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Newsletter

CMS Restructuring and Insolvency in Europe

Autumn 2012

Introduction

We are pleased to present this autumn 2012 edition of the CMS Restructuring and Insolvency in Europe Newsletter. We aim to give information on topical issues in insolvency and restructuring law in countries in which CMS offices are located.

This edition looks at:

— An update on what constitutes "known creditors" in Czech cross-border insolvency proceedings after a recent Supreme Court decision in the Czech Republic;

— Director's obligations in assessing solvency when a German company is facing financial difficulties;

— Managing Director's duties under Hungarian insolvency law upon the liquidation;

— New rules to allow for the financing of Italian companies in certain insolvency procedures;

— New laws for Dutch BVs aiming at simplification and flexibility of the Dutch BV regime;

— A change of the law in Poland to improve the possibility of rescuing companies facing insolvency or liquidation;

— the operation of the EC Regulation or insolvency proceedings and other cross-border insolvency issues faced in the administration of Dewey & LeBoeuf LLP

CMS is the organisation of independent European law and tax firms of choice for organisations based in, or looking to move into, Europe. CMS provides a deep local understanding of legal, tax and business issues and delivers client-focused services through a joint strategy executed locally across 28 countries with 53 offices in Western and Central Europe and beyond. CMS was established in 1999 and today comprises ten CMS firms, employing over 2,800 fee earners and is headquartered in Frankfurt, Germany.

The CMS Practice Group for Restructuring and Insolvency represents all the restructuring and insolvency departments of the various CMS member firms. The restructuring and insolvency departments of each CMS firm have a long history of association and command strong positions, both in our respective homes and on the international market. Individually we bring a strong track record and extensive experience. Together we have created a formidable force within the world's market for professional services. The member firms operate under a common identity, CMS, and offer clients consistent and high quality services.

Members of the Practice Group advise on restructuring and insolvency issues affecting business across Europe. The group was created in order to meet the growing demand for integrated, multijurisdictional legal services. Restructuring and insolvency issues can be particularly complex and there is such a wide range of different laws and regulations affecting them. The integration of our firms across Europe can simplify these complexities, leaving us to concentrate on the legal issues without being hampered by additional barriers. In consequence we offer coordinated European advice through a single point of contact.

Editorial

It is with pleasure that I present the Autumn 2012 edition of the CMS Restructuring and Insolvency in Europe Newsletter. I hope this edition will again increase and broaden your understanding of the insolvency regimes across Europe.

In this edition, several issues that a company, its directors or other stakeholders may encounter during a restructuring or insolvency procedure will be discussed. The contribution of CMS Prague highlights an important judgment in which the Supreme Court has recently clearly defined the term "known creditor". This judgment may help to identify more creditors, including creditors from other Member States. Moreover, the article discusses an amendment to the insolvency law which entered into force on 1 November 2012. With this amendment the unjustified filings of insolvency petitions can now be contested. CMS London will elaborate on their work for the administrators of Dewey & LeBoeuf LLP focussing on cross-border insolvency issues.

The duties and liabilities of directors remain to be a "trending topic" in restructuring and insolvency law across Europe: the Hungarian contribution deals with the duties and liabilities of managing directors whilst the German contribution discusses a director's obligation to monitor in times of crisis. The article addresses the exculpation of company representatives and the role of external advisors.

Again, the newsletter includes contributions on changes to national laws. In Poland, changes in insolvency law have been announced which include a more prominent role for the restructuring of companies, the founding of specialised insolvency departments within courts and the creation of an online insolvency register. In Italy, the amendments to the Insolvency law have already been implemented. These changes concern the financing of companies in a pre-insolvency procedure. Last but not least, the Dutch contribution for this newsletter gives an overview of the most significant changes in the Dutch BV law after the amendment which entered into force on 1 October 2012. The aim of the amendment is to simplify the Dutch BV law and make it more flexible as well as to make the "BV" (a limited liability company) a more appealing structure for companies abroad. It remains to be seen whether the changes implemented will be sufficient to achieve these goals.

Proposed amendments to Dutch insolvency law

Very recently, the Dutch Minister of Justice, Mr Opstelten, wrote a letter to the Dutch House of Representatives. In this letter, several amendments to the Dutch Bankruptcy Act (dating from 1893) are proposed. Several banks, bankruptcy trustees and other parties involved have once again expressed their dissatisfaction about the current legislation. The Dutch Bankruptcy Act continues to be a matter of discussion and several initiatives to change the law have been rejected in the past. Five years ago, a provisional draft for a new Bankruptcy Act was presented to the Minister of Justice. Nevertheless, in 2011 the former Minister of Justice ruled that the current situation was not a reason for the implementation of the proposed changes.

The current Minister of Justice seems to acknowledge the seriousness and urgency of changing the Dutch Bankruptcy Act in order to compete with other European countries in these times of financial crisis. The proposed amendments include the possibility to appoint a provisional liquidator in order to prepare a plan to restart a company before it is declared bankrupt and the possibility to force a creditor into a settlement when that settlement is considered to be reasonable. The main goals of these changes are to prevent companies from going bankrupt because a settlement cannot be achieved or companies shifting their "centre of main interest" to another country in order to make use of a more favourable legal system. Other proposed amendments are aimed at the prevention of insolvency fraud by enhancing transparency and by making it impossible for convicted fraudsters to become directors of companies again.

Revision of the European Insolvency Regulation

Additionally, I would like to draw attention to the revision of the European Insolvency Regulation. The regulation came into force on 31 May 2002. The European Commission put the revision of the Insolvency Regulation in their work programme for 2012 and from the 30 March until 21 June 2012 a consultation period was held. INSOL Europe instituted a working group to investigate to what extent the regulation should be modified. Their report was presented to the European Commission on 20 June 2012 and consists of various recommendations; for example, concerning the insolvency proceedings of groups of companies. The European Commission's proposal for modernising the Insolvency Regulation is expected next December and will probably give all of us food for thought again. Further, the ongoing financial and economic crisis across Europe will continue to raise questions and problems in the field of restructuring and insolvency. No doubt there will continue to be a great many topical subjects in this field of law to discuss!

Our CMS lawyers are increasingly involved in cross-border restructurings and insolvencies cooperating effectively with colleagues from other jurisdictions. With the upcoming revision of the European Insolvency Regulation our clients will benefit from our deep local expertise, seamless service and large European footprint.

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A clear definition of "known creditors" in cross-border insolvency proceedings

Following our article in a previous issue (Spring 2012) on submissions of claims of foreign creditors in the insolvency proceedings in respect of Czech debtors, we can report a positive update in current case law.

