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CMS Guide on Restructuring Possibilities in Europe

April 2014

Content

Introduction

We are delighted to present this CMS report which provides an overview of the various restructuring possibilities throughout Europe.

During the CMS Restructuring & Insolvency Associates Training which took place in Cologne in April 2013, the different restructuring options in multiple jurisdictions were discussed. The outcome of the training and the differences between the jurisdictions were remarkable enough to justify the publishing of a report on this topic.

While the European Commission strives for unity of laws within the European Union, it is clear that there are (and will most probably remain) numerous differences between in-court and out-of-court possibilities for restructuring. While these differences may create confusion and uncertainty, they can also create new possibilities. In the brochure that was drawn up after last year's associates training; the 'CMS Guide to finding COMI', "forum shopping" was given consideration. This is relevant in this respect as well. Under certain circumstances it is possible to choose the national insolvency law that will apply.

This report focuses both on the 'insolvency proceedings' as mentioned in the EC Insolvency Regulation[1] (EIR) and on restructuring options that do not have a legal basis. We are proud to give you an overview on this matter in 19 jurisdictions!

If you have any questions regarding the issues contained in this report, please contact us. A contact list is included at the end of this report.

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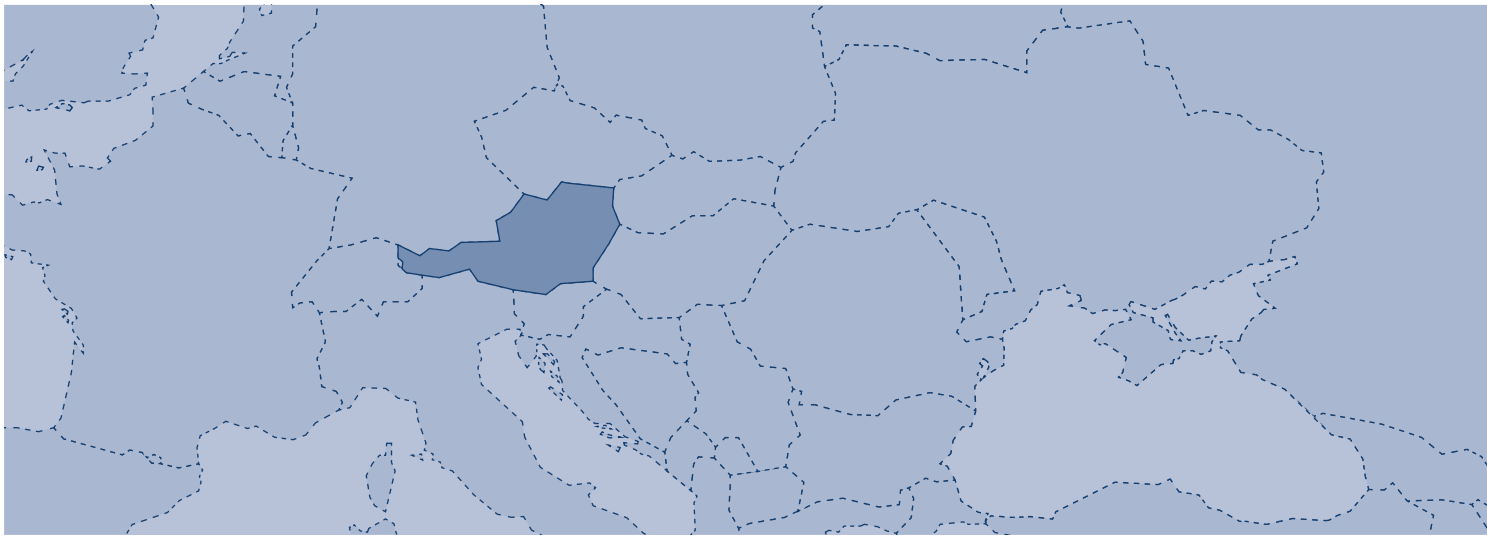
[1] Council Regulation (EC) No. 1346/2000 on insolvency proceedings.



Austria

Introduction

Austria's insolvency law was fundamentally amended in 2010 by the Austrian Insolvency Amendment Act (in German: *Insolvenzrechtsänderungsgesetz – IRÄG*). Prior to the amendment, two insolvency procedures were regulated under Austrian law, namely the bankruptcy procedure (in German: *Konkursverfahren*) and the settlement procedure (in German: *Ausgleichsverfahren*). Both procedures were regulated in separate legal codes.[2] The 2010 amendment unified these separate codes into one code, the Austrian Insolvency Code (in German: *Insolvenzordnung – IO*).[3]

Therefore, one unified insolvency procedure (in German: *Insolvenzverfahren*) is contemplated and regulated by the Austrian Insolvency Code. After filing for insolvency, however, the procedure may be continued either as a bankruptcy procedure or a restructuring procedure (in German: *Sanierungsverfahren*). Whereas the result of a bankruptcy procedure is the sale of the company's assets and the liquidation of the company, the restructuring procedure aims to ensure the company's continuance. Austrian lawmakers introduced the business reorganisation procedure (in German: *Reorganisationsverfahren*) in 1997. The procedure is aimed to give companies the possibility to undergo a reorganisation procedure before they meet the insolvency prerequisites. However, in practice the reorganisation procedure plays a minor role.

Winding-up proceedings

1. Bankruptcy procedure

Condition for opening

The opening of a bankruptcy procedure requires an application by an authorised person, (e.g., the managing director of a limited liability company or a creditor of the debtor). Such application must be filed with the competent court and is appropriate if: (i) the debtor is unable to pay its debts when due (in German: *Zahlungsunfähigkeit*); or alternatively (ii) the debtor's debts exceed its assets (in German: *Überschuldung*) and the business forecast is negative (negative *Fortbestehensprognose*). The latter insolvency fact (debtor's debts exceeding its assets) applies only to legal entities, estates, and limited partnerships. Additionally, the debtor applying for a bankruptcy procedure must have sufficient financial means (in German: *kostendeckendes Vermögen*) to cover the expenditures of the insolvency procedure. As of today, EUR 4,000 is being considered sufficient to cover such expenditures. If the prerequisites for opening the bankruptcy procedure are fulfilled, the court will announce the opening publicly and appoint a liquidator (in German: *Masseverwalter*).

Restructuring methods

Creditors' claims are satisfied from the proceeds of the sale of the debtor's insolvency estate (in German:

Insolvenzmasse). The sale of the insolvency estate may be undertaken by an out-of-court sale (in German: *außergerichtliche Veräußerung*) or as a court-supported sale (in German: *kridamäßige Versteigerung*). As the out-of-court sale is generally more promising, such method is preferred in most cases. If the debtor is a legal entity, the distribution of the proceeds to the creditors leads generally to the liquidation of the debtor. However, in the course of the bankruptcy procedure, the debtor may apply for a restructuring plan (in German: *Sanierungsplan*). If such restructuring plan is accepted by the creditors' assembly (in German: *Gläubigerversammlung*), the sale of the debtor's assets may be forestalled and the debtor may continue its operations.

Success rate
The success rate of a certain creditor of having its claims against the debtor settled in the course of an insolvency proceeding depends mostly on the status of such creditor. In a bankruptcy procedure, secured creditors may separate their claims from the outstanding creditors (in German: *Aus- und Absonderungsrecht*). Typically, such creditors: (i) still own the assets which are in the possession of the debtor at the time the bankruptcy procedure is opened; or (ii) have their claims against the debtor secured by, e.g., a pledge. These secured creditors may claim their assets from the debtor or may claim the sale of the pledge. Claims of the outstanding creditors may be satisfied from the proceeds of the insolvency estate. In most cases, the proceeds are not sufficient in order to cover the claims of all creditors. In such case, the proceeds are divided among the creditors according to the creditor's rank. In 2011, the average quota of a creditor amounted to approximately 17%.

Pros and cons
Pros: The bankruptcy procedure is rather fast and may be completed within approximately six months. Further, it gives the insolvency administrator the possibility to continue its business as the liquidation is a last-resort solution. Also, the creditors have the potential to influence the procedure as the creditor assembly decides whether the debtor, in case of a legal entity, shall be liquidated or continued.

Cons: If the creditor is not secured, the possibility of being satisfied from the insolvency estate is rather small as the average quota amounts to approximately 17%. Further the success of the procedure depends mostly on the liquidator, which is appointed in most cases by the court and is responsible for the execution of the procedure. Hence, the debtor itself has almost no influence on the procedure.

Other proceedings

1. Restructuring procedure

Conditions for opening
A prerequisite for opening a restructuring procedure is to file a restructuring plan (in German: *Sanierungsplan*) with the competent court. In case such restructuring plan is accepted by the creditors' assembly by simple majority, the debtor may continue its business. If the creditors' assembly does not accept the restructuring plan, the restructuring procedure continues as a bankruptcy procedure.

Restructuring methods
The restructuring plan prescribes the conditions for debtor's restructuring. The minimum quota is 20%. Such amount must be distributed to the creditors within two years from the date of the acceptance of the restructuring plan. The restructuring plan must set out a schedule for repayment (e.g., equal monthly instalments). By accepting the restructuring plan, the creditors waive their claims against the debtor in excess of the minimum quota of 20%. In the event the debtor fails to comply with the restructuring plan, the total value of the creditors' claims prior to the restructuring plan is renewed.

Success rate
Since the amendment of Austria's insolvency law in 2010, the number of restructuring procedures constantly increased. In 2011, every fifth insolvency procedure was executed as a restructuring procedure. However, since such procedure is relatively new, it will take some time in order to better assess the success rate thereof.

Pros and cons
Pros: The significant advantage of the restructuring procedure for the creditors is the higher minimum quota of 20% as compared to the average quota of 17% for bankruptcy proceedings. Additionally, the debtor may continue its business under the condition of compliance with the restructuring plan. In case the restructuring plan sets forth a minimum quota of 30% and if the debtor provides the court with further reassuring information, such as a detailed inventory, reorganisation measures, finance plan, among other things, the debtor may even stay in control over the business operations and therefore, is not fully depended on the liquidator.[4] In such scenario, the liquidator only supervises the procedure instead of executing it.

Cons: The restructuring period of two years may not be extended. This has negative consequences on debtors who manage to recover their business in the course of the restructuring procedure. Before the amendment in 2010, creditors could have demanded a higher quota in such case but also could have granted to the debtor additional time in order to finalize the reconstruction. After the amendment, such extension is not possible any more. Hence, the creditors may demand a higher quota but cannot grant to the debtor additional time for finalization of the restructuring.

2. Debt regulation procedure

The debt regulation procedure (in German: *Schuldenregulierungsverfahren*) regulates the insolvency of physical persons and sole proprietors. It is more accessible to debtors than bankruptcy or restructuring procedures because the prerequisite of showing sufficient financial means for such proceedings does not have to be fulfilled under certain circumstances. The relief of debt occurs mainly in two ways, namely through (i) the repayment schedule (in German: *Zahlungsplan*) and (ii) the levy procedure (in German: *Abschöpfungsverfahren*).

The repayment schedule is a simplified version of the restructuring procedure. The main differences between the repayment schedule and a restructuring plan are that the repayment schedule does not require a minimum quota and that the repayment term may amount up to seven years. In case the creditors agree on the repayment schedule, the court determines for the debtor a reasonable term to comply with the repayment schedule and to repay the debts. If the debtor fails to comply with the repayment schedule, such schedule will become null and void and the debtor will lose all benefits connected with such repayment schedule.

The levy procedure constitutes the last resort in order to relieve the debtor of its debts. The application for such procedure shall be granted by the court only if the repayment schedule is rejected. After initiation of the procedure, the court appoints an escrow agent (in German: *Treuhänder*) who is responsible for the execution of the procedure and distribution of the assets to the creditors. In the course of the procedure the debtor shall comply with numerous obligations such as obtaining appropriate employment, treating every creditor equally, and omitting new debts, among other things. The court ends the procedure if: (i) three years from the day of the initiation have passed and the creditors have received at least 50% of their claims; or (ii) the term of the procedure (maximum seven years) has elapsed and the creditors have received at least 10% of their claims. The court then announces that the debtor is released from all claims not satisfied in the course of the levy procedure.

3. Business reorganisation procedure

The business reorganisation procedure shall give an enterprise in distress the possibility to prematurely prevent insolvency. The prerequisite for such business reorganisation procedure is a certain need for reorganisation (in German: *Reorganisationsbedarf*). Such need for a reorganization procedure is assumed, inter alia, in case the annual financial statements show an equity ratio of 8% and a debt-settlement period (in German: *fiktive Schuldentilgungsdauer*) of at least 15 years. If the enterprise applies for such reorganisation procedure, the court appoints an auditor who prepares a report analysing whether a reorganisation procedure would effectively prevent the enterprise from insolvency. The Austrian Code on Reorganisation Procedures[5] grants certain incentives to enterprises who apply for such procedure. One such incentive, among others, is the exemption of certain measures (e.g., taking up of reorganisation loans and shareholder loans) from the challenge of the creditors. On the other hand, if the enterprise omits such procedure, the respective law proscribes negative consequences, such as the liability of the management of a corporation which did not apply for such procedure. For instance, if the corporation becomes insolvent within two years, the management shall become liable for the debts of the corporation up to an amount of EUR 100,000, unless the management can prove that the insolvency would have occurred regardless of a reorganisation procedure.

In practice, the reorganisation procedure has a minor importance as companies fear the negative publicity which may derive from such procedure and the consequences connected therewith.

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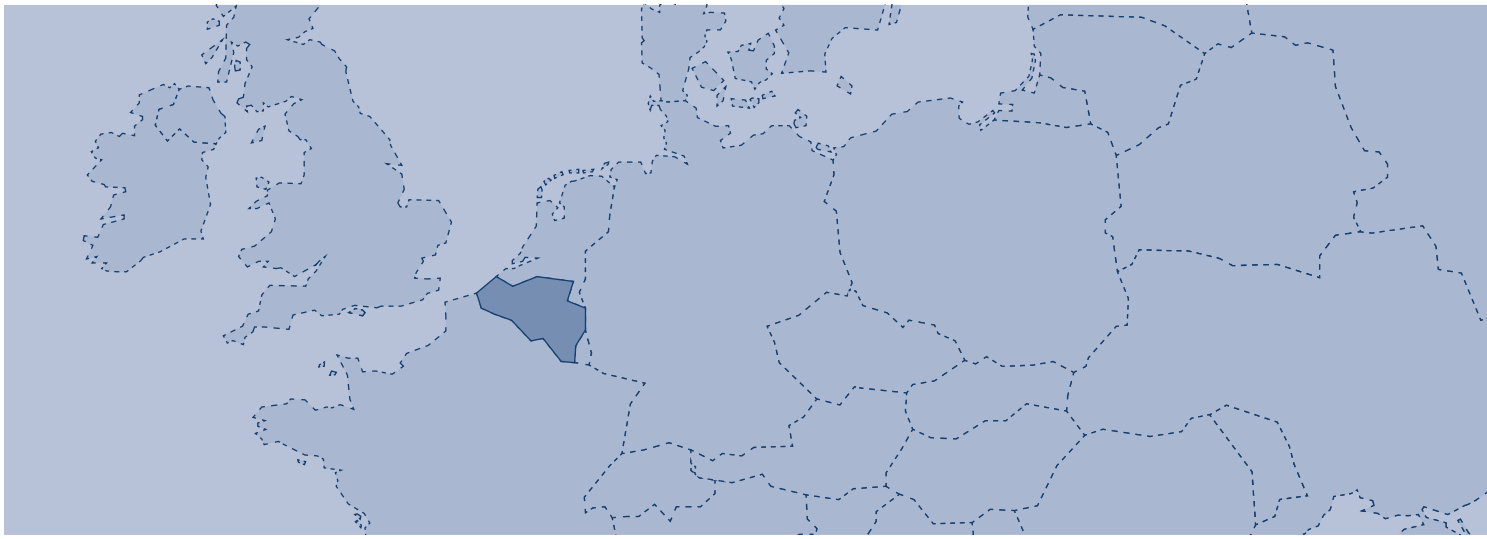
[2] Austrian Bankruptcy Act and Austrian Settlement Act (in German: *Konkursordnung – KO and Ausgleichsordnung – AO*).

[3] Bundesgesetz über das Insolvenzverfahren (Insolvenzordnung – IO) BGBl. I Nr. 29/2010.

[4] Restructuring procedure with self administration (in German: *Sanierungsverfahren mit Eigenverwaltung des Schuldners*).

[5] Unternehmensreorganisationsgesetz – URG, BGBl. I Nr. 114/1997.



Belgium

Winding-up proceedings (as referred to in Annex B to the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceeding (the "Regulation")

1. Bankruptcy

Bankruptcy proceedings are primarily used to liquidate companies who suffer severe financial difficulties in order to fulfil the outstanding claims of its creditors.

Conditions for opening
Bankruptcy can be filed on a voluntary basis by the company or by forced request of its creditors, the public prosecutor, the interim-administrator of the company, or the liquidator of a territorial insolvency proceeding.

In order to open the bankruptcy proceedings, the court shall have to verify that the company is in a situation of a persistent cease of payments and that its creditworthiness is undermined.

Restructuring methods
The court appoints a bankruptcy trustee in order to liquidate the assets of the company and, if possible, to distribute the revenues to the creditors of the company. The liquidated assets will be divided between the creditors giving priority to creditors with privileged claims. If all creditors have been paid, any remaining assets will be divided between the shareholders of the company and the company will cease to exist.

Pros and cons
Pros: There are few costs involved with a bankruptcy proceedings and the simplicity of the procedure results in legal certainty for the creditors of the company.

Cons: Bankruptcy raises a bad image with the public, which can be problematic if the company is part of a group. In addition, there is a potential director's liability for faults that have directly contributed to the bankruptcy.

2. Voluntary liquidation

The shareholders of a company can decide to liquidate the company and to divide the realized assets between the shareholders. Unlike a bankruptcy procedure, the company is not necessarily in financial difficulties.

Conditions for opening
The draft terms of dissolution must be prepared by the governing body of the company. A recent (i.e., not older than three months) statement of assets and liabilities must be annexed to this report.

By notary deed, the general assembly of shareholders can, with the backing of 75% of its shareholders, representing at least 50% of the share capital, dissolve the company. In principle, the general assembly of shareholders can appoint the liquidator. However, the liquidator will only enter into function after confirmation by the court that the liquidator meets the criteria of righteousness. After the company has been dissolved, the company will continue to exist for the purpose of its liquidation.

Restructuring methods
A voluntary liquidation allows the shareholders to liquidate the company in order to divide the remaining assets between the shareholders.

After the fulfilment of the liquidation duties and at least one month before the final general meeting of

shareholders, the liquidator must issue and communicate a report on the accounts of the liquidation, the use of the funds and assets, and the results of the liquidation, with all justifying documents. In this report the liquidator will also propose the method for distribution of the liquidation bonus (if any) to the shareholders.

Finally, an extraordinary general meeting shall be organized in order to decide on the closing of the liquidation. The company will subsequently cease to exist.

Success rate
Given the fact that the procedure is initiated by the company itself, the procedure has a high success rate when there is a general consensus between the shareholders. However, if the assets are not sufficient to cover the claims and the procedure is initiated in order to avoid a bankruptcy, the success rate will be dependent on the cooperation of the creditors of the company.

Pros and cons
Pros: Closing a company by way of voluntary liquidation has a better image than a bankruptcy. The procedure allows certain freedoms, as it is the company itself who initiates the procedure and who can choose the liquidator. Dissolution and liquidation of the company is also possible in one deed if certain conditions are met (no debts present, no liquidator appointed, and unanimous approval by shareholders), thus simplifying and accelerating the procedure.

Cons: The obligation to appoint a liquidator and the requirement to hold the general assembly of shareholders to decide on the dissolution of the company in the presence of a notary, results in extra costs. The procedure is also difficult to organize if the company's assets are not sufficient to cover its claims, as at least a majority of creditors will have to agree with the voluntary dissolution. Therefore, the opening of a bankruptcy proceeding is still possible if the conditions for this proceeding are met.

3. Judicial liquidation

Contrary to the voluntary liquidation, the initiative to proceed with a judicial liquidation of the company comes from a third party, not the company itself.

Conditions for opening
Any third party can ask the court to pronounce the liquidation of the company when the net assets of a company have fallen below a certain amount (61.500 EUR in a NV, 6.200 EUR in a BBO) or when the company has not made a deposit in its annual accounts for the previous three consecutive years.

Restructuring methods
The primary aim of a judicial liquidation is a forced liquidation in order to realize assets for its creditors or to dissolve inactive companies. Contrary to a voluntary liquidation, the liquidation will be realized by court judgment after which the company will cease to exist.

Success rate
In principle, the court must pronounce the liquidation of the company when the legal conditions are met. However, if the company manages to raise its net assets above the legal threshold before the court pronounces the liquidation or if the annual accounts are deposited during the procedure, the judicial procedure is without subject. Therefore, the judicial liquidation is not often pronounced.

Pros and cons
Pros: The risk of a forced judicial liquidation gives a legal incentive to companies to ensure that their annual accounts are timely deposited and that their net assets do not fall below the legal threshold. It also grants an effective measure by which creditors can intervene when its debtors are rapidly accumulating debts.

Cons: The proceeding can also lead to abuses in cases where the proceeding is initiated for the sole purpose of dissolving a rival company.

4. Judicial reorganization by transfer under judicial supervision

Proceedings of judicial reorganization by transfer under judicial supervision allow an alternative to bankruptcy proceedings for companies in financial difficulties by organizing a partial or full transfer of its activities.

Conditions for opening
When initiated by the company itself, the company will not have to comply with specific conditions. The proceeding is often initiated as result of a failed procedure of judicial reorganization by collective agreement and in order to avoid the opening of a bankruptcy proceeding.

The procedure can also by initiated by forced request of a creditor, the public prosecutor, or any third party that can prove an interest as long as the conditions for the opening of a bankruptcy proceeding are met or in the event of a failed procedure of judicial reorganization by collective agreement. The creditor will have to demonstrate that they have a claim that cannot be seriously contested and a valid interest to request the opening of the procedure. A third party will have to demonstrate that it has an interest to acquire (a part of) the company.

Restructuring methods
The court grants a suspension period to the company for payment of its debts and appoints a judicial representative in order to organize the partial or full transfer of the activities of the company to a third company. When the judicial representative is of opinion that all transferable activities of the company have been transferred, they can request the court to close the procedure of judicial reorganization. The court can subsequently convene the general assembly of shareholders in order to vote on the dissolution of the company. However, the general assembly is not obliged to dissolve the company and can still decide to file for bankruptcy.

Success rate
Statistics show that nearly 50% of all proceedings of judicial reorganization by collective agreement are successfully resolved.

Pros and cons
Pros: In principle, a judicial reorganization has a better image than a bankruptcy procedure. It is also an efficient way to save part of a business or to acquire a business for a reasonable price.

Cons: As each third party with a valid interest can initiate the procedure, the risk exists that the business will be sold to a competitor or that the procedure can be initiated for the sole purpose of eliminating a rival company.

Insolvency proceedings (as referred to in Annex A to the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceeding (the "Regulation")

1. Bankruptcy

See above.

2. Judicial reorganization by collective agreement

The judicial reorganization by collective agreement is an efficient way for a company in financial difficulties to ask temporary suspension of payment and to propose a financial plan which prioritizes the payment of its most important creditors for the purpose of ensuring the continuity of its business activities, thus potentially avoiding a bankruptcy.

Conditions for opening
When the continuity of a company's business activities is at risk, the company can request the court to open a procedure of judicial reorganization by collective agreement. In addition, the company will have to demonstrate the purpose of the reorganization procedure and the measures that it intends to take in order to restore the profitability and solvency of the company. The request must also contain additional information and documents, such as the two most recent annual accounts, a list of all creditors and their current claims, and an estimate of the expected income and expenses during the suspension period.

Restructuring methods
The court grants a period of suspension for the payment by the company of its debts to creditors in order to allow the company to draft a reorganization plan. In this plan, the company will divide the various creditors in different objective categories and the claims of each category will be reduced with a certain percentage (up to 85% of the principal amount). The plan will be submitted for approval to the creditors of the company and will be considered as approved in case of a favourable vote by the majority of creditors representing half of all sums due.

Success rate
Statistics show that nearly 50% of all proceedings of judicial reorganization by collective agreement are successfully resolved. However, 70% of these companies are nonetheless declared bankrupt within two years.

Pros and cons
Pros: The management remains in control of the company, thus allowing the company to continue in the usual course of business. The possibility to favour the most important creditors is a strong tool for the company to guarantee the continuity of its business activities.

Cons: During the proceeding, nearly all creditors' rights are suspended and creditors' claims can be reduced by up to 85%. This can lead to financial difficulties for many small creditors. The procedure can also lead to abuses where a company in financial difficulties tries to avoid an inevitable bankruptcy and continues to use certain business assets of its creditors without compensation.

3. Judicial reorganization by transfer under judicial supervision

See above.

4. Collective debt procedure

The collective debt procedure is a procedure available for natural persons, non-traders, who face excessive debts. Given that it is not available for companies, this procedure falls outside the scope it this brochure.

5. Voluntary liquidation

See above.

6. Judicial liquidation

See above.

7. The temporary deprivation of management

Conditions for opening
Upon the initiative of any third party having a valid interest or on its own initiative, the court can temporarily transfer the management of a company to an interim administrator when there are serious indications that the conditions for bankruptcy of the company have been met.

Restructuring methods
The temporary deprivation of the management of a company will only be applied in urgent cases where there is a serious risk that the management of the company would commit acts that are detrimental to the rights of the creditors of the company prior to filing for bankruptcy. The appointment of an interim administrator is therefore a conservative measure, allowing the third party (or the interim administrator if they have been appointed by initiative of the court) to request the opening of the bankruptcy proceeding of the company.

Pros and cons
Pros: The measure is an effective way for creditors' to protect their rights in the case that malicious company management neglect to file for bankruptcy when appropriate.

Bulgaria

Winding-up proceedings (as referred to in Annex B to the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceeding (the "Regulation")

1. Opening of insolvency proceedings

Pursuant to Annex B to the Regulation, the corresponding Bulgarian procedure is the insolvency procedure. Insolvency proceedings are governed by the court and are initiated by a petition in writing submitted to the court. The petition must be submitted by the debtor itself or, respectively, by the liquidator (in the event of a voluntary liquidation), or by a creditor. It can be also submitted by the national tax authorities.

Conditions for opening
Under Bulgarian law there are two triggers of insolvency proceedings: insolvency and over-indebtedness. Such triggers are not cumulative – it is sufficient that a company is either insolvent or over-indebted for the company to be obliged to enter insolvency proceedings or its creditors to be entitled to enforce same.

A company is insolvent when it is unable to meet: (i) a due and payable payment obligation caused by or related to a commercial transaction, including its validity, performance, non-performance, termination, invalidity and rescission or the consequences of its termination; or (ii) a public obligation to the state and municipalities related to its commercial activity (such as tax); or (iii) an obligation under the so called '*private state receivables*' (such as receivables of the state under contractual agreements). There is a legal presumption in favour of insolvency if the company has ceased to make due payments. The company may also be insolvent if it is able to pay only some of its debts and such difficulties are not temporary in nature.

A company will be considered over-indebted if its assets are insufficient to cover its monetary (payment) obligations. The definition provided by the law is very broad, but in accordance with prevailing case law, the most common test is whether the total value of the company's cash, cash equivalents, and fast liquid assets is lower than the total value of the company's short-term liabilities (i.e., liabilities which are expected to mature within a year).

However, even if the company is deemed insolvent or over-indebted, the court shall not commence insolvency proceedings if it is of the opinion that the company's distress is of a temporary nature or the company's assets are sufficient to cover all of its liabilities without endangering the interests of creditors.

Restructuring methods
Apart from operating as an enforcement procedure, bankruptcy proceedings can be viewed as a way for the company to recover financially. During the court proceedings a recovery plan may be adopted to that effect. However this is not an obligatory stage of the bankruptcy proceedings. The right to propose a recovery plan is vested with the company, the bankruptcy administrator, creditors holding 1/3 of the secured receivables/unsecured receivables, partners/shareholders holding at least 1/3 of the capital of the company, unlimited liability shareholders, and twenty percent of the company's employees.

