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Rescue of Business in Insolvency Law

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Acuria-project

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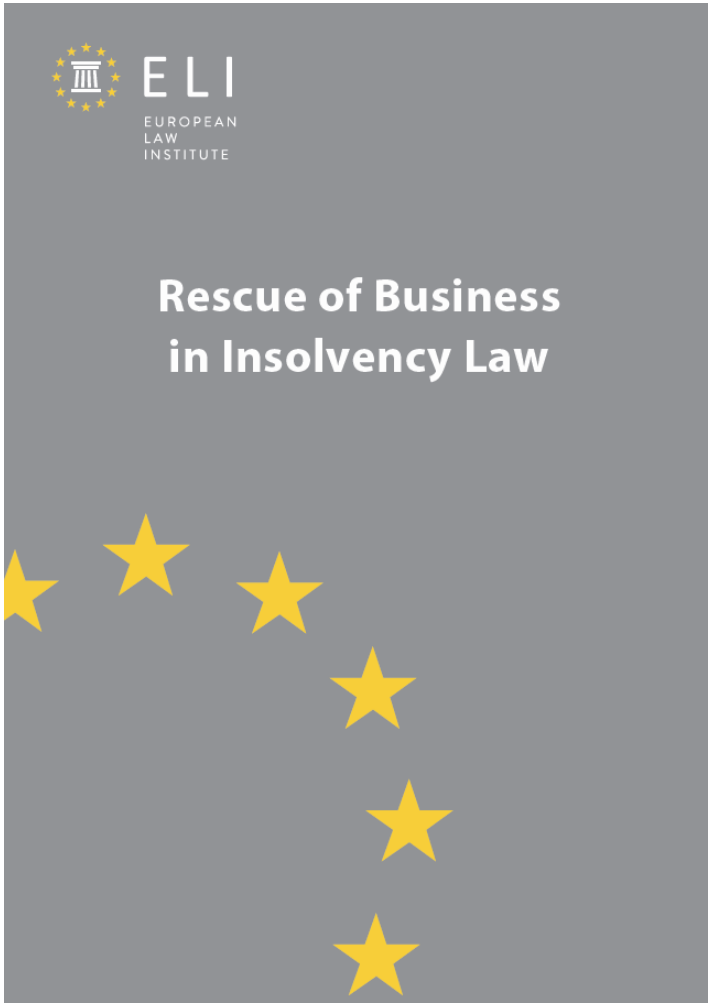
ELI Project

Business Rescue in Insolvency Law

- Q1/2014 – Q3/2017

- Aim: to design a set of norms and requirements that will enable the further development of coherent and functional rules for business rescue in the EU



Introduction

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Project 2013-2017

- http://www.bobwessels.nl/blog/2017-08-doc6-presenting-business-rescue-report-in-vienna/
- https://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVENCY.pdf
- https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3032309
- Oxford University Press (forthcoming)

Paradigm shift in European national insolvency laws

In short: aim of insolvency legislation/regulation has shifted:

- 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 (involving an increased group of interested stakeholders),

- 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),

Paradigm shift in European national insolvency laws (Cont'd)

- from insolvency being seen as a personal 'sin' (morale failure), to have developed to insolvency seen as a business risk (economic failure) (enhancement of a *rescue culture*),
- from a formal legal procedural approach to an openness for flexible and pragmatic choices: '*deformalisation*', sometimes '*contractualisation*' of insolvency, including a pushing back of the role of courts,
- changing role of *actors*: involvement of courts, insolvency mediation, growing emphasis on integrity/*professionality* of IPs and courts.

All leading to the development of a distinct body of business rescue and insolvency law

Role of the Courts – has changed/will change

- **From supervising a liquidation process …**
  - Appointing and supervising the insolvency practitioner (IP)
  - Deciding on objections of parties
  - Organised rather similar to enforcement law procedures
  - Central role for judge in the process

- **… to supervising the rescue of a running business**
  - Often less involved in appointing the IP
  - Deciding on objections of parties now includes assessment of business models and financial structures → also in liquidations ('pre-packs')
  - Similarity to company law procedures
  - Different stages require direct involvement of judges

Role of the Courts (cont'd) (Our recommendations 1.03-1.06)

- **Integrity**
  - Courts handle big restructuring and insolvency cases
  - Independence, and stakeholders trust in the independence, of judges is essential

- **Qualification**

  A court / a judge has to fulfil a set of five criteria:

  1. a general understanding of business management (so as not to assume managerial tasks),
  2. understanding what it needs to effectively enforce the rights of both secured and unsecured creditors outside of insolvency proceedings,
  3. preferably, be a specialists in commercial matters,
  4. be impartial and independent, and,
  5. were practical, have specialized insolvency expertise.