The Insolvency Court sets the deadline for filing debt claims pursuant to the Czech Insolvency Act. Generally, the deadline cannot be less than 30 days or longer than two months from the date that the declaration of the debtors' bankruptcy is published in the Insolvency Register.

The Supreme Court of the Czech Republic declared in a decision in 2008 that creditors from other member states fall under a more lenient regime. The time period within which creditors from other member states may register their claims begins from the day that the creditors receive a letter from the Insolvency Court, not from the date that the bankruptcy is published in the Insolvency Register.

The Czech Insolvency Act places an obligation on the Insolvency Court to inform "known creditors", which includes "creditors who have habitual residences, are domiciled, or have a registered office in any of the EU Member States (with the exception of Denmark)" however no more specific definition of this is provided in the legislation.

The legal commentaries have defined known creditors as "people about whom the Insolvency Court is aware".

The Supreme Court of the Czech Republic, has in its recent decision, clearly defined "known creditor". According to the Supreme Court, a known creditor is a creditor who is known to the Insolvency Court or by the insolvency administrator as a result of (i) the documents that have been submitted to the Insolvency Court, (ii) the accountancy documents, or (iii) other documents regarding the debtor's assets or commitments (including correspondence). Additionally, as a result of the Supreme Court's decision, there is a reduced risk that a creditor might be excluded from the insolvency proceedings due to the poorly managed documents and accounts of a debtor.

The definition of the "known creditor" may now help to identify more creditors from other Member States of the insolvent debtor and hence protect their rights within the insolvency proceedings.

Bullying behavior / unjustified insolvency petitions

One of the key developments in Czech insolvency law is the adoption of an amendment to the Insolvency Act regarding the unjustified petitions submitted by creditors. This amendment came into effect on 1 November 2012. The purpose of the amendment is to protect debtors against the misuse of the creditor's right to lodge insolvency petitions.

During the economic crisis, and in order to eliminate competitors, creditors often misused their rights to lodge the insolvency petition. The primary function of submitting an insolvency petition is to resolve the business difficulties of a debtor. However, insolvency petitions have often been used unfairly, for example in an attempt to eliminate the debtor as a competitor in public tenders, as a debtor against whom insolvency proceedings have been initiated cannot participate in such tenders. This behavior is deemed as bullying behavior.

The amendment of the Insolvency Act strengthens the position of the debtor against creditors and eliminates potential abuse of the insolvency law. The amendment comes with a definition of an unjustified insolvency petition. An unjustified insolvency petition is a petition with the purpose of damaging a debtor in any way. Damage to the debtor stems from the fact that after the submission of the insolvency petition, the commencement of the insolvency proceedings is recorded in the Insolvency Register, a publicly accessed register. This may adversely affect the debtor, its reputation and, as a consequence, its business.

The amendment brings protection against such bullying petitions though the following rules:

— the Insolvency Court has a new right to dismiss any insolvency petition which is obviously unjustified;

— the Insolvency Court may expressly state in its decision that the insolvency petition, which has been lodged, is unjustified;

— the Insolvency Court has a new right to impose a fine on the creditor who is abusing its right to lodge an insolvency petition against the debtor; and

— the Insolvency Court may demand a monetary guarantee from the creditor lodging the insolvency petition to secure that the potential damage to the debtor will be covered.

The amendment shall help to eliminate the increasing number of bullying petitions, which have been made in past months.

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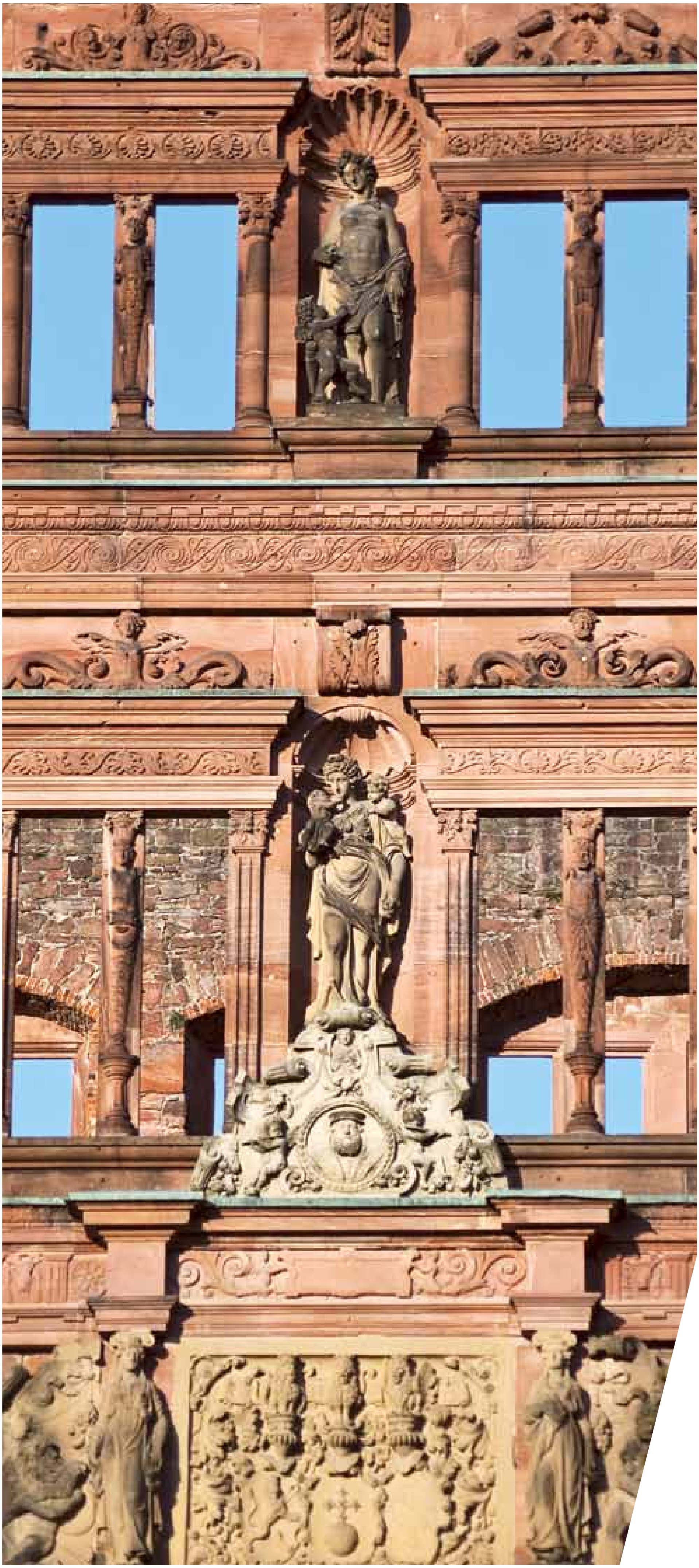

The director's monitoring obligation in times of crisis

The Federal Court of Justice has specified the conditions for the possibility of exculpation of company representatives.

