IBA Mid-Year Insolvency Conference

The Paradigm Shift:
From Insolvency to Restructuring

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Context – 2nd Decade Legislative Footprints

During the 2nd decade in 21st century, in many (Western) European countries, there are several common tendencies in the approach to company rescue:

1 **Early recourse** – Often there is an earlier moment of starting a rescue/restructuring/recovery process (e.g. French *Sauvegarde*); the debtor must encounter (financial) problems that it can not solve, which is earlier than the traditional moment that the debtor can not pay its financial obligations when they are due

2 **Debtor in possession (DIP)** – The board is not (fully) replaced by a court appointed IP; in restructuring proceedings the board stays in control of the business (under supervision of an IP)

3 **Stay** – In these countries one finds a moratorium or a stay either automatic (*Sauvegarde*) or at request (e.g. *concordato preventivo* or *réorganisation judiciare, WHOA*), covering all or a limited number of creditors. Different periods, sometimes extendable

Context – 2nd Decade Legislative Footprints (cont'd)

4. **Protecting fresh money** – Special provisions to protect fresh money available for the company while trying to work itself out of its distress, e.g. protection from avoidance rules (sometimes set-off) or grant special priority status for repayment of fresh money in subsequent (formal) insolvency proceedings

5. **Debt for equity swap** – Possibilities of a debt for equity swap, i.e. the conversion of a creditor's claim into shares in the capital of the company

6. **Restructuring plans** – With division of creditors in 'classes' and certain majorities for adoption of a plan, plan confirmation/homologation by a court, and a mechanism to bind disapproving creditors ('cram-down')

PRD 2019/1023 - Basis in EU Treaties?

- Preventive Restructuring Directive (PRD 2019/1023) - Basis in Art. 114(1) TFEU (establishing internal market)

'…. The European Parliament and the Council shall, acting in accordance with the ordinary legislative procedure and after consulting the Economic and Social Committee, adopt **the measures for the approximation of the provisions laid down by law, regulation or administrative action** in the Member States which have as their object the **establishment and functioning of the internal market.**

- Implementation in 27 MSs:
  - 22 have notified EC
  - Others
    - Difficult fit in (recently renewed) legislation – civil law jurisdictions
    - No political priority / No 'legislative capacity' / 'elections'

Where do we stand in 2024 and beyond?

Actors in EU: “Brussels square mile”?

- Commission – EP – Council – EcoSoc
- *Deliberate participatory governance*, via
  - Group of Experts (since early 2021 – proposal December 2022)
    - Source of inspiration
    - Sounding board/touchstone
  - Stakeholders
    - Influencing input (consultations) and test output
    - Trade creditors, unions (trade, labour, finance), professionals (lawyers, accountants, turnaround experts)

Paradigm shift in Europe: 3rd decade > rescue culture

- **1 Philosophy:** from insolvency being seen as a personal 'sin' (*moral failure; destruction of economic life and social status*), to have developed to insolvency seen as a 'normal' business risk (*economic failure*) (enhancement of a *rescue culture*), including cross-border coordination
  - Majority rule of affected parties (including secured creditors and shareholders)
  - In different classes
  - Restructuring plan including future forecast

- **2. Aim:** from being rather exclusively to protect the creditors' private law interests, to being deployed for *rehabilitation* of the debtor and the continuity of its business (with an increased group of interested stakeholders, including shareholders)
  - Definition of "likelihood of insolvency"

Paradigm shift in Europe: rescue culture (cont'd)

- **3. Goal:** from viewing insolvency as a terminal proceeding for business ending in liquidation, to the recognition of insolvency proceedings as a gateway to potential business rescue ('*instrumentalisation*' of insolvency law)
  - Stay (via court)
  - Division of classes (confirmed by court)

- **4. Procedural:** from a strict formal legal procedural approach to an openness for flexible and pragmatic choices: '*deformalisation*', sometimes '*contractualisation*' of insolvency, including a pushing back the involvement of courts during the full procedure
  - Debtor led: IP ["Restructuring is a daily task of any business's management"]
  - Policy on minimum court intervention (last phase: "homologation")

Queries

- **5. Actors:** changing role of *actors*:
  - (i) from traditional 'IP' to 'turn around' advisors / restructuring experts
  - including 'practitioners in field of restructuring' (pifor). In NL: 'observer'
  - (iii) new dispute mechanisms (e.g. insolvency mediation)
  - (iii) growing emphasis on using tools ('undertaking'; 'protocol') and
  - (iv) desire to enhance integrity/*professionality* of IPs and courts

- **6. Key players:** changing roles of key players
  - Practitioners / Judges / Legislators
  - Scholars
    - Uncertain bounderies "insolvency law" > contract law (multi-party agreement)
    - "Restructuring under the shadow of the law" – "Principles of insolvency law"?

Overall: create awareness among (national) politicians about this paradigm shift

Thank you for your attention!

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