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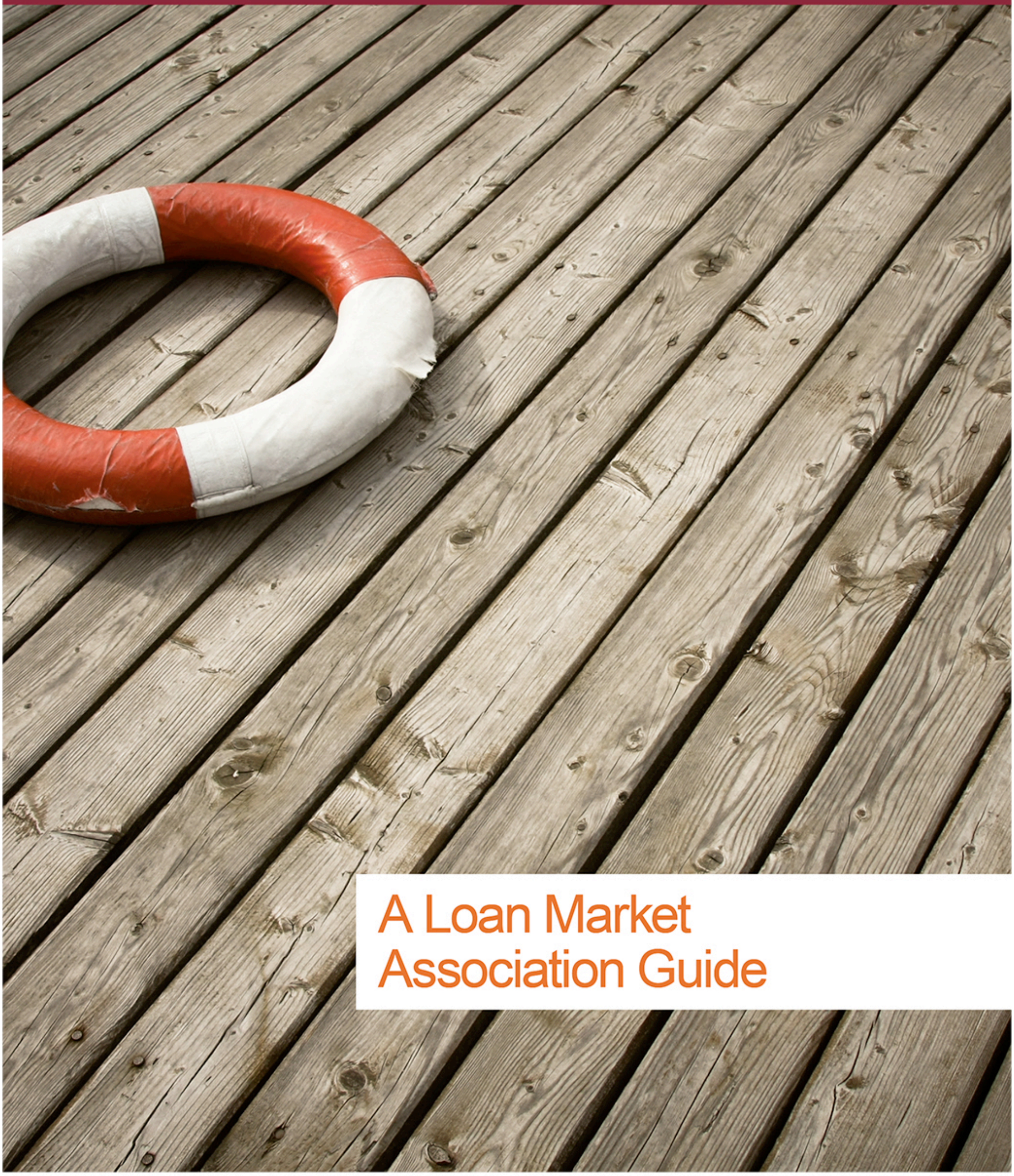
Insolvency in the Loan Market

June 2016



A Loan Market Association Guide

A LOAN MARKET ASSOCIATION UPDATE

GUIDE TO EUROPEAN INSOLVENCY REGIMES

Loan Market Association

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This "Guide to European Insolvency Regimes" is not intended to be completely comprehensive. Rather, it seeks to set out the key restructuring and insolvency regimes in major EU jurisdictions. Most importantly, this publication is not designed to provide legal or other advice on any matter whatsoever.

The Loan Market Association

The Loan Market Association (LMA) is the trade body for the EMEA syndicated loan market and was founded in December 1996 by banks operating in that market. Its aim is to encourage liquidity in both the primary and secondary loan markets by promoting efficiency and transparency, as well as by developing standards of documentation and codes of market practice, which are widely used and adopted. Membership of the LMA currently stands at over 600 and consists of banks, non-bank lenders, borrowers, law firms, rating agencies and service providers. The LMA has gained substantial recognition in the market and has expanded its activities to include all aspects of the primary and secondary syndicated loan markets. It sees its overall mission as acting as the authoritative voice of the EMEA loan market vis à vis lenders, borrowers, regulators and other interested parties.

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For any questions in relation to this guide, or the LMA's regulatory and lobbying activity in respect of insolvency initiatives, please contact Gemma Haley. (gemma.haley@lma.eu.com)

INTRODUCTION

From the fallout of Dubai World to the collapse of Lehman Brothers, the post-financial crisis era has seen an unprecedented volume of new legislation which has had, and will continue to have, a significant impact on financial institutions globally.

There are numerous issues concerning financial regulation which the current financial turmoil has highlighted, from bank insolvency regimes to commercial bank liquidity risk and crisis management. Governing authorities have responded to these concerns both at a national and international level, causing fears in the market that institutions may become exposed to conflicting regimes. It is imperative for the future success of these initiatives, and the stability of the financial sector, that authorities work together and take an integrated and globally consistent approach to ensure alignment with other proposals.

European jurisdictions have witnessed a dynamic evolution of their restructuring and insolvency regimes, aimed at encouraging business rescue to enable value preservation and to save employment. The purpose of this guide is to provide a summary of where the law currently stands in the diverse legal systems that operate across Europe, summarising the output from recent initiatives which have sought to amend the underlying insolvency regimes across Western Europe.

The aim of this paper is therefore to inform loan market participants of the main rescue and insolvency proceedings currently in place in selected European jurisdictions, capturing all those reforms which have taken place over recent years.

Section 1

EUROPEAN UNION

The focus of this guide is on the national insolvency regimes in England & Wales, France, Germany, Italy and Spain. But before considering the individual jurisdictions, it is also important to consider the recent reforms and recovery proposals put forward at a pan-European level, as these influence the future direction of national legislation. This Section will provide a high level review of the European insolvency and restructuring initiatives in place at present and also considers some future initiatives.

A. THE EUROPEAN REGULATION ON INSOLVENCY PROCEEDINGS

The European Regulation on Insolvency Proceedings[1] (**Insolvency Regulation**) came into effect on 31 May 2002.[2] It was originally adopted to improve the efficiency and effectiveness of cross-border insolvency proceedings and prevent the use of "forum shopping", which came about as a result of disparities between national insolvency laws. It achieves this by imposing rules governing the jurisdiction in which an insolvency proceeding in the EU can be opened and subsequently administered. It sets rules for the mandatory recognition and effects of those proceedings (save for certain important exceptions relating for example to security rights and set off rights) in other EU member states.

I. APPLICATION OF THE INSOLVENCY REGULATION

The Insolvency Regulation applies to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator.[3] The relevant 'insolvency proceedings' for each member state are listed in Annex A and B to the Insolvency Regulation.

The Insolvency Regulation applies to corporates and individuals within the member states, with the scope of its application confined to parties with their centre of main interests (**COMI**) within an EU member state. The Insolvency Regulation does not apply to insolvency proceedings concerning insurance undertakings[4], credit institutions[5], investment undertakings, which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings. These are subject to separate pieces of European legislation.

II. JURISDICTION OF OPENING OF PROCEEDINGS

The courts of the member state within the territory of which the debtor's COMI is situated shall have jurisdiction to open main insolvency proceedings and, therefore, dictate the law under which the proceedings are to be conducted.

[1] Council Regulation 1346/2000.
[2] The Insolvency Regulation is binding in and on each EU member state with the exception of Denmark, which exercised its right to opt out. In this guide, references to member states should be read as excluding Denmark.
[3] Article 1(1), Insolvency Regulation.
[4] The reorganisation and winding-up of insurance undertakings is addressed in Council Directive 2001/17.
[5] The reorganisation and winding-up of credit institutions is addressed in Council Directive 2001/24.

Whilst COMI is not defined in the Insolvency Regulation, it should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties.[6] In the case of a company, there is a rebuttable presumption that a corporate debtor's COMI is location of the company's registered office.[7]

Where the debtor's COMI is situated within the territory of a member state, the courts of another member state have jurisdiction to open proceedings against that debtor only if the debtor possesses an establishment within the territory of that other member state (these are referred to a secondary or territorial proceedings). The Insolvency Regulation therefore contemplates that insolvency proceedings may be opened in more than one member state in relation to the same debtor. However, territorial proceedings are limited in their effect to the assets of the debtor situated in the territory of that member state[8] and secondary proceedings are currently limited to winding-up proceedings.[9]

III. RECOGNITION OF INSOLVENCY PROCEEDINGS

When insolvency proceedings (whether main or otherwise) are opened in a member state, the general rule is the law applicable to those proceedings and their effects shall be the law of that member state.[10] The member state's laws shall determine the conditions for the opening of the proceedings, their conduct and their closure.[11]

There are exceptions to the general rule and if an exception is relevant, the laws of other member states (or in some cases non-member states) may apply. These exceptions are set out in Articles 5 to 11 of the Insolvency Regulation and include rights in rem, set off, reservation of title, contracts relating to immovable property, payment systems and financial markets, contracts of employment, rights subject to registration and European patents and trademarks.

B. RECAST INSOLVENCY REGULATION

On 5 June 2015, the final text of the EU Regulation on Insolvency Proceedings (recast) (**Recast Insolvency Regulation**) was published in the Official Journal of the EU. The Recast Insolvency Regulation[12] entered into force on 25 June 2015, with the majority of its provisions to apply to insolvency proceedings commenced after 26 June 2017. The existing Insolvency Regulation will continue to govern insolvency proceedings that are opened in the EU before 26 June 2017.

The Recast Insolvency Regulation introduces a shift in emphasis to the promotion of pre-insolvency and rescue proceedings, in recognition of the pre-insolvency techniques developed by national jurisdictions in light of the global financial crisis.

[6] Paragraph 13, Preamble, Insolvency Regulation.
[7] Article 3(1), Insolvency Regulation.
[8] Article 3(2), Insolvency Regulation.
[9] Article 3(3), Insolvency Regulation.
[10] Article 4(1), Insolvency Regulation.
[11] Article 4(2), Insolvency Regulation.
[12] Known formally as Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast), Official Journal reference L 141/19 (5.6.2015).

The Recast Insolvency Regulation aims to make cross-border insolvency proceedings more efficient and effective. It covers a wider range of procedures, including those in which the debtor's management remains in place, and a wider range of pre-insolvency procedures that seek to rescue or reorganise the debtor. Amongst other things, the Recast Insolvency Regulation covers:-

I. SCOPE

The current scope of the Insolvency Regulation does not extend to pre-insolvency and rehabilitation style proceedings. For many member states these types of rescue processes are becoming more prevalent and are considered to increase the chances of a successful restructuring of businesses. It is therefore seen as a positive step in cross border restructurings that the Recast Insolvency Regulation seeks to extend the scope of the regulation to proceedings which promote the rescue of economically viable but distressed businesses.

The Recast Insolvency Regulation seeks to extend its scope to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency, and to proceedings which leave the debtor fully or partially in control of its assets and affairs.[13] In addition, the Recast Insolvency Regulation's scope is extended to proceedings which are triggered by situations in which the debtor faces non-financial difficulties, provided that such difficulties give rise to a real and serious threat to the debtor's actual or future ability to pay its debts as they fall due.[14]

II. JURISDICTION FOR OPENING PROCEEDINGS

Due to discrepancies in the interpretation of the Insolvency Regulation, there has been criticism that the Insolvency Regulation fails to prevent forum shopping by companies and natural persons. Uncertainty in the application of the Insolvency Regulation has led to a substantial volume of case law having been generated since its introduction, with disagreements as to where the COMI is located being ultimately resolved by the European Court of Justice (**ECJ**).[15]

The Recast Insolvency Regulation therefore aims to clarify the circumstances for satisfying the COMI requirement when commencing insolvency proceedings, and states that it is possible to rebut the presumptions that the registered office, the principal place of business and the habitual residence are the debtor's COMI. In the case of a company, it should be possible to rebut this presumption where the company's central administration is located in a member state other than that of its registered office, and where a comprehensive assessment of all the other relevant factors establishes, in a manner that is ascertainable by third parties, that the company's actual centre of management and supervision and of the

[13] Paragraph 10, Preamble, Recast Insolvency Regulation.
[14] Paragraph 17, Preamble, Recast Insolvency Regulation.
[15] See *Interedil Srl (in liquidation) v Fallimento Interedil Srl and another* [2011] EUECJ C-396-09 and Rastelli Davide e C. Snc v Jean-Charles Hidoux [2011] EUECJ C-191/10.

management of its interests is located in that other member state.[16]

In an effort to prevent forum shopping, the Recast Insolvency Regulation has introduced a minimum 3 month look-back period for establishing a debtor's COMI.[17] This would require a debtor to conduct the administration of his interests on a regular basis in the insolvency jurisdiction for at least 3 months prior to the opening of insolvency proceedings or provisional proceedings.

III. SECONDARY PROCEEDINGS

The Insolvency Regulation provides for the possibility of having two concurrent insolvency proceedings in respect of the same debtor, which can give rise to significant cost and complexity, thereby hampering the efficiency of the main proceedings.