It is not an easy time for directors in Germany when a company is experiencing a crisis. Directors are obliged to continuously monitor the financial situation of the company in crisis and, in the event that grounds for insolvency arise, they are obliged to file for insolvency without undue delay. Assessing grounds for insolvency based on illiquidity or overindebtedness is a very demanding task even for a knowledgeable director, as this involves numerous complex legal and financial issues. If the director is not able to assess the situation himself, he is obliged to involve an expert adviser. Considering the strict liability of directors for failure to file for insolvency *(Insolvenzverschleppung)* and the extensive prohibitions on an insolvent company making payments, it is strongly advisable to involve a qualified adviser even if the director is competent. Such a view is reinforced by the decision of the Federal Court of Justice from 2007 (FCJ, 14.05.2007 – II ZR 48/06). Here the court ruled that company representatives do not culpably breach their duty to file for insolvency if, when they themselves lack the expert knowledge to clarify whether the company is to be qualified as insolvent, they obtain the advice of an independent expert professional adviser. However, this exception only applies if the company representative provides information on all the circumstances which are significant for the assessment and, after assessing the plausibility of the advice received, follows the advice and refrains from filing for insolvency.

This decision gives directors the opportunity to avoid liability for failure to file for insolvency and the obligation to reimburse based on the breach of prohibitions of payment by outsourcing his monitoring obligations to an external professional adviser. However, the issue of who is considered to be a qualified external adviser was not examined in the judgment, nor was the level of monitoring required on the part of the director to avoid liability. The FCJ has now answered these questions, among others, in its decision of 27 March 2012 (FCJ, 27.03.2012 – II ZR 171/10).

1. Decision of the Federal Court of Justice 27 March 2012

The facts behind the decision were that, at the request of its bank, the director of a limited liability company in crisis instructed a consultant in August 2008 to examine the assets of the company and any restructuring possibilities. On 9 November 2008 the consultant submitted an expert report which confirmed that the company had a positive prognosis for continuation of the business. On 12 December 2008 the director filed for insolvency and it became evident in the course of the insolvency proceedings that the company was already illiquid at the end of August 2008. The insolvency administrator subsequently demanded all payments made by the company since the end of August 2008 be paid by the director. The Regional Court dismissed the claim of the insolvency administrator and an initial appeal was also unsuccessful.

In response to a further appeal of the insolvency administrator, the Federal Court of Justice overturned the earlier decisions and ruled that the adviser's report was not sufficient to discharge the director from liability. The court justified this by determining that, inter alia, the director could have recognised the illiquidity himself in August 2008 and, thus, could not simply rely on the results of the expert report. The court also decided that the instructions issued to the adviser were not sufficiently clear and the director should have endeavoured to have an expert report prepared without undue delay. The fact that the instructions for the assessment were issued without undue delay alone does not suffice.

2. Practical implications of the decision

Following the decision of 2007 the Federal Court of Justice has further specified the conditions for the possibility of exculpation of the director through the involvement of an external adviser.

(a) Ongoing controlling and monitoring duties of the director

To begin with, the Federal Court of Justice expressly confirms the obligation of the director to regularly monitor the financial situation of the company. In practice, this involves drawing up liquidity plans and interim reports as required. If the director does not personally have the knowledge to assess the insolvency then he is obliged to involve a qualified external adviser who can assess the situation of the company with regard to insolvency.

(b) A qualified external adviser does not have to belong to a specific profession

The court has also now clarified that it is not mandatory to involve a chartered accountant *(Wirtschaftsprüfer)* in order to discharge the director from potential liability. Advisers from other professions who have the required professional qualification can also function as expert advisers. Thus, in addition to chartered accountants, lawyers, tax advisers or business consultants may potentially serve as external advisers. The court also indicated that the requisite professional qualification in each case may be determined based on the specific details of the situation; for example, based on the size and complexity of the financial relationships of the company.

(c) Specific instructions for review

If the director notices first signs of a crisis and decides to involve an external adviser, the instructions for the review must specify an assessment of the solvency (or otherwise) of the company as the basis of the advice in order for the director to reduce their chances of incurring liability. The only case where this does not apply is where the director can clearly expect that the adviser will assess solvency in the course of the review without specific instructions.

(d) Issuing instructions without undue delay does not suffice

Furthermore, it is not sufficient for a director to merely issue instructions to an external adviser to have an assessment carried out without undue delay in order to avoid liability. Rather, it is also his responsibility to insist that the report or opinion is prepared quickly. The director must provide all the documents and information necessary to give the external adviser a comprehensive picture of the financial situation of the company for the purposes of their assessment.

(f) Assessment of plausibility by the director

Finally, the Federal Court of Justice confirmed that a review by an external adviser does not release the director from the obligation to carry out his assessment of the plausibility of the results. If the external adviser does not find grounds for illiquidity or overindebtedness the director may not simply accept this assessment without considering whether or not it is plausible.

3. Conclusion

The decision of the Federal Court of Justice helps to clarify an important issue for directors. Through the involvement of a qualified external adviser, directors can significantly reduce their risk of liability. It is likely that the role of external advisers will continue to increase in the future in the light of this decision. However, external advisers cannot and should not take the place of responsible company management. Instead such reports should constitute an effective tool in times of crisis to assist management in the complex matter of assessing insolvency. The decision of whether to file for insolvency and the associated consequences remain in the realm of responsibility of the management.

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Duties and liabilities of managing directors under Hungarian insolvency law

Hungarian insolvency law imposes certain obligations on managing directors. This article reviews some of the key duties and areas of potential liability for managing directors.

1. Duties in liquidation proceedings

Pursuant to the Hungarian Bankruptcy Code, managing directors must closely co-operate with the liquidator (who takes over the role of management in respect of the liquidation assets and employees) and comply with the obligations:

a) to prepare a closing inventory and tax returns;

b) to prepare a list of documents that must be archived following the end of the liquidation proceedings;

c) to declare to the liquidator and the competent environmental protection agency as to whether there are any environmental risks associated with the company;

d) to disclose to the liquidator all information in connection with any transactions which can be deemed to be challengeable;

e) to notify employees and trade unions (if any) of the commencement of the liquidation proceedings;

f) to notify the beneficiaries of certain allowances and compensatory damages of the commencement of liquidation proceedings;

g) to provide information at the request of the liquidator about the activities of the company prior to the liquidation proceedings; and

h) to notify any financial institutions that maintain a securities account for the company and all banks that provide financial services to the company of the commencement of the liquidation proceedings.