The recovery plan may include postponing or rescheduling of payments, writing-off of the debts

in full or in part, reorganisation of the enterprise, or undertaking other acts or transactions. The entire company or a separate part of its business could be sold as a part of the recovery proceedings. In such case a draft of the agreement, signed by the purchaser, is attached to the recovery plan. The recovery plan may also provide for election of a supervisory body for monitoring the implementation of the recovery plan.

For the purposes of the recovery plan, all creditors are divided in classes (e.g., secured, employees, unsecured creditors, creditors under shareholder loans, etc.). The recovery plan should be such that debts of a certain class are treated equally. The recovery plan will be voted on by the classes of creditors separately.

The recovery of the company may include debt-to-equity swaps. If this is agreed, the recovery plan includes a list of the creditors who have agreed to subscribe to a quota/shares of the capital.

The court passes a decision whereby it allows the creditors' meeting to vote for the approval of the recovery plan. After the plan has been approved by the creditors' meeting, remains unchallenged, and all other statutory requirements have been fulfilled, the court approves the recovery plan. As a consequence of the approved recovery plan, the bankruptcy proceedings are terminated.

If the company fails to implement the recovery plan, its effectiveness could be suspended and the bankruptcy proceedings may be re-opened. This could happen upon initiative of creditors' holding at least 15% of the receivables against the debtor or upon the supervisory body. In the re-opened bankruptcy proceedings no recovery proceedings are allowed.

Court decision declaring the debtor insolvent

If no recovery plan is adopted, a proposed recovery plan is not approved, or the company's assets are not sufficient to meet the insolvency expenses, the court will declare the debtor insolvent. Following this declaration, the court will suspend the debtor's business activity, terminate the rights of the debtor's competent bodies, impose a general restriction over the debtor's assets, and deprive the debtor of its right to manage and transfer its assets. At this point, the liquidation of the company's assets (i.e., conversion of the assets of the bankruptcy estate into cash) begins.

After the bankruptcy estate is converted into cash, the creditors' claims are paid according to their ranking and priority.

Out-of-court settlement

During each of the stages of the bankruptcy proceedings, but after the court had approved the list of the creditors to the bankruptcy estate, the debtor can enter into settlement agreement with all such creditors. The debtor (the company) is not being represented by the bankruptcy administrator in the negotiations and signing of the agreement; therefore in practice it should be an initiative of the shareholders and/or the creditors. The only requirements to such agreement are that (i) it is made with all creditors from the approved list, and (ii) it is in writing. If the executed settlement agreement is compliant with such requirements, the court adopts a decision on the termination of the bankruptcy proceedings. If the debtor fails to meet its obligations under the settlement agreement, the bankruptcy proceedings can be re-opened.

Success rate

Pursuant to the COFACE Bankruptcy Report[6], the total number of companies that went insolvent in Bulgaria in 2012 was 1,339 compared to 390 insolvent companies in 2011. This implies an increase of 243%. For 2013 and 2014, a further increase is expected.

We could not find available data from public sources for the number of successfully completed recovery plans or out-of-court settlements during the bankruptcy proceedings.

Pros and cons

Pros: Among the positive aspects of the insolvency procedure for the creditor is the opportunity to request the court to impose preliminary security measures for the purposes of protecting the debtor's property, such as: appointment of a temporary trustee in bankruptcy; imposing attachment or other security measures; termination of the individual enforcement proceedings against the property of the debtor; securing the available assets of the debtor; and ordering the sealing of the debtor's premises, equipment, and transport vehicles if there is danger of dissipation, destruction, or concealment of the property.

Cons: The insolvency procedure is a comparatively long process governed by the court and can be potentially costly (costs for the insolvency proceedings, security measures, court expertise, etc.).

Directors of an insolvent/over-indebted company are obliged to file for the opening of insolvency proceedings within 30 days of insolvency/over-indebtedness occurring. Failure to comply with this 30-day deadline can result in personal liability to the company's creditors for damages caused by the delay and possible criminal liability, including a fine or imprisonment.

Under Bulgarian law, a person that has been a member of a managing or controlling body of a company dissolved on grounds of bankruptcy in the last two years preceding the date of the court's decision on declaring bankruptcy and provided that

unsatisfied creditors remain, may not be a director of a limited liability or a joint stock company. Such right of the individual can be reinstated by the court if the unsatisfied creditors have been fully repaid or the directors have proved that the company was declared bankrupt due to adverse changes in the economic environment.

Other proceedings (as referred to in Annex A to the Regulation or based upon other applicable laws of your jurisdiction)

With the exception of the insolvency procedure described above, there are no other proceedings listed in Annex A to the Regulation. Please refer to section Winding-up proceedings.

Other restructuring techniques

1. Voluntary restructuring

It is not specifically regulated under Bulgarian law, but the creditors and the debtor may enter into a voluntary agreement for restructuring of the loan and/or to execute a standstill agreement while considering a restructuring plan.

With respect to the banks, pursuant to Bulgarian law[7], a bank's exposure towards a borrower shall be considered restructured where the original agreement terms are amended by the bank to alleviate payment obligations for the debtor due to deterioration of debtor's financial status that led to the inability to repay in a due term the full amount of the debt and which allowances would not have been given by the bank under other circumstances.

The original agreement terms are deemed amended if there is a debt reduction (with respect to principal and/or interest), substitution of the part of the debt against equity, refinancing, or other financial allowances by the bank, except for changes in contractual interest rates resulting from market interest rate changes.

An exposure shall not be considered restructured if the following conditions are met:
- The parties have agreed to prolong the term of principal and/or interest repayments, with no more of two years totally, without reduction of the net present value of the cash flows under the provisions of additional agreements;
- The bank has a reason to assume that it will collect both the principal and the interest; and
- There are no circumstances indicating that the financial state of the debtor has been deteriorated.

The restructuring could be distinguished from the renegotiation. Renegotiation would be the case where the terms of the loan agreement are amended with a voluntary agreement between the parties, but the conditions for the restructuring are not met. Renegotiation can be pursued at any time during the term of the loan agreement.

Restructuring methods
The restructuring techniques depend on the purpose of the restructuring – whether it aims for the company's survival or an orderly sale of the company's assets/business.

If the creditor seeks the continued survival and stabilization of the debtor, it could use various methods, such as remission of part of debt, postponing/rescheduling the debt, additional financing, financial support by the shareholders and subordination of their receivables to the bank's receivables, new collaterals, additional guarantees, reorganization of the debtor, and/or sale of assets which are not essential for the business of the debtor, among other things.

If the main purpose of the restructuring is the sale of the company's assets/business, the restructuring methods may include debt-for-equity swaps, rescue sales, distressed debt trading (including through assignment of receivables/debts, factoring, and novation).

The above restructuring methods could be used separately or in combination.

Under Bulgarian law, a debt-for-equity swap can be done using an in-kind contribution procedure. It should be noted that the Bulgarian Credit Institutions Act limits the proportion of a bank's own capital that can be invested in qualifying equities and also the maximum size of equity stake a bank can hold in any single entity. Therefore, if the lender wishing to swap debt for equity is a bank, its resulting equity participation must not exceed the statutory requirements.

Under Bulgarian law, loans can be transferred either by assignment or by novation. The assignment is the most common method of loan transfer, and it occurs in the form of an assignment of rights/receivables and an assumption of obligations. Novation is an alternative to assignment when there is a change of the lender and the terms of the loan are being varied. Novation takes effect by discharging the original rights and obligations and replacing them with new ones.

Another technique is the step-in-debt. The most common use of step-in debt is where the original lender and the new lender agree to be jointly liable for the outstanding obligations towards the borrower. The borrower's consent is not required. On the borrower's side, step-in-debt (also known as assumption of obligations) means that a third party enters as a co-debtor under the agreement. The co-debtor and

the original debtor will be jointly liable for the outstanding debt towards the creditor. If the creditor has approved the step-in debt agreement, this agreement cannot be repealed or amended without the creditor's consent.

Pros and cons

Pros: In many cases the creditor and the debtor may protect their respective interests more effectively through direct negotiations and voluntary restructuring in comparison to individual enforcement or bankruptcy.

Cons: However, a creditor must consider certain risk, some of which are briefly described herein below.

Any security granted after the court decision for opening of the insolvency proceedings is null and void as against the company's creditors.

Furthermore, Bulgarian legislation provides that certain transactions entered into during "suspect periods" can be challenged and revoked.

As stated above in the section Winding-up proceedings, even if the directors of a company want to enter into a voluntary restructuring agreement with the bank, if the company is in fact insolvent or over-indebted and the company's distress is not temporary, the company's directors are obliged to file for the opening of insolvency proceedings within 30 days of the occurrence of the insolvency/over-indebtedness. Failure to comply with this obligation can result in civil and/or criminal liability of the directors.

Other additional issues

There are data protection and confidentiality issues which could prevent a lender from selling and/or transferring the loan. Bulgarian bank secrecy laws and data protection laws prohibit disclosure of bank secrets and personal data without the subject's consent. It is therefore standard practice to include in the original loan agreement the borrower's prior consent to disclosure for the purposes of loan trading.

There are also requirements with respect to the transfer of the collaterals and supplemental registrations necessary in this regard which vary depending on which restructuring methods are used. There are also different applicable rules with respect to the different forms of the agreements, their execution and perfection.

[6] http://www.coface.bg/en/News-Publications/Publications/Coface-bankruptcy-report-Insolvencies-on-the-rise-throughout-Central-Europe.

[7] Ordinance No 9 of the Bulgarian National Bank as of 3 April 2008 on the Evaluation and Classification of Risk Exposures of Banks and the Allocation of Specific Provisions of Credit Risk.

Croatia

Winding-up proceedings (Annex A)/Insolvency proceeding (Annex B)

1. Insolvency proceeding

Conditions for opening
The insolvency proceeding shall be opened when any of the following conditions occur: (i) the company is not liquid; (ii) the debtor is over-indebted; or (iii) the debtor is not able to pay due obligations.

The debtor is considered not liquid if it cannot, in a certain period, fulfil monetary obligations which became due in such period. It will be deemed that the debtor is not liquid if the debtor is (i) more than 60 days late with fulfilment of one or more monetary obligations the amount of which exceeds 20% of the amount of the debtor's total obligations published in the debtor's annual financial reports for the preceding year; or (ii) it is more than 30 days late with payment of the employee salaries and related taxes and contributions.

The debtor is considered over-indebted if the debtor's assets do not cover the existing liabilities. The debtor shall not be deemed over-indebted if circumstances (such as business plans, assets, securities, etc.) show that it is reasonable to expect that the debtor will be able to fulfil its obligations as they become due.

The debtor is considered unable to pay its due obligations when its bank account has been blocked by creditors for more than 60 days.

Restructuring Methods
The restructuring of a debtor is not possible in the insolvency proceeding. The creditors' claims are settled by sale of the debtor's assets and the debtor ceases to exists as a result of the insolvency proceeding.

Success Rate
The amendments of the Croatian Insolvency Act were introduced at the end of 2012, thus no information on the success rate is not available.

Pros/Cons
Pros:
— Assets are sold to settle the debts towards the creditors.
— Official receiver is in charge of the insolvency process and has a control over the debtor. The debtor's management has no influence on the debtor.
— It is a court-driven proceeding.

Cons:
— No possibility of restructuring during the insolvency proceeding – after the insolvency proceeding the debtor ceases to exist.
— The insolvency proceedings usually take long time before they are finished.
— Chance of full recovery of creditors' claims is very low.
— Under certain conditions debtor's agreements and other legal actions can be challenged by the liquidator or other creditor as a result of which such agreement and legal actions may be declared invalid.

Other restructuring techniques

1. Pre-insolvency settlement proceeding

Conditions for opening
At the end of 2012 the pre-insolvency settlement proceedings were introduced. Since then the restructuring of the debtors is no longer possible in the insolvency proceedings and can be done only through the pre-insolvency settlement proceeding.

The pre-insolvency proceeding can be opened for any one or more of the same conditions as the insolvency proceeding, namely: (i) the debtor is not liquid; (ii) the debtor is over-indebted; or (iii) the debtor is not able to pay due obligations.

The pre-insolvency settlement proceeding can be initiated only by the debtor itself. Creditors cannot initiate the pre-insolvency settlement proceeding. If the debtor does not initiate the pre-insolvency settlement proceeding when any of the above conditions occur, the debtor can be fined. However, the primary consequence is that, in such case, the creditors can initiate the insolvency proceeding by which (as explained above) the restructuring of the debtor will not be possible, and the debtor's assets will be sold and the debtor will cease to exist.

The pre-insolvency settlement proceeding requires a settlement to be reached between the debtor and the creditors during the proceeding. The pre-insolvency settlement proceeding consists of two stages: (i) proceedings in front of the Financial Agency council whereby the restructuring is agreed upon between the debtor and the creditors (settlement must be approved by the majority of the creditors); and (ii) proceedings in front of the Commercial Court where the settlement reached in the first stage will be confirmed by the court.

Restructuring Methods
During the pre-insolvency settlement proceeding, the debtor and the creditors will explore various alternatives for restructuring the debtor. The debtor shall present to the creditors the restructuring plan (covering both operative and financial restructuring) and must get prescribed majority of the debtors' votes.

If the pre-insolvency settlement has been reached and confirmed by the Commercial Court, such settlement will become legally binding and the debtor and the creditors will be obliged to act accordingly throughout the entire settlement period.

During the pre-insolvency settlement proceeding, the debtor and creditors should agree on the restructuring actions which are to be implemented in order to enable the debtor to remedy the insolvency conditions and continue with its business activities.

The Pre-Insolvency Settlement Act lists some of the restructuring techniques which can be applied: write-off of parts of the creditors' claims, debt-to-equity swap, extension of repayment period, decrease of interest rates, changes in the security instruments, corporate restructuring of the debtor, and introduction of strategic partners of the debtor to enter the shareholding structure, among other things. Once the required majority of the creditors approves the restructuring plan, such plan will be included in the settlement and become binding for both debtor and creditors.

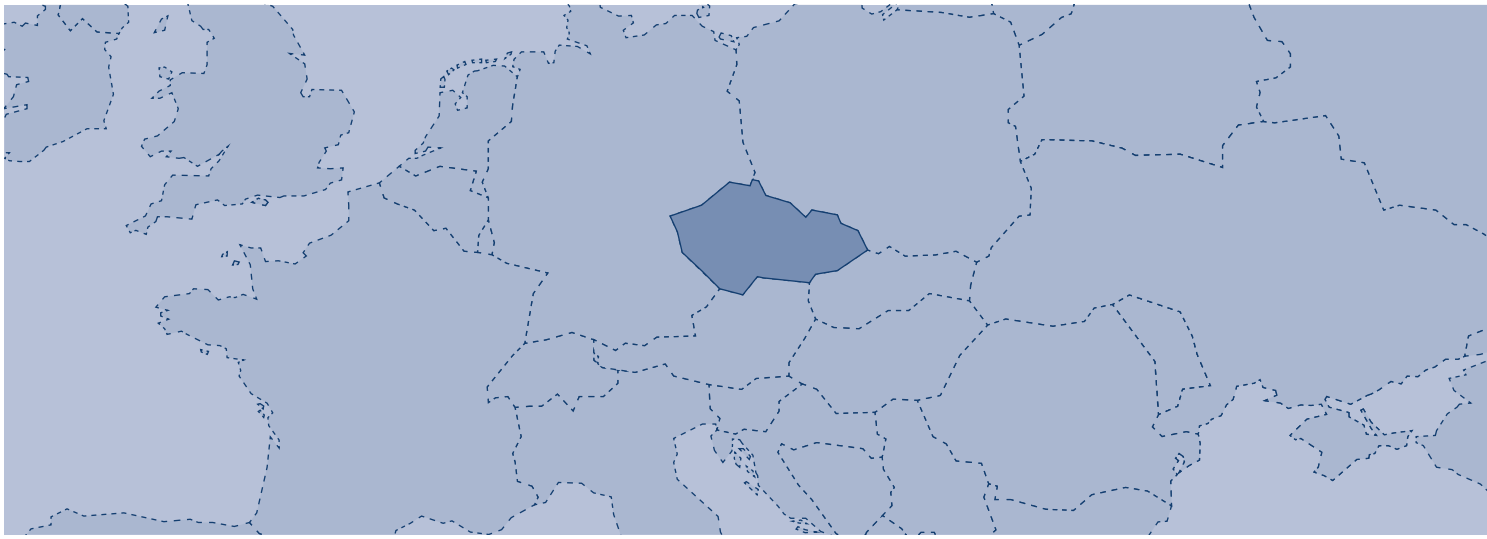
Success Rate
The pre-insolvency settlement proceeding is new as of 2012, thus, no data is available on its success rate.

Pros/Cons
Pros:
— Enables restructuring of debtors that have a viable plan for further business activates.
— Prevents long-lasting and inefficient insolvency proceedings.
— The deadlines for finalization of the pre-insolvency proceeding prescribed by the Act are rather short.

Cons:
— Certain creditors (such as the ones with the secured claims or the ones with claims disputed by the debtor) can stay out of the proceeding and the settlement reached at the end of the proceeding will not be binding for such creditors.
— As a newly introduced proceeding, it still has procedural complications which are in the process of being remedied.
— Creditors can be forced by law to participate in the restructuring of the debtor. This may not be in their best interest (e.g., to enter the shareholding structure of the debtor).

2. Voluntary debtor/creditor arrangements

Arrangements between the debtor and creditors on voluntary basis, such as renegotiating loan agreements and executing standstill agreements are also possible restructuring techniques. However, such arrangements are done on an individual and voluntary basis between the parties within the general legal framework.



Czech Republic

Introduction

Under the Czech Insolvency Act[8], debtors' insolvency can be resolved by way of (i) winding-up proceedings (in Czech: *konkurs*) as a process leading to the liquidation of the insolvent debtor; (ii) a (post-insolvency) restructuring (in Czech: *reorganizace*) which enables the continuing business activity of the debtor; or (iii) a discharge of debts (in Czech: *oddlužení*) as a specific method applicable to individuals who are not entrepreneurs.

The Czech Insolvency Act regulates the process after the occurrence of "insolvency" (in Czech: *úpadek*) of a debtor who has multiple creditors. It sets out the criteria of two forms of insolvency: (i) debtor's inability to pay overdue debts (liquidity test); and (ii) over-indebtedness (balance sheet test).

The insolvency proceeding is opened on the basis of an insolvency petition filed by the insolvent debtor or by a creditor. The insolvency court examines whether the criteria of insolvency are met and, if so, confirms the debtor's insolvency and appoints the insolvency administrator. Creditors can register their claims within the period set out by the court. After the expiry of this period, the creditors' committee and the insolvency court decide which method of resolution of the debtor's insolvency will apply. The entire process of the insolvency proceeding, including filings made by the parties, resolutions of creditors' bodies, and decisions of the insolvency court are available online at the website of the Czech Ministry of Justice.

Winding-up proceedings

1. Bankruptcy proceedings

Conditions for opening
The conditions for the opening of bankruptcy proceeding (as a winding-up proceeding) are: (i) the initiation of the insolvency proceeding; (ii) a decision of the insolvency court declaring that the debtor is insolvent; and (iii) a decision of the insolvency court that the debtor's insolvency will be resolved by way of bankruptcy proceeding.

Restructuring methods
As a result of the bankruptcy proceeding, creditor's claims are satisfied from the proceeds of the sale of debtor's property (insolvency) mass. The process leads to the liquidation of the debtor (in the case of legal entities). In this type of proceeding, there is no negotiation regarding the restructuring of debtor's obligations or debtor's corporate restructuring.

Success rate
The bankruptcy proceeding is usually preferred by secured creditors, whose claims up to 100% of value are satisfied from the proceeds of enforcement of security, typically sale of the property or asset which is subject to security. (If the proceeds of the enforcement are not sufficient, the unpaid portion of the claim is registered as unsecured claim). As regards unsecured creditors, usually only a small portion of their registered claims is satisfied (from our practical experience, usually less than 10%).

Pros and cons
Pros: The process is formally less complicated and secured creditors have a chance to achieve the repayment of their claims (depending on the value and ranking of the security). This method of resolution of insolvency is prevailing under Czech law in respect of insolvent corporate debtors.

Cons: Only a small part of unsecured creditors' claims is usually satisfied. The role of the insolvency administrator and the insolvency court prevails over the role of the creditors, (i.e., this method does not emphasise creditors' pro-active approach). Furthermore, as a general rule, directors of a company in bankruptcy cannot (with certain exceptions) perform the office of a director in other companies, unless this statutory restriction is overruled by 2/3 majority of the shareholders.

Other proceedings

1. Reorganization (post-insolvency restructuring)

Conditions for opening
As an alternative, debtor's insolvency can be resolved by way of reorganization (post-insolvency restructuring). In the practice, this method applies in the following cases:

- Reorganization under the terms agreed between the debtor and creditors before the initiation of the insolvency proceeding and presented to the insolvency court (sometimes called "pre-packed" reorganization)[9] is used where the insolvency proceeding should not lead to the liquidation of a debtor – applies to small and medium enterprises or individual entrepreneurs; and
- "Standard" reorganization, which only applies to debtors (a) whose total aggregate turnover in the previous financial year was at least CZK 50 million (i.e., approx. EUR 2 million); or (b) who employ at least 50 employees (full-time).

In addition to the standard conditions for opening of insolvency proceedings (as described above), the insolvency court will decide on the reorganization if: (a) it is proposed in the insolvency petition filed by the debtor or by a creditor (if certain conditions are met); or (b) if this method is chosen by a resolution of creditors' meeting. Subsequently, a reorganization plan must be prepared by creditors or by the debtor. After the reorganization plan has been approved by the creditors' (voting at the creditors' meeting in classes) it must be also approved by the insolvency court. If either of the creditors or the court rejects the reorganization plan (and no new plan is approved in a repeated process), the court will decide that the debtor's insolvency will be resolved by way of a bankruptcy proceeding.

Restructuring methods
The contents of the reorganization plan can be negotiated by the creditors and the debtor. There are no specific statutory requirements for the reorganization plan, however, the following principles should be complied with: (i) priority rule (satisfaction of claims in priority reflecting creditors' classes: secured creditors, unsecured creditors, subordinated creditors, shareholders); (ii) possibility of restructuring (the restructuring and the debtor's performance of agreed obligations will not lead to the debtor's further insolvency); (iii) equal treatment of receivables (within the classes of claims); and (iv) fairness (in relation to distribution of profits).

Typical forms of reorganization used in the Czech Republic are: (i) new financing of borrower's enterprise (or its part) under new terms; (ii) restructuring of creditors' claims; (iii) sale of the property (insolvency) mass or its part or sale of the enterprise; (iv) merger of the debtor with another entity or transfer of debtor's assets to its shareholder (creditors' rights continue to exist vis-à-vis the new debtor or renegotiation of such creditors' rights); or (v) transfer of debtor's assets and property to the creditors or to a newly incorporated entity in which the creditors hold a stake.

Success rate
The success rate in the case of reorganization depends on the terms of the respective reorganization plan. From the perspective of all creditors (secured and unsecured) in average, the overall success rate is usually higher.

Pros and cons
Pros: The costs of resolution of debtor's insolvency are split among all groups of creditors (in contrast to the case of bankruptcy, the costs are not borne mostly by unsecured creditors). The reorganization enables further operation of the debtor's enterprise (as a going concern) under the remedial actions set out in the reorganization plan. The reorganization plan is subject to review and approval both by the creditors and the insolvency court. Additionally, the creditors can continuously inspect whether the debtor acts in compliance with the terms set out in the reorganization plan.

Cons: From the perspective of secured creditors, this method is not advantageous as the period of recovery of their claims (as set out in the reorganization plan) is usually longer than a bankruptcy proceeding leading to debtor's liquidation and the claims of new lenders financing the debtor within the scope of reorganization have a better priority (as claims against the insolvency mass) than the claims of secured creditors. Reorganization is not permitted for debtors in liquidation, securities and commodities exchange brokers, and traders.

2. Discharge of debts (individuals)

The discharge of debts is as a specific method of resolution of insolvency that only applies to individual debtors whose debts do not originate from their entrepreneurial activity. From this perspective, the discharge of debts is likely less relevant for the purposes of this paper, however in the current practice of Czech insolvency courts, it represents approximately 70% of the insolvency courts' agenda. The debtor must request the court for approving the discharge of debts. As a general condition, the court only approves the discharge if the debtor is able to settle at least 30% of unsecured creditors' claims, unless the creditors consent in writing to a lower settlement. Creditors' claims can be satisfied (i) by way of a sale of the debtor's assets or, typically, (ii) pursuant to a repayment schedule approved by the court under which the debtor must pay a fixed sum (subject to a statutory maximum) to its unsecured creditors every month for the period of five years. The fixed sum is distributed among unsecured creditors in proportion to the value of their claims. During this period, the debtor only retains the minimum amount necessary for the debtor's personal needs.

The success rate for the creditors is low. In respect of this method of resolution of insolvency, social interests of debtors are preferred to economic interests of the creditors. The court can cancel a debt discharge on a number of grounds (e.g. debtor's failure or inability to comply with the terms of the discharge approved by the court, or if the debtor misuses the discharge scheme) and open a standard bankruptcy proceeding.

3. Restructuring (pre-insolvency)

Conditions for opening
A restructuring of loans or other debts before the opening of insolvency proceeding against the debtor is not expressly regulated under Czech law. It is usually based on contractual arrangements, such as standstill agreements or restructuring agreements, between the borrower (debtor) and the bank(s) (creditor(s)).

The methods used at this stage are similar to the ones described in relation to the reorganization. It is advisable that creditors respect the principles set out for the reorganization plan (as described above) in order to decrease the risk that the restructuring will later on be challenged by the insolvency court or other creditors in the event of debtor's subsequent insolvency.

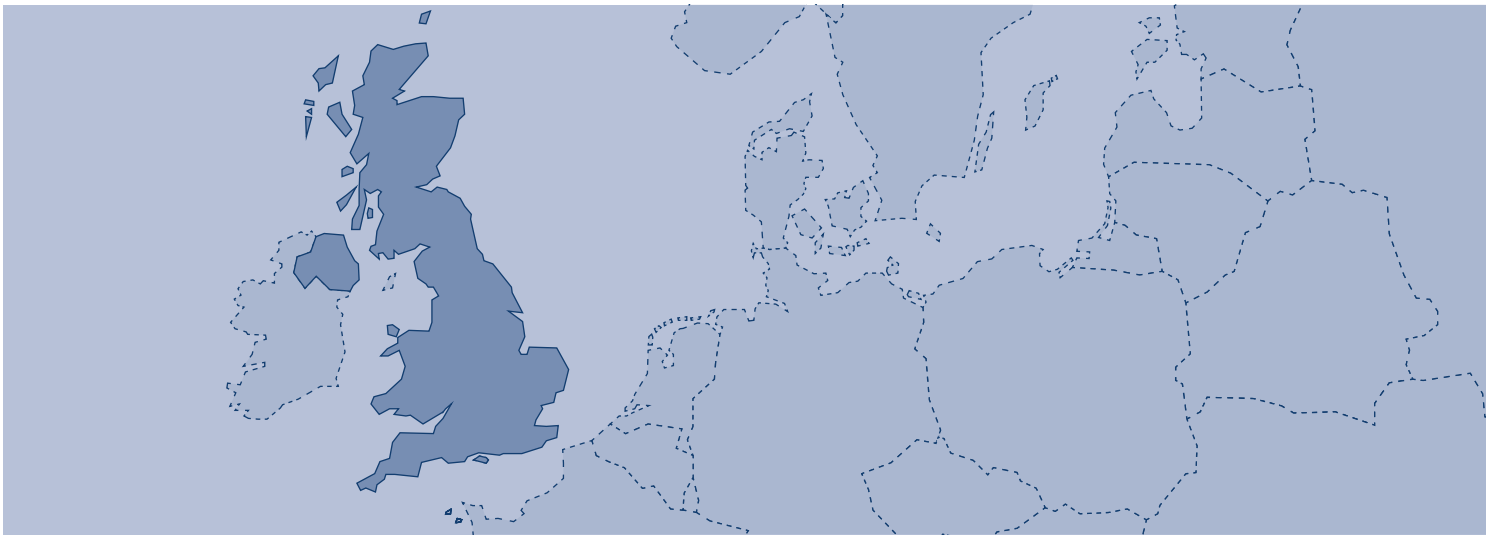
Success Rate
The success rate will depend on the terms of a standstill or restructuring agreement in an individual case.

Pros and cons
Pros: The advantages of this process are similar to the (post-insolvency) reorganization, save for the fact that the process is less formal and more flexible for the creditors and the debtor.

