



IBA INSOLVENCY SECTION MID YEAR CONFERENCE

**23 MAY 2023
MADRID, SPAIN**



Panel Bios



Robert van Galen (Netherlands)

Robert is an of counsel at NautaDutilh, after having been partner from 1994 until 2022. His practice focuses on reorganisations and bankruptcy litigation, with an emphasis on cross-border issues. He has been involved in various major insolvency cases in the Netherlands over the past 20 years, such as Barings, Fokker, GTS, KPNQwest, Lehman, Yukos and OSX. Furthermore, he is admitted to the bar of the Dutch Supreme Court and has been involved in a number of cases there.

Functions

- Substitute justice in the Court of Appeal of The Hague
- Member of the experts group advising the European Commission on insolvency legislation
- Representative of the Netherlands in UNCITRAL WG V
- Co-chair of the international committee of the American College of Bankruptcy
- Former president of the European association of insolvency practitioners, INSOL Europe
- Former president of the Dutch association of insolvency lawyers, INSOLAD
- Former president of the Amsterdam lawyers society (Praktizijnsociëteit)



Shirley Cho, Pachulski Stang Ziehl & Jones (U.S.) - Moderator

Ms. Cho has more than twenty five years' experience advising key stakeholders in some of the most complex chapter 11 reorganizations in recent history. She has represented the largest companies in America to restructure billions of dollars of debt, dozens of official committees of unsecured creditors across a variety of industries, purchasers of assets out of bankruptcy, and creditors to successfully pursue significant claims in chapter 11. She has served as an expert on U.S. insolvency law in foreign proceedings and regularly speaks on insolvency topics around the world.

As an independent director of a public company, Ms. Cho has unique insight into the business and practical issues facing companies. An active member of the community, Ms. Cho is affiliated with several nonprofit organizations in leadership roles, was appointed to the Local Rules Advisory Committee for the Central District of California, and has co-chaired several industry conferences. Ms. Cho has been selected for inclusion in Best Lawyers in America every year since 2016, Southern California's "Super Lawyers" every year since 2014, and the Daily Journal's Top 100 Women Lawyers in 2019.

She is resident in our Los Angeles office.



Benn Richards, Michelmores (U.K.)

Benn is a Partner in the Restructuring & Insolvency team in Michelmores LLP's London office, specializing in both contentious and non-contentious insolvency. He is a solicitor-advocate (all higher courts, civil and criminal) in both England & Wales and is admitted to practice as a solicitor-advocate in the Eastern Caribbean Circuit. Benn's work includes acting for insolvency practitioners, creditors, debtors, companies, directors, and other stakeholders.

Benn has a depth of advisory experience and has recently advised on proposed Restructuring Plans under Part 26A of the Companies Act 2006 and advised a large sports travel company on a joint-venture agreement in relation to the Tokyo 2020 Olympic Games. Benn has significant experience in the not-for-profit sector having (among other things) led the insolvency advice on the pre-pack sale of 4Children (August 2016).

Benn has significant experience acting on complex contentious matters, including acting on unlawful tax avoidance schemes, breach of duty claims against directors, cross-border insolvency issues, and acting on complex bankruptcy issues.



Andrea Metz, Barckhaus Rechtsanwälte (Germany)

Andrea Metz is Founding Partner at Barckhaus law firm, a newly founded boutique law firm based in Frankfurt, Germany. She is specialised in Distressed M&A and Restructuring/Insolvency and has more than 20 years of experience in advising national and international clients.

Andrea has been involved in some high profile transactions in the German and European restructuring market, such as the Air Berlin / NIKI transaction in which she advised the bidder International Consolidated Airlines Group (IAG) throughout the complex insolvency process.

Andrea is also coordinator of Barckhaus's French Desk.

After her studies at Johannes Gutenberg university in Mainz, Andrea Metz completed a Master of Laws (LL.M.) degree at the London School of Economics.

Before forming Barckhaus (together with five other partners), she worked as an inhouse legal counsel at entertainment group Stella AG in Hamburg with a focus on Corporate Law/M&A. She then joined Luther law firm where she worked for many years, followed by BUSE law firm.

For the duration of one year, Andrea Metz has also worked at the German Legal Desk of EY / Donahue & Partners in New York.