The liquidation court may impose fines on managing directors for failing to comply with the above obligations.

2. Liability for wrongful trading

When a company is in danger of becoming insolvent, its managing directors must conduct the business in a manner whereby their primary responsibility is to protect the rights and interests of all of the company's creditors as opposed to their normal responsibility *vis-à-vis* the company and its shareholders. A managing director who fails to fulfill this obligation may be liable for wrongful training.

In such a scenario, it is often not easy to establish when a company is in danger of becoming insolvent. However, it seems from recent court decisions that the main test of establishing whether a company is in danger of becoming insolvent is whether:

a) the company will be able to pay its debts as they fall due from its liquid assets; that is to say, whether it is able to immediately pay its debts on their due date (by liquidating its assets to cash (if needed)); and

b) the managing directors of the company can reasonably foresee this event.

If these criteria are met, the managing directors must act by giving priority to the interests of the creditors and taking all measures that could be expected from persons holding such a position in order to reduce the losses to creditors and to initiate certain measures by the shareholders.

The liquidator and the creditors may only claim damages in respect of the wrongful trading during liquidation proceedings and against those directors who have been in their position for three years prior to the commencement of the liquidation proceedings. In order to claim damages in respect of such liability, the competent courts would firstly need to ascertain that the directors did not fulfill their obligations to act in the interests of creditors. If this is established, the court would then determine the quantum of damages in a separate process.

Additionally, the concept of "shadow management" under Hungarian law extends the possibility to claim damages from those persons who had real and effective control in the management of the company, irrespective of whether they have any position with the company.

We note that although there are no precedents dealing with the interpretation of "shadow management" liability under Hungarian law, there is a growing concern that creditors, shareholders and managers (in Hungarian: *cégvezető*) may be at risk of incurring liability as "shadow directors."

It is also worth noting that in Hungary, managing directors may incur liability separately under corporate law for taking certain actions whilst the net assets of the company are negative. Such corporate law liability is addressed differently and gives rise to different sanctions compared with infringements of insolvency law.

Notwithstanding that Hungarian law does not contain the concept of the Business Judgement Rule used by the courts of the USA (whereby directors are granted discretion to take actions that may be in the interests of the business); it appears that the principle of this rule is mirrored in the Hungarian court decisions as a defence to wrongful trading.

In one such decision, a managing director had made poor business decisions by entering into two supply agreements and undertaking to prepay certain fees in cash despite the fact that this was not the normal practice of the company. In this case, the supply agreements were never completed and the cash prepayment was never refunded to the company. However, the managing director had carried out some due diligence on the suppliers and the supply agreements were prepared by the in-house company lawyer. The court held this to be part of the risk associated with doing business and that the director was not liable for wrongful trading.

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The new provisions on financing to companies in pre-insolvency procedures

The recent Law Decree no. 83 of 22 June 2012 which was converted into Law no. 134 of 3 August, 2012, has brought into effect various amendments to Royal Decree no. 267 of 1942 (the "Insolvency Law"). It also introduced a new article, *182-quinquies*, relating to the provision of new finance to help ensure that corporate continuance to companies facing a creditor composition procedure *("concordato preventivo")* or adhering to a debt restructuring agreement *("accordo di ristrutturazione dei debiti").*

Concordato preventivo and accordi di ristrutturazione dei debiti are two different pre-insolvency Court-driven procedures. In the course of these proceedings, there is a general prohibition of the company entering into new financing arrangements that may harm creditors or delay a declaration of bankruptcy.

New financing

Following the recent changes in the law, a company applying for such pre-insolvency procedures can now ask to the competent Court for the authorisation to enter into new facility agreements, if certain conditions are met.

Specifically, to obtain such authorisation, the company must provide the Court with a declaration drafted by an expert appointed by the company to certify the feasibility of the restructuring plan which forms the basis of the pre-insolvency procedure. This declaration must state that the obtaining of the new facilities would be beneficial to the repayment of creditors.

The appointed expert (i) must not be linked to the company in distress by private or professional relationship; (ii) must meet the requirements set forth by Italian Civil Code for internal auditors *(sindaci)* of a joint-stock company; and (iii) must not have been employed by the company in distress or formed part of its management or supervisory bodies within the last 5 years.

In rendering the above declaration, the expert must take into account the expected financial needs of the company until approval of the relevant pre-insolvency procedure, to give comfort to creditors and the new lender(s) that the company will not be declared bankrupt before such approval.

The authorisation of the Court can also be obtained for facilities which are still under negotiation with the lender(s). The Court can authorise the company to grant pledges or mortgages to secure such facilities, notwithstanding the general prohibition under Italian Insolvency Law on companies from granting security during any pre-insolvency procedures.

It is worth noting that, in order to encourage banks and other lenders to grant loans to companies in distress, article *182-quinquies* provides that any facilities granted thereunder will be repaid in advance of any other credit of the pre-insolvency procedure (so-called *"crediti prededucibili"*) in case the company subsequently goes bankrupt.

Art. *182-quinquies* appears to be helpful for both parties to the relevant credit facilities. The borrower (distressed company) can access credit more easily; (either as new facilities or as bridge loans aiming at repaying existing debts) and meet the aims of the pre-insolvency procedure which may otherwise fail due to the lack of adequate financing.

From the lenders' side, the various protections offered by the reformed Insolvency law could soften the typical mistrust of the distressed companies and, by virtue of the express exclusion of liabilities for bankruptcy crimes *("bancarotta")* provided for by Art. *217-bis* of Italian Insolvency Law for any action carried out in the course of *concordato* and *accordi di ristrutturazione dei debiti,* it is expected that banks will be less reluctant to help a company to recover by providing them with finance.

Additionally the granting of facilities, in such scenarios will also benefit from the claw-back actions exemption if the company in distress does become insolvent.

Business continuance

Art. *182-quinquies* also offers distressed companies the possibility to continue trading during the pre-insolvency procedures, in an attempt to keep their business running.

In the course of a *concordato preventivo* procedure which is structured to allow the continuation of the business, the company may, inter alia, request that the Court grants the authorisation for it to pay key existing payables due for goods and services, provided that the above -described expert states that such payments:

(i) are essential for the operation of the business; and

(ii) are in the best interests of the creditors.

The same possibilities are offered to companies applying for the *accordi di ristrutturazione dei debiti.*

Any payment made under art. *182-quinquies* is exempt from claw-back action in the case of the subsequent insolvency of the company.