Cons: The risks in are significantly higher than in the case of a formal (post-insolvency) reorganization process. E.g., certain risks are:
— Ineffectiveness of legal acts made by the debtor which prefer some of the creditors over others or which are detrimental to some of the creditors (e.g., additional security related to existing financing); or
— Consequences of subsequent opening of insolvency proceeding, e.g.: (a) interruption of the process of registration (perfection) of new security, (b) ineffectiveness of security registered after the opening of insolvency proceeding; or (c) agreements made within the scope of pre-insolvency restructuring which are detrimental to some of the creditors can be declared ineffective for the purpose of insolvency proceeding.

There is a risk of civil liability of directors towards the company and third parties. There is also risk of criminal liability for directors (e.g., in the case of intentional preferential act made by a director of an insolvent debtor in favour of certain (preferred) creditor, where the pre-insolvency restructuring has not been approved by all creditors).

[8] Act No. 182/2006 Coll., on the Insolvency and the Methods of Its Resolutions (Insolvency Act), as amended.
[9] The term "pre-packed" reorganization is used for cases where the creditors and the debtor are able to agree on the terms of a reorganization plan before the first creditors' meeting takes place and subsequently, the reorganization plan is formally approved by the creditors already at the first session of the creditors' meeting.



England & Wales

Liquidation

Liquidation is a terminal procedure by which the assets and of company are collected, realised, and distributed to creditors (and then shareholders if there are sufficient assets). A company can be placed into liquidation through one following procedures:

— Compulsory winding up or liquidation
— Creditors' voluntary liquidation (CVL)
— Members' voluntary liquidation (MVL)

1. Conditions for opening

Compulsory liquidation
Compulsory liquidation is initiated by the presenting of a winding-up petition at court. A judge then decides at a court hearing whether it is appropriate to make a winding up order.

The two most common grounds for a compulsory winding up order are that the company is unable to pay its debts or that it is just and equitable for the company to be wound up. An officer holder (e.g., a liquidator in another EU jurisdiction) can also petition for an insolvency procedure.

Once the winding up order is made, the Official Receiver (a civil servant) will automatically be appointed as liquidator in respect of the company.

Creditors' voluntary liquidation and Members' voluntary liquidations
A CVL or and MVL is commenced by the company passing a special resolution for winding up approved by 75% or more of the shareholders.

An MVL is a solvent procedure and requires the majority of directors to make a statuary declaration of solvency that the company has sufficient assets to discharge its liabilities.

The appointer can appoint a licensed insolvency practitioner as the liquidator in a CVL or MVL. In a CVL the liquidator must hold a creditors meeting within 14 days of the relevant resolution.

2. Restructuring methods

This is a terminal procedure which usually leads to the closing of the business as a going concern and deferring control of all the assets to the liquidator. Liquidation is usually the end state of a restructuring after the assets of the company have been realised by way of an administration or receivership (both discussed further below).

3. Success Rate

Liquidation will lead to the realisation of any available assets but will be terminal to the business.

4. Pros and cons

Pros: The benefit of liquidation is that it offers the creditors certainty e.g.:

— The liquidator takes control of the company and the powers of the directors cease;
— The liquidator is obliged to act in the best interests of all creditors; and
— The liquidator can challenge previous transactions and may be able to reclaim company property.

Cons: The main concern for creditors is that liquidation will lead to a fire sale of assets and therefore may diminish returns. The liquidator can increase the assets available to creditors by using its powers to challenge previous transactions and disclaim onerous company property such as leases.

Administration

Administration is an insolvency regime which allows for the reorganisation of a company or the realisation of its assets under the protection of a statutory moratorium.

1. Conditions for opening

A company may enter administration in one of two ways:

— By court order, made in an open hearing, upon a formal application to court (the court route); and
— The filing at court of a prescribed series of documents (the out-of-court route), by the company or its directors; or the holder of a qualifying floating charge (QFCH) over the company's assets.

Administration must aim to achieve one of the following:

— The rescue of the company (as distinct from the business carried on by the company) as a going concern (the primary objective);
— If the first objective cannot be achieved, the achievement of a better result for the company's creditors as a whole than would be likely if the company were wound-up (without first being in administration); and
— If neither the first nor second objectives can be achieved, the realisation of some or all of the company's property to make a distribution to one or more secured or preferential creditors.

Once a court administration application is made or a notice of intention to appoint or notice of appointment of administrators is filed at court following the out of court route, the company has the benefit of a moratorium which prevents creditors enforcing their claims against the company.

On appointment, the administrator will assume all the powers of the company and become the agent of the company. The directors will technically remain in office, but cease to have any power to bind the company.

2. Restructuring methods

The wide powers of the administrators allow the business of the company to continue post-appointment which makes administration a very flexible tool. Administration is the most common and effective corporate insolvency procedure in England and Wales. Broadly, an administration can be used in multiple kinds of insolvency scenarios:

Pre-pack sale: where the sale of the assets or entire business or restructuring is planned and negotiated before the insolvency and executed immediately upon the appointment of the administrators. This is used to minimise any disruption to a business which may be caused by the insolvency and often allows the administrator to achieve the best value for the business and assets of a company. Pre-packs sales do occasionally attract criticism from unsecured creditors that they receive little or no distribution from the realisations of the pre-pack sale and it is important that the administrators sell the company's assets at the right value.

Trading administration: where the administrator once appointed stays in office for up to a year (or longer if an application for an extension is made). In this case the administrator operates the business until it exits administration as a solvent company or can be sold to a third party as a functioning business. The wide powers of the administrator allow the business to continue trading to better achieve one of the purposes of the administration and maximise the sale price of the assets or collect receivables for creditors.

Orderly wind-down: an administrator may be appointed to wind down the operations of a company and collect book debts or other assets that may otherwise be more difficult to realise in a disorderly collapse or liquidation.

3. Success Rate

Administrations have been used to maintain and improve the assets available to creditors upon insolvency and have become a popular restructuring method. Although the primary purpose of administrations is to rescue the company, this is impossible in many cases and rarely occurs in practice.

4. Pros and cons

Pros:

— The administrator is an independent officer of the court with wide powers to take control of the company's business and assets for the benefit of the creditors as a whole;
— It creates stability through the statutory moratorium;
— The company can continue as a going concern;
— Administration is not necessarily terminal as the aim is to rescue the company rather than dissolve it – in practice this is rarely achieved; and
— Previous transactions by directors can be challenged by the administrator.

Cons: The main drawbacks of administration are that it can be expensive compared with some other processes and that secured creditors may achieve better returns with less leakage by appointing receivers (particularly where the main assets are real estate).

Creditors Voluntary Arrangements (CVA)

A CVA is a compromise or arrangement between a company and creditors which is binding on all unsecured creditors once it is approved.

1. Conditions for opening

A CVA can be proposed by the directors of a company, an administrator, or a liquidator, but cannot compromise secured claims without the consent of secured creditors. The proposal must be approved by 75% of the creditors (by value) and must not be opposed by more than 50% of the unconnected creditors. If approved, it is binding on all unsecured creditors. The CVA is administered by the CVA supervisor.

2. Restructuring methods

CVAs are often used in retail insolvencies where landlords represent a large unsecured creditor whose consent is necessary for the continuation of the business or after an administration once secured creditors have been paid out and a rump of assets remains for the unsecured creditors.

3. Success Rate

CVAs are only successful if the necessary creditor consent threshold is met.

4. Pros and cons

Pros: The advantage of this procedure is that the outcome is binding on all creditors regardless of whether they have consented. Thus, it can be used even where there is a minority of dissenting creditors.

Cons: The disadvantage of the procedure is that it can be costly.

Alternative restructuring techniques not listed in the Annexes to the European Insolvency Regulation but commonly used in restructuring

1. Receivership

A receiver is appointed in respect of the charged assets of a company (and not the company itself) by the beneficiary of the charge. This is not a collective insolvency procedure and as such is not listed in the annex to the European Insolvency Regulation.

Conditions for opening
A receiver can be appointed by the beneficiary of a document creating a fixed charge over the assets of a debtor once the conditions for enforcement in such charge are met. A receiver can be appointed quickly and cheaply by the bank or charge by it executing an appointment deed and the receiver accepting the appointment.

Restructuring methods
A receiver is appointed in respect of specific assets and this determines the use of receivers in restructurings. Receivers are commonly used in two situations: (i) where the main value of the debtor are assets charged by way of fixed such as real estate; and (ii) to effect a group restructuring by appointing receivers over the shares of the valuable companies in an insolvent group and selling these to a solvent structure.

Success Rate
Receivership is a well-defined process and, provided that there has been a valid appointment and the assets are valuable, it is often an effective technique for restructurings. Receivers can be made vacate office by an administrator or liquidator so is may not be successful where if an administrator or liquidator is appointed and does not want the receivers to remain in office.

Pros and cons
Pros: The main benefit of a receivership is that the appointment of the receivers and realisation of the assets can be very quick and inexpensive. The receiver acts for the benefit of the appointing charge but remains the agent of the debtor, thus, the bank is not liable for the receivers' actions in office.

Cons: The limitation of receivership is that receivers are vulnerable to subsequent appointment of a liquidator or administrator and have no power to manage the affairs or business of the company other than to realise the asset.

2. Administrative Receivership

Conditions for opening
Administrative receivership is now prohibited in England and Wales with a very few narrow exceptions after the Enterprise Act 2002 (Enterprise Act) came into force on 15 September 2003. An administrative receiver can be appointed by way of an appointment deed by the holder of a floating charge over the whole (or substantially the whole) of the property created before 15 September 2003.

Restructuring methods
The primary aim is to realise assets of the debtor for the benefit of the creditor that appointed the administrative

receiver. An administrative receiver has wide ranging powers to sell or deal with the property of the company – a greater scope of powers than a receiver. However, there is no statutory moratorium as there would be in an administration.

Success Rate
Unless the security predates 15 September 2003, administrative receivership is not usually possible. The administrative receiver has a wide range of powers and owes it duties to secured creditors so can be a very effective process.

Pros and cons
Pros: The administrative receiver has the benefit of a wide range of powers and acts for the benefit of the appointing charge but remains the agent of the debtor so the bank is not liable for the receivers' actions in office. The process is often cheaper than administration and it often affords better realisations and control to the secured creditors.

Cons: The main disadvantage, when compared with administration, is that there is not the protection of a statutory moratorium.

3. Schemes of arrangement

Schemes of arrangement are court supervised compromises or arrangements between a company and its creditors or shareholders (or any class of them). The process is a company law process often used in mergers and is not restricted to insolvencies. It is not listed in the annex European Insolvency Regulation and can be used by foreign companies with a sufficient connection to England and Wales. There have been several high profile cases of European companies taking advantage of the flexibility of schemes of arrangements to restructure their debts.

Conditions for opening
An application must be made to court to propose the arrangement. The court monitors the arrangement and, if satisfied that the conditions are met, will grant an order to implement the scheme. The arrangement will divide affected creditors or members into classes and the court will scrutinise the composition of the classes. More than 75% of each class (by value) must approve the scheme.

Restructuring methods
Schemes of arrangement are usually used where unanimous consent of lenders required under the finance documents for restructuring steps cannot be achieved, but the lower threshold of more than 75% lender consent can be achieved. Schemes are flexible as a restructuring tool as they allow particular classes of creditors to be treated differently.

Success Rate
Schemes of arrangement are effective once the required consent is achieved and the scheme has been approved by the court. Foreign companies must ensure that the terms of the scheme are binding in their own jurisdiction once the courts or England and Wales have approved the scheme.

Pros and cons
Pros: Schemes of arrangement have the benefit of avoiding the stigma of formal insolvency. They are flexible and can be used even where there is dissent from a minority of secured creditors. The oversight by the court provides greater certainty and enables recognition of the scheme abroad.

Cons: Schemes of arrangement are very expensive and are only used in high value cases. The proposed scheme is vulnerable to not being approved by the requisite majority of creditors or not being approved by the court in England and Wales or recognised by a foreign court if it is necessary to enforce the terms of the scheme there.

4. Debt-for-equity swaps

Debt-for-equity swaps are not formal procedures, but are agreements for the debt and capital of a company to be reorganised so that a creditor (usually a bank, possibly together with other banks, bondholders, and creditors) converts indebtedness owed to it by a company into one or more classes of that company's share capital or convertible equity instruments.

Conditions for opening
Debt-for-equity swaps are established by agreement with the creditors and the borrower.

Restructuring methods
Debt for equity swaps are often used where the creditors recognise that the debtor has an unmanageable debt burden but wish to retain some upside gain if the debtor recovers and equity value is restored.

Success Rate
Debt for equity is successful in the sense that the debtor does not enter an insolvency procedure. However, where the creditors are converting debt to equity they will usually be foregoing interest and effectively writing debt off. Banks are often reluctant to convert the equity instruments into a significant shareholding as this has an accounting and regulatory impact on the bank.

Pros and cons

Pros: The main advantage is that the debtor is allowed to continue under a lesser debt burden which may lead ultimately to greater realisation to the creditors than in an insolvency procedure.

Cons: In many cases the creditors are suffering an immediate loss with no certainty of being repaid the remaining performing debt. Additionally, creditors are often reluctant to hold equity.

France

Winding-up proceedings (L.641-1 and R.641-1 et seq. of the Commercial Code)

The Annex B of the Council Regulation no1346/2000 of 29 May 2000 on insolvency proceedings refers to the compulsory liquidation proceedings.

1. Conditions for opening

The compulsory liquidation procedure applies to all debtors that are in a state of cessation of payments and whose restructuring is clearly impossible. This procedure must be opened upon the request of the debtor within a period of 45 days starting from the date of cessation of payments or upon the request of the public prosecutor. A liquidator will be appointed by the Court to dispose of the company's assets in part or as a whole.

The opening of liquidation proceedings has the following consequences:

— The opening judgment renders the creditors claim immediately due (and thus constitutes an event of default);
— Creditors have to declare their claims to the liquidator; and
— Creditors are paid according to their rank as determined by the nature of their claim and the date on which it arose.

Liquidation proceedings last until the liquidator finds that no more proceeds can be expected from the sale of the company's business or assets. After two years (calculated from the judgment ordering liquidation), any creditor can request the Court to order the liquidator to close the liquidation proceedings.

2. Success rate

About 90% of the French insolvency proceedings are liquidation proceedings.

3. Pros and cons

Cons: The main disadvantage of the liquidation proceedings consists in the liability that can result from such proceedings to directors. Directors can indeed be prosecuted personally in case of mismanagement and according to the gravity of their wrongs to personal bankruptcy, to criminal bankruptcy, and disqualification from holding a management function.

Insolvency proceedings

The proceedings Annex A of the Council Regulation no 1346/2000 of 29 May 2000 on insolvency proceedings refers to are the liquidation proceedings which was explained above, the safeguard proceedings ("*sauvegarde judiciaire*") and the receivership ("*redressement judiciaire*").

1. The Safeguard proceedings (L.620-1 & seq. and R.621-1 & seq. of the commercial Code)

Conditions for opening
Safeguard proceedings allow still-solvent companies that face difficulties to be restructured at a preventive stage under the Court's supervision.

Only solvent companies can file a petition to open safeguard proceedings. If the Court realizes that the company is insolvent at the time of the opening, it will turn the proceedings into a receivership or liquidation proceedings. The company can choose its administrator.

The opening judgment appoints:
— An insolvency judge to oversee the proceedings;
— An administrator in charge of supervising or assisting the management; and
— A court agent to represent the creditors' interests and assess proofs of claim.

Following the opening judgement, observation period begins, during the course of which the company will restructure its business and negotiate with its creditors. The observation period is limited at up to six months, renewable once upon the request of the administrator, the debtor or the public prosecutor (six months can be added to the time limit upon the request of the public prosecutor).

For companies whose annual accounts were certified by a statutory auditor or established by a chartered accountant and that employ more than 150 employees or have an annual turnover of more than EUR 20 million, three classes of creditors must be organised:
— Financial institutions committee;
— Major trade creditors committee (trade creditors who hold more than 3% of the total trade claims); and
— Bondholders group.

These committees and the Bondholders group are invited to vote on the draft safeguard plan proposed by the company (including debt restructuring, re-capitalisation of the company, debt-for-equity swaps, etc.) at two-thirds majority (by value) for each class. If the committees do not vote on the draft safeguard plan within six months from the date of the opening judgment or if they refuse to adopt the plan, the consultation of the creditors may be done individually or collectively. If the creditors agreed to grant longer payment terms or remission of debt, the Commercial court will recognise their existence. The Commercial court can impose longer payment terms on creditors who did not agree to any longer payment terms or remission of debt (but in this situation, the safeguard plan cannot last longer than 10 years).

The adoption of the safeguard plan terminates the safeguard proceedings.

Pros and cons
Pros: The directors of the company continue to carry on controlling the company.

The role of the administrator appointed by the Court is to assist or to supervise the directors in the way the company is managed (the Court is not compelled to appoint an administrator when the company employs less than 20 employees and has an annual turnover of less than EUR 3 million excluding taxes).

The safeguard proceedings provide the following measures which help the company restructuring its debt:
— Preventing the company in distress from paying the debt which arose before the date of the opening judgment;
— Providing an automatic stay of all actions from the date of the opening judgment;
— Preventing the company in distress from paying the debt resulting from a loan concluded for a minimum term of a year from the date of the opening judgment;
— The opening judgment does not render a debt payable that was not due before the opening judgment; and
— No personal liabilities for the directors.

Cons: The publicity of the proceedings.

2. The Receivership (L.631-1 and R.631-1 et seq. of the French Commercial Code)

Conditions for opening
Contrary to safeguard proceedings, receivership occurs when the company is in a state of cessation of payments. In this situation, the company is unable to settle its current liabilities with available assets. Receiverships are used to help the company to carry on its business, maintain current employment, and to settle liabilities. Receiverships are appropriate if the company is insolvent and has not ceased operating, but only in a situation where the company's rescue seems possible.

The company must file a request for the opening of the receivership within 45 days following the date of cessation of payments. As for the safeguard proceedings, an observation period starts from the date of the opening judgment and for a minimum period of six months (renewable once upon the request of the receiver, the debtor, or the public prosecutor at the term of which six months might be added upon the request of the public prosecutor).

The opening judgment appoints:
— An insolvency judge to oversee the proceedings;
— A receiver in charge of assisting the management or taking control of the company's management; and
— A court agent to represent the creditors' interests and assess proofs of claim.

Different possibilities can result from a receivership:

— *The adoption of a restructuring plan*: the company, with the help of the receiver, establishes the draft of the restructuring plan based upon the economic, social and, if necessary, environmental report (the procedure we mentioned for safeguard proceedings also applies for receiverships);
— *The sale of part or all of the assets*: the Court pronounces a disposal sale plan which leads to the sole transfer of assets (and not to a transfer of liabilities);

The liquidation: if the company cannot adopt a restructuring plan and if the sale of part or all the assets cannot occur, the Court will convert the receivership into a liquidation proceeding.

Pros and cons

Pros:

— Prevents the company in distress from paying the debt which arose before the date of the opening judgment;
— Provides an automatic stay of all actions from the date of the opening judgment;
— The opening judgment does not render a debt payable that was not due before the opening judgment; and
— Prevents the company in distress from paying the debt resulting from a loan concluded for a minimum term of a year from the date of the opening judgment.

Cons:

— Publicity of the proceedings;
— The function of the receiver is important in the management of the company (as he can either assist the management or take control);
— Sale of part or all of the assets: this allows a third-party to buy the assets without the liabilities. The sale occurs when the company is not able to present a restructuring plan.

Other restructuring techniques

1. The Mandat ad hoc (L.611-3 & R.611-18 and seq. of the Commercial Code)

Conditions for opening

The Mandat ad hoc proceeding is a flexible and confidential proceeding in which the president of the Court appoints a "*mandataire ad hoc*" to help the management reach an agreement with the creditors of the company. The Mandat ad hoc is also used to help the management find a solution when there is a subject of disagreement with the shareholders, subcontractors, or other parties.

The aim of the Mandat ad hoc is to consider solutions such as debt rescheduling, debt cancellation, re-capitalization of the company, and/or sale of part of the assets.

This proceeding only applies to solvent companies and can only be instituted by sole request of the debtor by filing a claim to the President of the Commercial court.

This proceeding ends by the conclusion of an agreement between the contracting parties or when the parties cannot reach an agreement.

Pros and cons

Pros:

— The confidentiality of the proceedings;
— No duration is provided by the Commercial code;
— The mandataire ad hoc does not have any management responsibilities and there are no restrictions on business activities;
— Directors carry on managing the company as the mandataire ad hoc only executes the mission he was appointed for (helping the directors in the negotiation with third-parties).

2. The Conciliation proceedings (L.611-4 & seq. and R.611-22 & seq. of the Commercial Code)

Conditions for opening

This is also a flexible, voluntary, and fairly confidential for companies which encounter actual or foreseeable legal, economic, or financial difficulties, and which have not been in a state of cessation of payments for more than 45 days.

The request to open the proceedings can only be filed by the company to the President of the Commercial court, who will then appoint a *Conciliateur* for a maximum period of four months (with the option to extend such period for one additional month).

If an agreement is reached, the company has two options:

— *It can request a formal court approval of the workout agreement*: this measure aims at seeking the best efforts that could be granted by the creditors. Indeed, in this situation, creditors who would have granted new money facilities will beneficiate from a statutory priority of payment should the company subsequently file for insolvency. In this case, the court will render a judgment that will be public. However, the content of the agreement will not be disclosed in the judgment.
— *The agreement can be simply certified by the President of the Court*: thus keeping the confidentiality of the agreement.

The approval and certification pronounced by the Commercial court or the President of the Commercial court render the agreement enforceable.

Pros and cons

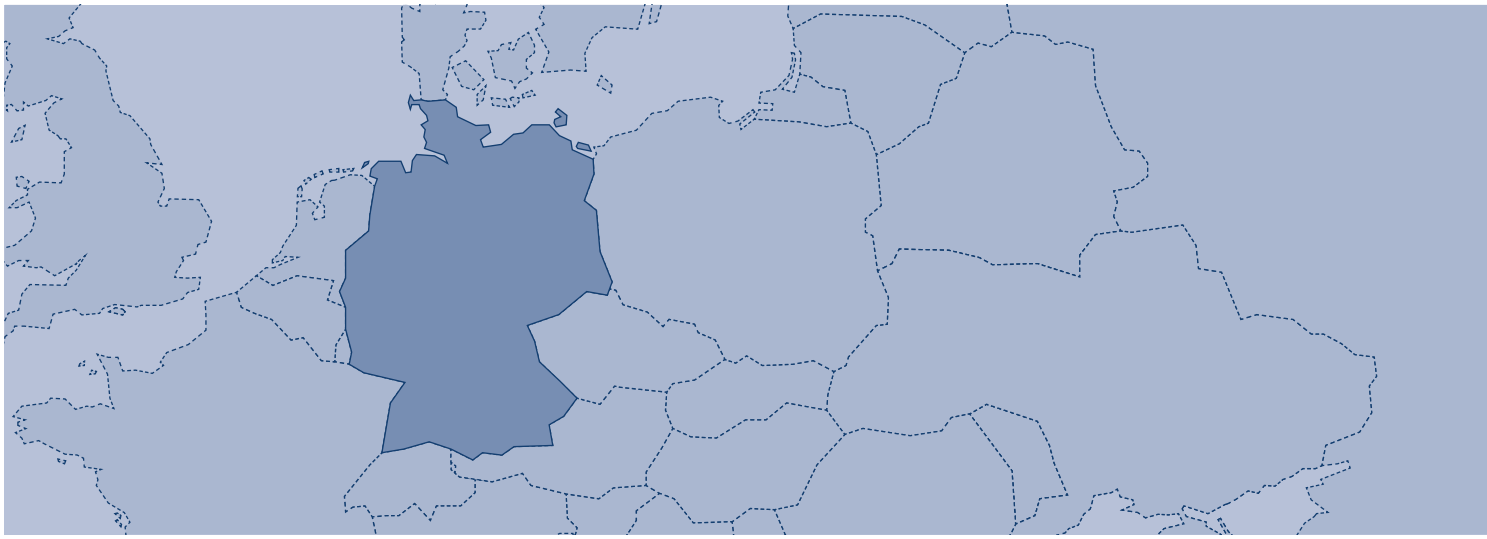
Pros:

— Confidentiality of the proceedings;
— Directors carry on managing the company as the conciliateur only executes the mission he was appointed for (helping the directors in the negotiation with third-parties).

Cons: The length of the proceedings. However, the practice consists in beginning with a Mandat ad hoc and then to carry on with a conciliation proceedings.

Success Rate

If the difficulties encountered by the company at this step cannot be overcome, judicial proceedings will usually be opened. However, from experience, we have determined that the opening of these amicable proceedings leads to a success rate of 75%.



Germany

Introduction

There are limited types of insolvency proceedings in Germany. However, a petition for insolvency proceedings may lead to a restructuring procedure or liquidation of the debtor. All insolvency proceedings are governed by the Insolvency Act (Insolvenzordnung – InsO).

1. The process of standard insolvency proceedings

Insolvency proceedings will only be initiated as a result of an insolvency application. The insolvency application can be filed by the creditor or the debtor.

Insolvency proceedings are not opened right away. On the date of the insolvency application the "preliminary" proceedings (Eröffnungsverfahren) start, and usually last for two or three months.

Subsequent to the preliminary the insolvency court will open the insolvency proceedings and designate an insolvency administrator. The registry of the insolvency court publishes the order opening the insolvency proceedings immediately. Usually all important orders are published at www.insolvenzbekanntmachungen.de.

The order opening the insolvency proceedings contains the following important information:

— In the order opening the insolvency proceedings creditors are required to file their claims with the insolvency administrator within a definite period of time.
— The insolvency court docket of meetings for a creditors' assembly.

At the creditors' assembly the decision on how to continue with the insolvency proceedings is taken based on the insolvency administrator's report. The creditors' assembly decides whether a restricting procedure or a liquidation of the debtor will be initiated.

At the end of the insolvency proceedings the creditors are satisfied jointly from the proceeds generated from realizing the debtor's assets (Quota).

Conditions for opening

Illiquidity – Section 17 German Insolvency Act: The debtor shall be deemed illiquid if he is unable to meet his obligations to pay. According to a fundamental decision by the German Federal Supreme Court (Bundesgerichtshof) the debtor's illiquidity is presumed, if he is not able to pay at least 90 percent of his due obligations during the following three weeks.

Furthermore, pursuant to section 17 paragraph 2 sentence 2 German Insolvency Act illiquidity shall be presumed as a rule if the debtor has stopped payments.

Imminent illiquidity – Section 18 German Insolvency Act: The debtor shall be deemed to be faced with imminent illiquidity if he is likely to be unable to meet his existing obligations to pay on the date of their maturity.

This opening reason aims to protect the debtor. Hence imminent illiquidity only constitutes grounds to open insolvency proceedings, if the debtor requests that insolvency proceedings are opened.

Overindebtedness (Überschuldung) – Section 19 German Insolvency Act: Overindebtedness shall exist if the assets owed by the debtor no longer cover his existing obligations to pay unless the continuation of the enterprise as a basis with according circumstances is deemed highly likely. A status is to be prepared showing the assets and the liabilities in comparison. This status is entirely separate from the evaluation under commercial law. An overindebtedness according to the commercial balance sheet may indicate an overindebtedness as defined in Section 19 German Insolvency Act, but it alone is not proof of overindebtedness.

This reason to commence insolvency proceedings relates specifically to the form of the entity. Its aim is to encourage the owners or executive bodies of the company to engage in more far-sighted and cautious financial and earnings planning.

Duty to file – Section 15 a German Insolvency Act: According to Section 15 a German Insolvency Act, the management is obliged to file for insolvency if the debtor is either illiquid or over-indebted. This does not apply if the debtor only threatens to become illiquid. This obligation relates specifically to the form of the entity.

Restructuring methods

Insolvency plan (Insolvenzplan): Insolvency plan procedure is based on U.S. Chapter 11. The intention of the procedure is that the debtor's business should continue. The satisfaction of the creditors entitled to separate satisfaction and of the creditors of insolvency proceedings, the deposition of the assets involved in insolvency proceedings and their distribution to the parties concerned, as well as the debtor's liability subsequent to termination of the insolvency proceedings may be settled in an insolvency plan by way of derogation from the regulations of the German Insolvency Act. The insolvency plan enables a wide variety of different options. Only the debtor and the insolvency administrator (who may be specifically mandated by the creditors' assembly) are authorized to submit a plan. While determining the rights held by the parties involved in the insolvency plan, groups of creditors are formed broken down by their legal status. Shareholders may build their own group and participate in the plan. The insolvency plan may include a debt-to-equity swap against the will of the shareholders. Creditors and/or shareholders may not be prejudiced as compared to a hypothetical situation.