As such, the Recast Insolvency Regulation sets out two specific situations in which the court seised of a request to open secondary insolvency proceedings should be able, at the request of the insolvency practitioner in the main proceedings, to postpone or refuse the opening of such proceedings.[18] Firstly, the Recast Insolvency Regulation confers on the insolvency practitioner in the main insolvency proceedings the possibility of giving an undertaking to local creditors that they will be treated as if secondary insolvency proceedings had been opened.[19] Second, the Recast Insolvency Regulation provides for the possibility that the court temporarily stays the opening of secondary insolvency proceedings when a temporary stay of individual enforcement proceedings has been granted in the main insolvency proceedings, in order to preserve the efficiency of the stay granted in the main insolvency proceedings. The court should be able to grant the temporary stay if it is satisfied that suitable measures are in place to protect the general interest of local creditors.[20]

In the event that secondary proceedings are opened, these would no longer be limited to a winding up of the business, thereby complementing any restructuring that may be taking place within the main proceedings. There is also an obligation on the insolvency practitioners and the courts of both the main and secondary proceedings to cooperate and communicate with each other.[21]

It should also be noted that the exceptions to the effects of the insolvency proceedings are retained in the Recast Regulation. So for example rights in rem located outside the Member State where the insolvency is taking place and set off rights will not be affected.

IV. GROUP COMPANIES

Despite a number of cross-border insolvencies involving groups of companies, the Insolvency Regulation is silent on how to deal with the insolvency of a multi-national

[16] Paragraph 30, Preamble, Recast Insolvency Regulation.
[17] Paragraph 31, Preamble, Recast Insolvency Regulation.
[18] Paragraph 41, Preamble, Recast Insolvency Regulation.
[19] Paragraph 42, Preamble, Recast Insolvency Regulation.
[20] Paragraph 45, Preamble, Recast Insolvency Regulation.
[21] Paragraph 48, Preamble, Recast Insolvency Regulation.

enterprise group.

To address this, a new chapter[22] has been introduced under the Recast Insolvency Regulation to deal with the insolvency of members of a group of companies whilst maintaining the entity-by-entity approach which underlies the current Insolvency Regulation. This new chapter specifically promotes cooperation and communication between officeholders and courts in different member states,[23] and imposes a duty on officeholders to explore and encourage restructuring on a group-wide basis where this is possible.

In addition, the Recast Insolvency Regulation provides for the opening of a voluntary group coordination process, led by an independent coordinator.[24] Group coordination proceedings are intended to facilitate the effective administration of the insolvency proceedings of the group members. The coordinator, appointed by the court, would have the role of identifying and outlining recommendations for the coordination of the insolvency proceedings, mediating disputes between group members and presenting a plan that recommends a comprehensive set of measures to resolve the group member's insolvencies.[25]

B. EUROPEAN COMMISSION RECOMMENDATION ON THE HARMONISATION OF EU INSOLVENCY LAW

On 12 March 2014, the European Commission published a "Recommendation" on a new approach to business failure and insolvency. The Recommendation seeks to harmonise certain aspects of EU insolvency law and, in doing so, promotes rescue mechanisms instead of formal insolvency processes aimed at reducing risks and improving recoveries for creditors.

The Recommendation focuses on two key areas: (i) setting a maximum discharge period of 3 years in relation to the debts of honest bankrupts; and (ii) suggesting minimum standards for restructuring frameworks. In relation to the restructuring frameworks, the Recommendation advocates the following approach: debtor in possession type processes; little court involvement; no requirement to open a formal insolvency proceeding; the availability of a temporary standalone stay (between 4 and 12 months); the ability of a certain majority prescribed by local law to bind all creditors affected under a restructuring plan; clear and specific restructuring plans; and protection for new finance from avoidance action at a later date.

The Recommendation is not legally binding, but member states were encouraged to adopt the principles set out in the Recommendation by 14 March 2015. On 30 September 2015, the Commission published its 'Evaluation of the Implementation of the Commission Recommendation'.[26] The Commission reported that, as of 12 March 2015, "among the Member States who replied, several Member States consider that they already largely comply with the Recommendation, and that a significant number of those which do not comply have not launched any reforms to date."

[22] Chapter V, Recast Insolvency Regulation.
[23] Section 1, Chapter V, Recast Insolvency Regulation.
[24] Section 2, Chapter V, Recast Insolvency Regulation.
[25] Article 72, Recast Insolvency Regulation.
[26] http://ec.europa.eu/justice/civil/files/evaluation_recommendation_final.pdf.

Whilst the Recommendation has provided useful focus for member states undertaking reforms in the area of insolvency, it does not appear to have had the desired impact of facilitating the rescue of businesses in financial difficulty because of its only partial implementation in a significant number of member states. This has led to the Commission looking to propose a legislative initiative on business insolvency in the Capital Markets Union Action Plan, which will draw on the experience of the Recommendation. To this end, the Commission launched a public consultation harmonising certain aspects of insolvency law on 23 March 2016, to seek views with regard to introducing common principles and standards to promote insolvency and restructuring frameworks, especially in a cross-border context.

Section 2

ENGLAND AND WALES

This section will provide a general overview of the main corporate insolvency procedures in England and Wales, together with recent developments in the insolvency and restructuring tools available to companies. The main procedures encountered in corporate insolvencies are administration, receivership, liquidation, and company voluntary arrangements which are governed by the Insolvency Act (IA 1986) and Insolvency Rules (IR 1986). We also cover schemes of arrangement pursuant to the Companies Act 2006 which are frequently used as a restructuring mechanism.

A. ADMINISTRATION

Purpose

Administration is a procedure intended to rescue companies which are or may become insolvent; it allows for the reorganisation of a company, or the realisation of its assets under the protection of a statutory moratorium.

An administration of a company must aim to achieve one of three objectives[27]: firstly to rescue a company as a going concern, being the overriding purpose of an administration. If this is not reasonably practicable, the achievement of a better result for the company's creditors as a whole than would be likely if the company were wound up. If this is not reasonably practicable, the realisation of some or all of the company's property in order to make a distribution to one or more secured or preferential creditors.

Procedure

A company can be placed into administration in one of two ways:-

i. by court order, made in an open hearing, upon a formal application to court (the court route);[28]

ii. the filing at court of a prescribed set of documents (the out-of-court route), by:-

   - the holder of a qualifying floating charge over the company's assets;[29]
   - the company;[30] or
   - the company's directors.[31]

[27] Paragraph 3(1), Schedule B1, IA 1986.
[28] Paragraph 10, Schedule B1, IA 1986.
[29] Paragraph 14, Schedule B1, IA 1986. A qualifying floating charge holder has the power to choose the identity of an administrator, whether by making the appointment themselves (if the floating charge is enforceable) or by intervening in the application to court made by another party. A qualifying floating charge holder may also be able to block the appointment of an administrator in certain circumstances by appointing an administrative receiver.
[30] Paragraph 22(1), Schedule B1, IA 1986.
[31] Paragraph 22(2), Schedule B1, IA 1986.

Protections

Once a company is in administration there is a statutory moratorium[32], preventing creditor or other third-party action against it or its assets or assets in its possession. Relief from the statutory moratorium may be available in certain circumstances with consent of the administrator or permission of the court. [33] It also prevents the commencement of alternative insolvency procedures in respect of the company. This provides the administrator with breathing space to reorganise a company's affairs or conduct an orderly realisation of the company's assets, without pressure from creditors taking individual action against the company or its assets.

Effect

Irrespective of the way in which the appointment is made, the administrator, is an officer of the court and has a duty to act in the interests of creditors as a whole, and may do anything necessary or expedient to manage the affairs, business and property of the company to which they are appointed.[34] In addition, an administrator has a number of specific powers,[35] which include the power to take control of and sell the company's property, even where the property is subject to security, and to make distributions to the creditors of the company.[36]

- **Power to dispose of property**

The exercise of the power to dispose of a company's property is often one of the main ways in which an administrator achieves the purpose of the administration, and the manner in which the administrator exercises this power is not constrained by the IA 1986 or the IR 1986. It is a matter for the commercial judgement of the administrator, acting in accordance with his general duty to act in the best interests of creditors. However the administrator must sell the assets at "market value", failing which he will have to make up the deficiency to the secured creditor.

For property which is subject to a fixed charge, or is held by the company under a hire-purchase agreement, the administration must first obtain either the leave of the court or the consent of the charge holder before taking any action relating to the property. Leave of the court will be obtained where the administrator demonstrates that the disposal will promote the administration's purpose and that the net proceeds of the disposal will first be applied towards meeting the debt of the secured creditor or owner of the property subject to the hire-purchase agreement.

For property which is subject to a floating charge, the administrator is free to deal with and dispose of any security as if it were not subject to that charge, i.e. without permission of the charge holder and without the sanction of the court. However, the holder of the floating charge shall then have the same priority in respect of proceeds of sale of the charged

[32] An interim moratorium is also in effect prior to the formal appointment. Paragraph 44, Schedule B1
[33] Paragraph 42 and 43, Schedule B1, IA 1986.
[34] Paragraph 59(1), Schedule B1, IA 1986.
[35] Set out in Schedule 1 to the IA 1986.
[36] In the instance of a distribution to unsecured creditors, (save for a distribution of the Prescribed Part) the administrator must first obtain the permission of the court.

property as they had in respect of the property disposed of.

The administrator is free to enter into a pre-pack sale of the company's assets, without consultation with the creditors or direction from the court (see below).

- **Pre-pack sales**

Pre-pack sales, where a sale of assets or a business is agreed prior to a formal insolvency and effected immediately, or soon, after the appointment of an administrator, are generally regarded as an essential part of the restructuring toolkit. The administrator is free to enter into a pre-pack sale of the company's assets, in certain circumstances without prior consultation with the creditors or a direction from court.[37] Where an administrator completes a pre-pack sale, he must (unless it is impractical to do so) send a report to creditors giving details of the sale, at the same time that he sends notice of his appointment to creditors.[38]

For sales to connected parties, since November 2015 there has been a voluntary referral process where the connected party may submit details of the pre-pack to a pool of independent experts who will review the terms of the sale. The connected party may also submit a viability review, essentially stating that the new company will survive for at least 12 months. Separately, the administrator is also required to comply with a prescribed set of marketing principles and disclosure obligations. These include reporting to creditors on the reasons for pursuing a pre-pack, providing details of the sales and marketing process and information on the approach to valuation in relation to the assets realised.

- **Administration expense regime**

For lenders, the order of priority ranking in insolvency proceedings is paramount, and plays a fundamental role in the assessment of credit risk at the outset of any financing. In addition, when borrowers get into financial difficulty, the importance of valuation and creditor priority become key considerations in the context of consensual or formal restructuring options. In the context of trading administration, administration expenses (essentially a defined set of obligations which arise after the appointment of the administrator), which rank after fixed charge security, but before floating charge security can be significant. While the long awaited decision of the Supreme Court in Re Nortel; Re Lehman Brothers International (Europe)(in administration)[39] in July 2013 reversed an earlier decision on the super priority ranking of Contribution Notices and Financial Support Directions which may arise out of the moral hazard provisions of the pensions' legislation: such claims now simply rank as unsecured claims. In another case, the Court of Appeal's unanimous judgment in the Game Station case: *Pillar Denton Ltd v Jervis*[40] in February 2014 means that companies in administration will be liable to pay rent for the period during which leasehold premises are used for the purpose of the administration. This is the position irrespective of when the rent falls due and how it may be payable. The rent will rank as an expense of the administration and this means that rent will be paid on a priority basis before the administrators' own remuneration

[37] *DKLL Solicitors v HMRC* [2007] EWHC 2067.
[38] Paragraph 11, Statement of Insolvency Practice 16.
[39] [2013] UKSC 52
[40] [2014] EWCA Civ 180.

and costs, unpaid wages and holiday pay, claims that benefited from floating charges, and unsecured claims. The decision was not all bad news for lenders however, as it also held that such rent will be limited to the period for which premises are used for the purpose of the administration. Administration expenses are something which therefore needs to be carefully factored into to any enforcement strategy involving the appointment of administrators.

Conclusion

The administration will end when one of the objectives of administration (see above) is achieved or if it is determined that the objectives cannot be achieved. Most administration cases result in a distribution to creditors, rather than a business rescue. Once the distribution is complete, the company will either be placed into liquidation or dissolved.

B. RECEIVERSHIP

Receivership is an enforcement mechanism, used by secured creditors. There are broadly three types of receiver.

I. LPA receiver

The first type of receiver is one appointed under statutory powers, pursuant to the Law of Property Act 1925 (**LPA**). The LPA confers the power to appoint on a mortgagee whose mortgage is created by deed. The powers of an LPA receiver are generally limited to collecting in income and applying it to reduce outgoings and mortgage interest. These are relatively rare.

II. Fixed charge receiver

The second type of receiver, known as a "fixed charge receiver", is appointed pursuant to an express power in a security instrument creating a fixed charge or a security trust deed. His/her powers will typically be extended beyond those of an LPA receiver and will include taking charge of, and realising, the charged assets and using the proceeds of realisations to pay the monies due from the borrower to the appointing lender.

III. Administrative receiver

An administrative receiver is an individual appointed by a creditor that holds security over all (or substantially all) the assets of a company which, as created, was a floating charge. An administrative receiver is authorised to take custody of the charged assets, run the company's business and dispose of the assets, either piecemeal or as part of the sale of the business as a going concern, to satisfy the secured debt. The principal duties and responsibilities of an administrative receiver are to the secured creditor that appointed him.

