European Corporate Insolvency Law: an analysis of the corporate rescue laws of France, Greece and the United Kingdom

Thesis submitted for the degree of

Doctor of Philosophy

at the University of Leicester

By

Alexandra Kastrinou

School of Law

University of Leicester

December 2009

Abstract

The thesis focuses on European corporate insolvency law by reference to the laws as developed of three different jurisdictions, namely France, Greece and the United Kingdom. The thesis is aimed at providing an analysis of the insolvency laws of the three jurisdictions, while the main focus is on the corporate rescue mechanisms that are available in the three jurisdictions. Although the thesis provides an overview of the historical background of the insolvency law regime in each of the three jurisdictions, it, particularly, focuses on reforms introduced within the last decade, namely from the early 2000s. The key concern of this research is to provide an account of the similarities of and differences between the French, Greek and the United Kingdom's insolvency laws and with the use of comparative law to identify the strengths and weaknesses of each system and to assess the effectiveness of the reforms recently introduced in each jurisdiction. Although the thesis acknowledges the evolution of convergence between the insolvency law regimes of the three jurisdictions, it does not aspire to propose substantive harmonisation of cross-border insolvency. Furthermore, the thesis offers a conceptual analysis of the legal concept of corporate rescue, and identifies the underlying factors in relation to the insolvency and rescue laws of the three jurisdictions, such as their social, political and legal cultures. Additionally, the thesis provides an analysis of the role of certain key 'actors' which are affecting the outcome of rescue proceedings, such as the management of a distressed company, the courts, insolvency practitioners and creditors. The consideration of such contextual factors enables one not only to identify and understand the differences between the rescue laws of each jurisdiction but also to assess the influence of the insolvency laws of other jurisdictions, such as the United States, on the shaping of a corporate rescue culture in the three European states. By way of consideration of the wider European context the thesis also discusses the European Regulation on Insolvency Proceedings. This Regulation is of note as an indicator of European Union policy, which has been to harmonise conflict of laws procedures but to leave the member states to develop for themselves insolvency procedures that they consider to be most suitable.

Acknowledgements

I would like to thank my supervisor, Prof Rebecca Parry for her invaluable help throughout the years of writing this thesis. I would not have been able to complete my thesis without her advice and endless support. I am more than grateful for the patience she demonstrated and the time she spent in pedantically reviewing several drafts of my thesis. I have benefited enormously from her encouragement; also her contribution to my knowledge, career and life is priceless.

I would also like to thank Mr Ian Snaith for his precious help and support during the years of drafting my thesis.

In addition, I would like to thank Prof Adrian Walters and staff at the Nottingham Law School for their support during the time of writing my thesis and for providing me with the opportunity to join a series of seminars which were held by Nottingham Trent University.

I would not be able to complete the thesis without the financial support provided by the University of Leicester in awarding me a scholarship and by the Department of Law at the University of Leicester. I am also grateful to the University of Westminster, in particular, the Department of Finance and Business Law, for the financial support that I was offered during the last stages of writing my thesis.

Last but not least, on a personal note I would like to thank my family, especially my parents Eleftheria and Thomas for their love and support and, for keeping me motivated during the difficult times. I would also like to express my gratitude to my sisters and flatmates, Ellie and Rania, for taking care of me in the last four years.

Table of Contents

Chapter VI: A Comparative Analysis of the corporate rescue laws of France, Greece and the United Kingdom

Chapter VII: Conclusion

List of abbreviations

Acquired Rights Directive 77/187	(ARD)
Association of Chartered Certified Accountants	(ACCA)
Centre of Main Interests	(COMI)
Companies Act 2006	(CA 2006)
Company Voluntary Arrangements	(CVAs)
Debtor in Possession	(DIP)
Department of Trade and Industry	(DTI)
EC Regulation on Insolvency Proceedings	(The Regulation)
Enterprise Act 2002	(EA 2002)
European Court of Justice	(ECJ)
European High Yield Association	(EHYA)
Insolvency Act 1986	(IA 1986)
Insolvency Practitioner	(IP)
Insolvency Rules 1986	(IR 1986)
International Monetary Fund	(IMF)
Open Method of Co-ordination	(OMC)
Organization for Economic Reconstruction of Enterprises	(OAE)
The Institute of Chartered Accountants of Scotland	(ICAS)
Transfer of Undertakings (Protection of Employment) Regulation 2006	(TUPE)
United Nations Commission on International Trade Law	(UNCITRAL)

Chapter I: An Introduction to the study of three insolvency law regimes

Introduction

The thesis focuses on European insolvency law by reference to three very different jurisdictions, namely France, Greece and the United Kingdom. The thesis aims to provide a comparison of the legal structures of the three jurisdictions, and in doing so to provide a review of insolvency law in these jurisdictions in the wake of European Union initiatives with particular emphasis being given to the corporate rescue mechanisms that were emphasized in these initiatives. Moreover, the key concern of this research is to provide an account of the similarities of and differences between the French, Greek and the British insolvency systems and, with the use of comparative law, to identify the strengths and weaknesses of each system and to assess the effectiveness of the relatively recently introduced reforms. It should be remembered that, the thesis, by means of a comparative analysis, is not aimed at drawing contrasts with the effective rules of one jurisdiction and the less effective of another. Instead, it is aimed at providing an understanding of the domestic laws of each Member State and discovering the reasons which give rise to the main differences between the three legal systems. Furthermore, it should be noted that although the thesis takes into account the historical background of the insolvency legal systems of France, Greece and the United Kingdom, it focuses primarily on the reforms introduced by each jurisdiction within the last decade. Although these laws have played a role in addressing the impact of the recent financial crisis the scope of the thesis excludes consideration of the crisis itself.

It is interesting to note that, the insolvency laws of France, Greece and the United Kingdom are very sophisticated and have a long standing history. However, they are very distinct. A number of different features can be identified. France and Greece, arguably, adopt a debtor-friendly approach in insolvency, which affords troubled businesses a second-chance,[1] whereas the United Kingdom arguably, adopts a creditor-friendly approach and strongly favours the interests of secured lenders.[2] Corporate rescue has attracted an increasing interest during the last two decades both on a global scale but also within Europe. In fact, a series of jurisdictions, including France, Greece and the United Kingdom, have introduced reforms to their existing insolvency legislation, so as to accommodate a corporate rescue culture.[3] In addition, on a European level, insolvency law has been given high priority in the legislative agenda, stemming from initiatives that commenced in 2000, so as to ensure that an effective corporate rescue framework is in place, in order to safeguard financial stability and protect the European Union form the detrimental consequences of corporate failure. Accordingly, the thesis looks into the reforms introduced by the three different jurisdictions, but also considers the steps taken on a European level in an effort to facilitate cross-border insolvencies. Furthermore, the thesis prior to providing an

---

[1] S Franken, "Creditor and Debtor Oriented Corporate Bankruptcy Regimes Revisited" (2004) 5 EBOR 645, at p. 650.

[2] S Davies QC (ed), *Insolvency and the Enterprise Act 2002* (Jordans, Bristol, 2003), at p. 12.

[3] See K Gromek Broc and R Parry (eds), *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (2nd edn, Kluwer Law International, 2006).

analysis of the concept of corporate rescue within the three legal systems and the rationale that lies behind corporate rescue, offers an analysis of the key factors that affect the design of insolvency law in the different jurisdictions.

The law exists in order to serve the needs of the society;[4] in essence, the law is an "indissoluble amalgam of historical, social, economic, political, cultural and psychological data, a compound, a hybrid, a 'monster', an outrageous and heterogeneous collage".[5] Therefore, in order to develop a deep understanding of the laws of a country, it is essential that one moves beyond the strict knowledge of the legal norms and examines the social and political context of a rule.[6] Arguably, the insolvency laws of a state are not the exception to this general rule and hence also vary significantly from that of another, primarily due to the differences in their historical, economic, social, geo-political and cultural backgrounds. It could therefore be argued that corporate rescue is also bound to be different depending on the abovementioned variables. Comparative law could prove to be a very valuable tool in helping us to comprehend the legal culture and the differences among the three jurisdictions. It has been argued that, beyond the discrepant cognitive processes which characterise the

[4] A Watson, "Comparative Law And Legal Change", (1978) 37 Cambridge L J, 313-336, at p. 313.

[5] P Legrand, "How to Compare Now", (1996) 16, Legal Stud. 232-242, at p. 236.

[6] See O Kahn-Freund, "On Uses and Misuses of Comparative Law", (1974) 37 Mod. L.R. 1-27, at p. 27. Kahn-Freund states: "All I have wanted to suggest is that [the use of the comparative method] requires knowledge not only of the foreign law, but also of its social, and above all its political context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law".

common law and the civil law systems within the European Union, a comparatist must learn to detect, to understand, to value and to cherish difference.[7]

Prior to describing and comparing the rules of a legal system, it is essential that one develops a cohesive understanding of a jurisdiction's legal culture. Legal culture has been defined as 'a specific way in which values, practices and concepts are integrated into the operation of legal institutions and the interpretation of legal texts'.[8] In essence, this definition embraces the '*law as culture'* and condemns the idea of approaching the '*law as rules*'.[9] It has been argued that 'legal cultures are part of more general cultures. Understanding law implies a sufficient knowledge and an understanding of the social practice of its legal community. Understanding this social practice presupposes knowledge and an understanding of the general culture of the society in which the legal community is embedded'.[10] Furthermore, it should be remembered that the law does not exist in a vacuum.[11] In particular, Legrand argues that "the 'legal' cannot be analytically separated from the 'non-legal' reality of society because the two worlds are inextricably linked. More accurately, law is a social subsystem. In other words, the 'legal' can never be perceived on its own terms; to

---

[7] See P Legrand, note 5 above, at p. 240.

[8] J Bell, "English Law and French Law – Not So Different?" in M Freeman & R Halson *Current Law Problems* (Oxford University Press, 1995) at p. 70.

[9] See P Legrand, "European Systems Are Not Converging" (1996) 45(1) I.C.L.Q 52-81, at p. 56, where he argues that rules and concepts alone actually provide limited information about a given legal system and fail to indicate anything about their deep structures. In addition, Legrand contends that the law simply cannot be captured by a set of organised rules, that 'the law' and 'the rules' do not coexist, and that there is indeed much 'law' to be found beyond the rules (ibid, at p. 60).

[10] J Bell, note 8 above, at p. 70.

[11] P Legrand, note 5 above, at p. 238.

penetrate the ‘legal’ one must appreciate the ‘social’ that underpins it, otherwise the ‘legal’ literally does not make sense”.[12] Moreover, the French anthropologist, Lévi-Strauss, noted that ‘if one wants to understand societies and the legal cultures they have produced (and that have produced them), one must move away from rules and concepts and embrace habits and customs’.[13]

Accordingly, in order to grasp an understanding of what factors determine law, it is necessary to consider how the law is perceived and consequently implemented and applied within a state. Arguably this entails an examination of the intentions of the legislature, together with an assessment of the mentality of the legal professionals and the role of the courts within the state.[14]

However, the use of comparative law should not involve contrasting the effective norms of a state to the inadequate rules of another. Instead, a comparison of the three legal systems is aimed at providing an understanding of the different structures of each country and to assess to what extent it would be possible to “transplant”[15] effective legislation to a country in order to assist it in successfully reforming its

[12] P Legrand, note 9 above, at p. 58.

[13] Ibid, at p. 60.

[14] For a more detailed analysis of the role of the courts and insolvency practitioners in insolvency, see Chapter 6 at pp. 225-233 and 245-253 respectively.

[15] See A Watson, *Legal Transplants*, (Scottish Academic Press, Edinburgh, 1974) at p. 21. He describes legal transplants as “the moving of a rule or a system of law from one country to another.”

economic system.[16] However, it should be kept in mind, as Stein also points out, that a rule, similarly to a living organism, such as the transplant of a kidney, could be transplanted, but the risk of being rejected by the home environment is still implied.[17] Nevertheless, one should acknowledge the possibility of effectively transplanting legislation with some modification, so as to reduce the risk of a mismatch.

With regard to the legislative transplantation, Montesquieu, 'the first of all comparative lawyers', [18] expressed the concern that laws cannot traverse cultural boundaries. [19] In his opinion, it was only in the most exceptional case, a great coincidence, (*"un grand hasard"*) that the law of a country could serve that of another at all.[20] Montesquieu believed that laws express the spirit of nations, hence are closely linked to their geographical, cultural, sociological, economic and political elements.[21]

Kahn Freund recognised that "industrialisation, urbanisation, the development of communications and the increased mobility of people, commenced a process of

---

[16] P Legrand, note 5 above, at p. 234.

[17] E Stein, "Uses, Misuses and Non uses Of Comparative Law", (1977) 72 (No.2) U. L. Rev. 198-216, at p. 199.

[18] Kahn-Freund, note 6 above, at p. 6.

[19] J Gillespie, "Transplanted Company Law: An Ideological And Cultural Analysis Of Market Entry in Vietnam", (2002) 51 Comp. L. Q. 641-672, at p. 644.

[20] See E Stein, note 17 above, at p.199. See also J Law, *Introduction: Monsters, Machines and Sociotechnical Relation*s, in his (Ed.), *A Sociology of Monsters: Essays on Power, Technology and Domination* (1991), at p. 18.

[21] See Montesquieu, 1749, *The Spirit of Laws*, Livre I, Gallimard, (Paris, reprint, JP Mayer and AP Kerr (eds), 1970).

economic, social, cultural assimilation or integration among developed countries, which renders the environmental obstacles of legal transplantation, expressed by Montesquieu, inapplicable in our days. However, Kahn Freund notices that, although environmental factors have lost their validity, political factors have equally gained in importance.[22] He interestingly notes: "The question is in many cases no longer how deeply [the transplanted rule] is embedded, how deep are its roots in the soil of the country, but who has planted the roots and who cultivates the garden".[23]

As mentioned above, comparative law for the purposes of this thesis shall be used as a mechanism that enables us not only to understand the disparate corporate rescue provisions of the three countries, but also to understand the principal reasons that lie behind these differences. In addition the purpose of this thesis is not to identify key provisions within a country and then to contrast them with those of another. Instead, the functional use of comparative law for the purposes of this thesis entails considering the possibility of improving ineffective legislation.

The study of the possibility of legal transplants attracts interest on a worldwide scale.[24] However, this thesis shall be limited in providing an analysis of three very distinct legal systems within the European Union. Although each country adopts a very

---

[22] See Kahn-Freund, note 6 above, at p. 8.

[23] Ibid, at p. 13.

[24] Institutions within the international community, such as UNCITRAL, the OECD, the World Bank and the International Monetary Fund, have drafted Model Laws, Legislative Guides and General Principles in order to assist developing countries in reforming or drafting their law.

distinct approach towards insolvency law and corporate rescue in particular, consideration will be given to the possibility of achieving an improvement or successful reform in this area of law, by means of 'borrowing' legislation, with or without modification, from these three countries. [25] However, it is noteworthy that most borrowing considered in the thesis that has already taken place has been from the United States.

The Role of International Organizations in the Modernization of Domestic Insolvency Law Systems and the Drafting of Corporate Rescue Laws

In the wake of globalization, corporate rescue has become the centre of attention in many countries. In fact, many jurisdictions, such as France, Italy, Sweden and the United Kingdom, have recently witnessed substantial revision of their insolvency laws so as to ensure that financially troubled companies are afforded a second chance.[26] In addition, international financial organizations, such as the World Bank and International Monetary Fund (IMF) have played a significant role in pushing for reforms to domestic insolvency systems.[27] In particular, since the early 1990s, in light of financial crises, the World Bank has worked together with the IMF in order to design an international

[25] That is because the intentions of the legislature, the mentality of the legal professionals and the role of the courts within each state may vary.

[26] See note 3 above.

[27] R Parry, "Introduction" in K Gromek Broc and R Parry (eds), *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (2nd edn, Kluwer Law International, 2006), at p. 6.

standard on insolvency and creditors' rights systems. Arguably, internationally recognized standards are aimed at strengthening a country's domestic institutions and where necessary spurring reforms, hence ultimately strengthening the international financial architecture.[28]

In addition, in 1999 the World Bank, in collaboration with other international bodies, issued the *Principles and Guidelines for Effective Insolvency and Creditors' Rights Systems*, which have been used as assessment tools to assist countries in their efforts to evaluate and improve core aspects of their domestic insolvency law systems.[29] Additionally, in 2004 UNCITRAL issued a *Legislative Guide on Insolvency Law*, with the aim of encouraging the establishment of an effective and efficient framework for corporate insolvency and providing detailed guidance and recommendations with regard to the substance of domestic insolvency laws.[30]

As mentioned above, the *Legislative Guide* contains an exposition of the structure and the key-objectives of an effective national insolvency law system and complements the *Principles* issued by the World Bank.[31] The *Guide* calls for the

---

[28] Consolidated Document of the Principles of the World Bank and the UNCITRAL at p. 3.

[29] Some of these are the IMF and the European Bank for Reconstruction and Development. See R Parry, note 27 above, at p. 6.

[30] A consolidated document of the Principles of the World Bank and the UNCITRAL Guide has been produced, which is available at: http://siteresources.worldbank.org/GILD/ConferenceMaterial/20774191/ICR_Standard_21_Dec_2005_Eng.pdf last accessed on 20th October 2010.

[31] R Parry, note 27 above, at p. 6.

implementation of numerous Recommendations which are crucially intended to ensure the establishment of a legislative framework for insolvency that not only is effective, but also reflects modern developments and trends in the area of insolvency.[32] In other words, the *Legislative Guide* identified the following key-objectives that a modern insolvency law system should seek to achieve: a) provide certainty in the market to promote economic stability and growth; b) maximise the value of assets; c) strike a balance between liquidation and reorganisation; d) ensure equitable treatment of similarly situated creditors; e) provide for timely, efficient and impartial resolution of insolvency; f) preserve the insolvency estate to allow equitable distribution to creditors; g) ensure a transparent and predictable insolvency law that contains incentives for gathering and dispensing information; and h) reorganise existing creditors' rights and establish clear rules for ranking of priority claims.[33]

The *Guide* does not provide a single set of model solutions that address the key elements of an effective insolvency law system but rather makes provision for flexible implementation approaches[34] and, importantly, states that insolvency law must be complementary to and compatible with the social and legal values of the society in which it is based and which it must ultimately sustain.[35] Nevertheless, it should be noted that , the *Guide* discusses issues, which are central to an effective and efficient insolvency law regime and, notwithstanding the different practices in policy and

---

[32] UNCITRAL Guide at p. 2.

[33] UNCITRAL Guide, Recommendation 1, at p. 14.

[34] UNCITRAL Guide, at p. 2.

[35] Ibid, at p. 10.

legislative treatment, these are recognised at an international level.[36] Finally, it should be noted that these Guidelines may prove particularly useful for developing countries, due to the lack of other measures for such jurisdictions to rely on. However, the Guidelines have not been equally influential in European jurisdictions, arguably because European Union Law effectively covers the area of insolvency law.

Furthermore, dynamic attempts to level the regulatory landscape in Europe have also been undertaken. Harmonisation of laws in particular areas has proved a useful tool for converging different practices that are followed by the Member States in their territory. It should be noted that insolvency law for years has not constituted a major part of the 'harmonisation agenda'. However, an agenda for economic and social renewal for Europe was initiated at the Lisbon Summit of the European Council, held on 23-24 March 2000.[37] The Summit was prompted by globalization and the new knowledge based economy and its aim was to develop a strategy in order to enable Europe to match the growth rate of the United States economy and also to reduce unemployment and social exclusion. Accordingly, as a result of this development the need to introduce reforms to corporate rescue laws emerged.[38]

---

[36] UNCITRAL Guide at p. 1

[37] The Council concluded that businesses require a regulatory climate conducive to investment, innovation, and entrepreneurship if they are to be competitive and dynamic. See *Presidency Conclusions Lisbon European Council 23 and 24 March 2000*, para. 14.

[38] See R Parry, note 27 above, at p. 5.

It should be noted that, as far as the reform of corporate rescue laws is concerned, the Open Method of Co-ordination (OMC) has been applied. The OMC is presented as a tool in which the application of the principle of 'subsidiarity' is ideal.[39] That is to say that in sensitive areas, such as insolvency law, the Community shall not interfere directly so as to effect significant structural changes in a Member State, but it shall rather employ a 'soft' co-ordination approach, which respects national practices. It has been said that 'by seeping into domestic discourses and arrangements, the OMC is to alter the beliefs and expectations of domestic actors, thus leading to convergence'.[40]

In particular, the OMC has been described as a 'decentralised but carefully co-ordinated process, which involves the exchange of best practices, the use of benchmarking, national and regional target-setting, periodic reporting and multilateral surveillance to achieve progress in politically sensitive areas'.[41] With regards to the practical implementation of the OMC, it is important to note that it is ultimately for the Member States to lay down national level goals in order to reach the objectives defined by the Community.[42]

---

[39] C De la Porte, "Is the Open Method of Co-ordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?" (2002) 8(1) E.L.J. 38-58, at p. 40. See also European Council, 1997, at para.3 where it was stated that 'Subsidiarity is a dynamic concept and should be applied in the light of the objectives set out in the Treaty. It allows Community action within the limits of its powers to be expanded where circumstances so require'.

[40] De la Porte, note 39 above, at p. 39.

[41] Ibid, at p. 38.

[42] Ibid, at p. 44.

In addition on May 31st 2002, the development of a uniform framework with regards to the opening of insolvency proceedings was attained via the introduction of the EC Regulation 1346/2000 (the Regulation).[43] The Regulation makes provision for a mandatory set of jurisdictional rules, which are mainly concerned with aspects such as the opening of and conducting cross-border insolvency proceedings.[44] It is important to note that the Regulation has contributed to an enhancement of unification of insolvency provisions, primarily because of its direct applicability in the territory of Member States, that is to say the Regulation has automatically a binding effect in its entirety in all Member States and requires no transposition via domestic legislation.[45]

It is argued that the Regulation has played a significant role in the development of a harmonised and uniform set of rules, which govern the opening of insolvency proceedings. Furthermore, it is noteworthy that similarly to the effect of the Regulation, UNCITRAL has adopted a Model Law on Cross Border Insolvency.[46] It could be argued that the UNCITRAL Model Law essentially complements the provisions of the Regulation in 'enhancing the level of orderly governance of international insolvency proceedings', as it has adopted the same basic conceptual approach adopted by the EC Regulation.[47] However, it should be noted that this thesis places no particular emphasis

---

[43] A detailed analysis of the effect of the Regulation on rescue proceeding will follow later in the Thesis.

[44] I Fletcher, "Living Interesting Times – Reflections on The EC Regulation On Insolvency Proceedings: Part 1", (2005) 18 (4) Ins. Int. 49-54, at pp. 52- 53.

[45] Ibid, at p. 50.

[46] Available at: http://www.uncitral.org/pdf/english/texts/insolven/insolvency-e.pdf, last accessed on 28th September, 2010.

[47] I Fletcher, note 44 above, at p. 55.

on the UNCITRAL Model Law, since it does not appear to have had a significant impact in the European Union yet.[48]

In particular, the Model Law has overcome the impediments of irreconcilable differences in domestic laws of countries and provides a coherent set of objectives which could be summarised as the following: to establish a) principles for the recognition of foreign insolvency proceedings and for the provision of relief and assistance in cross-border cases; b) a legal framework sanctioning co-operation between courts in different jurisdictions in order to secure a fair outcome and to ideally preserve the optimal value of the debtor's assets; and c) a principle, which recognises the right of foreign representatives to have direct access to the courts of another jurisdiction, where it may be appropriate to take action.[49]

It appears from the above that the establishment of a unified set of laws which facilitate both international and European insolvency proceedings has attracted significant interest; In fact, bearing in mind the significant effect of insolvency law on the international financial architecture, those initiatives are of invaluable importance and are well-justified. However, questions such as whether the European insolvency law systems are in fact converging are to be considered later in this thesis. In fact, it

[48] At the time of writing, a limited number of European jurisdictions had adopted the Model Law, such as the United Kingdom, Poland and Romania. See: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html, last accessed on 28th September, 2010.

[49] I Fletcher, "Better late Than Never: The UNCITRAL Model Law Enters Into Force In Great Britain" (2006) 6 Ins. Int. 86-93, at p. 87.

could be argued with regard to European cross-border insolvency that there is convergence between the approach of the courts and insolvency practitioners of Member States towards corporate rescue, rather than convergence between the actual domestic insolvency law procedures.

An introduction to the concept of corporate rescue

The topic of corporate rescue has recently attracted a lot of interest. Especially within Europe, in light of the recent global financial crisis it became apparent that it is necessary to have in place a common institutional framework, so as to safeguard the effective reorganization of financially ailing companies and to avoid the catastrophic consequences of corporate failure for both the European economies and their societies. It is important to note that, an efficient corporate rescue regime makes provision for certain formal and informal tools, in order to prevent a corporate failure and a chain of undesirable consequences, such as the loss of employment. It could be argued that, corporate rescue mechanisms provide for the well-being of both the economy and the society of a state. Hence, in light of the current climate and the challenges the financial markets are faced with, it is pertinent to have in place effective corporate reorganization procedures.

It should be noted that, the term 'corporate rescue' is very broad; therefore, it is necessary at this point to provide an analysis of what it entails.

In market economies, companies are not static organizations; they are rather in a state of constant change.[50] Running a business involves, *inter alia*, taking decisions, which may entail risks, and consequently dealing with potential crises that might be encountered. In an efficient marketplace, only those companies which can successfully compete for custom will survive, the rest will be 'driven against the wall' as a result of their inability to deal with distress.[51] Companies routinely encounter difficulties; however, their financial health is maintained by means of taking drastic and effective measures. According to Belcher: 'If rescue is defined as the avoidance of distress and failure, all management activity can be thought of as constant and repeated rescue attempt'.[52] This definition of corporate rescue is however very broad, as it embraces both formal and informal rescue procedures. Belcher argues that the concept of rescue should not be confined to legal rescue, but that it should extend so as to include intervention emanating from the company's management or other interested stakeholders.[53]

It should be noted that, for the purposes of this thesis, rescue will be limited to actions taken in relation to companies that are either insolvent or near to insolvency. Although an informal voluntary arrangement (which is not governed by insolvency law) between a debtor and key-creditors to restore a company to its financial well-being is a

---

[50] A Campbell, "Company Rescue: "The Legal Response To The Potential Rescue of Insolvent Companies" (1994) 5(1) ICCLR 16-24, at p. 16.

[51] V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd ed, Cambridge, 2009) at p. 144.

[52] A Belcher, *Corporate Rescue*, (Sweet & Maxwell, London 1997) at p.12, see also A Belcher, *The Economic Implications of Attempting to Rescue Companies*, *in Insolvency Law: Theory And Practice*, edited by H Rajak, (Sweet & Maxwell, 1993) at p. 236.

[53] A Belcher, *Corporate Rescue*, ibid, at p. 11.

crucial element of corporate rescue, the scope of this thesis is primarily focused on the formal proceedings of corporate rescue rather than the informal.[54]

Furthermore, Belcher sees corporate rescue as a 'major intervention necessary to avert eventual failure of the company'.[55] This definition, as Belcher recognizes, is imprecise, but obviously captures the available legal processes in addition to possible management responses. In other words, it is designed to encompass both formal processes and informal mechanisms. In order for a rescue attempt to be initiated, it is presupposed that the company is either in a state of distress or that it has entered a formal insolvency procedure.[56] The purpose of a drastic intervention in to a company's affairs is to avoid failure and does not necessarily entail that the company will be restored back to its pre-financial crisis position.[57]

When assessing the success of a rescue attempt, it is important to note that there might be a range of 'rescue outcomes'. A distinction should be drawn between rescuing the company and rescuing the business of the company.[58] The former would be a 'pure' rescue as it involves the company emerging intact from the

[54] For a brief analysis of informal voluntary frameworks, such as the London Approach which was encouraged by banks in the United Kingdom, see Chapter 6, at p. 237.

[55] A Belcher, note 52 above, at p. 12.

[56] V Finch, note 51 above, at p. 243.

[57] A Campbell, note 50 above, at p. 17.

[58] V Finch., note 51 above, at p. 244.

rehabilitation endeavor and being restored back to its former healthy state.[59] However, complete restoration is unlikely, and, as Campbell observes, it is rather common that major 'surgery' will be undertaken in order to restore the company to profitability and, although the 'survivor' company may have the same name, it will be different in many respects.[60] Rescuing the business of a company often entails a sale of its viable parts as a going concern to a third party. Frisby describes this process as 'corporate recycling' and questions the classification of this recycling outcome as corporate rescue.[61] In addition, as Parry acknowledges, 'corporate rescue' is a potentially misleading term. On the one hand, the term 'rescue' may denote the restoration of a company to financial health, with the survival of the company as an entity and without a change in the company's ownership. On the other hand, 'rescue' may involve merely the preservation of the value of a company which is faced with irredeemable failure, in order to achieve a better result than in an immediate winding-up.[62]

However, Davis expresses the view that 'the true meaning of a company rescue is the saving of an entity in whole or in part by satisfying in some measure its unsecured creditors and enabling the company to continue in business. This will also in some measure preserve employment'.[63]In addition, the Association of Business Recovery Specialists (R3 Group) identified three types of rescue, 'complete going concern sales,

---

[59] S Frisby, "In Search of a Rescue Regime: The Enterprise Act 2002" (2004) 67(2) M.L.Rev. 247-272, at p. 248.

[60] A Campbell, note 50 above, at p. 16.

[61] S Frisby, note 59 above, at p. 249.

[62] R. Parry, *Corporate Rescue*, (Sweet & Maxwell, London, 2008) at p. 2.

[63] N Davis, "The Rescue Culture in the United Kingdom", (1997) 2 I. L. & P. pp. 3- 4.

partial going concern sales and full company survival' and stated that 'the two sale types were the most common…It is not surprising to find that full company survivals had a relatively low frequency'.[64] Hence, it arises that 'corporate recycling' under current practice is the most common positive outcome. It should be noted that for the purposes of the thesis the term 'successful corporate rescue' shall embrace not only the effective restoration of a company to profitability, but also the rescue of the business of a company (i.e. what Frisby describes as 'corporate recycling').

As mentioned earlier, during a rescue attempt there might be a range of outcomes and there are various ways of achieving those outcomes. That is to say, where there is a prospect of restoring a company to profitability, there are a variety of steps that can be taken. For instance, a company may need to be reorganized and this may entail changes in its management. Such changes may for instance entail the dismissal of the management partly or wholly. Moreover, a company may have to be restructured, and this may, for instance, require the closure of less profitable branches. Additionally, a company may have to be downsized, that it to say a reduction in its workforce may be needed, or certain operations may have to be cut back. In addition, a company may be refinanced, that is to say new capital will be injected to it or its debts might be rescheduled in order to enable it to overcome its financial difficulties.[65]

---

[64] R3, "*Corporate Insolvency in the United Kingdom: a Decade of Change*", available at: http://www.r3.organisation.United Kingdom/publications, at p.20, last accessed on 10th September 2010.

[65] V Finch, note 51 above, at p. 188.

The adoption of the various corporate procedures entails some costs. Hence, although the ideal outcome of a corporate rescue procedure would be to restore a company to its former prosperous and profit-making state, nonetheless 'corporate rescue mechanisms are not intended to maintain inefficient firms that are not economically viable'.[66] It is rather important that, in cases of hopeless and irredeemable insolvency, an effective rescue regime should have sufficient checks in place in order to ensure that any extra costs, generated as a result of a fruitless rescue attempt, are avoided.[67] As a matter of fact, within an effective corporate rescue system, being able to distinguish between hopeless insolvency and a real rescue prospect is a great challenge.[68]

Accordingly, the process of rescuing a company in financial trauma is likely to have winners and losers.[69] Belcher states that 'all rescues can be seen, as in some sense, partial'.[70] For example, from the point of view of some parties, such as employees, the rescue of a company will be preferable since it will result in their jobs being preserved. However, other parties, such as creditors, may not share the same perspective, as they may see rescue as a hopeless prolongation of trading which will only result in them

---

[66] *A Review of Company Rescue and Business Reconstruction Mechanisms: Report by the Review Group, The Insolvency Practice* (London: HMSO, 2000) at para. 24.

[67] R Parry, "Introduction" in Gromek Broc, K., and Parry, R., *Corporate Rescue in Europe: An overview of Recent Developments from Selected Countries in Europe*, (Kluwer Law International, 2004) at p. 3.

[68] H Rajak, "The Enterprise Act and Insolvency Law Reform" (2003) 24(1) Comp. Law. 3. It is submitted that, rescue will not always constitute the most appropriate strategy, instead in many cases the sale of a company's business will take place on a piecemeal basis and its subsequent dissolution may be deemed pertinent.

[69] V Finch, note 51 above, at p. 244.

[70] A Belcher, note 53 above at p. 23.

incurring unnecessary losses.[71] In order for a corporate rescue regime to be effective, it is essential that the divergent interests of the abovementioned competing groups are taken into account[72] and, more importantly, that a balance is achieved between these interests.[73] In any event, it is argued that a key factor for the success of a rescue is that difficulties are realized at a sufficiently early stage and that speedy and drastic action is taken in order to avert failure.[74] It is submitted that the earlier a rescue is mounted, the greater are its chances of success.[75]

Where a company is facing financial difficulties, the different groups comprising it will be called to assess the different rescue methods available to them and decide what the best course of action is. There are various formal and informal strategies that can be adopted in order to effect the rescue of a troubled company. Informal arrangements do not involve any resort to statutory insolvency procedures they are rather made on a contractual basis. The choice of a rescue strategy is highly dependent on the corporate rescue culture of a country. For instance, as discussed in Chapter IV, in France, where the ethos of 'early intervention' flourishes, the aim of the corporate rescue laws is to promote the use of the pre-insolvency institutional framework. In contrast, as discussed in Chapters III and V, the United Kingdom and

---

[71] R Parry, note 27 above, at p. 4.

[72] V Finch, note 51 above, at p. 244.

[73] See R Parry, note 67 above at p. 3.

[74] V Finch, note 51 above, at p. 248.

[75] See Chapter IV at pp. 128-134 and Chapter V at p. 181. In addition, Chapter VI considers the effectiveness of early intervention mechanisms that are available in the three jurisdictions at pp. 195-197.

Greece respectively lack an early-intervention culture and as a result corporate restructuring primarily involves the use of formal rescue institutions.

National laws on insolvency are not isolated. They can rather be described as a complex architecture of legal rules, economic mechanisms and cultural mentalities.[76] Hence, insolvency laws reflect the different policies and priorities of a state.[77] In the light of an analysis of the laws on insolvency of Greece, the United Kingdom and France it arises that there are some remarkable differences between the three systems, which, arguably, stem from the political and economic contexts that prevailed at the times that they were elaborated.[78]

Factors affecting corporate rescue

Corporate rescue has many angles to it, and it would be a mistake to only focus on its legal aspect. Belcher suggests that the concept of corporate rescue should not be strictly confined to legal rescue.[79] Rather, in order to fully comprehend the meaning of

---

[76] C Pochet, "*Corporate Governance And Bankruptcy: A Comparative Study*", 2002, Centre de Recherche en Gestion, Cahier de Recherche no. 2002-152, at p. 16.

[77] P Burbridge, "Cross-Border Insolvency within the European Union: Dawn Of A New Era", (2002) 27(5) E.L.Rev. 589-609, at p. 594.

[78] C Pochet, note 76 above, at pp. 11-12.

[79] A Belcher, note 52 above, at p. 4.

the concept of rescue, it is essential that one looks at its various angles, for instance management, accounting, economics and the array of (individuals) ‘players’ involved in the process. These angles of corporate rescue vary significantly within France, the United Kingdom and Greece, mainly because of the cultural development of these countries. It should be noted that the thesis is focused on the role of what are considered to be the most significant parties in corporate rescue, namely directors, creditors, the courts and insolvency professionals. The roles played by the various actors will be the focus of the thesis in subsequent chapters, particularly Chapter VI.

Conclusion - Summary of Chapters

The main focus of the thesis is European insolvency law. In light of the recent financial crisis, Europe is arguably called to face challenging times and Member States must ensure that safeguards are in place so as to ensure their financial stability and prosperity. Accordingly, insolvency law and, in particular, corporate rescue becomes of increasing interest and assumes a high priority in the legislative agenda.

As far as European law is concerned, it should be noted that, although there is no harmonization among insolvency procedures across the European Union, there are nevertheless areas of harmonized law that have an impact on corporate rescue. For instance, the Acquired Rights Directive 77/187, [80] which relates to employment protection rights, may have a significant impact on the outcome of corporate rescue proceedings. The main premise of the Acquired Rights Directive is that it provides for the protection of employees in the event of a change of employer and, in particular, to ensure that their rights are safeguarded. Moreover, provision is made at the European Union level for the prohibition of state aid. In particular, the EC Treaty prevents Member States from conferring an advantage upon a company in any form on a selective basis. State aid is prohibited on the grounds that it distorts intra-community trade and has a detrimental effect upon rival businesses.[81] In addition, the European Commission is afforded extensive monitoring and investigative powers, [82] and may challenge state aid which is incompatible with the objectives of the Common Market. Nevertheless, it should be noted that, the impact of employment protection rights on corporate rescue and the topic of state aid do not fall within the scope of this thesis.

Furthermore, as far as the facilitation of cross-border insolvency proceedings within Europe is concerned, early concerns were expressed for the need to create a coherent and harmonised framework regulating cross border proceedings. Accordingly the EC Regulation on Insolvency Proceedings 2000 came to force on 31 May 2002 and provides an orderly framework for effectively and efficiently dealing with insolvencies

[80] The Acquired Rights Directive 77/187 on the approximation of the laws of the Member States on safeguarding of employees' rights on transfers of undertakings of businesses and parts of undertakings of businesses.

[81] Article 87 of the EC Treaty.

[82] See Article 4 of Council Regulation (EC) No 659/1999, setting out the rules for the Application of Article 88 EC, See also Article 87(3) (c). Under this provision the Commission has the power to approve aid, where such aid does not adversely affect intra-community competition.

which occur within the European Union. [83] The EC Regulation is a conflict of laws measure and, without altering the substantive laws of Member States, enables the initiation and co-ordination of both main and secondary proceedings. It also enables a judgment opening proceedings in one Member State to be automatically recognised and enforced in another State within the European Union. Chapter II provides a detailed analysis of the scope of the Regulation. In addition, by reference to a series of high-profile cases Chapter II provides an assessment of the impact of the Regulation across Member States and identifies its strengths and weaknesses.

Moreover, the thesis provides an analysis of the insolvency laws of France, Greece and the United Kingdom and focuses especially on the corporate restructuring techniques available in the three jurisdictions. The three jurisdictions have adopted different approaches towards corporate rescue. It is submitted that the different approaches taken can be comprehended once one takes into account several underlying factors in the insolvency laws of each jurisdiction. Accordingly, Chapters III, IV, and V provide a detailed analysis of the corporate rescue laws of the United Kingdom, France and Greece respectively. Furthermore, Chapter VI provides a comparative analysis of key rescue proceedings of each jurisdiction and identifies differences and similarities between the three legal systems. In addition, the main factors affecting the course of corporate insolvency proceedings are discussed in detail in Chapter VI. In particular, the role of key players affecting both informal and formal corporate rescue are considered, such the role of company directors, creditors, the courts and insolvency

[83] Council Regulation (EC) No.1346/2000 of 29 May 2000, OJ 2000 L160/1.

practitioners and turnaround professionals, as they can arguably influence substantially the outcome of insolvency procedures. In particular, it is submitted that although domestic insolvency procedures lay down the general framework to be followed during a rescue attempt, practitioners and the courts may be able to improvise so as to achieve a better outcome for the traumatized company.

As mentioned above, due to the lack of substantive harmonisation of the insolvency proceedings across the European Member States, the European Union placed great weight on the facilitation of cross border insolvency proceedings. In particular, the EC Regulation on Insolvency Proceedings came in force in May 2002,[84] in order to ensure the effective co-ordination of insolvency proceedings. The next Chapter offers a detailed analysis of the provisions of the EC Regulation and assesses its impact on the domestic laws of Member States. Moreover, Chapter II assesses the effectiveness of the provisions of the EC Regulation by way of considering a series of high-profile cross-border insolvency cases, such as *Daisytek*, [85] *MG Rover* [86] and *Eurotunnel*.[87] Although one may conclude from subsequent chapters in the thesis that there is in fact an evolution of 'indirect' procedural harmonization between the insolvency laws of Member States, it should be noted that, Chapter II is aimed at analyzing the provisions of EC Regulation and is not to assess the possibility of procedural harmonization of cross-border insolvency. Arguably, although the recent

[84] Ibid.

[85] *Re Daisytek-ISA Ltd* [2003] BCC 562.

[86] *MG Rover Espana and Other Subsidiaries* [2005] EWHC 874 (Ch); BPIR 1162.

[87] Judgment of the Paris Commercial Court, greffe number No 2006/1903.

reforms of the insolvency laws of Member States demonstrate a level of procedural convergence, it is still very early days to actually suggest that steps should be taken, so as to give effect to substantive harmonization. It is submitted that no 'one size fits all' insolvency law model would fit all European jurisdictions, especially when the differences in the economic strength and the social traditions of a jurisdiction are taken into account. In fact, Recital 11 to the EC Regulation acknowledges that as a result of the differing substantive laws across the European Union, it is not practicable to introduce uniform insolvency proceedings in the entire community.[88] Nevertheless, the recently growing trend towards convergence of the insolvency procedures of European jurisdictions cannot go unnoticed. In fact, a report recently produced by INSOL Europe concludes that in order to build an efficient crisis management framework for the internal market further harmonization of certain laws is required.[89] For instance, it was submitted that it is necessary to build uniform rules regarding: (i) directors' liability; (ii) the test to open insolvency proceedings and eligibility of the debtor.[90] With the EC Regulation due for review by the European Commission it may that the possibility of such harmonization will come under the microscope.

---

[88] See N Wouters, "The EU Framework for Cross-Border Crisis Management in the Banking Sector" INSOL WORLD, Third Quarter, 2010, at p. 17.

[89] "Harmonisation of Insolvency Law at EU Level", 26th April 2010, INSOL Europe, at the request of the European Parliament, Direcorate General For Internal Policies, Policy Department C : Citizens' Rights and Constitutional Affairs. Available at: http://www.insol-europe.org/eu-research/ last accessed on 23rd September, 2010.

[90] N Wouters, note 88 above, at p. 17.

Chapter II: Cross- Border insolvency and the EC Regulation on Insolvency Proceedings

Introduction

As mentioned in Chapter I, due to the lack of substantive harmonisation of the insolvency proceedings across the European Union, great emphasis is placed upon the co-ordination of cross border insolvency proceedings. Chapter II provides an analysis of the efforts made at a European level in order to provide an effective framework for the facilitation of cross-border insolvency cases. It should be remembered that the European Union, faced with a long-lasting challenge of ensuring financial stability across Member States, has focused on facilitating the effective administration of cross-border insolvencies rather than attempting to harmonise insolvency procedures of Member States. Accordingly, Chapter II provides a detailed analysis of the measures introduced by the European Union, namely the EC Regulation on Insolvency Proceedings, in order to ensure the effective co-ordination of insolvency proceedings.[1] It is important to note that, as mentioned in Chapter I, Chapter II is aimed at analysing the provisions of EC Regulation and does not assess the possibility of procedural harmonization of cross-border insolvency. This should be kept in mind, as it could be inferred from the discussion in the subsequent chapters of the thesis, especially Chapter VI, that there is a level of procedural convergence between the insolvency laws and, in particular the corporate re-organisation tools of Member States across the European

[1] Council Regulation (EC) No.1346/2000 of 29 May 2000, OJ 2000 L160/1.

Union. Although the thesis acknowledges the existence of a growing trend towards convergence of the insolvency procedures of many European jurisdictions, it also recognises that substantive harmonisation of insolvency laws is a very complex matter and therefore, one could safely conclude that a uniform set of insolvency law rules could take a significant time to work out prior to making an appearance in the European Union. Furthermore, Chapter II attempts to evaluate the effectiveness and assess the impact of the provisions of the EC Regulation on the domestic laws of Member States by reference to a series of high profile cases. It is interesting to note that an Anglo-French saga of jurisdictional disputes developed soon after the introduction of the EC Regulation. Arguably, this introduces a supplementary reason for considering in detail the impact of European Union legislation, as the two key jurisdictions which are the subject of this thesis are France and the United Kingdom.

Cross-border insolvency is a phenomenon that has recently attracted a lot of interest on a global scale, primarily because of its detrimental effect on the international financial architecture. As state above, because there is no harmonisation of insolvency proceedings across the European Union, Chapter II is designed to provide an analysis of the cross-border insolvency laws of the European Union. However, prior to having regard to the provisions of the EC Regulation, it is necessary to briefly mention its background, as only by having regard to the troubled past of the Regulation does it become evident to one that the nature of insolvency law is such that it touches on the raw nerves of a society's legal framework and, hence renders substantive harmonisation a very difficult task.

It should be noted that the European Union has not kept a passive stance as far as the facilitation of cross-border insolvency proceedings is concerned. Rather, early steps were taken in order to regulate insolvencies which stretch beyond the national borders of Member States. In particular, the initial effort was made in 1963, when a working party was set up so as to consider the need for a Convention on insolvency.[2] Although the Insolvency Convention project featured in the agenda of the institutions of the European Union for several years the adoption of its text was met by resistance on the part of a significant number of Member States. The attempt to create a common insolvency legal system proved futile, because of the draft Convention's far-reaching wording and its failure to take into account strongly-held national views.[3] Nevertheless the impetus for the provision of a workable and, most importantly, unified set of insolvency rules continued until 1995, when a finalised text of the Convention on Insolvency Proceedings[4] was produced and became subject to approval by Member States. Crucially, the Convention did not strive to achieve harmonisation of the laws of Member States in relation sensitive matters concerning credit, security, or insolvency matters. Instead, its primary objective was to establish jurisdictional rules with regard to cross-border instances and to provide ground rules for the choice of law that would be applied in cross-border proceedings.[5] It is important to note that, the final version of the

[2] See K Dawson, "Cross-Border Insolvency: The EC Regulation and The UNCITRAL Model Law" in K Gromek Broc, & R Parry, *Corporate Rescue: An Overview of Recent developments From Selected Countries in Europe* (Kluwer Law International, 2006) at p.360. See also G Moss, I Fletcher & S Isaacs, *The Regulation on Insolvency Proceedings: A Commentary and Annotated Guide*, (2nd edn. Oxford University Press, 2009) at p. 2.

[3] See P Omar, "The European Insolvency Regulation 2000: A Paradigm of International Insolvency Co-Operation, Bond Law Review" (2003) 1(1) at p 216. See also K Dawson, above at p.360. See also M Hunter, "The Draft EEC Convention: A Further Examination" (1976) 25 ICLQ 310-328.

[4] European Union Convention on Insolvency Proceedings, 24th November 1995, 35 I. L. M. 1223.

[5] See G Moss, I Fletcher & S Isaacs, note 2 above at pp. 12-14. See also I Fletcher, "The European Union Convention on Insolvency Proceedings: An Overview and Comment, With a US Interest in Mind" (1997-

Convention's text would only remain open for signature for a period of six months and all Member States (fifteen at the time) would have to sign it. However, the United Kingdom, primarily for political reasons,[6] failed to sign the convention within the six-month time limit and as a result any efforts to successfully give effect to the Convention project were abandoned.[7]

Nevertheless, after a series of abortive efforts, taking into consideration the negative impact of insolvency on the economy of a Member State, European leaders persevered in creating a coherent and harmonised framework regulating cross border proceedings.[8] Accordingly, the EC Regulation on Insolvency Proceedings (The 'Regulation') came in force on 31 May 2002.[9] Although negotiations leading to the Regulation took nearly forty years, the Regulation did not share the ill fate of its predecessor. However, following the challenges presented in the preceding decades, it could be argued that it constituted a compromise made by Member States and that it reflects, on the one hand, the tension between the need for a set of unified rules and, on

---

1998) 23 (57) Brook J Int L 25-56; and N Segal, "The Choice of Law Provisions in the European Union Convention on Insolvency Proceedings", (1997-1998) 23 (57) Brook J Int L 57-74.

[6] It should be remembered that, relations between a number of Member States and the United Kingdom were severely distorted at the time because of the 'beef-crisis', which lead the adoption of a non-cooperation policy by the United Kingdom. In addition, it has been argued that the true reason behind the United Kingdom's failure to sign the Convention was the controversial matter regarding sovereignty over the territory of Gibraltar. See I Fletcher, *Insolvency in Private International Law*, (2nd edn. Oxford, 2009) at pp. 341-345.

[7] See G Moss, I Fletcher & S Isaacs, note 5 above, at pp. 1-6.

[8] See Virgos-Schmit Report on the Convention on Insolvency Proceedings, which had been prepared during the concluding phase of the preparatory work on the Insolvency Convention, with the intention that it would become the authorised guide to its interpretation. The Report was published in the Official Journal No. L. The English version of the final text of the *Virgos-Schmit Report* is published as Appendix 2 in G. Moss, I. Fletcher and S. Isaacs (Editors and authors), *The EC Regulation on Insolvency Proceedings* (Oxford University Press, 2002), at pp.261-327.

[9] Denmark opted out from the Regulation and is not subject to its application.

the other hand, the desire of the Member States to guarantee the legal certainty of their citizens, which is ordinarily derived from the applicability of national law.[10]

Looking beyond the Regulation's troubled past, one could argue that it provides an orderly framework for effectively and efficiently dealing with insolvencies which occur within the European Union, as it provides for plurality and universality of insolvency proceedings. In other words, the Regulation, without altering the substantive provisions of the national insolvency laws,[11] enables the initiation of both main and secondary proceedings and ensures that a judgment which is delivered in one Member State will be automatically recognised and enforced in another State within the European Union.[12]

Scope of the Regulation

Article 1(1) of the Regulation defines its scope by stating that it 'shall apply to collective insolvency proceedings which entail the partial or total divestment of a debtor and the appointment of a liquidator'.[13] However, the meaning of insolvency is not

[10] T M Bos, "The European Insolvency Regulation and the Harmonisation of Private International Law in Europe" (2003) NILR, 31-57, at p. 52. See also I Fletcher, *Insolvency in Private International Law: National and International Approaches*, (Oxford University Press, 1999) at pp. 246-255.

[11] K Dawson, note 2 above, at p. 358.

[12] Ibid, at p. 361.

[13] A liquidator for the purposes of the Regulation should not be confused with the liquidator under the UK liquidation proceedings. Rather it has an independent meaning and as stated under Article 2(b) 'liquidator' shall mean any person or body whose function is to administer or liquidate assets of which the debtor has been divested or to supervise the administration of his affairs. A list of such persons is provided in Annexe C.

defined under the Regulation and it is therefore left to Member States to define insolvency in accordance with their national law and practice.[14] However, Article 2(a) defines 'insolvency proceedings' as the collective proceedings referred to in Article 1(1) and listed in Annex A, which contains a list of proceedings that fall within the ambit of the Regulation. The United Kingdom insolvency proceedings for the purposes of the Regulation include compulsory winding-up, creditors' voluntary winding up, administration and voluntary arrangements under insolvency legislation. In the case of France, such proceedings include judicial liquidation ('*liquidation judiciaire*'), administration ('*redressment judiciaire'*) and the new safeguard procedure ('*sauvegarde*'). However, it should be noted that under the new French Law of 2005 a pre-condition for the initiation of safeguard proceedings is the requirement that the debtor is not insolvent, but rather that he is facing financial difficulties, which are capable of leading to a subsequent insolvency. Similarly, in the United Kingdom under the Enterprise Act 2002, there is requirement that a company is financially traumatised in order to enter into a Company Voluntary Arrangement. It could be argued that although both the United Kingdom's and French procedures are listed in Annex A as falling within the ambit of the Regulation, this is not entirely in line with the provisions of Article 1(1) of the Regulation, which provides for 'collective insolvency proceedings'. Furthermore, pursuant to Article 1(2), the Regulation 'shall not apply to insolvency proceedings concerning insurance undertakings, credit institutions, investment undertakings which provide services involving the holding of funds or securities for third parties, or to collective investment undertakings'.[15]

[14] See G Moss, I Fletcher, & S Isaacs, note 8 above, para. 3.02 at p. 35.