Self-administration (Eigenverwaltung): Also based on the U.S. Chapter 11 procedure, this procedure allows for the debtor to remain in possession of the business, but requires that no facts must be known that could give rise to the assumption that creditors will be prejudiced. This may be combined with creditor protection proceedings (Schutzschirmverfahren, see below) and also follow the same rules as described in connection with the creditor protection proceedings.

Creditor protection proceedings according to § 270 b German Insolvency Act: The Law for the further facilitation of the Restructuring of Enterprises (Gesetz zur weiteren Erleichterung der Sanierung von Unternehmen, ESUG) came into force on March 1, 2012. It provides for new creditor protection proceedings that enable a debtor who filed for insolvency in self-administration to prepare a pre-packaged insolvency plan. According to § 270 b German Insolvency Act, the insolvency court may grant the debtor a period of up to three months during which the debtor may prepare and submit an insolvency plan, provided that the debtor is not yet illiquid and submits an expert opinion that restructuring by way of an insolvency plan is not evidently impossible. For the period of the creditor protection proceedings the insolvency court appoints a preliminary trustee (Sachwalter) with limited powers who mainly supervises the debtor's management. The creditor's interests are protected by the preliminary creditors' committee, which is entitled to request the insolvency court to terminate the creditor protection proceedings and to appoint a preliminary administrator if the debtor-in-possession-proceeding turns out to be detrimental to the creditors.

Success rate

Due to the recent changes in German insolvency law (ESUG), it is not yet possible to establish a success rate. However, even though the majority of insolvency proceedings is still treated in the traditional manner (liquidation/transfer of the business as a whole to a new entity by way of an asset deal), it has become obvious that, especially with large insolvency proceedings, debtors tend to choose for debtor-in-possession-procedures and try to enter into an insolvency plan.

Pros and cons

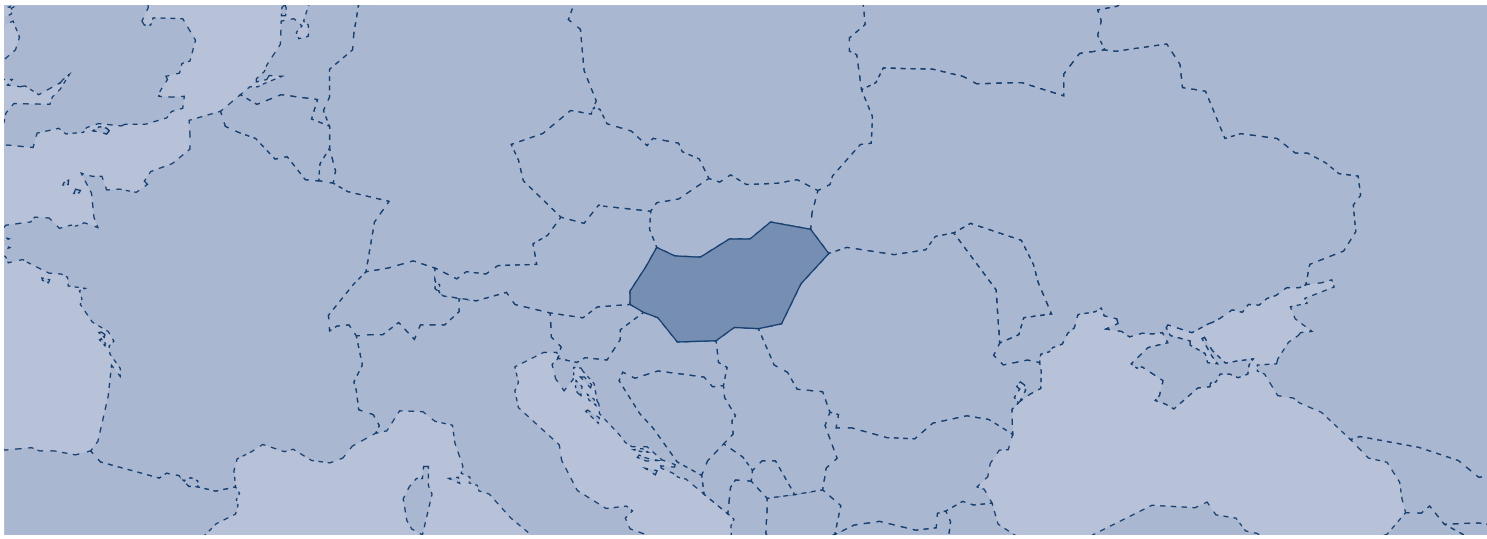
Creditor protection proceedings: Creditor protection proceedings provide the debtor the maximum level of self-reliance. The debtor remains in possession of the business and can restructure the business in a self-determined manner with the support of experts. The initiation of creditor protection proceedings is not published; hence creditors and especially suppliers will not be confronted with the word "insolvency". Upon expiry of the period granted by the court, the debtor has the possibility of presenting an insolvency plan.

However, creditor protection proceedings are both complex and expensive. The debtor has to provide a report by an independent expert stating that the debtor is not yet illiquid and that restructuring by way of an

insolvency plan is possible. An insolvency plan has to be prepared within a strict time-frame which again requires close coordination with the preliminary trustee, auditors, and/or a chief restructuring officer (CRO) of the debtor. Therefore, creditor protection proceedings are practical for rather large insolvency proceedings and ongoing, "cash-flow positive" businesses.

Self-administration: Regular self-administration still enables the debtor to remain in possession of the business, mostly supported by a special CRO, and to develop an insolvency plan. A trustee, appointed by the court, will only supervise the debtor's management. This proceeding is less complex than the creditor protection proceeding and is the most convenient procedure for medium insolvency proceedings. However, practice shows that self-administered debtors often face problems in obtaining a debtor-in-possession financing (Massekredit) from banks. In such cases, the court may grant the trustee special rights to do so.

Restructuring by asset-transfer (Übertragende Sanierung): If the insolvency administrator is able to sell and transfer the business, this is indeed, in most cases, the quickest way to satisfy the creditors. However, this option is generally the least favourable with respect to the interests of the debtors. Another issue under German law is the provision of § 613a German Civil Code (Bürgerliches Gesetzbuch), "Rights and Duties in the Event of a Transfer of Business" which stipulates that the purchaser has to take over all existing employment contracts of the debtor.



Hungary

Winding-up proceedings

1. Liquidation proceedings

In Hungarian: "*felszámolási eljárás*" mean the winding-up proceedings as referred to in *Annex B* to the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceeding (the "*Regulation*").

Conditions for opening
Please see the list of the main conditions to open the liquidation proceedings by the competent court:

— If the request is submitted:
  - *By the debtor company, inter alia, it must file the following documents with the court*:
    – The annual account or interim balance sheet prepared within three months prior to the date of liquidation request to certify that the debtor meets the insolvency test, (i.e., that the company's debts exceed its assets or that the company is not, or foreseeably will not be able to, comply with its payment obligations when they are due and the company's shareholders refuse to give an undertaking to guarantee the company's payment on time);
    – Consent of its shareholders;
    – A list of creditors; and
    – A declaration that the company does not intend to request a bankruptcy moratorium.
  - *By a creditor, it should be evidenced that*:
    – The company failed to fulfil or dispute its previously undisputed and acknowledged debts within twenty days of the due date, and failed to fulfil such debt upon receipt of the creditor's written payment notice provided that the amount of the debt exceeds HUF 200,000 (approx. EUR 670);
    – The company failed to timely fulfil a payment obligation set out in a final and binding court judgment provided that the amount of the payment obligation exceeds HUF 200,000 (approx. EUR 670);
    – A judicial enforcement procedure against the company was unsuccessful; or
    – The company failed to comply with its payment obligations set out in a bankruptcy settlement agreement made during bankruptcy proceedings.

Or the court can open the proceedings *ex officio* (e.g., if the competent court terminates the bankruptcy proceedings where no composition agreement was entered into, or if the company failed to perform its payment obligations, or at the request of the court of registration or the criminal court);

— Payment of a court fee.

If bankruptcy proceedings (which are a reorganization insolvency procedure under Hungarian law) are pending against the debtor company, liquidation proceedings cannot be opened.

Restructuring methods
There are two exit options that give an opportunity to restructure the debtor company:

— Payment of all the debts to each creditor; or
— Reaching a settlement agreement with certain majority of the creditors.

Success rate
Liquidation proceedings end up in the sale of all the assets of the debtor to satisfy creditors' claims. If the creditor's claim is secured with a pledge, this secured creditor can expect receive around 95% of the purchase price, while other creditors are highly unlikely to receive anything from the procedure as the income from the asset sale is generally only sufficient to cover the liquidation costs.

Pros and cons
Pros: From our experience, we find minimal practical benefit to liquidation proceedings.

Cons:
— Unless any of the exit options are used, the company will terminate as a result of the liquidation proceedings;
— There is no statutory deadline to complete the proceedings;
— Chance of full recovery of creditors' claims is very low;
— Certain agreements and declarations of the debtor company can be challenged by the liquidator or any creditor as a result of which agreements and declarations may be invalidated;
— The liquidator has wide-ranging power because he or she takes over the representation of the company regarding the liquidation of assets. Most of the decisions are subject to his or her discretion, although such decisions may be challenged before the court by the party affected by such decision (including the debtor, any of the creditors or the creditors' committee).

Other proceedings

1. Bankruptcy proceedings

The other proceedings are the *bankruptcy proceedings* (in Hungarian: "*csődeljárás*") listed in *Annex A* to the Regulation.

Conditions for opening
Please see the list below for the main conditions of opening bankruptcy proceedings by the competent court:
— Consent of the shareholder(s) (please note that these proceedings can be opened only at the request of the debtor company);
— The annual account or interim balance sheet prepared within three months prior to the date of the bankruptcy request;
— The list of creditors;
— Payment of a court fee.

Restructuring methods
During the proceedings, the debtor company is granted a payment moratorium to reach a settlement with its creditors. If the parties reach a successful settlement, the company can survive and avoid liquidation.

Success rate
The number of successful bankruptcy settlements is low. This might be a consequence of how these proceedings are regulated. Under the current legislation, it is difficult to reach (due to the rules regulating creditors' voting rights) and then comply with a settlement agreement (not-registered creditors often enforce their claims against the debtor and challenge settlement agreements).

Pros and cons
Pros:
— Debtor company can restructure its debts and survive;
— Management remains in place and will be monitored by a court appointed administrator.

Cons:
— Debtor company can win time or "misuse" with the payment moratorium (120 days which can be extended for a maximum period of 365 days);
— The settlement agreement binds each creditor – in practice, has resulted in large creditors losing a significant portion of their claims (e.g., 90%) due to the current regulations (the method under which the voting classes must be set up).

Other restructuring techniques

Although a debt settlement procedure, which is applicable only to Hungarian municipalities (i.e. local governments, in Hungarian: *önkormányzatok*), is a regulated insolvency procedure, it has not been listed in the Annexes of the Regulation. This procedure offers the possibility for Hungarian municipalities to restructure their debts and reach a settlement with their creditors. Therefore, in terms of municipalities, this procedure can be regarded as a regulated insolvency procedure.

Under Hungarian law, restructuring tools (except for those which bankruptcy proceedings may offer) are not regulated. However, this does not prevent the parties from making an agreement on a contractual basis using general Hungarian civil law.

Dealing with restructuring happens on an ad-hoc basis in Hungary. Also, in syndicated deals banks we usually do not see a common platform for restructuring.

Restructuring techniques most commonly used in Hungary:

— Get more security;
— Delegate board observer;
— Haircut;
— Debt-to-equity swap;
— Joint sale and sharing of income.

Budapest Rules have been recently adopted by the Banking Association – these rules are a non-binding set of principles together with template documentation for those banks who accept such rules.

Italy

Winding-up proceedings

1. Bankruptcy ("Fallimento")

Conditions for opening
Bankruptcy is regulated by the Royal Decree no. 267 of 1942 ("Italian Insolvency Law") and consists of a procedure applicable to distressed companies aimed at liquidating all assets. The procedure does not apply to public entities, which are subject to different measures.

Bankruptcy applies to insolvent companies, i.e., companies which are no longer able to regularly meet their obligations. A company cannot be adjudicated bankrupt unless the following conditions jointly apply: (a) the company assets value in the last three fiscal years does not exceed Euro 300,000.00; (b) the gross income of the last three fiscal years does not exceed Euro 200,000.00; and (c) the overall amount of debts, including those not yet expired, does not exceed Euro 500,000.00.

Creditors, the public prosecutor, or the debtor itself are entitled to file the request of bankruptcy to the competent Court (that of the place where the company has its legal seat). The Court will assess the existence of the conditions set forth by law, declare the bankruptcy of the company, appoint a receiver (*curatore*) in charge of the management of the company's assets and their liquidation, appoint a delegated judge (*giudice delegato*) in charge of supervising the whole procedure, and certify a creditors' committee (*comitato dei creditori*) which is given certain functions mainly consisting of the protection of creditors' interests.

Restructuring methods
The aim of bankruptcy is to liquidate the business and distribute the proceeds among all creditors, according to their preferential rights.

The company may also be authorised by the Court, with prior consent of the receiver, the Delegated Judge, and the creditors' committee, to temporary continuation of the business or to the rent of the business (or specific branches of same), to be managed by the receiver, provided that said continuation is beneficial to the creditors.

Please note that as a general rule, in case of contracts not yet completely performed, the declaration of bankruptcy triggers their suspension until the receiver – having been authorized by the creditors' committee – expresses its intention to succeed in the contract (various provisions of Italian Insolvency Law regulate the continuation or termination of specific contract types).

Typically, following the declaration of bankruptcy, the company is no longer entitled to dispose of its assets and creditors cannot start or continue enforcement or ad interim procedures against the bankrupt company.

Please note that non-gratuitous acts performed within 6 months or one year, depending on the case, before the declaration of bankruptcy, are subject to claw-back actions in order to preserve the creditors interest and to avoid the risk that the debtor cleans out all company assets before the bankruptcy procedure commences.

During the proceedings, a set-off of credits and debts is allowed.

Throughout the bankruptcy procedure, creditors, or even a third party, can propose an agreement for the settlement of the debts, which need to be approved by the majority of creditors and the Delegated Judge being then binding for all creditors.

Such agreements may provide for different treatment of creditors belonging to different classes, or restructuring of debts through any method, including through the sale of assets, or other extraordinary transactions, such as awarding creditors stocks, shares, or bonds, including those convertible into shares, or other financial instruments and debt securities.

Success rate
There is no real concept of success rate in the course of a bankruptcy procedure: the beginning of the procedure always leads to an end through a decision issued by the Judge. The success rate in terms of credit recovery is scarce for unsecured creditors (estimated approximately at 5-10% of original credit) and significantly higher for secured creditors, which must be normally fully repaid according to their title of privilege at least within limits of titles and privileges.

Pros and cons
Pros: The pros are limited to the fact that bankruptcy is a court-driven procedure, theoretically ensuring that no funds/proceeds/assets are diverted from creditors (though, in practice, long procedures involve high costs for custodians, bailiffs, the receiver, and other ancillary bodies linked to the procedure).

Cons: Bankruptcy contains more cons than pros, considering that certain cases could require time-consuming procedures lasting up to 20 years, and that the final distribution to creditors is normally very limited.

2. Compulsory administrative liquidation ("Liquidazione coatta amministrativa" – LCA)

Conditions for opening
The compulsory administrative liquidation is a procedure applicable to companies subject to public control and operating in a public interest sector (e.g., insurance companies, investment companies, banks, etc.), which are excluded from bankruptcy proceedings.

The LCA procedure applies to companies which are insolvent, have breached legal provisions of serious relevance, or whose conduct threatens the relevant public interest.

Since the scope of LCA is to protect not only the creditors, but above all, the public interest, the supervising Authority plays the same role in an LCA as is played by the Court in bankruptcy procedures; controlling the course of the entire procedure.

Insolvency of the company is stated by the Court, following a request filed either by the company itself, the relevant supervisory authority, or the creditors. The Court may even issue provisional measures aiming at protecting creditors before the opening of the procedure is formally declared.

Restructuring methods
The declaration of LCA by the relevant supervising authority is published within the following 10 days on the Official Gazette and filed at the Companies' Register. Following the LCA declaration, corporate bodies' functions are suspended, asset management can no longer be performed directly by the companies, and any acts and payments made after the publication of the decree which disposes the compulsory administrative liquidation are considered ineffective.

The procedure also involves a liquidator Commissioner and a board of surveillance, in charge of replacing the entrepreneur in the management of the corporate assets and for the performance of all operations necessary for liquidation and termination of the business under the coordination of the supervisory authority.

Success rate
Many companies in financial difficulty choose to mask the crisis by modifying the data contained in the accounting documents and continue to operate even in the presence of a distressed financial position. As a consequence, creditors cannot rely on high protection of their credits.

Pros and cons
There is no real concept of pros and cons in the course of LCA procedures. The recourse to such procedure is not an option for the relevant company, and represents, instead, a necessary measure which the company is subject to.

Insolvency Proceedings

1. Arrangement with creditors ("Concordato Preventivo")

Conditions for opening
Concordato preventivo is a court-driven procedure regulated by the Italian Insolvency Law that aims at avoiding bankruptcy for companies in distress, through an agreement between the debtor and its creditors (creditors might be divided into classes in respect with the nature/title of their relevant credits). Said agreement is reached through a plan approved by the majority of creditors and confirmed by the Court.

The plan is filed together with relevant documentation, including a report by an "expert" opinion concerning the reasonableness of the plan, the truthfulness of the company's accounting data, and the feasibility

of the restructuring plan. The *concordato* proposal must be approved by the majority of creditors and secured creditors are not entitled to vote unless they waive their privilege. The plan approved and confirmed by the Court is compulsory for all creditors whose claims arose prior to the filing of the proposal. No enforcement or ad interim measures can be started or continued by creditors after the distressed company's filing of the request for a *concordato* procedure.

Restructuring methods
The Concordato procedure may be structured as liquidation of assets or a continuation of the company's business and may involve leases, rentals, or sales of branches of business. Throughout the procedure, the debtor is entitled to manage the company's assets and to carry on business under the supervision of the Court. Actions and payments performed in execution of a confirmed concordato plan are not subject to claw-back actions.

Particular conditions are required if the concordato proposal provides for the continuation of the business. Notably, the plan must contain an analytic description of costs and profits predicted for the continuation of the business and the required financial needs and the relevant coverage. The expert report must confirm that the continuation of the business will enable the repayment of the company's creditors and the plan may contain a moratorium of up to one year from its confirmation by the Court for the repayment of creditors holding privileges, pledges, or mortgages. If the company does not follow the concordato plan, the distressed company will undergo bankruptcy.

Success rate
The success rate of concordato procedures is slightly higher than bankruptcy with respect to percentages of repayment normally achieved by creditors. Nonetheless, such payments remain low in the case of unsecured debts.

Pros and cons
Pros: The pros of concordato consist of the possibility of avoiding bankruptcy – at least partial – repayment to creditors and in having a Court-driven procedure. Furthermore, courtesy of recent amendment, companies are now allowed to file a so-called "blank application", which must include a record of all creditors and their relevant claims, and supply the Court with all required documentation, together with the restructuring plan, at a later stage. From the filing of the application creditors cannot start or continue ad interim or enforcement actions until the Court has officially rejected the company application. This new option allows a company to restructure its business by providing a simplified procedure which protects the company's assets while helping it avoid bankruptcy.

Cons: The cons consist of the risk of bankruptcy, which is declared when the plan is not confirmed or when the company fails to comply with the confirmed plan.

2. Extraordinary administration ("Amministrazione straordinaria")

Conditions for opening
Extraordinary administration, regulated by Legislative Decree no. 270 of 1999, allows for firms employing more than 200 employees, having a concrete possibility of recovering from economic distress, and having debts exceeding two-thirds of the company total assets as of the profits of last year, to benefit from a particular procedure which takes into account the significant commercial, productive, and employment value of the company.

Restructuring methods
The restructuring of the business is carried out by an Extraordinary Commissioner acting under the supervision of the Ministry of Industry and Commerce for a maximum period of five years.

The activity aims at reorganizing the business through a restructuring plan – supposing that the Extraordinary Commissioner asserts the possibility of recovery from the company's financial distress – otherwise the procedure turns into bankruptcy.

The application for extraordinary administration is submitted to the Court where the company has its registered office. After having verified all requirements provided for by law and after having heard the parties concerned, the Court declares the insolvency status and issues a judgment which must be published and notified to the relevant Ministry of the Economic Development.

The recovery can take place through different solutions: by the sale of the business, on the basis of a continuing business program for a period not exceeding one year, by the economic and financial restructuring of the company, on the basis of a rehabilitation program lasting no longer than two years, and, for companies operating in the field of essential public services, through the sale of whole assets and contracts, on the basis of a continuing business operation of the company for a period not exceeding one year.

If the company is part of a group of companies, the Commissioner can submit a request for the admission of other insolvent companies belonging to the same group to the Ministry of the Economic Development by filing with the competent Court an application for the assessment of insolvency status.

Success rate
The majority of the companies applying this procedure recovered by being sold to third parties.

This procedure has raised several problems in supporting and rehabilitating big insolvent companies. In fact, a faster procedure is made available to companies having at least 500 employees and a debt of at least EUR three hundred million. The purpose is continuation of the business by restructuring the business' debt through the sale of assets which are not strategic for the continuance of the business.

Pros and cons
Pros: Due to the important role played by the state, this procedure is able to provide a very high protection to the public interest to the detriment of the efficiency of the procedure in terms of creditor protection.

Other Restructuring Techniques

1. Arrangement for debts restructuring ("Accordi di ristrutturazione")

Conditions for opening
The agreements for debts restructuring are an out-of Court procedure regulated by art. 182-bis of the Italian Insolvency Law for companies facing crisis but not yet considered insolvent.

Restructuring methods
The agreement on debt restructuring proposed by the company must be approved by at least 60% of the creditors (in terms of value), and will be binding only for those creditors who participate in the agreement, though it must ensure the full repayment of all creditors which did not take part in the agreement. It is also required that the payment of the creditors not party to the agreement must occur (i) within 120 days from the date of the Court confirmation, if such claims are overdue; or (ii) within 120 days from their maturity date, in case of claims not yet due at the confirmation date.

Once the agreement is approved following its publication in the Companies Register, together with a report of an expert attesting its feasibility, it becomes fully effective. The plan also needs to be confirmed by the Court in order to obtain additional legal effects. From the publication in the said registry, any enforcement action taken by the creditors is suspended for the following 60 days and no new actions can be started.

The applying company is allowed to obtain loans in the course of the procedure if an expert ascertains that they serve the restructuring of the company and the repayment of creditors. All transactions and payments carried out or granted pursuant to a debt restructuring agreement approved by the Court are not subject to claw-back actions.

Success rate
Success rate of the arrangements for debt restructuring depends on the solidity of the plan and of the underlying expert's report.

Pros and cons
Pros: The possibility exists to finalise an arrangement not requiring 100% creditor consent, and to have an out-of-court procedure (the Court has to confirm the plan with less stringent requirements as compared to concordato preventivo). Furthermore the Judge, by means of a decree, can order the creditors to suspend any new or already started enforcement action for 60 days.

Cons: the necessary publicity of the agreement at the Companies Register and the lack of constant Court supervision.

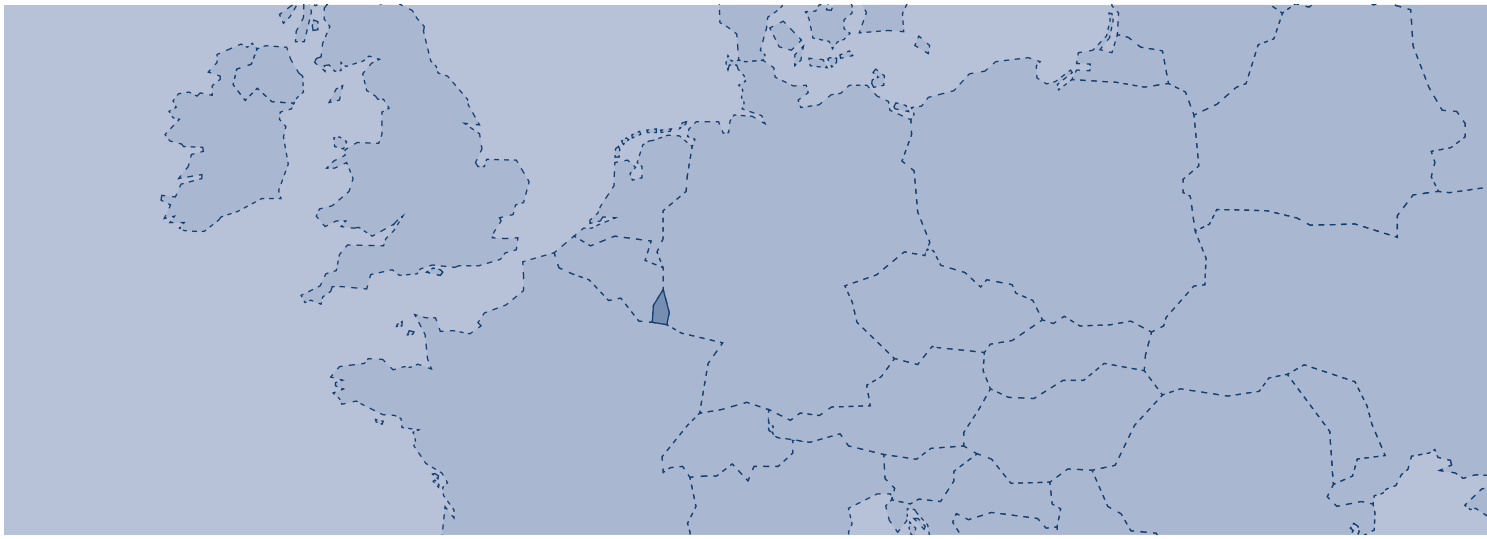
2. Certified recovery plans ("piani attestati di risanamento")

Conditions for opening and restructuring methods
Certified recovery plans provided for by art. 67 of Italian Insolvency Law consist of out-of-court procedures aiming at rebalancing the financial situation of the company. The plan is drafted by an independent expert appointed by the company and must respect certain strict requirements. The expert must indicate in the plan the measures that the company intends to undertake in order to sort out its financial difficulties. Furthermore, the expert must attest to the truthfulness of the company's accounting data as well as to the restructuring plan's feasibility. The expert could potentially incur criminal liability for a false certification and report.

The plan, if approved, will be published in the Companies' Register upon request of the applying company. All actions performed, the payments made, and securities granted by the distressed company in the course of the plan are exempted from claw-back actions.

Pros and cons
Pros: Pros of this technique consist primarily in the reduced timing and the possibility to avoid the disclosure of a restructuring procedure of the company to the public, given that no Courts are involved nor are any third parties are informed through publicity.

Cons: Cons consist in the responsibility of obtaining an expert to draft and attest to the plan and in the lack of intervention of a Court to supervise the procedure. Also, the intervention of the expert could comprise high costs.



Luxembourg

Winding-up proceedings (Annex B to the Council Regulation)

1. Bankruptcy (articles 437 et seq. of the Luxembourg Commercial Code (Code de Commerce))

Conditions for opening
The conditions of opening of bankruptcy proceedings are set out by article 437 et seq. of the Luxembourg Commercial Code:

The company will be declared in bankruptcy under three cumulative conditions: (i) the company is listed as a commercial company according to the Luxembourg law on commercial companies dated 10 August 1915, as amended (the "Company Law"); (ii) the company is in a situation of a persistent cease of payments, i.e., an inability to pay its debts as they become due; and (iii) the creditworthiness of the company is in jeopardy, i.e., the company is unable to raise credit.

The procedure can be initiated by the Court upon a declaration made by the directors of the company, by an unpaid creditor, or by the Court acting on its own initiative.

The court appoints a bankruptcy administrator in order to locate and liquidate the assets of the company and, if possible, to distribute the proceeds of the sale of assets to the declared creditors of the company. Any surplus after these distributions to creditors will be distributed to the shareholders.