Administrative receivership is rarely used in practice and is only available as a remedy for (i) the holders of floating charges over the whole (or substantially the whole) of the property of a company, that was created before 15 September 2003, being the date the EA 2002 came into force; or (ii) a qualifying floating charge holder, which includes the holder of a floating charge over the whole (or substantially the whole) of the property of a company, where one of the statutory exceptions[41] applies.[42]

D. COMPANY VOLUNTARY ARRANGEMENTS

Purpose

A company voluntary arrangement (**CVA**) is a procedure intended to help a company address its financial difficulties and to avoid liquidation by coming to an informal, but binding, agreement or compromise with its unsecured creditors. Typically, CVA proposals will include a rescheduling or reduction in the company's debts, they can be part of more complicated restructurings and used in conjunction with other restructuring techniques such as schemes of arrangement or pre-pack administrations.

Procedure

A CVA can be proposed by the directors of the company, who will first appoint an insolvency specialist to act as a nominee.[43] The nominee will report to the court whether, in his/her opinion, the proposed CVA has a reasonable prospect of being approved and implemented, and whether it should be put to the creditors and members. If he/she believes it should, meetings of creditors and members will be called to decide whether to approve it, with or without modifications.

The CVA is approved if the necessary majority of creditors[44] vote in favour of the proposals at properly convened meetings of creditors. The company's members can approve the proposals by a simple majority in value, although if they do not approve the proposals and the creditors do, the CVA will still be implemented. The CVA does not affect the rights of secured or preferential creditors unless they agree to the proposals. In addition, secured creditors cannot vote on a CVA, save to the extent their debt is unsecured.

Protections

A CVA does not automatically trigger a statutory moratorium that protects the company from creditors taking action to recover their debts. However, certain companies can apply to court to take the benefit of a 28-day moratorium;[45] such companies are limited to essentially small companies and do not include insurance companies, banks or building societies. Those unable to apply for a statutory moratorium can opt to use the administration process (which has the benefit of a moratorium) in conjunction with a CVA, although this will substantially increase the cost of the process.

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[41] There are eight exceptions, which are designed to safeguard large capital market arrangements involving the issue of a capital market investment, public-private partnership projects incorporating step-in rights, utility projects, urban regeneration projects, large-scale project finance incorporating step-in rights, financial market charges, system-chargers and collateral security charges, registered social landlords and protected railway companies.
[42] Sections 72B to 72GA of the IA 1986.
[43] It can also be proposed by an administrator or liquidator where the company is in administration or liquidation.
[44] Comprising both 75% in value of the company's creditors present and voting at the creditors' meeting called to consider the CVA proposal and 50% in value of the creditors that are unconnected with the company.
[45] Section 1A and Schedule 1A of the IA 1986.

Effect

If approved, a CVA takes effect from the date of the creditors' meeting that approves it[46] and is implemented under the supervision of the nominee. It binds anyone (including dissenting parties) entitled to vote at the creditors' meeting or who would have been entitled if they had notice of the meeting. A CVA, once approved, therefore binds both known and unknown creditors in relation to debts that the CVA is drafted to encompass.

Conclusion

Subject to the satisfactory conclusion of the CVA, the supervisor will issue a completion certificate and the company will continue to be run by the directors of the business for benefit of the shareholders

E. SCHEMES OF ARRANGEMENT

Purpose

A scheme of arrangement is a statutory procedure 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. In order to obtain court sanction, the scheme's proposals must be voted upon favourably by the requisite majorities in each class fair and reasonable.

Procedure

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 agreement 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 of the members or creditors (or of each class of members or creditors, as relevant) who vote in person or by proxy. Because there is a value element in the voting process, the members' vote must be on a poll (with an equivalent procedure for creditors).

A scheme of arrangement requires two court hearings, one to approve the summoning of the meeting or meetings of the relevant class or classes of creditors or members to consider the scheme and a second hearing (once the requisite approval is achieved at the meetings) is also required to sanction the scheme itself. The court will usually approve the scheme that has already been voted upon favourably by its creditors and members, as long as it is fair and reasonable.

Protections

A scheme of arrangement does not automatically trigger a statutory moratorium and

[46] Section 5(2)(a) of the IA 1986.

therefore it may be used in conjunction with an insolvency process (usually administration) to provide protection from creditors whilst the scheme is being put in place.

Effect

Once effective, the scheme binds all the members and creditors of each class that approved the scheme.

Schemes of arrangement for overseas companies

English schemes of arrangement have become the tool of choice for complex restructurings where a consensual deal is not possible. Using a scheme as a mechanism to overcome a dissenting minority of creditors is a technique which is simply not available in other EU member states. For this reason, in recent years an increasing number of foreign companies have taken advantage of English schemes to implement restructurings outside of formal insolvency procedures.

The English court will only exercise its jurisdiction to sanction a scheme for an overseas company if it is satisfied that there is sufficient connection between the company and England. Typical factors that have provided an overseas company with sufficient connection to England have been that the company has carried on business or is managed in England, that there are English creditors and assets, or that the debt to which the scheme relates is governed by English law. In a series of recent cases, English courts have found sufficient connection based solely on the fact that the relevant debt was governed by English law. In certain circumstances it may be possible to change the governing law to English law[47] and thereby establish jurisdiction for the purpose of sanctioning a scheme. Having established jurisdiction, the English court will also need to consider whether the scheme is fair and reasonable. In addition, for an overseas company, the English court will consider whether the scheme is likely to be effective and recognised in the overseas company's home jurisdiction. This is usually shown by way of expert evidence. It should be noted that schemes of arrangement do not benefit from the automatic recognition of the EU Insolvency Regulation and are beyond its scope.

Development of use

There has also been a development in the use of schemes being employed as a delivery mechanism for less complex restructurings. For example, schemes have recently been used to simply "amend and extend" secured facilities. In this respect, schemes which historically may have only been used in the absence of consensus and may have been perceived as a "Plan B", are now being considered as "Plan A", as a tried and tested method of binding stakeholders to a restructuring plan.

F. LIQUIDATION

[47] By way of example, on 14 April 2014 the English court sanctioned schemes of arrangement for the APCOA Group where, for the first time, jurisdiction was established on the basis of a facilities agreement whose governing law and jurisdiction clauses had been changed to English law and English courts by majority lender consent (*Apcoa Parking (UK) Ltd & others* [2014] EWHC 997 (Ch)).

Liquidation is the realisation and distribution procedure for companies under the law of England and Wales. Shareholders, creditors and the court have different degrees of control depending on the type of liquidation. Once the process has been completed, the company is dissolved.

There are two forms of liquidation, namely compulsory liquidation and voluntary liquidation.

I. Compulsory liquidation

Purpose

Compulsory liquidation (or "winding-up") is a court-based procedure under which the assets of a company are realised and distributed to the company's creditors.

Procedure

It 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.

The petition to the court has to be based on one or more specified grounds,[48] including the inability of the company to pay its debts[49] (which can be established on both a cash flow test[50] or a balance sheet test[51]). The most common ground is the failure of a company to comply within 21 days with a statutory demand for payment exceeding £750.

It is important to note that the court has discretion over whether or not to make a winding up order.[52] In exercising such discretion, the court may take into account factors such as the ability of the company to find additional finance or whether the majority of creditors support the liquidation.[53]

Protection

Once a winding up order is made, an automatic stay on commencing or continuing with proceedings against the company without the leave of the court comes into effect.[54] However, there is no freeze on enforcement of security. Secured creditors therefore remain free to enforce their security and to retain the proceeds of enforcement in priority to the claims of unsecured creditors.

Effect

Upon the making of a compulsory liquidation order, the management powers of the directors

[48] Set out in section 122(1) of the IA 1986.
[49] Section 123(1) of the IA 1986.
[50] i.e. the company cannot pay its debts as they fall due.
[51] i.e. the assets are less than the liabilities. In *BNY Corporate Trustee Services Ltd v Eurosail UK 2007-3BL PLC & Ors* [2013] UKSC 28, the Supreme Court held that in order to invoke the balance sheet test, it would be necessary to consider more than just audited accounts and that an assessment of whether a company can meet its liabilities, taking into account all relevant factors in relation to the company, including the nature of prospective and contingent liabilities, would be required by the Court.
[52] Section 125 of the IA 1986.
[53] *Re Hewitt Brannan (Tools) Co Ltd* [1990] B.C.C. 354.
[54] Section 130 of the IA 1986.

will cease and the directors are automatically dismissed from office,[55] with the liquidator taking over control of the company. The directors are required to co-operate with, and provide information and documents to, the liquidator, who has powers to cross-examine the directors either publicly or privately.

The liquidator is an officer of the court and subject at all times to the control of the court. The liquidator's duties are owed to the general body of creditors and shareholders. A liquidator's function is to collect in and realise the company's assets, and to distribute the proceeds to the company's creditors and, if there is a surplus, to the persons entitled to it.[56]

The liquidator has very broad powers,[57] including the ability to bring legal proceedings in the name of the company, to sell the company's assets and to disclaim onerous property.[58] However, the liquidator only has the power to carry on the company's business insofar as is necessary for its beneficial winding-up.

Conclusion

Once the winding up is complete, the liquidator must make up an account of the winding up, and provide a company of the account to the creditors. Assuming there are from creditors no objections, the liquidator will then send a copy of the final return to the court and registrar of companies. The company is automatically dissolved three months later.

II. Voluntary liquidation

Purpose

Voluntary liquidation is a procedure, effected by the resolution of a company's members, under which the assets of a company are realised and distributed to the company's creditors and/or members. If a creditors' voluntary liquidation is required to be recognised outside of the UK, it must be "confirmed" by the court.

Procedure

There are two types of voluntary liquidation, a members' voluntary liquidation and a creditors' voluntary liquidation, the key distinction being whether the directors of the company are prepared to swear a statutory declaration of solvency under section 89 of the IA 1986.[59] If they are, it will be a members' voluntary liquidation and a solvent process, and if they are not, it will be a creditors' voluntary liquidation. Accordingly, voluntary liquidation is not always an insolvency procedure and a members' voluntary liquidation is often used to effect a corporate reorganisation or restructuring.

[55] *Measures Brothers Ltd v Measures* [1910] 2 Ch 248.
[56] Section 143(1) of the IA 1986.
[57] Schedule 4 of the IA 1986.
[58] The effect of a disclaimer is that it effectively terminates the rights and liabilities of the company on the property it disclaims but does not affect the rights and liabilities of any other person. 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.
[59] Under a statutory declaration, the directors swear that they have made a full inquiry into the company's affairs and, having done so, have formed the opinion that the company will be able to pay its debts in full, together with interest at the official rate, within such period, not exceeding 12 months from the commencement of the winding up, as may be specified in the declaration.

Protection

There is no automatic moratorium on proceedings against the company on commencement of a creditors' voluntary liquidation. The liquidator or any creditor or shareholder may, however, apply to the court for a stay of any proceedings.[60] Such a stay will not be granted automatically.

Effect

Upon the making of a voluntary liquidation order, powers of the directors cease, unless the liquidator or the members in general meeting sanctions their continuance. As with a compulsory liquidation, the liquidator's general function is to realise the assets and to pay creditors in accordance with their entitlements. The liquidator has a number of powers, including the ability to disclaim onerous property. The order of priority of debts is the same as in a compulsory liquidation.

Conclusion

In a voluntary liquidation, a final meeting of members will be held during which the liquidator will present as account of how the company's affairs have been fully wound up and its property disposed of. This account will be provided to the Registrar of Companies within a week of this meeting. The company will then be dissolved three months later.

G. CROSS BORDER RECOGNITION OF FOREIGN INSOLVENCY JUDGMENTS

From an English law perspective there are a number of routes to recognising foreign insolvency judgments. These are as a result of (i) the European Regulation and insolvency proceedings (EUIR); (ii) the Cross Border Insolvency Regulations 2006(CBIR); (iii) s426 of IA 1986; and (iv) under the general principles of common law.

EUIR

Recognition of main and secondary or territorial proceedings in other EU Member States is automatic In England and Wales.

CBIR

Recognition of foreign insolvency proceedings may be granted following the application by the insolvency practitioner appointed in relation to the main or non-main proceedings in any jurisdiction to the English Court.

S426 IA 1986

The English courts' ability to provide assistance to other courts is also available pursuant to section 426 of the Insolvency Act 1986 in relation to any other part of the United Kingdom or any relevant country or territory. These other countries largely comprise former

[60] Section 112 of the IA 1986.

Commonwealth countries including (amongst others) the BVI, the Cayman Islands, Hong Kong and the Republic of Ireland. This provision allows the English Court to provide assistance and cooperation to insolvency courts within the relevant country or territory upon the making of a formal request by the foreign court.

Common law

Under Common law principles, a judgment of a foreign court (including a judgment in insolvency proceedings) will only be capable of enforcement in England where that person either (i) was present in the foreign jurisdiction at a relevant time; (ii) participated in the proceedings; or (iii) otherwise submitted to the jurisdiction of the foreign court.

Section 3

FRANCE

French insolvency law is codified in Book VI of the French Commercial Code (**Code**). The Code provides for consensual and collective proceedings that may be opened for the benefit of any entity governed by private law, including corporations and partnerships. Credit and financial institutions and insurance institutions do not fall within the scope of the Code, and are instead dealt with in Directive (EC) n°2001/24 and Directive (EC) n°2001/17 respectively.

Whilst France has historically been perceived as a pro-debtor jurisdiction, the French Government passed reforms to modernise French insolvency law, which came into force on 1 July 2014. This followed the 2009 wave of restructurings of leveraged transactions, including the Monier Group, the SGD Group (formerly Saint-Gobain Desjonquères), and the HIME/SAUR Group, and appears to have suggested a shift in favour of creditors.

This section will provide a general overview of the main consensual and collective proceedings available in France.

A. CONSENSUAL 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.

There are two main types of consensual proceedings:-

I. *Mandat ad hoc* proceedings

Purpose

Mandat ad hoc are flexible and confidential proceedings, used by companies facing financial difficulties to organise an extension of payments of payoff of its debts with its majority creditors. These proceedings are strictly confidential and voluntary, therefore the creditors of the company can refuse to enter into negotiations.