[15] Such undertakings are either subject to special regulatory regimes under national laws or specific measures adopted by the European Union. See G Moss, I Fletcher, & S Isaacs, ibid, para. 3.07 at p. 38.

As mentioned above, the Regulation does not seek to alter or harmonise the substantive provisions of national insolvency laws. Rather, it is a measure purely designed to reduce potential conflicts of law and thereby contains crucial rules with regards to the choice of law, jurisdiction and enforcement of judgements. In particular, with regard to the choice of law, Article 4 of the Regulation states that, in the case of both the main proceedings and any territorial or secondary proceedings, 'the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened'. However, it should be noted that Articles 5 to 15 of the Regulation make provision for a number of exceptions, in order to protect the expectations and the certainty of transactions in Member States other than that in which proceedings are opened.[16]

As far as jurisdiction is concerned, the Regulation crucially grounds international jurisdiction and allows for the maintenance of simultaneous collective insolvency proceedings. Nevertheless, it provides for a crucial division between main and secondary proceedings. Main proceedings may be commenced in a state where the centre of main interests ('COMI') of the debtor is to be found. Under Article 3(1) of the Regulation, the COMI is presumed to be the place of the debtor's registered office, unless proof to the contrary exists.[17] In addition, Recital 13 of the Regulation, which effectively compliments the Regulation's substantive provisions, states that the COMI is the place where the debtor conducts the administration of its interests on a regular

[16] These include rights in *rem*, set-off, reservation of title and contracts of employment.

[17] Article 3(1) of the Regulation states that 'the courts of a Member State within the territory of which the debtor's main interests is situated shall have jurisdiction to open insolvency proceedings. In the case of a company or a legal person, the place of the registered office shall be presumed to be the COMI in the absence of proof to the contrary'.

basis and is therefore ascertainable by third parties.[18] Furthermore, jurisdiction to open secondary or territorial proceedings exists, where the debtor possesses an 'establishment' within the territory of a Member State.[19] The term 'establishment' is defined as 'a place where the debtor carries out economic activity of a non-transitory nature with human means and goods.[20] Secondary proceedings are territorial proceedings, which are designed to protect local creditors and only relate to assets in the state in which they have been opened.[21] Secondary proceedings can only be liquidation proceedings. This could arguably have a detrimental effect on corporate rescue and re-organisation.[22]

It could be argued that the Regulation constitutes a radical attempt to achieve the mutual recognition and enforcement of insolvency proceedings within the European Union. However, it could be said that its application and interpretation has not proved unproblematic. Particularly, amongst others, a significant drawback of the Regulation is in relation to the loose definitions of the terms of COMI and Establishment. However, it

---

[18] It is important to note that Recital 13 is not part of the Regulation's main body; it is rather complementing Article 3(1). Moreover, paragraph 75 of the Virgos-Schmit report provides helpful guidance in respect of the determination of COMI as it suggests that in order to establish the presumption stated in Article 3(1), (i.e. that the debtor's registered office is its COMI), it must also be established that the registered office corresponds with the debtor's head office. Although the status of this report remains informal, it is nevertheless influential as it was designed to accompany the ill-fated Draft Insolvency Convention of 1995, the text of which is largely repeated in the text of the Regulation.

[19] See T M Bos, note 10 above, at p. 43.

[20] EC Regulation, Article 2(h).

[21] See note 3 above, See also Virgos-Schmit Report on the Convention on Insolvency Proceedings, paras. 21-33, at pp. 17-22.

[22] T M Bos, note 10 above, at p. 44. The law applicable in secondary proceedings is the law of the Member State within which the proceedings are conducted. Therefore, if such territorial law provides for the possibility of closing insolvency proceedings with a rescue plan (i.e. a sale of the business), rather than liquidation, such closure may only take place once the consent of the liquidator in the main proceedings has been granted.

should be noted that major problems have occurred in relation to the COMI, bearing in mind the importance of main proceedings, whereas it seems that there have been less problems with the use of the term 'establishment' and the subsequent opening of secondary proceedings.[23] Additional concerns have been raised in relation to the opening of main proceedings under the Regulation. Fears have been expressed that, where there is a lack of co-operation between domestic courts, there might be a race to initiate proceedings, bearing in mind the strategic advantages conferred on the Member State which first opens insolvency proceedings.[24] Nevertheless, it seems in recent years as if there has been more co-operation.

At this point, it is pertinent to provide a more detailed analysis of the Regulation's provisions and to consider its weaknesses by means of referring to landmark cases.

The Definition of COMI

The COMI of a debtor is of significant importance, as it determines which court has jurisdiction to initiate main proceedings. Unfortunately, the Regulation does not provide a clear and unequivocal definition and therefore forces domestic courts to subjectively interpret the meaning of the COMI.[25] It could be argued that the failure of

---

[23] K Dawson, note 2 above, at p. 372.

[24] See G Moss, "When Is A Proceeding Opened?" (2008) 21(3) Insolv Int 33-40, at p. 33. See Also *Eurofood IFSC Ltd, Re* (C-341/04) [2006] BCC 639.

[25] C M Di Luigi, "The Insolvency Regulation: A Criticism of the Jurisdiction Paradigm" (2006) 3(6), Int. Corp. Resc. 340-346, at p. 342.

the Regulation to provide for a clear definition of COMI effectively invites domestic courts to fill in the gaps of the Regulation. However, this judicial intervention in relation to COMI is not 'bias-free' as domestic courts may be influenced by their domestic interests, rather than attributing to it an autonomous meaning. Unsurprisingly, the approach adopted by domestic courts in various Member States has not been consistent and has inevitably given rise to jurisdictional disputes.

According to Article 3(1) of the Regulation, it is presumed that the COMI is the place where the registered office of the debtor is situated. However, it could be said that this presumption is inherently problematic as it does not reflect the reality in all Member States. The presumption arguably fails to take into account the existence of the two contradicting theories adopted by Member States in relation to establishing the jurisdiction, namely the 'real seat theory' adopted by countries such as France, Germany and Greece, and the 'state of incorporation theory', adopted in countries such as the United Kingdom, Ireland and the Netherlands. It has been speculated that an official definition of COMI has not been provided by Article 3(1), thus making the term COMI widely interpretable, in an attempt to build a bridge between the two different theories.[26]

In the absence of a clear definition of the COMI, it could be said that Recital 13 of the Regulation affords a chance to rebut the presumption as it states that the COMI should correspond to the place where the debtor conducts the administration of his

[26] Ibid, at p. 344.

interests on a regular basis and is therefore ascertainable by third parties.[27] Consequently, this entails an examination of where the debtor is seen by third parties to be conducting his business. Nevertheless, one could argue that Recital 13 adds to the ambiguity caused by Article 3, as an array of factors may be taken into account by domestic courts while interpreting the meaning of COMI, such as the location of the registered office, the location of main creditors and employees and the location of the parent company.[28]

Consequently, as mentioned earlier, one could argue that the courts could interpret the wording of the Regulation in relation to COMI influenced by their domestic interests, rather than attributing to it an independent and autonomous meaning. Arguably, because of the problematic interpretation of the concept of COMI, biased domestic courts could perceive the COMI to be located in their territory, hence giving rise to the paradox of main proceedings being initiated in more than one jurisdiction. It should be noted that, under the Regulation, it is not possible to initiate main proceedings in more than one jurisdiction. However, it could be argued that, for this reason, the domestic courts could 'race' to be the first to commence main proceedings, which would accordingly be immediately and automatically recognised by all Member States.[29]

[27]Ibid, at p. 343.

[28] K Rainey, "The European Insolvency Regulation and the Treatment of Group Companies: An Analysis" (2006) 3(6), Int. Corp. Rescue 322-328, at p. 326.

[29] Article 16(1) of the Regulation, (also supported by Recital 22).

It transpires that the wide interpretation of the meaning of COMI, coupled with the 'first in time-first in place' rule, could give rise to an acute conflict over jurisdiction. Accordingly, bearing in mind the strategic advantages enjoyed by the one first to open proceedings, it is crucial at this stage to consider the time that a proceeding is effectively 'opened'.[30] Under the Regulation, it is stated that 'the time of the opening of proceedings shall mean the time at which the judgement opening proceedings becomes effective, whether it is a final judgement or not'.[31] However, to add to the problem, it should be noted that the procedural laws of the Member States as to the moment that a proceeding becomes effectively opened may differ. For instance, in the United Kingdom, a petition has to be filed in order for the court to make a winding-up order and, although the petition is deemed to be a 'request for an opening', the winding-up order undoubtedly constitutes an opening.[32] This can be contrasted with the position in Italy, where no separate application is needed for the formal opening of proceedings. This also gives rise to concerns as it is possible that creditors or debtors would strive to enjoy the advantage of automatic recognition by exploiting the legal regime of a Member State, where proceedings are formally opened without the need for a separate judgment.[33] However, it should be pointed out that as the Regulation is due to be reviewed by 1st June 2012.[34] Arguably, this is a lacuna that has to be addressed.

---

[30] G Moss, I Fletcher, &S Isaacs, note 14 above, at p. 33.

[31] Article 2(f).

[32] Note 24 above, at p. 33.

[33] See for instance *Eurofood IFSC Ltd* [2005] B.C.C. 1021 (Case C-341/04). See also G Moss, "A Very Peculiar Establishment" (2006) 19 (2)20-24, at p. 23.

[34] See P Omar, *European Insolvency Law* (Ashgate Publishing, 2004) at p. 183.

Interpretation & Application of the Regulation

The troublesome interpretation of the provisions of the Regulation has generated an expanding body of case law. The problem becomes more apparent where a group structure is concerned. It should be noted that a significantly detrimental omission of the Regulation is the fact that it does not make provision for groups of companies *per se.*[35] In other words, in the event that the holding company and its subsidiaries become insolvent, one would expect that main proceedings would be commenced in the Member State in which each company's centre of main interests is located, therefore creating the need to apply the provisions of the Regulation for co-operation and co-ordination of proceedings.[36] However, it appears that a drastic approach has been taken by the domestic courts in the European Union, as on many occasions they have interpreted the Regulation in a manner which effectively fills in the gaps that the Regulation itself failed to address in the first place, namely co-ordinated corporate group insolvencies.[37] At this point, it is pertinent to make reference to a series of groundbreaking cases, which effectively demonstrate the approach adopted by the courts in various Member States with regards to the application of the Regulation. In addition, special reference will be made to leading cases, such as *Daisytek* and *MG Rover*, in order to compare the different approaches that have been adopted by the French and the United Kingdom courts towards cross-border insolvency.[38] It should be noted that, as opposed to the stream of jurisdictional disputes between France and the

[35] See A Chapman, "The European Union Insolvency Regulation: An Unfinished Task" available at www.insolvency.ca/docs/writingAwards/2006/Paper_Chapman_2nd%20place_2006_Competition.pdf last accessed on 19th October 2010, at p. 7.

[36] K Dawson, "The jurisdiction of the English courts under the EC Regulation on insolvency proceedings" (2003) 6 Insolv L 226-233, at p. 229.

[37] A Chapman, note 35 above, at p. 7.

[38] Detailed analysis of these cases takes place later in this thesis.

United Kingdom in the early years of the Regulation's life, a different picture existed in Greece, where the introduction of the Regulation was largely unnoticed. [39]

The Case of *Enron Directo Sociedad Limitada*

One of the early cases to be decided under the Regulation was *Enron Directo*.[40] Enron Directo was a subsidiary of the infamous Enron Group 'empire'. The company in question was incorporated in Spain but also traded in the United Kingdom. Following a petition by one of the company's creditors to open administration proceedings in England, the English court was called to consider whether the company's COMI was located in England or in Spain and whether it had jurisdiction to initiate main proceedings under the Regulation.

The main argument submitted in this case by Counsel, and which was effectively accepted by the Judge, was that in determining the COMI of the company, it should be considered whether the registered office corresponded with the company's head office functions. In addition, where the debtor provides proof to the contrary that

---

[39] See G Bazinas, "EU Regulation on Insolvency Proceedings: The First Year and the Outlook from Greece", available at www.iiiglobal.org last accessed on 19th October 2010.

[40] *Enron Directo Sociedad Limitada,* High Court of Justice Chancery Division Companies Court, 4 July 2002. It should be noted however, that there is no reasoned judgement available for this case, as the court accepted the skeleton argument of counsel. A detailed analysis of this case is provided by Moss. See G Moss, "Skeleton Argument on Behalf of the Petitioners, In the Matter of Enron Directo SL" available at www.iiiglobal.org last accessed on 20th October 2010.

the head office and registered office are not located in the same Member State and the head office is where the main financial, administrative, executive and strategic functions are performed then the presumption can be rebutted. In particular, in the light of the factual evidence and in accordance with Recital 13, the High Court concluded that the presumption stated under Article 3(1) was rebutted since all the principal, executive, strategic and administrative decisions were reached in London where the head office was based. Moreover, the court, in determining whether it had international jurisdiction, appears to have taken into account certain factual indicators, such as the fact that a) the company's main creditors knew that the company was administered from London, b) employment contracts were negotiated in London, c) all targets, budgets and margins were set in London, d) all Spanish regulatory and compliance issues were dealt with in London, e) the treasury was based in London, f) all customers and suppliers were subject to authorisation from London, and finally (g) all executive level management was based in London.[41] Arguably, the decision in *Enron* signifies the birth of the 'mind of management' theory, also known as the 'head office functions' theory.

The Anglo-French Saga of jurisdictional disputes

The case of *Daisytek ISA Limited*

[41] Ibid paras. 18-30.2.

One of the landmark cases in relation to the determination of the location of a company's COMI, where a group of companies is concerned, is *Daisytek.*[42] It is noteworthy that, similarly as in the earlier case of *Enron Directo*, the 'head office' function was at the heart of the dispute. The Daisytek Group comprised sixteen companies, which constituted the European subdivision of a wider group controlled by an American company, namely Daisytek Inc. The American parent company filed for re-organisation proceedings under Chapter 11 of the United States Bankruptcy Code. In addition, a petition was filed before the English court for administration orders in respect of fourteen of the sixteen European subsidiaries, ten of which had been incorporated in England, three in Germany and one in France. Accordingly, it was for the English court to consider whether the COMI of the French and the German subsidiaries was in England, and therefore, whether the court had jurisdiction to open administration proceedings in respect of these.

In light of the factual evidence before the English court, a pragmatic approach was taken and it was held that the COMI of each of the companies in the group was located in England, as the European operations of the group were co-ordinated by the head office in Bradford. In other words, it was argued that the place where each of the companies conducted the administration of its business on a regular basis and which was therefore ascertainable by third parties was Bradford.[43] In particular, the court noted that, in identifying the COMI, consideration should be given to the scale and importance of the company's interests administered in one location against the scale

[42] *Re Daisytek-ISA Ltd* [2003] BCC 562.

[43] Judgment of H.H. Judge McGonigal, [2003] BCC 562, at para. 14 (pp. 565-566).

and importance of the interests administered in another place which could be regarded as its COMI. The court attached great importance to the provisions of Recital 13 and examined where the main creditors such as financiers and trade creditors considered that the main administration was conducted. [44]

The court provided a detailed analysis of the factors which affected its decision. In particular, His Honour Judge McGonigal argued that the presumption stated under Article 3(1) was displaced and that the United Kingdom court was correct in asserting jurisdiction to open main proceedings in respect of each company in the group, in the light of the factual evidence, which demonstrated that a) effective management and control of all the companies in the Group was conducted from the head office in England; b) the companies' funding was provided through English financial institutions; c) all financial information was compiled pursuant to English accounting principles and reviewed in England; and, crucially, d) 70% of the supply contracts were negotiated centrally through the English head office.[45]

Unsurprisingly, the outcome in the Daisytek case was not welcomed in France or Germany. Notwithstanding the opening of main proceedings in England, the two jurisdictions declared the English administration proceedings void and contrary to the 'spirit' of the Regulation and each initiated main insolvency proceedings. In particular, it was argued before the French court that the English court ignored the general

[44] Recital 13 of the preamble to the Regulation states that 'the COMI should correspond to the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.

[45] [2003] BCC 562, at paras. 3-13, pp. 564-565.

principle of company law in relation to corporate groups, which establishes, that in the absence of any special factors, each company in the group should be treated as a separate legal entity. Furthermore, it was argued that corporate groups did not fall within the scope of the Regulation, and therefore the English court erred in its decision to assert jurisdiction.[46]

Subsequently, it appeared that the impossible had happened and that the very situation that the Regulation was intended to prevent was created.[47] It has been argued that both jurisdictions have failed to respect the mandatory nature of the Regulation and therefore their legal obligation to recognise insolvency proceedings opened in another Member State pursuant to its provisions.[48] In addition, it should be emphasised that the initiation of ‘parallel’ main proceedings a) undermined the provisions of Article 16 of the Regulation, which establishes the basic principle of immediate and automatic recognition of any judgement opening insolvency proceedings under the Regulation;[49] and b) defied the purpose of Article 17, as supported by Recital 22, which implies that the effect of the opening of proceedings in one Member State may not be challenged or

---

[46] See Hyde, & S Taylor, “The EU Insolvency Regulation” available in www.europeanrestructuring.com/05intro/008_013.htm last accessed on 19th October 2010, at p.4, See also J Alderton & A Adeline, “The EC Regulation on Insolvency Proceedings Streamlining Cross-Border Insolvency?” (2006) 3(5), Int. Corp. Rescue, 257-264, at p. 259.

[47] See I Fletcher, *Insolvency in Private International Law* (2nd Ed., Oxford, 2005), para. 7.49, at p. 372. See also Alderton, op.cit. at p. 259.

[48] Ibid, at p. 390.

[49] Article 16 states that ‘Any judgment opening insolvency proceedings handed down by a court of a Member State which has jurisdiction pursuant to Article 3 shall be recognised in all the other Member States from the time that it becomes effective in the State of the opening of proceedings’.

further scrutinised in another Member State and is to be recognised without further formalities.[50]

Moreover, as would be expected, the approach of the French lower courts threw the enforceability of the Regulation into doubt. From an English commentator's perspective, it has been argued that the English court adopted a commercial approach in order to give effect to the provisions of the Regulation and that English trade, together with the insolvency profession, has expanded into Europe.[51] However, as cynical as it could sound, the view adopted in France was that the United Kingdom courts had not embraced the Regulation, but had rather seized jurisdiction for themselves over foreign companies.[52] Moreover, one could argue that the Anglo-Saxon approach has been illegitimately exported in an imperialistic fashion.[53] Nevertheless, although the manner in which the administration orders of the English court have been obtained could be debatable, it should be insisted that any dispute with regard to the standing of the petitioning party to act in the name of the company should be pursued by means of an

[50] Recital 22 states inter alia that 'Recognition of judgments delivered by court of the Members States should be based on the principle of mutual trust. To that end, grounds for non-recognition should be reduced to the minimum necessary. This is also the basis on which any dispute should be resolved where the courts of two Member States both claim competence to open main proceedings. The decision of the first court to open proceedings should be recognised in the other Member States without those Member States having the power to scrutinise the court's decision'.

[51] The approach adopted by the English court is arguably the result of its common law ethos. See for instance s.221 of the Insolvency Act 1986, which permits the winding up of unregistered companies or even companies registered abroad, where there is a reasonable prospect of benefit to the applicant and the court is able to exercise jurisdiction over one or more persons.

[52] See J Alderton, note 46 above, at p. 258.

[53] See R Parry, "Co-operation In Areas Not Directly Addressed Under the EU Regulation 1346/2000, Differences Between Common Law and Civil Law Jurisdictions" at p. 10. Paper presented on 5th November 2007 at A Law School mini-conference, University of Hull. See also J Willcock, "Whose COMI Is It Anyway?" (2005) Eurofenix, summer, at p. 16.

appeal in the jurisdiction in which the order was made.[54] At this point, it should be noted that, pursuant to Article 26 of the Regulation, a Member State may refuse to recognise an order on the ground that it manifestly contravene its public policy.[55] However, non-recognition should be limited to the minimum necessary, as to readily invoke the provisions of Article 26 would be detrimental to the 'mutual trust' principle upon which the effectiveness of the Regulation is heavily dependent.[56]

Fortunately, the Court of Appeal of Versailles restored order by means of reversing the orders made by the Tribunal de Commerce.[57] The Court of Appeal, in delivering its triumphant decision, confirmed that, since the English court was chronologically the first to open main proceedings, it had jurisdiction to determine the location of the French subsidiary's COMI, and in line with the evidence before it, it agreed that the presumption in Article 3(1) had been displaced. The Court of Appeal also emphasised that, even in the event of a procedural irregularity in the English court, such a matter would have to be raised in an application attacking the English administration order and could not be raised in France.[58] This was arguably a development of crucial importance, as it appears that the Court of Appeal of Versailles

---

[54] I Fletcher, note 47 above, para. 7.71, at p. 391.

[55] Article 26 states that 'Any Member State may refuse to recognise insolvency proceedings opened in another Member State or to enforce a judgment handed down in the context of such proceedings where the effects of such recognition or enforcement would be manifestly contrary to that State's public policy, in particular its fundamental principles or the constitutional rights and liberties of the individual'.

[56] Recital 22 of the Regulation. See also I Fletcher, note 47 above, para. 7.71, at p. 391.

[57] Cour d'Appel de Versailles, 24eme chambre, Arrêt No.12 du Septembre 2003 (R.G. No.03/05038), JOR 2003/288.

[58] G Moss, "The Triumph of "Fraternité": ISA Daisytek SAS" available at www.iiiglabal.org last accessed on 19th October 2010, at p. 3.

put France back in line with the provisions of the Regulation and emphasized its primacy.[59]Importantly, the decision of the Appeal Court was upheld by the Cour de Cassation, which is the most senior court in the French judicial system. [60] The Cour de Cassation confirmed that the decision of the English court was effective and confirmed that the courts in France cannot control, challenge or discuss the jurisdiction of the court opening main proceedings, or impose any requirement for compliance with French formalities.[61]

The decision in Daisytek has gone beyond the 'mind of management' [62] approach which was adopted in the *Enron Directo* case.[63] In particular, several factors, including the expectations of creditors, were taken into account in establishing the COMI. Arguably, this constitutes a better approach than the one taken in *Enron Directo*, where it was implied that the establishment of COMI was restricted to intellectual activities only, which would be hardly ascertained by those dealing with the company.[64]

The *MG Rover* Case

[59] Fletcher, I., note 47 above, para. 7.72 at p. 391.

[60] *Klempka & Autres* v *PG Versailles*, 27 June 2006.

[61] J Alderton, note 46 above, at p.262.

[62] See A Chapman, note 35 above, at p. 12.

[63] A similar approach to the one adopted in Daisytek was also taken in the subsequent case of *Re Crisscross Telecommunications*, [2005] Insolv. Int. 85, where the perceptions of creditors were taken into account in finding that the COMI of a group of subsidiaries was in England.

[64] See Parry, R., note 53above.

Following the landmark decision in *Daisytek* and the courts' interpretation of COMI, it could be argued that a jurisdictional dispute between France and the United Kingdom within a short period of time could be anticipated. However, it should be remembered that, at the dawn of the decision in *Daisytek*, heated political debate was generated and social concerns were raised in relation to the potentially catastrophic consequences for the protection of employees' rights of systematically finding that a debtor's COMI was based in a jurisdiction other than its registered office.[65] Bearing in mind the long tradition of France's social concerns and the resentment prompted since *Daisytek*, the dispute over jurisdiction in the subsequent *MG Rover* case came as no surprise. [66]

MG Rover Group Limited was an English company which traded in the auto sector. MG Rover Group Ltd. was the holding company of sales subsidiaries in eight European countries. It is noteworthy that all subsidiaries were incorporated in the state where they were trading. On April 2005, MG Rover Group Ltd entered into administration proceedings and, at the same time, its subsidiaries, including the French incorporated Rover France SAS, also petitioned the High Court in Birmingham for administration orders. Consequently, prior to making the administration orders, the English court had to consider whether it had jurisdiction in respect of the companies in the Group. The court made reference to the earlier Daisytek decision and concluded that, in the light of the factual evidence, the COMI of each of the companies in the

[65] See M Haravon, "Recent developments in France under the EU Regulation 1346" (2005) 18(8) Insol. Int. 118-121, at p. 118. See also a statement issued by the Ministry of Justice, where, inter alia, it was stated that 'to systematically rule that the centre of the main interests of a subsidiary is the place where the parent company is established would be to misconstrue the European text. This misconstruction could well offend public policy, notably as far as the employees' representatives of the company are concerned and who would not be heard before the opening of the proceeding'. Rep. min. justice no.40288 to Ms Pascale Gruny: JOAN Q, August 3, 2004, p. 6104.

[66] *MG Rover Espana and Other Subsidiaries* [2005] EWHC 874 (Ch); BPIR 1162.

Group was in England. In addition, it was argued that, in line with the prime objective of the Regulation, a consolidated appointment would ensure effective co-ordination and control, and therefore deliver a better outcome for the creditors.[67] However, only a month later, the Public Prosecutor of the Commercial Court of Nanterre declared that, pursuant to Article 26 of the Regulation, the decision of the English court in relation to the French subsidiary's affairs was contrary to public policy and would not be recognised in France. Accordingly, the Public Prosecutor requested insolvency proceedings be opened in France.

This was arguably a turning (breaking) point in the application of the Regulation, as it appeared that the public policy ghost had returned.[68] It appeared that the reaction of the Public Prosecutor was largely influenced by the political situation in France at the time, and the intense discussion over the perceived imposition of 'Anglo-Saxon' business practice on French soil.[69] The cornerstone of the Public Prosecutor's public policy argument was the fact that the rights of employees of an insolvent company would be in jeopardy, as English law was less favourable than French Law.

Fortunately, in line with the 'uniformity spirit' of the Regulation, the Commercial Court of Nanterre rejected the Public Prosecutor's argument and held that Article 26[70] could not be invoked, because the interests of the French employees were

[67] J Alderton, & A Adeline, note 46 above, at p. 260.

[68] M Haravon, note 65 above, at p. 118.

[69] See J Willcock, note 53 above, at p. 16.

[70] See note 55 above.

fully protected.[71] In particular, the Court ruled against the application of Article 26 as, in line with the provisions of Article 10 of the Regulation, the effects of insolvency proceedings on employees were to be governed by the national laws governing the employment contract and not the law governing the main proceedings. In addition, the English administrators, in light of the social concerns of the French courts, have taken a series of additional practical steps, which safeguarded the interests of the French employees.[72] Particularly, the English administrators a) undertook to pay any unpaid wages on behalf of Rover France, b) ensured that the employees would receive amounts equivalent to what would be payable to them on a compulsory liquidation under French law, and c) emphasised that the administrators would bear the cost of laying off certain employees in France according to French insolvency proceedings.[73]

Consequently, pursuant to the provisions of Article 16 of the Regulation, the English administration order was to be automatically recognised in France without a need for further formalities.[74] The Commercial Court was satisfied that the English court had correctly considered the evidence in relation to the management and the operation of the French subsidiary and that its COMI was in England, hence rebutting the presumption under Article 3(1).[75] The Attorney-General, following the rejection of

[71] The Nanterre Court, in considering the application of the notion of public policy, made reference to the ECJ ruling of *Krombach v Bamberski* (C-7/98): [2001] Q.B. 709; [2000] E.C.R. I-1935.

[72] J Alderton, & A Adeline, note 46 above, at p.261. See Also R Parry, *Corporate Rescue* (Sweet & Maxwell, 2008) at pp. 273-274.

[73] See M Haravon, note 65 above, at p. 121.

[74] *SAS Rover France,* unreported, May 19, 2005, Commercial Court of Nanterre.

[75] See R Parry, R., note 72 above, at pp. 273-274. In light of the public policy concerns of the French courts, adjustments were made to normal procedures by the English courts and office holders. In particular, the administrator's proposals were especially adopted, so as to make them more acceptable

his arguments, appealed to the Versailles Court of Appeal, seeking to verify whether the English courts had in fact jurisdiction and whether the criteria for choosing jurisdiction were correctly applied. Importantly, the Appeal Court upheld the decision of the Commercial Court and drew emphasis to the importance of automatic recognition, which is a fundamental principle of the Regulation.

The decision in *MG Rover* is arguably a landmark decision as the French courts demonstrated a radical shift in their approach towards the application of the Regulation, in particular with regard to the issue of determining jurisdiction, and significantly clarified that the exception to Article 3(1) is in fact a very narrow exception and therefore Article 26 cannot lightly be invoked. One could argue that the decision in *MG Rover* constitutes atonement for the French courts, which in the earlier Daisytek case eagerly strove to assert jurisdiction although the commercial reality demonstrated the contrary. Finally, the decision in MG Rover allows one to confidently claim that judicial harmony has been achieved, although one must note the concessions for the French employees of the UK courts and administrators, as arguably the same decision would not have been reached.

by the French court. For instance the administrator's report *inter alia* explained the powers and duties of the administrator. In addition, modifications were also made so as to reflect the more favourable treatment of employees in France.

The *Eurofood* Case

The first time where the European Court of Justice had to consider a COMI-related question was in the case of Eurofood IFSC Ltd ('Eurofood').[76] Eurofood had its registered office in the International Financial Services Centre, Dublin.[77] The company was a wholly-owned subsidiary of Parmalat Spa, which was the Italian incorporated parent of the infamous Parmalat Group, and its sole function was to raise finance for the Group. Furthermore, it is noteworthy that the company had no employees and that its policy was determined by the headquarters in Italy, which also controlled Eurofood's decision-making function. In addition, the company only entered into three transactions, two of which were guaranteed by the parent company.[78] Following the revelations over the Group's financial crisis, on 27 January 2004, the Bank of America, which was a creditor of Eurofood, petitioned the Irish High Court for a winding-up order on the ground of insolvency and, at the same time, applied *ex parte* for the appointment of a provisional liquidator. It is significant to note that, at this stage, the Irish court made no finding of insolvency and no explicit pronouncement with regard to the COMI of Eurofood.

Furthermore, on 9 February 2004, the Italian Minister for Productive Activities admitted Eurofood to the extraordinary administration procedure and, on 10 February 2004, an application was lodged with the Italian court in Parma for a declaration of

[76] *Eurofood IFSC Ltd,* [2005] B.C.C. 1021 (Case C-341/04).

[77] The company's head office was located in the Dublin docks for tax reasons.

[78] G Moss, "Asking the Right Questions? Highs and Lows of the ECJ Judgement in *Eurofood*"(2006) 19(7), Insolv Int 97-102, at p. 97.

insolvency. Accordingly, on 20 February 2004, the Italian court declared Eurofood insolvent and asserted jurisdiction to open main proceedings on the basis that Eurofood's COMI was located in Italy and that the appointment of a provisional liquidator in Ireland did not amount to an 'opening' of proceedings.

Unsurprisingly, on 23 March 2004, the Irish High Court granted a winding-up order, which related back to the time that a petition was filed before the Court, namely on 27 January 2004, and subsequently held that main insolvency proceedings pursuant to Article 3 of the Regulation had been opened in Ireland. In other words, the Irish court ruled that Eurofood's COMI was in Ireland and that the opening of insolvency proceedings in Italy contravened the core principle of the Regulation of mutual recognition. In addition, it was held that the Italian court's failure to provide the Irish provisional liquidator with the relevant documentation amounted to a lack of due process, therefore Article 26 allowed the Irish court to not recognise the Italian proceedings. Subsequently, the Italian extraordinary administrator appealed this decision to the Irish Supreme Court, which in turn referred five specific questions[79] to the ECJ in order to obtain guidance in relation to the correct interpretation of the Regulation.[80]

[79] In particular, the Irish Supreme Court referred to the ECJ the following questions with regard to the interpretation of the Regulation: a) what constituted the opening of insolvency proceedings within the meaning of the Regulation and which national court had jurisdiction to open main insolvency proceedings; b) what are the governing factors for determining centre of main interests when the registered office of a parent company and its subsidiary are located in different member states; and c) whether a member state had to give recognition to a decision of another member state purporting to open insolvency proceedings in respect of a debtor, when that debtor had not been given the right to fair procedures and a fair hearing.

[80] It is important to note that the ECJ addressed the specific question before it and that it did not provide a detailed analysis of general principles.

In September 2005, the Advocate-General delivered his Opinion,[81] which was very much in line with the rulings by the Irish High Court. The Advocate- General considered all the five questions referred by the Irish Supreme Court and argued, *inter alia*, that the filing for a winding up petition and the appointment of a Provisional Liquidator in Ireland effectively amounted to an opening of proceedings. In addition, it was stated that the winding up order constituted main proceedings under the Regulation and that in fact it was related back to the date of the petition. Moreover, it was argued that pursuant to Articles 16 and 17 of the Regulation, the findings of a court in relation to a company's COMI in a Member State cannot be scrutinised by the courts of another Member State. Finally, Advocate-General Jacobs endorsed the view of the Irish Supreme Court that the opening of proceedings in Italy contravened Irish public policy (on the ground of lack of a fair hearing) and subsequently argued that Article 26 of the Regulation could be invoked.[82]

The definition of the meaning of COMI in the Regulation

In May 2006, the ECJ delivered its much-awaited judgement in the Eurofood Case. It should be noted that, although the findings of the ECJ ultimately match those of the Advocate General, the ECJ delivered its decision in a manner which was different in many respects.[83] For instance, in delivering his Opinion, the Advocate-General favoured the application of the 'head-office function' test, as a means of determining

[81] [2005]BCC 1021 (Case C-341/04).

[82] Moss, note 78 above, at p. 98.

[83] See I Fletcher, *Insolvency in Private International Law, Supplement to the 2nd Edition* (Oxford University Press, 2007) at p. 117.

the location of a company's COMI[84] (where a parent-subsidiary situation is involved), whereas (as it will appear from the analysis below) the ECJ elected to adopt a rather different and, arguably, more complicated approach. It has been argued that, after the Advocate General's Opinion, it did not come as a real surprise that the ECJ, in delivering its judgment, did not open its mind to the need for modern insolvency law to develop a particular set of rules for the insolvency of a group of companies.[85] Nevertheless, it could be argued that the fact that the ECJ chose not to mention the 'head-office function' test, does not necessarily imply that it disagreed with the submissions of the Advocate-General. It merely implied that the 'test' was irrelevant in the given circumstances, as the *modus operandi* of the ECJ was to only consider the specific questions before it, hence the 'head office function' test was not considered.

The ECJ confined itself to specifically addressing four out of the five questions put to it by the Irish Supreme Court. In particular, the ECJ chose to firstly deal with the fourth question put to it, which was to identify the determining factor in locating the COMI of a subsidiary company, where it and its parent company have their respective registered offices in two different Member States.[86] The ECJ laid emphasis on the presumption in Article 3 of the Regulation, that is to say that the location of the COMI is the place of the registered office. However, the ECJ also acknowledged that, as stated in Recital 13, this presumption may be rebutted, where there are factors that are

[84] *Eurofood* Judgment paras. 111-112.

[85] C Paulus, "The aftermath of "Eurofood" - *BenQ Holding BV* and the deficiencies of the ECJ decision" (2007) 20(6) Insolv Int 85-87, at p. 85.

[86] See I Fletcher, note 83 above, at p. 117.

‘objective and ascertainable to third parties’, which demonstrate that the COMI is elsewhere.[87]

The ECJ highlighted that the presumption in Article 3 of the Regulation shall not be displaced purely on the basis of parental control. In particular, it was stated that, where a company carries on its business in a Member State in which its registered office is located, the mere fact that its economic choices are or can be controlled by a parent company in another Member State is not enough to rebut the presumption laid down by the Regulation.[88] Rather, the ECJ, by means of an illustration, stated that it is possible that the presumption could be rebutted in the case of a ‘letterbox’ company, namely where although, a company has its registered office in a Member State, it does not carry out business in the territory of that Member State.[89] It is regrettable that, although the ECJ affirmed that the COMI ‘must be identified by reference to criteria which are both objective and ascertainable by third parties’, it nevertheless failed to provide guidance as to what those criteria might be. It could be argued that the judgement of the ECJ in *Eurofood* was not of great assistance and that it was rather a missed opportunity to clarify the legal position on this particular matter. Inevitably, it is now a matter of further case law being generated in order to obtain further clarification by the ECJ as to the meaning of COMI in the Regulation.[90]

[87] *Eurofood* judgment, paras. 30-34.

[88] Ibid, paras. 35-37.

[89] Ibid, para. 37.

[90] See J Alderton, & A Adeline, note 46 above, at p. 263. See also G Moss, note 78 above, at p. 101 and I Fletcher, note 83 above, at p. 118.

The time of 'opening' proceedings

Another question to which the ECJ failed to provide an answer was in relation to the time of opening of proceedings under the Regulation.[91] The ECJ concluded that following its answer in the affirmative that the appointment of a Provisional Liquidator amounted to an opening of proceedings within the meaning of the Regulation, it was unnecessary to consider any further the question concerning the time of 'opening' of proceedings.[92] However, it could be argued that, once again, the ECJ missed the opportunity to address an important problem with regards to the interpretation of the Regulation. As mentioned earlier, the time of the opening of proceedings is crucial as far as asserting jurisdiction and recognition of proceedings are concerned and undoubtedly, uncertainty as to the time of 'opening' could give rise to dangers, such as causing the courts in different Member States to race to the finishing post, namely to be the first to assert jurisdiction.[93]

In addition, it could be argued that some Member States, such as Ireland, may be in a better position to win such an unseemly race due to procedural differences. For instance, following the ECJ's decision in *Eurofood*, the appointment of a Provisional Liquidator constituted an opening, even though there was no judgment delivered by the Irish court as to the location of the COMI or the insolvency of the company. It is noteworthy that the ECJ having regard to the significant differences between the laws

[91] G Moss, ibid, at p. 101. See also G Moss, "Group Insolvency-Choice of Forum And Law; The European Experience Under the Influence of English Pragmatism" (2007) 32 Brook. J. Int'l L. 1005-1018, at p. 1014, where he argues that 'ultimately, getting the right answers depends on asking the right questions'.

[92] *Eurofood* judgment, para. 59.

[93] See G Moss, note 24 above, at p. 34.

of the Member States in relation to the time of opening of insolvency proceedings, opted for a flexible proposition.[94]

In particular it was stated that "a 'decision to open insolvency proceedings' for the purpose of the Regulation must be regarded as including not only a decision, which is formally described as an opening decision by the legislation of the Member State of the court that handed it down, but also a decision handed down following an application, based on the debtor's insolvency, seeking the opening of proceedings referred to in Annex A to the Regulation, where that decision involves divestment of the debtor and the appointment of a liquidator referred to in Annex C to the Regulation. Such divestment involves the debtor losing the powers of management which he has over his assets. In such a case, the two characteristic consequences of insolvency proceedings, namely the appointment of a liquidator referred to Annex C and the divestment of the debtor, have taken effect, and thus all the elements constituting the definition of such proceedings, given in Article 1(1) of the Regulation, are present".[95]

From the above, it appears that the ECJ has tactically avoided falling into the trap of having to precisely define the time of insolvency proceedings and, more importantly, to answer whether the doctrine of relation-back, as applied under Irish insolvency law, could supply an alternative ground that the Irish courts were the first to initiate insolvency proceedings under the Regulation.[96] Nevertheless, it could be said

[94] I Fletcher, note 83 above, at pp. 119-120.

[95] Para. 54 of the judgment.

[96] See I Fletcher, note 83 above, at p. 120.

that the ECJ's decision in *Eurofood* appears to be embracing a 'relation back theory', which, in its turn, affords certain jurisdictions, such as the United Kingdom and Ireland, a significant procedural advantage, arguably to the detriment of other jurisdictions such as Italy, where domestic legislation makes no provision for a concept of provisional orders. [97] In addition, it has been argued that the ECJ by means of requiring that a provisional liquidator be listed in Annex C of the Regulation introduced an opportunistic element.[98]

Moreover, critics have argued that the ECJ by means of introducing a 'relation back doctrine' has failed to adhere to the autonomous concept of 'opening' pursuant to the Regulation and rather arbitrarily provided for an 'extended' notion of opening.[99] This is arguably not intended in the Regulation (because it creates the exact opposite effect i.e. domestic courts rush to assert jurisdiction). Finally, it could be argued that the decision in Eurofood has not contributed in shedding more light into the grey area relating to the interpretation of the provisions of the Regulation, but has rather created further uncertainty as to the time that an opening takes place.

---

[97] It is noteworthy that the Regulation makes provision for an autonomous concept of opening. Article 2(f) states: "the time of the opening of proceedings" shall mean the time at which the judgement opening proceedings becomes effective, whether it is a final judgement or not'. Moreover, a winding up order under UK law does not have retrospective effect for the purposes of the Regulation. In other words, in the event of a petition, a judgement becomes effective on the day it is made and not on the day that the petition was filed. Therefore, the decision in *Eurofood* does not appear to be in full conformity with this.

[98] G Moss, note 24 above, at p. 39.

[99] Ibid, at p. 37.

The Interpretation of COMI by Domestic Courts after the *Eurofood* Case

It could be argued that, although the ECJ did not endorse the 'head office function test' in the *Eurofood* case, domestic case law has nevertheless been moving towards this direction.[100] In particular, with reference to the approach taken by the French courts, it appears from the approach adopted in the case of *Eurotunnel*[101] that, in spite of the lack of express approval of the 'head office function test' by the ECJ, the French courts have not been prevented from relying on this test. The *Eurotunnel* decision is the first application of the Regulation to the safeguard procedure, since its insertion in Annex A of the Regulation. In addition, the *Eurotunnel* case constitutes the first main decision of the French courts since the decision of the ECJ in *Eurofood* and since the first shock created by 'perfidious Albion' in the *Daisytek* case.[102] In particular, on 2nd August 2006 the Paris commercial court initiated main proceedings, pursuant to Article 3(1) of the Regulation, in respect of an English registered company, Eurotunnel Finance Ltd. It was held that the COMI of a series of the Eurotunnel entities was in France 'considering that it was good practice to find a unique solution to the same financial difficulty threatening the 70 applicant entities guarantors of a debt which exceeds their assets'. In particular, it was held that COMI was in France as a number of factors ascertainable by third parties indicated that a) the strategic and operational management of the various Eurotunnel entities was exercised by a joint committee which was based in Paris and which consisted of a number of French nationals; b) the

[100] See for instance, *Mpotec* [2006] BCC 681; also *Re Energotech* March 29, 2006 *(Unreported),* see M Haravon, & G Moss, "Building Europe' - the French case law on COMI" (2007) 20(2) Insolv Int 20-23, at p. 20.

[101] Judgment of the Paris Commercial Court, greffe number No 2006/1903.

[102] See Haravon, & Moss, note 100 above, at p. 20.

registered office of the two main French companies of the group, Eurotunnel SA and France Manche was in Paris; c) financial management which was responsible for the accounting of the various entities was located in France; and d) the main part of the activities was in France.[103]

Recognition of Proceedings & the Public Policy Exception under the Regulation

At the heart of the Regulation lies the issue of immediate recognition and enforcement in all Member States of any judgement opening insolvency proceedings, as handed down by the courts of a Member State.[104] In fact, the third question referred to the ECJ required the provision of guidance as to the approach that should be adopted towards the recognition of opening of insolvency proceedings. In particular, the ECJ provided an answer in the negative to the question presented by the Irish Supreme Court, which was concerned with whether the jurisdiction assumed by the court of a Member State to open main proceedings may be reviewed by a court of another Member State in which recognition has been applied for.[105] The ECJ drew particular emphasis on the principle of mutual trust which requires that, where main insolvency proceedings are opened in a Member State, the courts in another Member State must recognise these proceedings without questioning the jurisdiction of the opening State.

[103] Ibid, at p. 22.

[104] See Articles 16 & 17 of the Regulation.

[105] Judgment paras. 38-44, reported at [2006] BCC 406-407.

However, it is noteworthy that the ECJ identified an exception to the general rule of automatic and unquestioned recognition, which is stated under Article 26 of the Regulation. The ECJ recognised that Article 26, properly interpreted, provides that the court of a Member State is permitted to refuse to recognise or enforce proceedings opened in another Member State on the grounds of public policy. It should be remembered however that the application of Article 26 is rather narrowed down by the wording of Article 26. It is clear that the intention of the Regulation is that Article 26 should not be lightly invoked and that its application presupposes a breach of fundamental principles or constitutional rights and liberties of the individual. In the *Eurofood* case for instance, the decision of the Italian court to open the proceedings was taken in blatant breach of the provisional liquidator's fundamental right to be heard.[106]. In particular, it was stated that 'on a proper interpretation of Article 26 of the Regulation, a Member State may refuse to recognise insolvency proceedings opened in another Member State where the decision to open the proceedings was taken in flagrant breach of the fundamental right to be heard, which a person concerned by such proceedings enjoys'.[107]

[106] I Fletcher, note 83 above, at p. 119.

[107] See Judgment paras. 60-68, reported at [2006] BCC 409-410.

Co-operation and Co-ordination of Proceedings & the Role of the Courts

With regard to the body of case law that has been generated so far, it becomes apparent that many difficulties arise due to the wording and the problematic interpretation of the Regulation. However, it could be argued that the problem of jurisdictional disputes could be overcome through effective co-operation and communication between the courts of Member States.[108] In fact, recent case law demonstrates that, where the courts of Member States choose to adopt a less adversarial stance, difficulties over the interpretation of the Regulation may be conquered.[109]

An example of effective co-ordination of cross-border insolvency proceedings, which could be imitated by other Member States, is provided by both the *MG Rover* and *BenQ* cases.[110] The *Rover* case demonstrated that both English and French courts and practitioners have actively collaborated in order to give effect to a 'successful global sale', which safeguarded the interests of all the parties involved.[111] In addition, the case

---

[108] The importance of encouraging co-ordination of insolvency proceedings was recognised by the Virgos-Smidt Report, see note 8 above, at pp. 23-26.

[109] It should be noted that, as opposed to civil law jurisdictions, common law courts and practitioners have a long history of co-operation and co-ordination. For instance following the collapses of the Maxwell Corporation and the BCCI a number of protocols have evolved in the absence of coherent normative systems. See J Flood, & E Skordaki, "Normative Bricolage: Informal Rule-Making by Accountants And Lawyers in Mega Insolvencies, 1997 Global Law Without A State" at p. 111, available at http://www.johnflood.co.uk/pdfs/Normative_Bricolage_Insolvency_1997.pdf last accessed on 19th October 2010.

[110] See C Paulus, "The aftermath of '*Eurofood*' - *BenQ Holding BV* and the deficiencies of the ECJ decision"(2007) 20(6) Insolv Int 85-87.

[111] M Menjucq, & R Dammann, "Regulation No.1346/2000 in Insolvency Proceedings: Facing the Companies Group Phenomenon, (2008) 9(2) Business Law International 145-158.

of *BenQ* clearly demonstrates that the courts have a determinant role to play in the effective application of the Regulation and that co-operation and collaboration on an international scale between the courts may lead to the avoidance of jurisdictional discrepancies. In particular, it should be emphasised that the courts communicated despite the fact that Article 31[112] of the Regulation expressly makes provision for a duty of the 'liquidator' to co-operate and communicate information in cross-border instances and is silent with respect to courts and judges.[113] These cases are arguably very significant in featuring civil jurisdiction courts, which lack the long-standing tradition of co-operation that common law jurisdictions share.

Moreover, a case which demonstrates effective co-operation between courts is the case of the *Nortel Networks Group*,[114]where joint administrators were appointed so as to give effect to a wide co-ordinated reorganisation of the entire Nortel Group.[115] It should be noted that, because of the highly integrated trading relationships between group companies, the administrators believed that the best way to maximise value for

[112] Article 31 states: 1) Subject to the rules restricting the communication of information, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to communicate information to each other. They shall immediately communicate any information which may be relevant to the other proceedings, in particular the progress made in lodging and verifying claims and all measures aimed at terminating the proceedings.

2) Subject to the rules applicable to each of the proceedings, the liquidator in the main proceedings and the liquidators in the secondary proceedings shall be duty bound to co-operate with each other.

3) The liquidator in the secondary proceedings shall give the liquidator in the main proceedings an early opportunity of submitting proposals on the liquidation or use of the assets in the secondary proceedings.

[113] See C Paulus, note 110 above, at p. 85.

[114] *Re Nortel Networks & 17 Ors* [2009] EWHC 206.

[115]In particular, the English judge agreed to send a letter of request to the courts of a number of MSs, asking them to put in place arrangements under which the administrators would be given a) notice of any application for the opening of secondary insolvency proceedings in respect of any of the companies in administration; and b) an opportunity to be heard on any such application.

the creditors would be through a co-ordinated re-organisation of the entire Nortel group. Therefore, the Joint Administrators wished to avoid secondary insolvency proceedings being opened in respect of any of the companies as this would be likely to impede the global restructuring being planned and would reduce the value ultimately realised for the benefit of the companies' creditors.[116] It should be remembered that, although the Regulation only refers to a duty of 'liquidators' to co-operate with each other and not the courts, it was stated in the *Nortel* case that the duty to co-operate has been treated by the courts of member states as incorporating or reflecting a wider obligation which extended to the courts which exercised control of insolvency procedures in their respective jurisdictions. In particular, the English court referred to the decision in *Stojevic* (9 November 2004),[117] where the Austrian court considered that the duty to cooperate in Article 31(2) of the Regulation could be extended so as to apply to the courts. Subsequently, the English court made an order in order to give effect to the avoidance of secondary proceedings and stated that it was obviously desirable for the court dealing with an application to open secondary proceedings to be provided with the reasons why such proceedings may have an adverse impact on the main proceedings.[118] Additionally, the English court cited the decision of the French Court of Appeal in *MG Rover as* an example of the advantage of permitting the Joint Administrators in English main proceedings to be heard in relation to the opening of secondary proceedings in another Member State.[119]

[116] *Nortel Judgment* at para. 6. See also L Ho, "Perfecting the Union, Perfecting Universalism" Published version in (2009) 2 Corporate Rescue and Insolvency 71, also available in http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/corpdocs/Universalism.pdf last accessed on 18th October 2010, at p. 3.

[117] *Nortel Judgment* at para. 11.

[118] Ibid at para. 12.

[119] Ibid.

Moreover, communication between courts is crucial to the effective and efficient application of the fundamental principles of the Regulation. However, it should be noted that the objective of 'court to court' communication is not to jointly hold hearings, but rather to effectively co-ordinate insolvency proceedings and, where possible, to prevent or avoid misunderstandings and conflicts over jurisdiction.[120] It could be argued that the creation of a European register of insolvency proceedings would facilitate the promotion of a collaborative attitude between European courts. The creation of a central system of reporting and recording the opening of insolvency proceedings under the Regulation would constitute a major step forward as it would effectively limit conflicts over the time of opening of proceedings but would also allow the courts in different Member States firstly, to become aware of the opening, and secondly, to communicate with each other so as to ensure that each court has a full account of the true facts of a case and accordingly determine whether it should assert jurisdiction.[121] It could be argued that, had a central register of judgments been in place, the outcome in *Eurofood* would not have given rise to such dispute. The case illustrates that both the Irish and Italian courts reached two radically different views, although they were presented with essentially the same factual evidence. It could be said that the existence of a register would have prevented the radically different approach which was adopted towards the time of opening of proceedings and the location of the COMI in *Eurofood*. Nevertheless, it should be kept in mind that co-operation within twenty-six

[120] G Moss, & C Paulus, "The European Insolvency Regulation- the Case for Urgent Reform" (2006) 19(1) Insolv Int 1-5, at p. 4. See also G Moss, "Group Insolvency-Choice of Forum and Law; The European Experience under the Influence of English Pragmatism" (2007) 32 Brook J Int'l L 1005-1018, at p. 1009.

[121] G Moss & C Paulus, ibid, at p. 4.

Member States is a very challenging task and given the differences in language and legal culture, many practical difficulties could be presented.[122]

Furthermore, given the lack of guidance in the text of Article 31 of the Regulation, a group of scholars and practitioners have considered the liquidator's duty to co-operate and communicate in instances of cross-border insolvency.[123] The proposals of this group were embraced by INSOL Europe, which, following intensive discussions, came up with a set of guidelines, known as the European Communication and Co-operation Guidelines for Cross border Insolvency.[124] The Guidelines are designed to enable courts and liquidators to operate effectively and efficiently in cross-border insolvency within the context of the Regulation.[125] In addition, the Guidelines are a realistic set of rules designed to provide practical solutions to difficulties that arise due to the vague wording of the Regulation. It should be remembered, however, that the Guidelines constitute soft law and are not rigid rules that could be applied in every case.[126]

---

[122] Ibid.