Restructuring methods
This procedure is very rarely in use and is advantageous for creditors only.

Success rate
The success rate of such procedure is very high among the creditors. Indeed it is very easy to put a Luxembourg company into bankruptcy due to the fact that the conditions of insolvency are easily fulfilled.

Pros and cons
Pros: The pros such procedure serves the creditors to recover their claim quickly. As the procedure is not a written procedure in the first instance, the judgment on the insolvency can be quick in comparison to other jurisdictions.

Cons: The cons – in such procedure are the existence of a potential director's liability due to the faults that have directly contributed to the bankruptcy. The insolvency administrator and the Court normally examine business transactions undertaken in the period of up to six months before the date that the Court states the bankruptcy.

It is worth mentioning that there is a draft bill no. 6539 on business preservation and modernization of the bankruptcy law which was introduced in the Chamber of Deputies on 1 February 2013. The aim of this draft is to introduce in Luxembourg Law the preventive and restorative measures.

The draft bill no. 6539 is currently under review.

2. Special regulations for the liquidation of a public notary (Law of 31th December 1938, as amended)

Conditions for the opening
This special regulation, which is very rare, is granted under the condition that the notary's creditworthiness is compromised. This procedure can also be requested in case the notary is no longer able to fulfil their obligations.

The notary or the creditor must file a request to a special body called the Management Board which was instituted by the Law of 1938. The Management Board will then analyse the request, the notary must file an application, and the Court will then analyse such application and assess the financial situation of the notary.

Restructuring methods
Not applicable.

Success rate
As the procedure is very rarely used, information concerning its success rate is not available.

Pros and cons
This procedure does not represent an interest with respect to restructuring a company as it involves only the patrimonial situation of the notary.

Insolvency proceedings (Annex A to the Council Regulation)

1. Composition with creditors (Law of 14th April 1886, as amended)

Conditions for opening
The composition with the creditors may be granted in a situation where, although the company faces financial difficulties, there is a chance that it will recover.

The director of the company must file an application, upon which the Court will then analyse the business situation of the applicant and produce a report. The court then grants a suspension period to the company in order to allow the company to draft a reorganization plan that will be submitted for approval by the majority of creditors representing half of all sums owed and due.

Restructuring methods
Not applicable.

Success rate
The success rate is quite low, often followed by a bankruptcy.

Pros and cons
Pros: The pro of such procedure is that management remains in place in the company. This procedure is often requested in order to favour the most important creditors and to guarantee continuity of company activities.

Cons: The con of such procedure is that the creditors' rights often are neglected, which can lead to abuses.

2. Controlled Management (Grand-ducal decree of 24th May 1935)

Controlled Management is a procedure which is not often used in Luxembourg.

Conditions for opening
The conditions for opening are laid out by the Grand-ducal decree of 1935 which state that Controlled Management can be requested under the condition that the creditworthiness of the company is compromised and that there is a real possibility of recovery although the company faces financial difficulties. Therefore, the prospects of reorganization should be real.

The director of the company must file an application, whereupon the Court will analyse the business situation of the applicant and will release a report; if the application is accepted and the report convincing, the court will appoint one or more administrators who shall supervise the management of the company and draft a project plan of reorganization.

Restructuring methods
Not applicable. This procedure is very rarely used in Luxembourg.

Success rate
The procedure is very rare and the success rate is quite low, often followed by a bankruptcy.

Pros and cons
Pros: The pro of such procedure is that the management remains in place in the company under the control of one or more commissaires.

Cons: The con of such procedure is that the responsibility of the administrators appointed by the court can be engaged.

Other restructuring techniques

1. Suspension of payment (article 593 ff. of the Luxembourg Commercial Code)

Conditions for opening
The conditions for the opening of the suspension of payment is given by the article 593 ff. of the

Luxembourg Commercial Code which allows the procedure of suspension of payment under the conditions that the creditworthiness of the company is compromised and the company faces a temporary liquidity crisis – this does not necessarily mean a cease of payments.

The suspension of payment can also be granted in the absence of the conditions of "insolvency", e.g., in case the ability of the company to meet its payment obligations is compromised.

The balance sheets of the company must show that the company still has enough assets to satisfy its creditors both in respect of the principal and the interest to be paid.

In order to benefit from the procedure of the suspension of payment, the director of the company must file an application, upon which the court will grant a suspension of payment if the majority of creditors (representing at least two-thirds of the sums owed and due) agree, and will then fix a period of time for the suspension of payments and appoint one or more commissaires to supervise the management and control all operations of the company during the period of time the suspension of payments lasts.

Restructuring methods
Not applicable. This procedure is very rarely used in Luxembourg.

Success rate
This procedure is very rare and the success rate quite low, often followed by a bankruptcy.

Pro and cons
Pros: Management remains in place in the company.

Cons: Not applicable.

2. Voluntary liquidation / Judicial liquidation (article 203 of the Company Law)

Under Luxembourg Company Law, there are two types of liquidation: voluntary liquidation and judicial liquidation.

Conditions for opening
In order to commence a voluntary liquidation, approval at a majority of 2/3 of the shareholders representing at least half of the share capital of the company is required for public limited companies. In case of a judicial liquidation the procedure is launched by the Court.

The common feature of both the judicial and voluntary liquidation is the appointment of a liquidator. Indeed the shareholder and/or the Court appoint a liquidator in order to liquidate the assets of the company and distribute the proceeds of the sale of assets to the creditors of the company, with any surplus distributed to the shareholders pro rata.

Restructuring methods
Voluntary liquidation is used in Luxembourg fairly often and is usually done by way of the following three steps:
- A first Extraordinary General shareholders' Meeting (EGM), held in front of a Luxembourg notary public, decides, among other things, on the winding-up of the company and appointment of the liquidator. The liquidator prepares a detailed report concerning the assets and liabilities of the company.
- A second EGM is held during which the liquidator provides an oral or written report on his activities and a liquidation auditor (commissaire), who will verify the mission of the liquidator, will be appointed.
- A third and final EGM is held through which the shareholders resolve to discharge the liquidator and the auditor and close the liquidation.

Success rate
The voluntary liquidation has a high success rate as the main features of this procedure are decided by the company. On the contrary, the judicial liquidation has a moderate success rate as the main features of the procedure are decided by the liquidator appointed by the Court.

Pros and cons
Pros: Voluntary liquidation has a better image than a bankruptcy. Such procedure is often used with financial holding companies.

Cons: A judicial liquidation procedure may create problems for later business activities, i.e., it may impact the possibility of obtaining a business license which might be needed for managing the commercial activities of a new company.

The Netherlands

Winding-up proceedings

1. Bankruptcy

Bankruptcy proceedings focus primarily on the liquidation of debtor's assets. Contrary to the suspension of payment, bankruptcy proceedings aim to achieve a liquidation of debtor's assets on behalf of all the creditors.

Conditions for opening
Bankruptcy can be filed when a company cannot continue paying its debts. The court can declare the company bankrupt at the request of the company itself or at the request of one or more of the company's creditors. The company must leave at least two creditors unpaid. There is no obligation on the company to file a request for bankruptcy when it foresees that payment of its debts will become impossible, an obligation common in other jurisdictions. However, the company does have the obligation to inform tax and social security authorities when it is unable to pay its debts. Additionally, company directors may be exposed to personal liability if they fail to take appropriate steps when the company is unable to pay its debts.

The bankruptcy effects a general attachment on all existing and future assets of the debtor on behalf of all creditors. The general attachment replaces any previous attachments of individual creditors. The rights of pledgees and mortgagees remain unaffected. Only the appointed bankruptcy trustee is entitled to act on behalf of the bankrupt debtor, who does not have the assets at its disposal.

Restructuring methods
As under the moratorium regime (set out below) the debtor has the opportunity to propose a composition to its creditors.

In some cases, a reorganization is prepared in detail prior to the company's filing for bankruptcy. Once the company has been declared bankrupt and the trustee has been appointed, the company offers the trustee a reorganization plan by way of an asset-transaction. If planned carefully the trustee may not have many other options and could be inclined to cooperate. This type of reorganization will often be executed in close cooperation with the bank or financial institution which holds security rights on all major assets of the company. The secured creditors' cooperation is therefore essential for the success of the reorganization.

However, most bankruptcies do not lead to restructuring of the company. In most cases, the bankruptcy trustee will sell all the assets of the company and the proceeds will be divided amongst the creditors in order of their priority. Creditors with preferential claims will be the first to receive payment. In many cases, there are no bankruptcy proceeds at all or the bankruptcy proceeds are not enough for full payment of all the creditors. In that situation, the proceedings terminate due to lack of assets or through finalizing the distribution list. The company will cease to exist if the bankruptcy proceedings end. Only when a composition with creditors can be arranged the company will continue to exist.

Pros and cons of this specific proceeding
Pros: One of the most important advantages of restructuring through a bankruptcy is that there will not be an obligation to maintain contracts, for example, with employees. Costs can be easily reduced.

Cons: Disadvantages are the 'stigma' of bankruptcy and the fact that the company's' activities will not be performed for a certain period of time.

Director's liability
Director's liability has to be taken into account as well. There are several ways that a director can be held personally liable for the company's debt after it has entered into bankruptcy proceedings. A distinction should be made between liability towards the company and liability towards third parties.

If the company is unable to pay certain taxes or social premiums it must notify the relevant authorities of its inability. In the absence of such notification, or if the inability to pay is caused by apparent negligence of the management board, the managing directors are jointly and severally liable for the relevant taxes and social premiums. If the company is declared bankrupt, the managing directors are personally liable for the deficit in bankruptcy if the bankruptcy is, to a significant extent, caused by the apparent negligence of the management board during a three-year period prior to the date of bankruptcy. If the company has not kept proper financial records or has not filed its annual accounts with the trade register in a timely manner, there is a binding presumption that there has been apparent negligence and a further presumption that such apparent negligence has to a significant extent caused the bankruptcy.

An important legal basis for liability of the managing directors towards third parties is tort. Creditors of the company, for example, may hold a managing director liable on the basis of tort if he or she entered into a transaction on behalf of the company when he or she knew (or reasonably should have known) that the company would not be able to fulfil its obligations under that transaction.

Other proceedings

1. Suspension of payment

The suspension of payment, or moratorium, pursuant to the Dutch Bankruptcy Act is a general suspension of payment for ordinary (unsecured and non-preferential) creditors for a certain period of time. The suspension of payment is intended to give the debtor temporary relief from actions of certain categories of creditors and enable the debtor to propose a composition to its creditors. The procedure can be used to reorganize the business of the debtor and is intended to prevent bankruptcy proceedings.

Conditions for opening
The debtor will seek protection from the District Court of its registered seat to grant a suspension of payment for a certain period. The assistance of an attorney is required to file the petition. In the petition order, the debtor will state that, for the time being, it is not capable of paying its debts but that in the foreseeable future it expects to be able, at least partially, to pay its creditors.

Only the debtor can file a petition for suspension of payment. The petition should be signed by the directors of the debtor and the debtor's attorney. It should include information regarding the creditors of the debtor and the debtor's latest financial statements. The petition can also already include a proposal for a composition to the creditors.

The District Court will immediately grant a provisional suspension of payment for a limited period of time and an attorney will be appointed as administrator. The administrator must administer the debtor's business during the moratorium and pay attention to the rights and interests of all the parties affected by the moratorium. When granting the provisional moratorium, the District Court sets a date for a hearing of creditors in order to decide whether to grant a definite moratorium order. At the meeting of creditors, a vote takes place on the final granting of the moratorium. If a certain majority is not reached, continuation of the moratorium will be refused and the District Court will generally declare the debtor bankrupt.

Restructuring methods
The moratorium suspends all litigation by unsecured and non-preferential creditors against the debtor and stops the enforcement of judgments by such creditors against the debtor. The debtor needs the cooperation and consent of the administrator to act in relation to its assets. On the other hand, if the administrator wants to act on behalf of the estate, he needs the cooperation of the debtor as well.

The most important restructuring method in the suspension of payment procedure is the composition with creditors. In principle, consent of all the creditors is required. The debtor cannot force a creditor to accept a proposal for a composition. Most of the time the composition implies a partial payment of the creditors' debt and a discharge of the debtor for the remaining unpaid part of the debt. The Dutch Bankruptcy Act also offers the debtor the possibility of proposing a composition. When approved by at least 50% of the

creditors holding at least 50% of the debtor's debt, this majority can overrule a minority of creditors. Although the creditors with security rights and the creditors with preferential claims are not affected by the moratorium and are not entitled to vote for the composition, the debtor and administrator normally negotiate with these creditors. For example, tax and social security authorities are generally willing to accept the composition if they receive payment of twice the percentage that the ordinary creditors receive.

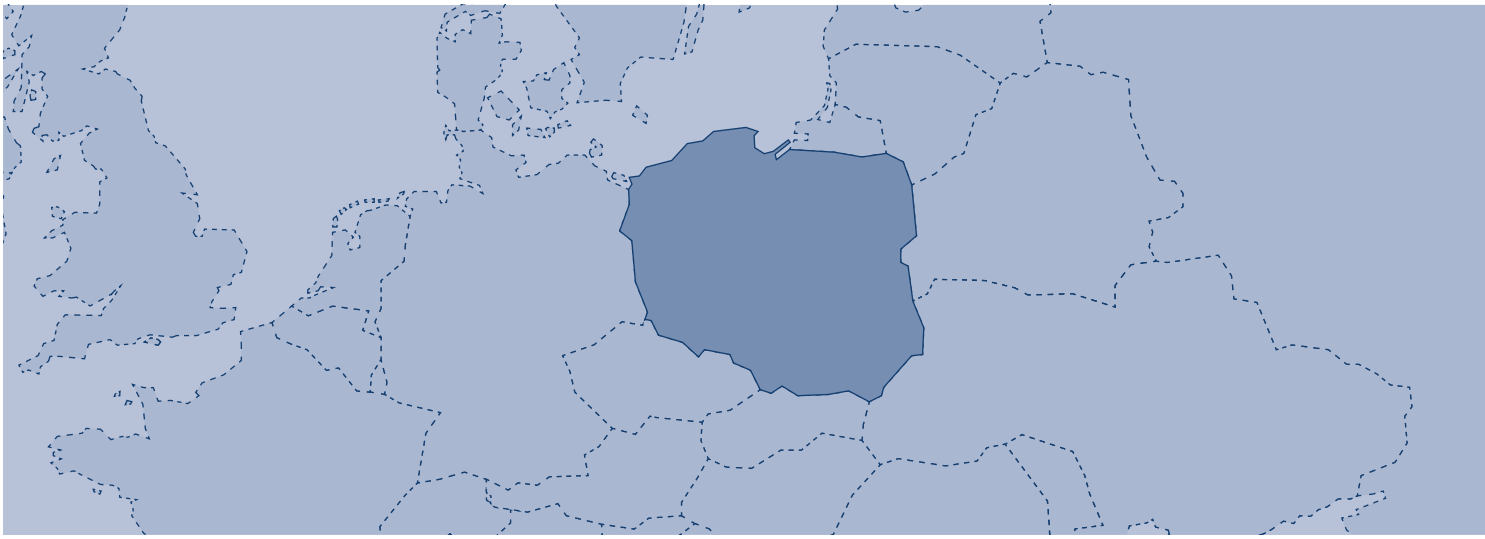
Success rate
Most of the time, the suspension of payment will not be the restructuring method that companies desire. Most suspensions of payment are followed by formal bankruptcy proceedings. In general, the suspension of payment is not to be considered successful at all.

Pros and cons of this specific proceeding
Pros: One of the most important advantages of the suspension of payment is, when it can be realized, the possibility to offer creditors a composition.

Cons: The main disadvantage of the suspension of payment is that it only offers protection against the claims and actions of unsecured and non-preferential creditors. Creditors with security rights (such as a right of pledge) and creditors with preferential claims (such as tax and employees rights) may still attempt to have their debts paid despite the suspension of payment.

Other restructuring techniques

Next to the bankruptcy and suspension of payment proceedings, an informal reorganization may be a viable restructuring technique. For example a private composition with creditors may be arranged. The bank or financial institution will have to cooperate and confidentiality is very important. All the creditors have to consent to a private composition or they are not bound by the composition.



Poland

Restructuring possibilities in Poland currently and planned reforms

The law currently in force in Poland (i.e., the Bankruptcy and Reorganization Act dated 2003, further the "Bankruptcy and Reorganization Law") allows for the restructuring of an entity facing financial crisis only to a very limited extent. In practice, the available legal institutions are perceived as either unachievable or not fit for their purpose. Entrepreneurs wishing to improve their position with creditors generally do not have the legal means to reach quick compromises, facilitate proper economic actions, or adjust business activity in a dynamic manner.

1. Current possibilities

Reorganization proceedings

The basic procedure set out in the Bankruptcy and Reorganization Law, which was supposed to enable entrepreneurs to carry out a restructuring, was the reorganization proceedings ("postępowanie naprawcze"). They can be initiated only by entities threatened with insolvency, namely those which despite discharging their liabilities will soon become insolvent. When the Bankruptcy and Reorganization Law came into force in 2003, the Polish legislature assumed that the reorganization and bankruptcy proceedings should be separated, i.e., that an entrepreneur can either be an entity threatened with insolvency (in which case, the debtor may institute the reorganization proceedings) or already insolvent (in which case the debtor should file a petition in bankruptcy).

For the purpose of commencing the reorganization proceedings the debtor needs to file with the court a statement on the commencement of the reorganization proceedings, as specified in the Bankruptcy and Reorganization Law, together with – among other items – a restructuring plan. The debtor may commence reorganization proceedings unless the court objects to the commencement of such proceedings within 14 days from the filing of the debtor's statement on the commencement of the reorganization proceedings.

As of the day of initiating the reorganization proceedings:
- Repayment obligations of the debtor's liabilities are suspended;
- Accrual of interest due from the debtor is suspended;
- Set-offs by creditors with respect to the debtor's liabilities may be made only on the terms and conditions specified in the Bankruptcy and Reorganization Law; and
- No court enforcement proceedings or proceedings to secure the creditors' claims can be initiated against the debtor, and those initiated previously are suspended by law.

The reorganization of the debtor's business is implemented through an arrangement with the creditors. Possible restructuring scenarios are the same as in the case of bankruptcy proceedings aimed at an arrangement, described below. Creditors whose claims are included in the list of claims, as well as creditors who are not included in that list but who have claims in amounts not denied by the debtor, may participate in the creditors' meeting and in voting on the arrangement.

The arrangement is adopted if the majority of creditors participating in the meeting and having at least two-thirds of the total value of claims vote

in favour of the arrangement. Once approved by the court, the arrangement binds all creditors that were notified of the creditors' meeting at which an arrangement was adopted, and those who notified the court supervisor of their participation and whose claims were not denied by the debtor.

The reorganization proceedings are discontinued by virtue of law if the arrangement has not been concluded within three months (with respect to "small" and "medium" debtors) or within four months (with respect to other companies) from the date of initiating the proceedings.

— Practical significance of the reorganization proceedings

  The practice of the past ten years during which the Bankruptcy and Reorganization Law has been in force, has shown that the significance of reorganization proceedings in business transactions has proven to be less than symbolic.

  The Bankruptcy and Reorganization Law clearly states that the debtor is considered insolvent if he does not pay his debts as they become due and payable. Therefore, according to the current legal status, an entity is insolvent if it does not discharge its liabilities owed to two creditors. As a result, it should be stated that the meaning given to the "insolvency" in the Bankruptcy and Reorganization Law is very different from the common understanding of that term. The Legislature defined insolvency in such broad terms that it applies to a great number of business entities. Having this legal structure in place, the courts usually will not allow entrepreneurs to conduct a reorganization, indicating that the entity is already insolvent and should therefore file the petition for bankruptcy announcement instead.

  Another obstacle to institution of reorganization proceedings are formal requirements concerning the statement declaring commencement of such proceedings and the high complexity of documents and declarations filed together with the petition in bankruptcy. In practical terms, filing a petition without formal defects (the condition for the institution of the proceedings) is only possible with the help of an experienced professional attorney.

Bankruptcy aimed at arrangement with creditors
Another restructuring option provided by the Bankruptcy and Restructuring Law, is the arrangement with creditors within the bankruptcy proceedings.

The Bankruptcy and Restructuring Law provides for two types of bankruptcy: liquidation and bankruptcy aimed at an arrangement with creditors. A court will declare bankruptcy aimed at an arrangement when it is probable that creditors would be satisfied to a greater extent through the arrangement than through the liquidation of the estate. Further, if during the course of liquidation proceedings, grounds for bankruptcy for the purpose of an arrangement arise (i.e., it is credibly established that creditors will obtain more relief under an arrangement than they would through conducting bankruptcy proceedings including liquidation of the debtor's asset), the court may change its ruling and allow bankruptcy proceedings aimed at an arrangement.

The debtor or creditors may initiate these proceedings by formally filing a bankruptcy motion and presenting the restructuring proposals. In the course of the proceedings, i.e., when the bankruptcy aimed at an arrangement with creditors is announced, the debtor remains a debtor-in-possession, and manages and administers its property, supervised, however, by a court-supervisor ("nadzorca sądowy"). In some cases, the management and administration of the debtor's estate may be vested in a receiver ("zarządca") appointed by a court and the debtor may be deprived of its management rights.

As a general rule, an arrangement covers all debts due before the date of declaration of bankruptcy, apart from secured creditors' claims and claims arising under an employment relationship, if the creditors did not consent to cover their claims by the arrangement. These claims must be satisfied notwithstanding an arrangement.

The arrangement may provide certain ways of reorganization and changes to the contractual obligations of the bankrupt, such as: (i) postponing payments; (ii) dividing payments into instalments; (iii) reducing the total amount of the claims; (iv) debt-for-equity swaps; and (v) amending, exchanging, or cancelling the right which secures a specific claim. However, reorganization may be conducted in any manner permissible by law. The arrangement may also provide for satisfying the creditors through liquidation of the bankruptcy estate (a "liquidation arrangement").

In general, an arrangement is adopted if it is supported by a majority of the voting creditors allowed to participate in the meeting from each category of interest. Such majority must also hold at least two-thirds of the total value of claims. The concluded arrangement is subject to court approval.

An arrangement is binding on all the creditors whose claims, pursuant to statutory law, are covered by the arrangement, even if they have not been placed on the list of claims.

— Practical significance of the bankruptcy aimed at arrangement with creditors

  This type of bankruptcy is, in practice, the only way to achieve a court restructuring of the debtor's indebtedness. However, successful reorganizations

are rare – even in cases when this type of bankruptcy is announced by the court (i.e., the court may see the chances of satisfying the creditors through an arrangement as more appropriate than a liquidation). The primary reason is that in order to restructure, a bankruptcy motion needs to be filed, since this type of restructuring is applicable to insolvent companies only. Entrepreneurs are not enthusiastic about filing such motions, as bankruptcy has a negative common perception. This has led to the situation where debtors file bankruptcy motions only when they are forced to do so (e.g., when enforcement proceedings are initiated against a debtor), which usually rules out effective restructuring. Confidence in an entity in bankruptcy falls massively – as a consequence, bankrupts themselves often file for the change of ongoing proceedings to the liquidation proceedings, even before the vote on the arrangement takes place.

2. Objectives of the planned reforms

The above described restructuring options and their rather low practical significance and usage revealed the need for a reform of the Bankruptcy and Reorganization Law in order to create a flexible legal framework for entrepreneurs and businesses in crises to allow them to choose from a number of instruments enabling an effective and quick restructuring without the risk of negative consequences associated with current regulations. Therefore, the Polish Ministry of Justice has appointed a group of experts in insolvency and restructuring (further "Ministry of Justice Group of Experts"). The group has prepared and published its recommendations, which will be the starting point of a planned reform of the Bankruptcy and Restructuring Law, which is expected to be introduced in the coming months. The reform is intended to:

— Deformalize, namely, by limiting barriers to filing petitions;
— Provide choice, namely, by enabling the entrepreneurs to choose a form of restructuring that is proper for them;
— Shorten the time necessary to make an arrangement with creditors;
— Rehabilitate, by creating a framework for carrying out a real economic restructuring (and not only debt restructuring) under protection of a court.

However, the achievement of the above objectives must take place with the maximum safeguard for the creditors' rights.

According to Ministry of Justice Group of Experts, rehabilitating elements of the proposed law should dominate the functioning of the undertaking and prevail over destructive actions (e.g., compulsory enforcement, liquidation, and bankruptcy), and similarly conciliatory elements (e.g., arrangement with creditors, settlements) over forced actions.

In order to achieve the above mentioned objectives, the Ministry of Justice Group of Experts has found it necessary to separate restructuring proceedings from bankruptcy.

3. Recommended proceedings

It is recommended that four restructuring proceedings aimed at making an arrangement with creditors be introduced to Polish law. These are:

— Proceedings regarding the approval of an arrangement;
— Proceedings regarding making an arrangement at the preliminary meeting of creditors (together with the proceedings regarding the approval of an arrangement – further the "Simplified Arrangement Proceedings");
— Arrangement proceedings (ordinary);
— Reorganization proceedings.

All restructuring proceedings will be directed at both insolvent entrepreneurs and those threatened with insolvency. Thus, businesses capable of paying their debts and not at risk of losing this liquidity will not be able to unjustly gain the benefits of the restructuring procedures.

The same regulations concerning the scope of liabilities contained in the arrangement, arrangement proposals, the making and approving of the arrangement and its consequences as well as amending and setting it aside will apply to all restructuring procedures.

Simplified Arrangement Proceedings
The Simplified Arrangement Proceedings will consist in the making and approving of the arrangement made without the institution of a separate procedure. Thus the only substantive decision issued by the court would be the confirmation of the arrangement or refusal to confirm it.

According to the Ministry of Justice Group of Experts, Simplified Arrangement Proceedings should become the primary procedures aimed only at leading to reaching an understanding between the debtor and its all creditors. As a result, the average length of reorganization bankruptcy proceedings is expected to become much shorter.

Both procedures included in the Simplified Arrangement Proceedings can be initiated by any entrepreneur, irrespectively of whether it is insolvent or not. The only negative premise, excluding the possibility of having an arrangement approved by the court, is the proportion

of the debtor's contentious liabilities towards all of the debtor's liabilities exceeding 15%. The existence of such a negative premise is perceived as necessary since it would be unacceptable for an arrangement – which as a rule applies to all creditors – to be adopted with the votes of creditors whose receivables are dubious, or do not exist at all, or to be adopted with the exclusion of entities which are in fact creditors even if the debtor does not acknowledge its obligation to pay.

— Proceedings regarding the approval of the arrangement

  The proceedings regarding the approval of the arrangement, i.e., the first procedure within the Simplified Arrangement Proceedings, entail gathering votes of the creditors before the institution of the formal court proceedings.

  This solution will enable the debtor to undertake individual negotiations with its creditors in an active and flexible way and present results of such talks to the court. Simultaneously, formal requirements concerning the petition itself (and, consequently, the possibility of the arrangement falling through due to formal defects) are limited to the absolute minimum by way of stating that information material to making a decision on the approval of the arrangement will be contained not in the petition itself but in the report of the arrangement supervisor. This should constitute a significant improvement compared to current proceedings particularly in the case of small businesses.

  Introducing the possibility for the debtor to choose a person holding a trustee license who will act as the arrangement supervisor will constitute an additional incentive to use this procedure. The participation of a professional entity, such as the license holder, will at the same time constitute a form of consultancy and help secure interests of the creditors.

  Another advantage of the proposed procedure is that the fact that the debtor is participating in the proceedings is not disclosed (made public) until the moment of filing of the petition in the court. This – undoubtedly – can have a positive effect on its market position. Yet, the period between the filing of the petition until the approval (or alternatively a refusal to approve it) will be short enough that this should not affect the functioning of the debtor. The procedure itself is expected to take less than two weeks from the moment of filing in the court a petition for the approval of the arrangement without any formal defects to the issuing of a decision in that matter by a court of the first instance.

— Proceedings regarding making an arrangement at the preliminary meeting of creditors

  The second procedure within the Simplified Arrangement Proceedings – that is the proceedings regarding making an arrangement at the preliminary meeting of creditors – should have analogical advantages. This solution is based on an institution of a preliminary meeting of creditors, already existing under the Bankruptcy and Restructuring Law, in which the votes concerning the proposed arrangement are not gathered by the debtor itself, but are delivered by its creditors directly to the court. However, the currently practical insignificance of that procedure is associated with the fact that it can be used in the course of bankruptcy proceedings, before the bankruptcy is formally announced. This means that in order to use that option, the debtor currently has to file a petition in bankruptcy for the purpose of concluding an arrangement at the preliminary meeting of creditors.