Role of the Courts (final)
Our recommendations 1.03-1.06

- **Specialisation**
  - Specialised courts or chambers should handle restructuring and insolvency cases
  - Further specialised subsection for hearing rescue and cross-border-cases

  Prof. Reinout Vriesendorp:

https://leidenlawblog.nl/articles/wanted-judges-with-experience-in-international-commercial-insolvency-practice!

- **Training**
  - Qualified judges must continue learning (new laws, new business practices etc.)
  - Member States must allow and finance education

- **Mandatory minimum terms for judges on the bench**
  - Careful with rotation of judge

Actors in restructuring and insolvency proceedings

Actors in restructuring or insolvency proceedings

- *court*
- *mediator*
- supervisor
- *independent intermediary*
- expert

- *insolvency practitioner*
- debtor in possession
- turnaround manager
- corporate restructuring officer (CRO)

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Need for solid insolvency systems

In each individual case the organisational structure should be assured, meaning

'… a country's insolvency governance system in an individual case (the allocation of functions between courts and liquidators, including the legal and operational relationships between them, based on law and additional regulations) as well as a country's institutional system, merely related to the requirements to fulfil these actors' functions, including professional and ethical rules that apply to them.'

(2012 Report 'Harmonisation of Insolvency Law in EU' by Fletcher/Wessels)

Courts: The way ahead?

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Thoughts

1. greater efforts in training of national and other EU judges
2. develop Professional Insolvency Standard by the judges themselves (NL example)
3. give a pre-vision on an uncertain matter (London Financial List)
4. introduce court specialization (*Loi Macron*, France)
5. a system of challenge based on the argument that the judge is not (sufficiently) competent to act in a certain case?
6. outsourcing to mediator / supervisor?
7. create specific courts (e.g. between neighbouring countries)??


MEDIATION

Recommendation of March 2014 on a new approach to business failure and insolvency/recital:

‘(17) To promote efficiency and reduce delays and costs, national preventive restructuring frameworks should include flexible procedures limiting court formalities to where they are necessary and proportionate in order to safeguard the interests of creditors and other interested parties likely to be affected. For example, to avoid unnecessary costs and reflect the early nature of the procedure, debtors should in principle be left in control of their assets and the appointment of a *mediator* or a *supervisor* should not be compulsory, but made on a case-by-case basis’

NORDIC-BALTIC Recommendations 2017

'Appointment of a mediator or a supervisor'

'8. Debtors should be able to enter a process for restructuring their business without the need to formally open court proceedings

9. The appointment of a mediator or a supervisor by the court should not be compulsory, but rather be made on a case by case basis where it considers such appointment necessary:

- '… (a) in the case of a mediator, in order to assist the debtor and creditors in the successful running of negotiations on a restructuring plan;

- '… (b) in the case of a supervisor, in order to oversee the activity of the debtor and creditors and take the necessary measures to safeguard the legitimate interests of one or more creditors or another interested party.'

Insolvency Mediation - Status

- 2008 Mediation Directive (cross-border mediation in civil and commercial matters)

- Support for 'insolvency mediation' in **World Bank** Principles for Effective Insolvency and Creditor Rights Systems, Principle B4 ('Informal Workout Procedures') and **UNCITRAL** Practice Guide

- 2014: Esplugues study 'mixed feelings' re implementation

- In 2015 (USA for complex multi-party restructurings)

- '… the use of mediation to reach consensual plans of reorganisation, while not standard protocol in cases, has become common and is no longer controversial' (Esher), who submits that in the EU mediation in insolvency '… may be problematic without some form of court or regularly compulsion'

- Mediation in EU: BE, ES, FR, EL (Greece), Portugal (?) (encouraged NL, UK)

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The way ahead?

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Independent intermediary

‘17.1. Courts should consider the appointment of one or more independent intermediaries within the meaning of Principle 17.2, to ensure that an international insolvency case proceeds in accordance with these EU JudgeCo Principles. The court should give due regard to the views of the insolvency practitioners in the pending insolvency cases before appointing an intermediary. The role of the intermediary may be set out in a protocol or an order of the court.

17.2. An intermediary:

(i) Should have the appropriate skills, qualifications, experience and professional knowledge, and should be fit and proper to act in an international insolvency proceeding;

(ii) Should be able to perform his or her duties in an impartial manner, without any actual or apparent conflict of interest;

(iii) Should be accountable to the court which appoints him or her;

(iv) Should be compensated from the estate of the insolvency case in which the court has jurisdiction.’

Art. 42(1) EIR 2015

Thank you for your attention!

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