Procedure

Initiated upon the request of the directors, the procedure is only available for solvent companies. It 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 and whose duties are defined by the appointing court. The *mandataire ad hoc* usually helps the debtor with assessing its situation and/or assists the debtor in its negotiations with its main creditors and possibly with the employees or with public authorities.

Protection

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. However, the debtor may make a request that the court imposes a grace period of up to 2 years on creditors via a *délai de grâce*.

Effect

Throughout these proceedings, the directors remain in place and retain all their powers, although are required to co-operate with the *mandataire ad hoc* and the major creditors to negotiate a solution to the company's difficulties. As the process is consensual, no cram-downs can be imposed.

Conclusion

If the parties reach an agreement, it is reported by the *mandataire ad hoc* to the president of the court but not sanctioned by the court. If there is no solution to the company's financial difficulties and it later becomes insolvent, the only option is to initiate insolvency proceedings.

II. Conciliation proceedings

Purpose

Conciliation proceedings are flexible, voluntary and, to some extent, confidential proceedings aimed at facilitating negotiations and reaching a conciliation agreement (*protocole de conciliation*) between a company and its creditors under the supervision of a court-appointed mediator (*conciliateur*).

Procedure

It 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.

Protections

The opening of conciliation 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. However, like in *mandat ad hoc* proceedings, the debtor may make a request that the court imposes a grace period of up to 2 years on creditors via a *délai de grâce.*

Creditors who participate in conciliation proceedings which result in a court-approved agreement (*accord homologué*) can benefit from certain protections against the risk of future claw-back and the new money injected in the framework of this court-approved agreement benefits from a statutory super-senior status should the debtor subsequently file for insolvency.

Effect

The conciliation agreement usually sets out any loans extended by creditors or shareholders, and any consents by creditors to grant waivers, rescheduling and/or the cancellation of existing debts. In addition, the debtor and conciliator may confidentially prepare a consensual sale of all or part of the debtor's assets, which will then be implemented in the framework of a subsequent insolvency proceeding.

The *conciliateur* is appointed for a maximum of 4 months, which may be extended by up to one month in exceptional circumstances.

Conclusion

If a conciliation agreement is reached by the parties during the prescribed period, it may either be acknowledged by an order of the president of the court (constat)[61] or approved by a formal judgement of the court (*homologation*)[62]. In case of a breach of the conciliation agreement, any party to the agreement can petition the court for its termination. The commencement of subsequent collective proceedings automatically puts an end to the conciliation agreement, in which case the creditors will recover their claims and security interests in full – save for those amounts already paid to them.

In the event a conciliation agreement is not reached, a debtor is not able to file for another consecutive conciliation proceeding for at least three months after the termination of the earlier proceedings.

B. COLLECTIVE PROCEEDINGS

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

I. Procédure de sauvegarde

Purpose

Safeguard proceedings allow companies that, though still solvent, face difficulties they cannot overcome to be restructured at a preventive stage under the court's supervision. The safeguard plan can involve debt restructuring, re-capitalisation of the company, a debt-for-equity swap, the sale of assets and/or the partial sale of the business. However, it cannot include a proposal to sell the business as a whole.

Procedure

Only the debtor can file a petition for safeguard, following which the court will appoint a judicial administrator to supervise and/or assist the debtor. However, management remains in place. In addition, the court will appoint a representative of creditors, which has the duty to receive and verify the lodgement of claims by the creditors. 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.

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[61] This option does not involve publicity

[62] This is only available where (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. New money facilities granted in the framework of a court-approved conciliation benefit from a statutory priority of payment should the company subsequently file for insolvency. Except in the case of fraud, the date of insolvency may not be set at a date earlier than the date of the final court decision that has approved an agreement (*homologation*) in the context of conciliation proceedings. The date of insolvency is important because it marks the beginning of the hardening period (*période suspecte*), being the period between the date of insolvency and the court decision commencing the proceedings. Certain transactions entered into by the debtor during the hardening period may be void or voidable by the court. However, the court approval must be recorded in a full judgment accessible to the public and is therefore subject to challenge by a third party (*tierce opposition*) or appeal.

Protection

Safeguard proceedings will trigger a 6 month observation period,[63] providing the debtor with the necessary breathing space to prepare and submit to the court the safeguard plan. This period may be renewed once, and exceptionally twice.

Effect

All creditors affected by the safeguard plan shall be consulted and may vote on the plan. Creditors not affected by the plan or fully reimbursed under the plan at the date of adoption of the plan or of the admission of the claim do not get a vote.

During the observation period, two committees of creditors will be created to vote on the safeguard plan if (i) the company is of a certain size[64] or (ii) if the debtor is authorised to create such committees by the supervising judge. These committees, comprised respectively of financial and trade creditors ("*comité des établissements de crédit*" or "*comité des principaux fournisseurs*"), have the right to approve the safeguard plan proposed by the debtor[65] or propose a plan of reorganisation as an alternative plan. Bondholders (who form a separate class of creditors) are not given the opportunity to put forward an alternative plan, but must be consulted after the class of financial institutions and the class of trade creditors have approved the plan.

If creditors refused to approve the plan, the court can impose on dissenting creditors (except for creditors benefiting from the so-called new money privilege) a rescheduling or deferral of payment of their claims for a maximum period of 10 years. This 10-year maximum term-out is without prejudice to any longer maturity date agreed in the loan agreement. Consenting creditors benefit from the shorter maturity date (if any) that they would have negotiated. The court cannot impose any debt write-off of principal or interest in a term-out scenario.

Conclusion

Once the court approves a safeguard plan, it appoints an agent to supervise its implementation (*commissaire à l' exécution du plan*). If the company fails to meet its obligations under the plan and becomes insolvent, the court must order the plan to be cancelled and initiate rehabilitation proceedings or, if the rescue of the company appears as obviously impossible, liquidation proceedings.

II. Sauvegarde financière accélérée

Purpose

The accelerated financial safeguard (*sauvegarde financière accélérée*) procedure (**AFS**) was introduced in French law to facilitate "pre-pack" bankruptcies and "fast-track" purely financial difficulties of large companies. The purpose of AFS is to expedite the restructuring of financial debt, without AFS affecting the position of non-financial creditors.

Procedure

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63 Being an automatic stay of all actions against the company and the individuals acting as guarantors and joint debtors. Exceptions to this include under certain circumstances (i) claims secured by a security interest conferring a retention right; (ii) claims assigned by way of *Dailly* assignment of receivables; (iii) claims secured by a *fiducie* agreement; and (iv) set-off and close-out netting of financial obligations.

64 Companies with more than 150 employees or with an annual turnover of more than €20 million, whose accounts are certified by a statutory auditor or carried out by a certified public accountant.

65 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.

A debtor may only file for an AFS where:

- it is subject to a conciliation proceeding;
- it is either solvent or was insolvent for less than 45 days at the time the petition for conciliation was filed;
- it has its accounts regularly certified by a statutory auditor or certified public accountant;
- it has either (i) total assets in its balance sheet of at least €25 million or (ii) total assets in its balance sheet of at least €10 million when such company controls another company which has more than 150 employees or has a turnover greater than €20 million or has total assets in its balance sheet of at least €25million;
- it has prepared, during the conciliation proceeding, a plan of reorganisation that ensures its sustainability[66] and can demonstrate that its proposed plan is capable of receiving enough support to be likely to be adopted by a two-third majority of each of the three creditors' classes (two-thirds in amount of claims of the voting creditors within each class) within two months from the opening of the AFS.

Once AFS is commenced, the conciliator is appointed judicial administrator and the court which has opened the conciliation proceedings has jurisdiction for the AFS proceeding.

Effect

The opening of an AFS triggers most of the effects triggered by the opening of a safeguard with the exception that only financial creditors are affected. The company must prepare a draft plan likely to receive sufficient support from its creditors, which would lead to its adoption.

The plan is then submitted to the creditors[67], who must vote within a minimum period of 8 days following its submission to them. If approved, the plan is submitted to the court to be sanctioned.

Conclusion

AFS will conclude once the plan has been approved by the financial creditors and sanctioned by the court. In the event the creditors do not approve the plan, or approval of the creditors and sanctioning of the court do not take place within one month (renewable once for one month maximum), the court is obliged to terminate the procedure.

III. Sauvegarde Accélérée

The accelerated safeguard procedure (*sauvegarde accélérée*) mostly similar to AFS, but affects all creditors, including trade creditors.

Purpose

This pre-pack process enables debtors, for which conciliation proved unsuccessful to reach creditors' consent, to be restructured in a very short timeframe with the consent of a two-third majority within creditor classes, including trade creditors.

Procedure

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[66] The restructuring plan must take into consideration subordination agreements concluded before the opening of insolvency proceedings (article L. 626-30-2 of the French Commercial Code).

[67] Only the class of financial institutions (and as the case may be, the class of bondholders) are invited to vote on the plan proposed by the company at a 2/3 majority in value (of those assisting or represented at the meeting) in each class. Trade creditors are not affected by the proceeding.

Accelerated safeguard is opened, at the debtor's request, provided that a conciliation procedure is pending in which at least a two-thirds majority in value of financial creditors and trade creditors (and as the case may be, bondholders) are likely to approve the restructuring proposals prepared by the company and the *conciliateur*.

As with safeguard proceedings, the class of financial institutions and the class of major trade creditors (and as the case may be, the class of bondholders) are invited to vote on the plan proposed by the company at a two-thirds majority in value (of those assisting or represented at the meeting) in each class.

Effect

This variant of the AFS is intended to facilitate the negotiation of pre-packaged plans with the ability to eventually cram-down dissenting minority creditors through the vote of creditor classes, including trade creditors.

Conclusion

The accelerated safeguard process must be completed within a maximum of three months from the date of the opening judgment.

IV. Redressement Judiciaire

Purpose

The purposes of judicial rehabilitation proceedings (*redressement judiciaire*) are to (in order of priority): (i) safeguard a company's activities and prospects of recovery; (ii) save jobs; and (iii) pay creditors.

Procedure

The company must file for rehabilitation no later than 45 days from the date on which it becomes insolvent (provided conciliation proceedings are not pending). Rehabilitation proceedings can also be initiated at the request of any creditor, whether secured or unsecured (regardless of the amount of its claims) or at the request of the Public Prosecutor.

The three classes of creditors are automatically set up for companies of a certain size and at the option of the debtor, subject to court approval, for small companies. If the three classes of creditors are set up, the rehabilitation plan must be approved by the same percentages as for the safeguard procedure.

Protection

The opening of proceedings will trigger a 6 month observation period (6 months renewable once and exceptionally twice). During the observation period, a judicial administrator is usually appointed by the court, to make an assessment of the financial situation of the company, the causes of that situation and the potential solutions in order to restructure the business.

The judicial administrator will generally assist the debtor in the administration of the business (*mission d'assistance*). In this case the debtor will continue to operate its business under the protection of the court. However, unlike safeguard proceedings, the administrator may be empowered by the court to take over the management and control of the debtor (*mission* *d'administration*).

Effect

In the same way as safeguard plans, rehabilitation plans can, in a term-out scenario, postpone the date on which the claims of dissenting creditors (except for creditors benefitting from the so-called new money privilege) must be paid by up to ten years (unless the initial maturity date was already in excess of ten years). However, the court cannot impose any debt write-off to dissenting creditors.

Conclusion

Judicial rehabilitation proceedings will terminate when the rehabilitation plan is sanction by the court.

If the court considers that no restructuring plan is viable, it can approve a sale of all or part of the business and the creditors will be repaid with the available proceeds. Alternatively, if it becomes clear that rehabilitation will not succeed, the court can order the conversion of the procedure into liquidation.

V. Liquidation Judiciaire

Purpose

The aim of judicial liquidation proceedings is to liquidate a company by selling (i) its business, as a whole or per branch of activity, or (ii) its assets one by one, whichever is approved by the relevant court. Liquidation is the appropriate remedy when the company is insolvent and its rehabilitation appears obviously impossible.

Procedure

The court opening the liquidation proceedings appoints an insolvency judge to oversee proceedings and a liquidator, who is responsible for (i) collecting in all of the company's assets before selling them at the best available price and distributing the sale proceeds to the creditors according to their respective priority rankings, to the extent that funds are available, and (ii) assessing proofs of claim and representing the creditors' interests. Controllers can be appointed by the court from among the creditors to assist the liquidator.

Protection

Liquidation proceedings usually trigger an automatic stay of proceedings against the company, where all pre-filing creditors are barred from enforcing their rights to seek payment from the debtor subject to some exceptions. However, subject to certain circumstances in a liquidation secured creditors benefiting from a pledge can enforce their security interest through a court-monitored allocation process.

Effect

The opening of a judicial liquidation proceeding puts an end to the operations of the debtor. However, if the business is to be sold as a going concern, the court can authorise a temporary continuation of the operations of the debtor for a maximum period of 3 months (renewable once at the public prosecution's request). Any intention to sell the business as a going concern must therefore be put forward at the outset of liquidation proceedings.

Should selling the business as a going concern not be viable, the liquidator will have to seek the authorisation of a supervising judge before executing the sale of any individual assets or rights of the debtor.

Conclusion

Liquidation proceeding concludes when either no due liabilities remain because the liquidator has sufficient funds to pay off the creditors (*extinction du passif*), or when continuation of the liquidation process becomes impossible due to insufficiency of assets (*insuffisance d'actif*).

VI. Simplified judicial liquidation proceedings

Simplified judicial liquidation proceedings are available for companies where: (i) they do not possess immovable assets, their turnaround excluding tax is equal to or less than €300,000 and they had one or no employees in the six months preceding the judgment opening the judicial liquidation proceedings; or (ii) they do not possess immovable assets, if their turnaround excluding tax is equal to or less than €750,000 and if they had between two and five employees in the six months preceding the judgment opening the judicial liquidation proceedings.