  The need for introduction of this procedure (or the modification of the existing institution into a separate procedure) is based on important justifications. In the economic reality of a limited trust in the independent actions of the entrepreneur or actions undertaken in order to gain benefits associated with the institution of court proceedings, the entrepreneur may be interested in the situation where the creditors are required to submit their votes directly to the court.

  In this procedure, unlike in the case of the proceedings regarding the approval of the arrangement, it will be possible to obtain the securing of the proceedings through the suspension of the enforcement proceedings carried out against the debtor in relation to a debt which constitutes a part of the arrangement, if such enforcement was to prevent or hinder approval of the arrangement – as it is the case in the current regulation in force. The debtor may also be interested in the quickest possible formal institution of the court proceedings which may be very important to him in a situation where the creditor intends to file or already filed a petition in bankruptcy with regard to the debtor.

Arrangement proceedings

Unlike in the case of the Simplified Arrangement Proceedings, in the case of the Arrangement bankruptcy proceedings and the reorganization the court – upon the debtor's petition – would open each of those proceedings in a separate decision.

The Arrangement bankruptcy proceedings will be least affected by the proposed changes. The essential change will be associated with the elimination of the fundamental fault associated with the applied terminology. The arrangement bankruptcy proceedings should not in any way refer to the bankruptcy proceedings and should not be associated with bankruptcy. It should be enough to change the name of the procedure from the bankruptcy open to an arrangement to the arrangement proceedings while leaving in place all other elements. In this respect introducing extensive changes is not appropriate. Pursuant to the Ministry of Justice Group of Experts, preservation of these widely known proceedings is justified.

Reorganization proceedings
The restructuring procedure with the most flexibility and the broadest options will be the reorganization proceedings. However, these will be proceedings of a completely different nature than currently. The main feature of such proceedings will be the creation of legal possibilities for carrying out a deep economic restructuring (i.e., "rehabilitation") of the enterprise.

This should be possible due to making available powers which currently are reserved solely to the trustee in liquidation proceedings (such as termination of disadvantageous contracts). According to the Ministry of Justice Group of Experts, there are no rational grounds for maintaining a situation where socially useful legal institutions are safeguarding only the bankruptcy estate and cannot be applied in order to restore to the entrepreneur the ability to discharge his liabilities.

The broad scope of powers, their nature, and uniqueness justify the implementation of the principle saying that the debtor-in-possession management should be taken away, and an administrator should be appointed. Such legal construction associated with the necessity of obtaining the consent of the judge-commissioner will allow for the balancing of interests of a debtor against which the reorganization had been instituted and the interests of the remaining participants of business transactions (e.g., employees and business partners).

In these proceedings it should be possible to:
— Stay all enforcement proceedings during the period necessary to increase the revenue and to reduce costs of the conducted business activity or while searching for an investor;
— Rescind unfavourable contracts;
— Flexibly adjust the level of employment to current needs;
— Sell undertaking's assets with the results of the liquidation bankruptcy sale.

The reorganization process itself will require – as a rule – a harmonious co-operation of the debtor and the administrator. Their success will depend primarily on the debtor's activity and achieving economic results of the restructuring which, as a final result, will allow the debtor to reach agreement with creditors based on the regained ability to discharge his liabilities. It should be stressed that the reorganization will be made possibly by employing the knowledge of the economists, advisers, and specialists from particular industries.

Legal solutions recommended for the reorganization proceedings are aimed at enabling the carrying out of extensive restructuring activities limited only to the extent necessary to secure interests of the creditors. Above all, the implementation of reorganization actions will be enabled due to the temporary staying of enforcement proceedings concerning debts that are outside the scope of the arrangement.

No doubt, the success of the reorganization proceedings will greatly depend on the moment in which the debtor files the petition for the institution of the proceedings, namely the stage of the crisis in the enterprise. The sooner it's done, the better chances there are that such reorganization will be successful. Hence, both the debtor and his creditors will be interested in the quickest possible commencement of the court reorganization proceedings which, in turn, will greatly limit unlawful actions resulting in the detriment to the creditors.

Relation between the proceedings
The above mentioned system of proceedings will open completely new diverse options of restructuring to the Polish entrepreneurs.

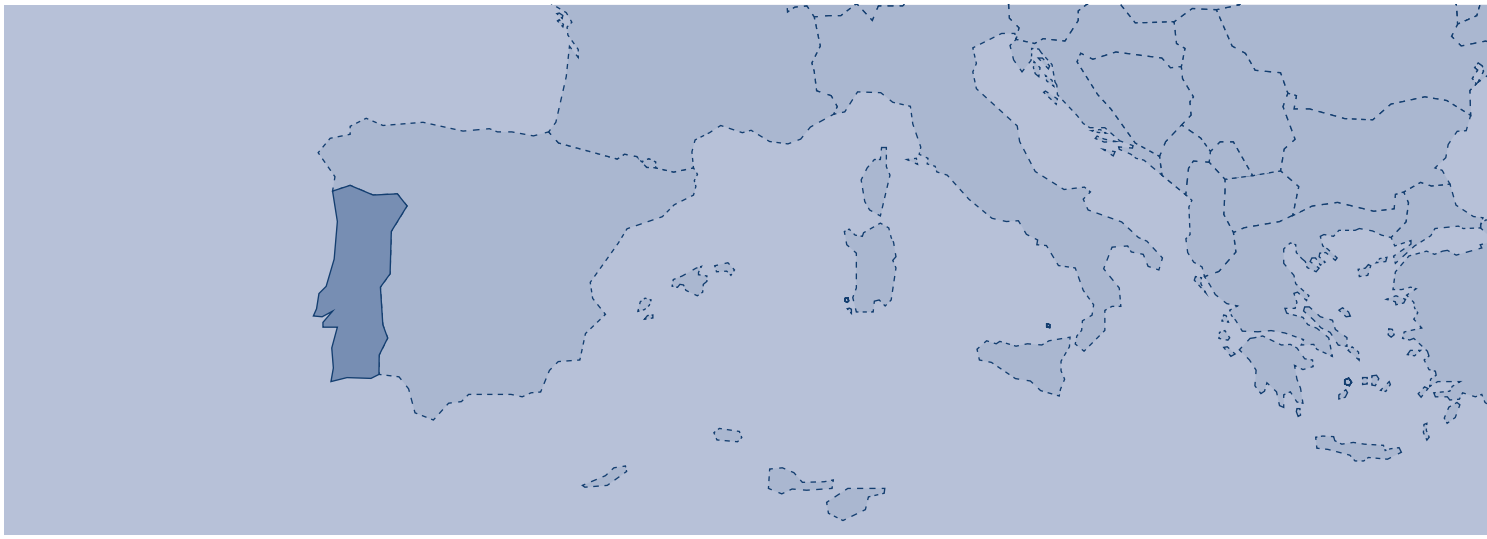
Giving a privileged position to the restructuring proceedings should also allow for making an arrangement despite the declaration of bankruptcy. Providing for such an option is completely justified in a situation where the bankruptcy had been declared without the prior use of restructuring options. In the case of discovering in the course of the proceedings circumstances indicating that the enterprise could be saved with the benefit to the creditors the trustee, the debtor and every creditor could submit arrangement proposals. In such a case the judge-commissioner will have the right to decide to stay the liquidation and put the submitted proposals to vote. The right to make the decision in this respect should be vested solely in the judge-commissioner because it is important for the option to submit arrangement proposals not to be used in any way to knowingly and purposefully dilate bankruptcy proceedings. One exemption should be the situation where the petition was filed by the majority of creditors or creditors holding claims in the amount greater than 50 percent of the total amount of debt.

In the latter case, putting arrangement proposals to a vote should be mandatory. In the case where arrangement is made and approved in this manner, the bankruptcy proceedings would be discontinued.

The priority of restructuring proceedings will also be demonstrated by the fact that in the case of filing simultaneously a petition in bankruptcy and a petition for the institution of restructuring proceedings (reorganization bankruptcy and the out-of-court reorganization) the court would first examine the petition for the institution of restructuring proceeding, unless it would be obvious that this would cause a detriment to creditors.

According to the Ministry of Justice Group of Experts, the result of the aforesaid regulations will be:

— A significant shortening of the time necessary to make an arrangement;
— An increased utilization of restructuring procedures by entrepreneurs, which should facilitate the more effective satisfaction of creditors;
— Instituting of court proceedings at an early stage of the crisis of the enterprise;
— An earlier submission of debtor's undertakings to court proceedings, which will cause a more comprehensive securing of their assets and limit further indebting and disposing of assets by the debtor in order to cause harm to his creditors or to satisfy their claims selectively.



Portugal

Preliminary Remarks

Pursuant to Portuguese Insolvency and Corporate Restructuring Code, approved by Decree-Law No. 53/2004, of March 18, which came into force on 15 September 2004 ("CIRE"), there is a single form of insolvency proceedings. Therefore, further to Annex B of the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceeding (the "Regulation"), the corresponding Portuguese winding-up procedure is also the insolvency procedure.

Relevant creditors (gathered in a creditors' meeting) choose between one of two possible outcomes:
— The liquidation of the insolvent's assets and the subsequent distribution to the creditors; or
— The company's restructure, through the approval of an insolvency plan (in the event the continuation of business is more likely than not).

Either outcome is triggered by the filing of an application before the relevant court, which is the court where the debtor's centre of main interests (COMI) is located. The code assumes that the head office of the debtor corresponds to its COMI.

Winding-up proceedings

1. Conditions for opening

In Portugal, creditors and debtor are entitled to request the initiation of bankruptcy proceedings.

Voluntary bankruptcy proceedings
The debtor shall file the insolvency proceeding within 30 day from the moment he became aware of his insolvency state.

The debtor shall submit a reasoned application outlining the existing or imminent insolvency situation and provide the court with a significant set of documents, including:
— The identification of the company's directors and of its five major creditors;
— The debtor's commercial certificate issued by the commercial registry office;
— The debtor's civil certificate issued by the relevant civil registry office;
— A list of all the known creditors and details of all pending lawsuits against the debtor;
— A comprehensive explanation of the company's activities over the previous three years, as well as all the debtor's establishments;
— Identification of all the debtor's shareholders and associates and of those who may be liable for the company's debts; a list of all the company's assets and rights, regardless of their nature;
— All the accounting books of the company;
— A list of all the debtor's employees; and
— A document that demonstrates the representation powers of the directors, as well as the resolution that approved the insolvency proceedings.

After the filing of the application for voluntary liquidation, the opening of insolvency proceedings shall be declared within the three subsequent working days.

Then, the Creditors, at a General Creditors Meeting, choose to liquidate all the company's assets, following the provisions regarding the sale of assets within enforcement proceedings. The liquidation is executed by an Insolvency Administrator appointed by the Court (even though it may be suggested by the Parties).

Involuntary bankruptcy proceedings
The opening of insolvency proceedings may be also triggered by any of the creditors (regardless of the nature of their credits); by any person who is liable for the debtor's debts; or by the public prosecutor.

In order to demonstrate the insolvency situation of a particular debtor (the cash flow test or the balance sheet test), at least one of the following requirements should be met:
— General default of the debtor on its payments and obligations;
— The disappearance of the company's directors or shareholders, or the abandonment of the debtor's head office or main establishment, due to its liquidity problems and without an appropriate substitute being appointed;
— Dissipation, abandonment, and rushed or ruinous liquidation of the company's assets and fictitious constitution of credits; or
— Debtor's failure to pay, within six months of the filing of the involuntary insolvency, one or all of the following: tax liabilities; social security obligations; labour credit default; etc.

After the filing of the application for opening of involuntary bankruptcy, there will be a service of process of the Debtor and the latter may file an Opposition in order to evidence that it has enough assets or is able to generate enough cash flow to pay its debts.

After the hearing, the Court shall decide whether the insolvency must be opened. In the event of the opening of insolvency proceedings, the Creditors, at a General Creditors Meeting, choose to liquidate all the company's assets, following the provisions regarding the sale of assets within enforcement proceedings.

2. Restructuring methods

Portuguese winding-up proceedings presupposes the entire liquidation of the company's assets.

3. Success rate

In what refers to voluntary winding-up proceedings the success rate is almost 100%. As a matter of fact, unless the debtor fails to add to the case bundles the above mentioned set of documents, the insolvency shall be declared within the three subsequent working days.

On the other hand, concerning involuntary winding-up proceedings, the success rate of this triggering option depends on the evidence of one of the above mentioned tests (the cash flow test or the balance sheet test). In a conservative estimate, according to our experience, we would say that 80% of the involuntary winding-up proceedings filed by Creditors are successful.

4. Pros and cons

Pros: One of the advantages of voluntary winding-up proceedings for creditors is the possibility to recover VAT previously paid to Tax Authorities, as such proceedings presupposes that the Debtor does not have enough assets to distribute for its creditors.

Cons: One disadvantage for the debtor is the "stigma" of bankruptcy and the liabilities that may result from such proceedings to the Directors in the event bankruptcy is considered culpable, namely the suspension of activities for a certain period of time and the personal and joint liability for the payment of the credits.

Insolvency Proceedings

1. Conditions for opening

As mentioned above, there is a single form of insolvency proceeding in which the respective creditors choose between a liquidation of assets and the company's reorganisation. Both proceedings start with the same formalities and requirements.

Moreover, with respect to the restructuring proceedings, while in a voluntary restructuring, the insolvency plan may be prepared and submitted by any creditor or group of creditors whose credits represent at least one-fifth of the total credits approved by the court or listed in the creditor's provisional list; in a voluntary restructuring, such insolvency Plan shall be applied by the debtor itself and filed in the proceedings.

2. Restructuring methods

The debtor can apply to a company restructuring by filing an insolvency plan. Such plan may be defined in a very free and flexible way to allow the debtor to carry on business during the reorganisation without restrictions.

Moreover, the insolvency plan may implement:
— Self-Administration (providing for the debtor to remain in possession in the event no facts are known that could give rise to the assumptions that creditors will be prejudiced);
— A share capital increase of the insolvent company;
— A moratorium;

— Restructuring by asset-transfer (in the event the Insolvency Administrator is able to sell and transfer part or the entire business); or
— The pardon or reduction of the credits over the insolvent company (whether principal or interest).

The insolvency plan should not violate the creditors' equality of treatment principle.

The insolvency plan must be discussed and approved by two-thirds of the votes at the creditors' general meeting, provided that the creditors' general meeting is attended by creditors that represent one-third of the total voting rights.

Once approved, the insolvency plan is adopted by the court within 10 days of the assembly and will be effective with respect to all credits and creditors whether or not they have been claimed and approved and whether or not the creditor has approved the plan.

Thus, as long as such plan is accepted by the majority of the creditors and by the court, it will enter into force and bind all the insolvency creditors. Unless the approved plan clearly states otherwise, the creditors' rights secured by guarantees in rem cannot be affected by it.

Once the process is approved and validated by the court and any possibility of appeal has been exhausted, the insolvency procedure ends unless the plan states otherwise. It is not common that in the event a restructuring is approved the debtor retains the sole administration of its assets. Usually it is defined in the plan that the debtor's activity is supervised by the insolvency administrator appointed by the court and under supervision of the creditors' committee. It is also common to stipulate that the debtor may not assume any obligation without the previous agreement of the insolvency administrator appointed with respect to acts out of the ordinary course of business.

Regarding acts in the ordinary course of business, it is usually stipulated that the debtor may act freely unless the insolvency administrator objects.

In order to protect the creditors who continue to supply goods and services after the insolvency plan is approved, the suppliers must ensure that the plan provides for such credits to be paid first if new insolvency proceedings are filed against the debtor before the plan is accomplished.

Notwithstanding, the insolvency plan ceases its effects in respect to a determined credit if the debtor fails to comply, with interest, 15 days after being challenged for it by the creditor, or in respect of all the credits if the debtor is declared insolvent in a new insolvency procedure. Creditors are classified as follows, in order of priority:
— Specific preferential credits (only the preferential credits that are specifically related to an asset);
— Secured credits (those that are guaranteed by mortgages, pledges, among others);
— General preferential credits (the preferential credits that are not specifically related to an asset, e.g., the credits related to social security or tax debts);
— Common credits (all the credits not included on other types);
— Subordinated credits (which shall be graduated after all the remaining insolvency credits).

It is important to mention that the insolvency plan may release non-debtor parties from liability in the event the creditors agree to such provision during the creditors' general meeting.

3. Success rate

The success rate of the approval of voluntary/ involuntary reorganisations is approximately 80%. However, the success rate of the compliance of the Insolvency Plan is just slightly above 20%.

4. Pros and cons

The entitlement to submit an Insolvency Plan allows the debtor to strive for its financial restructuring, thereby avoiding liquidation. Moreover, the Insolvency Plan with assignment of assets allows for a more flexible form of realization then regular bankruptcy.

Other restructuring techniques: Special reorganization proceedings

Special reorganization proceedings are the alternative to bankruptcy proceedings for companies which are in financial difficulties and cannot pay their debts, but which are not in an insolvency state and may be capable of being financially restructured. The aim of such composition proceedings is the preservation of remediable companies by helping them to (partially) settle their debts and avoid liquidation.

Special reorganization agreements shall be concluded under supervision of a Provisional Administrator appointed by the Court (even though it may be suggested by the Parties) and the agreement reached is binding on all creditors whose claims arose prior to the granting of the moratorium.

1. Opening of the proceedings

Special reorganization proceedings are jointly requested by a creditor and the debtor. Such request is to be filed with the composition court.

The Party shall request the composition proceedings by submitting a reasoned application outlining (i) the financial situation of the debtor and (ii) the creditors' benefits arising from the proceedings. Moreover, the debtor must submit all documents referred to above in the voluntary winding-up proceedings.

After receipt of the request, the court shall appoint a Provisional Administrator and the Debtor shall summon all his Creditors to start the negotiations.

The reorganization shall be concluded within two months' time.

2. Restructuring methods

The Special reorganization proceedings may foresee all the restructuring methods available for an Insolvency Plan, and as described above.

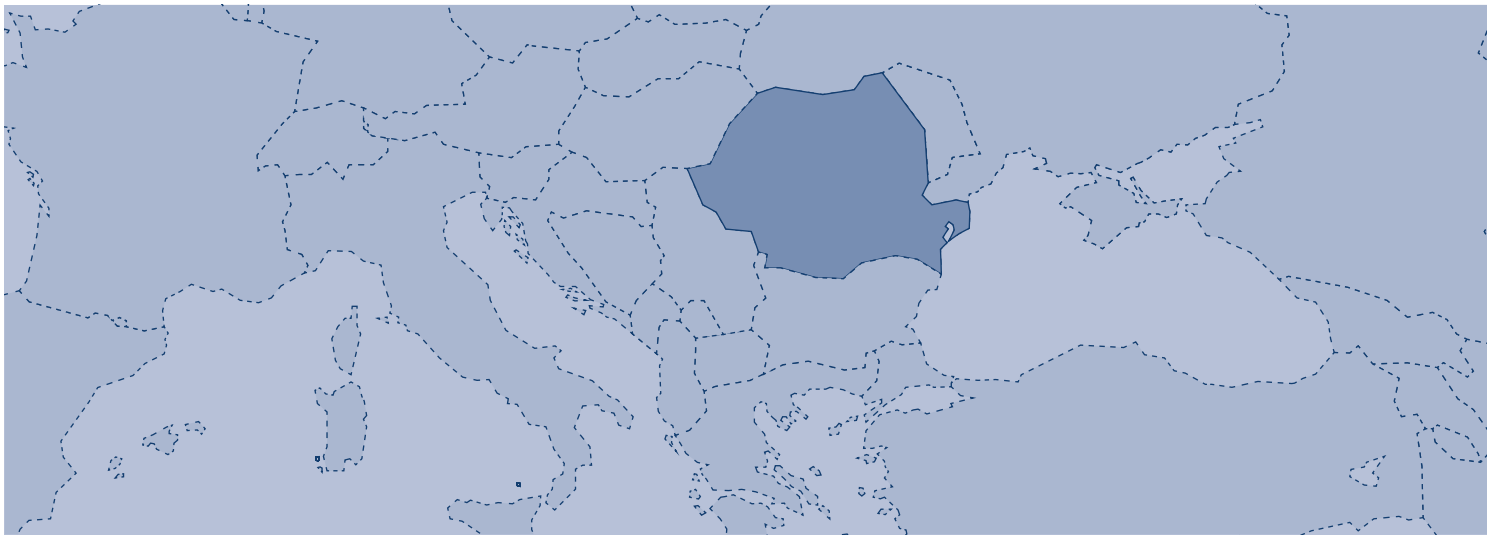
3. Success rate

The success of composition agreements seems to be limited, given that such agreements are usually triggered by companies which are already in an insolvency state. Notwithstanding, such agreements are commonly used to restructure large corporate debtors with success.

4. Pros and cons of those proceedings

Pros: In contrast to regular bankruptcy proceedings, an agreement reached within these proceedings allows the debtor to regain full authority to dispose and to continue his business. Moreover, it provides a more expedited manner of distributing the debtor's assets.

Cons: Notwithstanding, it may be used by debtors with the sole purpose to suspend the enforcement proceedings that have been previously filed by creditors.



Romania

Insolvency proceedings (as provided by Law 85/2006 "*Insolvency Law*")

Any insolvency proceedings are commenced by filing a request before the Tribunal, having jurisdiction over the debtor's headquarters, regardless of any changes of headquarters occurring after the filing of the insolvency request.

1. Who can file for insolvency

The claim can be filed either by the debtor or by its creditors (independently or jointly).

— *By the debtor*: When the debtor files for its own insolvency, the debtor must already be insolvent or the insolvency must be imminent. In the instance the debtor is already insolvent; the debtor must file for insolvency within 30 days of the date the insolvency status occurred.

— *By the creditors*: Any creditor could file for the insolvency of its debtor if it has a claim which is due, certain, and has a monetary value higher than RON 45,000 (approximately EUR 10,000). When such claim is filed by a debtor's employee, the value of the claim should be at least equal to six average gross salaries in Romanian economy (as calculated by the Romanian Institute for Statistics).

2. How to open the insolvency proceedings

The insolvency shall be opened further to the court decision rendered by the syndic judge (a judge specialized in insolvency matters). The said judge will appoint a temporary judicial administrator and set up the milestones for important issues (e.g., by when the creditors should submit their claims; by when the preliminary receivables chart will be prepared and published; by when the creditors' assembly will be set up; etc.).

3. Restructuring actions

By the same court decision, the debtor could preserve its administration rights (under the supervision of the appointed judicial administrator) or, conversely, any further debtor's activity will be coordinated by the judicial administrator.

Thus, the judicial administrator will review all the contracts concluded by the debtor in the past (up to three years prior to the opening of the insolvency proceedings). If the judicial administrator decides that such previous contracts were concluded with the sole purpose of damaging the creditor's rights, he could request the annulment of the said contracts to the syndic judge. Hence, in case the judicial administrator considers that the said contracts were detrimental to the creditors' rights he is entitled to request their annulment. The syndic judge will render a decision regarding such annulment.

Equally, the judicial administrator will review all pending contracts and, if they are detrimental to the debtor, may decide to terminate them.

4. Reorganization plan

The debtor, the judicial administrator, or the creditors (having at least 20% of the value of the credits) can propose a Reorganization plan. Such plan may not extend for longer than three years.

Such plan shall address several issues, including: whether the responsive persons from the debtor's structure shall be discharged of their management duties and, in case the bankruptcy is envisaged, determination of the categories of creditors entitled to receive credits.

Equally, through this plan it will be decided how the debtor's activity shall be restructured (e.g., merger; sales of assets; diminishing the number of employees; keeping or terminating contracts; modifying the debtor's constitutive acts and redistributing the managing powers; etc.)

In case the reorganization plan fails, then the bankruptcy proceedings will take the place of the insolvency ones.

5. The success rate of the reorganization plan

As the Insolvency Law does not provide for economic conditions to be fulfilled by the reorganization plan, and merely allows the judge to check the approval conditions of such plan, in practice, the reorganization plans often lead to bankruptcy.

6. Pros and cons

Pros: The reorganization allows companies to reduce their financial burden and to continue operating.

Cons: However, given several broadly interpretable provisions of the Insolvency Law, reorganization of plans are sometimes used fraudulently by Romanian companies.

Bankruptcy proceedings (as provided by Insolvency Law)

1. Conditions of opening

These proceedings can be opened directly as described above at point II on Insolvency proceedings, by a court decision rendered with respect to a claim filed in this respect, or upon failure to achieve positive results during the Insolvency proceedings.

Thus, the bankruptcy proceedings are also opened through a court decision. The syndic judge will appoint a judicial liquidator and set up the milestones for important issues.

In the event the bankruptcy follows the insolvency proceedings, the most important issues are already established (e.g., the receivables chart and the categories of creditors to receive receivables).

In case the bankruptcy has been directly requested, the syndic judge and the judicial liquidator must perform the tasks as described above in the Insolvency proceedings in order to identify the creditors, their rank, the value of their claims, and to set up the receivables chart.

2. Pre-liquidation Measures

The judicial liquidator shall identify, inventory, and valuate all debtor's assets; immediately sell any perishable goods; secure the remainder of the goods/assets; and take all the necessary measures to preserve the debtor's assets. All findings shall be set forth in a final evaluation report.

3. Asset liquidation

Once the pre-liquidation measures are taken, the judicial liquidator shall propose to the creditors' assembly the methods of sale of the assets (e.g., individually or as a whole). The assets might be sold directly or further to a public tender. The judicial liquidator will also have to advertise the sale of the assets.

4. Distribution of the gathered amounts

Once all the assets have been sold and the amounts recovered, the judicial liquidator shall proceed to distribute such amounts to the creditors in the following order of preference:

- Taxes, stamps, other expenses incurred in the insolvency proceedings including costs for the preservation and administration of the debtor's assets and the fees for the judicial administrator/liquidator and experts hired by the former;
- Creditors with real securities (e.g. mortgage over immovable or over movable assets);
- Receivables accrued from labour relations;
- Receivables consisting of loans, interest and other expenses as well as debts resulting from the debtor's usual business activity after commencing the insolvency proceedings;
- Tax duties;
- Receivables consisting of maintenance or children allowances or other alimony;
- Bank loans, interest and other corresponding expenses, receivables from delivery of products, services or works, rent;
- Other unsecured receivables;
- Subordinated receivables; in the following order of preference:
  - Loans granted to the debtor by associates holding at least 10% of share capital or by a member of the economic interest grouping;
  - Receivables from free transfers.

5. Pros and cons

Pros: The bankruptcy proceedings allow certain creditors (usually only the secured creditors) to recover most of their receivables in a timely manner.

Cons: However, in times of economic restraint, it is difficult to sell the assets of the debtor at reasonable prices, as a significant number of other debtors are also selling on the same market and the solid companies are reluctant to invest during an economic crisis.

Preventative concordat (*as provided by Law 381/2009*)

Please note that this law currently has an uncertain status, due to the fact that it was rescinded through a Government Ordinance that was further declared unconstitutional by the Constitutional Court. As a result, it is debatable whether this law is still applicable. Nevertheless, it is highly likely that in practice the provisions of the law will still be applied.

1. Definition

"*Preventive concordat* is an agreement between the debtor, on the one hand, and creditors holding at least two-thirds of the value of claims accepted and uncontested, on the other hand, where the debtor proposes a plan to straighten its business and to cover the receivables of these creditors against him and creditors agrees to support the debtor's efforts to overcome the difficulty of its firm"[10].

2. The preventive concordat procedure

The applications for the opening of the preventive concordat procedure are exclusively in competency of the syndic judge in whose jurisdiction is situated the debtor's head office and shall be ruled upon within 48 hours of its receipt.

Debtor will file an application at the court in whose jurisdiction it is situated for the opening of the preventive concordat procedure and will propose a provisional conciliator, among insolvency practitioners (fee will be borne by the debtor).