<https://www.barckhaus.com/metz/>



Adrian Thery Martí, Garrigues (Spain)

Adrian Thery heads the Restructuring & Insolvency Department in Madrid. He advises debtors or their stakeholders on out-of-court restructurings, as well as on in-court restructuring or insolvency proceedings, both domestic or cross-border.

Member of the Group of Experts on restructuring and insolvency law (E03362) established to assist the European Commission (DG Justice) in relation with the preparation of legislative proposals and policy initiatives.

Member of the Council of "INSOL Europe".

Member of the International Insolvency Institute ("IIL").

Conferee of the Conference of European Restructuring and Insolvency Law ("CERIL").

Co-Chair of the Restructuring and Insolvency Wing at the Madrid Bar Association.

Founder and President (2015-2016) of the Spanish Chapter of the Turnaround Management Association ("TMA").

Member of the Editorial Board at the European Insolvency and Restructuring Journal ("EIRJ") and the "Revista General de Insolvencias y Reestructuraciones" ("RGI&R").



| Lightning Round





Spain

Adrian Thery Martí | Garrigues





Spain

- Third party release (TPR) regulation introduced in Spain in September 2022. Unprecedented before.
- No concept of “equitable power” in Spain in favor of courts.
- TPR has an asymmetrical treatment in the three different corporate insolvency scenarios: (i) moratorium, (ii) restructuring plan and (iii) bankruptcy.



Spain: TPR in Moratorium

- Ability for the moratorium petitioner to also stay enforcement against third parties.
- Third party concept: limited to companies within the same group than the petitioner.
- Main requirements: enforcement likely to cause the insolvency of the third party and that of the debtor/petitioner itself.
- Purpose: allow operational subsidiaries to not have to file (and still benefit from the filing), in order to avoid associated stigma.



Spain: TPR in Restructuring Plan

- Ability for the plan proposer to also affect third parties through the content of the plan.
- Third party concept: limited to companies within the same group than the proposer.
- Main requirements: lack of plan extension likely to cause the insolvency of the third party and that of the debtor/petitioner itself.
- Purpose: allow operational subsidiaries to not have to file (and still benefit from the filing), in order to avoid associated stigma.



Spain: TPR in Bankruptcy

- Ability for the debtor to reach settlements with third parties (irrespective of whether within the same corporate group or not).
- Such settlements may actually discharge third parties from all of the liabilities that they would have otherwise had to face.
- Limitations: settlement content restricted to monetary considerations (i.e. no possible settlement, for instance, on directors' disqualification).



Spain: Conclusion

- No case law yet on the new September 2022 TPR regulation in Spain.
- Likely influence of the US, since the new Plan proceedings are essentially inspired in US Chapter 11.



Third Party Liability in the Event of Insolvency:

Applying in Germany

Andrea Metz | Barckhaus Rechtsanwälte





Germany: Framework of Insolvency Plans

§254 II 1 InsO (German Insolvency Code) states as a general rule that the rights of the insolvency creditors against co-debtors and guarantors of the debtor, with the exception of the rights arising from group internal collateral (§ 217 (2)) structured in accordance with section 223a InsO, are not affected by the plan.

217 (2) was introduced only on 1 January 2022 as part of the Restructuring and Insolvency Law Developing Act (SanInsFoG)

Purpose: to avoid follow-up insolvencies of group companies



Germany: Group Internal Third Party Guarantees

Who can be exempted?

- The insolvency plan may also structure the rights of the holders of insolvency claims to which they are entitled from a liability assumed by an affiliated company within the meaning of section 15 of the German Stock Corporation Act (Aktiengesetz) **as guarantor, co-debtor or on the basis of a liability otherwise assumed or to objects of the assets of this company** (group-internal third-party guarantees).

= Group internal third-party guarantees within the meaning of § 217 II InsO

Braun/Braun/Frank InsO § 223a para. 4)



Germany: Release from Third-Party Liabilities

- Who can be exempted?
- The personally liable partners of GbR, OHG, KG, Partnerschaftsgesellschaft, Partnerreederei and EWI are released from the liabilities towards the insolvency creditors
- Joint liability ceases pursuant to § 227 II InsO when the insolvency plan becomes legally effective.