Simplified judicial liquidation proceedings last for 1 year, extendable by 3 months maximum.

Section 4

GERMANY

Over the course of the recent global financial crisis, the German economy has demonstrated a strength and resilience which continues to underpin much of Western Europe. However, despite the implementation of the 2012 reforms, the German insolvency regime has not fared so well. Creditors, distressed companies and other stakeholders held the view that restructurings under the German insolvency regime were difficult to complete, time consuming and unpredictable in outcome, the process being primarily court and administrator led, with limited influence from the creditors or debtor. As a result, a significant number of major restructurings concerning distressed German companies took place in other jurisdictions, e.g. the restructurings of Schefenacker[68], Tele Columbus[69], PrimaCom[70] and Rodenstock[71] were implemented through English schemes of arrangement. The latest case in this line of cases is the English court decision of Apcoa on an extension of the maturing loan.[72] The novelty of the Apcoa case is the fact that the English Court accepted the change of the governing law and jurisdiction clause of a facilities agreement (originally under German law and jurisdiction) to English law as a basis to establish sufficient connection to the jurisdiction.

Evidence of "forum shopping" put the spotlight on German insolvency law, where it was recognised that the restructuring tools on offer were widely considered to be inadequate to sufficiently satisfy the interests of both creditors and debtors. This led to a substantial reform of German insolvency law in 2012, aimed at facilitating the implementation of restructuring solutions, such as debt-to-equity swaps and the cramming down of junior creditor claims. However, over the last few years the recently introduced restructuring tools are less frequently used than anticipated. The German restructuring framework does not allow for companies to effect a financial restructuring on a majority-vote basis without the requirement to file for insolvency. The gap shall be closed shortly, as the European Union has requested its member states to introduce pre-insolvency restructuring proceedings, causing the German government to commence discussions on the design of such a scheme. Its implementation in the near future can be considered as almost certain.

This section will provide a general overview of the main tools in corporate insolvency proceedings available in Germany.

A. GENERAL

The **German Insolvency Code** (*Insolvenzordnung*) originally entered into force on 1 January 1999 and has been amended from time to time, the last major reform being the Act for the Further Facilitation of the Restructuring of Companies, which largely came into force as of 1 March 2012. This new law replaced the Bankruptcy Code of 1877 and was designed to shift the emphasis from liquidation to reorganisation. The German Insolvency Code applies to all types of company, although there are certain specific rules for the insolvency of credit institutions and insurance companies which are beyond the scope of this summary.

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[68] (2007).
[69] 14 December 2010, unreported.
[70] [2012] EWHC 164 (Ch).
[71] [2011] EWHC 1104 (Ch).
[72] [2014] EWHC 1867(Ch).

All types of insolvency proceedings commence with a formal filing for insolvency. Other than by declaring itself publicly bankrupt, there is no way for a German company to implement a court supported and majority vote based restructuring scheme (a limited exception to this rule applies to the restructuring of certain indentures). The insolvency proceedings can be divided into two stages, the preliminary insolvency proceedings (**Preliminary Proceedings**) followed by the secondary (main) insolvency proceedings. The typical outcome of German insolvency proceedings will be the sale of the business as a whole by a court appointed insolvency administrator in an asset deal (leaving behind the liabilities). However, there are also comprehensive rules regarding the implementation of an insolvency plan through which the company can be reorganised where feasible (**Insolvency Plan Proceedings**) and for the management of the distressed company to continue to manage the company under certain conditions (**Self Administration Proceedings**).

It should be noted that German insolvency law currently applies on an entity-by-entity basis, i.e. there are no "group insolvency" proceedings yet in place. The law reform on group insolvencies, which was discussed in January 2013 appears to be "dormant".

B. PRELIMINARY PROCEEDINGS

Purpose

The purpose is to allow the court time to determine if the prerequisites for commencing insolvency proceedings are met, i.e. there is a reason for insolvency and there exists sufficient assets/liquidity in the estate to cover the costs of insolvency proceedings.[73]

Procedure

Preliminary proceedings are initiated by the filing of the petition, either by the debtor or by a creditor, at the local competent court.

Protection

The filing of a petition itself does not trigger a moratorium, but a court may (and it normally does) take steps 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. Such steps may include the appointment of a preliminary insolvency administrator and an order that transfers by the debtor are invalid unless approved by the preliminary insolvency administrator.[74] In addition, the insolvency court usually prohibits or terminates any foreclosure proceeding against the debtor. The court will usually make an order for such measures immediately after the filing of the petition, with all orders (except for certain order in protective scheme proceedings, see below) being publicised on the website www.insolvenzbekanntmachungen.de.

Effect

Where the debtor has ongoing business operations, the insolvency court is required to appoint a preliminary creditors' committee provided two of the following three criteria have been fulfilled in the last business year of the debtor company:-

[73] Costs include court fees and estimated fees and expenses of the (preliminary) insolvency administrator and the members of the (preliminary) creditors' committee.
[74] Section 21 of the German Insolvency Code.

i. a balance sheet sum of not less than €4.84 million (after deduction of potential negative equity);

ii. turnover of not less than €9.68 million; and

iii. not fewer than 50 employees on a yearly average.

In order to aid the court in the appointment of a preliminary creditors' committee, the debtor is required to provide the court with a list of its creditors when submitting its petition to commence insolvency proceedings.

Once appointed, the preliminary creditors' committee has the right to be directly involved in the selection of a (preliminary) insolvency administrator. In certain circumstances, the court may appoint a preliminary administrator ahead of the formation of the preliminary creditors' committee. However, once formed, the preliminary creditors' committee can, at its first meeting and by unanimous decision, elect another person to be appointed as administrator.

Conclusion

Once the provisional administrator has determined there is cause for insolvency, and that there are assets to pay for the costs of the procedure, he/she will recommend that the court open the insolvency procedure. The court will usually follow the recommendation of the provisional insolvency administrator.

Preliminary insolvency proceedings usually last up to three months but the provisional administrator can largely influence the duration of the preliminary proceedings according to the requirements of the debtor company.

C. PROTECTIVE SHIELD PROCEEDINGS

Purpose

Protective shield proceedings (*Schutzschirmverfahren*) give the debtor an opportunity to develop an insolvency plan to be implemented in a subsequent insolvency plan proceeding, while enjoying protection from foreclosure by creditors. In essence, protective shield proceedings are nothing more than a special form of preliminary insolvency proceedings with the purpose of preparing (main) insolvency plan proceedings in self-administration.

Procedure

Only the debtor can apply for protective shield proceedings, which are initiated by the filing of a petition at the competent local court.

Protective shield proceedings will only be available if, at the time of the filing of the application for a protective shield, the debtor is not illiquid and the intended restructuring is not futile. This must be verified through the provision of a certificate from an accountant, auditor or insolvency lawyer at the time the application is made. Creditors have the right to apply for the repeal of the protective shield; therefore, the debtor must communicate and work with its main creditors both before and after an application for a protective shield period.

Furthermore, the court is able, on the application of the debtor, to order that preferential debt can be created during the protective shield proceeding, the aim being to ensure that the debtor's business can be continued as a going concern.

Protection

These proceedings provide an automatic stay ahead of the appointment of an administrator and were originally developed to provide the debtor, under the surveillance of a custodian, with a three month period in which to work out a restructuring plan.

Effect

The protective shield should act to protect the interests of both debtors and creditors at the critical time of distress before an insolvency appointment is made, and can be a useful tool in forcing obstructive minority creditors to restructure by virtue of an insolvency plan. In order to provide for the successful development of an insolvency plan during the short period of the protective shield proceedings, the collaboration of the majority creditors is required.

Conclusion

Protective shield proceedings last for up to three months and end when a court order, initiating the commencement of the main insolvency proceedings, is released.

D. INSOLVENCY PROCEEDINGS

Purpose

The objective of insolvency proceedings is to liquidate the debtor's assets in an orderly fashion (unless an insolvency plan is implemented) and pay all creditors equally.[75] Any ordinary insolvency proceedings can switch into insolvency plan proceedings at a later point in time if the implementation of an insolvency plan turns out to be commercially more attractive.

Procedure

The petition for insolvency proceedings can be filed by (i) the debtor (in the case of legal entities represented by its officers and directors); (ii) if a legal entity has no managing director or management board, by any shareholder; or (iii) a creditor, provided that the creditor has a legal interest in the opening of the insolvency proceedings.

If there are compulsory grounds to open the insolvency proceeding (illiquidity or over-indebtedness but not threatening illiquidity), the managing directors of legal entities must file an insolvency petition without undue delay, but in any case no later than three weeks from the occurrence of circumstances providing grounds for the opening of an insolvency proceeding.[76]

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[75] Section 1 of the German Insolvency Code.
[76] Any person who fails to comply with this obligation is subject to criminal prosecution (which can result in a monetary fine or imprisonment) and is personally liable towards the insolvency estate for payments made by the legal entity to third parties (with limited exceptions).

In most cases the insolvency court will initially appoint a preliminary insolvency administrator, in which case the insolvency court will usually only open insolvency proceedings about two to three months after the appointment of the preliminary insolvency administrator (see Preliminary Insolvency Proceedings above).

Protection

Following the court order initiating the commencement of the main insolvency proceedings, a general stay of execution with regards to creditors' claims will come into effect, and any security interest created one month prior to the filing of the petition will be void.

Effect

The preliminary insolvency administrator will generally be appointed to continue their engagement throughout the main insolvency proceeding, and will be in charge of managing the debtor's business and making all necessary dispositions with respect to the estate. However, before entering into transactions which substantially affect the estate, the administrator must obtain the consent of the creditors' committee or, alternatively, the creditors' meeting. In most cases, the major decisions affecting a subsequent insolvency proceeding will already have been made during the preliminary insolvency proceeding.

Conclusion

After the insolvency administrator has distributed the available assets to the creditors, the insolvency court will conclude the insolvency proceeding. In many cases, it will take several years until the final distribution to the creditors can take place. If the company no longer has any assets, the company will cease to exist as soon as the extinction of the company is recorded in the Commercial Register (*Handelsregister*).

E. SELF ADMINISTRATION PROCEEDINGS

Purpose

The purpose of self administration proceedings is to allow the management of the distressed company to continue to manage the company under certain conditions.

Procedure

Upon the application of a debtor, self administration proceedings (*Eigenverwaltung*) are ordered by the court in its decision to open main insolvency proceedings, unless there are circumstances indicating a negative effect of such an order to the creditors' position. Where the creditors' committee supports the petition, there is a presumption that an order for self administration would not adversely affect creditors.

A court-appointed asset administration will be tasked with monitoring and supporting the company.

Protection

This is the same as in a regular insolvency proceeding (see above).

Effect

In order to provide more flexibility in a restructuring situation, the court may order that virtually all responsibilities with respect to the main estate remain with the debtor. Any influence of shareholders or existing controlling bodies on the management of the debtor company will be limited during the self administration period since the trustee/custodian, as well as the creditors' committee, are required to control the debtor's management on behalf of the creditors.

Conclusion

Once all available assets have been distributed to the creditors, the insolvency court will conclude the insolvency proceeding, including the self administration proceedings.

F. INSOLVENCY PLAN PROCEEDINGS

Purpose

Insolvency plan proceedings[77] (*Insolvenzplanverfahren*) are a special type of insolvency proceeding which allow for different ways of using all the debtor's assets and distributing them among the creditors. The objective of an insolvency plan proceeding is to find the best solution for all parties involved and to make that solution binding on all parties, without being subject to the rigid provisions applicable to a regular insolvency proceedings. In most cases, the legal entity as such (and not only the business undertaken by that entity) will survive insolvency plan proceedings and it will continue/restart to trade after the implementation of the insolvency plan with a restructured balance sheet.

Procedure

An insolvency plan can be formulated and submitted to the insolvency court by the insolvency administrator or the insolvency debtor itself. Alternatively, the insolvency creditors can mandate the insolvency administrator to draft an insolvency plan by resolving to do so in the creditors' meeting.

Protection

This is the same as in a regular insolvency proceeding (see above).

Effect

Whilst the German Insolvency Code regulates the plan's formal make-up, there are few rules regarding the plan's content. The 2012 reforms introduced the possibility of including a more classical US Chapter 11 style debt-to-equity swap in an insolvency proceeding. This allows for the cram down of the equity holders of a company and a conversion of creditor claims to shares in the company in an attempt to facilitate the maintenance of the legal entity behind the business. Prior to 2012, such debt-to-equity swaps were not possible in the absence of a consenting shareholders' resolution. This is no longer the case. Debt-to-equity swaps may now be conducted against the will of the existing shareholders, subject to compliance with certain prerequisites. However, a conversion of debt to shares against the will of any one respective creditor remains invalid. Potential "change of control" termination provisions are blocked if the change of control occurs by way of a debt-to-equity swap provided for in an

[77] Section 217, German Civil Law Code.

insolvency plan, but termination rights based on a breach of other contractual obligations are not affected.

The adoption of the insolvency plan is subject to creditor approval to be obtained by votes from the various creditor groups. The majority of creditors in each group, holding more than half of the value of claims within the group, has to provide the consent. A dissenting voting group is deemed to have consented to the plan if the respective group is presumed to suffer no additional loss under the insolvency plan when compared to a liquidation scenario of the insolvent entity (i.e. out of the money creditors are not assessed on a going-concern basis). This effectively provides a mechanism for the potential cram down of creditors. Once agreed, the insolvency plan must be formally confirmed by the insolvency court in order to be effective.

In order to expedite insolvency plan proceedings, creditors' rights to object to, or appeal against, an approved insolvency plan have been restricted through the 2012 reform. This is intended to prevent a creditor from blocking the insolvency plan and is supposed to tighten the proceedings to speed up the legally binding determination of the plan. Court-driven approval proceedings shall ensure that a confirmed insolvency plan can be executed notwithstanding a pending appeal.