The conciliator performs the following tasks:
- Draw up a List of Creditors, including challenged creditors or those whose claims are in dispute, and a List of Concordat's Creditors;
- Develop, with the debtor, the offer of the preventive concordat, with its components, namely, the project of the preventive concordat and the recovery plan;
- Take the necessary steps for the amicable settlement of any dispute between debtor and creditors or between creditors;
- Request the syndic judge to acknowledge and/or, where appropriate, to affirm the preventive concordat;
- Oversees the fulfilment of the obligations assumed by the debtor through preventive concordat;
- Inform immediately the meeting of concordat's creditors about the failure of the debtor to properly perform its obligations;
- Prepare and submit to the meeting of concordat's creditors monthly or quarterly reports upon its activities and of the debtor; the conciliator report will contain his opinion on the existence or, where appropriate, absence of a reason for the rescission of the preventive concordat;
- Convene the meeting of the concordat's creditors;
- Request the court to close the preventive concordat procedure;
- Performs any other duties stipulated by this law, established through preventive concordat or set up by the syndic judge.

3. The project plan

Within 30 days of its appointment, the conciliator shall, together with the debtor, compile a list of creditors and the *offer of the preventive concordat* which will be promptly notified to the creditors by the provisional conciliator in a manner which ensures the possibility of verifying receipt of the offer.

The offer of the preventive concordat will be filed in open court and will include *the project of the preventive concordat*, to which will be attached the debtor's statement regarding its financial difficulty and the list of known creditors, including those whose receivables are challenged in whole or in part, specifying the receivable's value and the collateral accepted by the debtor.

The project of the preventive concordat should include, among other things, *a recovery plan of the business and the ratio of receivable satisfaction which should be of at least 50%* as a result of the implementation of recovery measures proposed.

For this purpose, the debtor can propose, amongst other things: the postponement or rescheduling of payments, writing off of receivables or interest, and novations.

The *deadline* set by satisfaction of the receivables established through preventive concordat cannot exceed *18 months* from concluding the preventive concordat.

4. Effects

From the moment the court acknowledges the preventive concordat – *the enforcement procedures commenced by the concordat's creditors are suspended by force of law*. Also suspended is the running of the limitation of the right to request the enforcement procedure of their receivables against the debtor.

On the same date, *accrual of interest and penalties are suspended in relation to the concordat's creditors*.

All these effects are produced from the date of notice of the decision of acknowledgement of the preventive concordat, only during the concordat period and only *in relation to the concordat's creditors*.

The debtor carries out its business as usual, in accordance with the preventive concordat and under the supervision of the conciliator.

5. Outcome of the proceedings

In the event that the preventive concordat procedure completes successfully and the syndic judge finds accomplishment of the object of the preventive concordat, the alteration of the receivables (related to concordat's creditors) as provided by the preventive concordat remains irrevocable.

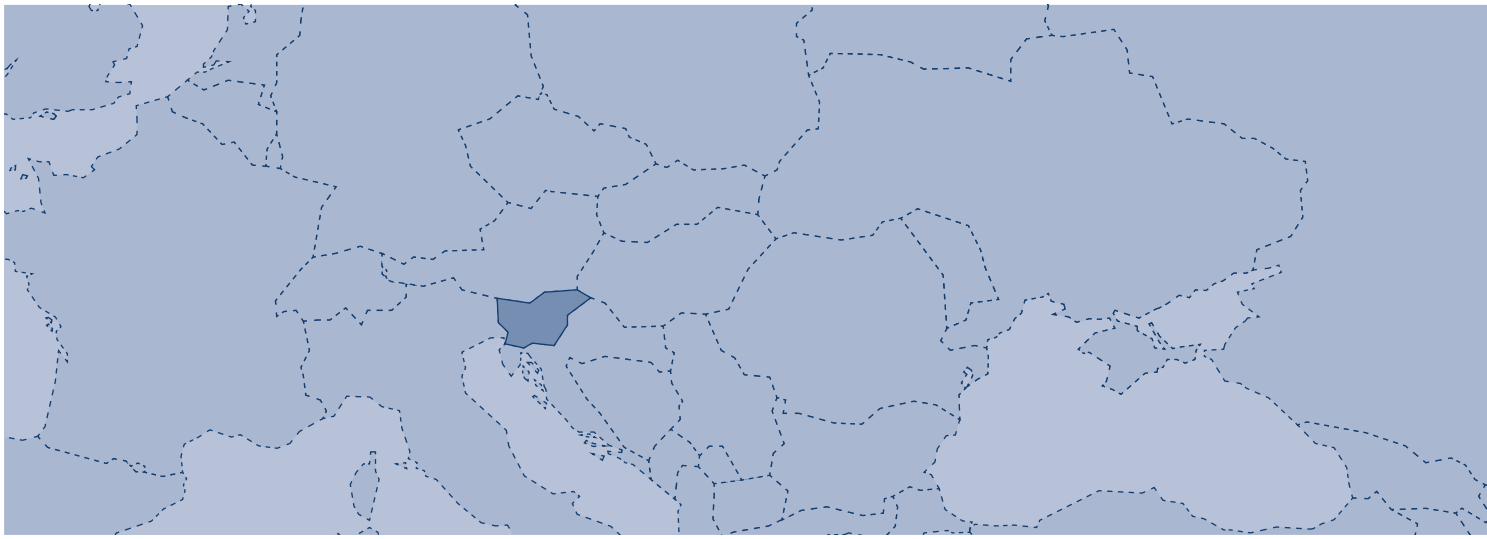
If the syndic judge, at the request of the conciliator, finds a failure of the object of the preventive concordat and closes the procedure, the running of the limitation of the right to request the enforcement procedure is resumed as of the decision (counting the time elapsed before notifying the acknowledgement of the preventive concordat decision).

On the same day there are also resumed the accrual of interest, penalties and any other costs relating to the concordat's creditors.

6. Conclusion

Such proceedings are used infrequently because, in the eyes of the creditors, they are not a better alternative to the insolvency proceedings.

[10] According to article 3 letter d) of the Law 381/2009.



Slovenia

Winding-up proceedings

1. Bankruptcy proceeding

Conditions for opening

In Slovenia initiation of the bankruptcy proceeding is decided on by the court upon the petition of an entitled petitioner – which can be the debtor, a personally liable shareholder of the debtor, the creditor, or The Public Guarantee, Maintenance and Disability Fund of the Republic of Slovenia (Javni jamstveni, preživninski in invalidski sklad Republike Slovenije). The court can also decide on the initiation of bankruptcy proceedings ex officio but only allowed by law in respect of a particular case.

If the bankruptcy proceeding is applied for by a debtor itself, the debtor shall be considered insolvent unless proven otherwise. If the petition is filed by a creditor, such creditor has to demonstrate that the debtor is insolvent, whereby the law provides for several rebuttable presumptions or insolvency.

Under Slovenian insolvency law, a debtor shall be deemed insolvent if it is unable to settle its obligations that fall due during a certain period of time. If not proven otherwise, the debtor is deemed insolvent if:

- The debtor is more than two months late in paying one or more of its obligations that together exceed 20% of all of its obligations, shown in the latest published annual report;
- The moneys standing to the credit of the debtor's bank account do not suffice for payment of the whole amount enforceable under the writ of execution (sklep o izvršbi) or for payment of the enforcement draft (izvršnica), whereby such status exists for 60 days in a row or for more than 60 days within the period of the last 90 days, and still subsists on a day preceding filing of the bankruptcy petition;
- The debtor has not at least one bank account opened and maintained with Slovenian bank and has in 60 days following finality of the writ of execution not settled respective obligations;
- If after conclusion of a compulsory settlement, the debtor is over two months late with payment of its obligations under the compulsory settlement or with payment of obligations towards secured creditors that arise before compulsory settlement proceedings commenced, or with any other financial restructuring measures stipulated within the financial restructuring plan;
- The debtor's obligations exceed the value of its assets; or
- When the debtor's current year's loss together with any loss brought forward from previous years is equal to, or greater than, half of the subscribed capital, and that loss cannot be covered by the profit brought forward or reserves.

Further, the debtor is deemed insolvent (whereby it is not allowed to demonstrate the opposite) if it is over three months late in paying employees minimum salaries or taxes and contributions that are paid together with salaries, if such delay existed on a day preceding filing of the bankruptcy petition.

In general, a petitioner has to pay a court fee and an advance payment to cover initial costs of bankruptcy proceeding; however, the law provides for certain exemptions.

Restructuring methods
The opening of the bankruptcy procedure leads to the suspension of all other enforcement proceedings against the debtor and prevents creditors from initiating new enforcement proceedings for claims against the debtor which arose before the opening of bankruptcy proceedings.

With the initiation of bankruptcy the powers of the debtor's representatives, holders of procuration, and other persons authorised to represent it, as well as the powers of the management of the debtor to conduct its operations, shall expire. The insolvency administrator appointed by the court then acquires the powers to represent the debtor in bankruptcy in order to liquidate the assets of the debtor and to distribute the revenues of the sale of assets to the creditors. The insolvency administrator can sell the assets individually or as a business whole – whichever is in the best interest of creditors. As a final result of the bankruptcy procedure, the debtor will cease to exist.

Success rate
Pursuant to the COFACE insolvency report for Central Europe (spring 2013; http://www.coface.at/CofacePortal/ShowBinary/BEA%20Repository/AT/de_DE/documents/2013/Insolvenzreport%20CER), in 2012, insolvency procedures were opened for 980 companies. Compared to 2011, this figure increased by 39.2% which results in an insolvency rate of 0.65%. In the first quarter of 2013,225 bankruptcy petitions were filed.

The bankruptcy proceedings usually result in a very low dividend among the ordinary creditors since valuable assets are normally always encumbered with mortgages or other priority rights.

Pros and cons
Pros: The insolvency administrator is obliged to act in the best interests of all creditors. Within the bankruptcy proceedings, any legal transaction or act which was concluded or performed by the debtor within the 12 month period prior to the application for the bankruptcy proceedings, and which preferred certain creditors or caused a decrease in the funds designated for the repayment of creditors, may be challenged by the insolvency administrator or by the creditor, provided that the person who benefited from the performance of that act knew or ought to have known about the insolvency of the debtor. In case of the acts that were performed for no consideration or for low value consideration only, the period during which such acts can be challenged shall be extended to the 36 month period prior to the application for the bankruptcy proceedings.

Furthermore, members of the management board and members of supervisory board are jointly and severally liable to creditors whose claims are not fully repaid in the bankruptcy proceedings if they failed to comply with their duties that arise upon occurrence of insolvency.

Cons: A primary con is that such procedures are lengthy (it may take up to 10 years or more for the bankruptcy procedures to end) with a very low dividend among the ordinary creditors. Current insolvency proceedings show that debtors often wait with filing of petition until the assets of the debtor are not sufficient for starting and pursuing court legal actions with respect to indemnity claims against management of the debtor or legal actions challenging the debtor's legal acts.

Other proceedings

1. Compulsory settlement proceeding

Conditions for opening
In Slovenia initiation of compulsory settlement proceeding is decided on by the court upon the petition of an entitled petitioner of the proceeding – the entitled petitioner can be the debtor or its personally liable shareholder.

In compulsory settlement proceeding, the debtor shall disclose to its creditors its financial position and operation, and provide them with all information necessary to assess: (i) whether the debtor is insolvent; (ii) whether the execution of the financial restructuring plan would enable a financial restructuring of the debtor which would ensure its liquidity and solvency; and (iii) whether the confirmation of the compulsory settlement proposed by the debtor would ensure the creditors more favourable payment conditions for their claims than initiation of bankruptcy proceedings against the debtor.

In order to commence compulsory settlement proceedings, the following conditions must be met:
— The debtor must be insolvent;
— The application must include:
  - A report on the financial standing and business of the debtor (including financial statements with explanations, a list of ordinary claims, a list of subordinated claims, a list of secured claims, and the amount of the company's average monthly operating costs—in the ordinary course of business);
  - An auditor's report, containing an unqualified auditor's opinion that the accounting report reveals a true and fair view of the debtor's financial situation and has been prepared using acceptable accounting principles;
  - A financial reorganisation plan;
  - A statement by the debtor's management that the proposed compulsory composition is more likely than not to succeed; A report of a certified

company value appraiser confirming that the debtor is insolvent, that the proposed reorganization plan is feasible, and that creditors' debts are more likely than not to receive a better return in the proposed compulsory composition than the alternative bankruptcy proceedings;
- A certificate of payment of the fee for commencement of compulsory composition proceedings and of initial advance payment for pursuing a compulsory composition proceeding.

Restructuring methods
The purpose of the compulsory settlement proceeding is to enable the debtor who became insolvent to financially restructure. Such procedure shall restore debtor's liquidity and solvency while ensuring the creditors more favourable payment conditions for their claims as they would achieve in case of bankruptcy of the debtor.

Within the compulsory settlement proceedings the insolvent debtor may negotiate with creditors for reductions of their ordinary claims and suspension of their payment time limits, whereby the law requires that at least 50 percent of each ordinary claim shall be repaid in four years (at least a quarter of the payment shall be repaid in each of the first three years and the remainder in the fourth year).

If the debtor is organized as a company with share capital, it may also invite the creditors to convert their receivables to the debtor's share capital. At the same time, any uncovered loss may be covered by reduction of the share capital.

If certain conditions are met, the creditors' committee or a majority of preferential creditors may decide on the insolvent debtor's share capital increase by conversion of the debt to equity (which may include a reduction in the share capital to account for uncovered loss). In addition, in certain cases the debtor's management or the creditors' committee may decide on the insolvent debtor's share capital increase by new monetary contributions (which may as well include a reduction in the share capital to account for uncovered loss).

Any creditor or party subscribing and paying new shares or stakes by new cash contributions or debt conversion based on a decision to increase the insolvent debtor's share capital adopted by the management, the creditors' committee, or a majority of preferential creditors, can request the court to grant authorization to manage the insolvent debtor's business until the first general meeting of the debtor's shareholders conveyed after the confirmation of the compulsory settlement.

The adoption of compulsory settlement shall be decided by creditors by vote. Each creditor whose claims were recognized or plausibly demonstrated shall have the right to vote on compulsory settlement unless otherwise provided for by law (e.g., creditors associated with the debtor and preferential creditors whose position is not altered by the compulsory settlement). Special multipliers are set for different classes of claims.

Success rate
Pursuant to the COFACE insolvency report for Central Europe (spring 2013; http://www.coface.at/CofacePortal/ShowBinary/BEA%20Repository/AT/de_DE/documents/2013/Insolvenzreport%20CER) in 2012 insolvency procedures were opened for 980 companies, in most cases the bankruptcy proceedings. Compared to 2011, this figure increased by 39.2% which results in an insolvency rate of 0.65%. In the first quarter of 2013 only eight proposals to commence compulsory settlement proceedings were filed.

Pros and cons
Pros: The reorganization enables restoration of debtor's solvency and further operation of the debtor in accordance with the reorganization plan. Creditors are able to monitor the debtor's operation and can in certain cases actively participate in the management of the debtor.

Cons: If 50% reduction of ordinary claims would not suffice for restoration of solvency or if the debtor cannot offer the statutory minimum of repayment schedule, then the procedure cannot be proposed and carried out. If the compulsory settlement is not confirmed, the bankruptcy starts automatically. The procedure is costly and complicated.

2. Simplified compulsory settlement proceedings for sole proprietors and micro companies

Conditions for opening
Micro companies may apply for restructuring by a simplified compulsory settlement procedure if they meet two of the following three criteria: (i) the average number of employees in a financial year of ten or less; (ii) net sales revenue of less than EUR 2,000,000; (iii) assets below EUR 2,000,000. Sole proprietors may also apply for simplified compulsory settlement proceedings if they meet the criteria under (i) and (ii).

A proposal to initiate the procedure would be enclosed with a report on the financial standing and operations of the debtor, a financial restructuring plan and evidence on payment of the initial advance. Compared to regular compulsory settlement proceedings, a proposal to initiate simplified compulsory settlement procedure need not be enclosed with an audit report concerning the debtor's financial standing and operations (instead, the debtor's notarised statement, where the debtor declares that the report is a true and fair presentation of its financial standing and operations, will suffice).

Also not required is a report by a certified company appraiser stating that the proposed financial restructuring would lead to a successful rehabilitation of the insolvent debtor.

Restructuring methods
The purpose of the simplified compulsory settlement proceeding is to enable the debtor who became insolvent to financially restructure. Such procedure shall restore debtor's liquidity and solvency while ensuring the creditors more favourable payment conditions for their claims as they would achieve in case of bankruptcy of the debtor.

Within a simplified compulsory settlement proceedings the insolvent debtor may negotiate with creditors for reductions of their ordinary claims and suspension of their payment time limits, whereby the law requires that at least 50 percent of each ordinary claim shall be repaid in four years (at least a quarter of the payment shall be repaid in each of the first three years and the remainder in the fourth year).

As opposed to the regular compulsory settlement procedure, within the simplified compulsory settlement procedure the debtor's share capital cannot be increased by converting debt to equity (the debtor can take such measure only by applying the general rules of company law).

Creditors having receivables listed in the debtor's report on financial standing and operations have the right to vote in simplified compulsory settlement. Simplified compulsory settlement will be adopted if voted for by creditors having receivables representing at least 60% of total ordinary receivables subject to the additional condition that over a half of creditors holding ordinary receivables vote in favour. Vote is cast by the creditor entering into a notarized agreement on the approval of simplified compulsory settlement with the debtor. The agreement applies subject to the condition that the simplified compulsory settlement would be finally approved.

Success rate
The simplified compulsory settlement for sole proprietors and micro companies was introduced by amendments to the insolvency law that entered into force on 15 June 2013 but will, with respect to simplified compulsory composition, became applicable in August 2013.

Pros and cons
Pros: Micro companies and sole proprietors have so far often been unable to undergo financial restructuring by applying the regular compulsory settlement procedure due to relatively high costs, complicated procedures, and complex conditions for applying for, managing, and approving compulsory settlement, even if the conditions for restructuring were met. The simplified compulsory settlement is cheaper and faster than the current compulsory settlement procedure and the court would not automatically initiate bankruptcy proceedings if the procedure is not successful.

Cons: In our opinion, the additional possibility of restructuring through simplified compulsory settlement proceedings has not been adequately reflected in the system of debtor's obligations stipulated within law for the case of insolvency. In addition, the amendment produces certain legal dilemmas, such as creditor's rights in the compulsory settlement proceeding if such creditor's claims are not recorded in the debtor's books and records. Moreover, the act does not provide a clear answer regarding the debtor's obligation in the event simplified compulsory settlement is not confirmed.

3. To be introduced shortly: Out-of-court financial restructuring in case of imminent or existent insolvency

The latest amendments of the insolvency law, which entered into force in June 2013, announced the adoption of a special act providing for expedited proceedings in case of imminent or existent insolvency when a special agreement regulating mutual obligations is entered into by the debtor and majority creditors according to principle of proportionality, whereby legal consequences of this agreement also apply to creditors who have not entered into this agreement. The act would thereby set up a regulatory framework for out-of-court (financial) restructuring using expedited procedure that is subject to approval by the court.

Special act will implement the recommended best practices as set out within the report of "Vienna Initiative" as of March 2012, prepared by the World Bank, EBRD, and International Monetary Fund.

No draft of the law has been presented to the public by the time this article was written.[11]

[11] This article reflects the situation up to 6 December 2013.

Spain

Introduction

Under the Spanish Insolvency Act of 2003 (as amended) (the "*Act*") – which aims to modernise and reorganise Spanish insolvency law – insolvent companies must file a petition for voluntary insolvency.

The Act contemplates a single type of insolvency proceeding, simply called "insolvency" (*concurso de acreedores*), that is applicable to all types of debtors including both corporate entities and individuals. Insolvency proceedings may conclude with either the debtor´s creditors approving a settlement or the liquidation of the debtor.

In addition, the insolvency proceeding is presided over by the Commercial Courts (*Juzgados de lo Mercantil*). The Commercial Courts are particularly specialised in dealing with Commercial Law matters, including insolvency proceedings.

The Insolvency Act's principal goal

The eventual payment of debts is the main goal of the Act. The Act provides certain measures to facilitate the payment of debts, including temporary suspension of mortgages, reactivating loans and credits that were discontinued as a result of the debtor's insolvency, and resolving claims for outstanding rent.

Furthermore, the Act reinforces the principle that all original and subordinated creditors are treated equally if they fall within the same class (*pars conditio creditorum*) and provides for judicial oversight of proceedings and the liability of the insolvent debtor's directors for the debts of an insolvent corporate debtor.

Insolvency proceedings

An insolvency proceedings is initiated by the filing of an application for commencement of insolvency proceedings, either by the debtor (a "voluntary insolvency") or by one of its creditors (a "forced insolvency"). Following the judge's determination that the debtor is insolvent, an insolvency trustees panel (*administración concursal*) is appointed to analyse and determine the extent of the active insolvency estate (*activos*) and the existing debts (*pasivos*).

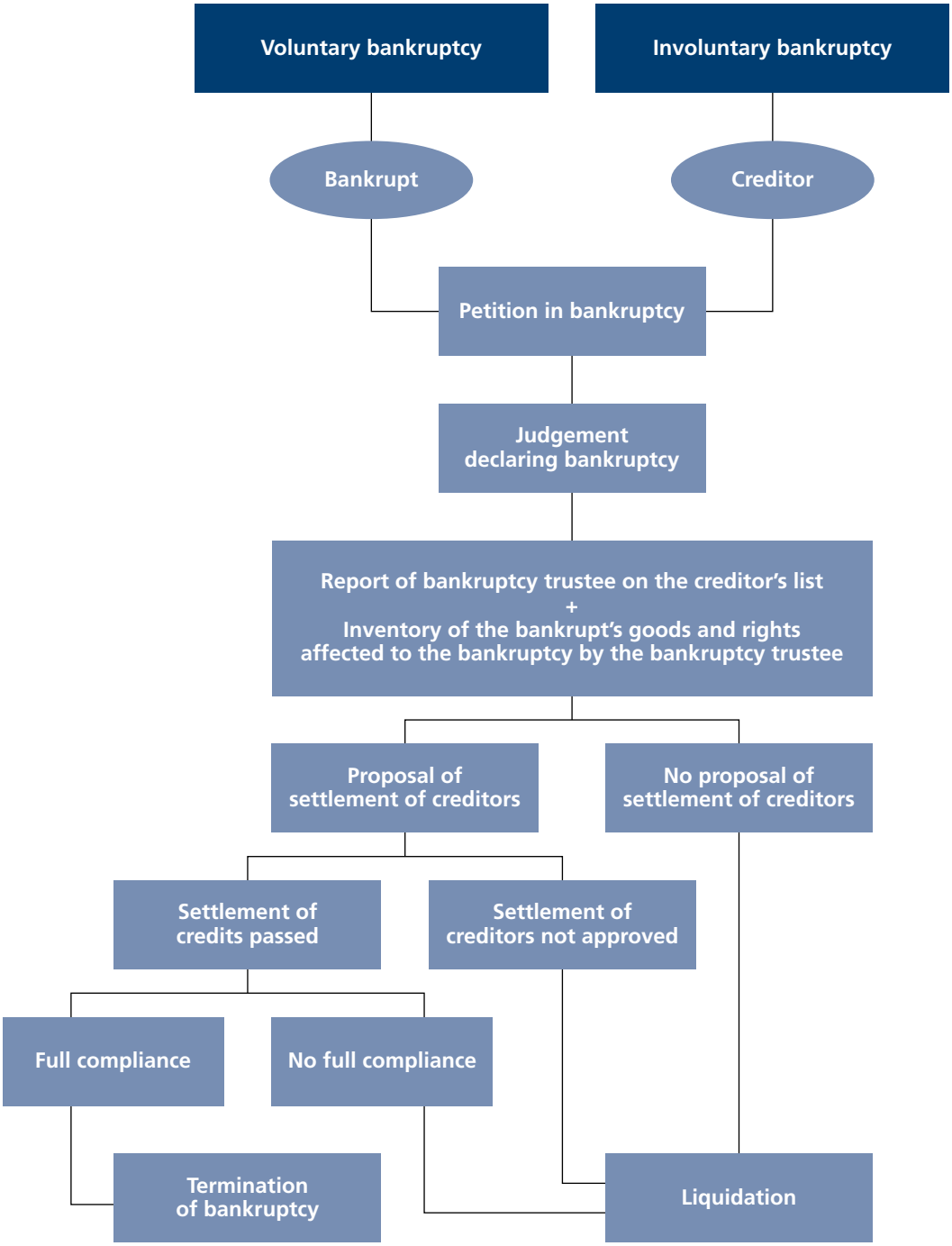
This stage concludes with a report drafted by the insolvency trustees' panel, including information on the debtor's assets, the active insolvency estate's inventory and the list of creditors. Once the inventory and the list of creditors are determined, one of two alternatives follows: (i) *the settlement of creditors*, where an agreement is reached between the debtor and its creditors for the payment of the debts; or (ii) *liquidation*, where the active insolvency estate is liquidated in order to pay the debts. The liquidation stage is initiated if the debtor fails to reach an agreement with the creditors or if the debtor fails to comply with its agreement with the creditors.

Submission of an insolvency application

The Act establishes several rules, of which the following are noteworthy:

1. Application by debtors

An insolvent debtor has the *duty to file an insolvency application* within *two months* from the date it knew or should have known about its insolvency. Insolvency is



presumed when a debtor is regularly not able to comply with its payment obligations.

A debtor may *file an application for commencement of a voluntary insolvency* when facing an *imminent insolvency*. An imminent insolvency is when a debtor foresees that it will not be able to regularly comply with its obligations.

The Act increases the liability of an insolvent debtor's directors by imputing responsibility for the debtor's insolvency to its directors including: (1) legally appointed directors; (2) directors fulfilling directorial functions in fact without being expressly appointed; and (3) persons who have fulfilled directorial functions in the debtor for a period of two years prior to the declaration of insolvency. If a debtor fails to comply with its duty to file an insolvency application, the insolvency may be classified as 'guilty' (*culpable*), leading to a prohibition on the debtor's directors or liquidators fulfilling management functions in a corporate entity for a period ranging from two to 15 years.

In a liquidation, the court may require the debtor's directors and other persons who fulfilled directorial functions for the debtor in the two years prior to the

declaration of insolvency, to pay creditors, totally or partially, the amount of the debts remaining unpaid after liquidation of the active insolvency estate.

In a forced insolvency, the court may order the seizure of assets belonging to the debtor's directors or liquidators to ensure their payment of the debts. The seizure of assets can be avoided if the director's or liquidators provide security to the court.

2. Application by creditors

A debtor's creditors are also legally entitled to file an application for commencement of insolvency. The law gives priority to the creditor initiating the insolvency by regarding a portion of its debt (i.e., up to half of its credit) as privileged debt.

Creditors are entitled to file an application for commencement of insolvency proceedings if one of the following circumstances occur:

- Debtor's non-payment of mandatory taxes, social security quotas, salaries or other labour compensation amounts (corresponding to the last three monthly wages) for a period of three months prior to the date of the filing of the insolvency application;
- Debtor's general default in payment obligations;
- General seizure of debtor´s goods; and
- Debtor's fraudulent transfer of the assets for a price below market value.

If the debt of the creditor filing the insolvency application is due, the debtor must deposit the full amount of the debt into the court for the filing creditor. The creditor may accept the debtor's payment in satisfaction and withdraw from the insolvency application; or reject the payment and continue with the proceeding.

In a voluntary insolvency the debtor is allowed to continue operating under the supervision of the insolvency trustee whereas in a forced insolvency, only the insolvency trustee is allowed to administrate and dispose over assets of the debtor. However, the court considers applications on a case-by-case basis and the courts have discretion to make provisions that depart from the general rules.

Effects of insolvency

A declaration of insolvency implicates the debtor, the debtor's creditors, the debtor's contracts and certain actions the debtor executed prior to the declaration of insolvency.

1. Effect on debtors:

- The possibility of restricting or intervening in the debtor's communications, requiring the debtor to be based in the city where its office is registered, and trustee´s inspection of documents at the debtor's registered office.
- Intervention in or suspension of the debtor's operations.
- The debtor can continue with its business but the court may order the partial or total cessation of the debtor's activities.
- The possibility of seizure of assets of the debtor's directors or liquidators of the debtor. Seizure is only applicable when the insolvency is due to acts of the director concerned and the debtor's assets are not enough to pay the debt.

2. Effect on creditors:

- Prohibition of new claims against the debtor that affect its assets.
- Suspension of executive actions (*acciones ejecutivas*) against the debtor.
- Suspension of the execution of collateral for a period of one year (*garantías reales*).
- Prohibition of compensation.
- Suspension of accrual of interest on debt.