Germany: Compensation for Third Party Liabilities

→ §223a InsO

- If the insolvency plan does not provide otherwise, the right of an insolvency creditor under a group internal third-party guarantee (§ 217 II InsO) shall not be affected by the insolvency plan. If a provision is made, the encroachment shall be adequately compensated.
- §223 (1) sentence 2 and (2) apply accordingly.
- It follows that the rights and claims of an insolvency creditor continue to exist in principle even after the insolvency plan enters into force.
- Problem: no protection from enforcement until insolvency plan enters into effect.



Germany: StaRUG (pre-insolvency restructuring)

- Security interests created by third parties in restructuring claims that are now subject to a restructuring plan remain unaffected pursuant to § 67 (3) sentence 1 of the German Corporate Stabilisation and Restructuring Act (StaRUG).
- This follows from the principle that the restructuring plan only affects those affected by the plan.
- This means that the creditor can continue to fully enforce its rights against third parties.
- In addition to a surety, a guarantee and all real security interests in movables and real estate are also covered.
- In order to be covered, the creditor must have independent access to the security interest and the security must have been provided by a third party.
- The exemption from the restructuring plan only extends to the debtor.



Germany: Group-internal third-party guarantees in the StaRUG

- This type of guarantee represents an exception, i.e. the structuring of **group internal guarantees** is possible according to § 2 para.4 StaRUG.
- Such an exception is necessary due to the “interconnectedness” within the group.
- This is because a creditor could continue to take recourse against the guarantor if intra-group collateral was provided, which would, however, jeopardise the overall group structure.



Netherlands

Robert van Galen | Nautadutilh



Netherlands

- Three relevant types of procedures for companies: bankruptcy (*faillissement*), suspension of payments (*surseance van betaling*) and “Dutch scheme” (*WVROA*)

	Bankruptcy	Suspension of payments	Dutch scheme
Goal	Liquidation of assets and distribution to creditors	Confirmation of a composition/plan	Confirmation of a composition/plan
Threshold	Debtor has ceased to pay debts when they fall due	Debtor foresees inability to continue to pay debts when they fall due	It can be reasonably assumed that debtor will be unable to continue to pay debts when they fall due
Affected	All creditors	Ordinary (unsecured) creditors	Creditors whose rights are affected by the plan
Control	Court appointed trustee	Directors together with court appointed administrator	DIP
Affiliates?	No	No	Yes, if thresholds apply (legal entity must also meet requirements)
Plan?	Yes	Yes	Yes
Guarantor affected by plan?	No	No	No, unless the plan provides otherwise and the guarantor is an affiliate who meets the requirements

Netherlands: claims of the debtor/estate against third parties

- In bankruptcy (liquidation), the bankruptcy trustee has the authority to settle or release claims of the debtor against directors and third parties. Approval from the court (supervisory judge) will be required. In some instances the bankruptcy trustee may have to obtain consent of all the creditors.
- If a creditor's committee exists (which only happens in a very small minority of bankruptcies), then the committee has the right to advise on a proposed settlement or release.
- In suspension of payments proceedings, the debtor can settle with any party but only with consent from the administrator.
- Also, in a Dutch scheme, the default situation is that rights of the debtor against third parties are unaffected, but there is an important exception.

Netherlands: claims of creditors against third parties

- Articles 160 (bankruptcy), 272(6) (suspension of payments proceedings) and 370(2) (scheme) DBA provide that in case a plan/scheme is adopted the rights of the creditors against third parties remain unaffected.
- However with some regularity we encounter plans in bankruptcy or suspension of payments which do contain such releases. So far such provisions have not been challenged in confirmation proceedings.
- In scheme proceedings the Bankruptcy Act provides for an exception allowing release of creditors' claims against affiliated parties in some instances.

Netherlands: (pre-)insolvent group companies

- The co-debtor must be a group company.
- The court would have jurisdiction with respect to the co-debtor if it would start scheme proceedings itself.
- The obligations concerned are obligations for which the main debtor is liable as well or they are obligations which serve to discharge of the main debtor.
- The co-debtor must foresee that it will be unable to continue paying its debts in the future in the absence of the release.
- As an interim measure the court may also grant a stay of enforcement measures against the co-debtor.