[123] See B Wessels, "Accommodating Cross-Border Co-ordination: European Communication and Co-operation Guidelines for Cross-Border Insolvency" (2007) 4 (5), Int Corp Rescue, 250-256, at p. 250.

[124] See M Virgos, & B Wessels, ''European Communication and Cooperation ('CoCo') Guidelines for Cross-border Insolvency'' (October 2007) developed under the aegis of INSOL Europe.

[125] B Wessels, note 123 above, at p. 253.

[126] Ibid, at p. 251.

Forum Shopping under the Regulation

As mentioned above, one of the most controversial aspects of the Regulation relates to the definition of COMI. The significant body of case law demonstrates that the majority of conflicts over jurisdiction are related to the problematic interpretation of Article 3 of the Regulation and particularly the vague definition of the COMI. It could be argued that an acute danger is subsequently presented in forum shopping[127]. It is possible that forum-shopping takes place, where those responsible for the formation of the company engineer its finances so that it becomes subject to the laws of a Member State, whose regulatory regime is more indulgent towards those who control and manage it. Additionally, forum-shopping could involve the transfer of judicial proceedings from one Member State to another, seeking to obtain a more favourable position.[128]

For instance, as far as the interpretation of Article 3(1) is concerned, it appears that where the administrative office and the registered office of a debtor do not coincide, the idea of readily rebutting the presumption (i.e. such as in *Daisytek* and *MG Rover*), may allow 'forum-shopping' within the European Union[129]. It should be remembered that the presumption is that the COMI is where the debtor's registered

[127] See M Rutstein, "A Wind Blows Through An English Brothel", (2010) 3(4) CRI 156. See also G Moss & C Paulus, "The Insolvency Regulation- the Case for Urgent Reform" (2006) Insolv Int 19(1), 1-5; and *Hellas Telecommunications (Luxemburg) II SCA* [2009] EWHC 3199 (Wind Hellas).

[128] For instance see *Shierson* v *Vlieland Boddy* [2004] EWCA2572. See also the Schefenacker Restructuring: "Schefenacker, Seeking Bankruptcy, Flees Germany for U.K. Courts" 17 July 2007, Bloomberg available at: http://www.bloomberg.com/apps/news?pid=20601109&sid=aoOp2euiFKzI&refer=home last accessed on 18th October 2010. See also *Hans Brochier Ltd* v. *Exner* [2006] EWHC 2594 (Ch).

[129] See R Rizzi, & G Caldwell, "Insolvency: Europe's Doomed Quest for Harmony" (2002) 21(10), IFLR 31 at p. 32.

office is and not the other way around. Hence, by being readily prepared to reverse this presumption, a race for a judgment in a jurisdiction which one believes to be more favourable to the interests of creditors, employees or the debtor could occur.

It could be said that once again 'court to court' co-operation would drastically contribute to the prevention of the phenomenon of forum-shopping, as efficient collaboration would enable courts to exchange information and determine which court should assert jurisdiction in order to benefit a greater body of creditors by means of realising the debtor's assets. Furthermore, given the policy of the Regulation against undesirable forum-shopping, the courts should adopt a purposive form of interpretation of the Regulation so as to prevent any easy evasion of jurisdiction.[130]

Conclusion

The case law that has developed under the Regulation in the last few years demonstrates that the application of the Regulation has proved to be a hard task. It could be argued that the difficulties that have arisen stem from the lack of a clear definition of COMI and also due to the most significant weakness of the Regulation, namely the fact the Regulation fails to make provision for the insolvency of groups of companies.[131] Arguably, this significant omission renders the co-ordination of proceedings difficult to organise and ultimately hinders corporate rescue.

[130] Moss, Fletcher, & Isaacs, note 14 above, paras. 8.44-8.41 at p. 171.

[131] J Willcock, note 53 above.

Another interesting point that arises by means of carefully considering the case law, which has so far been generated under the Regulation, is the approach that the courts of Member States have adopted since the enactment of the Regulation. For instance, back in the early years of the Regulation's enforcement, the *Enron Directo* case clearly illustrates the enthusiasm of courts in asserting jurisdiction. In particular, critics argued that, at times, there was an unjustified assertion of jurisdiction and the imposition of an Anglo-Saxon ethos of free enterprise ideals at the expense of social concerns.[132] This point is arguably not entirely arbitrary, when one considers the outcome in the *MG Rover* case. That case effectively highlights the pragmatic approach taken by the United Kingdom courts, which involves the sacrifice of the individual interest in favour of the collective interest. The quick and commercial approach adopted by the United Kingdom towards restructuring is in direct opposition with the French philosophy, which is strongly geared towards the protection of social values. However, a quick glance at more recent case law of several jurisdictions demonstrates that there has been a shift in the attitude of the courts and that a spirit of co-operation amongst them has emerged.[133]

In conclusion, it should be remembered that, in light of the lack of harmonised insolvency procedures across Member States, the co-ordination of cross-border insolvency proceedings, can most effectively be facilitated by means of the EC Regulation on Insolvency Proceedings. Chapter II has provided an analysis of the provisions of the EC Regulation, which, notwithstanding certain flaws, has proved to be a very important tool for the facilitation of cross-border insolvencies. In addition, by

[132] R Parry, note 75 above, at p. 272.

[133] Ibid. See also C Paulus, note 110 above.

reference to a series of high-profile cases Chapter II assessed the effectiveness of the Regulation and identified its strengths and weaknesses. Finally, it should be noted that the EC Regulation is a conflict of laws measure and does not seek to harmonise the insolvency institutions of Member States, instead it crucially provides for the choice of jurisdiction and choice of law with regards to cross-border insolvencies. As a result, it becomes necessary for one to have regard to the domestic insolvency laws of Member States and, to comprehend the approach taken towards corporate rescue by Member States within their jurisdiction. Subsequent chapters, in particular Chapters III, IV and V, will provide a detailed analysis of the insolvency law regimes of the United Kingdom, France and Greece respectively. The next chapter, Chapter III is aimed at considering the insolvency laws of the United Kingdom and particularly, the corporate rescue tools that are available in that jurisdiction.

Chapter III: Corporate Rescue in the United Kingdom

Introduction

As discussed in Chapter II there has been no attempt made to achieve substantive harmonization of the insolvency laws across the European Union. Instead, as seen in Chapter II, the EC Insolvency Regulation has attempted to fill in the gap caused by the lack of harmonised measures, by means of providing the tools for the effective and efficient co-ordination of cross border insolvency proceedings. It is submitted that, in the absence of harmonized insolvency institutions, it is important for one to comprehend the approach taken towards corporate rescue by Member States within their jurisdiction. Accordingly, Chapter III is aimed at providing a detailed analysis of the corporate rescue mechanisms that are available in the United Kingdom. In particular, great emphasis is placed on the administration procedure, which is used as the main tool of corporate rescue. In addition, an extensive analysis of the pre-packaged administration technique is offered, as it appears that the use of such proceedings has become a significant trend in corporate rescue in the United Kingdom. Subsequent chapters will consider the equivalent laws in France and Greece.

The design of an insolvency law system depends principally on the legislative culture of a state; in other words, on the objectives that a legislative measure is intended to achieve.[1] The United Kingdom's insolvency law has traditionally been regarded as 'creditor friendly' because of the strong priority given to the protection of creditors' interests. Nevertheless, the Enterprise Act 2002 was introduced in order to encourage a more collective approach towards corporate rescue, whereby all the interests in the company would be considered. This chapter provides a brief analysis of the law prior to the enactment of the Enterprise Act in order to effectively assess the impact of the 2002 reforms on the United Kingdom's corporate rescue culture. Moreover, in this chapter, an attempt will be made to assess the impact of the reforms introduced by the Act with special reference to procedures such as administrative receivership, administration and the company voluntary arrangement, which is largely a 'debtor in possession' procedure. Finally, this chapter is aimed at providing a detailed analysis of the United Kingdom system for comparisons to be effectively made later in the thesis.

The pre- Enterprise Act Regime

Prior to the enactment of the Insolvency Act 1986 (IA 86), there were only two main possible ways of keeping 'alive' a business in trauma, mainly through the use of the administrative receivership procedure or a scheme of arrangement. Nonetheless, the application of administrative receivership was conditional upon the exercise of the right

[1] A Belcher, *Corporate Rescue* (Sweet & Maxwell, London 1997) at p. 12; see also A Belcher, "The Economic Implications of Attempting to Rescue Companies" in *Insolvency Law: Theory And Practice*, edited by H Rajak (Sweet & Maxwell, 1993) at pp. 87-88.

of a floating charge holder to appoint an administrative receiver. Additionally, corporate rescue by means of a scheme of arrangement was particularly limited, mainly because the procedure was too 'procedurally cumbersome and failed to safeguard sufficient and effective protection for the company'.[2]

In 1985 by means of a text, later re-enacted as the IA 86,[3] two additional procedures were introduced as alternative means for corporate rescue, namely the administration procedure and the company voluntary arrangement ('CVA'). The innovative reforms introduced by the IA 86, originally had their roots in the 1982 report of the Cork Committee,[4] which recognised the need to strengthen the United Kingdom's corporate rescue culture. The Cork Report stated that a 'good, modern system of insolvency law should provide a means for preserving viable commercial enterprises capable of making a useful contribution to the economic life of the country'.[5] However, not all of the Cork Committee's proposals were embodied in the subsequent legislation, and even those that were had their importance diluted. In particular, administration suffered from significant inherent flaws detrimental to the original intention of promoting a collective approach towards the rescue of ailing businesses. For instance, it should be noted that, although upon his appointment the

---

[2] R Parry, "United Kingdom: Administrative Receiverships and Administrations" in Gromek Broc, K., and Parry, R., *Corporate Rescue in Europe: An overview of Recent Developments from Selected Countries in Europe* (Kluwer Law International, 2004) at p. 265.

[3] The Insolvency Act 1985 was consolidated as the Insolvency Act 1986.

[4] Report of the Review Committee on Insolvency Law and Practice, (Cmnd. 8558, 1982) ('Cork Report').

[5] V Finch, *Corporate Insolvency Law, Perspectives and Principles* (2nd edn., Cambridge University Press, 2009) at p. 246.

administrator was granted significant powers, (in fact his powers were as extensive as those of an administrative receiver) such as the power to impose a freeze on crucial creditors' remedies, such as the enforcement of security, he was nevertheless unable to prevent the appointment of an administrative receiver. Accordingly, it was always possible for a debenture holder to block administration by appointing an administrative receiver.[6]

Administrative receivership

Administrative receivership, which formerly dominated United Kingdom insolvencies,[7] is an 'enforcement remedy'[8] available to creditors holding a floating charge. The company grants a floating charge to the creditor, which is a charge over the present and future assets of the company. In essence, a floating charge allows the company to continue its operations in the ordinary course of events, until under certain circumstances the floating charge holder will seek to enforce his security.[9] For instance, where a debtor defaults on a secured loan or where there is obvious danger that he will

---

[6] See R Goode, *Principles of Corporate Insolvency Law* (3rd edn., Sweet & Maxwell, 2005) at p. 248. See also I Fletcher, "UK Corporate Rescue Culture: Recent Developments- Changes To Administrative Receivership, Administration and Company Voluntary Arrangements- The Insolvency Act 2000, The White Paper and The Enterprise Act 2002" (2004)5 EBOR 119-151, at p. 125.

[7] It is noteworthy that administrative receivership has nowadays fallen out of favour.

[8] R Goode, *Commercial Law* (3rd edn., Penguin Books, 2004) at p. 845.

[9] R Parry, note 2 above, at p. 267.

not be able to pay his debt at a due date, the floating charge 'crystallizes' and the floating charge holder is able to appoint a receiver.[10]

The procedure is implemented by an administrative receiver, who must be a qualified insolvency practitioner.[11] The receiver's primary concern is to take control over the company's assets and realize them in order to fully pay off the person appointing him. In summary, a receiver can be described as 'an independent contractor whose primary responsibility is to protect the interests of his appointor,[12] but who also owes a duty to his deemed principal, the company,[13] to refrain from conduct which needlessly damages its business or goodwill, and a separate duty, by statute, to observe the priority given to preferential creditors[14] over claims secured by a floating charge'.[15] Nonetheless, the abovementioned obligations do not prevent the receiver from ruthlessly promoting his appointor's interests without taking into consideration the position of the unsecured creditors of the company.[16] It consequently arises that,

[10] The power to appoint an administrative receiver must be expressly specified in the instrument creating the floating charge, as the IA '86 is silent as to the circumstances in which an administrative receiver can be appointed.

[11] IA 86, s. 230(2).

[12] See *Re B Johnson & Co. (Builders) Ltd*. [1955] 1 Ch. 634, See also, *Downsview Nominees* v. *First City Corporation* [1993] AC 295.

[13] See *Medforth* v. *Blake* [1999]3 All ER 97. For an in depth analysis of this case see: S Frisby, "Making a Silk Purse out of a Pig's Ear-*Medforth* v. *Blake & Ors"* (2000) 63 MLR 413-423.

[14] See *IRC* v. *Goldblatt* [1972] 1 Ch 498.

[15] R Goode, *Principles of Corporate Insolvency Law* (2nd Edn, Sweet & Maxwell, London 1997) at p. 217.

[16] S Frisby, "In Search of a Rescue Regime: The Enterprise Act 2002" (2004) 67(2) MLR 247-272, at p. 251; to this effect see also: *Lathia* v. *Dronsfield Bros*. [1987] BCLC 321.

although the receiver is required to act in good faith in his appointor's interests that does not prevent him from choosing to deal with the company or its assets in a way that inflicts harm on vulnerable junior claimants, who, while affected by the receiver's decisions, cannot hold him to account.[17]

Interestingly, administrative receivership has functioned as means of preserving a business in financial trouble. A floating charge holder is more likely to be paid off in full where the business is preserved as a going concern. Hence, it is to the interest of the floating charge holder that the receiver takes control of the company with the target of putting it out of its difficulties.[18] However, a defining feature of the administrative receivership procedure is still the predominance of the secured creditors' interests. Accordingly, it is not surprising that the White Paper preceding the Enterprise Act recognizes the 'widespread concern as the extent to which…receivership as a procedure provides adequate incentives to maximize economic value' by helping distressed businesses.[19]

The procedure was also criticized for being one-dimensional and individualistic. Webb finds that: 'if debenture-holders have claims on a common pool of assets, the receivership system may lead to an equilibrium in which the company is

---

[17] See R Mokal, *Corporate Insolvency Law: Theory and Application* (Oxford University Press, 2005) at pp. 4 &12. See also *Silven Properties Ltd*. v. *Royal Bank Of Scotland* [2003] EWCA Civ 1409 (CA).

[18] R Parry, note 2 above, at p. 268.

[19] White Paper, Productivity and Enterprise- Insolvency: A Second Chance (London: HMSO, 2001) para. 2.2.

prematurely and inefficiently liquidated. The problems stems from the feature of this system, which allows creditors to act in individualistic self-interest'.[20] In a similar way, Goode argues that: 'the debenture-holder or his receiver is entitled to dispose of assets on a break-up basis even though more could be obtained by carrying on the business and disposing of it as a going concern'.[21]

Consequently, administrative receivership came to be viewed as an unfair private procedure, which fails to take into account any interests other than those of the floating charge holder. The element of unfairness lies with the fact that the floating charge holder has no incentive to consider the interests of other parties and, more importantly, on the fact that his decisions could have a detrimental effect on other stakeholders' returns, without even a requirement for their consent.[22]

A counter argument, in defence of administrative receivership, is that secured creditors have earned the right to priority and that other creditors should not complain about the privileges enjoyed by floating charge holders, since they could enjoy similar rights had they offered better terms to the debtor.[23] Nonetheless, this argument ignores

---

[20] D Webb, "An Economic Evaluation of Insolvency Procedures in the United Kingdom: Does the 1986 Insolvency Act Satisfy the Creditors' Bargain?" (1991) Oxford Economic Papers 144.

[21] See R Goode, note 6 above, at p. 248. See also B Rider, *Proprietary Rights and Unsecured Creditors, in the Realm of Company Law* (Kluwer Law International, 1998) at pp. 191-192.

[22] V Finch, note 5 above, at p. 262.

[23] See R Goode, "Is the Law Too Favourable To Secured Creditors?"(1984) 8 Canadian Bus.L.J. at p. 53. See also R Goode, note 21 above, at pp. 248-250.

the interests of other stakeholders, such as employees, who are unable to bargain in order to obtain security over assets.[24]

Furthermore, it has been argued that administrative receivership raises serious corporate governance concerns as it effectively involves handing over the control of large corporations to the receiver,[25] who is acting only in the interest of the secured creditor and hence potentially to the detriment of other stakeholders such as other creditors and employees.[26] In addition, Mokal describes receivership as a 'perverse structure', which is designed to solely maximize the profit of the floating charge holder in the form of unnecessary job losses, resource misallocation and wastefully inflated costs.[27] He also argues that administrative receivership is 'destructive' of social value.[28]

These criticisms led to a 'revolutionary' change introduced by the Enterprise Act, namely the virtual abolition of the administrative receivership.[29] The holder of a

[24] V Finch, note 5 above, at p. 428. See also: R Parry, note 2 above, at p. 268.

[25] Mokal notes that as opposed to 'debtor in possession' regimes, the displacement of management under the procedure of the administrative receivership, involves greater direct costs, incurred because of the employment of new distress-orientated manager. See R Mokal, note 17 above, at p. 11. See also: S Ferris, & R Lawless, "The expenses of Financial Distress: The Direct Costs Of Chapter 11" (2000) 61 University of Pittsburgh Law Review 629-651.

[26] D Milman and D Mond, *Security and Corporate Rescue* (Hodgsons, Manchester, 1999) at p. 48.

[27] R Mokal, "Administrative Receivership and Administration- An Analysis". (2004) 57, Current Legal Problems, Available at SSRN: http://ssrn.com/abstract=466701 at p. 14, last accessed on 4th October, 2010.

[28] Ibid, at p. 1.

[29] Frisby openly identifies the procedure as the foremost obstacle facing the attainment of an improved system of insolvency law. See S Frisby, note 13 above, at p. 251.

floating charge created on or after September 15, 2003 may not appoint an administrative receiver except in special cases, primarily where financial markets are involved.[30]

It could be argued that the abolition of administrative receivership promotes fairness and encourages the use of collective insolvency procedures. Nonetheless, there are grounds to believe that the new regime is likely to inhibit the economy,[31] as lenders may seek to secure their position by attempting to fall within the exceptions. Moreover, in the absence of the right to appoint an administrative receiver, creditors may at an early stage take extra precautions in order to protect their interests. Accordingly, it could be argued that the retention of the ability of a suitably secured creditor to appoint an administrative receiver under the new regime undermines the suggestion that "administrative receivership should cease to be a major insolvency procedure"[32] and rather suggests that the procedure will continue to be an option for some time to come.[33]

---

[30] Sections 72A-G of the IA 1986.

[31] L Linklater, "The Enterprise Act: New Economic Dawn or Disaster", (2004) Comp.Law., at p. 33. See also, R Parry, note 2 above, at p. 272. However, the EA deliberately defines the exceptions in a narrow way so as to effectively protect financial markets.

[32]Productivity and Enterprise: Insolvency -A Second Chance, Cm 5234 (London: HMSO, 2001), para. 2.5.

[33] See: M Stevenson, "The Enterprise Bill 2002-A Move Towards A Rescue Culture" (2002) 15(7) Insolv. Int. 51-53, D Milman, "Enterprise Bill", (2002) 4 (Jul), Insolvency L.J. 119-121.M Phillips, & J Goldring, "Rescue And Reconstruction", (2002) 15(10) Insolv. Int. 75-76. A McKnight, "The Reform Of Corporate Insolvency Law in Great Britain", (2001) 16(8/9) J.I.B.L. 213-218.

Administration

As already mentioned above, the administration procedure was introduced by the Insolvency Act 1986 as a main weapon of company rescue,[34] since it allows companies a temporary breathing space from pressing creditors by virtue of a statutory moratorium.[35] In contrast to administrative receivership, administration is of a collective nature and enables all creditors to provide input and participate in the procedure.[36] Nevertheless, it could be argued that the statutory regime preceding the EA 2002 undermined the effectiveness of administration.[37] This point is clearly illustrated by means of examining the 'the pre-Enterprise Act' insolvency statistics, which demonstrate that administration had a rather disappointing impact on corporate rescue.[38]

Administration prior to the Enterprise Act

---

[34] A Campbell, "Company Rescue: "The Legal Response To The Potential Rescue of Insolvent Companies", (1994) 5(1) ICCLR, 16-24.

[35] L Linklater, "The Enterprise Act: Fulfilling Great Expectations", (2003) 24(8) Comp. Law. 225-226.

[36] R Parry, note 2 above, at p. 273. See also I Fletcher "UK Corporate Rescue: Recent Developments—Changes to Administrative Receiverships, Administration, and Company Voluntary Arrangements—The Insolvency Act 2000, The White Paper 2001, and the Enterprise Act 2002" (2004) 5 EBOR 119, 125.

[37] The pre-enterprise act procedure failed to provide directors with the ability of taking early action, since this was only possible through a court petition.

[38] See Insolvency statistics, available in http://www.insolvency.gov.uk/ last accessed on 4th October, 2010.

Administration as introduced by the Insolvency Act 1986 was a court activated process. An application for an administration order was initiated by means of a petition by the company, the creditors or the directors.[39] It is noteworthy that a petition could only be presented by the company's directors where it was the consequence of a board resolution.[40] The significant drawback of this requirement was that it made it impossible for individual directors, who were concerned both about their company's prospects and also their potential future liability,[41] to raise their concerns before the court.[42] Taking into account that directors are the ones who hold sufficient information with regards to their company's well-being, it is argued that this practical restriction effectively prevented them from presenting a petition at an early stage, where the possibility of restoration to profitability is greater.

In order for an administration order to be granted the company must have been (or be likely to become) insolvent[43] and an administrative receiver should not have been appointed. In addition, the court was to grant an order if it was satisfied that administration was likely to achieve one or more of the four following purposes:[44]

---

[39] See s. 9 (1) Insolvency Act 1986.

[40] See *Re Equiticorp International plc*. [1989] BCLC 317.

[41] For instance, liability for wrongful trading under s. 214 of the Insolvency Act.

[42] D Milman, *Corporate insolvency law and practice* (Sweet & Maxwell, 1994) at p. 32.

[43] Insolvency Act 1986 s. 8.

[44] Ibid, s.8 (1) (b), s. 8 (3). Furthermore, Parry argues that these purposes fail to provide a clear direction, as to the preferred outcome of administration. R Parry "England and Wales: Administration Orders" in Gromek Broc, K., and Parry, R., *Corporate Rescue in Europe: An overview of Recent Developments from Selected Countrie* "(2nd edn. Kluwer Law International, 2006) at p. 63.

1. The survival of the company and the whole or any part of its undertaking as a going concern;

2. The approval of a voluntary arrangement under Part I of the Insolvency Act;

3. The sanctioning under s.425 of the Companies Act 1985, of a compromise or arrangement between the company and its creditors or any class of them or between its members or any class of them; and

4. A more advantageous realisation of the assets than would be effected on a winding up.

Upon petitioning the court for an administration order a 'partial' moratorium is triggered, which provides the company with breathing space from pressing claims. However, the Achilles' heel of administration at this early stage was the fact that it was possible for a floating charge holder to veto the proceedings by means of appointing an administrative receiver. In essence, that statutory power of veto re-asserted the traditionally dominant position of secured creditors in the process of insolvency.[45] Nevertheless, where the court was convinced that one or more of the abovementioned purposes of administration were likely to be achieved, an order would be granted and the troubled company would be placed under the aegis of a moratorium,[46] which effectively prevented most types of pressing claims from being enforced against the

[45] D Milman, note 42 above, at p. 33.

[46] Insolvency Act 1986 s. 11(3).

company, (secured and unsecured).[47] Following the Enterprise Act 2002 reforms it is no longer possible for a floating charge holder to block administration, and the company cannot be wound up, or placed in administrative receivership.

As already mentioned, administration was introduced as a mechanism designed to promote a company rescue culture in the United Kingdom. However, only partial effect was given to the aspirations of the Cork Committee. The Chairman, Sir Kenneth Cork, rather critically summarised that the government, in implementing the proposals of the Committee Report, 'ended up by doing the very thing we asked them not to do. They picked bits and pieces out the [report] so that they finished with a mishmash of old and new'.[48] Arguably, the government failed to provide directors with substantial incentives in order to encourage them to act at an early stage. Moreover, the power of a floating charge holder to veto the proceedings in order to protect his own interest, undermined the potential effectiveness of the procedure. Finally, it should be noted that the costs involved in the administration process are considerable, mainly due to the high level of judicial supervision.[49]

---

[47] See *Re Atlantic Computer Systems plc* [1992] Ch 505, [1992] All ER 476; also *Bristol Airport* v. *Powerdrill* [1990] Ch 744, [1990]2All ER 493, 2 WLR 1362.

[48] V Finch, see note 5 above, at p. 275.

[49] Ibid, at p. 283.

Administration following the introduction of the Enterprise Act 2002

The statutory regime preceding the EA 2002 arguably weakened the effectiveness of administration as a company rescue device. The Act, however, introduced revolutionary changes to what was a time-consuming, expensive and complex procedure.

The EA 2002 contains a series of reforms designed to make administration more attractive. Under the new regime, Part II of the IA 86 has been replaced and a new Part II inserted in its place, which gives effect to an additional Schedule B1. A significant change introduced by the EA is the fact that it makes provision for two 'out of court' routes to administration. Under the old law, an administrator could only be appointed by an order of the court, on a petition by the company, its directors or any creditors[50]. However, under the EA 2002, a company is able to enter administration not only by means of a court order but also by a) an appointment by a floating charge holder or b) an appointment by the company or its directors.

[50] IA 1986, s. 9(1).

The EA 2002 enables the holder of a floating charge to appoint an administrator, provided that their security has become enforceable[51] and that their security interest relates to the whole or substantially the whole of the company's property.[52] The power to make an appointment must be specified by the instrument creating their security.[53] The second gateway to administration is by virtue of an appointment by the company or its directors. It could be argued that, although directors can often be held responsible for the company's difficulties, nonetheless, the rationale for granting them expedited appointment rights is to provide incentives-'sticks and carrots'- for them to take drastic action, when the company is in crisis.[54] It is noteworthy that, although the floating charge holder does not initiate this process, he is still given the opportunity to appoint his own administrator, unless the court thinks otherwise.[55] In addition, the floating charge holder must receive at least five days' notice of the company's intention to appoint an administrator[56] and no appointment may be made until the notice period has expired or until the floating charge holder gives his written permission.[57]

Where an 'out of court' method is used to appoint an administrator, it is necessary that a 'notice of intention to appoint' together with the administrator's

[51] IA 1986, Sch.B1, para. 16.

[52] Ibid, para. 14 (3).

[53] Ibid, para. 14 (2).

[54] J Armour, & R Mokal, *"Reforming the Governance of Corporate Rescue: The Enterprise Act 2002"* [2005] LMCLQ, 28-64, at p. 32.

[55] See IA 1986, Sch.B1, at para. 36.

[56] Ibid, para. 26 (1)

[57] Ibid, para. 28.

statement of consent to act, is filed in court.[58] Arguably, this technical requirement may result in unnecessary delays and consequently undermine the primary objective of the new regime, which is to make administration a quicker, less expensive and less complex procedure by means of minimising the court's involvement. However, the filing can be done by fax when the court is closed, which reduces the potential for delay.[59]

Moreover, a significant key element of the administration procedure is the interim moratorium.[60] By virtue of the interim moratorium, the administrator is allowed to perform his functions 'free from the burden of fending off attacks on the company and its assets by individual creditors'.[61] Crucially, the moratorium will prevent the enforcement of any claims against the company pending the granting or the dismissal of an administration application. Once the company is in administration, it cannot be wound up and the permission of the court or the consent of the administrator must be obtained for actions such as where a creditor wishes to enforce his security against the company or to repossess goods in the company's possession under a hire-purchase

---

[58] Paras. 18 & 19 (appointments by the floating charge holder) and paras. 29 & 31 (appointments by the company or its directors).

[59] Parry, note 2 above, at p. 278.

[60] See note 55 above, at para. 44.

[61] R Goode, note 8 above, at p.852. See also: *Bristol Airport plc* v. *Powdrill*[1990] Ch.744; *Exchange Travel Agency Ltd* v. *Triton Property Trust plc*[1991]BCC 341; *Re Atlantic Computer Systems plc* [1990] BCC 859.

agreement.[62] In addition, no legal action may be commenced or continued against the company or its property.[63]

Furthermore, once an administrator has been appointed, he takes over the control of any property to which he believes the company is entitled.[64] Although the directors are no longer in control of the company's management, it is noteworthy that they are not automatically removed from office. Nevertheless, the administrator may order the removal of any director of the company and can appoint directors where necessary.[65] The directors are required to provide the administrator with a statement of the affairs of the company and they have 21 days to comply.[66]

In performing his duties, the administrator becomes an agent of the company;[67] hence, he would not incur personal liability in respect of contracts or any other obligation he may enter into on the company's behalf. In addition, the administrator has three key functions. In sequential order they are: securing control of the assets, preparing proposals for the approval of creditors and, finally, carrying out those proposals. The administrator is obliged to act fairly and honourably and (under section 17 of the IA 86) a statutory duty is imposed upon him to exercise his duties in

---

[62] Insolvency Act 1986, Sch. 2B, para 43, inserted by the Enterprise Act 2002.

[63] See note 30 above, at paras. 42-43.

[64] I.A. 1986 Sch.B1 para.67.

[65] Ibid, at para. 61.

[66] See I.A. 1986 Sch.B1 para. 47(1)-(3).

[67] S.14(4) I.A 86.

accordance with the terms of the appointing order and the plan as approved by the creditors.[68]

A remarkable change introduced by the EA is with regards to the purpose of administration.[69] The administrator must hierarchically perform his functions with the objective of 'a) rescuing the company as a going concern, b) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up or c) realizing property in order to make a distribution to one or more secured or preferential creditors'. [70] Additionally, the administrator must perform his functions 'in the interests of the company's creditors as a whole'[71] and as 'quickly and efficiently as is reasonably practicable'.[72] In exercising his functions, the administrator acts as the company's agent.[73] Upon his appointment, the administrator has the power to do anything necessary or expedient in relation to the management of the affairs, business or property of the company.[74] For instance, he may challenge transactions at an undervalue, preferences, extortionate credit transactions and certain floating charges.[75]

---

[68] The creditors may approve the statement of proposals or amend, subject to the administrator's consent. S. 24(1) & (2) IA 86.

[69] Phillips and Goldring argue that "this provision makes it expressly clear that administration is first and foremost about rescuing the corporate entity". See note 33 above, at p. 76.

[70] IA '86 Sch B1, Para. 3(1)a-c.

[71] Ibid, para. 3(2).

[72] Ibid, para. 4.

[73] Ibid, para. 69.

[74] Ibid, para. 59 (1).

[75] See IA 86 sections 238,239, 244 and 245 respectively.

Further, the EA 2002 affords creditors enhanced participation in the administration proceedings. The Act requires the administrator to submit a statement of proposals for achieving the purpose of administration,[76] which must be accompanied by an invitation to an initial creditors' meeting.[77] However, no such meeting is necessary where the administrator believes that a) the company has sufficient property for each creditor to be paid in full; b) that the company has insufficient property to enable a distribution to be made to unsecured creditors other than by virtue of the statutory ring-fencing of fund for unsecured creditors;[78] or c) that none of the objectives for which the administration process was initiated can be achieved.[79] Upon consideration of the proposals, the creditors can either approve or reject them. Additionally, the creditors may approve the proposals with modifications. However, the administrator must consent to each modification.[80] Subsequently, if the administrator approves the proposed modifications and believes that they are substantial, he must call for a further meeting, where he will present the revised proposals or report any decisions to the creditors, and then report the matter to the court.[81] It should be pointed out that the requirement for administrators to set out proposals, which are in turn to be approved by

[76] IA 86 Sch B1 para. 49 (1), (3) & para. 49(4), (5) which states that a copy of the proposals must be sent to all the members it applies to, no later than the end of 8 weeks from the commencement of administration.

[77] Ibid, para. 51(1), also 51(2) states that the meeting must be held as soon as is reasonably practicable but not later than the end of 10 weeks from the commencement of the administration process.

[78] EA 2002 s. 251. See also R Parry, note 44 above, at p. 68.

[79]See note 72 above, para. 52 (1).

[80] Para. 51(3).

[81] Para. 54.

the creditors at the creditors' meeting, is designed to enhance creditor participation in the re-organisation process. However, the objective of this requirement is arguably undermined by pre-packaged administrations, as, where such proceedings are involved, it is possible for the administrator to effect a pre-pack disposal of the company's business, or a substantial part of it, prior to a creditors' meeting.[82]

Furthermore, accountability in administration is enhanced by virtue of paragraphs 74 and 75 of Schedule B1. The former allows a creditor or a member of the company to challenge the administrator's conduct on the ground that it unfairly harms the interests of the applicant[83] or that he is not performing his functions as quickly or efficiently as is reasonably practicable.[84] The latter enables the court, on the application of certain classes of persons, such as creditors, to make an order against an administrator that it finds guilty of misfeasance.[85]

With reference to the wording of paragraph 74, Phillips and Goldring suggest that the criteria of 'unfair harm to the interests of the applicant' represent a lower threshold than that of 'unfair prejudice' as found in section 27 of the IA 1986. Furthermore, it could be said that the wording of paragraph 75 is of significant

---

[82] An analysis of the pre-packaged administration technique and criticism over its use is offered below at p. 85.

[83] Para.74(1).

[84] Para.74(2).

[85] Para.75(3).

importance, as a company is no longer required to go into liquidation before bringing a misfeasance action against an administrator. Under the new regime, the court has the power to order an administrator to contribute a sum to the company's property by way of compensation for breach of duty or misfeasance. However, it should be noted that, in accordance with the *pari passu* principle of distribution, it is predicted that the court will be reluctant to award damages for harm done to the interests of one creditor alone.[86] However, such a creditor would surely have grounds for an unfair harm application.

An Analysis of the pre-pack technique in the United Kingdom

A practice, which has become something of an ongoing trend in the UK, is pre-packaged administrations.[87] A pre-pack involves a pre-arranged sale of the distressed business, which will be executed immediately after the appointment of the administrator. A pre-packaged administration is, on the one hand, regarded as an effective mechanism for furthering rescue objectives, whereas, on the other hand, it could be regarded as a means by which powerful players can bypass carefully

[86] A Charlwood, "Actions Against an Administrator before and after the Enterprise Act 2002", (2004), 17(3), Insolv. Int., at p. 48.

[87] It has been estimated that at least 50 per cent of all UK administrations are pre-packaged. See S Davies, "Pre-Pack: He Who Pays the Piper Calls the Tune", (2006) 16 Recovery (summer) at p. 17. See also A Katz, & M Mumford, "Report to The Insolvency Service: Study of Administration Cases" (Insolvency Service, London, 2006), where it was found that in 2004 a pre-pack was involved in 44 per cent of cases in which rescue was an objective of proposals for an administration.

constructed statutory protections.[88] Moreover from an unsecured creditor's perspective, a pre-pack is deemed, not only due to pragmatic but also psychological reasons, to involve an unlawful tactic which is aimed at prejudicing his interests, often to the benefit of those inside the company. There is a perception that pre-packs fail to maximise returns for creditors, as the opportunity to expose the business to the market on a large scale is missed.[89] In addition, pre-determined sales of ailing businesses have raised concerns relating to the morality and effectiveness of insolvency practitioners and have become for many the subject of fierce criticism.[90]

The Enterprise Act 2002 makes no provision for pre-packaged sales being a permitted rescue procedure, and thus fails to provide a clear answer in relation to their legality. However, the recent case of *DKLL*[91] is a significant development in the area and constitutes tentative authority that pre-packs are indeed a lawful restructuring tool.[92] It could be argued that the case demonstrates the courts' support for pre-packs and the fact that they may be prepared to adopt a more sympathetic approach towards pre-packs, where they are used with a view to achieve administrator's view of the best possible outcome for all parties affected by it and, predominantly, unsecured creditors. In this case, the court rejected a claim by a major creditor, opposing the initiation of

---

[88] V Finch, *Corporate Insolvency Law: Perspectives and Principles*, (2nd edn. Cambridge, 2009) at p. 453.

[89] See C Hughes, "Management Rescue Orbis in "Pre-pack" sale" Financial Times, 5 February 2008.

[90] See P Walton, "Pre-Packaged Administrations- Trick Or Treat", (2006) 19(8) Insolvency Intelligence 113-122.

[91] *DKLL Solicitors* v *Her Majesty Revenue and Customs* [2007] EWHC 2067 (Ch), [2007] BCC 908.

[92] See also *Kayley Vending* [2009] EWHC 904 (Ch), [2009] BCC 578.

administration proceedings by DKLL, in order to give immediate effect to the sale of the business to a newly formed firm of solicitors. The court, in the circumstances, held that it was appropriate to grant an administration order, as it was particularly influenced by the fact that the proposed sale a) appeared to be the only way of preserving the jobs of employees; b) was likely to achieve continuity of the service provided to the partnership's existing clients, and, finally, c) it would maximise returns for the creditors 'as a whole'.[93]

Pre-packaging involves a period of negotiation and, consequently, a deal with a prospective buyer of the business of an insolvent company prior to the implementation of a statutory administration procedure.[94] Following the introduction of the Enterprise Act 2002, there has been a significant rise in pre-packs.[95] The reasons behind the popularity of a pre-pack are easy to grasp, as the process allows for a speedy and confidential extraction of a viable business from an insolvent company. Under the right circumstances, a pre-pack could prove to be the most appropriate course of action, particularly where a business has a strong brand or intellectual property, the value of which would decrease dramatically by even the hint of a formal insolvency.[96] In addition, the seamlessness of a pre-pack minimises the erosion of customer confidence,

[93] See note 91 above, para. 20 of the judgment, where it was stated that the court in exercising its discretion, can take into account the interests of not only the business's creditors but also those of its stakeholders.

[94] S Frisby, "Report on Insolvency Outcomes", (2006) available at: http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/corpdocs/InsolvencyOutcomes.pdf last accessed on 4th October, 2010.

[95] S Mason, "'Pre-packs from the Valuer's Perspective", (2006) 19 Recovery (Summer).

[96] M Ellis, "The Thin Line in the Sand: Pre-packs and Phoenixes", (2006) 3 Recovery (Spring).

reduces any damage to relationships with employees, especially in service based companies and minimises the time and expense of administration. [97]

However, regardless of the merits of a pre-arranged preservation of a troubled business, the use of pre-packs has raised concerns. In particular, questions arise with regards to the accountability of insolvency practitioners/administrators and the manner in which they are carrying out their functions. It has been argued that pre-packs can cause the administrator to act in breach of his statutory fiduciary duties or put the administrator in a position where his various duties conflict in an unacceptable way.[98]

Administrator's discretion

As already mentioned, once the administrator is appointed, he is subject to various statutory duties. The administrator must perform his functions in the interests of the company's creditors as a whole[99] and as quickly and efficiently as is reasonably practicable.[100] Moreover, he must hierarchically carry out his duties with the objective of a) rescuing the company as a going concern; b) achieving a better result for the company's creditors as a whole than would be likely if the company was wound up or c) realizing property in order to make a distribution to one or more secured or preferential creditors.[101]

---

[97] S Davies, note 87 above, at p. 16.

[98] P Walton, note 90 above, at p. 115.

[99] Insolvency Act 1986 Sch B1, para. 3(2).

[100] Ibid, para. 4.

[101] Ibid, para. 3(1) a-c.

The administration procedure is largely driven by the administrator, who under the Enterprise Act 2002 is afforded significant powers of discretion. The Act states that the administrator is required to perform his functions with the objective of rescuing the company as a going concern. However, where the administrator 'thinks' that it is not reasonably practicable to achieve that purpose, then he must perform his functions with the secondary objective of achieving a better result for the company's creditors as a whole than would be likely if the company were wound up or of realizing property in order to make a distribution to one or more secured or preferential creditors.[102]

However, where a pre-pack is involved, the administrator, prior to his formal appointment, agrees a deal, settles a price of sale with a prospective buyer and, following his appointment, swiftly transfers the business to new management. This is a rather speedy process and, it could be argued, in many cases, it may involve a potential breach of duty, especially where the purchaser is the existing management of the troubled company. It could be argued that since a pre-packaged sale of the business does not achieve the primary objective of administration, the administrator has potentially failed to consider his statutory duty of rescuing the company as a going concern. Additionally, since a deal has already been agreed to sell the business prior to the administrator's formal appointment, it is argued that a pre-packaged sale is

[102] Ibid, see also para. 3(3)

inherently inconsistent with the primary objective of the administration regime, as it is rather designed to achieve only the second or third objective of administration.[103]

Administrator's accountability & unsecured creditors

The Enterprise Act 2002 promotes the use of administration as a more inclusive process in the event of insolvency and affords substantial participation rights to all creditors. For instance, it is noteworthy that the administrator has to prepare a plan stating how he is to achieve the purpose of administration and, within eight weeks of taking office, must send it to the company's creditors.[104] In addition, within ten weeks of taking office, he has to call a creditors' meeting in order to vote on the plan.[105]

However, it is not necessary to hold a creditors' meeting where the administrator thinks that i) the company can pay all creditors in full, ii) there is insufficient property to make a distribution to unsecured creditors, iii) the rescue of the company as a going concern is not possible or iv) it is not feasible to effect a result better than winding-up.[106] In other words, it is possible that the administrator will effect

---

[103] L Ho, "Interrogating and Indulging Prepacks: *Re Kayley Vending"* (2009) 2 Corporate Rescue and Insolvency 168, at p. 169.

[104] Insolvency Act 1986 Sch B1, para. 49.

[105] ibid, para. 51.

[106] ibid, para. 52 (1), However, see para. 52 (2)-(4), where a meeting is requested by creditors, whose debts exceed 10 per cent of the total debts of the company, the administrator is obliged to call a meeting.

a pre-pack disposal of the company prior to a creditors' meeting. Although the administrator will, prior to a pre-pack, consult with the company's secured creditors (particularly the company's bank), it could be argued that the rights of less powerful creditors will be overridden.[107] Frisby identifies that creditors' rights of participation are subjugated to commercial considerations in a pre-pack situation and acknowledges that there is a strong possibility that the commercial advantages of a pre-pack, in the form of enhanced consideration for the business and a reduction in the costs of selling it, will probably not inure to the advantage of those creditors who are excluded from the decision-making process.[108]

The decisions in *DKLL* and *Kayley Vending* provide clear indication that, in applications for the granting of an administration order, the courts place great reliance on the expertise and experience of impartial insolvency practitioners.[109] This is particularly important where a pre-pack sale is challenged because, as the *DKLL* case demonstrates, the court may be prepared to grant an administration order to effect a pre-pack.[110]

---

[107] This is a submission of the author based on anecdotal evidence.

[108] S Frisby, note 94 above, at p. 72.

[109] See para.10 of the judgment.

[110] See "Pre-pack Administration Survives HMRC Claim", R3 (17-09-2007), available in http://www.r3.org.uk/newsandpress/default.asp?page=1&i=4&id=214#PressStory last accessed on 4th October, 2010.

Earlier judicial support appeared in *Re T & D Industries Plc*,[111] where the court held that administrators have the power to sell the whole of the assets and business of the company in advance of convening a creditors' meeting and without the need to go to the court for directions.[112] Although this case was decided in relation to the administration regime prior to its amendment, the legislation on this point remains the same under the post EA 2002 regime. It is notable that, under the previous regime, the administrator could only be appointed by the court, where the statutory grounds for entering administration were satisfied.[113] Moreover, following the introduction of the Enterprise Act 2002, consistent with their policy decision in *Re T & D Industries Plc*, the court accepted in *Re Transbus International Ltd*[114] that, in many cases, the administrator will be called to reach an urgent and important decision in his attempt to preserve value in a viable business which would otherwise be lost.[115] Nevertheless, it should be noted that *Re T & D Industries Plc* and *Transbus International Ltd* were not pre-pack cases as such. Rather, these cases were concerned with an accelerated sale of the business. Accelerated sales, similar to pre-packs, involve a sale of the business prior

---

[111] *Re T & D Industries Plc* [2000] 1 All E.R. 333.

[112] Section 17(2) of the Insolvency Act 196 stated: 'the administrator shall manage the affairs, business and property of the company (a) at any time before proposals have been approved (with or without modifications), in accordance with any directions given by the court, and (b) at any time after proposals have been so approved, in accordance with those proposals as from time to time revised, whether by him or a predecessor of his'.

[113] Section (3) Insolvency Act 1986

[114] *Re Transbus International Ltd* [2004] 2 All E.R. 911.

[115] See A. Lockerbie & P. Godfrey, "Pre-packaged Administration: The Legal Framework" (2006) Recovery (summer) at p.22. See also *British American Racing (Holdings) Ltd* [2004] EWHC 2947, where the courts held that if it is genuinely not possible to save the company and the purpose of pre-packaged transaction is to achieve one of the alternative objectives of the IA then a pre-packaged sale of the business and assets may be justifiable.

to a creditors' meeting. However, the key difference between the two is the fact that, in an accelerated sale, the sale is not pre-arranged.

Moreover, in *DKLL*, it was envisaged that there would be no creditors' meeting to ratify the proposed sale of the business as the sale was designed to take immediate effect at the commencement of administration. The court rejected the majority creditor's suggestion that the creditor would be in a position to defeat the proposed sale in a creditors' meeting and noted that the administrator could not, in the circumstances, carry on business without further funding. Subsequently, the court accepted that, in light of *Re T & D Industries Plc* and *Re Transbus International Ltd*, the administrators had power to complete the proposed sale without the sanction of a creditors' meeting or a direction of the court.[116] It should be noted that a more guarded approach was taken by the court in the early case of *Re Consumer and Industrial Press Ltd (No.2)*[117] In this case, the court refused an application by the administrator for permission to dispose of the charged assets of the company, prior to a creditors meeting. Although the approach in this case has been subsequently found to be too restrictive,[118] it makes important points about not frustrating the purpose of having a creditors meeting.

However, the significant difference between the original administration regime and the post Enterprise Act 2002 regime is that under paragraph 68 of Schedule B1, an

[116] See paras. 17-18 of the judgment.

[117] [1998] 4 BCC 72.

[118] See for example *Re PD Fuels Ltd*. Unreported, 3 June 1998.

administrator may be appointed out-of court. In other words, through an out of court appointment, which can be brought about by the company managers, the administrator could in fact enter into an immediate sale of the company's assets without any involvement of the creditors or any scrutiny of the court.[119] Nevertheless, although at first glance one could argue that the procedural rights of unsecured creditors have been restricted, the Enterprise Act affords enhanced rights to sue an administrator.[120] It could be argued that the preservation of an ailing business will very much depend upon the commercial judgment of the administrator and that the creditors' enhanced rights to challenge his conduct leave the administrator vulnerable. However, the case law that was discussed above indicates that the courts are unwilling to interfere so as to 'second-guess' the commercial judgments of administrators.[121] More importantly, the decision in *DKLL* indicates that pre-packs have gained the approval of the courts, where the administrator's professional judgment is that a pre-pack is the best way forward. Nevertheless, it could be said that the courts have not rubberstamped pre-packs *per se*.

Pre-packs are subject to fierce criticism, especially where a Management Buy-Out ('MBO') is concerned[122] because of the perception that the business has not been marketed in an appropriate manner and hence the best market value has not been

[119] A Zacaroli, "The Powers of Administrators under Schedule B1 Prior To the Creditors' Meeting-Transbus International Limited" (2004) 1 (4) International Corporate Rescue, at p. 208.

[120] See para. 74 of Schedule B1. See also V Finch, "Re-Invigorating Corporate Rescue" (2003) JBL 527-557, at p. 533.

[121] C Swain, "A Move towards a Stakeholder Society?" (2003) 19 Insolvency Law & Practice at p. 7.

[122] Management Buy Outs will be discussed below.

obtained for the creditors.[123] Even if there are persuasive reasons for the company's limited marketing and the inability to trade in administration, creditors may suspiciously perceive a 'stitch-up' job.[124] Nevertheless, in many cases, a greater value can be achieved through a pre-pack[125] and the administrator must be able to defend how his decision to do so optimised creditor returns.[126]

In order to ensure the legality of a pre-pack, the administrator must test the market prior to selling the business.[127] However, it has been suggested that 'open marketing is about identifying the market and making it aware of the opportunities; it is not about exposing the proposal to the whole world'.[128] In a pre-pack situation, there is no time for full exposure of the business to the market. The insolvency practitioner is often required to act within a restricted timescale so as to preserve the value of the business and minimise the potential dangers of open marketing, such as a loss of confidence in the company or any delay to the sale, which would consequently result in the evaporation of the value of its assets, especially intangible assets such as goodwill and intellectual property rights.

---

[123] D Flynn, "Pre-Pack Administrations- A Regulatory Perspective", (2006) 3 Recovery (Summer).

[124] S Davies, note 87 above at p. 17. See also S Frisby, note 5 above, at p. 70.

[125] For the reasons noted in paragraph 1.

[126] For instance, in *DKLL* it was held that a sale of the business and the assets of the partnership to its salaried partners would maximise the returns to creditors 'as a whole'. In this case an MBO was preferable, as opposed to a winding up order that was petitioned by the majority creditor, because the effect of a winding up order would evidently be to erode any remaining value in the business.

[127] Valuations must comply with the Royal Institution of Chartered Surveyors (RICS) Appraisal and Valuation Standards Manual, known as the Red Book.

[128] M. Ellis, note 93 above.

Furthermore, accountability becomes a real concern where the pre-pack involves the sale of the business back to its existing management.[129] As mentioned above, a well managed pre-pack will often require an administrator to thoroughly explore the market and conduct an objective valuation of the business. Where, as is commonly the case, the business is sold back to the existing management, this may lead to the assumption that the market has not been properly explored.[130] Moreover, pre-packs involve a rather quick sale and valuers are called to carry out their investigation within a restricted time and often have to rely upon information provided by the company's directors. However, directors may be interested in an MBO and hence may have a vested interest in the information that they provide,[131] with a view to getting a good price and hoping that the lack of marketing will not bring rival bidders. Such an approach may backfire if poor information leads to an undervaluation, since this can attract rival bidders who sense a good deal.

From an apprehensive creditor's perspective, it could be argued that a pre-pack resembles the unscrupulous phoenix trading, which involves the continued use of a failed company's name or a similar one by a director who is also a director in a successor company. The purpose of the phoenix syndrome is to enable dishonest directors taking advantage of the goodwill of the failed company to the detriment and

[129] See Statement of Insolvency Practice 13, 'Acquisitions of Assets of Insolvent Companies by Directors', 1997, para. 1.2 at p. 1.

[130] S Frisby, note 94 above, at p. 71.

[131] S. Mason, note 95 above.

confusion of creditors, who unbeknownst to them are trading with a newly formed company and cannot recover any debts owed to them by the failed company.[132]

It could be argued that a pre-pack sale allows incompetent and dishonest management to benefit from continuing ownership on terms that are unfair to creditors and forced upon them.[133] A sale to the existing management is undoubtedly a sensitive operation and creditors may be forgiven for questioning the objectivity of the insolvency practitioner's conduct. However, arguably, only a few management buy outs involve an abuse of process, whilst the majority are commercially justifiable. In other words, the directors, given the special value of the business to them, will often be prepared to pay a higher price that could be received on the open market.[134]

In addition, Frisby describes a pre-pack sale back to the management as a 'quasi- corporate rescue device' and argues that pre-packs, in combination with one of the aims of the Enterprise Act, promote a 'second chance' culture. Frisby argues that pre-packs involving unconnected parties may result in business rescue, whereas a pre-

---

[132] Section 216 of the Insolvency Act 1986 is designed to tackle the 'phoenix trading' problem by means of imposing a restriction on the re-use of a failed company's name. See I Fletcher, "Phoenix Companies: Exceptions from the Restriction on the Re-Use of Company Names" [1987] JBL 395-397, at p. 395.