Conclusion

The insolvency plan proceedings are concluded when the insolvency plan is confirmed by a final and conclusive decision of the insolvency court. The insolvency plan may provide that the settlement of the creditors' claims in accordance with the insolvency plan must continue to be monitored after the insolvency proceedings are terminated.

Section 5

ITALY

Prior to 2005, the Italian bankruptcy system was centred on the idea that failed businesses should be liquidated and insolvent debtors expelled from the economic system. Strong disincentives, including criminal sanctions, to the granting of financing to distressed businesses were in place and as a result, pre-insolvency restructurings were kept out of court and, therefore, outside of a clear framework of legal protection.

In an effort to address this, the **Italian Bankruptcy Law**[78] underwent substantial reform aimed at resolving corporate distress and facilitating the turnaround of companies, with a view to preserving the value of the business, thereby allowing it to make a fresh start. The 2005, 2006, 2007 and 2009 reforms[79] introduced pre-bankruptcy procedures such as out of Court re-organisation plan and debt restructuring arrangements (comparable to the so called schemes of arrangement)[80] and a more efficient regulation of the pre-bankruptcy composition procedure.[81]

However, after the worsening of the financial crisis it became apparent that the restructuring framework was in need of further improvement. New rules[82] were introduced to further encourage the use of debt restructuring agreements and pre-bankruptcy procedures. In 2016, reforms were introduced,[83] establishing a national register of insolvency and pre-insolvency proceedings, to be maintained by the Ministry of Justice (*Ministero della Giustizia*). This is seen as an important stepping stone in the creation of the European insolvency register contemplated by the recent reform of the Insolvency Regulation (see Section 1).

This section will provide a general overview of the main rescue and corporate insolvency proceedings available in Italy.

A. RESCUE PROCEEDINGS

I. Pre-bankruptcy creditors' compositions[84] (*concordato preventivo*)

Purpose

The purpose of *Concordato Preventivo* is to allow a company in financial difficulty to propose a plan to restructure its debts.

[78] Royal Decree No. 267 of 16 March 1942.
[79] The Italian Bankruptcy Law was amended by Legislative Decree Law No. 35 of 14 March 2005, ratified by Law No. 80 of 14 May 2005; Decree No. 5 of 9 January 2006; Legislative Decree No. 169 of 12 September 2007; Law No. 2 of 28 January 2009, Law No. 69 of 18 June 2009.
[80] Article 67, paragraph 3, letter d) of the Italian Bankruptcy Law: the out-of-court debt restructuring plan (*piano attestato di risanamento*); and Article 182-bis of the Italian Bankruptcy Law: the debt restructuring agreement (*accordo di ristrutturazione dei debiti*).
[81] Articles 160 et seqq. of the Italian Bankruptcy Law.
[82] Decree Law No. 78 of 31 May 2010 as amended and ratified by Law No. 122 of 30 July 2010, Decree Law No. 83 of 22 June 2012 as amended and ratified by Law No. 134 of 7 August 2012, Decree Law No. 69 of 21 June 2013 as amended and ratified by Law No. 98 of 9 August 2013 and Law Decree No. 83/2015 of 27 June 2015 (the "**Decree**").
[83] Law Decree No. 59 of 3 May 2016.
[84] Article 160 et seqq. of the Italian Bankruptcy Law.

Procedure

The distressed debtor initiates the procedure by filing a petition with the Bankruptcy Court, with a proposed plan of reorganisation of the company, certified by an expert opinion confirming its feasibility and the truthfulness of the accounting data.

The 2015 reforms established that the plan must provide for the repayment of at least 20% of unsecured creditors, otherwise it will be declared inadmissible by the competent Bankruptcy Court[85].

The distressed debtor will then propose its plan to the creditors. This plan of reorganisation can achieve the restructuring of the business by any means, including debt restructuring, debt assumption, merger transactions, debt-for-equity swaps and/or the different treatment of varying classes of creditors.

The plan must be approved by creditors representing the majority of the claims admitted to vote (*i.e.* 50% + 1) and, in cases where the creditors have been divided into different classes, approved by creditors representing the majority of claims admitted to vote in the majority of classes, before being submitted for ratification by the Bankruptcy Court. Creditors are able to put forward alternative restructuring plans (*proposte concorrenti*), if: (i) the creditors represent at least 10% of the overall indebtedness of the debtor; and (ii) the debtor's plan offering the payment of unsecured credits is lower than 40% of the respective claims. Furthermore, any of the creditors may decide to file a competitive offer (*offerta concorrente*) for the purchase of the distressed company, or for a specific going concern, if the debtor has already entered into an agreement that aims to transfer the relevant company or specific assets to the first offeror.

The creditors can vote on all plans, which must be filed in advance at the Bankruptcy Court. The plan approved with the highest majority, in terms of the amount of claims, prevails. In the event of deadlock, the debtor's plan will take precedence. In the event of a deadlock among alternative plans, the plan which was filed at court first will have precedence.

Protection

After filing the petition for a *Concordato Preventivo* and until validation, the distressed debtor is managed by the board of directors but under the supervision of a Court appointed commissioner (*commissario giudiziale*). Any actions other than those falling within ordinary management must be authorised by the Bankruptcy Court.

No claim may be enforced following the commencement of this procedure. Once the plan has been confirmed, an automatic stay on creditor actions is put in place. This prevents creditors from creating new security interests to secure their claims, or taking further action against the debtor or its assets to enforce their security or collect their debts.

Creditors' claims freeze at the filing date, but the claims for interest on secured claims continue to accrue during the proceedings.

[85] This provision applies only when the *concordato preventivo* is by way of liquidation. Therefore, such limit does not apply if the concordato proposal relates to a concordato which involves business continuity (*concordato in continuità aziendale* as described below).

Effect

The court may cram down dissenting creditors if the plan is approved by the required majorities and the court finds that dissenting creditors will receive under the plan at least as much as they would potentially receive under any available alternatives, i.e. the liquidation of the business. However, the court cannot prevent dissenting creditors from proposing competing plans for the purpose of showing the court that they would recover a greater amount under available alternatives.

Conclusion

The proceedings must be concluded within six months from the date of filing the petition. This period can be extended by the Bankruptcy Court for an additional two months.
Once the plan has been approved by the creditors and the Bankruptcy Court, it is binding and must be fulfilled.

II. Debt restructuring agreement (*accordi di ristrutturazione dei crediti)*

Purpose

A debt restructuring agreement under Article 182-*bis* of the Italian Bankruptcy Law resembles a pre-packaged reorganisation plan under Chapter 11 of the US Bankruptcy Code.

Procedure

The debt restructuring agreement is an agreement by and between the insolvent company and its creditors representing at least 60% of all claims against the debtor, aiming to restructure the company's debts, and takes place partially out-of-court and partially in-court.

In order to qualify as a "182-*bis* proceeding", the restructuring agreement must (i) cover at least 60% of the debtor's creditors; (ii) must ensure full and timely payment of creditors not adhering to the restructuring agreement[86]; and (iii) the feasibility of the restructuring agreement must be confirmed by an expert appointed by the debtor.

After execution of the restructuring agreement, the agreement, along with the expert's opinion, is filed at the competent Register of Companies and the Bankruptcy Court. At the time of filing, under Article 182-*septies* a company, which has debts towards banks and financial intermediaries for an amount not lower than half of its overall indebtedness, can request[87] that the effects of the agreement be extended to those financial creditors who have not given their approval.

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[86] Payment, however, might be delayed by a payment *moratorium* of up to 120 days from the validation of the Article 182-bis arrangement.

[87] In order to make this request, the debtor must show that: (i) all creditors belonging to the same class of creditors have been informed of the start of negotiations with creditors and were put in a condition to participate in the negotiations; (ii) the financial creditors that have approved the debt restructuring agreement represent at least 75% of the indebtedness in class; (iii) the legal position and economic interests of the financial creditors to which the effects are to be extended and that of the financial creditors that have already approved the plan, have the same name; (iv) the financial creditors to which the effects are to be extended have received full and updated information on the assets and the economic and financial condition of the debtor, as

The bankruptcy court will then adjudicate any objections to the debt restructuring agreement, filed by the creditors or interested third parties, and grant judicial approval of the debt restructuring agreement once it has ruled on any opposing actions. The bankruptcy court's decree of approval is published in the companies' registry.

Protection

An automatic stay is imposed on creditor actions for 60 days from the date of filing the debt restructuring agreement prevents the creditors from taking action against the debtor or its assets to enforce their security or collect their debts.

In addition, all transactions, payments and security interests carried out or granted under a judicially-approved debt restructuring agreement are protected against bankruptcy claw-back actions.

Effect

The Italian Bankruptcy Law does not specify the possible contents of the restructuring agreement, which is left to the parties to decide, and the restructuring agreement can cover any type of claim, whether secured or unsecured, including tax claims.

Conclusion

The length of proceedings will depend on the duration of negotiations with creditors. Once confirmed, a debt restructuring agreement can be challenged by any interested party within 30 days from the publication. If no challenges are upheld, the court issues an order confirming the plan.

III. Out of Court reorganistion plans (*piani di risanamento attestati*)

Purpose
The purpose of the procedure is to allow for a company in financial difficulties to restructure its debts, without the intervention of the Courts, to ensure rebalancing of its financial situation.

Procedure

The debtor will prepare a plan, usually with the technical support of its financial adviser, with the aim of ensuring the repayment of the company's outstanding debts and the debtor's financial re-balancing.

Before entering into an out-of-court agreement based on a plan, creditors require that the certified rescue plan be reviewed by an expert, who issues an opinion on the reasonableness of the assumptions and the debtor's ability to fulfil its payment obligations.

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well as on the plan and its effects; and (v) the plan "imposed" on the dissenting financial creditors represents the "best alternative" for them, ensuring that the financial creditors will be satisfied in accordance with the plan at least as much as under any other realistically feasible alternative plan.

The expert's opinion is intended to provide protection for the creditors against claw-back actions based on the transactions, payments and security interests made or granted under the certified rescue plans and related agreements.

The plan requires expert, independent third-party certification. The working out of the plan requires a preliminary evaluation phase during which the company's management is required to uncover and examine the underlying reasons for the company's distressed state.

Once the analysis is completed, the management (usually in consultation with external advisors and with its main creditors) draft a new business and financial plan to be certified under section 67 of the Italian Insolvency Law. Based on the new business and financial plan, the company will negotiate and enter into out-of-court agreements with creditors that remain exempt from a liquidator's claw back.

Protection

The distressed company will look to negotiate and enter into a standstill agreement with its creditors in relation to existing indebtedness in order to allow the company time to prepare the rescue plan.

Effect

These agreements may provide for a variety of arrangements include write-offs and/or rescheduling of the indebtedness, debt-to-equity swaps, new equity injections or disposal of assets.

Conclusion

The proceedings end with the implementation of the contents of the expert's report and the fulfilment of the actions contained in the certified rescue plan.

IV. Increasing the efficiency of rescue proceedings

Recent reforms have aimed at increasing the efficiency of rescue procedures by offering Italian companies in financial distress greater flexibility to overcome their difficulties while preserving business continuity. These include:

Early commencement of the creditors' compositions (The so called "*concordato preventivo in bianco*")[88]

Debtors can apply to Court to commence the creditors' composition procedure before the plan itself has been fully formulated, providing them with the benefit of a stay on enforcement and protective actions upon the filing of a petition for *concordato preventivo* and its registration in the Register of Companies, allowing the debtor "breathing space" to formulate the composition plan. This is intended to help improve the chances of a successful restructuring.

[88] Article 161 §6 of the Italian Bankruptcy Law.

In order to benefit from this process, the debtor must file, together with the petition, its financial statements for the preceding three years, enabling the court to ascertain: (i) whether the business meets the pre-requisites for insolvency under Italian Bankruptcy Law; (ii) whether the court has geographic jurisdiction; and (iii) whether the petitioner has the authority to submit a composition petition. A pre-composition petition will not be admissible if a similar petition has been filed in the preceding 2 years. Further, in order to avoid misuse of this process, some Italian courts, including the Court of Reggio Emilia and the Court of Milan, have issued guidelines to clarify their approach to any petition under Article 161 of the Italian Bankruptcy Law.

In order to increase accessibility to creditor meetings, Law Decree No. 59 permits creditors to attend the meeting remotely through audio or video conference systems. These new rules facilitate attendance at creditors' meetings by foreign parties and investors, and ensure higher attendance (thus voting) rates at such meetings.

Where the *concordato preventive in bianco* is granted, the Court will allow the debtor between 60 – 120 days for the drafting of the plan and the filing of any further necessary documents. The Court may extend this period by up to 60 additional days where justified. Alternatively, and within the same term, the debtor may file an Article 182-*bis* restructuring agreement, together with the required documents.

This provides for much quicker access to bankruptcy protections and maximises the debtor's leverage *vis-à-vis* its creditors. This should also provide for an early emergence of the debtor's crisis, as the debtor will not have to fear the commencement of creditor actions, increasing the chances of the successful restructuring of businesses.

To prevent abuses of *concordato preventive*, the 2013 reforms require the Court to impose upon the debtor further monthly reports regarding the management of the business and activities outlined in the plan. Those reporting obligations and the activities performed by the debtor are supervised by a judicial commissioner appointed before the formal opening of the court proceedings.

Finally, pending a *concordato preventivo* or an Article 182-*bis* restructuring agreement neither the rules (provided for by Italian corporate law) on the obligation to reduce share capital nor the rules on the dissolution of the company due to reduction or loss of capital shall apply.