United Kingdom

Benn Richards | Michelmores





UK: Position Under UK Law

- Third party releases are permissible under UK law
- Not a direct statutory right but a discretion of the courts to be applied in certain circumstances
- UK courts tend to adopt a fairly flexible and commercially driven approach
- Can be considered that UK is pro-release



UK: Limited in Scope?

- Significant amount of law on third party releases – landlords and guarantors
- Controversial and often held insolvency process is unfair (in the context of CVAs and administrations where company seeking to avoid obligations)
- Third party releases therefore (presently) limited to Schemes of Arrangement
- Restructuring plans?



UK: What is a Scheme of Arrangement?

- A restructuring process under part 26, Companies Act 2006
- Not an insolvency process but a restructuring arrangement
- Compromise or arrangement between a company and its creditors, or any class of them, or between a company and its members
- Entry: hearings at court and meetings of stakeholders, voting thresholds



UK: When and How Used?

- Used when solvent but also when insolvent (Scottish Lion)
- As a contract – flexible – can achieve a number of things:
 - Modify maturity dates on loans/bonds
 - Reduce creditors' claims



UK: Give and Take

- Key ingredient – give and take
 - If a stakeholder gives up a right, must be a quid pro quo
 - No benefit for giving up right – may not work (NFU Development Trust Ltd)
 - Compared to Uniq PLC – compromise in equity stake reduced to 92% to make restructuring work



UK: Third Party Releases

- Part of give and take – best outcome
- Will not allow a third party to take steps to compromise the success of the scheme – court will only sanction if commercially sound
- T & N Ltd (No 3) [2006] EWHC 1447 (Ch)
 - Confirmation extends to third parties
 - Claims against company for personal injury (asbestos)
 - Agreed claimants would not claim against the company as £36m insurance fund
 - Objection – between claimants and insurance
 - Court held term "arrangement" is broad – tripartite deals in



UK

- Lehman Brothers (Europe) – logical to extend jurisdiction to schemes where third-party rights are varied
- Claims can be in contract or tortious, secured or unsecured
- Third party right closely connected to rights of primary debtor (T&N is on the edge of the scope)
- Must be necessary to the success of the arrangement