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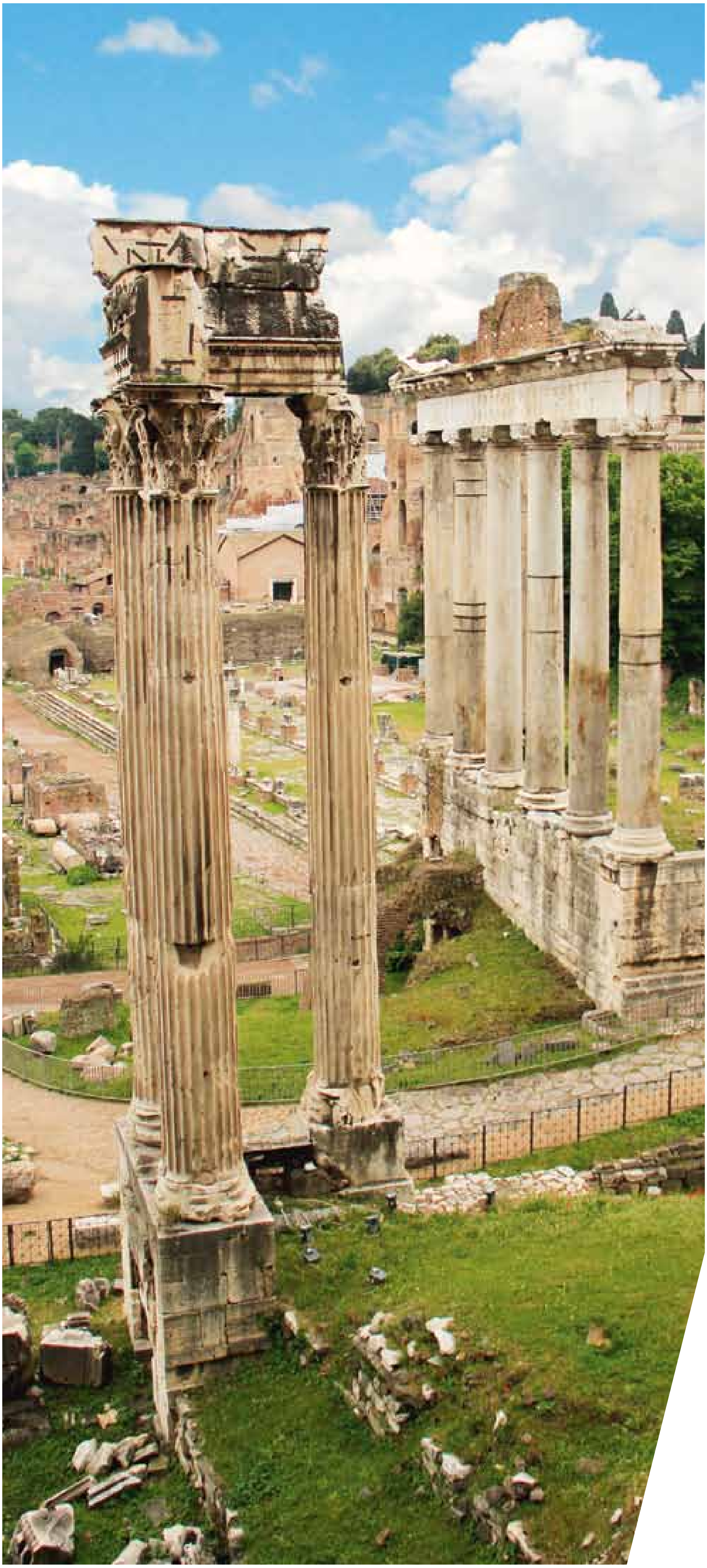

Flex BV: simplified but not simple

Introduction

On 1 October 2012, the Act on the Simplification and Extension of Flexibility of Dutch BV Law (the "Act") entered into force. The implementation of the Act forms the final accord of a lengthy legislative process initiated in an attempt to promote the competitiveness of the Dutch BV in comparison with legal forms under other European jurisdictions and to reduce the administrative burden for entrepreneurs.

The new legislation should be welcomed as good news. The Dutch BV has disposed of a number of mandatory rules in respect of capital maintenance which did not really offer effective protection to creditors and, in many instances, actually had the effect of forming an obstacle in restructurings and other transactions.

As indicated by its name, the purpose of the Act is to simplify the law on the Dutch BV and to make it more flexible. A greater degree of flexibility has indeed been achieved. Under the new law, joint ventures and other collaborating parties have more freedom to lay down specific regulations in the articles of association of a Dutch BV. This is beneficial as, in comparison, under the old law they were sometimes required to make use of additional contractual arrangements in a shareholders agreement. The other aim of the Act, namely the simplification of the BV law, seems to have succeeded to a lesser degree. That does not really come as a surprise. More flexibility leads to more options and, almost by definition, to more complexity.

It remains to be seen whether the new law lives up to its expectations and enables the BV to be a more competitive legal form in Europe. However, in any event, the innovations it brings are welcomed in the Netherlands. The most significant changes are set out below.

Abolition of minimum share capital

The mandatory minimum share capital of EUR 18,000 has been abolished. A BV may be incorporated with, for example, only one issued share of EUR 0.01.

Authorised capital no longer required

The authorised share capital is no longer required by law. However, one could still choose to include an authorised share capital in the articles of association.

Other denomination of share capital

The denomination of the nominal share value may be in a currency other than the Euro.

Postponement of the obligation to pay

It may be stipulated that the full nominal value of the shares or a part thereof may remain unpaid until after the expiry of a certain period of time or until it is called by the BV.

Abolition of bank statement and auditor's certificate

The requirement for a bank statement in the case of a payment for shares in cash upon incorporation of a BV has been abolished. The requirement for an auditor's certificate in the case of a contribution in kind upon incorporation has also been abolished. The same applies to the auditor's certificate in case of a contribution in kind on shares issued after incorporation of a BV. The requirement for a description of the assets to be contributed in case of a contribution in kind remains in force.

Abolition of the *nachgründung* regulation

The so-called *nachgründung* regulation, which provided for certain formalities in respect of transactions which the BV concluded with its incorporators or shareholders within the first two years after incorporation, has been abolished in its entirety.

Abolition of prohibition on financial assistance

A BV is now free to provide loans or security even in situations where these relate to the acquisition by others of shares (or depositary receipts thereof) in its capital.

Imposing obligations on shareholders

The ability to impose obligations on shareholders in the articles of association has been extended. This mainly concerns obligations of a contractual nature in relation to the BV or third parties or among the shareholders.

Abolition of mandatory share transfer restrictions

The mandatory share transfer restrictions have been abolished. The articles of association may even determine that no restrictions on the transfer of shares will apply.

Adoption of annual accounts

If the shareholders are also managing directors, the execution of the annual accounts by all managing directors and supervisory directors shall be deemed to constitute the adoption of the annual accounts by the general meeting. The adoption of the annual accounts shall be deemed to grant the managing directors and the supervisory directors a discharge of liability towards the BV for their management or supervision, for the previous financial year's accounts.