[133] A Katz & M Mumford, note 87 above, at p. 51.

[134] S Frisby, note 94 above, at p. 71.

pack sale back to the existing management of the company could afford a second chance for that management.[135]

Pre-packs and Secured Creditors

As discussed earlier, the reforms introduced by the Enterprise Act 2002 seek to promote a more inclusive insolvency procedure. At a first glance, the virtual abolition of administrative receivership, together with the improved administration, arguably promote the aims of the Act. As opposed to the administrative receivership procedure, where the receiver acted in the interests of his appointor,[136] the administrator has a statutory duty to secure a better value for all creditors. However, critics argue that the 'revamped' administration has merely replaced administrative receivership as the procedure of choice for the secured lender as appointor.[137] Moreover, the reforms could be described as a 'transmutation' or 'merger' of administrative receivership and administration procedures, rather than as being the end of the administrative receivership procedure.[138] In other words, the objective of the Act is undermined in practice and the significant control exercised by secured lenders is retained post Enterprise Act. It has been argued that a pre-packaged administration will certainly not

---

[135] Ibid, at p. 72.

[136] See *Re B Johnson & Co (*Builders) Ltd [1955] 2 All ER 775, also *Downsview Nominees Ltd.* v. *First City Corporation Ltd.* [1993] 1 AC 295. However, see *Medforth* v *Blake and Others* [1999] 3 All ER 97, where it was stated that in determining whether to carry on the company's business the receiver owes a duty to manage the business with due diligence, by taking reasonable steps to carry on the business profitably.

[137] S. Davies, note 87 above, at p. 17.

[138] V Finch, note 88 above, at p. 535.

happen without the agreement of the secured creditors. The secured creditors may control the whole process and have more control than in old style administrative receivership, where at least the receiver was left with some discretion as to how to conduct the receivership.[139]

Pre-packs are perceived by banks as a controlled way forward, which provides an assured return, potentially at the expense of other creditors. Given the powers of the banks, it is unlikely that insolvency practitioners will act against their will. After all, it seems that it is ‘he who pays the piper that calls the tune’. As a matter of fact there are close relationships between the so-called ‘panel firms’ and lenders and, even where the bank’s practice is objectionable, practitioners are not prepared to criticise them.[140]

However, although one could argue that the bank, together with the insolvency practitioner, could decide ‘willy-nilly’ on a sale for a price that would cover the outstanding moneys owed to the appointor, one should keep in mind that, in the majority of cases, no stigma is attached to the lender’s or the practitioner’s conduct.[141] It could be argued that ethical factors control the behaviour and conduct of practitioners and it is only a handful of ‘bad apples’ that facilitate unscrupulous phoenix trading and suppress the weaker creditors’ rights.

[139] P Walton, note 90 above, at p. 121.

[140] S. Davies, note 87 above, at p. 17.

[141] Ibid.

However, it is significant to note that the Insolvency Service has issued new guidelines with regard to the use of pre-packaged administration proceedings, contained in Statement of Insolvency Practice number 16 (SIP 16), which arguably 'heals the wound' caused by the potentially scandalous use of pre-packaged administrations. In addition, on 20th July 2009, the Insolvency Service published a Report on the first six months operation of SIP 16, where it was reported that 65% of the SIP 16 Reports reviewed complied with the disclosure requirements.[142] The Insolvency Service guidelines emphasise the importance of an explanation of the reason why a pre-pack was chosen, hence enhancing the clarity of the pre-pack administration process.[143] Furthermore, the Department for Business, Enterprise & Regulatory Reform (BERR) Committee Report on the Insolvency Service, published on 6 May 2009, emphasised that drastic action is needed to ensure that pre-pack administrations are transparent and free from abuse.[144] It could be argued that an effective disclosure regime would prevent undue criticism of the pre-pack trend and, more importantly, would ensure that a 'phoepack syndrome' would not arise.[145]

---

[142] Available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/sip16-final.pdf last accessed on 4th October, 2010. See also M Chapman, "SIP 16: Update" paper presented at the Insolvency Service Annual Conference, 10th November 2009, where it is reported that the level of compliance with SIP 16 on a monthly basis reached up to 70%.

[143] See http://www.printweek.com/RSS/News/870892/New-pre-pack-rules-force/ last accessed on 4th October, 2010.

[144] Seehttp://www.icaew.com/index.cfm/route/162018/icaew_ga/Members/Practice/Insolvency/SIP_16_E_and_W_Pre_packaged_sales_in_administrations/pdf last accessed on 4th October, 2010.

[145] See S Frisby, "SIP16: The Creditor's Perspective", paper presented at the Insolvency Service Annual Conference, 10th November 2009. The term implies that failure to comply with SIP 16, similarly to the phoenix syndrome, could result in a abuse of the pre-pack procedure.

Although the legality of pre-packs has been questioned, predominantly on the grounds that the process lacks transparency, as noted, recent case law indicates that the courts are supportive of this strategy, notwithstanding the opposition of a majority creditor to such a pre-determined sale of the business. In particular, in *DKLL,* the court ruled in favour of a pre-packaged administration. It was held that the proposed sale was reasonably likely to achieve the statutory objective of administration,[146] namely 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.[147] Additionally, a decisive factor affecting the decision of the court was that the proposed sale was influenced by the preservation of employment.

Moreover, it should be noted that in the recent decision of *Re Kayley Vending*[148] the court gave some helpful guidance on how to approach the pre-pack regime in the light of the recently issued guidelines contained in Statement of Insolvency Practice number 16 (SIP 16), which was entitled Pre-Packaged Sales in Administrations.[149] The

[146] See para. 3(1) (b) and 3 (2) of Schedule B1.

[147] See paras. 5-7 of the judgment.

[148] [2009] EWHC 904 (Ch).

[149] SIP 16 was introduced on 1 January 2009 and requires administrators to explain to creditors the background to their appointment and the reasons why they considered that a 'pre-pack' sale would be the best outcome for creditors. Administrators will not only have to reveal the name of the purchaser of the business and the price paid, they will also have to provide details of any connection that the purchaser had with the former directors or shareholders and the price paid. See How to complain about misuse of the 'pre-pack' administration process, The Insolvency Service, available at http://www.insolvency.gov.uk/howtocomplain/complainprepack.htm last accessed on 4th October, 2010. See also judgment at para. 12 where it was stated that SIP 16 'will act as a salutary reminder to insolvency practitioners of their responsibilities, which may influence the way in which they and the directors act, although it does not provide the creditors with any direct input into the decisions they

court in *Re Kayley* provided a summary of concerns which arise with regard to the legality of pre-packs.[150] In particular, it was stated that: 'A general summary of these concerns would be that the speed and secrecy which give rise to the advantages claim for pre-packs may too easily lead the directors and the insolvency practitioner to arrive at a solution which is convenient for both of them and their interests (perhaps also satisfying a secured creditor who might be in a position to appoint his own receiver or administrator), but which harms the interests of the general creditors because: i) it may not achieve the best price for the assets; ii) credit may be incurred inappropriately in the pre-appointment period; iii) they are deprived of the opportunity to influence the transaction before it takes place; and iv) having been presented with a fait accompli, they have insufficient information to make it worthwhile investigating and challenging the decisions taken'.[151]

It could be argued that, in light of the concerns mentioned above, the court sought to enhance the transparency of the pre-pack regime and to improve the accountability of officeholders engaging in this technique. Accordingly, it was held that an application for administration proceedings should contain sufficient information, so as to enable the court to conclude whether or not it is inappropriate to give the pre-pack

---

take. It will however provide creditors with information on the basis of which they may ask questions and, possibly, seek redress after the fact. Any creditor who is dissatisfied with a pre-pack sale is of course still subject to the lack of economic incentive …: he may in practice have to fund the whole cost of investigating his concerns and any resulting litigation, at the end of which even if successful recoveries are uncertain and in any event go in to the general pool of assets from which, at best, he is only likely to receive an enhanced dividend'.

[150] L Ho, note 103 above, at p. 169.

[151] See *Kayley Vending* [2009] EWHC 904 (Ch), at paras. 11-12.

the apparent blessing conferred by making the administration order. In particular, it was stated that '...the applicant has to identify what information is likely to assist the court, and that information may not be limited to the matters identified in SIP 16...'.[152]

It is of great significance to note that the court in *DKLL* did not declare the use of a pre-pack unlawful. This arguably provides a useful indication that pre-packs are recognised as a legal tool for corporate rescue and opens the road for wider and uncontroversial use of pre-packs in the pursuit of corporate rescue. Furthermore, the court has clearly reinforced the aim of the Enterprise Act to promote rescue despite the opposition from a major creditor.[153] Nevertheless, it is emphasised that prepacks involve effecting a sale of the business that provides better returns for the company's creditors as a whole than would be likely if the company were wound up, rather than saving the company as a going concern, which is the primary objective of administration.

Moreover, *DKLL* indicates that, in applications for an administration order, the court relies to a great extent upon the specialist knowledge and experience of the insolvency practitioner and it will not be prepared to interfere so as to 'second-guess' the commercial judgments of the administrator. Finally, where it is not reasonably practicable to rescue the company as a going concern, the court is likely to favour the

[152] See judgment at paras. 21-22 and para. 24.

[153] M Cohen, "Re DKLL Solicitors: Obtaining an Administration Order to Facilitate a Pre-Packaged Sale of the Business and Assets, in the Face of Opposition from the Majority Creditor" (2007) 4(4) International Corporate Rescue, at p. 221.

granting of a pre-pack administration order, if it is satisfied that the secondary purposes of administration will be achieved.

Exit from administration proceedings

The appointment of an administrator will automatically cease to have effect at the end of a twelve-month period. However, this period may be extended by the court[154] for as long as it deems necessary or, with the creditors' consent,[155] for a period of up to six months. Moreover, an administrator may apply to the court to cease the administration process, where he believes that the purpose of administration cannot be achieved; or that the company should not have entered administration; or where he is required to do so by a creditors' meeting.[156] In addition, where the administrator thinks that the purpose of administration has been sufficiently achieved, he may apply to the court to bring the procedure to an end.[157]

It should be noted that administration is only a facilitative procedure and may not always result in the rescue of a company. For instance, the process can lead to a scheme of arrangement or a CVA being employed or be converted to a voluntary winding up, where the administrator believes that there are sums available to make

[154] Para. 76.

[155] Para. 78.

[156] Para. 79(2).

[157] Para. 79(3).

distributions to unsecured creditors.[158] Regardless of the outcome of the proceedings, the administrator's remuneration and expenses are given priority over any distributions to secured creditors, floating charge holders, and unsecured creditors.

Company Voluntary Arrangement

The company voluntary arrangement ('CVA'), introduced by the Insolvency Act 1986, is a 'debtor in possession' process and is designed to facilitate the rehabilitation of financially troubled but viable enterprises. A CVA is a 'compromise' between the debtor company and its creditors, whereby, for instance, the creditors agree to receive less than the amount due to them in discharge of their claims.[159] There are two types of CVA: firstly, there are the CVAs without a moratorium, which are governed by Part I of the Insolvency Act 1986 and, second, CVAs with a moratorium, which are governed by the Insolvency Act 1986 and the Insolvency Act 2000, which introduced Schedule A1 in the Insolvency Act 1986.[160] The current judicial attitude[161] demonstrates that the

---

[158] Para. 83.

[159] M Rutstein, "Voluntary Arrangements: Contracts Or Not? Part1", (2000) 13 (1) Insolv. Int. 1-3, at p. 1. See also R Goode, "*Principles of Corporate Insolvency Law*", 3rd Ed. Sweet & Maxwell, at p. 324.

[160] See J Tribe, "Company Voluntary Arrangements and Rescue: A New Hope and a Tudor Orthodoxy" [2009] 5 JBL 454-487.

[161] See for instance*, Re McKeen* [1995] BCC 412, *Johnson v Davies* [1997]1 All ER 921, *Raja v Goodman* [1999] The Times April 14, See also *Oakley Smith* v. *Greenberg* [2002] EWCA Civ 1217, [2004] BCC 81, [2005] 2 BCLC 74, [2003] BPIR 709, [2002] WL 1876359, [2002] WL 1876359 and *Welsby v Brelec Installations Ltd* [2002] 2 BCLC 576, 579.

CVA is a contractual arrangement and hence should be governed by contractual principles.[162]

Prior to the enactment of the Insolvency Act 2000, the CVA procedure suffered serious practical deficiencies and proved to be of limited use to small ailing companies.[163] However, it could be argued that the reforms introduced by the 2000 Act addressed this issue[164] and now the CVA constitutes an important part of the current trend in shifting the ethos of the United Kingdom's insolvency law towards effective corporate rescue. Importantly, the 2000 Act introduced a moratorium for small businesses, which imposes a temporary stay on all claims against the company and allows it with a short respite, so as to design a rescue plan.[165]

However, it should be noted that from the outset, the procedure was not warmly received by insolvency practitioners and whether their attitude is likely to change following the recent reforms remains questionable. Commentators expressed the fear that the long-awaited transformation of the CVA procedure may be seen as a classic

---

[162]section 5(2) (b) I.A 1986, c 45 Pt I, where it is stated that: (2) The voluntary arrangement binds every person who in accordance with the rules (i) was entitled to vote at that meeting (whether or not he was present or represented at it), or (ii) would have been so entitled if he had had notice of it, as if he were a party to the voluntary arrangement. See Also M Rutstein, note 159 above.

[163] K Gromek Broc, "England and Wales: The Impact of The Revised Company Voluntary Arrangement Procedure", in Gromek Broc & Parry, C*orporate Rescue: An Overview of Recent Developments from Selected* (2nd edn. Kluwer Law International, 2006), at p. 93.

[164] Ibid, at p. 97.

[165] Ibid, at p. 104.

instance of ‘too little too late’.[166] In addition, it has been argued that the restrictive terms, under which only small companies[167] may have access to a moratorium, diminish the value of the CVA procedure.[168] However, it is significant to note that the possibility of extending the moratorium to all companies, not just small companies, as at present, was discussed in a government consultation exercise. A report by the Insolvency Service, which provides summary of responses to the consultation exercise, demonstrates that the proposals of the Government were welcomed.[169] It has been argued by some respondents that the moratorium would be particularly helpful in cases where the pre-conditions for a viable CVA were in place, but where there were aggressive creditors seeking to extract an unfair advantage at the expense of other creditors. In addition, it was suggested that the protection of a moratorium might help to reduce the number of pre-pack administrations. Importantly, respondents to the consultation exercise emphasised that a fundamental change of mindset amongst insolvency practitioners would be required for the proposal to have a significant impact.[170] It was recently announced that the Insolvency Service will be taking forward

---

[166] I Fletcher, note 6 above, at p. 130.

[167] Section 247 (3) of the Companies Act 1985 specifies that a small company must meet the following three conditions, namely 1) its turnover must not exceed £2.8 million, 2) its balance sheet total must not be more than £1.4 million, and 3) its number of employees must not exceed 50.

[168] I Fletcher, note 166 above, at pp. 130-131.

[169] Consultation: Encouraging Company Rescue- A Summary of Responses, November 2009, the Insolvency Service. Available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/registerindex.htm last accessed on 4th October, 2010.

[170] Ibid, at pp. 7-8.

more detailed development of the relevant proposals over the coming months, building on feedback received from the consultation.[171]

Implementation of the CVA

The directors of a company may propose the adoption of a CVA.[172] The directors must prepare a proposal, following the advice of a nominee, who will be supervising the process.[173] The proposal must, *inter alia*, state the reasons why the company's directors believe that a CVA is desirable, the company's assets and their value, details of assets charged in favour of creditors, the nature and the amount of the company's liabilities, the duration of the CVA, the dates of distributions to creditors and the remuneration of the nominee/supervisor.[174] The nominee must be instructed to act by means of written notice and must receive a copy of the proposal from the directors.[175] In addition, within 28 days of being indorsed to act, the nominee must submit a report to the court stating whether in his opinion meetings of the company and

---

[171] Consultation: Encouraging Company Rescue- Ministerial Statement. Available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/registerindex.htm last accessed on 4th October, 2010.

[172] Insolvency Act 1986, s. 1(1).

[173] Insolvency Act 1986, s.389A, inserted by I.A 2000 s.4 (4) states *inter alia* that a person may as a nominee if authorised to do so by a body recognised by the Secretary of the State for that purpose. Hence it is no longer required that a person acing as a nominee is a qualified insolvency practitioner.

[174] See Insolvency Rules 1986, r.1.3. (1) - (8).

[175] Insolvency Act 1986, s. 2(3); Insolvency Rules 1986 r.1.4. (1), (2).

its creditors should consider the proposal.[176] The directors are required to provide the nominee with a statement of the company's affairs,[177] with any information he requires in order to prepare his report[178] and give him access to the company's accounts and records.[179]

Furthermore, the nominee may call for a creditors' meeting, where creditors may consider whether to approve (with or without modifications) and go forward with the proposed CVA or not.[180] It is significant to note that, for voting purposes, the CVA treats all creditors as one single class.[181] All creditors who receive notice of a creditors' meeting can vote on a CVA draft. In order for the CVA to become effective, it needs to be approved by the requisite majority at the meeting.[182]

A significant reform of the CVA procedure was introduced by the Insolvency Act 2000. A CVA approved both by creditors and members is binding upon not only those creditors who had notice of the creditors' meeting, but also on creditors who did not have notice and creditors whose existence was unknown to those convening the

---

[176] Insolvency Act 1986, s. 2 (2).

[177] Ibid Insolvency Rules 1986 r.1.5.

[178] Insolvency Rules 1986 r.1.6.

[179] Ibid, r.1.6. (3).

[180] See s. 4 I.A 86, See also K Gromek Broc, see note 163 above, at p. 97.

[181] See I Fletcher, note 166 above, at p. 127.

[182] Insolvency Rules 1986 r.1.19: more than three quarters in value of the creditors voting on the resolution must vote in favour of the arrangement.

meeting.[183] This is a significant development as, previously, creditors who did not receive notice of the meeting were not bound by the arrangement and had a right to enforce their claim against the debtor company. For instance, such creditors had a right to petition for the company to be wound up, undermining therefore the effectiveness of the CVA procedure.[184] It is significant to note that, under the new regime, the only creditors who can escape from the content of a CVA are those who are not eligible to vote. Therefore, the possibility of disruptive tactics on the part of dissenting creditors may be kept to a minimum.[185] In addition, it should be noted that secured creditors, unless they have irrevocably waived their security rights,[186] retain their right to enforce their claim and are only eligible to vote in respect of any unsecured part of their claim.[187]

The Moratorium

As mentioned above, section 1A of the Insolvency Act 2000 introduced a moratorium for small businesses.[188] The moratorium effectively provides the ailing

---

[183] IA 86, s. 5(2) (b), as amended by I.A 2000, Sch.2, Part 1, para. 6(c), See also Gromek Broc, note 163 above, at p. 100.

[184] See R Parry, *Corporate Rescue* (Sweet & Maxwell, 2008) at p. 188.

[185] I Fletcher, note 166 above at p. 133.

[186] *Khan v Permayer* [2001] B.P.I.R. 95.

[187] See R Parry, note 184 above, at p. 189.

[188] Small businesses are defined by s.247 (3) of the Companies Act 1985.

company with some breathing space. For instance, during the moratorium, an administrative receiver cannot be appointed and no resolution aiming at the winding up of the company may be passed.[189] In addition, no steps may be taken to enforce security over the company's assets and no claims may be commenced or continued.[190]

The directors of the company may apply for a moratorium, provided that they can present sufficient evidence that the CVA has a reasonable prospect of success. For instance, it must be shown that, during the moratorium, the company will have sufficient funds to allow it carry on business. It is noteworthy that, only if the nominee forms the professional judgment that the proposal has a reasonable prospect of being approved and implemented, [191] can the directors file the proposal with the court.[192] Provided that the nominee supports the directors' proposal, they have three working days to apply to the court for a moratorium. The directors must enclose with their application a statement of the company's affairs and a document stating the terms of the envisaged CVA.[193]

---

[189] K Gromek Broc, note 163 above, at p. 100.

[190] J Tribe, note 160 above.

[191] See however, I Fletcher, note 166 above, at p 132 where he expresses the concern that the fact that directors have the ability to preselect the person whom they approach with a view to taking the appointment of the nominee, may present a source of difficulties with regard to the quality of professional judgment exercised at the outset of the CVA process.

[192] IA 1986, Sched. A1, paras. 6 & 7.

[193] Insolvency Act 1986, Sch. 1A, para.7, as inserted by IA 2000, Sch.1, para. 4.

The moratorium applies for a 28 day period, but it is extendable for up to two more months. During the moratorium, the directors will continue to manage the company, while the nominee monitors its affairs.[194] Upon approval of the proposed CVA, the nominee becomes the supervisor of the arrangement and his task is to oversee its implementation.[195]

The impact of the CVA

Although the Insolvency Act 2000 introduced some far-reaching changes to the CVA, only limited use of this procedure has been made. It could be argued that is the case predominantly because of the radical reforms brought in by the Enterprise Act.[196] The virtual abolition of administrative receivership would lead one to believe that the impact of the CVA would be greater.[197] However, it is submitted that the new streamlined administration process is now preferred over a 'free-standing' CVA. It is argued that a CVA proposal combined with an application for administration seems to be more popular because of the benefit of the moratorium (which is offered to

---

[194] L Tilbrook, "Corporate Rescue Reform in the UK", (2000) 2(3) J.I.F.M., 65-69.

[195] See K Gromek Broc, note 163 above, at p. 103. "The nominee is required to monitor the company affairs during the moratorium, among other reasons to prevent fraud".

[196] D Milman, "Corporate Insolvency in an Era of Increased Legal Complexity" (2004) 25(1), Comp. Law. 2.

[197] Prior to the EA 2000 it was possible for creditors to interrupt the CVA by means of appointing an administrative receiver.

companies of all sizes under the administration procedure). However, a significant drawback of this is the increase in costs.[198]

Furthermore, it could be said that one of the main factors that render the CVA as a less attractive means of corporate rescue is the fact that insolvency practitioners have never embraced the procedure. Flood argued that the possibility that CVAs could lead to a lower fee being paid to the insolvency practitioners, coupled with the lack of familiarity on their part with the CVA procedure, contributed significantly in the low uptake of CVAs.[199] Furthermore, it has been contended that insolvency practitioners failed to embrace the CVA procedure due to its significant weaknesses at the time that it was originally enacted.[200] It is submitted that, beyond the significant changes that reshaped the CVA procedure, a change of IPs mindset is needed, so as to convince them to have resort to the CVA at an early stage. Unfortunately, current practice demonstrates, that notwithstanding the high profile case-law developments, which effectively manifest the fact that CVAs could prove to be a valuable restructuring tool, and the recent statutory improvements to the procedure, insolvency practitioners continue to use tried and tested restructuring alternatives, such as administration (particularly pre-packs) and schemes of arrangement.[201]

---

198 Gromek Broc, note 163 above, at p. 106.

199 J Flood, "CVAs: A Neglected Lifeline?" (1994) 86(7) C.A, 31-32. See also *The Insolvency Act 1986*. Company Voluntary Arrangements and Administration Orders. A Consultative Document, (DTI, London 1993), where the lack of insolvency practitioners' familiarity with the CVA procedure was identified as one of the reasons for the procedure's limited use.

200 L Hiestand, & C Pilkington "CVAs: A Restructuring Tool for the Future" (2006) Recovery, Win. at p.38.

201 Ibid at p. 38.

The interplay of the CVA with Other Rescue Mechanisms

It could be argued that the CVA could prove to be a significant reorganisation tool for the future. For example, the CVA could serve as an effective exit from administration.[202] It should be kept in mind that administration is not a permanent procedure; rather it should lead to a different outcome, such a CVA or even liquidation. However, the CVA is a preferred alternative route as it provides for more flexibility and therefore better returns for creditors than liquidation.[203] In addition, entering a CVA is less complex than entering a scheme of arrangement.[204] For instance, it is important to note that, under a scheme of arrangement, the voting process takes place in classes, whereas under the CVA all creditors constitute a single class.[205] In fact, recent high profile cases[206] demonstrate that, in certain occasions, there are no legal reasons why a scheme of arrangement should be preferred over a CVA, as a CVA is usually quicker, simpler to implement and does not involve a high degree of court-involvement.[207] A brief comparison between the CVA and a scheme demonstrates that the CVA could prove to be not only a fast and cheap exit from administration, but it appears that this procedure would potentially reduce the possibility of 'ransom creditors', who, in

---

[202] See P Wallace & S Bewick "TXU- CVA's vs.425 schemes" (2006) 3(2) Int. Corp. Rescue, 69-73.

[203] See Parry, note 184 above, para. 13-11, at p. 197.

[204] It should be kept in mind that a Scheme of Arrangement is not strictly speaking a rescue procedure, as it can also be used by solvent companies. See below for a detailed analysis of such Schemes.

[205] See Parry, note 203 above, para. 13-12, at p. 198.

[206] For instance see *AES Barry Ltd v TXU Europe Energy Trading* [2004] EWHC 1757; [2005] 2 BCLC 22; for an analysis of this particular case see Wallace, P., TXU-CVA's v S425 Schemes, (2006) 3(2) Int. Corp. Rescue, 69-73.

[207] Hiestand & Pilkington, note 200 above, at p. 38.

seeking to improve their position, could threaten to block a scheme on the grounds that they form a separate class.[208]

Termination of a CVA

Finally, termination of a CVA takes place either where the conditions of the arrangement have been successfully fulfilled or where the obligations undertaken have not been met.[209] In the former scenario, the supervisor shall make the appropriate distributions in accordance with the provisions of the arrangement. In the latter scenario, the supervisor's task is to take all the necessary steps in order to achieve a suitable variation of the terms of the arrangement or, where that is not feasible, to put the company into liquidation.[210]

Schemes of Arrangement

A Scheme of Arrangement[211] is a useful alternative corporate rescue procedure, whose popularity has significantly risen in the last few years.[212] It should be noted, however,

---

[208] See P Wallace, note 202 above, at p. 72.

[209] See R Parry, note 203, paras. 15-01 & 15-02, at p. 217.

[210] Ibid, at pp. 217-218.

[211] Part 26 of the Companies Act 2006, which replaces Part XIII of the Companies Act 1985, makes provision for such schemes.

that a Scheme of Arrangement is not strictly speaking, a rescue procedure, as it is designed to be used mainly by solvent companies. A Scheme of Arrangement is a restructuring tool, which allows a company to reach a 'compromise' or an 'arrangement' with its creditors, or any class of its creditors, or with its members, or any class of them. A scheme of arrangement may also be used by a group of companies and it can prove particularly useful where the group is seeking to hive off any of its underperforming elements.[213] In addition, it should be noted that, Schemes of Arrangement prove to be very effective restructuring tools as they are, arguably, less stigmatic than other formal rescue procedures, since they are not insolvency proceedings.

A Scheme of Arrangement involves a complex voting structure. In other words, for voting purposes, creditors are divided into classes and it is required that a reorganization arrangement be approved by a majority vote of all classes[214] of creditors.[215] At first glance, it could be argued that this cumbersome requirement

---

[212] R Parry, note 203 above, at p. 233. See Also V Finch, *Corporate Insolvency Law: Perspectives and Principles* (2nd ed, Cambridge, 2009) at p. 486, where it is argued that the revived popularity of schemes of arrangement may be due to the courts 'constructive attitude, to facilitate the implementation of schemes by means of assessing junior creditors' 'real economic interests'.

[213] See R Parry, ibid at p. 234.

[214] A class includes persons whose interests are not to dissimilar as to make it impossible for them to consult together with a view to their interests. See *Sovereign Life Assurance Co* v *Dodd* [1982] 2 QB 573, 583; *Re BTR Plc* [1999] 2 BCLC 575.

[215] See S.899 Companies Act 2006, which states: If a majority in number representing 75% in value of the creditors or class of creditors or members or class of members (as the case may be), present and voting either in person or by proxy at the meeting summoned under section 896, agree a compromise or arrangement, the court may, on an application under this section, sanction the compromise or arrangement. However, see also C Maunder, "Bondholder Schemes of Arrangement: Playing the

effectively creates difficulties in having the arrangement quickly approved and therefore highlights the fact that the CVA procedure should be preferred over a Scheme of Arrangement, as creditors under a CVA may vote as a single class. However, on a closer look, it appears that the potential difficulties in having an arrangement approved and the simplicity that the CVA offers are outweighed by the fact that, once an arrangement becomes binding under the Scheme, it binds all creditors, even those who have dissented, whereas an agreement reached under the CVA is only binding upon creditors who were eligible to vote, or who would have been eligible to vote, if they had notice of a creditors' meeting.[216] In addition, it is important to note that, under a Scheme of Arrangement, it is not necessary to consult any class of creditors who have no real economic interest in the company, hence their votes on the scheme may be disregarded.[217] This is a significant advantage of a scheme since, as opposed to the CVA, it is easier to re-organize the company without having to worry about identifying and giving notice to all bond-holders.

As far as the implementation of the procedure is concerned, it should be noted that this involves three stages.[218] Stage one involves an application being made to the

---

Numbers Game" (2003)16(10), Insolv. Int. 73-77, at p. 76, where it is argued that if the majority in number requirement was removed, schemes of arrangement would be more flexible and attractive restructuring tools.

[216] R Parry note 213 above, at p. 233.

[217] See *Re Tea Corp.* [1904] 1 Ch. 12. See also *Re My Travel Group Plc* [2004] EWHC 2741; [2005] 1 WLR 2365, where the basis of valuation of entitlements caused some contention. See also R Parry, note 213 above, at p.246; and Finch, V., note 138 above, at p. 486.

[218] *Re BTR plc* [2000] 1 BCLC 740, at p. 742.

court, which will have to decide whether or not to make a ‘meetings order’.[219] In addition, stage two involves a meeting of creditors or members who will decide whether to approve the scheme. However, it is required that prior to the meeting sufficient information must be circulated so as to enable the creditors to reach an informed decision.[220] Finally, stage three involves a ‘sanction hearing’, where the court will consider whether or not to sanction the scheme.[221] Once the scheme has obtained the required level of approval, the court may sanction the scheme. However, it should be noted that, the court is not obliged to sanction a scheme which has received the approval of creditors.[222] Rather, the court has discretion to refuse to sanction a scheme, unless it is convinced that all the procedural requirements have been complied with;[223] in addition, the court must be satisfied that the classes were fairly represented by the parties who attended the meeting,[224] and, finally, the court must be satisfied that the terms of the scheme are fair.[225]

It is argued that the fact that a Scheme of Arrangement has to be approved by the court is a significant advantage of the procedure, because, once the arrangement has

---

[219] At the meetings hearing the court will consider whether or not the company has appropriately identified the classes, which will have to consider the scheme. See *Re Hawk Insurance Co Ltd.* [2002] BCC 300.

[220] See s.897 Companies Act 2006.

[221] See R Parry, *Corporate Rescue*, at p. 236.

[222] *Re BTR plc* [2000] 1 B.C.L.C. 740, at p. 747.

[223] *Alabama, New Orleans, Texas and Pacific Junction Rly Co* [1891] 1 Ch. 213, 245.

[224] Ibid, at p. 238.

[225] Ibid at pp. 239-247.

been court-approved, it cannot be challenged by the company's creditors or its members. It could be argued that this might be one of the primary reasons why such schemes seem to be more popular than the CVA, as a CVA may be challenged on the grounds of unfair prejudice.[226]

A significant advantage of the Scheme of Arrangement is that, although it has proved to be an effective re-organization tool, the procedure may be initiated without the requirement of an impending insolvency.[227] Accordingly, there is no need for an insolvency practitioner to be appointed and, importantly, the directors remain in control of the company.[228] It could be argued that the increasing popularity of schemes in rescue scenarios is implying a need to acknowledge its role as a corporate rescue procedure rather than purely regarding the scheme as simply a creature of company law.[229] Ultimately, one may raise the question whether there is a reason why the Scheme of Arrangement process should be used by insolvent companies or whether it should be restricted perhaps to solvent companies, where resort may be made to other procedures such as the CVA and administration.[230]

---

[226] R Parry, note 213 above, at p. 233.

[227] V Finch, note 212 above, at p. 482.

[228] R Parry, note 226 above, at p. 233.

[229] It should be noted that the scheme of arrangement does not benefit from a moratorium. Arguably, the introduction of such protection would enhance the level of effectiveness of the procedure.

[230] R Parry note 226 above, at p. 233.

Conclusion

The insolvency laws of the United Kingdom have arguably undergone thorough reforms so as to promote the idea of corporate rescue. The impact of the Enterprise Act 2002 on the establishment of a corporate rescue culture is, arguably, very significant, as it makes provision for the virtual abolition of administrative receivership and also establishes the more collective administration procedure as the primary way of achieving a corporate reorganization. Arguably, the reforms, by means of the Enterprise Act 2002, contribute greatly to affording distressed companies and their management a second chance. However, it should be noted that the Enterprise Act not only promotes a procedural change, but also a shift of ethos, that is to say, it seeks to move a traditionally creditor-friendly jurisdiction towards a more debtor-friendly direction. Nevertheless, it is noteworthy that a new trend, namely pre-packaged administration, demonstrates that, although the administrative receivership procedure was abolished, so as to establish a more collective approach towards rescue, creditors are still able to exert significant control in the re-organisation process.

In summary, it could be argued that the United Kingdom has in place an effective insolvency law regime, which enables the restructuring of distressed but viable companies. It is noteworthy that beyond the administration procedure, which is the primary weapon towards corporate rescue, there is an array of additional mechanisms, such as the CVA and Schemes of Arrangement which are designed to successfully effect a corporate re-organisation. It should be noted that, although the CVA procedure only enjoyed limited use in the past, the recently recommended reforms to the procedure are expected to increase its popularity. In addition, Schemes of Arrangement proved to be a very effective re-organisation tool, the initiation of which importantly does not require an impending insolvency, hence crucially enabling troubled companies to take steps at an early stage. Finally, it is should be noted that, in contrast to the insolvency law reforms in France, which shall be considered in Chapter IV, and Greece, which will be considered in Chapter V, the United Kingdom did not opt for the introduction of a debtor-in-possession institution, arguably remaining loyal to its creditor-orientated tradition.

Finally, it should be remembered that, in light of the lack of uniform insolvency procedures in the European Union, the thesis offers an overview of the domestic insolvency law regimes and in particular, corporate rescue mechanisms, so as to enable one to understand the approach taken towards corporate rescue in each jurisdiction. Accordingly, Chapter III provided an analysis of the insolvency law regime of the United Kingdom and an analysis of the tools that are used within this jurisdiction, so as to effect corporate restructuring. The next chapter, Chapter IV, is designed to provide an overview of the corporate rescue proceedings that are available in France. In addition, Chapter IV considers the relatively recent reforms to the French corporate rescue laws and attempts to assess the impact of those reforms on the long-standing ‘second-chance’ culture of this jurisdiction.

Chapter IV: An assessment of the rescue procedures under the Insolvency law system of France.

Introduction

As seen earlier in Chapters II and III, due to the lack of a uniform insolvency law regime in the European Union, it is vital for Member States to have in place an effective system of insolvency laws within their territory, in order to facilitate insolvency proceedings. In light of the un-harmonised insolvency law institutions in the European Union, the thesis provides an overview of the insolvency laws of three different jurisdictions, so as to enable one to comprehend the different approaches taken towards rescue by each Member State. As discussed in chapter III the United Kingdom, by means of the Enterprise Act 2002, successfully promotes the idea of corporate rescue. Following the analysis in Chapter III, it could be argued that, the United Kingdom has an effective corporate re-organisation regime, which makes provision for a series of tools that are designed to protect distressed companies against failure. Similarly to Chapter III, Chapter IV is aimed at providing an analysis of the insolvency laws of France with particular emphasis being placed on the corporate rescue mechanisms. Chapter IV offers an overview of the background to the French insolvency laws in order to enable one to understand the underlying factors that shape this regime. In addition, Chapter IV considers the recently introduced reforms to the French insolvency laws and evaluates the contribution of those reforms to the already well-established second-chance ethos of the French corporate rescue laws.

The need for an effective framework of corporate rescue laws was, similarly to the United Kingdom and Greece, recognized in France. Recently, France has, in a quest for an ideal insolvency system, introduced the 2005 Law which is designed to improve the efficiency of pre-insolvency institutions, the proper supervision of rescue plans and the simplification of liquidation procedures.[1] Arguably, the new law effectively improves the pre-existing pre-insolvency framework and, in particular, strengthens the mandat ad hoc procedure. In addition, the old amicable settlement procedure has gone through transformation and is being renamed as conciliation. Finally, the crucial contribution of the Law of 2005 to the French corporate rescue regime is that it creates a new debtor-in-possession procedure, namely the safeguard procedure, which is aimed at promoting the idea of intervention at an early stage, while leaving the company's incumbent management in the 'driver's-seat'. It should be noted that the Law of 2005 itself has been subject to reforms[2] recently in order to make the safeguard procedure more attractive, which in fact has enjoyed very limited use since its inception in 2005.[3]

---

[1] P Omar, "French Insolvency Law: The 2004 Project and Reform Perspectives" (2005) 2(2) Int. Corp. Rescue 65-77 at p. 67.

[2] See The French Ordonnance of December 18, 2008 on the reform of the law for businesses in difficulty, amending the law of July 26, 2005, which was published in the *Journal Officiel* of December 19, 2008.

[3] N Stolowy, "Transparency and Prevention for Corporate Bankruptcy: A US- France Comparison" [2009] JBL, 525-542, at p. 527. See also P Omar, "French Insolvency Law: Remodeling the Reforms of 2005" (2009) 6 ICCLR 214-219, at p.215. For statistics see also M Monsèrié-Bon and C Saint-Alary-Houin, *La loi des sauvegarde des enterprises: nécessité et interêt d'une réforme annoncée* (Recueil Dalloz, 2008), at p. 941, where they note 500 procedures in 2006 and 506 in 2007.

This chapter is aimed at providing an in-depth analysis of the corporate rescue laws of France and to evaluate the impact of the recent reforms.

It should be noted from the start that the issue of corporate rescue is approached in France in a rather diverse way, when compared to the United Kingdom.[4] A sharp distinction can be drawn between the United Kingdom system, which traditionally favours the interests of creditors, and the French system, which is primarily geared towards the preservation of an ailing company and hence safeguarding the jobs of employees.[5] Nevertheless, it should be noted that both France and the United Kingdom have recently introduced reforms, which bring the two systems closer to each other. It could be argued that the French insolvency law reforms bear a resemblance to the Anglo-American legal system,[6] whilst the United Kingdom has softened its traditionally 'creditor friendly' approach and introduced more collective insolvency procedures. In France, the preservation of a company is a matter of critical importance and is a paramount objective. In essence, certain groups' interests, mainly those of creditors, may be sacrificed in order to rescue the company.[7] A significant feature of the French legislation is that it is specifically designed to urge directors to become aware of

---

[4] R Parry, "Introduction" in K Gromek Broc and R Parry, *Corporate Rescue in Europe: An overview of Recent Developments from Selected Countries in Europe*, (Kluwer Law International, 2004) at p. 1.

[5] See Chapter VI, for an in depth comparison between the two different systems.

[6] The US Chapter 11 was used as a model for the recent reforms in French insolvency law, in particular the Chapter 11 concepts of amicable settlement and the pro-active involvement of creditors in any ongoing settlement regime. See C Dupoux & D Marks, "Chapter 11 a la Française: French Insolvency Reforms" (2004) 1(2) Int. Corp. Rescue at p. 74.

[7] R Parry, note 4 above, at p. 13.

their companies' financial difficulties at an early stage and consequently to take steps so as to recover their position.[8]

An overview of the background of the French corporate rescue law

The French corporate rescue system is arguably a very sophisticated system. It is noteworthy that the codification of bankruptcy law originates in the foundation of the Empire by Napoleon Bonaparte.[9] However, the modern corporate rescue law has its roots in 1967, where the first attempt was made to establish laws specifically designed to eliminate bankruptcy.[10] The law of 1967 introduced two separate procedures, which could be followed in the event of insolvency, namely those of judicial settlement and judicial liquidation. Where the court was convinced that a business could be preserved the process of judicial settlement was chosen. However, where there was clear indication that a business had little possibility of survival, judicial liquidation was ordered.[11] Unfortunately, the 1967 law was designed so as to reflect the needs of a prosperous society and, following the 1970's first oil crisis, it became clear that it failed

---

[8] M Campana, "A Critical Evaluation of the Development and Reform of the Corporate Rescue Procedures in France" in K Gromek Broc and R Parry, *Corporate Rescue in Europe: An overview of Recent Developments from Selected Countries in Europe*, (Kluwer Law International, 2004) at p. 34.

[9] P Omar, "The Future of Corporate Rescue legislation In France: Part 1: History and reforms" (1997) 8(4) I.C.C.L.R. 129-134.

[10] Law 67-563 of 13rd July 1967 on judicial settlement, liquidation of goods, personal bankruptcy and criminal bankruptcies, implemented by Decree 67-1120 of 22nd December 1967.

[11] See note 8 above.

to achieve its target.[12] The 1970's 'oil shocks' resulted in a series of business failures and, as a result, in the collapse of the local economies. The subsequent high rate of unemployment and its devastating consequences resulted in the development of a social policy where the emphasis was shifted from the liquidation of businesses in trauma to their rehabilitation.[13]

The failure of the 1967 law caused a wave of legal reforms. Importantly, the emphasis shifted from the liquidation of businesses to the preservation of businesses.[14] Subsequently, in 1984, the Prevention of Business Difficulties Law[15] was introduced, which provided for a) the diagnosis of difficulties and b) a voluntary arrangement scheme. Additionally, the Insolvency Law of 1985 was introduced.[16] The new legislation was inspired by the United States bankruptcy law, in particular the Bankruptcy Reform Act of 1978.[17] The new revolutionary law stated that its primary concern was the prevention of business difficulties.[18] Moreover, the new law introduced

---

[12] See P Omar, & A Sorensen, *Corporate Rescue Procedures in France* (Kluwer Law International, 1996) at p. 25.

[13] M Campana, note 8 above.

[14] Omar, & Sorensen, note 12 above, at p. 26.

[15] Law 84-148 of March 1, 1984 on the prevention and amicable settlement of business difficulties, implemented by Decree 85-295 of 1st March 1985.

[16] Law 85-98 of 25th January 1985 on the judicial rescue and liquidation of businesses, implemented by Decrees 85-1387 and 85-1388 of 27th December 1985.

[17] M Campana, note 8 above, at p. 35.

[18] Note 12 above, at p. 27.

a procedure of judicial rehabilitation, which was intended to enable safeguarding the firm, maintaining activity and employment and the settling of liabilities.[19]

The Law of 1985 was strongly criticized for being extremely 'pro-debtor' at the expense of creditors' interests and also because of the increasingly large number of corporate failures occurring.[20] Subsequently, following strong lobbying from creditors, most notably banks, the law became subject to reform in 1994.[21] The 1994 amendments had two main aims; the first was to improve corporate rescue procedures, especially to reinforce those measures at the pre-insolvency stage dealing with informal arrangements. The second aim was to redress some of the rights of creditors during insolvency proceedings.[22] Nevertheless, it has been contended that the 1994 reforms have only tinkered with the procedural framework for both pre-insolvency and insolvency measures, and failed to introduce an in-depth change on the fundamental philosophy underlying the institutions of insolvency.[23]

---

[19] Code de Commerce, Article L.620-1. It should be noted that the judicial rehabilitation procedure introduced by the Law of 1985 was a revised form of the existing provision, rather than being a wholly new procedure.

[20] See Note 12 above, at p. 28, where it is reported that in 1993, 70,000 businesses became insolvent, with the consequent liquidation in 93 per cent of cases resulting in 300,000 losses of jobs and only 5 per cent of debts recovered.

[21] Law No. 94-475 of 10 June 1994, implemented by Decree no. 94-910 of 21st October 1994.

[22] P Omar, "The Progress Of Reforms to Insolvency Law and Practice In France", in K Gromek Broc and R Parry, *Corporate Rescue in Europe: An overview of Recent Developments from Selected Countries in Europe (* KluwerLaw International, 2004) at p.52. See also note 12 above, at p. 28.

[23] P Omar, "Insolvency Law and Practice in France" in Gromek Broc, K., and Parry, R., *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (Kluwer Law International, 2006) at p. 113.

Following the occurrence of a number of high profile financial scandals affecting both insolvency practitioners and the Commercial Courts, the need for wide-ranging reforms became imminent in order to restore public confidence in the commercial justice system.[24] Accordingly, the reform of insolvency law was given high priority in the Government's agenda. In 1999, the Minister of Justice issued a preparatory orientation document ("*document d'orientation preparatoire*"), which proclaimed substantive changes to insolvency law. In particular, the reforms were aimed at improving the efficiency of insolvency law procedures, these being the diagnosis and prevention of financial difficulties at a pre-insolvency stage, the informal treatment of business difficulties through compositions and agreements with creditors, the proper supervision of rescue plans, and the definition and simplification of liquidation procedures.[25]

There are two types of treatment that may be adopted in order to help companies in difficulties, namely the out-of-court treatment and the judicial treatment. Following the 2005 reforms, there are now three pre-insolvency institutions, the newly introduced safeguard-preservation procedure ('*sauvegarde*'), the conciliation procedure ('*conciliation*') and the ad hoc mandate ('*mandat ad hoc*'), which are designed to complement the two insolvency institutions, namely, administration ('*redressement judiciaire*') and liquidation ('*liquidation judiciaire*'). However, at this stage, reference

[24] See note 8 above, at p. 66.

[25] Note 15 above, at p. 57.

will be made to the law prior to the Law of 2005 in order to effectively demonstrate the shift in philosophy of the French insolvency law.

Tools for Diagnosis and Treatment

The out-of-court treatment in effect involves an agreement being reached between debtor and the main creditors, in order to prevent the company's failure. The process involves two stages. Firstly, any difficulties that the company may be experiencing are detected (tracking stage) and, secondly, negotiations are initiated with regards to these difficulties. The basic idea behind the 'tracking stage' is that prevention of business failure shall only be effective where sufficient information is disclosed in relation to the company's affairs. For instance, under the current legislation, company directors are required to provide detailed information where their company reaches a certain amount of employees and to keep forecast accounts. In essence, the requirement for disclosing information operates as a 'warning device', which enables directors to detect any difficulties and deal with these at an early stage.[26]

[26] M Campana, note 8 above, at p. 23.

The alert system

The law heavily promotes the use of ‘pre-insolvency diagnostics tools’.[27] In other words, it emphasizes that the early detection of any problems is of catalytic importance. Where signs of difficulties are detected, an alert can be triggered either within or outside the company.

An internal alert may come from the company’s auditors, shareholders or the ‘enterprise committee’, which represents the interests of employees. An auditor may raise an alert where he detects ‘facts of a nature such as to compromise the continuing viability of the company’s operation’.[28] The role of the auditor is not strictly confined to accounting issues. The auditor may deem necessary the raising of an alarm where, for example, he detects diversity a) in the company’s financial report or b) in its wider economic environment (for instance, the bankruptcy of a major customer). Subsequently, the auditor will call the chair of the administrative board to provide him with an explanation, with regards to the detected difficulties and their potential harmful effects to the operation of the company. Provided that the company directors’ reply is satisfactory, the alert will cease at this stage.

[27] ibid, at p. 51.

[28] ‘*des faits de nature à compromettre la continuité de l’exploitation*’: Code de commerce, Article L. 234-1.

However, if the auditor remains unsatisfied with the information provided, he may convene a meeting of the administrative board or supervisory boards for a further discussion of the matters concerned (second stage). If, at this stage, the auditor believes that the company's continued operation remains compromised, the alert procedure will not stop and he will draft a special report to be submitted at a subsequent board meeting. It is noteworthy that the 1994 reforms enable the auditor to inform the president of the commercial court[29] of any issues concerning him and the outcome of any actions he had taken.[30]

Furthermore, the company's shareholders may raise an alert. Although the shareholders' alert is of less significance than the auditor's, still it is of great importance, as it may attract the latter's attention.[31] For instance, Code de Commerce, Articles L. 223-36 and L. 225-232, provide that shareholders of joint-stock companies raise written questions can twice in any financial year before directors with regards to anything that could impair the continued operation of the company. Notably, the directors' reply is passed on to the auditors.

---

[29] Code de commerce, article L. 234-1.

[30] The 1994 Reforms have significantly reduced the confidentiality of the matters discussed in board meetings. The minutes of the board meeting are distributed to the enterprise committee, the auditor and the president of the commercial court.

[31] M Campana, note 8 above, at p. 38.

Moreover, the enterprise committee may instigate an alert, where it becomes aware of facts which may have a detrimental effect on the company's operation.[32] The nature of the alert raised by the committee is different from that of the auditor. In other words, the committee may trigger an alert because of facts that affect it in particular, such as the existence of a collective dismissal or a branch closure plan. The committee may request the company directors to provide it with information on the issues that concern it. Where the directors fail to supply the requested information, or when the information is not sufficient, the committee will draft a report. Notably, the committee may require directors to put the content of the report before the shareholders. Nonetheless, the alert power of the committee is undermined, since the directors are not obliged to convene a meeting in order to expressly discuss the content of the committee's report.[33]

The 'ad hoc mandate'

At a stage prior to insolvency there are two procedures designed to promote corporate rescue, namely the conciliation procedure[34] and the 'ad hoc mandate' (*mandat ad hoc*). [35] The ad hoc mandate is a procedure that has developed

---

[32] Labour Code, Article L 432-5.

[33] M Campana, note 8 above, at p. 39.

[34] This was known as 'amicable resolution' (*reglement amiable*) prior to the Law of 2005. An analysis of the procedure follows below.

[35] A pre- condition that needs to be satisfied in order to use this process is that the company is not in "cessation de paiements". Cessation of payments may be defined as the impossibility for a business to

predominantly as a result of the practice of the Paris Commercial Court.[36] The initiation of this process usually involves the ailing business making a request to the President of the Commercial Court in order to appoint a 'mandatee'.[37] The request for the Court's assistance can be in the form of a registered letter and must be accompanied by a plan stating the measures the company is going to take in order to repay its debts and also its plans for restructuring its business. Where the court is convinced that the company is likely to overcome its difficulties by means of a scheme of arrangement, it will order the appointment of a mandatee. Once the debtor and the creditors have agreed on a scheme of arrangement, the mandatee will establish its terms and conditions. It is noteworthy that the agreement will be binding upon the agreed parties.[38]

An advantage of the 'ad hoc mandate' is that it is subject to fewer formalities than amicable resolution and that, importantly, it offers more flexibility for informal and private negotiations between the debtor company and its debtors. The confidential character of the procedure crucially allows negotiations between the debtor company and its creditors without raising undue public attention. In addition, confidentiality is a significant quality of the "*mandat ad hoc*" procedure, as it averts any unnecessary

---

satisfy the debts which are due with the assets that are available. See Omar & Sorensen, note 12 above, at p. 11.

[36] C Dupoux & D Marks, note 6 above, at p. 75.

[37] P Omar, & A Sorensen, "The French Experience Of Corporate Voluntary Arrangements" (1996) 7(3) ICCLR 97-103.

[38] P Omar, note 9 above.

rumours, which could have a catastrophic effect on a rescue attempt.[39] However, it has been argued that beyond the incentives that the current rescue regimes provides for directors to take early steps in order to avert a crisis, it is nevertheless the mindset of those involved in rescue which defines largely the level of success of a procedure. Accordingly, because directors regard the court as solely a ‘purveyor of sanctions’ and are reluctant to approach the Commercial Court in order to prevent a financial crisis at an extra judicial stage, it is often the case that, when they decide to implement an extra-judicial settlement, it is too late and the only way forward would be judicial proceedings.[40]

Moreover, a significant drawback of this process is that no specific time frame is set out within which the process must be completed. Accordingly, the length of the process is left to the discretion of the President of the Court. Another noteworthy disadvantage is that the availability of the procedure differs from court to court, depending on the experience of the judges.[41] Nevertheless, where difficult cases are concerned, the lack of a specified time frame could also prove to be a great advantage as the debtor company could enter a long-lasting negotiation process in order to devise a viable reorganisation plan. In such cases it is common practice that the ad hoc mandate will be the preliminary stage to the amicable settlement procedure, because, as

[39] However, it has been argued that confidentiality of extra-judicial procedures is only theoretical in small or medium sizes towns, so that directors fear that the anxiety that will be aroused in their economic and financial partners by the disclosure of their difficulties may in fact worsen the company’s financial position. See M Campana, note 8 above, at p. 32.