UK: Examples

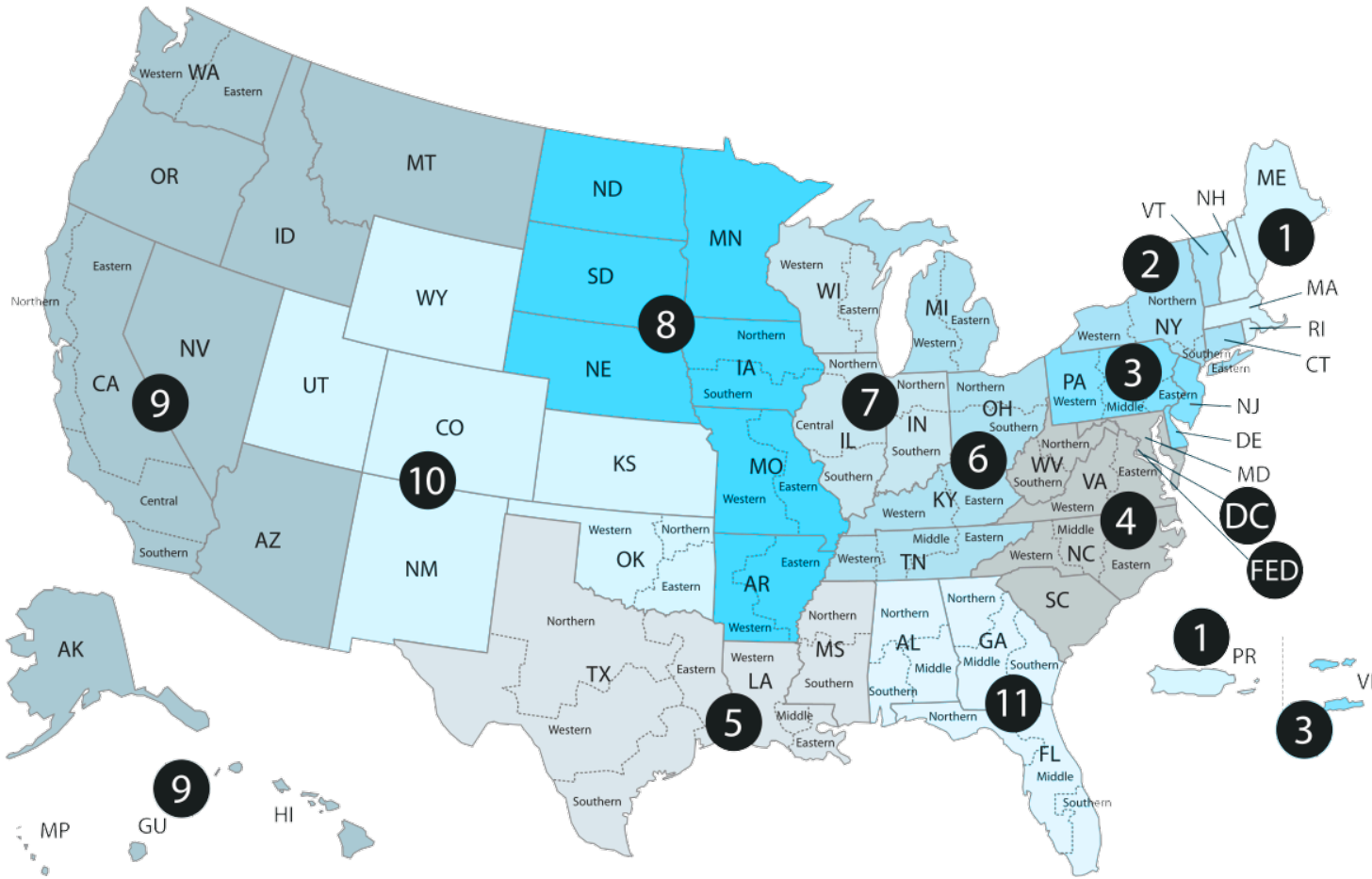
- Discharge of obligations under loans for monies and release of guarantor who have security (Far East Capital)
- Third party release to give legal and commercial effect to arrangement (Van Gansewinkel)
- Release to a third-party group member under a guarantee, in exchange for the third-party releasing other group members from claims (La Seda De Barcelona)
- Noble Group Limited:
 - complex group restructuring. Creditors' claims written off but they got debt instruments in a new entity
 - Scheme also release management from claims (as well as senior creditors and a long cast, agents, employees, officers for the implementation etc)
 - Court accepted – on the edge



United States

Shirley Cho | Pachulski Stang Ziehl & Jones







US: Circuit Count on Third Party Releases

→ *Extreme* Circuit Split in the U.S.

→ Resolution Needed by the U.S. Supreme Court or by Congress TBD

Circuit	3 rd Party Release?	Authority
1 st	TBD	In re Chicago Investments, 470 B.R. 32 (Bankr. D. Mass. 2012)
2 (NY)	Yes	In re Metromedia Fiber Network, 416 F.3d 136, 143 (2d Cir. 2005)
3 rd (Del.)	Yes	In re Millennium Lab Holdings II, 945 F.3d 126 (3d Cir. 2019)
4 th	Yes	National Heritage Foundation v. Highbourne Foundation, 760F.3d 344, 347 (4th Cir. 2014)
5 th (TX)	No	In re Pacific Lumber Co., 584 F.3d 229 (5 th Cir. 2009)
6 th	Yes	In re Dow Corning, 280 F.3d 648, 658 (6th Cir. 2002)
7 th	Yes	In re Ingersoll, 562 F.3d 856, 864-65 (7 th Cir. 2009)
8 th	TBD	In re U.S. Fidelis, 481 B.R. 503 (Bankr. E.D. Mo. 2012)
9 th	No	In re Lowenschuss, 67 F.3 rd 1394 (9 th Cir. 1995)
10 th	No	In re Western Real Estate Fund, 922 F.2d 592 (10 th Cir. 1990)
11 th	Yes	In re Seaside Engineering & Surveying, 780 F.3d 1070, 1078 (11 th Cir. 2015)





US: 5th, 9th, and 10th Circuits

- No third-party releases allowed.
- 11 U.S.C. § 524(e) states that the discharge of a debtor does not affect the liability of any other entity.