3. Effect on contracts:

- Validity of contracts with reciprocal obligations.
- Clauses relating to the automatic termination of the contract due to the declaration of insolvency of any of the parties are invalid.
- Debtor may terminate existing contracts, modify the labour conditions and suspend eviction claims in relation to rent obligations.

4. Prejudicial acts relating to the debtor's assets:

- The debtor's prejudicial acts relating to its assets may be rescinded if such acts took place during the two years prior to the date of declaration of insolvency.
- In some cases, prejudice is presumed (e.g., gratuitous transfers and payment of obligations which are not due).
- In other cases, prejudice is a rebuttable presumption: (e.g., non-gratuitous lucrative transactions made by parties specially related to the debtor and collateral relating to pre-existing obligations).
- In other cases, the insolvency trustee will have to prove prejudice.

— The effect of rescission is a declaration of the relevant act's inefficacy and restitution of considerations. If one of the parties who contracted with the debtor acted dishonestly, then the debt may be postponed.

Types of debts affected by the insolvency: payment of ordinary debts

The credits are classified based on the principle of *prior tempore potior Jure*, which leads to the following classification of debts:

— Privileged debts (general and special) are debts receiving preference in repayment in the event of debtor's liquidation. Privileged credits are not affected by the settlement of creditors unless the creditors holding privileged debts have voted in favour of the settlement agreement. Special debts are debts affecting specific assets whereas general debts affect all the debtor's assets.
— Ordinary debts are those debts not legally classified as privileged or subordinated. These debts will be paid out after the payment of privileged debts and before the payment of subordinated debts. In the event of a settlement of creditors, ordinary debts will be paid out as stated in the agreement.
— Subordinated debts are the debts that will only be paid out once all other debts (privileged and ordinary) have been paid.

In order to ensure the payment of the *ordinary creditors* the Act provides for the following:

— Limitation of the privileges granted to labour debts.
— Temporary suspension of the foreclosure on assets of the debtor affected by the debtor's activities.
— Restricting the amount Public Treasury and Social Security debts that may be privileged to 50% of the amount of their debts (the remaining amount will be considered as an ordinary debt).
— Creation of a new category of debts: the subordinated debts that will only be paid when the rest of the debts are paid (there is a high possibility that these subordinated debts will remain unpaid).

According to the Act the following credits are included in the subordinated debt category:

— Debts which have been subordinated by contract.
— Interest on any kind of debt.
— Fines and sanctions.
— Debts generated by means of interest.
— Debts held by creditors related to the debtor.
— Debts that have not been timely communicated from the creditor to the insolvency trustee panel.

Regarding creditors that are specially related to the debtor, the Act distinguishes the following cases:

— If the debtor is an individual, the specially related persons are: the debtor's spouse or any person with a similar relationship, the ancestors, descendants and brothers of the debtor or his/her spouse or couple, and the spouses of the abovementioned relatives.
— If the debtor is a legal entity, the specially related persons and entities are: the shareholders who are personally liable for the debtor's debts; the shareholders who own 5% of the capital stock in listed debtor companies; the shareholders who own 10% of the capital stock in non-listed debtor companies; the directors, the liquidators and people with powers of attorney granted by the debtor (including those persons fulfilling those functions two years prior to the filing of the application for commencement of the insolvency procedure); and the companies belonging to the same group as the debtor and those companies' shareholders.
— The debts held by specially related persons are considered subordinated debts meaning that the debts rank below all the other debts and have little chance of satisfaction. This subordination could have an adverse effect on the existing financing arrangements of such specially related persons (e.g., parent companies that used to grant loans to related companies with economic difficulties are now exposed to a high risk of non-payment in the event of insolvency of such related companies).

Verification of debts by the insolvency trustee panel:

— Before including a debt in the creditors list, the insolvency trustee panel must verify and expressly accept each debt for inclusion in the list. As such, within one month after the publication of the judgment declaring the debtor insolvent, the creditors must serve notice and to submit the documents that prove the existence of their outstanding debts. If the notice is not served within one month, the debt will be classified as a subordinated debt.

Insolvency Trustee Panel

As a general rule, the insolvency trustee panel must include a lawyer (with at least 5 years of practice) or an auditor (with at least 5 years of practice). In exceptional cases, the court can also appoint a creditor to the panel.

Among other functions, it is the panel's duty to supervise, or even manage, the debtor's activities (depending on the decision of the courts), and draft a report on the debtor's economic situation.

Limits to the settlement of creditors

It is important to point out that the Act limits the scope of the settlement of creditors, as it forbids settlements with creditors releasing more than 50% of the amount of the debts and those with waiting periods over five years (with some exceptions). Moreover, the Act forbids the settlement of debts for the purpose of winding up the debtor, which was common in past suspension of payment proceedings.

The settlement of creditors is passed, as a general rule, by the creditors' meeting with a majority of 50% of a total amount corresponding to the ordinary debts. The quorum required is lower compared to the former regulation in an effort to facilitate the approval of agreements. The debtor, or any creditor representing at least 20% of the total amount of ordinary debts can submit a proposal for the settlement of creditors. The courts have the ultimate discretion in relation to the approval of the settlement of creditors.

The following persons are entitled to oppose the approval of the settlement of creditors:

— Any creditor who has not attended the creditors' meeting;
— Creditors who have voted against the settlement of creditors; or
— Insolvency trustees and creditors representing 5% of the total amount of debts if they consider that the debtor's compliance with the settlement is objectively impossible.

Switzerland

Preliminary Remarks

Since Switzerland is not a member of the EU, Annex A and B to the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency and winding-up proceedings, respectively, are not applicable. Thus, the proceedings outlined in this overview are based purely on provisions of Swiss law.

Further, this overview is limited to winding-up proceedings for legal entities and, therefore, does not encompass comparable issues involving individuals.

Winding-up proceedings

1. Bankruptcy proceedings

Conditions for opening
In Switzerland, both creditors and debtors are entitled to request the initiation of bankruptcy proceedings. Pursuant to Swiss bankruptcy law, only entities and individuals registered in the commercial register are subject to bankruptcy proceedings (individuals not registered in the commercial register are subject to ordinary debt enforcement proceedings).

A creditor may request the initiation of bankruptcy proceedings within the scope of an ordinary debt enforcement proceeding (i.e., as an ultimate measure of a creditor whose claim has not been settled but upheld within the course of the debt enforcement proceeding). The court will approve the creditor's request and open bankruptcy proceedings, unless the statutory requirements for a dismissal are satisfied (e.g., the request for a composition proceeding is pending or indications for a prospective composition proceeding exist). Further, a creditor may also request the opening of a bankruptcy proceeding directly (i.e., without carrying out an ordinary debt enforcement proceeding), provided: (i) a debtor subject to enforcement proceedings by bankruptcy ceased to pay its debts or (ii.a) a debtor's residence is unknown; (ii.b) a debtor has gone on the run in order to avoid fulfilling his obligations; or (ii.c) a debtor has acted fraudulently, is attempting to act fraudulently, or has concealed assets in enforcement proceedings.

In addition, the debtor, regardless whether or not qualifying for bankruptcy proceedings, may request the initiation of bankruptcy proceedings by declaring its insolvency. Insolvency means persistently not being able to pay due debts. The bankruptcy court will approve a debtor's request if there are no prospects for debtor's recovery.

Restructuring methods
As under regular composition proceedings (cf. below), the debtor, after having been declared bankrupt, but also a creditor, has the opportunity to propose a composition. In contrast to regular composition proceedings, the granting of a moratorium is not necessary, as the opening of bankruptcy proceedings suspends all other enforcement proceedings against the debtor and prevents creditors from initiating new enforcement proceedings for claims arising prior to the opening of bankruptcy proceedings (except for the enforcement of third party pledges). Further, during the time period between the vote of the creditors concerning the approval or dismissal of the composition agreement and the composition court's decision, the realisation of the debtor's assets is suspended.

If a debtor, against whom bankruptcy proceedings have been opened (but final distribution of the bankruptcy proceeds has not yet taken place) or one of its creditors, proposes a composition agreement, the bankruptcy administration assesses the proposal on behalf of the creditors and submits the assessed proposal for creditors' approval. Creditors' approval requires the same quorums as those within the scope of regular composition proceedings (cf. below). Subsequently, assuming creditors' approval, the bankruptcy administration forwards the composition agreement to the composition court for confirmation. Provided the composition agreement meets the statutory requirements (cf. below), the composition court will confirm the agreement. If confirmed, the bankruptcy administration must file a bankruptcy revocation request with the bankruptcy court. If the composition agreement is rejected by the creditors or by the composition court, the bankruptcy proceedings will continue.

Success rate
In practice, the submission of composition agreements by debtors subject to an ongoing bankruptcy proceeding are rare. If there are any prospects for a composition, a composition agreement is concluded prior to the opening of bankruptcy proceedings.

Pros and cons
Pros: The debtor's right to submit a composition agreement after the opening of bankruptcy proceedings allows a debtor to strive for its financial restructuring, thereby avoiding its liquidation.

Also from a creditor's point of view, a composition agreement with assignment of assets is more favourable than a regular bankruptcy proceeding, since the court may approve such agreement only provided that the proceeds generated through the composition agreement exceed the proceeds which might be generated in a bankruptcy proceeding. In addition, a composition agreement with assignment of assets allows for a more flexible form of realization than regular bankruptcy proceedings (i.e. allowing to keep costs low and await proper time to realize).

Other proceedings

1. Composition Proceedings

Composition proceedings are the alternative to bankruptcy proceedings for companies in financial difficulty that cannot pay their debts, but are capable of being financially restructured. The aim of composition proceedings is the preservation of remediable companies by helping them to (partially) settle their debts and avoid liquidation.

Composition agreements may be concluded in judicial or extrajudicial proceedings. Extrajudicial proceedings are based on private legal acts and are composed of many individual composition agreements generally bilaterally negotiated with each creditor (i.e., unlike in judicial proceedings, no creditor may be forced to agree on a settlement of its claim). The judicial composition proceedings are carried out under supervision of the composition authorities and the agreement reached is binding on all creditors whose claims arose prior to the granting of the moratorium and subsequently without the consent of the administrator, respectively.

Conditions for opening
Composition proceedings can be requested by the debtor or its creditors (to the extent entitled to apply for the opening of a bankruptcy proceeding). A request for composition proceedings is filed with the composition court.

The debtor requesting composition proceedings must submit a reasoned application outlining (i) its current and future financial situation (e.g. by submitting underlying documents such as balance sheets, profit and loss statements, liquidity plans, etc.) and (ii) a provisional restructuring plan. Unless the court comes to the conclusion that there is obviously no prospect for either a restructuring or the confirmation of a composition agreement, it will grant a provisional moratorium for a duration of up to four months and take asset preservation measures. Further, a provisional administrator might be appointed in order to examine the prospects of a restructuring or of an approval of a composition agreement. Under certain conditions, a provisional moratorium will not be published (for a certain time). Once the examination is concluded, the composition court decides whether to approve the moratorium definitely, taking into particular consideration the prospects of recovery and the creditors' approval of the composition agreement.

Restructuring methods
Provided that the composition court determines that the corresponding requirements are met, the court grants a definitive moratorium for another four to six months (i.e. up to ten months in total; renewable up to 12 months or, in complex circumstances, 24 months upon request by the administrator) and appoints one or several administrators. During this period, the administrator (i) drafts the composition agreement, if necessary; (ii) supervises the debtor; (iii) establishes an inventory and values the assets; (iv) requests the creditors to register their claims; and (v) strives to negotiate the composition agreement with the creditors.

In order to facilitate the progress of the composition proceedings, creditors not holding claims secured by real

estate are deprived from commencing or continuing debt enforcement proceedings against the debtor. However, the moratorium also limits the debtor's ability to dispose of assets and its power to deliberately manage the company's affairs. The debtor is under constant supervision of the administrator, in addition, it might require the consent of the administrator to carry out certain operations or it might be deprived of its management competences.

As soon as the draft composition agreement is completed, the administrator convenes a creditors' meeting which votes on approval of the proposed composition agreement. The agreement is approved provided, (i) approval of the majority of the creditors representing two-thirds of the total amount of claims, or (ii) approval of one-fourth of the creditors representing three-fourths of the total amounts of claims is obtained. Privileged and secured creditors are not entitled to participate in the votes. After creditors' approval, the composition agreement requires confirmation by the composition court in order to become valid and binding upon all creditors of claims subject to the composition agreement, regardless of the creditors' participation in the composition proceedings.

Composition proceedings may result in the conclusion of an ordinary composition agreement (Dividendenvergleich/Stundungsvertrag) or a composition agreement with assignment of assets (Nachlassvertrag mit Vermögensabtretung).

Within the scope of an ordinary composition agreement the creditors agree to (i) forgo a certain percentage of their debts or (ii) defer payments (i.e., without foregoing the claim or part of it). In either alternative, the debtor may continue its business activities and resume full authority to dispose of assets. The confirmed composition agreement is binding on all creditors whose claims arose prior to the granting of the moratorium and subsequently without the consent of the administrator, respectively. However, secured creditors regain their right to request the realization of granted pledges. Thus, after a successful composition proceeding almost all existing debts are settled, and the debtor is allowed to continue its activities on an almost debt-free basis.

To the contrary, a composition agreement with assignment of assets leads – as in bankruptcy proceedings – to the dissolution and liquidation of the debtor company. The debtor assigns its assets to (i) a hive-off vehicle (which is to be realized, instead of the single assets) or (ii) all creditors for realization by a creditor-elected and court-appointed liquidator. The liquidation is similar to that in bankruptcy proceedings, but is more flexible. The proceeds are distributed proportionally to the creditors once the liquidator has assessed their claims. The distribution is effected according to the hierarchy of creditors provided by Swiss insolvency law.

Success rate
The use of ordinary composition agreements seems to be limited given that such agreements are rarely used to restructure large corporate debtors.

Pros and cons
In contrast to regular bankruptcy proceedings, an ordinary composition agreement allows the debtor to regain full authority to dispose of assets and to continue its business. This is not the case when a composition agreement with assignment of assets is approved and confirmed by the creditors and the court. However, the liquidation of the related assets are subject to far more flexible rules than in ordinary bankruptcy proceedings as the assets are not limited in the mode of realization, thereby, taking into consideration the state of the assets, the development of their value and the current market conditions (to the extent possible).

2. Restructuring measures in case of loss of capital

Conditions of opening
Article 725 para. 1 of the Swiss Code of Obligations requires the executive boards of stock corporations and limited liability companies to convene an extraordinary shareholders' meeting and to propose appropriate restructuring measures as soon as there is a loss of capital. A loss of capital means that the assets reflected in the balance sheet of the company no longer cover one-half of its share capital and the legal reserves. At the beginning of the extraordinary shareholders' meeting, the executive board informs the shareholders about the company's financial situation and proposes restructuring measures. Subsequently, the shareholders decide whether to approve, reject, or alter the proposed restructuring measures.

Restructuring methods
The aim of the restructuring measures is to overcome a current financial crisis, avoid liquidation proceedings, and secure the company's continued existence.

Before implementing appropriate restructuring measures, the executive board of a stock corporation or a limited liability company has to precisely assess to what extent the stock corporation or the limited liability company may be financially restructured. Provided there are prospects for a successful financial restructuring, the executive board is obligated to propose all appropriate measures to restore the company's financial position.

The starting point for restructuring measures pursuant to article 725 para. 1 of the Swiss Code of

Obligations is the evaluation of balance sheet measures (i.e., realization of reserves and/or provisions, revaluation of assets, etc.). If the measures are not sufficient to eliminate the balance sheet loss, the executive board often strives to implement one or several of the following measures:

— Capital reduction with immediate capital increase (Kapitalschnitt)
— Capital increase without capital reduction (Kapitalerhöhung ohne Kapitalschnitt)
— À fonds perdu contributions (À fonds-perdu-Zuschüsse)
— Subordination of claims (Rangrücktritt)
— Partial waiver of debt (Partieller Forderungsverzicht)
— Sale of assets (Aktivenverkauf)
— Rescue merger (Sanierungsfusion)

Success rate

Considering that the above restructuring measures depend largely on the willingness of the company's creditors and/or the involvement of third party investors, no general statement as to the success rate of this technique can be made.

Pros and cons

Pros: On the one hand, the related restructuring measures may be resolved without involvement of a court or the debtor's creditors.

Cons: On the other hand, despite implementation of restructuring measures, creditors may not be forced to make any concessions vis-à-vis the debtor.

3. Restructuring measures in case of over-indebtedness

Conditions for opening

Swiss stock corporations, limited liability companies and cooperatives are subject to an additional regime that applies in cases of over-indebtedness. Over-indebtedness means that the assets reflected in the balance sheet of a company no longer cover the claims of the company's creditors. As a consequence, the executive boards of the aforementioned companies must notify the court of over-indebtedness.

The bankruptcy court then opens bankruptcy proceedings (cf. winding-up proceedings above), unless there are prospects for recovery and the executive board or a creditor of the company requested the postponement of the adjudication of bankruptcy. If a postponement is granted, the bankruptcy court may appoint an administrator and deprive the executive board of its power of disposal or make its resolutions conditional upon the consent of the administrator (to preserve the company's assets).

With regard to licensees involved in collective investment schemes, an even stricter regime applies, entitling the Swiss Financial Market Supervisory Authority to open bankruptcy proceedings where there is good cause to suspect over-indebtedness or liquidity problems and no prospects for recovery subsist or related measures failed.

Restructuring methods

A postponement of the adjudication of bankruptcy allows the company to implement restructuring measures ensuring its permanent financial recovery and its continued existence. In comparison to the restructuring measures in case of a loss of capital, restructuring measures pursuant to article 725a of the Swiss Code of Obligations have to be (indirectly) approved by a court that decides whether the proposed measures are appropriate. Therefore higher requirements must be met and corrections of the balance sheet and purely financial improvements are insufficient. Operational and structural measures must be implemented as well.

To obtain this court approval, a restructuring plan has to be established, outlining the restructuring concept. The court must approve the request if all of the following conditions are met: (i) there are justified prospects for sustainable restructuring; (ii) the creditors' are not disadvantaged due to the adjournment of bankruptcy (i.e. in comparison to the instant opening of bankruptcy) and the principle of equal treatment is ensured; and (iii) the restructuring concept is plausible and credible.

In practice, a restructuring concept is composed of one or several of the following measures:

— Corrections of the balance sheet and financial measures (cf. restructuring measures in case of loss of capital as discussed above)
— Operational and structural measures:
  - Cost reductions (Kosteneinsparungen)
  - Staff reduction (Personalabbau)
  - Inventory reduction (Lagerabbau)
  - Entry into new markets (Erschliessung neuer Märkte)
  - Diversification (Veränderung des Angebots)
  - Merger with a financially stable company (Übernahme durch eine gesunde Gesellschaft)

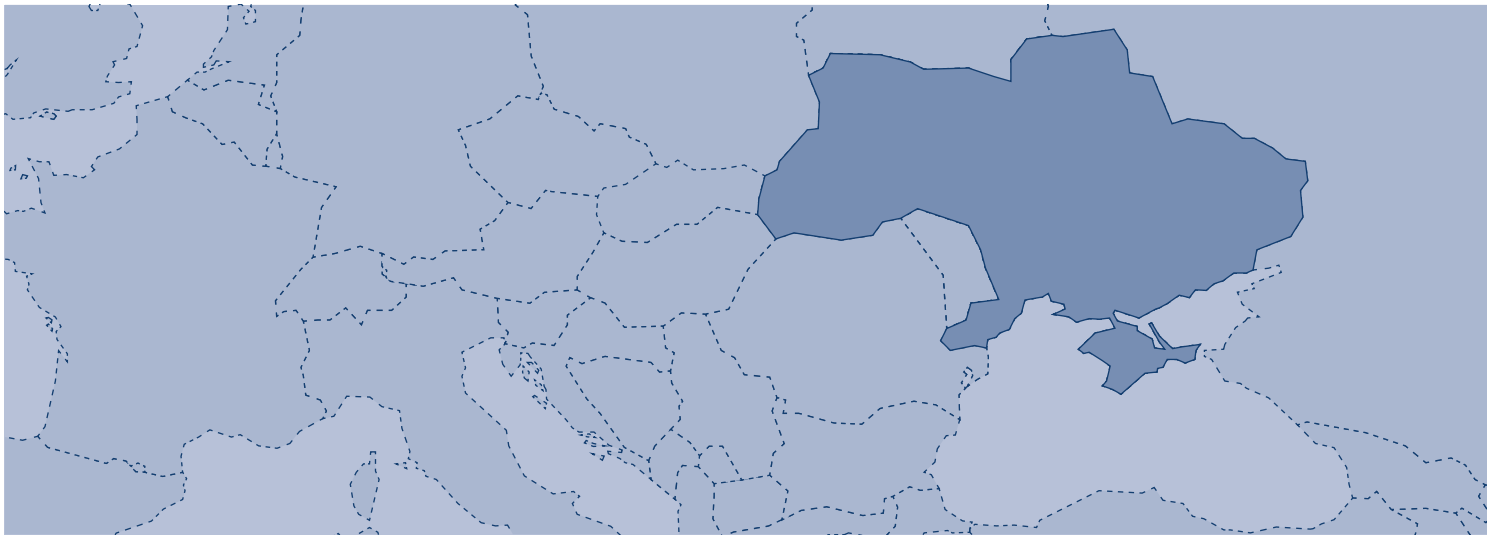
Success rate

In practice, postponements of the adjudication of bankruptcy are extremely rare because of the restrictive judicial requirements. Often, the assessment of creditors' interests prevents the court from approving postponement requests.

Pros and cons

Pros: Postponements of the adjudication of bankruptcy prevent the opening of bankruptcy, other bankruptcy requests, and liquidation acts and grant a period of time to improve the company's financial situation. In addition, the adjournment of bankruptcy is normally not published (at least in the beginning and providing that third party interests do not require a publication).

Cons: As outlined above, the court is obliged to impose measures ensuring the preservation of the company's assets. Therefore, the company is not able to decide and act as flexibly as it could prior to the adjudication of bankruptcy. Further, despite the judicial approval, creditors may not be forced to make any concessions vis-à-vis the debtor.



Ukraine

Introduction

Since Ukraine is not a member state of the European Union (EU), Council Regulation (EC) No. 1346/2000 of 29 May 2000 On Insolvency Proceedings (the "*Regulation*") is not applicable to Ukraine. Ukrainian insolvency proceedings are regulated only by the Law of Ukraine "On Solvency Rehabilitation of the Debtor or Declaring Its Bankruptcy" dated 14 May 1992 (*Bankruptcy Law*). The Bankruptcy Law generally recognizes the cross-border insolvency proceedings (which are considered winding-up proceedings as defined in the Regulation), but their effect in Ukraine is subject to certain conditions and specific order.

Winding-up proceedings

1. Cross-border bankruptcy

On 19 January 2013, the restated Bankruptcy Law came into force and cross-border bankruptcy proceedings (the "*Winding-up proceedings*") became possible in Ukraine. Unfortunately there is, as of yet, no information on how Ukrainian courts apply cross-border bankruptcy provisions. However, the pertinent provisions of the Bankruptcy Law provide as set out below.

Conditions for opening
Winding-up proceedings can be initiated in Ukraine in relation to (i) a debtor which is in a bankruptcy proceeding in Ukraine or (ii) to a foreign debtor against whom insolvency proceedings were initiated and who has property in the territory of Ukraine.

Winding-up proceedings may be initiated upon the application of an international liquidator (property administrator, solvency rehabilitation manager) appointed in another country where the insolvency proceedings were started (the "*Liquidator*"). However, by contrast with the Regulation, the Liquidator cannot initiate Winding-up proceedings in relation to a Ukrainian company which is not subject to ongoing insolvency proceedings in Ukraine. In this case, foreign creditors must initiate insolvency proceedings in Ukraine pursuant to the general provisions of the Bankruptcy Law and independent from the foreign insolvency proceedings (as defined in the Regulation).

Restructuring methods
Ukrainian law considers foreign insolvency proceedings to be secondary proceedings in relation to bankruptcy proceedings that were initiated in Ukraine. Accordingly, the Liquidator has few options. The Liquidator may seek the following measures in a Ukrainian court: (i) suspension of bankruptcy proceedings in Ukraine, (ii) preservation of debtor's assets situated within the territory of Ukraine, and (iii) initiating of other procedures if such are stipulated by the ratified treaties of Ukraine. However, Ukraine has not yet entered into any treaties with respect to insolvency.

Pros and cons
Pros: Enhances foreign creditors' rights in Ukrainian insolvency proceedings.

Cons: Winding-up proceedings are terminated once foreign creditors' claims are added to the list of creditors' claims in Ukraine; winding-up proceedings

are subordinated to domestic proceedings; and the powers of the Liquidator are much more limited in comparison with the Regulation.

Insolvency proceedings

1. Insolvency

Conditions for opening
Insolvency proceedings may be initiated by a debtor or its creditors on the ground of a debtor's inability to pay its undisputed debts (exceeding circa EUR 35,000) for more than 3 months. The three-month period runs from the date of opening of enforcement proceedings to collect the debt. If a debtor partially satisfies creditors' claims and as a result the monetary threshold is not reached the insolvency proceedings cannot be initiated.

The insolvency proceedings may include the following stages: (i) management of the debtor's assets; (ii) amicable settlement agreement; (iii) solvency rehabilitation procedure; and (iv) liquidation. Restructuring is possible only within the solvency rehabilitation and amicable settlement agreement stages.

Restructuring methods
The Bankruptcy Law provides for the following restructuring methods that may be used by debtor and creditors in insolvency proceedings: (i) debtor's reorganization (e.g. merger, corporate consolidation, spin off and split up); (ii) postponement/rescheduling of debts; (ii) a debt-to-bonds conversion; (iii) a debt-to-equity conversion; (iv) rescheduling, postponement or write-off of debts through conclusion of an amicable settlement agreement; (v) sale of part of or all assets of a debtor; (vi) recovering of debts by debtor's property's owner (state authorities with respect to state and municipal enterprises); (vii) assignment of debts; and (viii) increasing of the charter capital of a debtor.

The above list is not exhaustive and the debtor's creditors may propose application of any restructuring methods they deem relevant. However, application of any restructuring methods should be approved by the commercial court that started insolvency proceedings.

Success rate
The information is not publicly available. However, the general perception of insolvency proceedings in Ukraine is that they do not protect creditors effectively.

Pros and cons
Pros: An insolvency proceeding allows recovery of most debts; receivables that were not recovered may be treated as uncollectible receivables which are deductible from taxable income.

Cons: Insolvency proceedings are long lasting and generally inefficient. As a result insolvency proceedings do not compensate creditors for time and money spent and, therefore, are used by the creditors as a last possible option to get at least part of their claims satisfied. Insolvency proceedings generally lead to the debtor's liquidation; if a creditor used its right to adjust its taxable income, it must adjust its taxable expenses relating to it (e.g. cost of sales).

Other proceedings

1. Pre-bankruptcy proceedings

This procedure was introduced in 2013 with adoption of the new version of the Bankruptcy Law. It provides creditors and a debtor with a method to restructure a debtor's debts without initiating insolvency proceedings.

Conditions for opening
The procedure may be initiated with: (i) written consent of the owner of the debtor's assets (state authorities with respect to state and municipal enterprises); (ii) written consent of creditors whose aggregate amount of claims exceeds 50% of debtor's total indebtedness; and (iii) a restructuring plan approved by all secured creditors and at a general creditors' meeting.

Restructuring methods
The procedure includes the elaboration and adoption of the restructuring plan, which may consist of the same restructuring methods as within bankruptcy proceedings. Out-of court rehabilitation procedures and restructuring plans should be approved by the court and should not last longer than 12 months. During the period, it is not possible to start bankruptcy proceedings and recover any debts in a way that is not prescribed by the restructuring plan.

Pros and cons
Pros: The pre-bankruptcy proceeding: allows creditors to participate in the restructuring proceedings and agree on a restructuring plan which best fits their interests; and allows debtors to continue their business activities.

Cons: The pre-bankruptcy proceeding is a new untested proceeding (created in early 2013); and may be used fraudulently by the creditors or debtor.

Other restructuring techniques

The debtor and its creditors may create arrangements on a voluntary basis through renegotiating of the agreement under which indebtedness exists, or entering into standstill, settlement and other similar agreements. However, specific terms of such arrangements may be unenforceable in bankruptcy proceedings.

Jurisdictions covered at a glance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Croatia
Romania
Bulgaria

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