[40] Ibid, at p. 32.

[41] Omar, & Sorensen, note 37 above.

opposed to the latter, there is no time-limit within which a creditors' agreement must be reached.

Finally, it should be noted that, following the enactment of the Law of 2005, an increase of pre-packaged agreements has been noted, as part of the safeguard procedure. Arguably, the 2005 reforms boost the use of the mandat ad hoc as the procedure may be used in order for an agreement to be reached prior to a safeguard plan. Once a pre-packed agreement is complete, the safeguard procedure can be commenced. Effectively, this allows for quicker reconstruction of a company's affairs, as a safeguard plan can be approved shortly after the opening judgment (practice demonstrates that this may range from thirty to fifty days) in order to speed up the new financing described in the pre-established plan.[42]

The Conciliation procedure

Following the reforms, introduced by means of the Law of 2005, the preceding preventative mechanism of amicable settlement has undergone significant changes in order to improve the procedure and make it more attractive to debtors. The new

[42] See I Didier, "Pre-Packs-French Style" Paper presented at the INSOL Europe Annual Congress in Stockholm on 1-4 October, 2009.

conciliation procedure, similar to its predecessor, is designed to bring closer creditors and debtors, in order to negotiate possible solutions to the problems of the company, other than liquidation. The process of amicable resolution is of informal and voluntary nature. Beyond the cosmetic changes to the amicable settlement procedure,[43] the changes introduced by the Law of 2005 are of a far more substantial nature.[44] The new conciliation procedure is designed to provide the troubled company with breathing space and encourages negotiations on a confidential and contractual basis with the company's creditors at an early stage. Conciliation is available to businesses experiencing legal, financial or economic difficulties, actual or forecast, which have ceased payments for no more than forty-five days.[45] This allows technically insolvent companies to use this institution, hence lessening the restricting effect of the precondition that a company should not be unable to pay its debts as they fall due.[46] Under the previous regime, it was necessary that a debtor prior to entering an amicable resolution was not unable to pay its debts. Additionally, a debtor must have been in a legal, economic or financial situation that presented him with difficulties, which could not be solved in the ordinary course of events by finance from a third party that would cover his indebtedness and which would at a later stage lead to insolvency.

[43] The amicable settlement procedure has been modified and renamed as 'conciliation'.

[44] See P Omar, "Insolvency Law and Practice in France" in K Grome Broc and R Parry, *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (Kluwer Law International, 2006) at p. 140.

[45] Article L 611-4 of the Commercial Code (Inserted by Article 5, Law of 2005).

[46] Law of 1994 L. Article 35.

The procedure is opened by the President of the Commercial Court, who, upon the request of the chairman of the troubled company, shall appoint a conciliator (*conciliateur*).[47] It is interesting to note that any person whose experience is likely to facilitate the course of the proceedings and who is, in the view of the President of the Court, capable of fulfilling the duties and responsibilities of conciliation can be appointed as a conciliator. The powers of the conciliator are partly set out by statute and partly by the President of the Court. However, the conciliator is by no means impotent;[48] rather he is able to dramatically affect both the course and the outcome of the proceedings. In fact, the mission of the conciliator is to assist the debtor company to enter into negotiations with its principal creditors and any other affected parties, such as banks, and to conclude an agreement, which would ensure the continuation of the company's business.[49] An agreement should be concluded within a period not exceeding four months and may be extended by a month only.[50]

Ratification of the agreement and the role of the court

[47] Article L 611-6 of the Commercial Code (Inserted by Article 5, Law of 2005).

[48] Omar & Sorensen, note 37 above.

[49] Article L 611-7 provides that 'the conciliator may suggest any proposal, which is relevant to the preservation of the business, the pursuit of economic activity and the maintenance of employment. Additionally, useful information is communicated to the conciliator from the debtor or the President of the Commercial Court.

[50] Article L 611-6.

Under the previous regime, once an agreement had been concluded, it could be simply ratified by an order of the President of the Commercial Court. This allowed for the procedure to retain its crucially confidential character. However, it did not mean that the agreement was ratified for all purposes and for all time, as on occasion the court, in subsequent insolvency proceedings, in reviewing the agreement, had to modify the date of insolvency prescribed in the original order.[51] That in its turn created a '*suspect period*' during which certain transactions could be set aside and liability could potentially arise for those who delayed in filing for insolvency.[52]

The Law of 2005 importantly redresses this problem and enhances the court's involvement in the conciliation procedure by requiring it to ratify the conciliation agreement in certain circumstances.[53] Under the new regime, there is an option to have the conciliation agreement approved either by the President of the Commercial Court or by the Court itself. The crucial difference between the two being that, where an agreement has been approved by the President of the Court (*constatation*) confidentiality is retained, whereas, where enforced by the Court, the judgment

---

[51] C Dupoux, & D Marks, "French Bankruptcy Law: Putting the Safeguards in Place" (2006)3(4) Int. Corp. Rescue, at p. 209.

[52] When the court decides to commence insolvency proceedings, it fixes the date on which the company is deemed to become insolvent (this can be 18 months before the opening of insolvency proceedings). The period of when the company was deemed to be insolvent and the date where the filing for insolvency proceeding took place, is called the 'suspect period'.

[53]Pursuant to Article L 611-8 of the Commercial Code, at the request of the debtor, the agreement is validated by the Court and becomes public if the following conditions are present: a) The debtor is in not is cessation of payments or the agreement brings this to an end; b) the terms of the agreement are of a nature to ensure the continuity of the business' activity; c) the agreement does not prejudice and makes provision for the interests of non-signatory creditors.

becomes public (*homologation*).[54] It could be argued that making the agreement public could have an adverse effect upon the debtor company, as it could alarm its creditors.[55] However, it is important to note that homologation only takes place upon request of the debtor and where the agreement does not harm the interests of any non-signatory creditors. Additionally, as mentioned above, *homologation* has a stronger effect than *constatation* as the court is unable to question the date when the company's insolvency was pronounced.[56]

It could be argued that, although the publicity of an agreement could worsen the already ailing financial position of a company, it should be noted that the need to eliminate the stigma which is attached to corporate insolvency was emphasised recently in France. In particular, President Sarkozy highlighted the need to provide the right framework for enhancing the efficiency of French insolvency procedures and the need to afford a second chance to ailing companies and their managers. In particular he stated that 'the law should give to the manager of a firm the means to get going again; it should help him to recover confidence when he is faced with difficulties; it should

[54] Pursuant to Article 611-9 of the Commercial Code, the court makes a public judgment having previously received submissions in chambers from the company, the creditors who are party to the agreement, the conciliator, the public prosecutor and representatives from any works council and any other party that appears to be relevant and useful.

[55] See M Campana, note 8 above, at p. 32.

[56] See note 51, above at p. 209.

convince him that failure is not irreversible. The vision in France of a failure that is final must come to an end.[57]

Furthermore, from a creditor's perspective, it could be argued that one may prefer to have resort to a simple court ratification rather than homologation, because of the confidentiality this process entails. On the other hand, however, a formal approval of the agreement affords extra protection to creditors and persuades them to extend more generous credit arrangements.[58] A significant innovation of the Law of 2005 is that it affords a super-priority to creditors who have injected new funds to the troubled company or continued to supply goods or services during the conciliation process. This priority entitles the abovementioned creditors to rank above all debts arising prior to the opening of conciliation.[59] Similarly, the same priority will be afforded to those creditors in the context of any formal insolvency proceedings opened, as a result of the failure to endorse the conciliation agreement.[60]

The conciliation procedure is undoubtedly a significant pre-insolvency mechanism. Nevertheless, there is a range of reasons why the process may fail. For instance, the debtor may seek help where it is too late and, consequently, where the

---

[57] See P Omar, "French Insolvency Law: Remodeling the Reforms of 2005" (2009) 6 ICCLR 214-219, at p. 219.

[58] Ibid.

[59] See Article L.611-11 of the Commercial Code.

[60] Article L. 611-12 of the Commercial Code.

company's difficulties have reached such a stage that recovery is impossible. Moreover, where the debtor's expectations for the salvation of the company as a going concern are too high, the creditors may not be convinced of the success of the process. Additionally, the process is likely to fail where, although an agreement has been reached, a creditor is unwilling to respect its terms.[61]

Moreover, the new law, importantly, addresses the concerns of banks and states that, except in cases where blatant fraud or inappropriate behaviour is manifested, those creditors who extend funds with a view to support the continuation of the ailing business, cannot at a later stage be held liable for improperly extending credit to the debtor.[62] This is known as the principle of "improper support" ("*soutien abusif*"), which developed in case-law in the mid-1970s by the Commercial Chamber of the *Cour de Cassation.* The doctrine imposes liability upon a lender for knowingly extending finance that is beyond the capacity of the debtor, thus contributing to the aggravation of the company's perilous situation and leading to its subsequent insolvency.[63] As stated above, the Law of 2005 confines lender liability for improper support. This proved necessary in order to protect creditors who, in the context of the conciliation process or a rescue plan, offered post-commencement funds.

[61] P Omar, "French Insolvency Law: The 2004 Project and Reform Perspectives" (2005) 2(2) Int. Corp. Rescue 65-77.

[62] Ibid, at p. 69.

[63] Ibid. See also P Omar, "Reforms to Lender Liability in France"(2006) 3(5) Int.Corp.Rescue277-284.

The safeguard procedure- Chapter 11 *a la Française*

The new 'safeguard' procedure is the core change introduced by the Law of 2005 in order to facilitate the re-organisation of companies that are faced with financial crisis but that are not yet insolvent. The safeguard procedure is inspired by the American Chapter 11 model.[64] Similarly to Chapter 11, the safeguard procedure is 'a debtor in possession' procedure that allows the incumbent management to continue being in charge of the ailing business in order to help it overcome its financial difficulties. For instance, a safeguard plan could provide for a wide range of solutions, such as waivers of debt, a rescheduling of debt, a change in the company's control, or a sale of certain corporate assets.

The safeguard procedure provides a significant incentive to directors, who are encouraged to take early steps in order to save their company. However, a key pre-condition, which has to be satisfied by a debtor who wishes to enter into safeguard proceedings, is that the business is not insolvent. It is fundamental that the debtor has not actually ceased payments,[65] as this remains the qualification for entering judicial rescue. The Law of 2005 originally required that, in order for a debtor to be able to use the safeguard procedure, it should be shown that the company is faced with difficulties

---

[64] R Jadot, & L D'Orgeval, "The Reform of French Insolvency Proceedings" (2005) 2(1) Intern.Corp. Rescue at p. 16.

[65] For the importance of the concept of 'Cessation de Paiements' see, P Omar, "Defining Insolvency: The Evolution of the Concept of 'Cessation de Paiements' in French Law," (2005) 2 E.B.L.R. at p. 311.

that it is not able to surmount and the nature of which is capable of leading to cessation of payments.[66] However, it is important to note that the recent reforms amended the criterion for entering into the safeguard procedure.[67] In particular, it is possible for a debtor to use the safeguard procedure before actually being in default on payment, on the condition that the debtor 'provides proof of difficulties he cannot overcome'.[68] Subsequently, it could be argued, on the one hand, that the reforms have drastically facilitated the entry for distressed companies into the safeguard proceedings. On the other hand, it could however, be argued that the changes to the entry requirements could cause additional uncertainty for creditors as to when a debtor may request the court's protection.[69] Nevertheless, it has been argued that the amendment of the test of entry into the safeguard procedure applies, in actual fact, more in theory than in practice, as the debtor must always prove to the court the genuineness of his financial difficulties.[70]

The safeguard procedure is implemented by a court judgment at the request of the debtor. [71] The court will appoint an administrator (*administrateur judiciaire*) where proceedings are initiated in relation to businesses that are above a threshold, which is

---

[66] Article 12, amending Article L 620-1 of the Commercial Code.

[67] The French Ordonnance of December 18, 2008 on the reform of the law for businesses in difficulty, amending the law of July 26, 2005, which was published in the *Journal Officiel* of December 19, 2008.

[68] Article 12 of the Ordonnance.

[69] See Freshfields Bruckhaus Deringer LLP, "French Insolvency Law- Reform of Safeguard proceedings Comes Into Effect On 15 February 2009" 13 February, 2009, at p. 2.

[70] J Vallens, "Flexibility in France", Eurofenix, 2009 (Summer) at p. 22.

[71] Article 621-3 states that the judgment opens an observation period for a maximum duration of six months, which may be renewed once by a reasoned decision at the request of the debtor, the administrator or the Public Prosecutor.

fixed by decree of the Council of State.[72] It should be noted that, by means of the reforms of 2008, the role of directors has been significantly enhanced, as it is now possible for the debtor to nominate an administrator for appointment by the court.[73] The administrator is required to supervise or assist the debtor in the performance of some or all management operations.[74] The judgment also triggers an automatic moratorium (‘*periode d’observation*’) under the protection of which the debtor is permitted to propose a recovery plan.[75]

The role of the court in the implementation of the continuation plan

It could be argued that a limited role is attributed to the court during safeguard proceedings, in order to positively encourage distressed companies to seek the protection of the court at an early stage, prior to a real threat of insolvency. The Law of 2005 contains a further incentive for debtors to use the safeguard provision, by preventing the courts for removing the company’s directors, unless the Public Prosecutor makes a request to this end.[76] Prior to the reforms, the removal of directors

[72] Article 17, amending Article L 621-4 of the Commercial Code. However the court is not bound to appoint an administrator, where proceedings benefit a debtor, whose number of employees and gross turnover are below the threshold fixed by decree.

[73] Article 14 of the Ordonnance.

[74] Article 23 Law of 2005, amending Article 622-1, Commercial Code.

[75] See note 66 above, Article 12, amending Article L 620-1 of the Commercial Code. See also “Stay Ordered Because Of French Sauvegarde Proceedings – Case Comment” Insolv. Int. 2007, 20(3), at p. 46.

[76]Article 626-4, Commercial Code.

was a sanction imposed automatically upon the initiation of rescue procedures.[77] It is noteworthy that the sanctions section of the Commercial Code has been amended so as to ensure that directors who resort the safeguard procedure are not unduly exposed to the risk of sanctions.[78]

Although the directors are at the helm of safeguard proceedings, the court may exercise its discretion, where it appears that the debtor is in cessation of payments, in order to convert the proceedings into judicial administration or liquidation.[79] This could be one of the reasons why directors are reluctant to resort to safeguard proceedings,[80] as conversion of proceedings to judicial rescue would mean that the management could be ousted by the court. It could be argued that, during the first year of the application of the safeguard procedure, the directors, threatened by potentially being removed from the company's management, preferred to resort to conciliation proceedings, where the outcome of a case is not solely dependent upon the judge hearing the case, but rather extensive negotiations take place between the debtor and its principal creditors.[81]

---

[77] P Omar, note 44 above at p. 141.

[78] Ibid, at p. 142.

[79] See Article 22 law of 2005.

[80] A statistical analysis carried out by Euler Hermes demonstrates that the safeguard procedure has been applied to only 1% of the insolvency proceedings opened during 2006. Available in http://www.eulerhermes.com/france/fr last accessed on 18th October 2010.

[81] See C Theron & V Pellier "Why Did the French Invent the Rescue Procedure?" (2007) Eurofenix, Summer, at p. 19.

The role of the creditors

Notwithstanding the recent reforms, it could be argued that France remains a pro-debtor/employee jurisdiction. However, the new regime portends changing attitudes, as it affords greater protection to creditors, who are involved in pre-insolvency proceedings. Notably, the safeguard procedure is seeking to strike a balance of preserving an ailing business while satisfying the creditors.

With regards to businesses whose number of employees and gross turnover exceeds the threshold, the Law of 2005 provides for a key novelty. In other words, it is stated that a financial creditors' committee and a principal suppliers' committee will be set up.[82] The role of the two committees is to approve the rescue proposals submitted by the debtor, assisted, it being the case, by the administrator. The establishment of the two committees is designed to increase the creditors' involvement in developing a viable re-organisation rescue plan.[83] The 'preservation' procedure involves an extensive negotiation process, between the debtor and the creditors, who must co-operate in order to achieve a settlement of the company's debts.

The draft rescue plan must be presented for approval before the two creditors' committees within two months of their being formed. Following discussions with the debtor and the administrator, the committees will vote on the draft plan. It is important

[82] Article 620-1 Commercial Code.

[83] See I Didier, "Creditors' Rights in France after the Reforms of 26 July 2005- Part II" (2007) 4(5) Int. Corp. Rescue, at p. 241.

to note that, under the Law of 2005, a decision was taken, within a further period of thirty days, by each committee, by a majority of its members representing at least two-thirds of total amount of the debts owed to all the members of the committee as indicated by the debtor and certified by the company's auditors.[84] However, following the recent reforms of 2008, the voting rules on creditors' committees have been amended. Accordingly, approval of a plan shall require only a vote in favour by committee members representing at least two-thirds of the claims by value of that committee. This effectively prevents creditors from splitting their debt among various entities of the same group in an attempt to obtain a majority in number.[85]

The subsequent exchange of opinions and recommendations form the final draft, which is submitted to the court for validation. Once the court has finally endorsed the rescue plan, it becomes binding upon all members of the committees.[86] However, dissenting or non-participating creditors are not bound by the decisions of the committees. Creditors, who are not members of the committees, must be consulted in parallel as to the strategy of settling the debts owed to them.[87] The role of the court is rather limited, as, in validating the plan, it must do so in conformity with the suggestions of the two creditors' committees. In addition, the court must ensure that the interests of all creditors are sufficiently protected.[88]

---

[84] Article 626-30 Commercial Code.

[85] See note 69 above, at p. 2.

[86] Article 626-29 to 35, Commercial Code.

[87] Article 626-33 Commercial Code.

[88] Article 626-31 Commercial Code.

The Law of 2005 strengthens further the rights of creditors. It is provided that the judge supervising the proceedings may appoint a technical expert[89] and up to five creditors[90] in order to assist him in his mission to supervise the management of the business. The appointed creditors, who are to act as 'inspectors' ('*Contrôleurs*'), must not be associates of the debtor and hold no shares in the company. The inspectors may have access to all documents transmitted to the administrator and the judicial nominee.[91] The option to appoint inspectors, who must be consulted and informed throughout the proceedings, already existed prior to the reforms. However, the Law of 2005 strengthens the position of the controllers, as it provides that, in case of default, they may bring a claim against the debtor in the collective interest of creditors as a whole.[92]

Moreover, public creditors, such as financial authorities and social security bodies, account for a very substantial part of the liabilities of distressed companies.[93] It is significant to note that the Law of 2005 introduces a 'principle of forgiveness' in respect of public claims.[94] In other words, public creditors may consent, in parity with the efforts agreed by the other creditors, to waivers of all or part of the debts owed to

[89] Article 626-9 Commercial Code.

[90] Article 621-10 Commercial Code.

[91] Article 621-11 Commercial Code.

[92] Article 622-20 Commercial Code.

[93] See I Didier, note 83 above, at p. 242.

[94] Ibid.

them by the debtor company.[95] Therefore, public creditors, such as the 'tax administration authority', are authorised to grant a waiver for the whole of any directly paid taxes, such as corporate income tax. In addition, indirect taxes, such as VAT, may be deferred, but only as to interest on late payments, accumulations or other penalties.[96]

It could be argued that having public creditors involved in waivers of debts is a clear indication of the legislature to promote a metamorphosis of the rescue culture of France. It is noteworthy that, prior to the 2005 reforms, public creditors were paid-off on a priority basis, in respect to debts owed to them. Therefore, the introduction of the principle of 'debt forgiveness' in relation to public claims is a step that would be welcomed by private creditors, who may now achieve a return sooner than they would have otherwise would have done.[97] In addition, 'debt forgiveness' is only possible in the context of the safeguard procedure and not judicial re-organisation, hence making safeguard proceedings more attractive for private creditors.

As mentioned already, similarly to conciliation, in safeguard proceedings, creditors who, in order to support the continued operation of a distressed company, have injected new funds into it, are conferred a super-priority by the Law of 2005.[98]

---

[95] Article 626-6, Commercial Code. The conditions for the waiver of debts are determined by a decree of the Council of State.

[96] Article 626-6 para. ii, Commercial Code.

[97] I Didier, note 83 above.

[98] Article L. 611-12 of the Commercial Code.

This could be seen as a reward for creditors who promote corporate rescue at a pre-insolvency stage. However, it is argued that the safeguard procedure will primarily affect larger businesses and will have a limited effect of smaller companies.[99]

The Eurotunnel Case

The first substantial case to be concerned with the initiation of safeguard proceedings involves Eurotunnel, the Channel Tunnel operator, which links France and the United Kingdom.[100] The Canterbury Treaty, which was signed in 1986, paved the way for the construction of the tunnel. However, the prime ministers of both France and the United Kingdom clearly stated their intention not to grant state aid to the project, but rather that financing should come from private banks and the allotment of shares to the public. Since its creation, the company has suffered significant losses, primarily because of the high construction costs and increasing competition from low-fare airlines. In 2006, the company was threatened by the initiation of liquidation proceedings.

However, the company's creditors were called to support the company by approving a re-organisation plan under the safeguard procedure, which would enable Eurotunel to make a fresh start, by performing a share swap. Under the plan, a newly formed company, Groupe Eurotunnel SA, would offer to swap its shares for shares in

[99] See statistics by Euler Hermes available in http://www.eulerhermes.com/france/fr last accessed on 18th October 2010 .

[100] See judgment of the Paris Commercial court: greffe number No 2006/1903.

Eurotunnel plc and Eurotunnel SA. The rescue plan was aimed at reducing Eurotunnel's debt from £6.2 billion to £2.84 billion. Following tough and long-lasting negotiations between the company and its creditors, the plan received the necessary approvals in late 2006.

Accordingly, in January 2007, the President of the Commercial Court authorized the implementation of the rescue plan. Taking into account the fact that preservation of employment is a matter of critical importance in France, it could be argued that the court favoured the implementation of the plan as it would result in the preservation of 2,300 employees' jobs.[101]

A significant advantage of the safeguard procedure is that, pursuant to Annex A of Regulation 1346/2000, it qualifies for being principal proceedings in relation to cross-border insolvency proceedings. The effect of this can be seen by the case of *Merrill Lynch International Bank Ltd* v *Winterthur Swiss Insurance Company*,[102] where the High Court held that the institution of safeguard proceedings by the Eurotunnel companies amounted to principal bankruptcy proceedings.

---

[101] See INSOL International Case Study Series 1, Eurotunnel Plc & Eurotunnel S.A. And Associated Companies, 2nd August 2006 and 15th January 2007, available at http://www.rovigo.ro/images/INSOLInternationalTechnicalCaseStudy1.pdf last accessed on 18th October 2010. For further commentary on the Eurotunnel case see also Chapter II at p.55-56. See also Chapter VI at p. 230.

[102] Unreported, November 30, 2006 (QBD (Comm)).

Nevertheless, in assessing the effectiveness of the safeguard procedure, one could say that the great expectations introduced by the Law of 2005 have not been met. Although the safeguard procedure was used in high profile cases, such as Eurotunnel, it should be noted that it only represents a nominal percentage of all insolvency proceedings in France since the law came into force.[103] It has been argued that the main reason for the significantly limited success of the safeguard process is the stigma, which is attached to insolvency proceeding in France. Arguably, debtors, scared of the stigma of insolvency, delay in filing for the commencement of safeguard proceedings and, in most instances, it is inevitable that the company becomes insolvent.[104] Hence the company is required to enter a judicial re-organisation procedure, if not to pay the ultimate price of entering liquidation.

Finally, it should be noted that the Eurotunnel case revealed certain flaws of the safeguard procedure, which prompted the reforms of 2008. It could be argued that the reforms of 2008 effectively clarify the rules applicable to the approval and implementation of a safeguard plan. The reforms make provision for the extension of the financial institution committee of creditors, so that it not only covers banks, but also creditors who have purchased a claim from a supplier or any other entity with which the debtor had concluded a credit transaction. Furthermore, it is now possible for creditors to convert their claims into shares.[105] In addition, it could be argued that the reforms

---

[103] Safeguard proceedings only represent 1% of all insolvency proceedings in France. See Freshfields Bruckhaus Deringer LLP, French Insolvency Law, 13th February 2009.

[104] Ibid, at p. 1.

[105] See J Vallens, note 70 above, at p. 24.

establish the safeguard procedure as the key-reorganization tool, as the process is now more easily accessible. Nevertheless, it has been argued that the amendment of the entry criteria into the safeguard proceedings creates uncertainty for creditors and opens the road for abuse of the procedure as debtors may seek the protection of the court any time their creditors threaten to enforce their security.[106]

Judicial Rescue

It has been argued that the safeguard procedure has filled in a gap between failure-preventive mechanisms and judicial rescue as, similarly to the *mandat ad hoc* and conciliation, it can only be applied before cessation of payments but, similarly to judicial rescue, it also provides the protection of a moratorium.[107] However, where it is impossible to resolve the difficulties of the company at an early stage, judicial settlement will be the next resort. As mentioned earlier, judicial rescue is available to companies that are technically insolvent.[108]

Implementation of the procedure

The procedure of judicial rehabilitation or rescue is designed to safeguard the firm, maintain economic activity and employment, and also discharge liabilities.

---

[106] See Freshfields Bruckhaus Deringer LLP, note 85 above, at p. 2.

[107] C Theron & V Pellier, note 81 above, at p. 19.

[108] Article 88, Law of 2005.

Judicial rescue gives rise to a plan that is adopted at the end of an observation period and, it being the case, the formation of two creditors' committees.[109] Judicial rescue proceedings may be opened at the request of the debtor, at the latest within forty-five days following the cessation of payments (under the old law, it was fifteen days). In addition, the court will seek to intervene and may ex officio open judicial rescue proceedings, where conciliation proceedings have failed.[110] The opening of judicial rescue proceedings is triggered by a judgment of the Commercial Court, which determines the date of cessation of payments. In default of a determination of this date, cessation of payments is deemed to occur at the date of the judgment that notes it.[111]

Following the commencement of *redressement judiciaire* proceedings, a court-appointed administrator is to jointly or separately assist the debtor in the management of the company.[112] The existing management is, in principle, left in control and is assisted by the administrator, who co-manages the company. However, as opposed to the safeguard procedure, where the court thinks it is appropriate, it may order the replacement of the existing management by the administrator. In fact, this seems to be in practice the trend followed by the courts, which seek to punish the incumbent management for its failure.[113] Where the administrator is entrusted with the task to

[109] Ibid.

[110] Article 89, Law of 2005. That is where the conciliator's report shows that the debtor has been in fact in cessation of payments.

[111] Ibid.

[112] Article 92, Law of 2005.

[113] Fried, Frank, Harris, Shriver & Jacobson LLP, Client Memorandum, November 17, 2005, at p. 9.

solely and exclusively manage the company, the court may appoint one or more experts in order to assist the administrator in carrying out his management functions.[114]

Effectiveness of the procedure

It could be argued that the provisions of the Law of 2005 have limited significantly the scope of the judicial rescue procedure. Under the new law, a rescue plan which involves the sale of the company, either in full or in part, is prohibited during the process of judicial reorganisation. It is provided under the new law that, once judicial rescue proceedings have been initiated, third parties are permitted to submit to the administrator offers relating to the maintenance of the business activity through the partial or complete sale of the business. However such proposals can only be implemented once the company has been placed into liquidation.[115]

Arguably, this could be one of the primary reasons why judicial rescue has been described as the ante-chamber to liquidation.[116] In other words, where a rescue plan involves a proposal to sell the company, for instance by means of a take-over bid, and the court is satisfied that the debtor is incapable of reorganising the ailing company, it may consider such sale and order the conversion of the judicial reorganisation

---

[114] Article L 631-12, inserted by Article 92, Law of 2005.

[115] Article L 631-13, inserted by Article 92, Law of 2005, See Chapter II, Title IV of the Commercial Code, which is concerned with the sale of the Business.

[116] P Omar, note 44 above, at p. 143. See also P Omar, "French Insolvency Law: The 2004 Project and Reform Perspectives" note 1above, at p. 71.

proceedings into judicial liquidation in order for the sale to take effect. Insolvency practitioners have contended that this provision has an adverse effect on the sale of a company, as it may prove difficult to obtain a good price.[117] Accordingly, such a sale could have a detrimental effect on the interests of creditors, who would obtain better realisations through the safeguard procedure.

Taking into account the potentially detrimental effect that the sale of a traumatised business may have on the interests of creditors during the liquidation procedure, it is argued that the impact of the judicial rescue procedure is significantly restricted and that the safeguard procedure is still to be promoted. It could be said that, notwithstanding the fact that the judicial rescue procedure has been maintained by the Law of 2005, it only serves a very limited purpose. In other words, this procedure is now designed to assist a) those who have missed the opportunity to take advantage of the safeguard procedure; b) in situations where rescue by means of a 'debtor in possession' scheme seems impracticable or c) in instances, where a straightforward liquidation would not offer the opportunity to develop an elaborated sale-type plan, which would provide better realisations being distributed to the creditors.[118] It appears that the ultimate intention of the legislature is to replace *redressement judiciaire*, either by the safeguard procedure or liquidation, where attempts to achieve rescue seem futile.[119]

---

[117] R Jadot, & L D'Orgeval, note 64 above, at p. 17.

[118] P Omar, note 44 above, at p. 143.

[119] C Dupoux & D Marks, note 6 above, at p. 76.

However, it is noteworthy that, similar to safeguard proceedings, creditors also have enhanced rights in the adoption of a continuation plan during judicial rescue proceedings. In particular, the judicial reorganisation procedure mirrors the provisions of the safeguard procedure, as it provides for the creation of two creditors' committees, which have the power to approve a draft continuation plan.[120] Nevertheless, one could argue that the influence of creditors' remains limited in judicial rescue proceedings, as the two creditors' committees may only approve the plan put forward by the debtor and cannot themselves make proposals for the restructuring of the company.[121] In addition, the participation of creditors in judicial reorganisation is enhanced through by means of their power to appoint controllers (*Contrôleurs*), whose role is to assist the administrator in relation to the operation of the two committees and to ensure that the best interests of creditors are protected.[122]

The judicial rescue procedure is designed to ensure the continuation of an ailing business and the subsequent repayment of the company's creditors. Therefore, as mentioned above, a plan to save the company by means of a partial or complete sale will only be implemented in accordance with the provisions of the liquidation procedure.[123] One of the most important questions that arises in relation to proposals by competing third parties, who are willing to take-over the ailing business, is

---

[120] (L 631-1) Article 88, Law of 2005 states that two creditors' committees must be formatted, in compliance with the provisions of Articles L 626-29 and L 626-30 of the Commercial Code.

[121] See C Dupoux & D Marks, note 51 above, at p. 211.

[122] Ibid, at p. 212.

[123] See Chapter II, Title IV of the Commercial Code.

undoubtedly in respect of the rights of employees. It is significant to note that, under the judicial reorganisation procedure, the court may authorise the administrator to carry out accelerated redundancies, where it is satisfied that for an economic reason they present an urgent need and are inevitable and indispensible, in order for the business to survive.[124] Nevertheless, a decisive factor that may influence the decision of the court in authorising the sale of the business is not primarily the sale-price, but rather the level of and perspectives for employment justified by the sale.[125] In other words, if there are two competing offers at a satisfactory price, the court may authorise the one, which provides for the greatest number of employees to be taken on by the buyer.[126]

A key difference between '*redressment judiciaire*'and '*sauvegarde*' is that the simplified procedure which involves accelerated redundancies is only available under the judicial rescue procedure. It has been said that it is regrettable that the safeguard procedure does not benefit from the simplifications applicable in judicial rescue. However, the legislature feared that there would be an abuse of the safeguard procedure, whereby a company, with a view to solely implement a redundancy plan, would request to take advantage of the simplified procedures for redundancies, hence negating the protection afforded to employees' rights.[127]

---

[124] Article L 631-17, inserted by Article 92, Law of 2005.

[125] Article 642-2(II) (5).

[126] This finding is based on anecdotal evidence, gathered through a series of research interviews.

[127] See note 121 above, at p. 210.

Evaluation of the reforms – Conclusion

It may be noted from the above that the French law is heavily geared towards the preservation of ailing businesses, as a main source of employment and economic welfare in general. The law, importantly, encourages companies to adopt measures which enable them to detect any difficulties at an early stage, so that their treatment and recovery can be a possibility. It could be argued that, since the 1994 legislative reforms, a strong emphasis has been placed on corporate rescue, as the 1994 Law introduced significant changes to the French laws dealing with companies in financial distress. The primary objective of this regime was to actively promote corporate rescue by means of reinforcing the already sophisticated 'pre-insolvency stage' procedures and by simplifying the judicial mechanisms. Moreover, the 1994 law introduced the so much-wanted improvements to the status of creditors. Although creditors' interests were arguably still subordinate to the ideal of corporate rescue, an attempt was made to reduce the sacrifices imposed on them and achieve a balance of interests.

Moreover, the Law of 2005 made many modifications to all insolvency procedures and some incidental rules. The Law of 2005 drew further attention to the ideal of corporate rescue in France, primarily by means of introducing the key *'sauvegarde'* procedure, which was effectively applied in the *Eurotunnel* case. The *Eurotunnel* case highlighted certain flaws of the '*sauvegarde*' procedure. However, it could be argued that these have been effectively addressed by the 2009 reforms, which came in force on 15th February 2009. Moreover, it could be said that the new law of 2005, in line with France's legal tradition, promotes entrepreneurship and the preservation of employment, but also strengthens the position of creditors drastically, as it makes provision for two creditors' committees which are able to oversee rescue proceedings.

Although the Law of 2005 is relatively recent, it is important to note that it has undergone drastic amendments. It has been argued that the increasing numbers of insolvency cases in France in 2008 explain the breadth of amendments that the 2005 Law has undergone.[128] It is interesting to note that the Law of 2005 and its subsequent amendments demonstrate clearly the continued influence of the United States Chapter 11. In fact, it has been argued that the continued fascination in France over the efficiency of Chapter 11 is peculiar, when taking into consideration that even American commentators have expressed their doubts about it.[129] Finally, following the legislator's methodical efforts to promote the prevention of corporate failure, it could be argued, in light of the practical application of the law, that only time will tell whether or not the 2005, together with the 2009, reforms were fruitful. However, one should note the words of Lyon-Caen, who interestingly argues that it is rather naïve to expect that corporate failures will be eliminated simply by means of law.[130] These failures have

[128] See P Omar, "French Insolvency Reforms Aim to Help Businesses" (2008-2009) Eurofenix, (Issue 34) (Winter) at p. 28, where it is stated that in the third quarter of 2008 there was an average 17% increase in the number of insolvencies.

[129] P Omar, "French Insolvency Law: Remodeling the Reforms of 2005" (2009) 6 ICCLR 214-219, at p. 219.

[130] A Lyon-Caen, *"Les Orientations Generales De La Reforme"*: Ann. Univ. Toulouse, Vol. 34, p. 1.

their roots in economic, political and social phenomena, which are beyond the control of law.[131]

In conclusion, following the analysis in Chapter IV, one could argue that France has concluded the quest for an effective and efficient insolvency law regime. Chapter IV has provided an analysis of the insolvency laws of France and offered an account of the corporate rescue mechanisms, which facilitate the re-organisation of ailing companies within this jurisdiction. The next chapter, Chapter V, moves on to the third of the jurisdictions to be considered in this thesis, namely Greece. It takes a similar approach to Chapter IV, in providing an exposition and analysis of the insolvency law regime and in considering the relatively recent reforms to what were old and out-of-date corporate rescue tools in that jurisdiction.

[131] See M Campana, note 8 above, at p. 47.

Chapter V: An assessment of the corporate rescue procedures under the insolvency law system of Greece

Introduction

As seen earlier in Chapters III and IV, because the European Union lacks a uniform insolvency law regime, Member States are required to provide within their territory a legal framework that makes provision for re-organisation tools, so as to give effect to the facilitation of insolvency proceedings. As discussed in Chapters III and IV, both the United Kingdom and France in their quest for an efficient insolvency regime introduced significant reforms to their laws, so as to promote the rescue of financially distressed companies. Subsequently, Chapter V is aimed at providing an analysis of the insolvency law regime of the last of the jurisdictions to be considered in the thesis, namely Greece. Following the example set by other European jurisdictions, such as France and the United Kingdom, Greece sought to reform its insolvency law system in 2007, in order to offer a genuine chance of survival to problematic companies. The aim Chapter V is to offer an analysis of the insolvency laws of Greece and, particularly, the corporate rescue laws of this jurisdiction. An attempt to evaluate the recent reforms will also be made in this chapter. In order to understand the significance of the changes introduced to the insolvency law regime of Greece by means of the 2007 reforms, it is necessary to provide an analysis of the previous rather old-fashioned regime. Hence, Chapter V will initially look at the historical background of the laws of Greece and will then focus on the current regime and assess its impact on the Greek economy.

It is noteworthy that Greece lacks a sophisticated corporate rescue regime. Rather, it could be argued that the Law of 2007 constitutes a serious effort to promote the concept of corporate restructuring in this jurisdiction, which was previously geared towards the liquidation of traumatised companies. Because of the limited attention that this topic attracted in Greece, the thesis places less emphasis on this jurisdiction, as arguably its impact on the European economy, as opposed to the regime of France and the United Kingdom, is rather limited, if not non-existent. It is significant to note that, historically, the Greek insolvency laws resembled those of France. However, it is interesting to consider that, as opposed to France, where sophisticated provisions effectively assist in the re-organisation of troubled companies, in Greece, similar provisions are not equally successful. It is argued that since, the laws of Greece have traditionally resembled those of France, it is primarily social, political and economic factors that render the corporate rescue regime of Greece ineffective and not the substance of its insolvency laws.

In the summer of 2007, the new Insolvency Law[1] was introduced, with the aim of updating a rather complicated and outdated system, which made little provision for the prevention of corporate trauma and eventual failure.[2] The new law introduced

[1] Law 3588/2007 enacted on 10-07-2007.

[2] The regime preceding the Law of 2007 was arguably geared towards the liquidation of distressed companies, as only large companies (such as the national airline and large football clubs), the collapse of which would significantly affect the national economy of Greece, were to be rescued.

radical changes to the Greek corporate rescue philosophy, as it, *inter alia*, provides that its primary aim is to prioritise the rescue of ailing companies and to offer a second chance to the ill-fated debtor. In addition, the recent reforms make provision for a new restructuring procedure under which an agreement is to be reached between the debtor company and its creditors. Moreover, the new law makes special provision for small and medium-sized traumatised businesses. In the event that attempts to rehabilitate such businesses prove futile, the new law introduces a simplified liquidation procedure, which is intended to ensure quick access to liquidation proceedings. Prior to the recent reforms, corporate rescue provisions did not have a codified form, but various dispersed rejuvenation provisions existed, which dealt with the avoidance of corporate failure and distress.[3] The new law is a welcome development as it importantly replaces all these dispersed laws with a unified Insolvency Code.

Historical Background

The Greek rejuvenation law, which had its roots in French Commercial Code of 1807,[4] went through various stages. In brief, the Greek rejuvenation law went through the following phases: a) the 'on a case-to-case basis' legislation, (Law 2378/40, LD 2577/53, LD 3023/54), which was effectively an *ad hoc* intervention of the legislature

[3] In brief these provisions were a) LD 3562/56 on 'placing of companies limited by shares under the administration and management of creditors and placing of these under special winding-up'; b) The compulsory rejuvenation of L1386/83 on '*Organization for economic reconstruction of enterprises' (OAE)*, a public limited company under the supervision of the State; and c) Law 1892/90 on 'Modernisation and development and other provisions' (Articles 44, 45, 46 and 46a).

[4] M Patsis, *The Law of Bankruptcy*, (Sakkoulas Publishers, Athens, 1999) at pp. 3-6.

in order to overcome the financial difficulties of a large company, failure of which would have an adverse effect on society as a whole (e.g. big railway companies); b) LD 3562/56 on ‘placing of companies limited by shares under the administration and management of creditors and placing under special winding-up’; c) the compulsory rejuvenation of Law 1386/83 on ‘organization for economic reconstruction of enterprises’; and d) Law 1892/90 on ‘modernization and development’.[5]

At this stage it is essential to provide an analysis of the provisions preceding the recent Law 3588/2007, in order to gain a good understanding of how the corporate rescue culture of Greece has developed.

LD 3562/56 on ‘placing of companies limited by shares under the administration and management of creditors and placing of these under special winding-up’

Law LD 3562/56 [6] made provision for the compulsory three-stage re-organisation of a company in cessation of payments, in order to achieve the permanent repayment of creditors.[7] The law provided that the management of the company would either temporarily or permanently be transferred to a court appointed manager, clearly

[5] Philippe & Partners and Deloitte & Touche, *“Bankruptcy and A Fresh Start: Stigma on Failure And Legal Consequences Of Bankruptcy”*, (Brussels July 2002) p. 1-2. Available at: http://europa.eu.int/comm/enterprise/entrepreneurship/support_measures/failure_bankruptcy/stigma_study/report_gree.pdf last accessed on 20th October 2010.

[6] As amended by LD 1159/72.

[7] By virtue of RD 22/28.12.1956 the provisions of LD 3562/56 were also extended to the general partnerships, as well as to the limited partnerships.

indicating the lack of trust towards the debtor. It could be argued that this law demonstrates how in Greece, similarly as in other jurisdictions, such as the United Kingdom, the debtor was treated with distrust and suspicion and consequently was deprived of the right to manage and safeguard the continuity of his business.[8]

The first stage of this procedure could be characterised as preparatory, as it involved the re-affirmation of the company's debts and the temporary continuation of trading for the company. Secondly, a petition, which was approved by a special committee, was submitted by the majority of the company's creditors to the bankruptcy court.[9] The court would consequently place the company under the administration and management of a 'provisional manager'.[10]

It should be noted that the petition not only contained a request for the placing of the company under provisional management but also made provision for a further stage, which involved either the placement of the company under the permanent administration and management of the creditors or under special liquidation.[11] If the company was subsequently placed under the administration and management of the creditors, personal titles of the company, which attribute property rights, would be

[8] See L Georgakopoulos, *A guide in Commercial Law* Vol.3. "Corporate Insolvency and Rescue" (1997) at p. 193.

[9] Article 2 par. 2 of LD 3562/56.

[10] Upon the creditors' application to the court the right to manage the company is ceased and all personal claims are stopped.

[11] See note 3 above, p. 18.

issued to the creditors equal to the amount of their credit.[12] The company remained under the administration and management of the creditors for three years, after the passage of which, the company was either dissolved or placed under a special liquidation.

Despite its theoretical perfection, this law presented a complex and inflexible mechanism of application. It could be argued that the significant drawback of this law was primarily the uncertainty, which stemmed from i) the need to have the petition approved by the majority of the company's creditors, and ii) the existence of an unnecessary preparatory stage, which only prolonged an already uncertain process and added to the costs of the procedure.[13]

The compulsory rejuvenation of L1386/83 on '*Organization for economic reconstruction of enterprises'* (OAE)

Law L1386/83[14] effectively involved the placement of ailing companies under the state's control.[15] The state's interference by means of Law 1386/83 was mainly for

[12] The management and administration of the company returns to the shareholders, once the personal titles have been paid for.

[13] L Georgakopoulos, note 8 above.

[14] Under Article 47 of L1890/92, the provisions of L1386/83 only apply to companies, which have already been placed under L1386/83 and not for new cases.

[15] Although the constitutionality of this law was questioned, it was held to be justified since its purpose was to protect the public interest.

social reasons and in the public interest, since the aim of this Law was to contribute to the country’s economic and social development.

The provisions of this law would apply to businesses a) which had suspended or ceased their activities for financial reasons; b) which were insolvent or had been placed under the management of their creditors or under provisional management or which have gone into liquidation; c) which concerned the country's defence or were of vital importance for the development of national resources or whose main object was the provision of public services and which were manifestly unable to meet their liabilities; d) whose total liabilities were five times greater than the sum of their capital and apparent reserves and which were manifestly unable to meet their liabilities; or e) which requested application of the provisions to them.[16]

An ailing company could be made subject to the provisions of Law 1386/83 upon a request either by the company itself or its creditors.[17] Subsequently, an order would be issued by the Minister of Finance (after being consulted by an advisory committee),[18] providing for the taking-over of the company’s management by the OAE.[19] In an attempt to safeguard the viability of a traumatised business, an agreement would be concluded between the OAE, the creditors and the debtor for the rehabilitation

[16] Article 5.

[17] Article 6 para. 1 a) – (e).

[18] Article 6.

[19] Article 8, para. 1.

of the company.[20] Alternatively, the Minister of Finance could order the satisfaction of the business's obligations in such a way, so as to ensure its viability either (a) by a compulsory increase in the capital[21] by means of contributions of new assets or by the conversion of any existing debts into shares or (b) by restructuring the company's existing obligations.[22] Finally, in the event that the abovementioned procedures proved unsuccessful, it was at the discretion of the Minister of Finance to order for the special liquidation of the company.[23]

Law 1386/83 was been heavily criticised for failing to achieve its original goal, namely the promotion of the economic and social development of the country. In other words, although the OAE[24] was charged with the task of rehabilitating companies in financial distress and restoring them to profitability, it has instead exaggerated their debts by means of granting loans.[25]

Moreover, the constitutional basis of Law 1386/83 was put into question on the grounds of infringing individual economic freedoms under Article 7 of the Constitution**.** However, although heavily criticised, the Council of State held the limitations imposed

[20] L1386/83, Article 8, para. 5.

[21] Article 8, para. 8.

[22] Article 8, paras 5 & 6.

[23] L1386/83, Article 9.

[24] Section 2(3) of Law 1386/83.

[25] N Rokas, *Principles of Insolvency Law*, (Sakkoulas Publications, Athens, 1997) p.76, see also L. Kotsiris, & R Hatzinikolaou-Aggelidou, *The Law of Rejuvenation And Liquidation Of Problematic Companies*, (Sakkoulas Publications, Athens, 1998) at p. 6.

by L1386/83 constitutional and hence justified on the grounds of the public interest. However, Law 1386/83 seemed to be incompatible with the Second Council Directive (77/91/EEC) of 13 December 1976 (concerning the formation of public limited companies and the maintenance and alteration of their capital) and more particularly with Article 25 of the Directive, according to which 'any increase in capital must be decided upon by the general meeting'. [26]

It is interesting to note that none of the forty-five companies, which were placed under the management of the OAE, managed to overcome their financial difficulties, and all eventually entered into liquidation. [27] Consequently, the OAE ceased its operations and was placed in liquidation in 2002, following its inability to promote corporate rescue in Greece.[28]

Law 1892/90 on 'Modernization and development and other provisions' (Articles 44, 45, 46, 46a)

At first glance it could be argued that the aim of this law was to introduce a rescue procedure, which would primarily ensure the continuation of the operations of an ailing, but nevertheless viable company. It could be said that, as opposed to its

---

[26] Ibid, at pp. 19-21.

[27] N Rokas, note 25 above, at p. 76. See also P Mazis, *Special Liquidation Of Problematic Companies*, (Sakkoulas Publications, Athens, 1998) at pp. 36-37.

[28] L.2741/1999, Articles 12-20.

predecessors, Law 1890/90 shifted the emphasis of re-organisation, from being primarily geared towards the protection of the creditors' interests to rescue, which recognised the importance of allowing the debtor to remain in possession and control of his company. In particular, Article 44 made provision for the conclusion of an Agreement between the company and the creditors, aiming at the co-ordination and settlement of the debts of the company, and consequently its rescue. Importantly, the procedure would be initiated by the debtor. In addition, Article 45 provided that the implementation of an Agreement under Article 44 could be facilitated by means of the appointment of a trustee. Nevertheless, in the event that rescue proved unfeasible, Articles 46 and 46(a) made provision for a special winding-up procedure. The procedure of the special winding-up of the company functioned in two different ways. Firstly, Article 46 provided for the sale of the company's assets by means of a compulsory auction. Secondly, Article 46a made provision for the compulsory sale of the company as a whole by a liquidator under the procedure of a public tender to be awarded to the higher bidder.[29]

At this point it is essential to provide a brief analysis of the corporate regime under the law of 1892/90.

[29] See Kotsiris & Hatzinikolaou-Aggelidou, note 25 above, at p. 34.

Article 44 of Law 1892/90

Article 44 made provision for the conclusion of an Agreement between the company and the creditors, aiming at the reduction of the company's debts and consequently at the company's rescue. In order for a company to benefit from the provisions of Article 44, it was essential that it was in cessation of payments.[30] The Agreement accomplished between the company and its creditors had an obligatory character.[31] In essence, the Agreement was an "all-embracing" commitment, which bound all the creditors, for instance, preferential or not, parties to the Agreement or not.[32] In order for an Agreement to be reached under Article 44, it was required that the contracting creditors represented at least 60% of all claims as these appeared in the records and the balance sheet of the last financial year before the Agreement and that at least 40% of the creditors secured by mortgage, lien or pledge were included in the above percentage.[33]

Law 1892/1992 pursued the rescue and the continuance of the operation of ailing companies, which were still viable, in order to safeguard the employment and the national economy.[34] The law facilitated the conclusion of Agreements aimed at the rescue and re-organisation of financially distressed companies by means of the

[30]L1892/90 Article 44 para.1, as referred in L1386/83, Article 5 para. 1(a) (b) (c) and (d).

[31] The Agreement is enforceable only when it has been ratified by the Court of Appeal.

[32] Th. Liakopoulos *The Law of Rejuvenation And Liquidation Of Companies*, (Sakkoulas Publications, Athens, 1994) at pp. 50-51.

[33] Philippe & Partners and Deloitte & Touche, *"Bankruptcy And A Fresh Start: Stigma On Failure And Legal Consequences Of Bankruptcy"*, (Brussels July 2002) at p. 9.

[34] Ibid.

favourable terms stated under Article 44(3).[35] Article 44(3) stated, *inter alia*, that companies would benefit from a series of tax and charge exemptions. For instance, with regards to tax law issues, Article 44 (3) stated that Agreements concluded between the company and its creditor would be exempted of any tax, duty, tariff, charge imposed in favour of the State or third parties.[36]

Article 45 of Law 1892/90

Appointment of the Trustee

The implementation of an Agreement under Article 44 could be facilitated by means of Article 45[37], which would set the company under a trusteeship. Pursuant to Article 45, creditors representing at least 51% of the debts could petition the Court of Appeal to appoint a trustee in order to promote the conclusion of an Article 44 Agreement.[38] The nomination of the Trustee was merely a short-term arrangement, which did not alter the conditions of the conclusion of the Agreement of Article 44 and did not change the legal character and content of the Agreement.[39]

[35] See Th., Liakopoulos, note 32 above, at p. 52.

[36] Note 33 above, at pp. 10-11.

[37] Article 45 was added to Law 1892/1990 by means of Article 43 of Law 1947/1991.

[38] Article 45 (1).

[39] See Kotsiris & Hatzinikolaou-Aggelidou, note 25 above, at p. 74.

According to Article 45, upon the publication of the court's decision nominating the trustee, all personal prosecutions and interest bearing of the claims were suspended.[40] Upon appointment, the Trustee would not take over the control of the company, but rather would be working together with the debtor. The Trustee's primary concern was to act as a mediator between the company and its creditors in order to accomplish an Agreement under Article 44.[41] The Trustee was called to examine and evaluate the condition of the company and to, objectively, make proposals which would be beneficial for both parties.[42] It is interesting to note that Law 1892/1990 did not make provision for certain skills or knowledge that the Trustee should possess. In addition, in the event that an individual was nominated by at least 51% of the contracting creditors to act as a Trustee, the Court was obliged to appoint that person and would not have the power to examine his suitability for the role.[43]

As mentioned above, the Trustee would not take over the control of the company but he would instead "co-exist" with the management board and the general meeting of the company. Nevertheless, Article 45 imposed certain limitations on the exercise of powers by the company's management board. According to Article 45(3), the board of directors was obliged to obtain the consent of the Trustee prior to any sale of the company's property. In essence, the purpose of this provision was to maintain the company's assets, so as to compensate the creditors whose personal claims against the

[40] Article 45 (6).