Depositary receipts for shares

In situations where depositary receipts for shares have been issued or shall be issued, the articles of association are to determine whether or not meeting rights are attached to depositary receipts for shares.

Introduction of distribution test

For all forms of distributions on shares a so-called distribution test will be introduced. The management board must determine whether the BV as a result of the distribution will be able to continue paying its due and payable debts. Depending on the specific circumstances, the liquidity, the solvency and the profitability of the BV must be taken into consideration when making the decision. In general, one will need to make a financial forecast for one year following the distribution.

A resolution of the general meeting to make a distribution shall have no effect until the management board has granted its approval. The management board may only refuse to grant its approval if it is aware or reasonably expects that the BV will not be able to continue paying its payable debts.

The managing directors risk personal liability if approval is granted in a rash manner. If the BV goes bankrupt, the recipient of the distribution will be required to repay the distribution if he received the distribution in bad faith.

Balance sheet test

The Act introduces a limited balance sheet test. Distribution of profits or reserves shall only be allowed if and to the extent that the equity of the BV exceeds the aggregate amount of the reserves which must be maintained pursuant to the law and the articles of association.

Capital reduction

The possibilities for capital reduction have been extended. Creditors can no longer oppose a capital reduction. Instead, the distribution test has been introduced together with liability penalties for managing directors and a repayment obligation for shareholders who acted in bad faith.

Shares without voting rights or entitlement to profits

Shares without voting rights or without entitlement to profits may be created.

Appointment and dismissal of managing directors and supervisory directors by holders of shares of a particular class

The articles of association may include regulations to the effect that certain managing directors or supervisory directors can be appointed, suspended and dismissed by the meeting of holders of shares of a particular class or specification.

Regulation in respect of instruction rights tightened

The articles of association may provide for a right of the general meeting to give binding instructions to the management board. Such instruction rights are not limited to *general* instructions but may also concern *specific* instructions.

Adoption of resolutions without holding a meeting

The regulations restricting the adoption of resolutions without holding a meeting in certain circumstances have been eased.

Notice period for general meetings reduced

The Act has reduced the notice period for general meetings from at least fifteen days to at least eight days.

Adoption of resolutions outside the Netherlands

Under the Act, general meetings may be held outside the Netherlands. The place of the general meetings must be mentioned in the articles of association.

Transitional law

As a general rule, the Act has immediate effect. The implementation act contains a limited number of specific transitional provisions.

Although the transitional legislation aims for a seamless transition, misunderstandings may easily arise. For example, uncertainty may arise as regards the consequences of provisions in the articles of association which have been copied from statutory provisions which have subsequently lapsed after the implementation of the Act. Uncertainty may also arise where the articles of association refer to such statutory provisions.

Conclusion

The implementation of the Act has significant consequences for existing BV's. The articles of association of these BV's will have to be reviewed to determine whether they are still appropriate.

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// **Poland**

Announcement of changes to the insolvency law

The Polish government announced a change to the insolvency law which aims to create an improved regulatory environment which is conducive to rescuing, rather than liquidating, companies when they become insolvent. The government also announced the creation of an online Central Insolvency Register which contains information about insolvent companies with a view to these companies being purchased by interested investors. In addition, there are plans to create 16 specialised insolvency departments within district courts nationwide in which judges would only deal with insolvency issues which should also streamline the court procedure.

For a long time, the current insolvency law has been criticised by practitioners as a law that does not support companies in financial difficulties. The basic problem of the law is that the insolvency proceedings provided for by the law do not give much practical help to a company that wishes to attempt to avoid liquidation and enter a restructuring process. Another negative aspect is the time-consuming and costly nature of insolvency proceedings. Additionally, statistics show that recovery proceedings (another type of procedure under Polish law), are very rarely used in practice, mainly because of the stringent conditions to commence such proceedings.

Therefore, the changes to the insolvency law which have been proposed by specialists primarily concern changes to the conditions required to commence an insolvency procedure. It is frequently suggested that the premise of insolvency proceedings should be limited to a lasting failure to settle due financial obligations. The current regulation allows for a declaration of insolvency to be made against a company if there is a temporary failure to fulfil their obligations. The court may dismiss an application for a declaration of insolvency if the default in fulfilling the obligations does not exceed three months and the sum of unsettled obligations does not exceed 10% of the balance sheet value of the debtor's business.

The suggested changes to recovery proceedings aim to mitigate the stringent conditions for the initiation of the proceedings and allow recovery proceedings for companies not fulfilling smaller obligations. Currently, recovery proceedings are only available to businesses at risk of insolvency that (i) are continuing to settle their obligations or (ii) where the court has dismissed a declaration of insolvency because the relevant default did not exceed three months and the sum of unsettled obligations did not exceed 10% of the balance sheet value of the company.

Detailed proposals for the draft amendment of the law, which are currently being prepared by the Polish government, are to be announced towards the end of this year. The new draft law is expected to be ready by the end of February.