US: 1st, 3rd, and 8th Circuits

- The 3rd Circuit permits releases in limited circumstances based on their broad equitable powers under §105(a).
- 1st and 8th Circuits have not yet ruled, but the lower courts generally follow the 3rd Circuit's approach.
- *In re Master Mortg. Inv. Fund*, 168 B.R. 930 (Bankr. W.D. Mo. 1994):
 1. an identity of interests between the debtor and third party;
 2. the third party has provided a **substantial contribution of assets** to the debtor's reorganization;
 3. whether the release is essential to the reorganization;
 4. whether a substantial **majority** of affected creditors **consent** to the release; and
 5. whether the plan provides for payment of substantially all claims affected by the release.



US: Remaining Circuits

- **4th, 6th & 11th Circuits:** Yes, but limited circumstances and must prove the 5 “*Master Mortgage*” Factors plus:
 6. whether the plan provides an opportunity for those claimants who choose not to settle to recover in full; and
 7. whether a court made a record of specific factual findings that support its conclusions.
- **2nd* & 7th Circuits:** “when truly unusual circumstances exist” and “necessary” to accomplish the plan's purposes substantial financial contribution that makes the plan possible

* Note Purdue appeal pending





US: Purdue Pharma Case Snapshot

- Thousands of lawsuits filed against Purdue Pharma relating to overdose epidemic caused by opioid painkiller OxyContin that Purdue manufactures.
- September 11, 2019 Purdue filed chapter 11 in the White Plains division of the Southern District of New York.
- In exchange for \$4.5 billion of funding from the Purdue Pharma owners – Sackler family and several state attorney generals, the parties agreed to a pre arranged plan of reorganization under which the Sackler families would be granted releases.
- The District Court overturned the confirmed plan. Bankruptcy Court does not have authority under the Bankruptcy Code to grant third party releases held by creditors against non debtors who did not agree to those releases (i.e., non consensual releases).
 - Judge found that while there are specific provisions authorizing such releases for asbestos cases in section 524(g) and (h), those only apply in asbestos cases.
- Now on appeal to the 2nd Circuit.





US: Ascena Case Snapshot

- Retailer of women’s clothing – several brands: Ann Taylor, Loft, Justice, Catherine’s; Mega case filed in E.D. of Virginia; over \$1.8 billion of funded debt; 2,800 retail locations
- Consensual plan of liquidation negotiated with Committee
- Appeal by shareholders who objected to non-consensual third party releases
 - Plan ballot provided that creditors could check the box and “opt out” of providing releases
- District Court vacated the confirmed plan and struck the releases:
 - Section 524(e) only provides a release of debtors, not non debtors
 - The Bankruptcy Court has no constitutional authority to permit third party releases
 - “Opt Out” box on ballot does not equate to consent; must be an affirmative “opt in”
 - Equitable mootness did not apply even though the case had been post confirmation for more than a year after the effective date of the Plan and hundreds of millions of dollars had been disbursed through the confirmed plan. U.S. Trustee did not obtain a stay pending appeal.
 - No appeal taken; District Court opinion is the **final opinion**; plan was reformed to remove releases.



US: Mallinckrodt PLC

- Large, mega opioid pharma manufacturer filed in Delaware to avoid liability on 3,000 lawsuits.
- February 3, 2022 confirmation opinion issued reaffirming viability of third-party releases in the Third Circuit after the U.S. Trustee attempted to defeat the releases in Mallinckrodt's plan by citing the Southern District of New York's recent [Purdue](#) decision.
- Judge Dorsey acknowledges that the *Purdue* court and the Eastern District of Virginia in [Ascena](#) came to contrary conclusions, but he emphasizes:

“I am applying the law of the Third Circuit which has recognized that bankruptcy courts do have statutory and constitutional authority to approve a plan of reorganization that contains non-consensual third-party releases, albeit, only in extraordinary cases.”



General Questions

UNITED STATES	UNITED KINGDOM	NETHERLANDS	GERMANY	SPAIN
				

| Conclusion

Thank you!