[41] Article 45 (4).

[42] Article 45(5) enables the Trustee to have full access to any financial information that he might need. In addition the directors of the company are under a duty to supply the Trustee with any information that he requires, in order to assist him in reaching an informed decision over the company's financial condition.

[43] See note 39 above, at pp. 95-97.

company have been suspended.[44] In addition, the Trustee was required to consent to any decisions reached by the general meeting to amend the articles of association.

The scope of Law 1892/90 was to ensure the execution of an Article 44 Agreement in a short-time period.[45] Therefore, the law provided that the mediatory tasks of the Trustee should be completed within a period of six months after the publication of the Court's decision for his appointment.[46] However, the Trustee could apply to the Court in order to extend further the negotiation process for a period of no more than nine months.

Where an Agreement would have been fulfilled, the company and its creditors would subsequently petition the Court for its ratification and the trusteeship of the company would be terminated.[47] In addition, the office of the Trustee would be terminated in the event of failure to conclude or execute the terms of the Agreement and accordingly the company would be placed under the winding-up procedure, as was provided by Article 46.[48]

---

[44] Article 45(6).

[45] See note 31 above, at p. 14.

[46] Article 45(4).

[47] The Trustee is not a party to the process of petitioning the Court for ratification.

[48] Article 45(9).

Articles 46 and 46(a) –Special Liquidation (Administration) of the Company

As mentioned earlier, Law 1892/90 provided for a two-stage legal framework aimed at the restructuring and the rescue of financially traumatised enterprises. On the one hand, the first stage involved the creditors of the company being given the opportunity to rescue the company by means of reaching an Agreement under Article 44 and consequently settling the company's debts. On the other hand, the second stage was concerned with the special winding up procedure provided under Articles 46 and 46(a). The procedure of the special winding-up of the company functioned in two different ways. Firstly, Article 46 provided for the sale of the company's assets by means of a compulsory auction. Secondly, Article 46a made provision for the compulsory sale of the company as a whole by a liquidator under the procedure of a public tender to be awarded to the higher bidder.[49]

Article 46

The primary objective of the procedures as stated both under Articles 46[50] and 46(a) was to satisfy the creditors by means of selling the company's property and eventually to rescue it. Article 46 states that a company could be put under special liquidation: a) not only where the creditors believed that it was not feasible to reach or execute an Agreement under Article 44, but also b) after an application was made to the

[49] See note 33 above.

[50] Article 46 amended by Articles 14 of Law 2000/1991 and 60(3) of Law 2324/1995, made provision for a special liquidation and also made reference to Articles 9-20 of Law 1386/83, which in turn made reference to the special liquidation procedure stated under Articles 18-21 of Law 3562/1956.

Court of Appeal by creditors who represented at least 20% of the total of the company's outstanding debts, which should amount to more than to 880,411€.[51]

Article 46a

Moreover, Article 46(a)[52] provided an alternative way of setting a company in financial distress under special liquidation. The following companies could benefit from the regime of Article 46a: a) companies which have suspended or discontinued their operation for financial reasons; b) companies which were in the situation of cessation of payments, while the total of their debts amounted to up to 880,411€; c) companies, which were under liquidation, as long as its operative assets were not yet sold; and d) companies, which were obviously unable to pay their debts.[53]

Article 46(a) provided that the Court of Appeal would order the special liquidation of the company following an application being lodged with it by creditors, who represented at least 51% of the outstanding debts against the company.[54] The creditors who filed the petition should nominate a liquidator, who could either be a Bank, operating legally in Greece, or a subsidiary of such a Bank.[55] The Court,

---

[51] See N Rokas, note 25 above, at p. 78. See also Kotsiris & Hatzinikolaou- Aggelidou, note 25 above, at pp. 115-116.

[52] Added to Law 1892/1990 by Article 14 of Law 2000/91 and amended by Law 2224/94 and Law 2302/95.

[53] Article 46a (1). See Th. Liakopoulos, note 32 above, at pp.55-56; see also n. 33 above, at p.9.

[54] N Rokas, note 25 above, at p. 78.

[55] The Bank was also required to produce a declaration of acceptance to the Court, see: Athens Court of Appeal 1083/1993; and Athens Court of Appeal 3089/1993.

subsequently, would order the appointment of a special liquidator, who would act as a representative of the company,[56] and who would be under a duty to prepare a detailed evaluation report of the company's assets and to sell the company as a whole under the procedure of a public tender.[57]

Following the announcement of the appointment of the special liquidator, all personal claims against the company were stopped and no petition for the winding up of the company was permitted to proceed.[58]

The strict procedure imposed by Article 46(a) ensured transparency[59] and required that the special liquidator carry out his operations within a short period of time. Accordingly, the special liquidator had twenty days, from the day of the announcement that the company was set under special liquidation, to publish an invitation to potential buyers in order to manifest their interest in buying the company.[60] In addition, the special liquidator was required within thirty days from the day of his appointment, to make out an Offering Memorandum, which should set out the terms of the sale and

[56] As from the next day of the publication of the Court's decision the company's bodies ceased to excurse their powers.

[57] Article 46a (2).

[58] Article 46a (4).

[59] See note 25 above, Kotsiris & Hatzinikolaou-Aggelidou, at p. 174.

[60] Interested buyers were called to declare, in writing, their interest within twenty days. However, this declaration was not binding upon them. See Th. Liakopoulos, note 32 above, at p. 56.

provide adequate information with regard to the company's operations and submit it to any interested buyers.[61]

After the opening of the offers, the special liquidator should prepare a report of evaluation of the offers together with a proposal of acceptance of the best bidder, which in turn he should submit to the creditors for their approval. The best bidder did not necessarily need to be the one offering the higher price. Instead, the selection process involves considering amongst others the solvency and the credibility of the buyer, his commercial experience, and his ability to maintain the existing employment contract of the company in the future.[62] An offer, which provided for the maintaining of the personnel of the company, was regarded in a positive way.[63]

Once the creditors who represented 51% of the company's outstanding claims approved the report and the bidder, the special liquidator would enter into a 'contract of transfer' with the bidder before a notary public. The creditors were required to submit in writing their remarks, or to ask for clarifications, or ameliorations of the offers. In the event that creditors failed to approve the report within a month, their approval would be presumed and the sale of the company as a whole would proceed[64]. Nevertheless, creditors had the right to declare to the special liquidator that an offer was not

[61] See note 23 above, at p. 165. Article 46(a)(4) as amended by Article 2(2) of Law 2702/1999,enabled potential investors to acquire information, provided that they confirm in writing that the information has been made available to them strictly within a confidential context.

[62] See Kotsiris & Hatzinikolaou-Aggelidou, note 23 above, at p. 166.

[63] See note 33 above, at p. 11.

[64] Article 46(a) (7).

considered to be profitable. In that case, the tender would be repeated in fifteen days and, if the new tender also failed, the company would consequently be sold partially by auction. Additionally, it was possible for a third tender to take place, providing for the sale of the autonomous operative units of the company.[65]

Furthermore, Article 46a facilitated the sale of a company as a whole, as it made provision for a range of tax exemptions. In particular, Article 46a provided that the contract of transfer as well as any other relevant transfer, sale, action and deeds performed for the fulfillment the above transfer were exempted of any tax, duty, tariff, charge imposed in the favor of the State or third parties. The Buyer was also exempted from the tax imposed on real estate.[66]

Article 46(a) not only reassured the interests of creditors, who had a leading role to play in the procedure, but also sought to promote the rescue of the company by ensuring the continuance of its operations through its sale to a third party.[67] However, it is noteworthy that Article 46 did not make provision for a restructuring plan.[68] To this effect, it could be argued that the absence of such provision inhibited the potential

---

[65]Article 46(a) (14). See also Liakopoulos, note 32 above, at p. 57.

[66] Article 46(a) (13).

[67] See N Rokas, note 25 above, at p. 79.

[68] However, Law 2601/1998, which modified Law 1892/1990, offered several financial incentives to both healthy and problematic enterprises so as to proceed to investment planning in Greece. In particular, pursuant to article 10 par. 2 of Law 2601/1998 companies that were faced with serious financial problems could submit a complete restructuring Business Plan so as to achieve their technological, administrative, organizational and business reforming and modernization. See E Anagnostou, *Law 2601/1998 on 'Financial aid to private investments for the economic and regional state development'* (Ipirotiki Publications, 1998-1999) at pp. 257-261.

rescue of an ailing company and that the provisions of Article 46 solely resulted in the company's short-term survival, rather than its long-term rationalised improvement.

Evaluation of Law 1892/90

However, many commentators treated Law 1892/90 with suspicion, as, beyond its attractive name, it became apparent that it was part of a denationalization plan. Therefore, one of the primary aspirations of Law 1892/90 was to relieve the State from ownership of a series of problematic companies, which became to own by means of the provisions of Law 1386/83.[69] Moreover, it could be argued that the provisions of Article 44 were attractive to failing businesses because of its extensive tax relief provisions, arguably to the detriment of public creditors, such as the National Insurance Fund. Nevertheless, it is significant to note that, although the law of 1892/90 enabled the successful rescue of several football clubs, other factors, primarily social and political, were taken into account.[70]

In addition, following the recent revelation of financial scandals, which involved several members of the judiciary and insolvency practitioners ('*paradikastiko kuklwma'*), it has been contended that judges have been bribed in order to ensure that certain buyers were treated preferentially in the auction procedures.

---

[69] See Kotsiris & Hatzinikolaou-Aggelidou, note 25 above, at p. 7. See also N Rokas, note 25 above, at p. 80.

[70] It is interesting to note that the financial difficulties witnessed by certain clubs, such as Panaxaiki and Panionios, prompted the intervention of the Minister of Economy, who introduced special laws specifically addressed to these particular clubs.

The metamorphosis of the Greek insolvency law

As discussed above, under the previous much criticised and outdated regime of Law 1892/90, rehabilitation of financially traumatised businesses was only theoretically possible, through a settlement of debts between the debtor company and its creditors. In particular, Article 44 made provision for the voluntary re-organisation of the business by means of a direct creditors' agreement, while Article 45 provided for the facilitation of such agreement by means of a court-appointed trustee.

However, Law 3588/2007 has introduced radical changes to the corporate rescue culture of Greece. The new Insolvency Law not only provides for quick and easy access to effective rehabilitation procedures but it is primarily designed to ensure the rescue of viable distressed companies and accordingly the preservation of employment. In particular, Article 1 of the new Law states that 'the purpose of insolvency proceedings is the collective repayment of the creditors, which can be achieved by means of a sale of the debtor company's assets, or preferably any other way, such as a reorganisation plan, which aims to the preservation of the company'. It should be noted that the new Insolvency Code draws a distinction between solvent and insolvent companies. In particular, it is stated that a company becomes insolvent, when it has ceased payments and, its indebtedness is such, that it is unable to meet its commercial obligations as they fall due. The prediction of a prospective inability of the debtor to satisfy a later occurring debt may also suffice, however, only in cases of voluntary petitions.[71]

The new Law reshapes the philosophy of the insolvency laws of Greece, as it introduces two clear-cut procedures, namely the pre-insolvency procedure of conciliation (‘sindiallagi’) and the judicial reorganisation procedure (‘anadiorganosi’). It could be argued that the two new rescue mechanisms, which are aimed at conferring a second chance to the unlucky *bona fide* debtor and, ultimately, to promote the concept of corporate rescue, bear great similarities to the French rescue procedures. In addition, the recent reforms make provision for an easier, more transparent and quicker liquidation procedure (ptoheysi), which under the previous law could last for up to five years.[72] It is noteworthy that the new law draws a distinction between small and large scale insolvencies. In particular, it provides for the ‘special treatment’, by means of a simplified liquidation procedure, of small and medium scale companies, the assets of which do not exceed the value of 100,000 Euros. Moreover, under the new regime, an important distinction is drawn between the *bona fide* and the fraudulent debtor. The new law significantly abolishes a series of outdated and arguably draconian measures that were imposed in the event of non-fraudulent insolvency, such as the detention of the debtor and the deprivation of his political rights.[73]

---

[71] See C Klissouras & Y Sakkas, “A practical insight to cross-border Corporate Recovery & Insolvency: Greece” (2008) The International Comparative Guide to Corporate recovery & Insolvency, available at http://www.iclg.co.uk/khadmin/Publications/pdf/2008.pdf last accessed on 21st October 2010.

[72] See Y Sakkas, “Coming to Terms with Financial Catastrophe: The Greek Insolvency Code” (2010) Eurofenix, summer at pp. 28-30.

[73] It should be noted that, similarly to France, where formal proceedings have been initiated in respect of the company’s insolvency, deprivation of the civil rights of any parties involved in the management of the company may be imposed as a sanction.

Conciliation Procedure

Similarly to the French legal system, the new law makes provision for a pre-insolvency procedure, which is primarily designed to rehabilitate the traumatised business and also preserve employment. In particular, Article 99, which replaces Article 44 of Law 1892/90, introduces a novel type of 'debtor in possession' procedure, namely 'conciliation', which allows debtors to overcome the financial difficulties experienced by their business, whilst they remain in control of their company. It could be argued that Article 99 contains a significant incentive for debtors to react at an early stage, as it confers a right upon them to remain responsible for the management of their company during the re-organisation period.

The precondition for access to the conciliation procedure is that the debtor company is experiencing financial difficulties, either present or foreseeable, but importantly is not in cessation of payments.[74] The debtor may apply to the court for the initiation of the conciliation procedure. The debtor's application must contain detailed information in relation to the social importance of the company, from an employment perspective. In addition, the debtor is required to submit information with regard to the financial situation of his company, together with a plan, which is aimed at the extrication of the company from its financial crisis.[75]

[74] Article 99(1).

[75] Article 99(2).

The Role of the Court

The Greek conciliation, similar to its French equivalent, is a largely court-supervised procedure. The court has extensive powers in considering the information submitted by the debtor and, where necessary, it may choose to appoint an expert, in order to ascertain the real financial state of the applicant company or whether the company's financial difficulties are the product of fraudulent behaviour.[76] It is important at this point to stress that the new law draws a sharp distinction between an honest unsuccessful debtor and a fraudulent one. Under the new regime, the honest debtor is treated sympathetically and is given a second chance to undertake business activity.

Where the court is satisfied that a viable plan exists, which will restore the company to financial prosperity, it will order the initiation of the conciliation procedure and will also appoint a conciliator. The conciliator is entrusted with the task of achieving an agreement between the debtor and the creditors[77] in order to overcome the company's financial difficulties and safeguard its survival. The conciliator is required to achieve an agreement within a period of two months, which may be extended, upon his application, for one more month.[78] This requirement is significant, as it demonstrates the intention of the new law, namely to ensure quick and effective rehabilitation of ailing companies.

---

[76] Article 99(3).

[77] Article 101 (1). This must include creditors, who represent the majority of claims against the debtor.

[78] Article 100 (1).

The conciliation procedure is a newly introduced rescue mechanism for a country that arguably lacks a sophisticated rescue culture. A fear is expressed that the application of this procedure could merely remain theoretical, as taking steps to avert a crisis at an early stage is not part of the Greek rescue philosophy. In addition, an interesting comparison could be drawn between the Greek conciliation procedure and its French equivalent. In France the conciliation procedure is commonly combined with the 'ad hoc mandate' mechanism. In this way the negotiation process is not oppressed by time limitations. Instead, where negotiations have reached a mature point, it is possible to convert the proceedings to conciliation, where an agreement may be concluded within a period of four months. It is noteworthy that, as opposed to the law in France, the new Greek law does not make provision for a procedure similar to the 'ad hoc mandate'. Therefore, it could be argued that two or even three months is a rather limited time for the conciliator to restore the business to prosperity.

The ratification of the agreement

The involvement of the court is significantly enhanced during the conciliation procedure, as it is required to ratify the agreement reached between the debtor and the creditors. The ratification of the agreement must take place within ten days from the time that the agreement was reached.[79] However, it is important to note that the court is afforded discretionary powers and it may choose not to validate an agreement, where it is satisfied that: a) the company is in cessation of payments; b) the terms of the agreement do not safeguard the continuation of trading for the company; c) the interests

[79] Article 103(1).

of dissenting creditors are prejudiced; or d) the duration of the settlement stipulated by the agreement exceeds the period of two years.[80]

Upon ratification of the agreement by the court, the conciliation procedure comes to an end[81]. During the time that the agreement is effective, the debtor receives a series of benefits, for instance, any claims against the debtor are stayed.[82] Additionally, any *restrictive measures* (injunctions) are not permitted, unless they are aimed at preventing the transfer or removal of the company's intangible assets.[83] Furthermore, for a period of six months, starting with the date of the publication of the agreement, collective claims for the compulsory winding up of the company are prohibited.[84] It should be noted that the agreement is binding upon the debtor and the consenting creditors only.[85]

Ending of the Agreement

The conciliation agreement will automatically come to an end after two years.[86] However, it is possible that the agreement is terminated at an earlier stage, for instance,

[80] Article 103 (2).

[81] Article 104(1) (a).

[82] Article 104(1) (b).

[83] Article 104(1) (c).

[84] Article 104(1)(f).

[85] Article 104(1) (g).

[86] Article105 (2).

where the debtor company has became insolvent and entered either liquidation or formal reorganisation proceedings.[87] Furthermore, the court, upon a consenting creditor's application, may order the ending of the agreement, where it is satisfied that its terms have not been properly implemented. Nevertheless, dissenting creditors may apply to the court in order to end the agreement, where it becomes apparent from the circumstances, in particular the financial state and the implemented rescue measures that the viability of the continuation of trading for the company is unfeasible.[88]

It could be argued that a significant disadvantage of the new conciliation procedure is the fact that it quite restrictively allows only two years for the implementation of the conciliation agreement, therefore this could significantly limit the chances of successfully implementing a rescue attempt. Moreover, it could be said that dissenting creditors are afforded enhanced rights in the reorganisation process as they may set aside the agreement, even if that entails their prevailing over the majority of creditors' wishes.[89]

Moreover, the new law provides that creditors who have injected fresh capital in the business during the pre-insolvency stage, with the intention of ensuring the continuation of trading, are given a super-priority in respect of these funds.[90] In other words, these creditors will be paid in priority to creditors who rely on debts acquired

[87] Article 105 (3).

[88] Article 105(1).

[89] See A Patsis & Associates, "Basic Innovations of the New Insolvency Code" 21/2/2008, available at: http://www.capital.gr/law/articles.asp?id=454119 last accessed on 20th October 2010.

[90] Article 105 (4).

prior the opening of the conciliation procedure. This super-priority arguably constitutes a significant incentive for creditors to support a rescue attempt, as they are reassured that they will receive payment before anybody else. .

Conclusion and evaluation of the conciliation procedure

The new conciliation procedure affords a real second chance to the debtor, who is encouraged to take steps at an early stage, in order to prevent a subsequent failure of his business. The debtor is importantly allowed to retain control of his company, while ensuring that it is at a safe distance from any financial difficulties.

Judicial Re-organisation

The new law importantly provides for a uniform system of reorganisation and insolvency, that is to say the new law states that its primary aim, namely the re-payment of the ailing company's creditors, can be achieved either through the continuation of the company's operation by means of a re-organisation plan or with the initiation of insolvency proceedings.[91]

Where attempts to avert a financial crisis at the pre-insolvency stage have proved futile, Law 3588/2007 makes provision for a new procedure, namely judicial re-

[91] Article 1.

organisation, which is designed to ensure that the debtor is given an opportunity, even at a later stage, to enter into a re-organisation phase and consequently avoid liquidation.

In particular, it is possible to rescue an insolvent company by means of a re-organisation plan,[92] which has to be approved by creditors, who represent at least 60% of all claims. Additionally, it is essential that at least 40% of the above-mentioned percentage includes secured and preferential creditors.[93] The debtor is given the right to submit before the court a re-organisation plan at the same time with his request to file for insolvency. In addition, the debtor may submit a reorganisation plan within four months from the moment that the cessation of payments was declared. This time may be extended by the bankruptcy court for a period not exceeding three months, provided that this does not prejudice the interests of creditors and that there is a real prospect that the plan will be accepted by them.[94] It could be argued that the introduction of the re-organisation procedure clearly demonstrates the intention of the legislator to promote the idea of corporate rescue, where rescue attempts at the pre-insolvency stage have failed. The new law arguably encourages the debtor to submit a re-organisation plan even at a later stage and therefore adds an extra ‘bulwark’ against liquidation.

[92] Article 107.

[93] Article 121(1).

[94] Article 108(2)

Content of the Re-organisation Plan

The information contained in the re-organisation plan is divided into three stages, namely an 'informative', a 'descriptive' and a 'development stage'. In particular, the debtor is required to submit a plan which contains important information in relation to the financial situation of the company and describes the origins of the company's distress. In addition, the debtor is required to disclose any information, which would be likely to affect the implementation of the re-organisation plan, its acceptance by the creditors or its ratification by the court.[95] Moreover, the plan must provide a comparison in relation to the re-payment of the creditors' claims between the suggested reorganisation plan and liquidation.[96] Furthermore, the debtor must provide a list of measures that he has adopted, or intends to adopt, in order to ensure the realisation/satisfaction of the suggested rearrangement (diamorfwsi) of creditors' rights/ claims in addition to a list of measures which are concerned with changes in the operational aspects and the unproblematic continuation of the company.[97]

The re-organisation plan is built upon four dogmatic bases, that is to say it provides for: a) a minimum percentage up to which the debt may be reduced; b) the compulsory categorisation of creditors' claims; c) the rights of secured creditors; and d)

[95] Article 109a (a).

[96] Article 109a (b).

[97] Article 109 (b).

the *pari passu* satisfaction of each class of the creditors, who are participants to the plan.[98]

In particular, it is provided that a re-organisation plan may not contain a proposal which provides for the reduction of the debt to less than 20%.[99] It is important to note that, although the re-organisation plan provides for an economic agreement between the debtor company and its creditors to reshuffle the debt, the law imposes a limitation upon the extent to which that debt may be reduced. However, it could be argued that the aim of this provision is to protect Public Creditors, which, under the previous regime, were often the 'victim' of a drastic reduction of the debt owed to them pursuant to Articles 44-46 of Law 1892/1990.[100] For instance, during the reorganisation of certain financially distressed football clubs in the early 2000s, only a fraction of the debt owed to the National Insurance Fund was paid by the football clubs.[101]

In addition, the re-organisation plan must provide for the creation of different classes or sub-classes of creditors with homogenous financial interests. In particular creditors are to be divided into the following classes: a) secured; b) preferential; c)

---

[98] G Kermanidis, "Corporate Rescue Procedures" available at: http://www.ebeth.gr/eb/STH_meeting_bankruptcy.asp last accessed on 20th October, 2010.

[99] Article 110.

[100] Capital Gr, 21/2/2008, available at http://www.capital.gr/law/articles.asp?id=454119 last accessed on 18th October 2010. Nevertheless, it should be noted that pursuant to the provisions of Article 102 it is still possible for public creditors to accept a modification/ reduction of the debt owed to them.

[101] This submission is based on anecdotal evidence.

unsecured; and d) employees.[102] It is important to note that employees constitute a separate 'special' class.[103]

It should be noted that the court's involvement in the re-organisation process is rather enhanced as it is to examine the plan prior to its acceptance by the creditors and within twenty days from its submission.[104] The court has the power to reject the plan, where the correct procedure[105] for drafting the plan has not been followed or where it is too obvious that the creditors' committees will reject the reorganisation plan. In addition, where it is too obvious that the satisfaction of claims of the creditors included in the plan is not feasible, the court will reject the plan.[106] However, where the court is satisfied that the plan should not be rejected, it makes an order for the acceptance of the plan by the creditors.[107]

Furthermore, following the acceptance of the plan by the court, the plan is to be submitted before the creditors at a creditors' meeting in order for them to vote on it.[108] It is crucial to note that, during the reorganisation process, the creditors' committees of

[102] Article 111 (1)(a) (b) (c).

[103] Article 111(2).

[104] Article 114(1).

[105] Specified by Articles 109-113.

[106] It is significant to note that during the examination of the plan by the court and its subsequent ratification or rejection, the court may crucially order a stay of claims, in order to prevent the subtraction of assets which could endanger the already problematic status of the company, and accordingly the enforcement of the plan See Article 114(4).

[107] The plan has to be accepted within three months of the publication of the court's judgment; see Article 115 (1).

[108] Article 117 (1).

the company serve a key role, as they can supervise the procedure. In particular, where the creditors have accepted the plan, they have the right to appoint a trustee[109] who is under an obligation to report to the creditors' committees about the progress of the plan every six months.[110] Finally, once the plan has been accepted by the creditors, it has to be ratified by the bankruptcy court. Otherwise, the provisions of the plan have no legal effect and do not bind the creditors who voted on it.[111] Nevertheless, once the plan has been ratified by the court, its provisions become binding upon all creditors, even dissenting or creditors who did not participate in the voting process.[112] Accordingly, the debtor, unless otherwise stated by the plan, becomes responsible for the management of the affairs of the company with the aim of achieving the targets specified by the plan.[113]

Conclusion

It is argued that, following the introduction of the Law of 2007, the insolvency laws of Greece witnessed a remarkable shift of ethos. Arguably, the primary aim of the new law is to promote the concept of corporate rescue and to encourage a second-chance culture. It is crucial to note the dispersed nature of the insolvency laws, which preceded the Law of 2007, effectively enabled the eruption of a series of scandals that

[109] Article 117(2).

[110] See Article 131.

[111] Article 122(1).

[112] Article 125(1).

[113] Article 125(2).

involved a number of bankruptcy judges and insolvency practitioners.[114] Arguably, the scandals have contributed greatly to the shaping of the new Law's philosophy as the Law of 2007, as opposed to its predecessors, seeks to promote accountability during the reorganisation process. It could be argued that the approach adopted in Greece towards insolvency and corporate rescue in particular resembles the approach taken in France, which, as seen in Chapter IV, also opted for the introduction of a debtor-in-possession regime. It could be argued that underlying political, historical and social factors led to such reforms. Finally, it could be said that the reforms of the Greek insolvency laws are pioneering in substance and are more than welcome, as they replace a rather dated system. Arguably, what remains is for time to demonstrate how effective the new provisions will prove to be in practice.

To sum up, Chapter V offered a detailed analysis of the insolvency law regime and, particularly, the corporate rescue provisions of Greece. In addition, Chapter V provided an extensive exposition of the relatively recent reforms to the Greek Insolvency Code and considered their effectiveness. As seen in this chapter, the reforms were introduced with the aim of updating the complicated and outdated Greek Insolvency law regime, which made little provision for the prevention of corporate failure and reorganization of financially traumatised companies. It follows from the analysis in Chapter V that, Greece by means of the reforms, successfully managed at a time crucial for its economy to modernize the legal framework governing insolvency proceedings and to launch a rehabilitation ethos that the country arguably, lacked. It is important to note that, the new Insolvency Code has been accepted by practitioners with

[114] See "The search for the New Judicial Scandal Continues" available in http://www.athina984.gr/taxonomy/term/3164 last accessed on 20th October 2010.

enthusiasm, as its provisions seem to effectively restore financially troubled companies to a healthy status. However, it is arguably still very early for one to reach a firm conclusion with regard to the impact of the new Code on the Greek economy. Finally, it should be noted at this stage that, Greece is the third and last jurisdiction to be considered in the thesis. The next chapter, Chapter VI, is aimed at providing a comparative analysis of the insolvency laws of the three jurisdictions considered in the thesis, namely the United Kingdom, France and Greece and, to demonstrate how corporate rescue is achieved within these jurisdictions. Chapter VI also places emphasis on some of the key ‘players’ that participate in the corporate rescue process, such as secured creditors, directors, courts and insolvency practitioners and considers how such participants may influence the outcome of a reorganization attempt. Finally, it should be noted that the comparative analysis in Chapter VI is aimed at providing an understanding of the differences between the rescue laws of the three jurisdictions and does not aspire to propose the introduction of substantive harmonisation at a European level. It could be argued that, in light of the emerged globalised nature of commerce, at some point in time there will be further convergence of the laws of Member States. Nevertheless, substantive harmonization is unlikely to occur in the near future and hence, falls outside the scope of this thesis.

Chapter VI: A Comparative Analysis of the Corporate Rescue Laws of France, Greece and the United Kingdom

Introduction

In the last decade, the insolvency laws of many countries in the European Union have undergone significant reforms. As considered in the previous chapters, the United Kingdom (Chapter III) , France (Chapter IV) and Greece (Chapter V) introduced substantial reforms to their insolvency regimes, so as to promote the the idea of corporate rescue, which in turn would effectively safeguard their economic wealth and ensure the preservation of employment. This chapter is designed to provide a critical and comparative analysis of the reformed corporate rescue procedures of each jurisdiction, a detailed analysis of which was offered in chapters III, IV and V respectively. It should be noted that, although France and Greece opted for a United States Chapter 11[1] model, the United Kingdom, loyal to its 'creditor-friendly tradition' chose not to import such a 'debtor in possession' re-organisation mechanism.[2] It could

---

[1] US Chapter 11 of the Bankruptcy Reform Act 1978.

[2] V Finch, *Corporate Insolvency Law: Perspectives and Principles*, (2nd ed. Cambridge, 2009) at p 278. See also DTI Report: A Review of Company Rescue and Business Reconstruction Mechanisms, (2000) at p.39, where it was inter alia stated that the United Kingdom was not a debtor-centred regime as opposed to the US insolvency system, which was described biased in favour of the debtor. Available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/con_doc_archive/consultation/condoc/condocreview.pdf last accessed on 20th October 2010.

be argued that, in light of the recent collapses deriving from the fierce credit-crunch, the abovementioned states, in particular the United Kingdom, will have to re-examine the strength and the effectiveness of their corporate recovery regimes, in order to face significant challenges, such as the numerous corporate collapses (and forced merger-sales (e.g. see Lloyds TSB and HBOS) and, consequently, the prospect of rising unemployment rates. Following the shock that the financial markets sustained in the United Kingdom, critics raised questions in relation to the effectiveness of the rescue laws that are available to troubled businesses. In particular, it has been argued that the United Kingdom should follow the United States Chapter 11 model and hence shift its 'creditor-orientated' ethos, so as to allow businesses a second chance to successfully recover from their financial trauma.[3]

The aim of this chapter is to provide a comparative analysis of the insolvency law systems of Greece, France and the United Kingdom and to consider the factors that influenced the design of the corporate rescue laws in these three jurisdictions. In particular, reference will be made to the importance of economic and socio-political factors and also the approach towards corporate rescue that has been adopted by the insolvency professional bodies and the courts of these jurisdictions. It should be kept in mind that, for the purposes of this chapter, the comparative analysis will not focus on the effectiveness of the legal norms of a Member State nor draw contrasts with the

[3] It should also be noted that in April 2009, it was announced that the Insolvency Service was conducting a consultation exercise in order to ensure that the regulations and procedures for dealing with troubled companies work to facilitate company rescues whenever they are appropriate, that the maximum economic value is rescued from companies that get into difficulties, and that the knock-on effects of company insolvencies on their creditors are minimised. Available at www.hm-treasury.gov.uk/d/Budget2009/bud09_completereport_2520.pdf last accessed on 21st October 2010, at p. 75.

inadequate rules of another. Instead, the purpose of comparing the insolvency laws of the three jurisdictions is to provide an understanding of the laws in each state and examine the factors, behind which lie the main differences between the three legal systems. Also, the aim is not to propose an ideal system and to suggest harmonisation of insolvency and corporate rescue laws. This is because, arguably, there is no 'one size fits all' insolvency model fitting all countries. This becomes obvious when the differences in the economic strength and the social traditions of a jurisdiction are taken into account.

The Approach towards Corporate Rescue in the Three Jurisdictions

It could be said that the laws of a country are the mirror of its society. According to Montesquieu, laws express the spirit of nations, hence are very closely linked to their geographical, cultural, sociological, economic and political elements.[4] In a similar manner the insolvency laws of the three jurisdictions, namely France, Greece and the United Kingdom, have been influenced by 'external' factors, such as the political, social and cultural conditions which prevailed in each jurisdiction. Accordingly, it could be said that it is due to the major differences in the historical background that all three countries have developed three very different insolvency law systems. However, beyond the effect that the abovementioned factors have on corporate

[4] See Montesquieu, 1749, "The Spirit of Laws", Livre I, Gallimard, Paris, reprint, JP Mayer and AP Kerr (eds), 1970.

re-organisation, it is useful at this stage to identify and consider the 'internal' factors that have shaped the design of the insolvency laws in each of the three jurisdictions. For instance, it could be argued that the elements which principally affect the process of corporate rescue range from the behaviour of the company's directors and the conduct of the insolvency professionals to the approach taken by secured lenders and the courts. The analysis in this chapter will focus on the impact of those elements on corporate rescue in all three jurisdictions.

Furthermore, before considering the various factors which affect the outcome of a rescue attempt, it is important to draw a distinction between formal and informal rescue proceedings.

Pre-Insolvency Procedures in the Three Jurisdictions

It is, arguably, during the last decade that, in Europe, the foundation of a 'second-chance culture' has been put in place. The introduction of the recent reforms signifies that all three jurisdictions place great emphasis on business recovery. Although various formal and informal steps may be taken in order to give effect to a successful rescue, it is submitted that a traumatised company would often benefit from intervention before it goes to the stage of insolvency. In fact, it has been noted that most rescues are achieved through informal rescue.[5] Informal rescue mechanisms have a variety of advantages for the ailing company. From a director's and also a shareholder's perspective engaging in informal rescue is preferable as it prevents any adverse publicity in relation to the company's financial troubles and hence protects its goodwill and reputation.[6] It could be argued that, by pursuing informal rescue, the company would effectively avoid the stigma which is attached to corporate failure and that the realisable value of its assets would be protected.[7] Moreover, one could argue that informal rescue is not as costly as court proceedings. However, it should be noted that informal rescue is not a cheap method of rescue,[8] as the turnaround professionals, who co-ordinate the process, often charge very hefty fees.[9]

Moreover, since there is no court involvement in informal rescue, one could argue that the process is more flexible.[10] Nevertheless, a disadvantage of informal reorganisation is that the process is of a contractual nature, hence there is great reliance on the creditors' consensus. The fact that there is a need to obtain the consent of all creditors during an informal reorganisation attempt arguably negates the advantages of

---

[5] See S Frisby, "Report to the Insolvency Service: Insolvency Outcomes" (Insolvency Service, London June 2006).

[6] V Finch, note 2 above, at p. 251.

[7] See V Finch, note 2 above at pp. 251-252.

[8] For instance see ibid at p.309, where it is stated that the implementation cost of the London Approach have been high, i.e. up to £6 million.

[9] K Wruck, "Financial Distress, reorganisation and Organisational Efficiency" (1990) 27 Journal of Financial Economics at p. 419, See also A Belcher, *Corporate Rescue*, (Sweet & Maxwell, London, 1997) at p. 121.

[10] For instance the London Approach. For a brief analysis of the London Approach, see a description by the British Bankers Association, available at: http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=130&a=2281 last accessed on 20th October 2010.

informal rescue, as obtaining consent from dissenting creditors could prove to be a time-consuming and expensive course of action.[11]

It could be argued that intervention at an early stage is a crucial aspect of corporate rescue and it appears that, from early years, that the insolvency law regimes of all three Member States included insolvency-prevention mechanisms. For instance, in France, procedures such as the 'ad hoc mandate' and conciliation[12] made their appearance in the early 1980s and were primarily designed to encourage an early stage intervention by the existing management.[13] In addition, in the United Kingdom, with the exception of one of the oldest rescue devices in the world, namely the Scheme of Arrangement, in 1986, the CVA and administration procedure were introduced following the recommendations of the Cork Report.[14] Furthermore, Greece, notwithstanding the dispersed nature of its corporate rescue laws, also had a voluntary rescue procedure in place ('*ekousia exigiansi*'), which provided for intervention at a pre-insolvency stage.[15] However, it is significant to note that in all three jurisdictions the successful use of the available prevention tools was rather limited.[16] One could

[11] It could be said that a formal procedure, such as the Company Voluntary Arrangement in the United Kingdom, could prove more effective, as far as consent is concerned, since an approval in excess of 75% in value would suffice.

[12] For an analysis of the prevention mechanisms available in France, see Chapter IV, at pp. 133-136.

[13] See M Campana, "A Critical Evaluation of the Development and Reform of the Corporate Rescue Procedures in France" in K Gromek Broc and R Parry, *Corporate Rescue in Europe: An overview of Recent Developments from Selected Countries in Europe*, (Kluwer Law International, 2004).

[14] The Report of the Insolvency Law Review committee, Insolvency Law and Practice, Cmnd 858 (1982, HMSO, London).

[15] Th. Liakopoulos *The Law of Rejuvenation And Liquidation Of Companies*, (Sakkoulas Publications, Athens, 1994) at p. 50.

argue this is primarily because companies seek to employ those tools at a very late stage.

The role of turnaround professionals

It could be argued that, over the last decade, the focal point of corporate rescue work has shifted and that the major lenders have sought to intervene at an earlier stage.[17] For instance, in the United Kingdom the virtual abolition of the administrative receivership procedure, by means of the Enterprise Act 2002, indirectly led secured lenders to adopt a more vigilant stance and to engage in more pre-insolvency monitoring intervention than before.[18] In particular, following the enforcement of the EA 2002, the right of floating charge holders to appoint an administrative receiver was taken away and hence at times of financial troubles, key lenders, such as banks, would no longer be able to recover their funds without having regard to the interests of the rest

[16] For an analysis of the CVAs entered into in the United Kingdom, see Insolvency Statistics for England and Wales, (2009) 22(6), Insolv. Int., 94, at p.94, where it is reported that CVAs are still not a major part of the non-liquidation corporate statistics, amounting to less than 10 per cent of this category. Nevertheless, the popularity of the procedure is increasing as in 2008 the number of CVAs reached 587, as opposed to 475 CVAs which have been initiated ten years earlier, namely in 1999.

[17] V Finch, "Doctoring In the Shadows of Insolvency" (2005) J.B.L. 690-708, at p. 690.

[18] Ibid at p. 691.

of the creditors.[19] Accordingly, the shifted focus of reorganisation effectively has brought onto the scene a series of professionals, ranging from ‘management consultants’, ‘company doctors’, ‘turnaround professionals’, ‘business recovery specialists’ and ‘cash flow managers’,[20] who may be called either by the company or secured lenders to intervene at an early stage in order to restore the company to profitability.[21]

However, the increased tendency of troubled companies to address a financial crisis at a pre-insolvency stage arguably raises questions in relation to the accountability of turnaround specialists. It could be argued that, although early intervention is desirable in order to achieve successful rescue, this should nevertheless involve the appointment of a specialist, who is accredited by a competent authority.[22] It should be noted that, although the need to regulate the conduct of those who administer formal rescue proceedings and the importance of having a system of control over the skill and competence of insolvency practitioners was recognised in the United Kingdom early in the 1980s by the Cork Committee,[23] no similar provision is made in respect of turnaround specialists. In particular, turnaround professionals are not subject to any

---

[19] For a further analysis of the administrative receivership procedure and critique, see p. 245 below.

[20] S MacDonald, “Turnaround Finance” (2002) Recovery (Winter) at p. 26.

[21] Arguably, the ability of secured lenders to appoint a specialist professional depends on the extent of the company’s borrowing.

[22] See V Finch, “Controlling the Insolvency Professionals” (1999) Insolv. L. 228-239, at p. 238, See also J Flood & E Skordaki, “Insolvency Practitioners and Big Corporate Insolvencies” Research Report No.43. ACCA. Certified Accountants Educational Trust. London, 1995, at p. 5.

[23] See “Report of the Review Committee on Insolvency Law and Practice” (Cmnd. 8558,1982) (‘Cork Report’) at para. 756.

mandatory regime of training, experience or qualification.[24] For instance, it should be noted that although a practitioner is eligible to act as an office holder only if qualified under the Insolvency Act 1986,[25] no similar condition exists for turnaround specialists, who operate in the twilight zone.

Formal rescue proceedings and the 'actors' involved

Moreover, it is noteworthy that all the three jurisdictions have introduced reforms into their domestic legal regimes (formal rescue mechanisms), following the great emphasis that corporate reorganisation has attracted around the globe and the extensive reshuffle of insolvency laws across Europe. However, one should note that the law reforms of key corporate rescue mechanisms are not free of stark differences[26]. These, arguably, reflect the wider cultural differences that exist amongst the three jurisdictions.

[24] V Finch, note 17 above, at p. 696.

[25] See Insolvency Act 1986, Part XIII and the Insolvency Practitioners Regulations 2005 (SI 2005/524). For a further analysis on the regulation of the IP profession, see p. 37 below.

[26] For example it should be noted that the United Kingdom decided not to opt for a 'Chapter 11' regime of re-organisation.

Having provided a detailed background to the procedures in the previous chapters, this chapter aims to provide an analytical comparison of the regimes of France, Greece and the United Kingdom. As mentioned above, particular emphasis will be placed on the 'key actors' involved in corporate rescue, namely company directors, creditors, insolvency practitioners and the courts.

The Role of Company Directors in the Rescue Process

Directors have a crucial role to play in ensuring the financial health of their company. Generally speaking, running a company involves reaching key decisions, which may entail a significant degree of risk. Belcher best describes this drastic-decision routine as follows: 'if rescue is defined as the avoidance of distress and failure, all management activity can be thought of as a constant and repeated rescue attempt'.[27] In addition, Omar argues that rescue involves 'the revival of companies on the brink of economic collapse and the salvage of economically viable units to restore production capacity, employment and the continued rewarding of capital and investment'.[28]

---

[27] A Belcher, note 9 above, at p. 12. See also A Belcher, "The Economic Implications of Attempting to Rescue Companies", in *Insolvency Law: Theory And Practice*, edited by H Rajak, (Sweet & Maxwell, 1993) at p. 236.

[28] P Omar, "Thoughts on the Purpose of Corporate Rescue" (1997) 4 Journal of International Banking Law 127.

Arguably, the tasks of directors become even harder to perform during challenging times, where credit is too hard to obtain due to the changing market conditions. At such times, it is vital to ensure that the insolvency laws of a jurisdiction make provision for a set of rules which influence directorial behaviour. It could be argued that the foundational principles of the insolvency law of every jurisdiction should be such that not only they ensure that directors are precluded from irrational and irresponsible risk-taking, in order to afford protection to the company's creditors and shareholders against severe financial laws, but should also punish incompetent or dishonest directors.[29]

Furthermore, company directors have a significant role to play in the process of corporate rescue, as they may be the first to sense a forthcoming financial crisis and hence are able to be the first to adopt drastic measures in order to safeguard the viability of their company. It is argued that incentives should be granted to directors in order for them to effectively avoid corporate failure. Such incentives could be in the form of 'sticks and carrots'. In other words, on the one hand, directors should be rewarded for engaging in diligent behavior and for dealing with a financial trauma at the earliest possible stage. On the other hand, personal liability should be imposed upon directors, as a direct consequence of their inability to readily adopt drastic measures against the collapse of their company.

[29] See B Carruthers and T Halliday, *Rescuing Business: The Making of Corporate Bankruptcy Law in England & the United States* (Oxford University Press, 1998) at pp. 274-277.

It could be argued that the behavior and ethics of the company's directors during a period of financial distress are elements of significant importance. However, it could be said that, whether the directors will take steps at an early stage to avert a financial crisis, depends highly on cultural factors, such as, for instance, the perception of the society towards the role of directors. It could be argued, that in jurisdictions such as Greece and France,[30] where a friendly approach is taken towards the debtor, company directors are encouraged to seek help at an early stage; whereas a different approach is seen in jurisdictions such as the United Kingdom, where the debtor is in most occasions is regarded as the one to blame for the company's failure.[31] For example, if an early intervention culture has not developed within a jurisdiction,[32] then directors are not likely to seek help in fear of the loss of control and also the stigma that is attached to failure.[33] This point is illustrated through a comparison between the approach to insolvency between the United States and the United Kingdom. This demonstrates that the United States is a pioneer country that promotes entrepreneurship as a major

---

[30] It is noteworthy that, although France adopts a more 'debtor-friendly' approach towards the debtor, the number of insolvencies is not significantly less than in the United Kingdom. It is argued that another primary factor, which contributes to the fact that directors take steps at a late stage is the stigma attached to failure.

[31] See R Goode, *Principles of Corporate Insolvency Law* (3rd Ed., Sweet & Maxwell, London, 2005) at p. 328, where it is stated that insolvency law in the United Kingdom is predicated on the assumption that where a company becomes insolvent it is due to the failure of the management and hence those responsible for the company's plight should not be left in control.

[32] It could be argued that the society's expectation that directors should be able effectively to deal with the challenges is well justified, when their remuneration is taken into account. This could be seen as one of the reasons why an early-stage intervention culture has not developed and instead a stigma is attached to failure.

[33] See G McCormack, "Control and Corporate Rescue: An Anglo-American Evaluation" (2007) I.C.L.Q 56(3) 515-551, at p. 522 where the attitude towards insolvent debtors in the United Kingdom is described as 'once a bankrupt, always a bankrupt'. See also G Moss, "Comparative Bankruptcy Cultures: Rescue or Liquidations? Comparison of Trends in National Law-England" (1997) 23, Brook. J. Intl L., 115-138,at p. 115, where it is noted that the bias towards creditors in the United Kingdom reflects a general social attitude, which is inclined to side with creditors, when they suffer a loss and to punish and to punish risk-takers by displacing them from the company's management.

component of the creation of wealth and, accordingly, it places greater confidence in 'debtor-in possession' management.[34] In brief, Chapter 11 provides for the incumbent management to remain in control of the company's management under the auspices of the bankruptcy court, unless fraud or other misconduct has been committed by the directors.[35] In contrast, the United Kingdom has a long standing tradition of being apprehensive towards unfortunate debtors and accordingly 'debtor in possession' insolvency procedures.[36] Arguably, this is why the United Kingdom opted for a streamlined administration procedure, where it could have, mimicking a series of other Member States, including France and Greece, launched in its insolvency law system an additional debtor-in-possession procedure, which would co-exist with the CVA, a-debtor-in possession regime introduced in 1985.[37]

---

[34] See G McCormack, ibid, at p. 524.

[35] See A Keay, "A Comparative Analysis of Administration Regimes in Australia and the United Kingdom" in P Omar*, International Insolvency Law: Themes and Perspectives* (Ashgate Publishing, 2008) at p. 112.

[36] However, it has been argued that the Blair Government has encouraged the creation of an ambitious business culture, whereby entrepreneurial risk taking is encouraged and where honest debtors, who become insolvent, are given a second chance staring over their business. See V Finch, note 2 above, at p. 497.

[37] It is important to note that the Insolvency Act 2000 introduced a stand-alone debtor-in-possession procedure, the Company Voluntary Arrangement (CVA) with a moratorium which is designed to facilitate the reorganisation of smaller companies. In addition, it is interesting to note that recently the CVA became the subject of a consultation exercise, where the possibility of extending the moratorium for medium-sized and large companies is considered, in order to promote the further use of the procedure as a route of restructuring a company's affairs. See Encouraging Corporate Rescue- a consultation, available at: http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/compresc/compresc09.pdf last accessed on 20th October 2010, at p. 12-14. See also J Tribe, "The Reform of UK Corporate Insolvency Laws: CVAs, the Conservatives and Chapter 11" (2009) 47 International Accountant, pp. 20-23.

On the other hand, the insolvency legal regime of France has traditionally been debtor-friendly[38] and provided for 'early warning mechanisms' so as to encourage directors to seek help at an early stage.[39] However, it is interesting to note that even then insolvency rates sky-rocketed,[40] as directors failed to take advantage of 'early stage intervention mechanisms'. It is argued that one of the reasons for this failure on the directors' part is the stigma of insolvency. Finally, with regard to the Greek insolvency system and the social influences that have affected its shape, it is submitted that a great emphasis is placed on failure and that a second-chance culture has only recently been introduced, by means of Law 3588/2007. Law 3588 has arguably brought about the metamorphosis of Greek corporate rescue laws as it effectively codifies the dispersed rescue procedures (which existed until 2007) and provides that its primary aim is to prioritise the rescue of ailing companies and to give a second chance to the ill-fated debtor.[41]

Accountability and Efficiency of Directors

[38] C Dupoux & D Marks, "Chapter 11 a la Française: French Insolvency Reforms" (2004) 1(2) Int. Corp. Rescue at p. 74.

[39] See Chapter IV, at p. 133.

[40] Seehttp://www.eulerhermes.com/en/documents/pr_intl_insolvencies_4june09_en_final.pdf/pr_intl_insolvencies_4june09_en_final.pdf last accessed on 20th October 2010, where a remarkable acceleration of corporate worldwide insolvencies was reported (i.e. 35% increase) reported. In particular, in France corporate insolvencies increased by 6% in 2009.

[41] Article 1 of Law 3588/2007.

The conduct of directors may be challenged in respect of transactions, which preceded insolvency. This covers not only 'suspicious' transactions prior to the outbreak of insolvency, but also any negligent or wrongful conduct of the directors. However, it should be noted that different approaches involving 'sticks and carrots' are adopted within the European Union jurisdictions. For instance the United Kingdom leans towards the adoption of sticks in order to hold incompetent directors accountable. Accordingly, directors may incur liability or be disqualified even where they have not been dishonest, but merely negligent.[42] In contrast, France and Greece make use of sticks more restrictively. In particular, incompetent directors may be treated more leniently in France, as they will only be disqualified where they have been convicted of a criminal offence. It is noteworthy the Greek insolvency law system contains no fraudulent trading provision. In fact, fraudulent trading is governed by the provisions of the Criminal Code. It is noteworthy that fraudulent trading proceedings are very rarely initiated against delinquent directors.

Bearing in mind the liability regimes of France and Greece, it could be argued that both the courts and the insolvency practitioners have a significant stake of responsibility for the malfunction of the liability regime, as they arguably fail to ensure that dishonest directors are held accountable.[43] In other words, it could also be argued that the courts fall short of adequately encouraging insolvency practitioners to bring actions for a contribution or with a view to a disqualification of directors and, accordingly, the insolvency practitioners neglect this crucial function in their

[42] See ss. 214, 212 Insolvency Act 1986. See also s.6 Company Directors Disqualification Act 1986.

[43] It is submitted that both the courts and insolvency practitioners fail to ensure the punishment of company directors, who engage in fraudulent trading.

profession.[44] In particular, the judicial trend in France appears to stem from the fact that judges in the Commercial Courts are individuals that are elected from amongst the business community, hence they consider that their role is not to police their 'peers' and that such a function should be delegated to the Public Prosecutor.[45]

Furthermore, it could be argued that an essential part of insolvency law is to provide for the availability of measures that range from civil claims to criminal sanctions, in order to ensure that dishonest behaviour is punished, hence ensuring the protection of the public from the costs of mismanagement, as well as deterring delinquent and negligent behavior.[46] For instance, all three jurisdictions, namely France, Greece and the United Kingdom, make provision for an array of criminal measures, which are designed to ensure that directors are held accountable for failing to file for insolvency within a specified time, as well as civil measures which are intended to compensate creditors. In other words, the insolvency laws of each jurisdiction make provision for the punishment of incompetent directors, where, at a time of a crisis, they continued trading, hence furthering the indebtedness of the company and, accordingly, reducing any prospects of it avoiding liquidation. However, it should be noted that the three jurisdictions take different views as to the appropriateness of sanctions that should be applied where imprudent conduct is involved.

[44] P Omar, "France: The Regime Governing Directors' Liability in Insolvency and Reform Perspectives" (2004) 25(12) Comp. Law. 378-384, at p. 381.

[45] Ibid, at p. 381. See also B Soinne, Traité des Procédures Collectives (LITEC, 1999) at p. 28.

[46] See P Omar, "The European Initiative on Wrongful Trading" (2003) 6 Insolv. L., 239-249, at p. 239.

At this point, it is essential to provide a brief analysis of the various provisions that may be used in the three jurisdictions in order to hold directors accountable and also provide a comparison of these.