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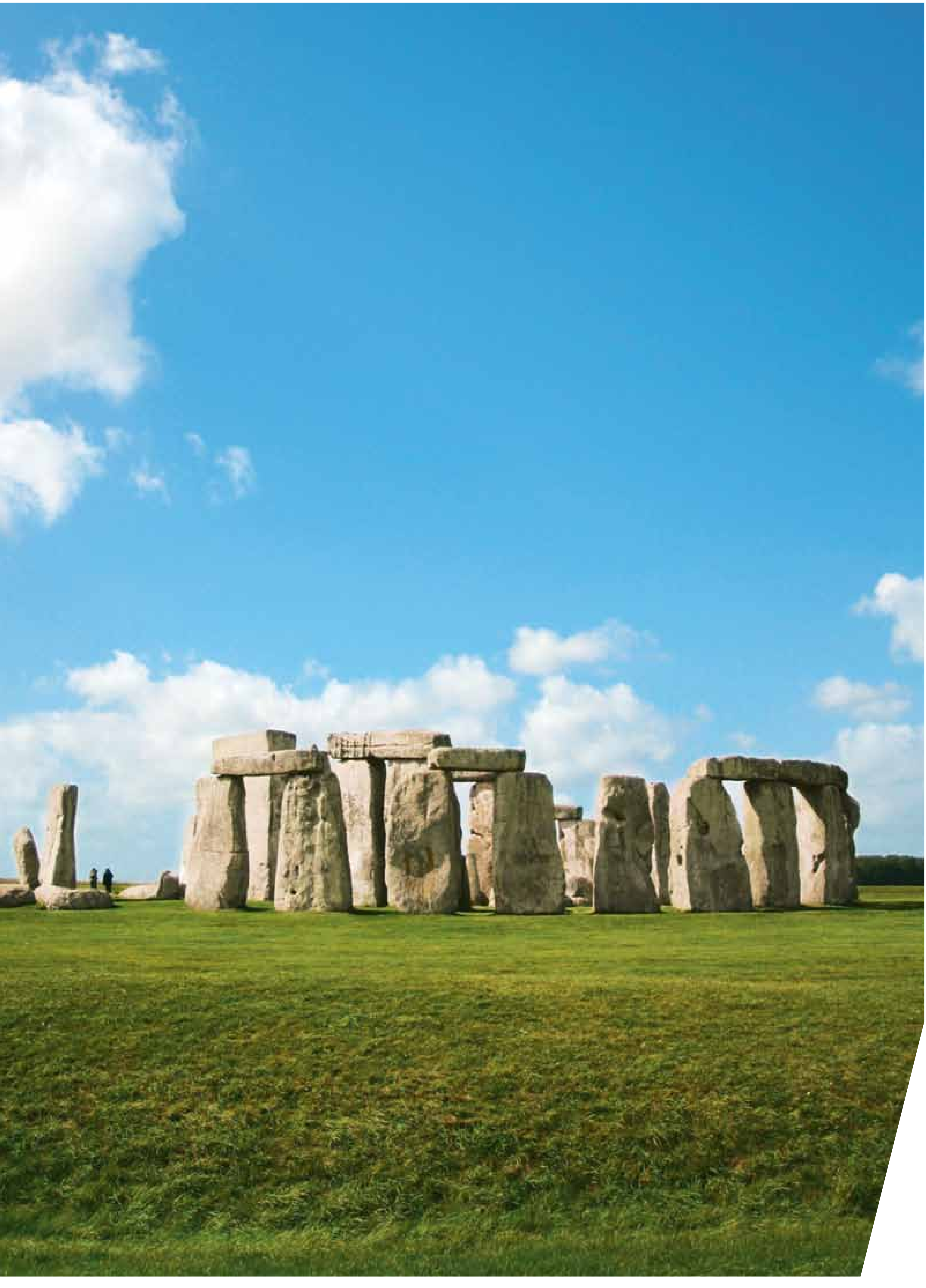

Cross-border insolvency issues arising from the collapse of Dewey & LeBoeuf

Introduction

Earlier in the year, CMS London advised Dewey & LeBoeuf LLP **("DLB")** on the wind down of its business and entry into English administration proceedings and administrators from the accountancy firm BDO LLP (the **"Administrators"**) on the subsequent administration of DLB. BDO LLP are a leading practice in the field of law firm insolvencies, with the firm having previously acted in the administration of, among others, Halliwells LLP (again with the assistance of CMS London) but the administration of DLB involved the added complexity of extra-jurisdictional issues arising from Dewey & LeBoeuf's international offices.DLB was the UK office of the global law firm Dewey & LeBoeuf which collapsed in Spring of this year. DLB operated as a limited liability partnership based in London with a branch in Paris (the **"Paris Branch"**). This article revisits the insolvency of DLB and in particular reflects on the cross-border legal issues faced by the Administrators in dealing with the Paris Branch under an English administration.

Pre-appointment issues

In the insolvency of any law firm, the legal regulators seek to protect, where possible, the interests of lawyers and clients in the course of the insolvency proceedings. Many regulators have significant powers of intervention in the insolvency of law firms. The Paris Branch fell under the regulatory jurisdiction of L'Ordre des Avocats de Paris (the **"Paris Bar"**).

In the weeks before its insolvency, Dewey & LeBoeuf's financial difficulties were regularly exposed in the press both in the USA and overseas. It became clear to the Paris Bar that the Paris Branch was in a precarious financial position and its management structure was under strain. Consequently, the Paris Bar intervened by appointing a senior member as an *"Administrateur ad Hoc"* to oversee the firm to protect the interests of its lawyers. This appointment was not an insolvency procedure and did not effect the subsequent appointment of the Administrators in England. However, by the time the Administrators were appointed, certain aspects of the Paris Branch's affairs were being overseen and influenced by the Administrateur ad Hoc.

Post-appointment issues

The EC Regulation on Insolvency Proceedings (No. 1346/2000) (the **"Insolvency Regulation"**) governs cross-border insolvencies in Europe and was relevant in the DLB case where proceedings were opened in England which affected assets based in France. Article 4 of the Insolvency Regulation provides the general rule that cross-border insolvency proceedings are governed by the law of the county in which main proceedings have been opened (in DLB's case, England).

French Employees

French employment rights enjoy a formidable reputation across the Channel. French employment law has a prescriptive process for terminating employment contracts and any breach of the termination process entitles employees to significant compensation. Further, in the distribution of realisations to creditors under French insolvency law, employee claims benefit from a super-priority status. Under the Insolvency Regulation, the law which governs the employment contracts is French law but English law governs the insolvency proceedings and dictates the rules governing the distribution of proceeds from the realisation of assets and the ranking of claims.

In the insolvency of DLB, the effect of the Insolvency Regulation was that French employees of the Paris Branch of DLB had their full rights, and correspondingly large compensation claims, under French employment law. However, on the distribution of realisations these claims ranked equally with UK employee claims in the English administration.

The Administrators took steps to prevent the adoption of the employment contracts of the French employees as DLB was no longer carrying on business. The risk for administrators is that, if employees were adopted into the employment of the administration, their wages and salaries would constitute an expense of the administration and be payable in priority to floating charge realisations.

In France employees who lose their jobs from the insolvency of their employer can draw on the "AGS" which is a state-backed fund for redundant employees. In the UK a similar role is performed by the Redundancy Payments Office (RPO). Once the AGS has paid out to the former employees, it becomes entitled to step into the shoes of those employees and submit a proof for their claims in the insolvency proceedings. The Administrateur Ad Hoc negotiated with the AGS who requested that secondary proceedings be opened in France. Although not strictly necessary, the opening of French proceedings allowed the French DLB employees quicker and simpler access the AGS scheme than they would have otherwise had if only English proceedings had been underway.

Secondary Proceedings

Secondary proceedings are permitted under Article 3(2) the Insolvency Regulation and must be winding-up proceedings that apply only to the assets of the debtor situated in that jurisdiction. The opening of secondary proceedings displaces the primacy of the insolvency law of the country of main proceedings over the assets in the secondary jurisdiction. French secondary proceedings allowed the AGS to enjoy its super-priority status for its claims in the French liquidation of the assets of DLB situated in France.