Cherry picking contracts

Debtors (with court approval) are able to withdraw from, or suspend their obligations under certain existing contracts, irrespective of the terms of the contract, if this would facilitate the restructuring.[89] Alternatively, the debtor may ask the court to suspend its duty to perform under such contracts for 60 days (extendable by up to 60 additional days for justified

[89] Article 169-*bis* of the Italian Bankruptcy Law. This provision on pending contracts is not applicable to (i) dispute resolution clauses; (ii) employment contracts; (iii) lease agreements under Article 80 of the Italian Bankruptcy Law; and (iv) preliminary agreements under Article 72(VIII) of the Italian Bankruptcy Law for the sale of real estate for residential purposes.

reasons) in order to have enough time to decide whether to assume or to reject such contracts.

In the event the contract is terminated, the other contractual party will be entitled to an indemnification equal to the damages arising from the failure to perform the agreement. Such indemnification enjoys super priority over other liabilities.

Preservation of business continuity (the so called "*concordato con continuità aziendale*")[90]

As of the date of the filing of the application with the Register of Companies, the debtor is (i) authorised to perform acts of ordinary administration; and (ii) entitled to request the court's approval for any act of extraordinary administration. In addition, the debtor may ask the court to approve specific payments for goods and services due before the filing, provided that an independent third-party expert certifies that the goods and services rendered by such vendors and suppliers are (i) essential to ensure the continuity of the business; and (ii) instrumental to enhance the recovery of all creditors.

Where a debtor commences a *concordato preventivo con continuità aziendale* aimed at satisfying the distressed entity's creditors through the continuation of thebusiness of the company [91]:-

1) creditors cannot terminate executory contracts on the basis of the debtor's insolvency, despite any provision in the contract to the contrary;

2) pending contracts, including those contracts entered into with a public authority, are not automatically terminated because of the admission to the procedure;

3) a debtor will be able to participate in competitive public contract tenders; and

4) a debtor can present joint offers with other entities in connection with public contract tenders, provided specified independent third-party expert evidence is submitted to court.

In addition, should the *concordato preventivo con continuità aziendale* proposal provide for the sale of the business as a going concern, the reform provides that the business may be sold free from encumbrances.

Financings obtained during a *concordato preventivo*

A debtor who files a request for a *concordato preventivo* may request that the competent Court authorises the debtor to enter into loan agreements whose proceeds shall be considered as super-senior. In order to qualify, an independent expert must certify that such loan agreements will better enable the debtor to carry on its business and satisfy its creditors

[90] Article 186-*bis* of the Italian Bankruptcy Law.

[91] Pursuant to Article 33, paragraph 1, letter h) of the Decree, a *concordato preventivo con continuità aziendale* encompasses plans of reorganisation providing for: (i) the continuation of the business by the debtor; or (ii) the sale of the business as a going concern; or (c) the contribution in kind of the business as a going concern to one or more entities (including new entities). A *concordato preventivo con continuità aziendale* is governed by special rules where, among other things: (i) an independent third-party expert must certify that preserving the business continuity is instrumental to enhancing the creditors' recovery; and (ii) the plan of reorganisation must contain an analytic description of the expected proceeds and costs and of the financial resources necessary to fund the business continuity.

in the long term. The Court may also authorise the debtor to grant mortgages and pledges as security for such loans.
In addition, a new amendment addressing the risk of claw-back proceedings has been introduced, which relates to acts associated with *interim* funding obtained during a *concordato preventivo*. This offers lenders and/or investors providing interim funding arrangements protection from claw-back from the filing date of the composition petition rather than from the date of the sanctioning by the Court.

This should increase the financing available to distressed companies, which typically face cash shortfalls when seeking to finalise their restructuring plans, thereby increasing the likelihood of a successful reorganisation.

Priority for restructuring finance

Article 182-*quater* provides that new financing, made available (i) in the implementation of pre-bankruptcy agreements or Article 182-*bis* debt restructuring agreements[92] (which have been approved by the Court (*omologazione*); (ii) in a composition with creditors; or (iii) for the purposes of filing a petition, will be treated as a statutory expense of the procedure, i.e. as super-senior, in any subsequent insolvency proceedings. Such financing must be provided by banks or certain financial institutions enrolled with the Bank of Italy under Articles 106 and 107 of the Italian 1993 Banking Act[93], and must meet the conditions set out in Article 182-*quater*. Prior to the introduction of Article 182-*quater*, claims for "new money" extended to distressed companies were deemed unsecured in an insolvency scenario, unless secured by a mortgage, pledge or lien.

Similarly, bridge financing provided by shareholders is considered super-senior and is payable in priority of 80% of the amount in any subsequent insolvency proceedings. Loans granted by persons who become shareholders as a result of the restructuring plan are also payable in full.

Interim financing

Article 182-*quinques* provides a debtor who has filed for the admission to a *concordato preventivo* or who has filed an application to approve an Article 182-*bis* debt restructuring agreement, to request authorisation to either receive interim financing or to continue to use existing credit lines (*linee di credito autoliquidanti*), which acquire legal priority.

The court can authorise such interim financing and credit lines upon request of the debtor, without the prior certification of an independent expert but after having consulted with the main creditors, provided that (i) the financing and credit lines are functional to meet urgent operational needs of the business; (ii) the debtor specifies what use will be made of the new financings and credit lines, and that it is otherwise unable to obtain alternative financings;

[92] Restructuring agreements pursuant to Article 182-*bis* of the Italian Bankruptcy Law are pre-packaged reorganisation plans that can achieve the debtor's restructuring by any means provided that (i) an independent third-party expert certifies the feasibility of the plan; (ii) creditors holding at least 60% of the total debts approve the plan; and (iii) the competent bankruptcy court ratifies the plan. Dissenting creditors must be paid in full and cannot be subject to cram down. The debtor must seek court ratification of the agreement and publish the agreement on the Register of Companies (following which, for 60 days, creditors' actions on the debtor's assets are stayed). In addition, a new paragraph has been introduced to Article 182-*bis* under which a debtor may request the court grants a moratorium during the negotiations of a debt restructuring arrangement.
[93] Legislative decree No. 385 of 1 September 1993.

and (iii) the absence of this interim financing could cause irreparable and imminent harm to the business.

Debt restructuring arrangements with financial institutions

New Article 182 *septies* of Italian Bankruptcy Law, introduced by Law Decree 83/2015, provides that, in case of filing of a Debt Restructuring Agreement under 182 *bis* of Italian Insolvency Law, if the total debts towards banks and financial intermediaries are not lower than 50% of the whole indebtedness, the company in distress may (i) enter into a "*Debt Restructuring Arrangement with banks*"; (ii) request that the restructuring arrangement is effective also for the creditors belonging to such class(es) who have not adhered to the restructuring; and enter into standstill agreements and extending the effect of it also to those financial intermediaries who did not approved the agreement in the first place, provided that the standstill agreement has been approved by more than 75% of the existing creditors. Please note that the standstill or similar agreement cannot, in any circumstances impose new obligations on the non-approving creditors or require them to carry out addition obligations.

The court will validate the debt restructuring arrangement with financial intermediaries after it has ascertained that the negotiations were held in good faith and the relevant conditions were met.

B. LIQUIDATION

The liquidation procedure is governed by company law, and can be voluntary or mandatory.

- **Voluntary**

The decision to put a company into voluntary liquidation must be taken by shareholders.

The shareholders will announce the decision to voluntary striking off to the Italian Commercial Register, which will then place the company under “pending dissolution” for one calendar year in order to make sure all the creditors are paid.

A meeting of shareholders will then be called, during which a liquidator will be appointed 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. The company will then be struck off the companies' register.

- **Compulsory**

Mandatory winding up of a company can be requested by the debtors, creditors, a prosecutor or an Italian court. Compulsory liquidation is required when the equity capital is reduced below the legal minimum, and also when the object for which the company was formed is attained or for any other reason set out in the by-laws.

Under compulsory liquidation the shareholders of the Italian company must file all the business’ financial records for the last three years, an assessment of the company’s activities and a list of the creditors with the High Court of Justice. The Italian company is declared bankrupt and the Court appoints a receiver to make an inventory and administer the corporate assets of the business. Within 60 days from the bankruptcy, the receiver must submit a liquidation calendar.

The procedure will end with the company struck off the companies' register.

C. BANKRUPTCY PROCEDURES (*FALLIMENTO)*

Purpose

The purpose of bankruptcy proceedings is to pay out the creditors by realising the debtor's assets and distributing the proceeds to them. The status of insolvency justifies the adjudication of bankruptcy by the court, even where the insolvency is not due to the debtor's misconduct.

Procedure

Bankruptcy proceedings are initiated when a company is deemed to be insolvent according to the provisions of the Italian Bankruptcy Law, meaning it is no longer able to regularly meet its obligations and pay its debts.

To be subject to bankruptcy proceedings, the company must have its registered office in Italy and meet one of the following requirements:

i. reached in the last three years (from the bankruptcy petition or from its incorporation) an annual balance sheet revenue higher than €300,000;

ii. reached in the last three years (from the bankruptcy petition or from its incorporation) an annual gross proceeds higher than €200,000; and

iii. debts (including debts not yet due) for an amount higher than €500,000.

The procedure is started by an order of the Bankruptcy Court having jurisdiction over the debtor's principal place of business, based on a petition filed on the initiative of one or more creditors, the debtor, or the public prosecutor.

Protection

An automatic stay is granted on the making of a bankruptcy order, to prevent any creditor from pursuing claims outside the bankruptcy court.

Effect

Upon the making of the bankruptcy order, the bankruptcy court will appoint a receiver who will usually, but not necessarily, be a lawyer, a law firm (assuming no conflict of interest) or a certified accountant. The receiver will be responsible for liquidating the assets of the company in order to satisfy the creditors.

Conclusion

Proceedings will be formally concluded once the receiver has liquidated all the company's assets and distribute the proceeds to the creditors.

D. THE EXTRAORDINARY ADMINISTRATION PROCEDURE

The Extraordinary Administration Procedure under Law 270/1999 ("Prodi *bis*")[94] is an insolvency procedure applicable to large business[95] when there is the expectation that the company's situation may be rebalanced 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 plan (the duration of which cannot exceed 2 years).

Procedure

The Extraordinary Administration procedure commences with the filing of a petition with the competent court for the insolvency declaration by the company, its creditors, the public prosecutor (*pubblico ministero*) or *ex officio* by the bankruptcy Court.

Admission to the procedure may be decided by the competent court after verifying that all requirements are met. Then, the court appoints one to three extraordinary commissioner(s) extraordinary commissioner(s) who deliver to the Minister for Economic Development the recovery plan of the company.

The recovery plan (which must contain, inter alia, an indication of the method and timing of repayment of outstanding debts) needs to be approved by the competent court. Once approved, the plan must be carried out by the extraordinary commissioner(s) under the supervision of the Minister for Economic Development.

Protection

From the date of the opening of Extraordinary Administration, no enforcement or precautionary proceedings can be commenced or, if already commenced, continued against the distressed company and its assets.

Effect

Prodi *bis* Law does not specify the possible contents of the restructuring agreement, which is left to the parties to decide.

Conclusion

[94] As an alternative, please note that an additional type of "*Amministrazione Straordinaria*" is contemplated by Law Decree n. 347/2003 ("**Marzano Law**"), which applies to large insolvent companies when certain dimensional requirements are met. For the purpose of this Memorandum reference is made to the "*Amministrazione Straordinaria*" set forth by Prodi *bis*.

[95] A "large" business which is eligible to be subject to an Extraordinary Administration Procedure shall meet the following cumulative criteria: (i) it shall employ or have employed more than 200 employees during the preceding 12 months; and (ii) it shall have an aggregate debts amount no lower than two third of each of (1) the company's assets resulting from the company's last approved balance sheet and (2) the incomes deriving from the sales made and from the services provided during the latest accounting period.

The proceedings end with the implementation of the contents of the recovery plan and the fulfillment of the actions contained in the certified rescue plan.

Section 6

SPAIN

Distressed companies in Spain have tended to shy away from formal insolvency mechanisms, instead leaving them to the last minute when it is usually too late. The Spanish Insolvency Act[96] (**SIA**) came into force in 2004, aimed solely at modernising the treatment of insolvency in Spain. In addition, a new type of court – the Commercial Court – was created, tasked first and foremost with conducting insolvency proceedings.

Despite the protections afforded under the new legislation, the number of insolvency proceedings in Spain remained substantially below the European average, with companies choosing to avoid formal insolvency mechanisms. However, from the start of the financial downturn in 2007, the number of insolvencies dramatically increased, with the majority ending in liquidation rather than a successful restructuring of the business. Legislators therefore undertook a review of SIA in light of the gravity and characteristics of the downturn. The result of this was the Insolvency Law Reform[97] (**2011 Reform**), which came into force on 1 January 2012.

The 2011 Reform's preamble sets out that it seeks to foster alternatives to formal insolvency proceedings, giving companies more economical and flexible alternatives through refinancing agreements. It signalled a clear shift by legislators towards pre-insolvency mechanisms and the preservation of business. Additionally, the 2011 Reform introduced important modifications to SIA, aimed at streamlining insolvency proceedings, simplifying some aspects of the same and providing more flexibility to the sale of assets of the estate within insolvency proceedings.

However, a number of uncertainties regarding key provisions of the 2011 Reform arose following its implementation, leading to further amendments being introduced from 2013 to 2015, the latest having taken place in October last year.

The objective of those amendments was to improve the legal framework governing financing agreements to remove obstacles that have previously impeded the successful execution of restructuring and refinancing transactions, thereby providing distressed companies with more options to avoid collapse.

This section will first look at general considerations to take in account when commencing a restructuring or insolvency proceedings in Spain, following by a review of the main pre-insolvency and insolvency procedures available to companies.

A. GENERAL CONSIDERATIONS ON INSOLVENCY PROCEEDINGS

I. Duty to initiate insolvency proceedings suspended

Like many civil law jurisdictions, Spain imposes a specific time limit on distressed debtors to initiate formal insolvency proceedings when they are insolvent. This often led to management seeking the protection of the court to avoid incurring personal liability as opposed to exploring possible restructuring opportunities available to the business.