Directors' Liability in the three jurisdictions

The United Kingdom regime

A key principle of insolvency law is the *pari passu*[47] principle, which provides for the fair and equal distribution of assets amongst creditors, where liquidation of the debtor company takes place. The *pari passu* principle effectively provides for the equal treatment of creditors in insolvency and, in effect, restricts the rights of individual creditors, so as to ensure that the body of creditors as a whole is benefited.[48] In essence, this means that certain transactions, such as transactions which affected the disposition of the company's assets, may be challenged within a time period prior to the initiation of insolvency proceedings, so as to inhibit the enrichment of the benefited party to the

[47] For a detailed analysis see R Mokal and L Ho, "The *Pari Passu* Principle in English Ancillary Proceedings: *Re Home Insurance Company*" (2005) 21(6) *Insolvency Law & Practice* 207-210. See also R Mokal, "Priority as Pathology: The *Pari Passu* Myth" (2001) Cambridge Law Journal 581-621.

[48] A Keay, & P Walton, *Insolvency Law: Corporate and Personal*, (Pearson Education, 2003) at p. 478.

detriment of the body of creditors.[49] However, it should be noted that the *pari passu* principle is subject to many exceptions.

However, it could be argued that directors could use (or abuse) insolvency proceedings, not only to maintain their office,[50] but also in order to escape from potential personal liability. For instance, where directors have concerns that they may incur wrongful trading liability, they could file for administration proceedings and hence prevent their conduct from being challenged by either the company's creditors or the administrator[51] during such proceedings.[52] As far as the use of administration proceedings by directors is concerned, it has been noticed that, following the streamlined out-of-court- route of entry to administration by means of the Enterprise Act 2002, the popularity of the procedure increased significantly.[53] In fact, Frisby notes

[49] It is important to note that this time zone extends to a time prior to the commencement of administration proceedings; this arguably, prevents the misuse of this particular rescue procedure and discourages directors from using administration as a way of getting protection against liability in respect of illicit trading prior to insolvency. However, such provision could only prove useful where liquidation proceedings have been initiated, since until that point no wrongful trading action may be brought by the company's administrators. For a further discussion on the point that administration, as a course of action, could be a way for directors to avoid liability in respect of wrongful trading, see, A Keay, note 35 above, at p. 128.

[50] With regards to the choice of proceedings, Finch points out that directors tend to file for reorganisation proceedings rather than liquidation, because if they opted for liquidation they could face an immediate replacement by the liquidator, whereas if they opted out for administration proceedings they would expect to remain in office. See V Finch note 2 above, at p. 401. See also P Aghion, O Hart, & J Moore, "The Economics of Bankruptcy Reform" (1992) 8 Journal of Law, Economics and Organisation 523.

[51] It should be noted that where the administrator suspects that the directors of the company may be liable for wrongful trading, he is only able to hold them personally liable and to contribute to the company's assets, once the rescue proceedings are converted to liquidation proceedings. Both section 213 and section 214 IA are 'reserved' for the liquidator to use.

[52] A Keay, note 35 above, at p. 128.

[53] V Finch, note 2 above, at p. 393.

that during 2003-2004, 65.5% of administrations involved out of court appointments,[54] and 70.6% of these proceedings were commenced by directors.[55]

The conduct of directors of a financially distressed company may be challenged by the liquidator, who is called to collect the assets of the debtor company in order to make distributions to the creditors. The Insolvency Act 1986 provides that directors may incur personal liability where they have engaged in either fraudulent[56] or wrongful trading.[57] In other words, directors may be called to personally contribute to the company's asset pool in order to maximize the returns to creditors,[58] where their company is in insolvent liquidation. However, it should be noted that, at a time of insolvency, it is only the liquidator who may make use of the two 'main weapons' against incompetent directors, in order to seek compensation on behalf of the body of creditors as a whole. The two provisions are, arguably, of little use, as the liquidator is faced with the dilemma as to whether or not he should pursue proceedings, which are of a time-consuming and expensive nature. Arguably, funding such claims will prove hard, hence discouraging the liquidator from relying on them,[59] but more importantly defeating the rationale behind their very existence. Nevertheless, it is noteworthy that

[54] Whereas only 29.8% involved an appointment by a court order.

[55] S Frisby, "Report On Insolvency Outcomes" (2006), available note 5 above at p. 55.

[56] S.213 of the IA. 1986.

[57] S.214 of the I.A 1986.

[58] For a more detailed analysis of the two provisions, see further below.

[59] See A Keay, & P Walton, note 48 above, at p.530. See also Godfrey, P., & Nield, S., The Wrongful Trading Provisions: All Bark and No Bite, (1995) 11, I L & P, at p. 140.

the Company Directors' Disqualification Act 1986,[60] arguably, compensates for the weaknesses of the two above-mentioned provisions, as it provides that unfit directors could be disqualified from being concerned with the management of other companies for a period not exceeding fifteen years, depending on the seriousness of their misconduct.[61]

In the United Kingdom, section 213 of the Insolvency Act states that fraudulent trading is committed by 'a person who knowingly is a party to the carrying on of the affairs of the company with the intention to defraud creditors or for a fraudulent purpose'.[62] Accordingly, section 213 empowers the court to make an order against any such person, to personally contribute to the company's assets. It should be noted that, although relating to dishonest conduct, proceedings under s.213 are of a civil nature. However, criminal proceedings for the offence of fraudulent trading may be initiated under section 993 of the Companies Act 2006. It is noteworthy that both the civil and the criminal proceedings require that actual dishonesty and a real moral blame is established,[63] so effectively the notion of 'fraud' under the two provisions is identical, but the burden of proof is different.[64]

---

[60] See in particular, s. 6 of the CDDA 1986.

[61] See ss. 2, 6 & 10 CDDA 1986; see also *Re Sevenoaks Stationers (Retail) Ltd* [1994] Ch 164.

[62] In particular, s. 213 (1) I.A 1986, states: (1) If in the course of the winding up of a company it appears that any business of the company has been carried on with intent to defraud creditors of the company or creditors of any other person, or for any *fraudulent* purpose, the following has effect. Accordingly, s.213 (2) states: The court, on the application of the liquidator may declare that any persons who were knowingly parties to the carrying on of the business in the manner above-mentioned are to be liable to make such contributions (if any) to the company's assets as the court thinks proper.

[63] *Re Patrick and Lyon Ltd* [1933] Ch 786.

[64] See Keay, & Walton, note 48 above, at p. 532.

It could be said that one of the main differences between the two fraudulent trading actions is procedural. In other words, the difference lies with the person that may initiate the action and with the time when the action may taken. In particular, proceedings pursuant to s.213 may only be commenced where the company is in insolvent liquidation, by the liquidator, whereas an action under s.993 CA 2006 may be triggered by the Crown and it is irrelevant whether the company is insolvent or not.[65] In addition, it should be noted that there is an important difference with regard to the actual purpose of the two provisions. It should be remembered that the purpose of section 213 IA 1986 is to compensate the company for the loss suffered, rather than punishing those who are responsible for fraudulent trading. In contrast, the punitive element is contained in section 993 CA 2006, which is primarily designed to punish the fraudulent directors.[66]

It is important however, to note that the actual meaning of 'fraud' is not clearly defined by means of statutory legislation, instead, for years, it has been one of the difficult issues that the courts were called to address.[67] Accordingly, the case law provides some guidance as to what conduct may amount to fraudulent trading. Nevertheless, it could be argued that the judicial approach in defining fraudulent trading has not always been consistent. It could be said that in essence what makes s. 213 differ from s.214 is the important requirement to prove that the affairs of the company have

[65] Ibid, at pp. 532-533.

[66] B Jones, "The Difficulty of Proving Fraudulent Trading" (2007) 16(9), Insolv. Int. 69-70, at p. 70.

[67] J Farrar, "Fraudulent Trading" (1980) JBL 336, at p. 339.

been carried on 'with the intent to defraud.[68] Consequently, one should expect that in order for a claim under s.213 to succeed, actual dishonesty should be established.[69] However, the courts have at times adopted a more vigorous approach, whereby fraudulent conduct could resemble recklessness,[70] as it was asserted that directors could not only incur liability, where the liquidator would prove an intent to defraud creditors, but even where a director was of the belief or had an expectation that ultimately the creditors would be repaid.[71]

Another provision that the liquidator may invoke, in order to hold directors individually liable for the company's losses, is section 214 IA 1986. Similarly to section 213 IA, proceedings pursuant to section 214 IA may only be commenced at a time of insolvent liquidation and only by the liquidator. Section 214 of the Insolvency Act states that a director may incur liability, if at some time prior to the commencement of the liquidation he knew or ought to have concluded that there was no reasonable prospect that the company would avoid insolvent liquidation.[72] Therefore, this presupposes that the exact time, where the director knew or ought to have known that the company was unable to meet its liabilities, can be defined. This could, arguably, be an extremely difficult task[73] as, at a time of crisis, such as where a lender, such as a

[68] See *Bernasconi* v *Nicholas Bennet &Co*. [2000] BCC 921, [2000] BPIR 8.

[69] See *Re Patrick and Lyon Ltd,* note 63 above. See also *Re L Todd (Swanscombe) Ltd* [1990] BCC 125.

[70] See Keay, A., & Walton, P., note 48 above, at p. 534.

[71] *R* v *Grantham* [1984] 2 WLR 815; [1984] BCLC 270.

[72] See s. 214(2).

[73] See M Simmons, "Wrongful Trading" (2001) 14(2) Insolv. Int. 12-16, at p. 12. , See also A Keay, "Wrongful Trading And The Point Of Liability" (2006) 19(9) Insolv. Int. 132-134, at p. 133.

bank, withdraws its financial support to the company, effectively rendering it vulnerable to insolvency,[74] a director honestly believed that their company would survive the 'storm' by getting more funding. It is important to note that the liquidator bears the significant burden of correctly identifying the time that a director knew or ought to have concluded that there was no reasonable prospect of avoiding insolvent winding-up or, in other words, the point that liability was triggered. Consequently, in the unfortunate event that the liquidator fails to convince the court that his case is made out with reference to a particular date, he may not be permitted to provide an alternative date at a hearing.[75] Therefore, it could be argued, given the fact that there is no consistency in the approach adopted by the courts, that a safe option for the wise liquidator would be to nominate a date from which the directors undoubtedly knew or ought to have concluded that insolvent liability was unavoidable.[76] It is, however, important to note that a director may avoid the bullet of personal liability,[77] where the court is satisfied that, while trading in the 'twilight zone', he took pro-active steps in order to minimise the potential loss to the company's creditors.[78] It should be noted that s.214 IA 1986 explicitly provides that a director must take 'every step' to minimise the creditors' loss. Hence, taking some steps would not be enough to protect him from incurring personal liability.

---

[74] See M Simmons, ibid, at p. 13.

[75] See *Re Sherbourne Associates Ltd* [1995] B.C.C. 40. In contrast, see *Continental Assurance*. [2001] B.P.I.R. 733 at 899, where the judge was stated he would not: "wish his decision to be cited hereafter as authority for the proposition that in all cases under s 214 the Liquidator must always specify his starting date, and must lose the whole case if he cannot satisfy the Court that his case is made out by reference to that particular date. Cases vary in detail and complexity".

[76] A Keay, see note 35 above, at p. 134.

[77] M Simmons, note 74 above, at p. 13.

[78] S. 214 (3) IA 1986.

Finally, it should be noted that the wrongful trading and fraudulent trading provisions only apply in liquidation. This is arguably the 'stick', which is designed to hold directors accountable for their misconduct. Arguably, directors, whose company is in financial difficulty, are provided with the incentive ('carrot') to take action at an early stage so avoid personal liability in the event of insolvency. However, where they fail to make correct use of such 'carrot', they are faced with the 'stick' of personal liability. A recent example where directors may have failed to take drastic measures at an early stage is provided by the collapse of the retail giant, Woolworths.[79] In particular, the creditors of the company, who lost over £700m, challenged the conduct of directors and contended that they went into administration too late and were trading at a loss.[80]

The French regime

The insolvency law regime of France is sophisticated and, similarly to the United Kingdom, it makes provision for a wide range of civil and criminal measures, which are designed to hold directors accountable for the failure of their business. The

[79] See "Woolworths Stores to Close After Christmas" The Times, November 27, 2008 available at: http://business.timesonline.co.uk/tol/business/industry_sectors/retailing/article5241228.ece last accessed on 20th October 2010.

[80] T Brown, "The £1bn Legacy for Woolies Creditors" Daily Mail, 4 February 2009, available at http://www.thisismoney.co.uk/markets/article.html?in_article_id=472791&in_page_id=3# last accessed on 20th October 2010.

civil liability regime of France seeks primarily to compensate the company for its losses and accordingly provides for the disqualification of unfortunate and incompetent directors, who may be required to make personal contributions towards the assets of the company. In addition, the criminal liability regime provides for sanctions against fraudulent and dishonest and accordingly makes provision for the imposition of penalties, which have a punitive character.[81]

In the event of liquidation proceedings, personal liability may be incurred by the company's directors in respect of the company's insufficiency of assets. However, Article L651-2 of the Commercial Code provides that certain criteria have to be satisfied prior to any liability being imposed. Firstly, a director may suffer civil liability if he has committed a fault in the management of the company (*faute de gestion*). It is noteworthy that, although the concept of 'fault in the management' is not specifically defined by statute, case law has nevertheless refined the concept so as to cover errors in the management of the company, negligence, breaches of law, regulation or the by-laws of the company.[82] Secondly, prior to personal liability being imposed upon a company's director, it must be established whether there is an insufficiency of assets. In other words, whether the liabilities of the company exceed the value of its assets. Finally, it must be considered whether a causal link exists between the *faute de gestion* and the insufficiency of assets.[83] However, it is noteworthy to show that the error in the

---

[81] P Omar, "The Regime Governing Directors' Liability In Insolvency And Reform Perspectives" (2004) 25(12) Comp. Law. 378-384, at p. 379.

[82] "Directors In The Twilight Zone III" INSOL International Report, August 2009, at p. 268.

[83] It should be noted that no provision is made for a specific time limit, prior to the commencement of formal insolvency proceedings, during which the *faute* must have occurred. However, since a causal link

management contributed to the insufficiency of the company's assets and it is not necessary to demonstrate that the *faute* is the only cause.[84] The determination of the *faute de gestion* lies with the court, which shall also consider whether the directors should bear all or part if the company's debts.[85]

Furthermore, during the course of formal insolvency proceedings commenced against the company, a director may be subject to personal bankruptcy and may be prohibited from being involved in the management of a company.[86] For instance, such liability is involved where a director abusively carried out an unprofitable business activity that would necessarily lead to the legal entity's insolvency, misappropriated or concealed all or part of the assets of the company, or fraudulently increased the liabilities of the company or carried out a management function of a company while forbidden to do so. In addition, personal liability may be imposed on a director: a) for having the intention of avoiding or delaying the opening of formal insolvency proceedings; or b) for having entered into, for the account of a third party and without consideration, undertakings which are considered too significant at the time of signature, given the situation of the company; c) for having paid after the date of cessation of payments one creditor in preference to others; d) for having failed to keep accounts, when required by applicable law or e) for having kept either fictitious,

must be established between the *faute* and the company's insolvency the period is in practice limited. Arguably, the last *faute du gestion* may be committed by the directors, where a declaration of cessation of payments is not filed within the legal limitation period (see Article L.631-4 of the Commercial Code).

[84] INSOL Report, note 82 above, at p. 269.

[85] Article L. 652-1 of the Commercial Code.

[86] See Articles L.653-3, L.653-4, L.653-5 of the Commercial Code for personal bankruptcy and Article L.653-8 for the prohibition on management.

incomplete accounts or for having caused accounting books and records to disappear.[87] It is important to note that liability in both the cases of personal bankruptcy and prohibition on management is civil, albeit that they have characteristics of penal sanctions.[88]

Furthermore, under the French law, a director may, in certain circumstances, be subject to the imposition of the criminal sanction of 'criminal bankruptcy'.[89] A director may incur such criminal liability, provided that formal insolvency proceedings have been commenced in respect of the company. However, it should be remembered that the court, in exercising its punitive jurisdiction, is not seeking to compensate the company.[90] In particular, a director may be guilty of an offence,[91] where with the intention of avoiding or delaying the opening of formal insolvency proceedings, he has made purchases with a view to resale at a lower price or used ruinous means to obtain funds. In addition, the criminal offence may be committed where a director has: a) fraudulently increased the debts of the company; b) misappropriated or concealed all or part of the company's assets; c) kept fictitious accounts or caused accounting records to disappear; or d) kept manifestly incomplete sets of accounts or kept accounts that do not comply with legal requirements.[92] It should be noted that, where a director is found

---

[87] INSOL Report, note 82 above, at p. 271.

[88] Ibid.

[89] Article L 654-2 of the Commercial Code.

[90] Note 87 above, at p. 274.

[91] A person guilty of this offence may be subject to imprisonment (maximum five years) or a fine (maximum 75,000 Euros).

[92] Note 82 above, at p. 273.

guilty of the offence of ‘criminal bankruptcy’, a series of severe sanctions may be imposed upon him. That is to say a director may be liable to imprisonment or a fine. It is noteworthy that the gravity of the offence will be reflected in the length of imprisonment of the fine that is ordered and in the nature and extent of any other sanctions that might be imposed. It should be noted that the court may, in addition to the imprisonment or the payment of a fine ,order the: a) deprivation of his civic, civil and family rights; b) prohibition, for a maximum period of five years, on having a public function or conducting a professional activity in the same field as that in which the offence was committed; c) exclusion from being permitted to bid for public tenders for a period of at least five years; d) publication of the judgment; or e) personal bankruptcy or prohibition on management.[93] Moreover, criminal liability for the offence of fraudulent organization of insolvency[94] may be imposed upon a director where he: a) fraudulently misappropriates or conceals part of his own personal property to avoid paying the debts of the company in insolvency; or b) fraudulently acknowledges and accepts debts that to not exist. It should be noted that absence of the intent to defraud constitutes a defence against both criminal sanctions, namely criminal bankruptcy and fraudulent organization of insolvency.[95]

[93] Ibid.

[94] Article L.654-14 of the Commercial Code.

[95] Note 82 above, at p. 274.

The Greek regime

The Greek insolvency laws, following the example set by many other European jurisdictions, including France and the United Kingdom, have recently been subject to far-reaching reforms, so as to promote the idea of corporate rescue. Along with the introduction of a new streamlined rescue procedure, the legal framework governing the liability of company directors has significantly improved. It is interesting to note that an innovative part of the new Law 3588/2007 is that it firstly stresses the need to draw a distinction between fraudulent and unfortunate directors and, secondly, it makes clear provision for both criminal and civil liability which may be incurred by company directors, where they have clearly failed to take reasonable steps at a time close to insolvency to avert failure or to minimise the company's loss. The introduction of a clear-cut liability regime arguably constitutes significant progress as the predecessor regime was rather complicated and consequently ineffective. It is argued that the new law, influenced by the new social environment, came to replace a rather outdated regime, which, awkwardly enough, made provision for the imposition of sanctions on any parties involved in the management of the company, such as the withdrawal of political/civil rights, regardless of whether or not they acted in bad faith.[96] It is argued that the new law effectively reflects the need for a 'second-chance culture', as it for the first time provides for a distinction between ill-fated and unfortunate debtors.

[96] L Kotsiris, "The New Bankruptcy Code of Greece" available at: www.insol.org/emailer/november2007_downloads/newbankruptcycodeofgreece.doc last accessed on 20t October 2010.

The Greek regime makes provision for 'sticks' and 'carrots', seeking to ensure that directors are held accountable. It could be argued that the liability regime of Greece technically[97] resembles that of France to a significant extent. In other words, the Greek insolvency laws, similarly to the French system, are more 'carrot-orientated' and. as opposed to the United Kingdom insolvency system, and focus less on the 'sticks', which would be used against directors. Furthermore, the Greek insolvency system, in the same way as France and the United Kingdom, makes provision for both civil (arguably, Article 98 resembles wrongful trading) and criminal sanctions (Chapter Twelve) against directors, who are responsible for the failure of their company.

In particular, the Insolvency Code provides that directors may face civil liability where they have failed to file for the initiation of insolvency proceedings within fifteen days starting from the day that the company became unable to pay its debts.[98] The new law provides that directors may be liable to personally satisfy the debts that the company incurred from a period that covers the date that the filing for insolvency should take place and the actual date that insolvency was declared.[99] In addition, both negligent and dishonest directors who are proved to have contributed to the insolvency of their company either due to their acts or their omissions may become personally liable to repay the company's creditors.[100]

[97] That is to say that although there is a great resemblance between the legal provisions of the two countries, the Greek system has arguably failed to ensure that those provisions are effectively enforced.

[98] See Law 3588/2007 Articles 98 and 5(2)

[99] Law 3588/2007 A. 98(1)

[100] Law 3588/2007 A. 98(2)

The role of the courts in the rescue process in the three jurisdictions

It could be argued that in, some jurisdictions, such as France and Greece, the role of the courts is crucial during formal corporate rescue proceedings.[101] Nevertheless, it should be noted that the courts have a significant role to play even before actual cessation of payments has taken place. In other words, since successful corporate rescue depends highly upon early steps being taken by the debtor company,[102] it is argued that the insolvency laws of each jurisdiction should provide a secure legal framework, which would allow debtors to swiftly negotiate their debts with the creditors without seeking the protection of the courts, but which might at the same time provide for the ability to obtain guidance from commercial judges or insolvency practitioners[103] who have a high level of experience and expertise in the area.

It is argued that minimising the interference of the court in the process of corporate rescue would significantly reduce not only the time but also the costs involved in rescue proceedings. For instance, in the United Kingdom, following the

---

[101] Arguably, the role of the courts differs in the United Kingdom system, where greater reliance is placed on the insolvency practitioners; the courts have a supervisory role and also provide guidance when necessary. See A Walters, "Regulating the Insolvency Office Holder Profession Across Borders" in *Crossing (Dutch) Borders In Insolvency*- Papers From the INSOL Europe Academic Forum and Meijers Institute of the Leiden Law School Joint Insolvency Conference, Leiden The Netherlands, 5-6 June 2006. In addition, it should be noted that in the United Kingdom, most major corporate restructurings are conducted outside formal insolvency proceedings. See EHYA Submission on Insolvency Law Reform, 23rd April 2007, Appendix 1 at p. 2.available at www.ehya.com.

[102] See A. Belcher, *Corporate Rescue* (Sweet and Maxwell, 1997) at p. 12, where she defines corporate rescue as 'a major intervention necessary to avert eventual failure of the company'.

[103] It should be noted that in the United Kingdom out-of-court negotiators can work without court guidance.

enforcement of the Enterprise Act 2002, it is possible for the distressed company to enter into administration proceedings without having resort to the court. In the United Kingdom, in an out-of-court appointment, the role of the court is limited in receiving and filing documents and does not involve scrutinising or validating the rescue plan prepared by the administrator. Instead, only upon the administrator's request, will the court provide him with guidance.[104] Scrutiny of the applicability of the three purposes for which an administration order is made is very important.[105] In addition, in France, the new 'safeguard' procedure provides for limited involvement of the courts in the rescue process. Debtors are encouraged to react at an early stage and in return the courts are prevented from removing directors from the company's board.[106]

Furthermore, it could be said that there is, indisputably, a great need to ensure that commercial courts posses a high level of expertise and understanding of commercial practice.

In addition, it is essential that the courts do not strictly adhere to a stringent application of rules, but rather that they adopt a more pragmatic approach towards rescue, giving therefore a second chance to unfortunate but honest debtors. It has been

---

[104] An out-of-court appointment depends heavily on the insolvency practitioner agreeing to take up the appointment and giving an opinion that the purpose of administration is reasonably likely to be achieved. See I.A. 1986 Schedule B1, paras. 18(3) and 29(3). See also R Parry, *Corporate Rescue* (Sweet & Maxwell, 2008) at p. 43.

[105] R Parry, "England And Wales: Administration Orders" in K Gromek Broc and R Parry, *Corporate Rescue: An overview of Recent Developments from Selected Countries in Europe* (Kluwer Law Intenational) at p. 65.

[106] Art. 62, Law of 2005, amending Art. L.626-4, Commercial Code.

argued that a significant number of viable businesses have failed, due to the strict legal framework.[107] Arguably, the tricky task, which is to be performed by Commercial Courts in promoting corporate rescue, is ensuring that a fine balance is kept between the application of existing corporate re-organisation mechanisms and commercial reality. For instance, it could be said that the need for a more pragmatic approach has been recognised in France, where commercial men with a good understanding of the real needs of the ailing business sit as judges of the commercial courts.[108] Furthermore, in the United Kingdom, a practical approach has been taken by the courts, which for example have recently accepted pre-packaged sales of insolvent businesses.[109] In addition, where a pre-pack administration is concerned, the United Kingdom courts have adopted a realistic approach with regards to pre-creditors meeting sales. In particular, although, following the initiation of administration proceedings, the administrator must call a creditors' meeting within ten weeks of taking office so as to vote on the re-organisation plan,[110] it is possible that the administrator will effect a pre-pack disposal of the company prior to a creditors' meeting.[111] It could be said that,

---

[107] Günter Verheugen, The Vice-President of the European Commission, responsible for enterprise and industry policy, said: "Too many businesses go bankrupt and don't get a second chance, simply because the legislative framework is often too rigid..."., Europa, RAPID-Press Releases, IP-06-387, Brussels, 28 March 2006, available at: http://europa.eu/rapid/pressReleasesAction.do?reference=IP/06/387&format=HTML&aged=0&language=EN&guiLanguage=en last accessed on 20th October 2010.

[108] P Omar, "Insolvency Law and Practice in France" in K Gromek Broc & R Parry *Corporate Rescue: An overview of Recent Developments from Selected Countries in Europe* (Kluwer Law Intenational) at pp. 126-128.

[109] See for instance the decision in *DKLL Solicitors* v *Her Majesty Revenue and Customs* [2007] EWHC 2067 (Ch) and also *Kayley Vending*[2009] EWHC 904 (Ch).

[110] Insolvency Act 1986 Sch B1, para 51.

[111] Ibid, para. 52(1), where it is stated that it may not be necessary to hold a creditors' meeting where the administrator thinks that: i) the company can pay all creditors in full, ii) there is insufficient property to make a distribution to unsecured creditors, iii) the rescue of the company as a going concern is not possible or iv) it is not feasible to effect a result better than winding-up.

following the decision in *DKLL*,[112] the United Kingdom courts place great reliance on the expertise and experience of impartial insolvency practitioners and appear to be willing to grant an administration order in order to facilitate a corporate rescue attempt.

At this point, it is essential to consider the factors that cause the domestic courts of France, Greece and the United Kingdom to adopt a rather different approach towards corporate rescue.

At the heart of formal corporate rescue are the court's powers to supervise and control the rescue arrangements, as the courts are commonly given the significant power to scrutinise and accordingly approve viable rescue plans.[113] However, it should be noted that different factors affect the discretion of commercial courts across different jurisdictions. For instance, the enforcement of employment protection rights in France and Greece is deemed to be a key factor affecting the success of corporate rescue proceedings.[114] Although, it is not to be said that the rights of employees in the United Kingdom are of less importance, it appears that the courts in the United Kingdom are more readily prepared to give effect to a viable business rescue plan.[115] In fact, it has been argued that, although employees in the United Kingdom are given protection

---

[112] [2007] EWHC 2067 (Ch).

[113] However, it should be noted that the courts do not do so in all cases; for instance courts do not do so in the United Kingdom, whereas they do in France and Greece.

[114] P Burbridge, "Cross Border Insolvency Within the European Union: Dawn of A New Era" (2002) E. L. Rev. 589-608, at p. 595.

[115] This is evidenced by the approach taken by the United Kingdom courts in the case of *MG Rover* [2006] EWHC 1296 Ch., but also in *Leeds United Association Football Club Ltd (In Administration)* [2007] EWHC 1761 Ch. and in *Huddersfield Fine Worsteds Ltd*. [2005] EWCA Civ. 1072.

under the legislation, this is nevertheless done in a manner that balances their protection against the collective interest in saving the company or the business.[116] Moreover, the legal culture of a jurisdiction is a factor of crucial importance with regard to corporate rescue. In particular, there are stark differences between the legal cultures of the three jurisdictions, as the insolvency legal system of the United Kingdom has traditionally favoured the interests of creditors, whereas the insolvency laws of France and Greece give less weight to protecting the interests of creditors and are more heavily geared towards the protection of employees' interests.[117]

Furthermore, the role of the courts becomes even more significant where cross-border proceedings are involved, as there is an indispensable need for them to be open about foreign practices and institutions and to attempt a reconciliation of any differences in order to effectively promote cross-border corporate rescue. It is argued that co-operation and mutual respect between the domestic courts of Member States is crucial and that reasonable steps should be taken so as to minimise potential conflicts over jurisdiction.[118] Additionally, it should be said that, although in some instances an eager acceptance of jurisdiction can lead to more effective corporate rescue,[119] in the interest of corporate rescue, domestic courts should be more reluctant to readily assert jurisdiction, so as to avoid potential conflicts, which could prove fatal for the salvation of an ailing group of companies. Nevertheless, the approach of the courts in a series of

[116] See R Parry, note 105 at p. 108, paras. 8-12.

[117] P Burbridge, note 114 above, at p. 595.

[118] For a detailed analysis regulating co-operation between courts, see Chapter II on the EC Insolvency Regulation.

[119] For instance decisive action by the courts can sometimes enable companies to be saved.

cross-border proceedings clearly demonstrates their zeal to assert jurisdiction. For instance, the *Daisytek* and the *MG Rover* cases clearly demonstrate that both the French and the United Kingdom courts were vigorously prepared to strongly fight over asserting jurisdiction for the commencement of primary insolvency proceedings.[120] It should be noted that one of the primary reasons which caused the French domestic courts to forcefully battle for the assertion of jurisdiction involved the widely-spread social concerns that allowing the United Kingdom courts to assert jurisdiction would potentially have catastrophic consequences for the protection of employees' rights.[121] It has been argued that the French courts are very reluctant to turn down an opportunity to seize jurisdiction and that they are not free to exercise restraint or discretion in a meaningful way, due to the economic and political importance that the preservation of employment is given in insolvency law.[122] A clear illustration of this point is offered by the *MG Rover* case,[123] where in light of the concerns of the French courts, the English courts and office holders took extra steps in order to demonstrate that the interests of the French employees were safeguarded. In particular, the administrator's proposals were especially adapted, so as to make them more acceptable by the French court. For instance, the administrator's report, inter alia, explained the powers and duties of the

[120] See J Alderton, "The EC Regulation on Insolvency Proceedings Streamlining Cross-Border Insolvency?" (2006) 3(5), Int. Corp. Rescue, 257-264, at p. 259.

[121] See M Haravon, "Recent developments in France under the EU Regulation 1346" (2005) 18(8), Insol. Int. 118-121, at p. 118.

[122] For a detailed analysis of the case of *MG Rover* see Chapter II at pp. 48-52. See also R Parry, note 105 above, at pp. 273-274. See also P Omar, *European Insolvency Law* (Ashgate, 2004) at p. 126.

[123] See R Parry, note 105 above at p. 274.

administrator. Modifications were also made so as to reflect the more favourable treatment of employees in France.[124]

In addition, it could be said that the case of *Eurotunel*[125] is a case which has manifestly imposed on the domestic courts of both France and the United Kingdom a great pressure to deal with insolvency at an international level. Arguably, the outcome in the *Eurotunnel* case provides an excellent example of successful corporate rescue, which could be partially attributed to the high degree of co-operation amongst the domestic courts of France and the United Kingdom (and partially to co-operation amongst insolvency practitioners) and to the realisation by both sides of the fact that flexibility in cases on cross-border insolvency is a vital ingredient of effective rescue.[126]

Moreover, another crucial factor, which has to be considered, is the need for transparency in corporate rescue proceedings. For instance the findings of an investigation in France during 1996-1997, which indicated that a significant number of commercial judges were suspected of engaging in unprofessional conduct, resulted in subsequent legislative reforms in order to restore the public trust in the way that

---

[124] Ibid.

[125] On August 2, 2006 the Paris Commercial Court initiated proceedings, under the new '*sauveguard*' procedure. See judgement of the court: greffe number No 2006/1903. It should be noted that the Eurotunnel decision constitutes the first application of the EC Insolvency Regulation (EC Regulation No.1346/2000 on Insolvency Proceedings [2000] OJ L 160/1.) to the safeguard procedure. See also INSOL International Case Study Series 1, Eurotunnel Plc & Eurotunnel S.A. And Associated Companies, 2nd August 2006 and 15th January 2007, available at http://www.rovigo.ro/images/INSOLInternationalTechnicalCaseStudy1.pdf last accessed on 20th October 2010.

[126] INSOL International Case Study, ibid.

commercial justice was administered in France.[127] On a similar note, during the early 2000s in Greece, there was an outbreak of scandals which revealed that an amalgamation of lawyers and judges repeatedly abused their powers in order to further their own business interests.[128] It is noteworthy that in the United Kingdom, there was no similar scandal reported. Instead, from the early 1980s, the findings of the Cork Report have ensured accountability and transparency of corporate rescue proceedings and led to a significant improvement of the regulatory system.[129]

It should, nevertheless, be noted that in the United Kingdom, the recently persistent use of pre-pack administration proceedings has given rise to a significant level of circumspection amongst those who administer the pre-packs, especially where a management buy-out is involved.[130] Although, on the one hand, the use of pre-pack administration appears to be efficient as it safeguards the fast recovery of ailing businesses and also offers better job-preservation than business sales that do not involve a pre-pack,[131] on the other hand, concerns have been raised relating to the objectivity

---

[127] P Omar, note 108 above, p. 117.

[128] See http://www.ant1online.gr/Society/Justice/Pages/20087/ec7b500e-65c5-4596-8bfa-ef135310d15c.aspx last accessed on 20th October 2010.

[129] In particular, significant amendments were introduced with regards to the regulation of the Insolvency Practitioners' conduct, following the Cork Report. See V Finch, *Corporate Insolvency Law, Perspectives and Principles* (Cambridge, 2009) at p. 178.See also Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558, 1982) at para. 732.

[130] See S Frisby, "Report On Insolvency Outcomes" (2006), available at: www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/corpdocs/InsolvencyOutcomes.pdf last accessed on 20th October 2010, at p. 70.

[131] Ibid, at pp. 69-70.

and transparency of pre-pack reorganisation proceedings.[132] However, it could be said that the new guidelines contained in Statement of Insolvency Practice number 16 (SIP 16), issued by the Insolvency Service, have arguably 'healed the wound' caused by the potentially scandalous use of pre-packaged administration.[133] The guidelines emphasise the importance of an explanation of the reason a pre-pack was chosen, hence enhancing the clarity of the pre-pack administration process.[134] Arguably, if the operation of SIP 16 proves effective in the future, it would not be necessary to make additional provision for court intervention.

The role of creditors in the rescue process in the three jurisdictions

The body of creditors, in particular secured creditors, has a crucial role to play in the rescue process. It is recognised that creditor participation in insolvency proceedings has long been regarded as an important feature of any mature insolvency law system. The level of creditors' participation varies depending on the types of proceedings that are involved. However, it has been argued that the need for creditors'

[132] See S Davies, "Pre-pack: He Who Pays the Piper Calls the Tune" Recovery, (Summer) 2006 at p. 16.For a detailed analysis of the scepticism over the procedural objectivity and fairness of pre-packs , see Chapter III at p. 93.

[133] See the Report on the First Six Months' Operation Of Statement of Insolvency Practice 16, available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/sip16-final.pdf last accessed on 20th October 2010, at para. 3.1.1. at p. 14.

[134] See http://www.printweek.com/RSS/News/870892/New-pre-pack-rules-force/ last accessed on 20th October 2010.

participation is greater where rescue proceedings are involved.[135] In addition, it has been noted that creditor participation 'is increasingly regarded as an important element of an insolvency law, especially as a counter-balance to the roles assigned to other participants under the law and as an important means of safeguarding creditor interests'.[136]

The security obtained by creditors serves many subsidiary, but nevertheless important, purposes. For instance, creditors obtain access to information and a degree of control over the conduct of the debtor's business.[137] However, in the unfortunate event of insolvency, the rights of secured creditors become of significant importance as these (depending on the philosophy of the creditor) may threaten the viability of the ailing business.[138] Creditors acquire significant control powers during a rescue attempt. In particular, the insolvency laws of France, Greece and the United Kingdom provide that creditors, through their creditors' committees may, or may not, approve a viable rescue plan.[139]

---

[135] R Tomasic, "Creditor Participation in Insolvency Proceedings" Report presented in OECD Meeting held on 27-28 April 2006 at p. 2.

[136] UNCITRAL (2004), UNCITRAL Legislative Guide on Insolvency Law, p. 242.

[137] It should be noted that creditors by using contractual mechanisms, such as performance-based bonuses, induce the company's directors to align with their interests and to complete effectively and quickly a re-organisation, hence limit the risk of financial loss. See Kuney, "Hajaking Chapter 11" (2005) 21 Emory Bankr. Dev. J. 19, at p. 105, See also Skeel, "Creditors' Ball" (2004) 152 U. Pa. L. Rev., at p. 919.

[138] In the United Kingdom, for example, secured creditors may appoint a receiver and jeopardise any rescue attempts. In addition, even following the initiation of administration proceedings, secured creditors exert significant control on the administrator's conduct.

[139] For the importance of a creditors' meeting see Chapter III at 91. Similarly, for the significance of the creditors' committees in France and Greece, see Chapter IV at pp. 139-140 and Chapter V at p. 201 respectively.

It has been argued that, where a financially distressed company has a single lender with concentrated control rights, an even greater influence is exerted.[140] However, this appears to be undesirable[141] and is in contrast with the spirit of bankruptcy law, which calls for a more collective approach towards insolvency. The effectiveness of creditors' concentrated control rights have been questioned and challenged in the United Kingdom. For example, administrative receivership was a procedure which was very strongly criticised for failing to take into account the interests of all the parties involved in an insolvency. In particular, administrative receivership was a strictly individualistic procedure, which enabled the secured creditor to enforce his legal rights.[142] Webb finds that: 'if debenture-holders have claims on a common pool of assets, the receivership system may lead to an equilibrium in which the company is prematurely and inefficiently liquidated. The problems stem from the feature of this system, which allows creditors to act in individualistic self-interest. They have the right to recover the value of their claim without considering the overall value of the pool of assets upon which they draw. This may force the company to liquidate its assets even though on efficiency grounds it should continue business'.[143] In a similar

[140] J Armour, W Hsu, & A Walters, "The Costs and Benefits of Secured Creditor Control in Bankruptcy: Evidence from the UK", *In: American Law and Economics Association 17th Annual Meeting, Harvard Law School, Cambridge, MA, USA, May, 2007* at p. 5.

[141] It was announced in the Budget speech that the Insolvency Service will start a consultation exercise, in order to consider the possibility of affording super-priority for new financing during a corporate restructuring process, in an attempt to diminish the excess control exercised by secured lenders. In essence this entails that a creditor would be able to advance new funds to the ailing business in order to support its rescue and in return priority would be granted to him over existing secured creditors. See www.hm-treasury.gov.uk/d/Budget2009/bud09_completereport_2520.pdf last accessed on 20th October 2010, para. 4.17, at p. 75.

[142] It should be noted that the decision to initiate the administrative receivership procedure rested with the holder of a floating charge. For a critical analysis on the administrative receivership procedure see also: R Mokal, "The Harm Done By Administrative Receivership" (2004) 1(4) International Corporate Rescue.

[143] D Webb, "An Economic Evaluation of Insolvency Procedures in the United Kingdom: Does the 1986 Insolvency Act Satisfy the Creditors' Bargain?" (1991) Oxford Economic Papers 144.

way, Goode argues that: ‘the debenture-holder or his receiver is entitled to dispose of assets on a break-up basis even though more could be obtained by carrying on the business and disposing of it as a going concern. Further, he is, it seems, entitled to realize any asset of his choosing, even if it is equipment crucial to the company’s business and there are other assets available which would realize sufficient to cover the amount due’.[144]

It is important to note that, following the virtual abolition of administrative receivership,[145] the administration procedure was remodelled so as to provide a more collective rescue mechanism.[146] However, realistically talking, one must bear in mind that it is not to say that following the redesigning of a collective mechanism, such as administration that the control of secured lenders has necessarily diminished.[147] Rather, it has been argued that secured lenders retain their strong influence over rescue proceedings. For instance, it has been noted that banks typically operate ‘panels’ for the selection of accountants to act as their insolvency practitioners and these impose reputational constraints on the latter’s actions. Accordingly, those who are appointed are ‘bound’ not to take steps contrary to the banks’ interests in the course of an

[144] R Goode, “Proprietary Rights and Unsecured Creditors” in B Rider, *The Realm of Company Law* (Kluwer International, 1998) at pp. 191-192.

[145] The holder of a floating charge created on or after September 15, 2003 may not appoint an administrative receiver except in special cases, where financial markets are primarily involved, See s. 72A-G of the IA 1986.

[146] The administration procedure provides for a stay of all claims, both secured and unsecured, therefore it could be argued that it limits significantly the control exercised by a secured lender, such as a bank. See also S Frisby, “In Search of a Rescue Regime: The Enterprise Act 2002” (2004) 67(2) M L Rev. 247-272, at p. 251, where she openly identifies administrative receivership as the foremost obstacle facing the attainment of an improved system of insolvency law.

[147] G McCormack, note 33 above at p. 536, where it is argued that there are great similarities between administrative receivership and the new streamlined administration procedure, to the extent that administration is described as ‘receivership-plus’ and as ‘receivership with a few add-ons.

appointment as this may simply mean that they should not expect to be appointed again.[148]

It is important to note that the role of creditors is vital from the very early stages of a rescue attempt, as directors, who have recognised on time the need to take steps to prevent insolvency, must convince existing creditors that there are sound prospects of recovery and that a reorganisation plan would offer them better returns than having resort to formal insolvency procedures.[149] It could be said that the support and co-operation of key lenders (such as banks) for the traumatised business is very important. The willingness of key lenders not to enforce their legal rights at times that the company is cruising through a financial crisis could prove life-saving.[150] As mentioned above, it is crucial that a legal framework is in place, which enables the debtor to carry out negotiations out-of court with their creditors at an early stage. For instance, in France, it is possible for the debtor to negotiate with lenders even before the cessation of payments. In addition, this is a crucial aspect of the rescue process, as lenders can enter into negotiations under privacy and secrecy and avoid linking their reputation to a potentially failed company.

---

[148] See note 140 above, at p. 8.

[149] V Finch, *Corporate Insolvency Law- Perspectives and Principles* (Cambridge, 2002) at p. 218.

[150] Nevertheless, note that in the United Kingdom following the decision in *Re Atlantic Computer Systems PLC* [1992] Ch. 505, 529–530 which was recently reaffirmed in *Innovate Logistics Ltd*. v *Sunberry Properties Ltd.* [2008] EWCA Civ 1321 secured creditors who have supplied the ailing business with goods which remain unpaid, may still be able to negotiate with the administrator for the repossession of those goods, where repossession does not impede the purpose of administration.

Furthermore, in the United Kingdom since the early 1970s banks have encouraged a more sympathetic approach towards corporate rescue, known as the 'London Approach'. The London Approach can be summarised as a non-statutory and informal voluntary framework, introduced with the support of the Bank of England, dealing with temporary support operations mounted by banks and other lenders to companies that are in need of intensive care.[151] It is important to emphasise that the London Approach is not relevant to all types of company, but rather to large significant companies, which have diverse lenders.[152] The London Approach has four main phases: firstly, there is a standstill covering all debt owed and this requires the unanimous consent of all banks involved; secondly, the banks send in investigating accountants, who would not be the company's auditors; thirdly, the lead bank initiates negotiations with other banks in order to provide a new facility for the company; and finally, a new financial structure is agreed, which should allow the company to prosper.[153] It should be noted that the London Approach is a totally informal practice, which entails that reliable and timely information is given to all the involved creditors, in order to

[151] See A Belcher, *Corporate Rescue* (Sweet & Maxwell, London 1997) at p. 338-9. See also V Finch, *Corporate Insolvency Law- Perspectives and Principles* (Cambridge, 2009) at p. 299-316.For a brief analysis of the London Approach, see also a description by the British Bankers Association, available at http://www.bba.org.uk/bba/jsp/polopoly.jsp?d=130&a=2281 last accessed on 20th October 2010.

[152] Initially the level of complexity of those companies' lending only involved multi-bank lenders. However, now there is increased complexity, as companies have other types of financiers, such as bond holders. Accordingly, it should be noted that the role of the Bank of England and its influence to corporate restructuring efforts is declining, since less of the lending is bank lending.

[153] J Flood, R Abbey, E Skordaki, P Aber, "The Professional Restructuring of Corporate Rescue: Company Voluntary Arrangements and the London Approach" ACCA Research Report No 45, at p. 27.

investigate the company's position and to then formulate a solution that can be unanimously implemented.[154]

It is important to note that the approach that creditors take towards corporate rescue depends heavily on their philosophy and culture but also on 'market forces', as it could be argued that a key lender, such as a bank, would not wish to link its reputation with a corporate collapse. It could be said that banks are cautious and seek to protect their reputation by offering their support to ailing businesses. For instance, a clear example of the manner in which banks operate and react to a reorganisation effort is again illustrated by referring to the implementation of the London Approach, where unanimous consent is necessary. In such circumstances, there would always be a presence of several bank creditors. Although a lead bank, namely one with the biggest exposure, may impose pressure on minor creditors, there is nevertheless a spirit of mutual support and co-operation amongst bankers, who in the future may again be called to support each other's rescue workouts.[155] To put it simply, the approach taken by banks could be best described by the phrase that: 'you scratch my back, I'll scratch yours'.[156]

---

[154] R Parry, "United Kingdom: Administrative Receivership and Administration" in Gromek Broc & Parry *Corporate Rescue An Overview of Recent Developments from Selected Countries in Europe* (Kluwer International, 2004) at p. 154. See also C Bird, "The London Approach" 1996, I.L & P, at p. 87.

[155] It is important to note that the secrecy that characterises the London Approach, allows banks to work together rather than in competition with each other. See Flood, J., Abbey, R., Skordaki, E., Aber, P., note 248 above, at p. 29.

[156] See note 153 above.

Furthermore, although the debtor company's need to obtain the full support of secured lenders in the process of a corporate reorganisation plan is crucial, it is also vital to ensure that lending is afforded to ailing companies in a responsible manner. In other words, it is necessary to ensure that credit is issued to a financially distressed business, where there is a reasonable prospect of it being able to pay back its creditors and that over-indebtedness due to irresponsible lending practices is avoided. Arguably, the creditors' attitude is crucial, since they must carefully evaluate the rescue plan proposed by the company's directors. It could be said that the level of risk that a director may be willing to take depends on a variety of factors, such as the pressure exercised by the company's creditors but also the financial position of the company and the prospects of him preserving his office.[157] In essence, where the company is fragile but solvent the director may not wish to engage in risky endeavours, so as to preserve his post.[158] On the other hand, it is equally possible that a director would, at the brink of insolvency, take a disproportionately high risk, as this would be the only way of ensuring sufficient returns.[159]

As mentioned above, the full support of secured creditors is crucial during a corporate reorganisation, firstly because they may be required not to enforce their legal

---

[157] L Qi, "Managerial Models During the Corporate Reorganisation Period and Their Governance Effects: The UK and US Perspective" (2008) 29(5) Comp. Law. 131-140, at p. 135.

[158] See Lopucki & Whitford, "Corporate Governance in the Bankruptcy Reorganisation of Large, Publicly Held Companies" (1993) 141 U. Pa. L. Rev. at p. 684, where it is noted that 'a manager tainted by the company's financial problems might prefer to take high risks because only they could lead to returns sufficiently high to restore the manager to favour; on the other hand a manage whose job and company are not in immediate jeopardy might prefer investments with risks that are lower than those preferred by the company's investors.

[159] L Qi, note 157 above, at p. 135.

rights immediately after they sense a crisis, and, secondly and more importantly, because they may be invited to inject new funds into the distressed company. However, it should be noted that lending new funds to a problematic business is regarded by creditors as a very risky activity, as they can be repaid in full only if the rescue attempt is successful.[160] Accordingly, the injection of new funds into the traumatised business may not prove to be an easy task,[161] as reluctant creditors may seek to receive additional reassurances and incentives prior to granting their support.[162] For instance, creditors advancing new capital will wish to ensure that any new funds are genuinely necessary for the continuation of the company's operation and for which repayment is adequately provided.[163] It could be argued that super-priority in return for injecting new monies into a financially distressed company is a key element, which could arguably warrant the success of a reorganisation attempt and secure the continued operations of the traumatised business. In essence, super-priority ensures that adequate capital is injected into the troubled business, when it needs it the most,[164] whilst a creditor who

---

[160] V Finch, note 151 above, at p. 405.

[161] See G McCormack, "Super-Priority Financing and Corporate Rescue" (2007) J.B.L. 701-732, at p. 706. Although the support of lenders who have no existing association with the ailing company is not impossible, it is more likely that existing lenders will be prepared to provide new financing, in order to ensure that their existing security retains its value.

[162] See Principle 8 of the INSOL International Statement of Principles For A Global Approach To Multi-Creditor Workouts, (2000), at p.33 available at http://www.insol.org/pdf/Lenders.pdf last accessed on 20th October 2010, which states that 'If additional funding is provided during the Standstill Period or under any rescue or restructuring proposals, the repayment of such additional funding should, so far as practicable, be accorded priority status as compared to other indebtedness or claims of relevant creditors'.

[163] See ibid, Commentary on Principle 8, at p. 33.

[164] See R3s Ninth Survey of Business Recovery in the UK, available at http://www.r3.org.uk/pdf/09th_Company_survey.pdf last accessed on 20th October 2010, which noted that lack of funding was the main reason of unsuccessful rescue in one in five companies with a turnover exceeding £5milion. 2001, at pp. 7,8,12. See also V Finch, note 152 above at p. 406, where she presents the findings of a research carried out by Maria Carapeto, which demonstrated that of 326 companies, which filed for Ch.11, 135 raised super-priority financing which comprised around 19% of the total debt of the company; additionally, almost half of the new-financing was injected by existing

injects new funds or supplies goods or services during the reorganisation process is afforded priority over any existing secured creditor, who advanced funds prior to any rescue concerns being raised in the company.[165] The concept of super-priority for new financing has its roots in the United States Chapter 11.[166] However, it should be noted that, under Chapter 11, there is no automatic approval of post petition financing and accordingly for super-priority.[167]

The idea for provision of super-priority financing during reorganisation received great support in Europe.[168] Following the example of other European jurisdictions, both France and Greece made provision for super-priority for creditors who advance new funding during reorganisation proceedings.[169] Furthermore, the need to ensure that adequate finance is available during a reorganisation phase was also recognised in the

---

(pre-petition) creditors and high levels of super-priority financing were associated with successful recovery rates. On the association of new financing and successful recovery rates see also G McCormack, note 161 above, at p. 709.

[165] R Parry, "Is UK Insolvency Law Failing Struggling Companies?" NLJ 1, at p. 14.

[166] See Finch note 151 above, at p.406-407. See also G McCormack, note 162 above, at p. 714.

[167] If the provision of new financing to the debtor is in ordinary course of business, (i.e. to pay employees salaries) then super-priority is automatic. However, if credit is extended to the troubled company outside its ordinary course, super-priority must be authorised by the court. (See s. 364 of the US Bankruptcy Code).

[168] For instance, the European Bank for Reconstruction and Development designed 10 Core Principles for and Insolvency Law. Core Principle 8 states that 'Most insolvent companies will require additional working capital during the re-organisation process to complete their restructuring activities. While each insolvency must be treated on a case-by-case basis to determine if such financing is appropriate, a mechanism is needed to give this financing super-priority'. Available at http://www.ebrd.com/country/sector/law/insolve/core/principle.pdf last accessed on 20th October 2010.

[169] See Chapter IV at p.148 and Chapter V at p. 196 respectively.