The Administrators concluded that the assets in France would be difficult to realise and ultimately insubstantial. In this case the French assets were unlikely to increase the realisations to creditors in DLB's English administration and may in fact have resulted in greater costs for the administration. The Administrators were not able to prevent the opening of secondary proceedings but could have applied for a stay of liquidation if it was in the interests of the creditors in the main proceedings. Given that creditors in the English administration were unlikely to suffer any material loss from the French liquidation, the Administrators raised no objection to the opening of such proceedings.

Costs of Proceedings

An application for secondary proceedings in France may be made by the Administrators and anyone empowered to open insolvency proceedings under French law, which includes unpaid creditors and the Prosecutor General (an official of the French Government who performs a similar role to that of the Official Receiver in the UK). An applicant may be liable for the costs of opening the proceedings and the Administrators were happy, therefore, to allow the Prosecutor General to make the application.

The French liquidator's costs are met from the realisations of the French assets and any shortfall is covered by the Public Treasury. The Public Treasury retains a claim against the insolvent entity for amounts it has paid out to fund the shortfall. The Administrators sought advice on whether such a claim could be an expense of the administration and therefore rank ahead of distributions to floating charge holders. However, given that the liquidator's costs arose from the voluntary actions of third parties over whom the Administrators had no control (i.e. the AGS, Administrateur Ad Hoc and the Prosecutor General), it was our view that such costs were not administration expenses in this case.

The Administrators were vigilant to the risk of incurring statutory charges in France and the effect this would have on the English administration. Following the Nortel judgment, the insolvency market is aware that non-provable English statutory claims can rank as an expense of administration. Insolvency practitioners in England should also be alive to the risk that statutory claims arising under the law of another Member State may be treated in the same way as English statutory claims and could be payable as an administration expenses. The English courts are less likely to grant statutory claims under the laws of non-Member States the same status as English statutory claims. There is therefore less risk of statutory claims arising in non-Member States becoming payable as an expense of an English administration.

Upon the opening of secondary proceedings the Administrators do owe a duty of cooperation and sharing of relevant information with the French liquidators pursuant to Article 31 of the Insolvency Regulation. This duty can be a cost to the Administrator in terms of time and resources. However, in cases where the businesses in the separate jurisdictions are relatively autonomous and the assets remain largely separate, there is less likelihood that this duty of cooperation will give rise to onerous obligations. In the insolvency of DLB, the English and French business were not closely interlinked and the Administrators and French liquidator have largely been able to operate independently.

Comment

The administration of DLB brought into focus the workings of the Insolvency Regulation. While the Insolvency Regulation provides for the prevalence of one jurisdiction's insolvency law (in this case that of England and Wales), local advice is required in the jurisdictions where any significant assets or liabilities are based. It is important to identify the key legal risks in each jurisdiction so that Administrators can weigh the benefits and costs of different courses of action. If secondary proceedings are necessary, the impact of such proceedings on the realisations in the main proceedings must be carefully considered.

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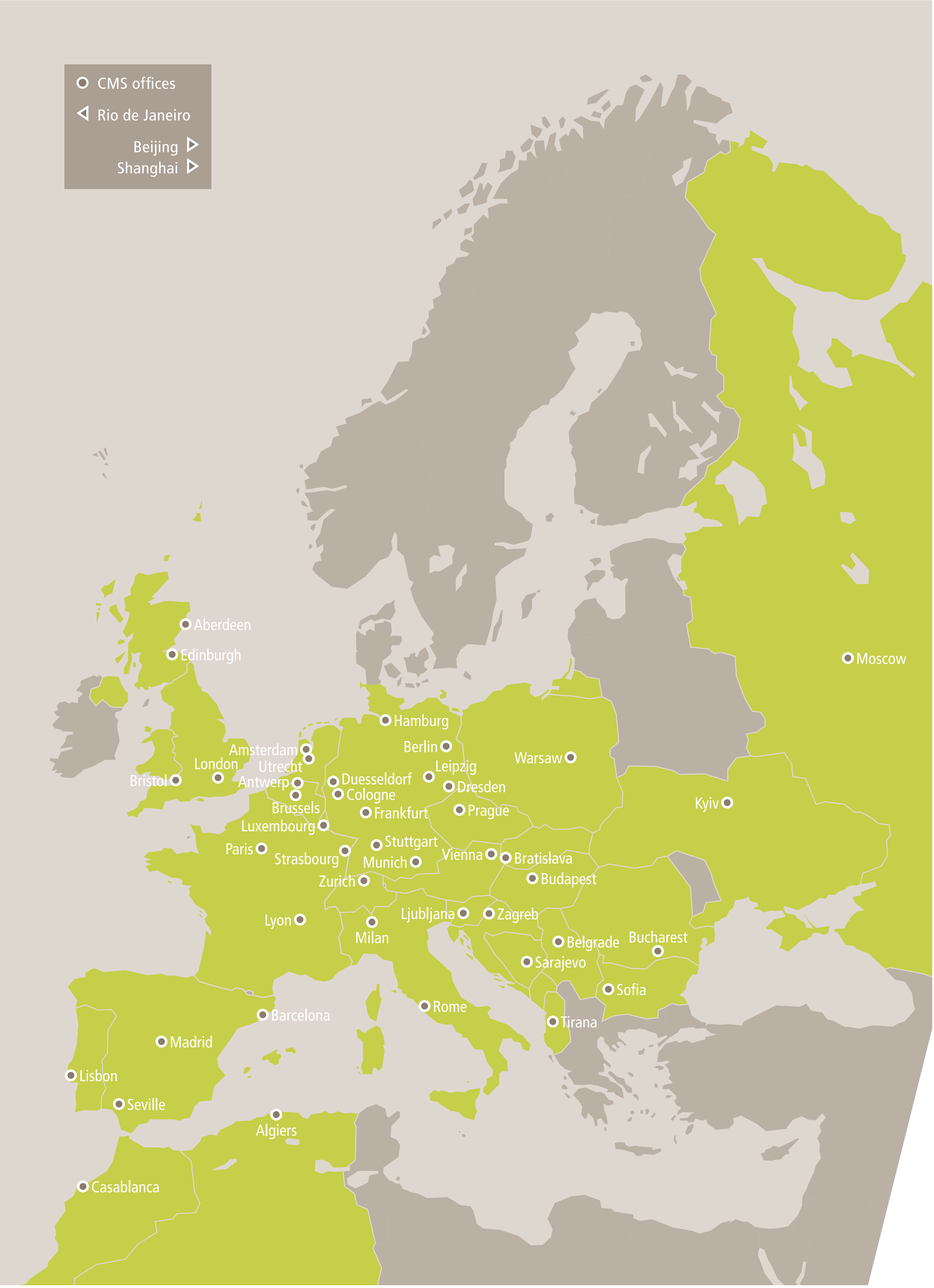

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