Prior to the 2011 Reform, a debtor had to file for insolvency within 2 months of being in a state of insolvency. Afterwards, Article 5-*bis* of SIA (repealing Article 5.3 of SIA) was introduced, which allows debtors to "stop the clock" and utilise a four month moratorium to

[96] Law 22/2003.
[97] Law 38/2011 of 10 October 2011.

agree a proposal for a restructuring agreement (*propuesta anticipada de convenio*) or an out-of-court refinancing agreement (*acuerdo de refinanciación formal*[98]) with its creditors.

The 2011 Reform amended Article 5-*bis* so that no enforcement actions can be initiated after the filing of a 5-*bis* notice over assets necessary for the continuity of the business of the debtor. Any enforcement actions already initiated shall be suspended.

In addition, the revised Article 5-*bis* contains a special rule whereby financial creditors will also be subject to enforcement stays (whether judicial or not) where (i) it is evidenced that creditors representing over 51% of financial liabilities have expressly supported the start of negotiations of a restructuring agreement; and (ii) such creditors have undertaken not to start or to continue individual enforcement actions against the debtor whilst negotiations are on-going. The debtor must therefore obtain standstill agreements signed up by the required majorities in order to be protected from enforcement actions by financial creditors during a 5-*bis* period.

Debtors heavily indebted with public administrations should note that the moratorium will not apply to public debt, for example tax liabilities, social security claims and other claims by public administrations.

II. Costs arising from insolvency proceedings

The debtor must pay all costs arising from insolvency proceedings. The mains costs are legal fees, court agent's fees and the fees of the insolvency receivers. However, where a creditor files for insolvency and the application is dismissed, the creditor will have to pay the corresponding legal costs and fees (and potentially damages caused).

B. REFINANCING AGREEMENTS

I. Out-of-court refinancing (refinanciación)

Purpose

Out-of-court refinancing proceedings allow the debtor to reach an agreement with the majority of its creditors to increase the available credit or to modify its obligations to avoid insolvency court proceedings.

Procedure

The refinancing agreement must include a viability plan that allows the debtor to continue activity in the short- and medium-term. Both the debtor and the creditors are entitled (but not compelled) to request the appointment of an independent expert in order for him to analyze whether the viability plan is reasonable and feasible, and also whether the security granted is proportionate to the funding provided and any other issue required by the law.

Protections

- Protections against claw-back actions

A protective shield against claw-back actions is offered to parties to a refinancing agreement. Two types of restructuring agreements may benefit from a safe harbour protection against claw-back actions, being:-

[98] Article 71.6 of SIA.

i. **General type**[99]: debt restructuring agreements supported by creditors representing at least 60% of the debtor's general liabilities (or at least 51% of the debtor's financial liabilities where the agreement is judicially homologated), and:
   a. which provide for a significant increase of the available credit or modify or extinguish liabilities, provided that the amendments or extensions are based on a viability plan that allows for the continuity of the business of the debtor in the short and medium term;
   b. the auditor of the debtor issues a certificate certifying the support of the required debt majorities; and
   c. the agreement is notarised.

ii. **Special type**: debt restructuring agreements that do not meet the requirements set out above will still benefit from protection from claw-back actions provided the restructuring agreement results in the following:
   a. an increase in the assets-to-liabilities ratio;
   b. the resulting assets being at least equal to the resulting current liabilities;
   c. either the value of security granted to creditors not exceeding 90% of outstanding liabilities, or the security-to-debt ratio not exceeding that which existed prior to the restructuring agreement being entered into;
   d. the interest rate applicable to the restructuring agreement, for the lenders taking part, not exceeding by more than one third the interest rate applicable to the previously existing debt;
   e. it sets out the reasons justifying the refinancing agreement; and
   f. it is notarised.

It should be noted that the safe-harbour provided is an absolute protection against claw-back actions. Insolvency administrators are entitled to challenge refinancing agreements under claw-back accounts, but only on grounds of failure to comply with the safe-harbouring requirements.[100]

- New money protections

In order to encourage the granting of new funding, cash injections, including those from specially related persons[101] and from the debtor (except if they are devised though a share capital increase) would qualify as "claims against the estate" during a transitional period that last up till next 2 October 2016.

From that date onwards, fresh money provided to the debtor in the context of a refinancing will be also prioritised in any subsequent liquidation proceedings. It will be treated as follows: 50% as a claim against the insolvent's estate; and in the remaining 50% as a claim which is generally privileged. However, contrary to the position above, this regime does not apply to the cash injections made by the debtor or by specially related persons.

[99] There is no longer a general requirement to appoint an independent expert to provide opinion on the restructuring agreement, although it is still required in certain instances (such as in cases of conversion of debt into equity) or where the debtor or creditors require it.
[100] Article 72(6) SIA
[101] Defined as those persons or entities which are shareholders of the insolvent debtor holding certain percentages of its share capital before they became creditors, as well as directors and shadow directors and entities of the same group as the insolvent debtor.

Effect

The restructuring agreement provides for modification of the debtor's total available credit or the debtor's obligations. When it is approved by the required majority, it affects all the creditors. This allows the company to avoid insolvency court proceedings, provided the debtor observes the agreement's provisions.

II. Court Sanctioned

Purpose

This court sanctioned process can be used to bind dissenting financial creditors under a refinancing agreement, provided certain conditions are met (see below).

Procedure & Effect

Either the debtor, or any creditor that has signed a refinancing agreement, can apply for a judicial endorsement of a refinancing agreement (*judicial homologation*). This process can be used by the majority of financial creditors to enable them to bind dissenting creditors where the following requirements are met:

a. The refinancing agreement must have the support of creditors representing at least 51% of the financial liabilities.
b. Creditors who are deemed to be specially related to the insolvent debtor will not be included for the purposes of calculating the required majorities, but will be affected by the restructuring agreement in respect of the financial debt they may hold.
c. Creditors within the frame of syndicated loan agreements will be taken as a whole, with all of them being deemed to back the restructuring agreement if at least 75% (or a lower percentage if provided by the applicable majority lenders' consent regime in the relevant documentation) of the syndicated facilities debt amount vote in favour of the restructuring.

The scope of financial creditors affected by the judicial homologation, and therefore subject to the cram down, include (i) unsecured creditors and secured financial creditors, in respect of that part of their claims not covered by the value of their security[102] (together "**Class A**" claims); and (ii) secured creditors, in respect of that part of their claims covered by the value of their security where specific qualified majorities apply ("**Class B**" claims). Homologated refinancing agreements therefore provide for two different classes of claim, each claim to be treated equally within its class.

The effects of judicial homologation are as follows:-

a. A 60% majority will result in stays of up to 5 years and conversions of debt into PPLs for maturities of up to the same period being imposed on non-participating or dissenting holders of Class A claims. A majority of 65% of Class B claims will be required to impose these same effects on Class B claims held by dissenting or non-participating creditors.
b. A majority of 75% of holders of Class A claims will be entitled to impose on dissenting creditors:-
    - stays of up to 10 years;
    - debt write-offs;
    - conversion of debt into equity;

[102] Under RDL, security assets will be valued at 90% of their fair value (as determined by the criteria set out in the revised Additional Provision 4) minus any debt holding preferential or better ranking security over such assets.

- § conversion of debt into PPLs with a tenor ranging between 5 and 10 years, or into convertible bonds, subordinated loans, PIK loans or any other financial instrument with a rank, maturity or characteristics different from the original one; and
- § transfers of assets as repayments of debt or debt to asset swaps.

A majority of 80% of Class B claims will be required to impose any of these measures on Class B claims held by dissenting or non-participating creditors.

Protection

The court will order a general stay on enforcement actions upon receipt of a request for homologation, the stay remaining in place until the homologation is approved. The judicial decision is taken by way of an urgent process within a period of 15 days, with an excerpt being published by means of a disclosure announcement in the Public Insolvency Register and the State Official Gazette.
The homologation may be challenged by creditors, within 15 days from the publishing of the court ruling, based only on (i) the lack of necessary majority to achieve such homologation; or (ii) a "disproportionate sacrifice" being imposed on dissenting creditors.

C. INSOLVENCY PROCEEDINGS (*CONCURSO*)

Purpose

The aim of insolvency proceedings depends on whether the debtor is being rescued or liquidated. In a rescue (*convenio*), the objective is to restructure the debt to allow the debtor to continue operating. The debtor makes an arrangement with creditors to reduce its debt over a certain period of time, up to the limitations set by the Insolvency Act (a debt reduction or postponement). In a liquidation (*liquidación*), the objective is to sell the assets of the debtor company to repay as much of the debt owed to the creditors as possible.

Procedure

The procedure begins with the filing of an insolvency petition with the Commercial Court (*Juzgado de lo Mercantil*) of the capital of the province in which the debtor has its COMI. If insolvency proceedings are voluntary (*concurso voluntario*), the directors or liquidators file the insolvency petition. If they are compulsory (*concurso necesario*), the insolvency petition can be filed by a creditor, or the shareholders who are personally liable for the company's debts, provided, in both cases, the company is deemed to be currently insolvent.

An insolvency petition must be filed in writing and accompanied by certain documents, including 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. Where the insolvency petition is filed by a creditor, it must provide evidence of its debt as well as the insolvency situation. This may be proven when a general inability of the debtor to meet payments as they become due is proven, when enforcement proceedings have been taken against the debtor but assets have not been found to cover the amount claimed[103] (in this case the debtor would have no grounds to challenge the petition), when the debtor is performing an asset stripping exercise or ruinous sale of its assets, or when the debtor is unable to meet any of the following payments: tax payments during 3 consecutive months, contributions to the Social Welfare, payment of salaries or compensations for a consecutive 3-month period. If the

[103] Where a creditor files for insolvency after having unsuccessfully tried to seize the debtor's assets, any opposition by the debtor will inadmissible and the judge will declare the insolvency the next day.

compulsory insolvency proceeding is declared, the creditor who initiated the process has a priority ranking which amounts to 50% of its unsecured debt.

Where the judge issues a declaration of insolvency, such declaration must be published in the Official State Gazette (*Boletín Oficial del Estado*) and must be registered with the Registry for Insolvency Proceedings (*Registro Público Concursal*). Creditors will have to give notice of their claims within a month of the insolvency declaration appearing in the Official State Gazette.

Protection

During the insolvency proceedings, the creditors cannot begin any in-court or out-of-court enforcement proceedings, or administrative or state tax writs against assets which are necessary for the business. The stay will generally last one year.

Effect

Upon making the declaration, the court will appoint a single court receiver[104] (economist or lawyer). In the case of voluntary insolvency, as a general rule, 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.

If the debtor has not requested liquidation, an arrangement with its ordinary creditors must be reached and approved by the creditors at a creditors' meeting, and by the court. The agreement can also be reached in writing (without holding a creditors' meeting). An arrangement proposal can be put forward before the end of the period in which the creditors must submit proof of their claims (*convenio anticipado*). This proposal may provide for termination of the proceedings by fast track.

Secured creditors (*créditos privilegiados especiales*) and generally privileged claims (*créditos con privilegio general*) are not affected by an arrangement and the debtor must reach separate agreements with each of these. They can opt to join the arrangement, but will lose their preferential status and be subject to the proposed debt repayment structure if they do. Creditors with subordinated debts (*créditos subordinados*) cannot vote on the arrangement. Claims accrued after the insolvency proceedings are immediately payable (*créditos contra la masa*).

An arrangement is approved if at least one-half of the ordinary creditors representing more than one-half of the total debt vote in its favour, always provided that the measures agreed are the following: write-offs equal or below to the half of the amount of the claims, stays of up to 5 years or debt conversion in PPLs for maturities of up to the same period. However, if the total value of debts owed to ordinary creditors voting in favour of the arrangement is greater than the total value of debts owed to ordinary creditors voting against the arrangement, it can be approved if either (i) the agreement provides for ordinary debts to be repaid in full within three years; or (ii) the agreement provides for ordinary debts to be repaid immediately with a write-off of less than 20%. The arrangement is not effective until the court gives its approval. Otherwise, if measures agreed entail write-offs above the half of the amount of the claims, stays for more than 5 years and up to 10 years or debt conversion in PPLs for maturities of up to the same period, the required majority will be 65% of the ordinary creditors.

[104] 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.

Conclusion

Insolvency proceedings end if (i) all recognised debts are repaid or the creditors are satisfied in full by other means; (ii) it is proved that the company has no further assets to repay its debts and no party is liable for this lack of assets; (iii) the court declares that the conditions of the debtor's arrangement with the creditor have been fully met; or (iv) the Court of Appeal (*Audiencia Provincial*) revokes the insolvency declaration.

CONCLUSION

The financial crisis has not only spurred a dramatic change in the direction of national policy, but has also seen European jurisdictions implement a dynamic evolution of their restructuring and insolvency regimes, aimed at encouraging business rescue to enable value preservation and to save employment. In addition, the increased awareness of forum shopping, essentially driven by differences in national law, is likely to promote future harmonisation of insolvency regimes, which will aid the future stabilisation of the financial sector by increasing certainty for parties.

This remains a continually evolving area of law at both national and European levels, and it is therefore imperative that national legislators consider all new initiatives in light of the global movements currently underway and ensure that they do not introduce multi-tiered compliance systems that financial institutions will have to adhere to.

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Insolvency in the Loan Market

A Loan Market Association Guide

European jurisdictions have witnessed a dynamic evolution of their restructuring and insolvency regimes, aimed at encouraging business rescue to enable value preservation and to save employment. This Guide (updated from the 2014 Edition) is intended to provide a summary of where the law currently stands in the diverse legal systems that operate across Europe, summarising the output from recent initiatives which have sought to amend the underlying insolvency regimes across Western Europe.

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