United Kingdom prior to the enactment of the Enterprise Act 2002.[170] In particular, it was suggested that the provision of additional finance to ailing businesses could be value enhancing provided that it was part of a thoroughly considered re-organisation plan.[171] Nevertheless, the concept of super-priority proved to be a 'hot-potato'[172] and the legislators decided not to create a statutory framework of super-priority during administration proceedings.[173] Accordingly, the Enterprise Act makes no provision for super-priority financing.[174]

In addition, it is noticeable that the issue of super-priority funding was included recently in a consultation exercise carried out by the Insolvency Service.[175] The purpose of the exercise was to consider whether legislative provision for super-priority funding should be made in the United Kingdom in order to make the CVA and the

---

[170] The House of Lords proposed the introduction of the concept of super-priority in the United Kingdom, but the proposals were regrettably rejected by the United Kingdom government. See HL Debates, 21 October 2002.

[171] See DTI Report: A Review of Company Rescue and Business Reconstruction Mechanisms, (2000) at p. 41, available at: http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/con_doc_archive/consultation/condoc/condocreview.pdf last accessed on 20th October 2010.

[172] Following the virtual abolition of the administrative receivership procedure by means of the Enterprise Act, the legislators have sweetened the pill for floating charge holders (in particular banks), who would only be able to appoint an administrator via the out-of-court route. Arguably, the introduction of a super-priority provision would prejudice further the interest of the already upset secured lenders, upon whom ailing companies have traditionally relied.

[173] See A McKnight, "The Reform of Corporate Insolvency Law in Great Britain-The Enterprise Bill 2002" (2002) 17 JIBL 324-335, at p. 333. It should be noted that the issue of super-priority funding was discussed again recently in the United Kingdom by the EYHA. See EHYA UCL-"Roundtable Discussion-Restructuring procedure Reform- Timely Change for Britain's Economy" 4th March 2009, at p. 6.

[174] See G McCormack, *Corporate rescue Law: An Anglo-American Perspective* (Edward Elgar Publishing Ltd, 2008) at p. 194.

[175] See "Consultation: Encouraging Corporate Rescue" available at: http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/compresc/compresc09.pdf last accessed on 20th October 2010, at p. 18.

administration procedures more attractive.[176] Although super-priority was welcomed in France and Greece, it could be argued that the inclusion of super-priority in the United Kingdom is not necessarily desirable, as it could adversely affect the cost of borrowing.[177] In other words, where a secured creditor knows that his security may be subordinated in insolvency, although he might be prepared to advance funds, borrowing would nevertheless be at an increased cost. For instance, where security is held subject to a negative pledge,[178] it could be said that if priority is given to rescue finance, then existing lenders would find that the security they hold is worth less to them than they had though. Consequently, such lenders may seek greater security when they agree the initial loans with the company, thereby driving up the cost of borrowing.[179] In addition, it should be added that, although super-priority would enable the troubled, but viable, debtor to secure additional funds and hence would enhance the chances of successful rescue to the benefit of creditors as a whole, one could contend that the interests of original lenders should also be protected and rescue which provides for the dilution of those lenders' interests should not be pursued. Instead, companies, which have no true chances of survival, should be placed into liquidation. Accordingly, it could be argued that super-priority funding interferes with the rights of existing creditors and could potentially endanger distressed companies that nevertheless have true chances of survival.

---

[176] Ibid, para. 57, at p. 19.

[177] In fact it was recently announced that the Government decided against taking the issue of super-priority funding any further. See Consultation: Encouraging Corporate Rescue- Summary of Responses, November 2009, available at: http://www.insolvency.gov.uk last accessed on 20th October 2010, at pp. 11-13.

[178] A negative pledge limits a company's ability to borrow money using its assets as security, which protects existing secured lenders against any later dilution of their security.

[179] See note 176 above, para. 59, at p. 19.

Finally, it could be said, that although it is key to ensure that 'fresh' capital is injected into an ailing business, it is equally important to ensure that a legal framework is in place, which is designed to 'punish' creditors who afford improper support to distressed companies. It is argued that a fine balance must be maintained between, on the one hand, encouraging the support of lenders during a re-organisation plan, by means of providing for incentives, such as super-priority and, on the other hand, imposing creditor liability for excessive and undue support. It could be argued that such balance was formerly achieved in France, under the principle of "improper support" (*"soutien abusif"*), which imposes liability upon a lender for knowingly extending finance that is beyond the capacity of the debtor, thus contributing to the aggravation of the company's perilous situation and leading to its subsequent insolvency.[180] It should be argued that, due to cultural differences, no equivalent provision exists in the United Kingdom, where it is, in contrast, believed that the loss of money which creditors already lent operates as a disincentive. Hence, creditors supporting the ailing business are already discouraged enough from engaging in such misconduct. Nevertheless, it could be said, that in the United Kingdom, any irresponsible lending or oppressive behaviour on the lenders' part, especially banks, is potentially to be combated by means of holding them liable as shadow directors[181] in wrongful trading claims.[182]

---

[180] See also P Omar, "Reforms to Lender Liability in France", (2006) 3 ICR 277-284.

[181] See s. 214 & s. 251 of the Insolvency Act 1986. A 'shadow director' is perceived as a person in accordance with whose directions or instructions the directors of the company are accustomed to act. See also *Re Hydrodam* [1994] 2 BCLC 180, where it was held that 'a shadow director does not claim or purport to act as a director. On the contrary, he claims not to be a director. He lurks in the shadows, sheltering behind others, who, he claims, are the only directors of the company to the exclusion of himself'. See also *Re Euro Express Ltd., Secretary of State for Trade and Industry* v. *Deverell* [2001] Ch. 340.

[182] It is nevertheless interesting to note that in practice the provisions of s.214 IA 1986 are very rarely applied. Therefore, it appears that the provision lacks teeth as it is only applicable in theory. See A Campbell, "Wrongful Trading and Company Rescue" (1994) 25 CLJ 69. See also D Arsalidou, "The Impact of s.214 of the Insolvency Act 1986 on Directors' Duties"(2000) 21 Co.Law. 19.

Nevertheless, it should be noted that the new French Law of 2005, taking into account the concerns of banks, provides that those creditors, who extend funds with a view to support the continuation of the ailing business cannot at a later stage be held liable for improperly extending credit to the debtor.[183]

The role of Insolvency Practitioners in the process of corporate rescue

It has been suggested that the success of any insolvency legal system depends heavily on those who administer it.[184] In addition, it could be argued that those who administer re-organisation proceedings may influence the outcome of such proceedings because of their cultural and professional backgrounds. However, it should be noted it is not the same actors that administer rescue proceedings in every jurisdiction. For instance, lawyers in Greece are predominantly involved in insolvency practice, whereas, in the United Kingdom, rescue proceedings have traditionally been controlled by accountants, with lawyers[185] acting largely as their advisors.[186] Moreover, it could be

[183] See P Omar, "French Insolvency Law: The 2004 Project and Reform Perspectives" (2005) 2(2) Int. Corp. Rescue, at p. 69.

[184] Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558, 1982) at para. 732.

[185] J Flood, & E Skordaki, "Insolvency Practitioners and Big Corporate Insolvencies" Research Report 43. ACCA. Certified Accountants Educational Trust. London, 1995, at p9. The limited involvement of lawyers in the insolvency sector could be explained with reference to their 'status concerns' during the 19th century, where the association of a prestigious body, such as lawyers, with debt collection had unfavourable connotations.

[186] Ibid, at p. 5.

said that the regulation of the Insolvency Practitioners (IPs) conduct and their performance are matters that affect both private rights and the public interest.[187] It is therefore submitted that, in order to safeguard the integrity of rescue proceedings, it is important that the skills and qualifications of those involved in the insolvency work are recognised and regulated by a professional body, which is able to take disciplinary action against those who fail to meet the set competence criteria.[188] Furthermore, it is also important to draw a distinction between the types of rescue proceedings that IPs are engaged in. This distinction is important as, where informal rescue proceedings are concerned, it is possible for turnaround professionals, who are not necessarily accredited by a special professional body, to control the process.[189] However, where formal rescue proceedings are involved, it is important that the qualification of those administering the process have been assessed by a competent authority, such as the Secretary or the State, or by virtue of membership in an accredited professional body.[190]

The need to regulate the profession of insolvency practitioners, with particular regard to formal insolvency proceedings, was recognised in all the three jurisdictions concerned. In particular, the importance of having a system of control over the skill and competence of insolvency practitioners was highlighted in the United Kingdom early in the 1980s by the Cork Committee, which was concerned that the administration of

[187] See V Finch, "Controlling the Insolvency Professionals" (1999) Insolv. L. 228-239, at p. 228.

[188] V Finch, note 152 above, at p. 183.

[189] These could be either individuals or organisations which help companies in effecting turnarounds, and they come with a variety of labels, such as company doctors, business recovery specialists, risk consultants, solutions providers, independent business reviewers, asset-based lenders, private equity providers, debt management companies, credit advisers and insurers, and cash-flow managers. See V Finch, "Doctoring in the Shadows of Insolvency" (2005) J.B.L. 690-708, at p. 692.

[190] See V Finch, note 187 above, at p. 238, See also J Flood, & E Skordaki, note 186, above, at. 5.

insolvency proceedings was open to abuse.[191] Subsequently, the Insolvency Act 1986 brought along significant changes in the insolvency philosophy, as it gave effect to the Cork Committee aspirations by restricting the appointment of office holders to only persons qualified under the Act.[192]

Similarly to the United Kingdom, in the 1990s, the conduct of IPs also became the centre of attention in France, but for a very different reason, namely because of a series of scandals, which adversely affected public confidence.[193] The number of high-profile cases that occurred demonstrated that the insolvency practice was an unusually close-knit network, in which judges, lawyers and practitioners formed suspiciously strong relationships.[194] Accordingly, the reforms focusing on the insolvency practice of France were part of a large scale reform process which affected the administration of the entire system of commercial justice.[195] The reforms, which were severely delayed, were finally enacted in 2003[196] and introduced far-reaching changes to the profession of IPs as specific criteria were formed in order to access the profession.[197] Provision was

---

[191] 'Cork Report' at para.756. See also V Finch, note 151 above, at 182. On the emergence of the IP profession see also B Carruthers, and T Halliday, *Rescuing Business: The Making of Corporate Bankruptcy Law in England & the United States* (Oxford University Press, 1998) ch.8.

[192] See Insolvency Act 1986 part XIII and the Insolvency Practitioners Regulations 2005 (SI 2005/524. It should be noted that individuals who wish to become qualified IPs have to successfully set an examination organised by the Joint Insolvency Examining Board (JIEB).

[193] P Omar, note 108 above, at p. 114.

[194] In particular, it was found that a large number of commercial judges were involved in instances of unprofessional practice and potentially serious misconduct. See P Omar, ibid at p. 114-115.

[195] P Omar, note 193 above, at p. 125.

[196] Law of 2003, published in the Official Journal 0n 4th January 2003.

[197] See Article 5 Law of 2003, which makes provision for an examination system for the qualification of practitioners and their formal admission to practice. See P Omar, note 193 above, at p. 132.

also made with regard to the control, inspection and discipline of the profession.[198] Furthermore, in Greece in the early 2000s, a series of political scandals occurred which raised concerns over the conduct of those administering insolvency proceedings, namely commercial judges and practitioners, who similarly to France, operated in a very close network. In particular, these scandals regrettably showed that insolvency practice in Greece has been repeatedly abused by practitioners who have acted under the auspices of corrupt members of the judiciary.[199] However, in contrast to France, Greece has not introduced any legislative intervention in order to regulate the profession of IPs. This failure to address such a crucial matter is deeply deplored, as the punishment of the 'bad apples' was left to the courts, which were suspected of not being totally independent from political pressure.[200] Finally, it could be argued that, beyond the radical reforms which were introduced in Greece in 2007, which aimed at promoting corporate rescue, the failure to regulate the IP profession constitutes a

[198] For instance, by means of Article 21 of the Law of 2003, important restrictions were imposed of the professional functions of liquidators, who would no longer be able to act as liquidators and at the same time carry out business as lawyers. It should be noted that similar restrictions were not imposed on the conduct of administrators (see Article 8, Law of 2003). (See ibid, P Omar, at p. 132).

[199] It should be noted that legal proceedings against the allegedly corrupted individuals are still ongoing. For commentary on the wide-spread scandals involving over one hundred judges in Greece, see "Tension at the Judicial Scandal Trial" Eleftherotypia ('Ελευθεροτυπία'), 16th September 2009, available at *www.enet.gr* last accessed on 20th October 2010. Also a clear example demonstrating the strong political influence of the actions of the courts is the eruption of the Siemens corruption scandal. The scandal involves the paying of huge bribes by leading Siemens managers to Greek political parties in order to secure contracts for Siemens, especially during the Athens Olympics. It appears that the courts influenced, by political pressures, have taken steps to ensure a more favorable treatment than the one the existing legislation provides. See "The Supreme Court Rejects Zagorianos Exclusion Application" Eleftherotypia ('Ελευθεροτυπία') 16th September 2009, available at *www.e-net.gr* last accessed on 18th October 2010.

[200] See Eleftherotypia ibid. For a full account of the progress of the legal proceedings against those facing charges for their involvement in the scandals see also "The search for the New Judicial Scandal Continues" available at http://www.athina984.gr/taxonomy/term/3164 last accessed on 20th October 2010.

significant omission, which very much demonstrates that Greece unfortunately remains true to its troubled political heritage.

It is submitted that the requirements in relation to the qualifications and expertise of insolvency practitioners are of a vital significance, as they arguably ensure that rescue proceedings are fairly and properly conducted. It could be said that, in the outbreak of a series of large-scale insolvencies, the experience of IPs is crucial. For instance, an interesting comparison could be made between the reactions of IPs on both sides of the Atlantic, where the prospective filing of insolvency is concerned. In particular, in 2008, following allegations in the United Kingdom with regard to the solvency of Lehman Brothers, an integrated financial institution operating in a number of countries, the reaction of the United Kingdom company's advisors was so rapid that they immediately filed for the initiation of administration proceeding on 15 September 2008, whereas in the United States, the advisors adopted a more confident stance and filed for insolvency five days later on 19 September 2008. On the one hand, one could contend that the approach taken by the United Kingdom IPs demonstrates their lack of experience in dealing with such a large-scale reorganization[201] and hence the fact that it was difficult to effectively deal with the United Kingdom part of Lehman due to the lack of time to plan.[202] However, on the other hand, it could be said that the outcomes

[201] It has been argued that the lack of planning subsequently resulted in a significant drop of the company's value. See EHYA UCL Roundtable Discussion-Restructuring procedure Reform- Timely Change for Britain's Economy, 4th March 2009, at pp. 4-5.

[202] Although an early filing for insolvency could result in loss of confidence in the market, it should also be remembered that early intervention enhances the chances of successful rescue. In particular, in the United Kingdom early filing for administration proceedings brings the moratorium in effect, which is designed to preserve value. It therefore appears that the issue of early action constitutes a double-edged-sword.

in Lehman Brothers demonstrates effectively the cultural difference towards insolvency between the United States and the United Kingdom. Accordingly, it could be argued that in a jurisdiction, such as the United States, with a 'second-chance' ethos, steps are taken to ensure that the value of the company is protected more effectively.[203] In contrast, in the United Kingdom, which arguably lacks a rescue culture, where a company is expected to enter insolvency proceedings it is automatically stigmatised and that results into a loss of confidence in the market, which arguably deteriorates the position of the already fragile company.

In addition, it could be said that the contribution of IPs to corporate rescue is immense because of their inherent ability to develop practical solutions for problems for which the legislature either made no provision or failed to deliver an effective and workable outcome. The ability of practitioners to adopt a more 'creative' and practical approach towards existing problematic legal procedures is effectively illustrated by having regard to the pragmatic approach that IPs adopted in relation to pre-pack administration proceedings in the United Kingdom.[204] In particular, the existing administration procedure was 'manoeuvred' so to provide greater returns for all the actors involved in the insolvency proceedings, but, more importantly, the company's employees and, ultimately, its creditors.[205] In fact, the use of the pre-pack technique has

---

[203] See for instance the approach taken in the restructuring of TMD Friction, where a United States company which was a market leader in automotive brake manufacturing, was able to wipe out debt and thus able to buy assets in times of poor liquidity. See also note 201 above, at pp. 4-5.

[204] For a greater analysis of the pre-pack administration procedure, see chapter III at pp. 93-112.

[205] See for instance the approach taken in *DKLL Solicitors* v *Her Majesty Revenue and Customs* [2007] EWHC 2067 (Ch), where the administrator in order to quickly give effect to a sale of a business was entitled to skip a creditors' meeting prior to the sale and proceed with pre-packaged administration proceedings.

drastically increased in a wide range of jurisdictions, including France, as demonstrated by a recent report.[206] An additional example is by reference to the collapse of the Maxwell Corporation, which demonstrated effectively the tensions between the global and the local and the creative faculties of practitioners who had to craft solutions, by way of protocols, in the absence of coherent normative systems.[207] In addition, the *MG Rover* case clearly demonstrates the 'creativity' of IPs, who specifically adjusted normal procedures in order to address the concerns of the French Court.[208]

Furthermore, it is important to note that, beyond qualifications and skills, the mindset of insolvency practitioners may influence the outcome of a rescue attempt to a great extent. It could be said that the way that practitioners perceive their role in the insolvency practice could effectively shape the outcome of such proceedings. For instance, where practitioners consider themselves as debt-collectors, then it could be argued that a rescue attempt would prove fruitless.[209] Nevertheless, the difference between debt collectors and licensed insolvency practitioners should not only be one of

[206] "Life After Lehman, Allen & Overy analysis of changes in market practice" available at http://www.allenovery.com/AOWeb/binaries/53064.PDF last accessed on 20th October 2010, at p. 29 last accessed on 20th October 2010. See also See S. Davies, "Pre-Pack: He Who Pays the Piper Calls the Tune", (2006) 16 Recovery (summer) at p. 17, where it has been estimated that at least 50 per cent of all administrations in the United Kingdom, are pre-packaged.

[207] See J Flood, & E Skordaki, Normative Bricolage: Informal Rule-Making by Accountants And Lawyers in Mega Insolvencies, 1997 Global Law Without A State, at p. 111, available at http://www.johnflood.co.uk/pdfs/Normative_Bricolage_Insolvency_1997.pdf last accessed on 20th October 2010.

[208] See R Parry, *Corporate Rescue* (Sweet & Maxwell, 2008) at pp. 273-274.

[209] See J Flood, & E Skordaki, E., Insolvency Practitioners and Big Corporate Insolvencies, ACCA Research Report No. 43, at p. 15, available at http://www.johnflood.co.uk/pdfs/Insolvency_Practs_And_Big_Corp_Insolvencies_1995.pdf last accessed on 20th October 2010, where an officeholder who was asked how he perceived his role in insolvency proceedings, replied that 'we are debt-collectors.

scale and complexity.[210] Instead, saving a viable business as a going concern should be embedded in practitioners' culture, so that a 'second-chance culture' would truly have a chance. This fundamental philosophical difference becomes clearer by means of comparing the approach of United Kingdom insolvency practitioners (who are largely accountancy driven) to their United States counterparts (where IPs are largely lawyers) towards a cross-border insolvency.[211] As already mentioned, the approach in the United States, similarly to France and Greece, favours the protection of debtor-in-possession regimes, whereas the United Kingdom law tends to be a manager-displacing regime and favour the appointment of a practitioner. Moreover, it has been observed that most administrations in the United Kingdom result in a sale of the business to a third party, while in the United States the business tends to remain in the hands of the debtor.[212] Accordingly, it becomes apparent that in such jurisdictions there is a set of two fundamental conflicts, namely a normative but also a conflict of professional authority.[213]

However, beyond the normative and the philosophical divides concerning cross-border insolvency, it is imperative that practitioners, regardless of their professional backgrounds, maintain a high level of co-operation, so as to ensure that insolvency

---

[210] Ibid, at p. 15.

[211] See for instance the inter-professional tension which was developed between British accountants and American lawyers in dealing with the cross-border insolvency of the Maxwell Corporation, when the former attempted to assert authority over the latter. See Flood & Skordaki ibid, at pp. 117-119.

[212] L Qi, "Managerial Models During the Corporate Reorganisation Period and Their Governance Effects: The UK and US Perspective" (2008) 29(5) Comp. Law. 131-140 at p. 136. See also N Martin, "Common Law Bankruptcy Systems: Similarities and Differences" (2003) 11 Am. Bankr. Inst. L. Rev. 367, at p. 396.

[213] J Flood & E Skordaki, note 209 above, at p. 112.

proceedings are smoothly operated across jurisdictions. Moreover, a relationship of healthy competition, rather than being resented, should be encouraged between the different actors who are involved in the administration of insolvency proceedings. In particular, where cross-border proceedings are involved, co-operation between IPs becomes vital. Although it is recognised that the differences in cultural and professional backgrounds of practitioners could make such co-operation difficult, every effort should be made by them to override any potential conflicts.[214]

Administration and its foreign counterparts: an entry mechanism to corporate rescue

It is important to take into account that not all companies are 'worthy' of rescue. It has been argued that part of the commencement process of corporate rescue proceedings involves a filtering stage, whereby firms that require immediate liquidation are distinguished from those which are likely to provide better returns to creditors than liquidation.[215] Following the completion of this filtering process, it is then crucial to ensure that a formal legal framework is in place in every jurisdiction, which enables a company to exit from a financial crisis and to re-organise itself. Equally, it is significant

[214] It could be argued a basic difference, such as the remuneration of IPs in the different jurisdictions, could cause hardship. See Flood & Skordaki, note 209 above, at p. 12.

[215] C Anderson, & D Morrison, "The Commencement of Corporate Rescue: How and When Does it Start?" available in P Omar, *International Insolvency Law: Themes and Perspectives* (Ashgate Publishing, 2008) at p. 86.

to ensure that this transitory process takes place quickly and at a low cost, in order to enhance the chances of successful rescue.

It is interesting to note that, although sophisticated re-organisation regimes exist in all the three jurisdictions, the approach taken towards rescue in each differs. In particular, the United Kingdom chose not to follow the example of Greece and France, where reforms were introduced in order to promote corporate reorganisation through 'debtor in possession' regimes. In other words, a convergence towards a Chapter 11 'debtor in possession' reorganisation regime is noticed in France and Greece, whereas the United Kingdom opted for a divergence from Chapter 11 proceedings. In the United Kingdom, the most significant rescue procedure is the administration procedure, which has undergone major amendments via the Enterprise Act 2002. Following radical reforms, a streamlined administration process is now available, which, following the virtual abolition of administrative receivership, constitutes the main weapon of corporate rescue.[216] It could be argued that the United Kingdom's choice to maintain administration as the main rescue process and not to adopt a United States Chapter 11 model signifies the fact that the United Kingdom may not be ready just yet to surrender significant control to the debtor's management.[217] However, it is interesting to note that the Insolvency Service carried out a consultation exercise, in order to examine the possibility of extending the moratorium on creditor action against small companies trying to agree a CVA to medium and large companies. The proposed changes are

[216] See Chapter III at p. 82.

[217] See note 37 above, "Consultation-Encouraging Corporate Rescue" available at: http://www.insolvency.gov.uk last accessed on 20th October 2010.

aimed at giving struggling large and medium sized companies a breathing space while they seek to reach legally binding agreements with their creditors, without first having to place their companies into administration. It is argued that this approach would be the sign of a 360 degree shift towards a ‘debtor in possession’ regime and would effectively lead to a United States Chapter 11 equivalent. As opposed to the United Kingdom, both Greece and France, in line with their debtor-friendly philosophy opted for ‘*judicial rescue*’ and ‘*redressement judiciaire*’ respectively, which are ‘debtor-in-possession’ regimes and, arguably, bear similarity to the United States Chapter 11.

One of the primary points prior to the commencement of corporate rescue proceedings is to consider who initiates the proceedings and whether there is a pre-requisite of insolvency.[218] In the United Kingdom, the administration process could traditionally be initiated by means of an administrator being appointed by the court. However, following the reforms introduced by the Enterprise Act 2002, an administrator can now also be appointed by the company, its directors, or by a floating charge holder. It is important to note that where, the administrator is appointed by the court, the company, or its directors, there is a requirement that the company ‘is or is likely to become unable to pay its debts’.[219] However, where the administrator is appointed by the holder of a qualifying floating charge, there is no requirement to show that the company is in fact insolvent.[220] This, arguably, ‘sweetens the pill’ for the charge holder as his ability to appoint a receiver was lost following the abolition of the

[218] C Anderson, & D Morrison, note 215 above, at p. 87.

[219] See Insolvency Act 1986, Schedule B1, paras. 11 & 27 respectively.

[220] See Insolvency Act 1986, Schedule B1. See C Anderson, & D Morrison, note 216 above, at p. 88.

procedure of administrative receivership. Similarly, in France, where judicial rescue proceedings *(redressement judiciaire*- the equivalent of the United Kingdom administration) are initiated, there is a requirement that the company is technically insolvent.[221] Judicial rescue proceedings may be opened at the request of the debtor or the court may seek to intervene and may ex officio open judicial rescue proceedings, where pre-existing conciliation proceedings have failed.[222] Finally, in Greece, a similar approach is taken, whereby the distressed company or its directors are encouraged to file for judicial reorganisation proceedings, where the company has actually ceased payments.[223]

A sharp contrast with the approach taken by all European jurisdictions is noticed in the United States in relation to Chapter 11 filings. Firstly, it is interesting to note that, in the United States, there is no direct requirement to show that the distressed company is in fact insolvent.[224] In addition, it is notable that the company's directors are responsible for the initiation of a reorganisation plan under the auspices of a Chapter 11 filing and that, although the company's creditors may theoretically initiate bankruptcy

---

[221] Article 88, Law of 2005.

[222] Article 89, Law of 2005. That is where the conciliator's report shows that the debtor has been in fact in cessation of payments.

[223] Article 107, Law of 2005.

[224] However, the lack of an insolvency requirement under Chapter 11 should be seen in the context of the nature of the process under the Bankruptcy Code, as the process involves a court filing as the trigger for all of the consequences that the procedure will involve. See Anderson, C., & Morrison, D., note 216 above, at p. 90. See also D Baird, "The Elements of Bankruptcy" (Foundation Press, New York, 2001) at p. 8, where it is stated that the position adopted in the US could be justified on the basis that 'insolvency may not be easy to measure at the outset of a case'.

proceedings, in practice United States law discourages creditors from doing so.[225] Nevertheless, it should be remembered that an early filing for the initiation of Chapter 11 proceedings may not always occur because of the 'manager-friendly' approach that the United States law encourages, but rather because of the control rights an important creditor may enjoy within the company. For instance, a creditor may in practice force directors to file for insolvency proceedings by threatening to remove assets that are essential for the company's continuation.[226] An interesting point of comparison between the American and the European insolvency models is that, although in all three European jurisdictions a wider sphere of participants is involved in the reorganisation process and although all are able to initiate involuntary insolvency proceedings (namely against the wish of the company's directors),[227] it is still unclear whether this factor results in increasing significantly the number of filings being reported at an early stage.[228] Nevertheless, with regards to filings of insolvency solely by the company's directors, it could be said that, because in all the three European jurisdictions directors could be displaced by an outside official who takes over the company's management, directors lack the motivation to seek help prior to a financial crisis.[229]

[225] It is required that three or more creditors together initiate involuntary a bankruptcy filing. See M White, "The Cost of Corporate Bankruptcy: A US – European Comparison" available in J Bhandari & A Weiss, *Corporate Bankruptcy* (Cambridge University Press, London 1996) at p. 469. See also C Anderson & D Morrison, note 216 above, at p. 90.

[226] See M White, ibid, at p. 469.

[227] For instance, the United Kingdom administration procedure is of a collective nature and enables all creditors to provide input and participate in the procedure. See R Parry, "United Kingdom: Administrative Receiverships and Administrations", at p. 265, available in K Gromek Broc, and R Parry, *Corporate Rescue in Europe: An overview of Recent Developments from Selected Countries in Europe*, Kluwer, 2004, at p. 273.

[228] See M White, note 226 above, at p. 469.

[229] For instance, in the United Kingdom the administrator takes over the management from the company's directors. Similarly in France and Greece an outside-official, following the displacement of the directors is responsible for the reorganisation of the business's affairs. Nevertheless, it should be

Another important factor to consider is the policy adopted by the various jurisdictions in relation to the imposition of a time-limit within which an insolvency petition should be filed. Arguably, the time of filing is important as there are greater prospects of survival for a company which files for insolvency proceedings at an early stage.[230] It is noteworthy that, in all three jurisdictions, criminal and civil sanctions may be imposed on directors for failing to adopt measures against insolvency at an early stage.[231] For instance, in France, the debtor must file for a petition at the latest within forty-five days following the cessation of payments. Furthermore, in the United Kingdom, the company's directors are encouraged to file for insolvency at an early stage in order to avoid personal liability. In particular, where it is shown that the company's creditors suffered additional losses, because the company continued trading after it has become insolvent, liability for fraudulent or wrongful trading[232] may be imposed and the directors could also be faced with disqualification proceedings.[233] In addition, under the Greek judicial reorganisation procedure, the debtor is required to file for insolvency within fifteen days and to submit a reorganisation plan within four months from the moment that the cessation of payments was declared.[234] Arguably, the requirement to file for insolvency within a prescribed time limit would increase the

noted that following the reforms in France and Greece displacement of the directors does not occur often, in line with the debtor-in-possession regime that the two jurisdictions are seeking to promote.

[230] See M White, note 226 above, at p. 470.

[231] See above (pages 8-14).

[232] See ss. 213 &214 of the Insolvency Act 1986.

[233] For instance, on the grounds of 'unfitness' under s. 6 of CDDA 1986.

[234] See Article 108(2) of Law of 2007. See also Article 3 para.2 & Article 5 para.2 of Law of 2007.

chances of successful rescue attempts. Nevertheless, the counterargument could be that a strict requirement of insolvency could inhibit rescue attempts at an early stage.[235]

Furthermore, prior to identifying the key procedural differences between the corporate rescue mechanisms that are available in the three jurisdictions, it is important to have regard to the position of directors at the time that rescue proceedings commence. A sharp difference is once again to be noticed between the two sides of the Atlantic, namely, between the United States and Europe. In particular, it is interesting to note that, in all three European jurisdictions, the company's directors are often displaced following the commencement of insolvency proceedings. In contrast, in the United States, where Chapter 11 proceedings are involved, the existing managers are permitted to remain in control of the company and have the right to adopt a reorganisation plan, which would hopefully result in overcoming the financial difficulties the company is faced with. Meanwhile, the company is able to continue its operations as usual.[236] Arguably, this is a significant cultural difference, as, in the United States, entrepreneurship and relevant risk-taking is promoted.[237] Accordingly, the approach taken towards failure in the United States is different and the unfortunate

[235] For instance this is the approach adopted in the US, where there is no requirement to prove insolvency.

[236] See M White, note 226 above, at p. 217-218. See also J Franks, & W Torous, "Lessons From A Comparison Of US and UK Insolvency Codes" available in Bhandari, J., & Weiss, *Corporate Bankruptcy* (Cambridge University Press, London 1996) at p. 457. For a general discussion on Chapter 11 see also, P Lewis, "Corporate Rescue in the United States" available in K Gromek Broc, & R Parry*, Corporate Rescue: An Overview of Recent Developments from Selected Countries* (Kluwer Law International, 2006) at pp. 339-342.

[237] See V Finch, *Corporate Insolvency Law: Perspectives and Principle* (2nd ed., Cambridge, 2009) at p. 279. See also J Westbrook, "A Comparison of Bankruptcy Reorganisation in the US With the Administration Procedure in the UK" (1990) 6 I.L. &P. 86 at p. 143 where he argues that in the USA corporate failure is more readily regarded as "the inevitable downside of entrepreneurship and risk".

directors are given a 'second chance' rather than being punished for their conduct, unless of course this is blameworthy.[238] In contrast, in the European jurisdictions, failure is stigmatised and the company's directors are usually believed to be the ones to blame. For instance, in the United Kingdom, the approach towards corporate rescue is heavily fault-based and involves directors relinquishing their control of the company to the administrator and the courts.[239] Moss interestingly notes that 'in England insolvency, including corporate insolvency is regarded as a disgrace. The stigma has to some extent worn off but it nevertheless still there as a reality. In the US business failure is very often thought of as a misfortune rather than wrongdoing. In England the judicial bias towards creditors reflects a general social attitude which is inclined to punish risk takers when the risks go wrong and side with creditors who lose out. In the United States is still in spirit a pioneering country where the taking of risks is thought to be a good thing and creditors are perceived as been greedy'[240].

Similarly, in France, following the commencement of *redressement judiciaire* proceedings, an administrator may be appointed in order to jointly assist the debtor in

[238] It should be noted that the reorganisation process remains under the close supervision of the bankruptcy court and that in circumstances where the conduct of the directors is questioned, the bankruptcy court may appoint a trustee to oversee the company's operations.

[239] V Finch, note 238 above, at p. 276.

[240] G Moss, "Chapter 11: An English Lawyer's Critique) (1998) 11 Ins. Int. 17-20, at p. 18. See also N Martin, "Common Law Bankruptcy Systems: Similarities and Differences" (2003) 11 Am. Bankr. Inst. L. Rev. 367, at pp. 409-410, where she observes that: 'Americans may have a different relationship with money than most other people… [Money] defines Americans' worth and status in a way unmatched elsewhere... Material things appear to play a smaller role in most other societies... Americans are encouraged by society to buy things, also need material things in order to be valued in society… Given these differences in societal views and economic goals, as well as those quirks of history and culture, the differences among the common law bankruptcy systems should not be surprising. In fact, perhaps the many similarities among these systems should surprise us instead'.

the management of the company.[241] It is important to note that, under the French judicial rescue procedure, it is possible for the existing management to remain in control of the company and that the administrator's role is to co-manage the ailing company. However, where the court thinks it is appropriate, it may order the replacement of the existing management by the administrator. In fact, this practice has been traditionally followed by the courts, which, in order to punish the incumbent management for its failure, imposed such sanction on an automatic basis.[242] Nevertheless, an important step towards effective corporate rescue was taken by the Law of 2005, which prevents courts from removing directors in an attempt to give an incentive to the debtor company to seek early help.[243] It is argued that, although there is a possibility for the displacement of the existing directors from office, still the French law in relation to administration proceedings indicates some kind of convergence towards a debtor-in-possession regime.

This argument becomes even more obvious by means of a brief comparison with the United Kingdom regime, where, upon the appointment of the administrator, the existing management, although required to co-operate with the administrator,[244] still

---

[241] Article 92, Law of 2005.

[242] Fried Frank, Harris, Shriver & Jacobson LLP, Client Memorandum, November 17, 2005, at p.9. See also P Omar, "Insolvency Law and Practice in France" available in K Gromer Broc, and R Parry, *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (Kluwer, 2006) at p. 141.

[243] Ibid, at p. 141.

[244] For instance, following the appointment of the administrator, directors may be called to provide a statement of the company's affairs. See IA 1986 Sch. B1 para.47 (1); IR 1986 r.2.28.

must surrender the company's control.[245] This arguably demonstrates that, as opposed to France and Greece, the United Kingdom law is manager-displacing[246] as directors are more readily removed from the company's management upon the administrator's appointment.[247] Subsequently, the United Kingdom regime could be described as 'practitioner- in -possession' when compared to its French and Greek 'debtor- in-possession' counterparts as the insolvency practitioner (the administrator) takes over the management of the company.[248] Furthermore, Moss effectively describes that, in the United Kingdom, a debtor-in-possession regime is regarded with suspicion and is frowned upon as leaving an alcoholic in charge of a pub.[249] In addition he observes that 'creditors in the United Kingdom tend to feel very strongly, and have felt very strongly over the last century or more, that once disaster strikes, the management of the company's business should be taken out of the hands of the management elected by the shareholders and should be given to a professional person chosen by the creditors, so that the creditors' interests can be put first'.[250]

[245] Upon his appointment, the administrator takes over custody and control of the company (See IA 1986 Sch. B1 para.67) and has the power to do anything necessary or expedient in relation to the management of the affairs, business or property of the company, See IA 1986 Sch. B1 para. 59 (1).

[246] L Qi, "Managerial Models During the Corporate Reorganisation Period and Their Governance Effects: The UK and US Perspective" (2008) 29(5) Comp. Law. 131-140, at p. 131.

[247] The administrator in the United Kingdom has control over the composition of the company's board of directors and may consequently choose to either remove or appoint a director. See IA 1986 Sch. B1 para. 61.

[248] See L Qi, note 246 above, at p. 132.

[249] G Moss, note 240 above, at p. 19.

[250] ibid at p. 18.

Furthermore, it has been suggested that, in companies with concentrated-ownership, directors are subject to manipulation by the company's shareholders and are more likely to respect their interests to the detriment of creditors. Subsequently, a manager-displacing framework aligns well with a concentrated system of ownership (such as the United Kingdom).[251] In contrast, in jurisdictions where a debtor-in-possession policy exists, such as in France and Greece, reorganisation procedures are invoked at an early stage.[252]

In addition, it is interesting to note that, in a jurisdiction with a management-displacing policy, directors may be induced to engage in highly risky activities, because they expect that they will be displaced post-petition. On the other hand, if the approach towards insolvency is not fault-based, directors are not tempted to engage in risky behavior, which may be in favour of the company's shareholders but against the interests of creditors.[253] It should be remembered that, where the company is border-line solvent, highly risky activities may benefit the company's shareholders but it will be the creditors who will bear the risk.[254]

---

[251] J Armour, B Cheffins, & D Skeel, "Corporate Ownership Structure and the Evolution of Bankruptcy Law: Lessons From the United Kingdom" (2002) 55, Vand. L. Rev. 1699, at p. 1733. See also G McCormack, "Control and Corporate Rescue- An Anglo-American Evaluation" (2007) I.C.L.Q 56(3) 515-551, at p. 541, where he argues that in jurisdictions where there is a separation between ownership and control, management can be trusted with continuing to control the company's affairs during the reorganisation process. In contrast, where there are concentrated shareholdings allowing the management to keep control of the company jeopardises the creditors and leaves them vulnerable to manipulation by shareholders.

[252] See D Hahn, "Concentrated Ownership And Control Of Corporate Reorganisations" (2004) 4 JCLS 117, at p. 127.

[253] L Qi, note 246 above, at p. 135.

[254] Ibid.

Once rescue proceedings have been initiated, it is important to consider the purpose these are designed to serve. In other words, it is argued that re-organisation proceedings should involve a stay of all claims against the debtor company, in order to afford it a much needed breathing space and facilitate the drafting of a reorganisation plan. Accordingly, the purpose of the United Kingdom administration procedure, in view of the potential vulnerability of the company to the enforcement of claims by creditors, is to provide a shelter for the distressed company.[255] The commencement of administration proceedings triggers a moratorium,[256] which imposes an automatic stay on all claims, both secured and unsecured, hence affording the company a much-required 'breathing space'.[257] The protection afforded to ailing businesses through a moratorium is critical to the success of a re-organisation plan. The moratorium offers protection to the company against a wide range of proceedings. For instance, creditors cannot deprive the administrator of property, which may be needed for the purpose of administration.[258] Furthermore, it is important to note that administration is not a rescue procedure *per se* as it entails that a rescue process might or might not follow from the completion of the administration proceedings.[259] In addition, it worth noting that an

---

[255] See R Parry, note 105 above, para.4-42, at p.54-56. See also L Linklater, "The Enterprise Act: Fulfilling Great Expectations" (2003) 24(8) Comp. Law. 225-226.

[256] The moratorium takes effect when the appointment of the administrator has effect. See IA 1986 Sch. B1, para.1 (2) (a).

[257] IA 1986, Sch.B1, para. 44(2).

[258] Sir Nicolas Brown-Wilkinson V.C. noted in *Bristol Airport Plc* v *Powdrill* [1990] Ch. 744, 758 that "the continuation of the business by the administrator requires that there should be available to him the right to use the property of the company, free from interference by creditors and others during the, usually short period, during which such administration continues". See R Parry, note 255 above, para. 7.08 at p. 85. However, it should be noted that it is possible for some corporate assets to be removed with the permission of the court or the insolvency practitioner.

[259] A Keay, "A Comparative Analysis of Administration Regimes in Australia and the United Kingdom" available in P Omar, *International Insolvency Law: Themes and Perspectiv*es (Ashgate Publishing, 2008) at p. 106.

ailing company is likely to be pre-packed, whereby the business is sold and the company is liquidated.[260]

The need to provide a similar sophisticated process, which would offer a speedy transition at a minimum cost and at the same time the vital protection of a moratorium, has also been recognised in France and Greece. For instance, in France, a moratorium is available under the judicial rescue procedure, which prevents creditors from enforcing their claims against the ailing company and enables the administrator to propose a workable rescue plan.[261] Similarly, in Greece, upon the initiation of the judicial reorganisation proceedings, an automatic stay of proceedings is imposed, which restrains creditors from enforcing their claims against the debtor company. In this way the administrator is afforded protection against potential litigation and is instead, able to focus on drafting a rescue plan, which will hopefully safeguard the viability of the company.[262]

Furthermore, it is essential to consider the legal framework surrounding the drafting of the reorganisation plan of a company, which enters into administration proceedings. Firstly, it should be noted that, as opposed to the American counterpart, in

---

[260] S Frisby, "An Analysis of Pre-packaged Administrations: An Update" presented on Monday 8th September 2008, at the 3rd Insolvency Research Conference hosted jointly by the Insolvency Service and R3, at p. 28.

[261] See P Omar, "Insolvency Law and Practice in France" in Gromek Broc, K., and Parry, R., *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (Kluwer Law International, 2006) at p. 141.

[262] R Goode, R., *Commercial Law* (3rd edn, Penguin Books, 2004) at p.852, where it is stated that the administrator is allowed to perform his functions "free from the burden of fending off attacks on the company and its assets by individual creditors".

the three European jurisdictions the existing management is not solely responsible for the re-organisation proposals. Instead, on many occasions, the reorganisation plan is drafted by an outsider, namely an insolvency practitioner, as opposed to the existing managers.[263] Arguably, there are both advantages and disadvantages in having the re-organisation plan prepared by an outsider. On the one hand, the trustee is independent and may propose an unbiased plan, which safeguards the long term interests of the company. On the other hand, the directors have a full account of the company's affairs, and the insolvency practitioner is reliant on them for this account and, although directors could at times be responsible for the company's troubles, their involvement in the drafting of the rescue proposals could prove salvaging.

As mentioned earlier, the creditors' participation in the re-organisation process is increasingly regarded as an important element of insolvency law. Arguably, active creditor participation enhances corporate governance, safeguards the integrity of insolvency proceedings and minimises monitoring costs.[264] Furthermore, the approval of the reorganisation plan by the company's creditors is necessary. In particular, in France and Greece, the law makes provision for the formation of creditors' committees, which have to approve the rescue plan which is proposed by the company's management.[265] For instance, in France, the judicial rescue procedure (*redressement*

[263] For instance, as mentioned above, in the United Kingdom upon the appointment of the administrator, the existing management is required to co-operate with him and may be asked to provide a statement of the company's affairs. See IA 1986 Sch. B1 para. 47(1); IR 1986 r.2.28.

[264] See A Schwartz, "Security Interests and Bankruptcy Priorities: A Review of Current Theories" (1981) 10 J. Legal Stud. 1-37, at p. 10.

[265] For the approach taken in France and Greece, see Chapter IV at p. 154 and Chapter V at p. 201 respectively.

judiciaire) triggers the formation of two creditors' committees,[266] which have the power to approve a draft continuation plan.[267] Similarly, in Greece, the new law of 2007 makes provision for a creditors' committee, which, during a re-organisation attempt, will be responsible for the supervision of the rescue process. The new law of 2007 provides that the 'creditors' committee' shall consist of three members; accordingly, one will represent secured creditors, one the preferential and one unsecured creditors.[268] In addition, in the United Kingdom, the company's creditors can establish a 'creditors' committee' in order to represent their collective interests.[269] In addition, it should be noted that creditors may exert significant control over the course of administration proceedings, as following his appointment, the administrator is required to hold a creditors' meeting, whereby the company's creditors could ratify or reject his proposals.

Furthermore, the approval of the reorganisation plan is vital for the survival prospects of the company. With regards to the voting requirements, in all the three European jurisdictions, it is provided that approval of the suggested rescue plan requires

[266]Article 88, Law of 2005 states that two creditors' committees must be formed in compliance with the provisions of Articles L 626-29 and L 626-30 of the Commercial Code. It should be noted that there may be committees of financial creditors and trade creditors, depending on the size of the company.

[267] Nevertheless, one could argue that the influence of creditors' remains limited in judicial rescue proceedings, as the two creditors' committees may only approve the plan put forward by the debtor and cannot themselves make proposals for the restructuring of the company, See C Dupoux & D Marks, "French Bankruptcy Law: Putting the Safeguards in Place" (2006) 3(4) Int. Corp. Rescue, at p .211.

[268] See Article 111 and Article 117 of Law of 2007; see also F Kalliri, "New Bankruptcy Code that Does Not Terminate..." Kathimerini, available at http://news.kathimerini.gr/4dcgi/_w_articles_economy_100010_18/04/2007_223667 last accessed on 20th October 2010.

[269] See IA 1986, Sch. B1 para. 56(2), the committee is to be given a wide range of powers under the Act, see for instance I.A.1986, Sch. B1 para. 57(3)(a), which provides that the creditors may request the company's administrator to attend on the committee on any reasonable time, provided that at least seven days' notice is given.

majority voting by the creditors. In particular, under the Greek law, it is stated that the re-organisation plan has to be approved by creditors who represent at least 60% value of all claims. In addition, it is essential that at least 40% of the above-mentioned percentage includes secured and preferential creditors.[270] Similarly, in France, the rescue plan must be approved by a majority of the committee members, representing at least two-thirds of total amount of the debts owed to all the members of the committee as indicated by the debtor and certified by the company's auditors.[271] It could be said that the rules surrounding the voting of the plan in France and Greece are tougher than those of the United Kingdom, where a majority in value of those present and voting is required.[272]

At this point, it is interesting to note that dissenting creditors in Europe are in a position to block rescue proceedings. This can be contrasted with the approach taken in the United States, where a cram-down practice is applied, which entails that a reorganisation plan that is confirmed by the court may be imposed on a class of dissenting creditors.[273] It should be noted that, during the creditor approval process of the rescue plan, the creditors are organised in different classes of voting rights and any classes that are impaired are identified by the plan. It is interesting to note that, where the plan has been approved by a majority in number and two-thirds in value, then any

[270] Law of 2007 Article 121(1).

[271] Article 626-30 Commercial Code.

[272] See Insolvency Rules 1986, rule 2.43. See further Parry, R., Corporate Rescue (2008) at p.73.

[273] See V Finch, note 151 above, at p.279. See also G McCormack, "Control and Corporate Rescue- An Anglo-American Evaluation" (2007)56 (3) I.C.L.Q., 515-551, at p. 515.

impaired classes of creditors shall be deemed to have accepted the plan.[274] The rescue plan is then upheld by the court, which is primarily concerned not only with whether the plan is 'fair and equitable',[275] but also whether the plan is fair to creditors, in other words whether they will receive at least as much as under the plan as they would have under liquidation under Chapter 7.[276] It could be argued that the cram-down procedure applied in the United Stated contributes greatly to the enforcement of rescue plans, as its confirmation may take place notwithstanding the objections of a class of impaired creditors. Accordingly, it could be argued that a similar approach could be taken within the European Union, whereby domestic courts could intervene in order to impose the approval of rescue plans, where, in their discretion this was necessary.[277] It should be noted that the need for cram down provision has been recognized by a creditors' lobbying organisation in the United Kingdom.[278]

However, one could argue that, although the intervention of the courts in the approval of a rescue plan would be well-received in a court-driven jurisdiction, such as France and Greece, it might not be as welcomed in others, such as the United Kingdom, where, following the enactment of the Enterprise Act, one of the main focuses was to

[274] See s.1126 (c) of the US Chapter 11. See also Parry, R., Corporate Rescue, 2008, at pp. 264-265.

[275] See s.1129 (b) of the US Chapter 11. See also J Friedman, "What Courts Do to Secured Creditors in Chapter 11 Cram Down" (1993) 14 Cardozo L. Rev. 1495-1544, at pp. 1495-1509.

[276] See s.1129 (a) (7) of the US Chapter 11, See also J Friedman, ibid, at pp. 1500-1501.

[277] It should be noted that, in France and Greece, like the United Kingdom, there are different classes of voting rights.

[278] See EHYA "UCL-Roundtable Discussion-Restructuring procedure Reform- Timely Change for Britain's Economy" 4th March 2009, at p. 12.

limit the court involvement in rescue proceedings order to encourage quick and cheap reorganization.[279]

It should be remembered that administration is only a facilitative procedure, which is designed to afford short-term protection to a financially troubled company until another measure of a more 'permanent' nature is put in place.[280] It is important to note that the purpose of administration is to provide the company with only a temporary shield against any precipitate action by creditors,[281] as prolonged protection would place the company in an advantageous position to the detriment of other 'healthy' companies and could effectively distort competition.[282] There is an array of measures that can be employed in order to exit administration proceedings. These vary from the provision for automatic cessation when a specific period of time has lapsed to the subsequent conclusion of a voluntary arrangement or the dissolution of the company, where the administrator's efforts to restore the company to profitability have failed.

In summary, it is important that every jurisdiction has in place provisions that allow the quick conversion of proceedings at minimum cost.[283] In particular, the link

---

[279] See for instance possibility to initiate 'out of court' administration proceedings following the two-gateways to administration provided under the Enterprise Act.

[280] R Parry, note 208 above, para. 9.01 at p.121.

[281] R Goode, *Principles of Corporate Insolvency Law* (Sweet & Maxwell, 2005) at p. 21.

[282] See R Parry, note 280 above, at p.121. See also V Finch, *Corporate Insolvency Law: Perspectives and Principles* (Cambridge, 2002) at p.120, where it is argued that in an efficient marketplace, only those companies, which can successfully compete for custom will survive, the rest will be 'driven against the wall' as a result of their inability to deal with distress.

[283] See C Anderson & D Morrison, note 215 above, at pp. 97-98.

between corporate rescue proceedings and liquidation is undeniable, as for instance in the United Kingdom, where liquidation is recognised as a legitimate outcome of administration.[284] It should be noted that in all three jurisdictions, namely France, Greece and the United Kingdom, provision exists for the speedy conversion of rescue proceedings into liquidation proceedings. In particular, in Greece, following the genesis of a 'rescue culture' in 2007, a streamlined liquidation process is available. Similarly, in France, liquidation proceedings may be easily entered into where no prospect of corporate reorganisation exists.

Conclusion

This chapter has examined the corporate reorganisation procedures of three countries, namely France, Greece and the United Kingdom, and the role of the various 'actors' involved in such rescue proceedings. In particular, emphasis was placed on administration and equivalent proceedings. It could be argued that, following the intense reforms in the insolvency law regimes of the three jurisdictions, although with major differences amongst them, all three administration proceedings incline in some fashion towards a United States Chapter 11 approach. Arguably, France and Greece opted for a rather obvious imitation of the 'debtor in possession' regime that exists in the United States. In contrast, it could be said that the United Kingdom radically shifted towards Chapter 11, but did so by using different means, as a blatant shift in attitude

[284] Ibid at p. 97. See also R Goode, note 281 above, at pp. 384-385.

would be going against its creditor friendly tradition. In particular, following the major amendments that the administration procedure underwent, by means of the Enterprise Act 2002, it is, arguably, established as the most significant rescue mechanism in the United Kingdom. The new streamlined administration regime, contrary to its administrative receivership predecessor, places emphasis on corporate rescue and affords protection to the ailing company during a transitory period within which the company is seeking to return to profitability. It could be said that each jurisdiction adopted different means, in order to achieve the same ends, namely effective corporate rescue. Finally, it appears that, in all three jurisdictions, account was taken of the fact that not all troubled companies should be rescued and, instead, that a quick and cheap commencement of liquidation proceedings should exist. In other words, where a financial downturn is irreversible and a company is not worthy of rescue, provision exists in all three jurisdictions for the swift initiation of dissolution proceedings.[285]

[285] See C Anderson & D Morrison, note 215 above, at p. 86, where it is argued that of the commencement process of corporate rescue proceedings involves a filtering stage, whereby firms that require immediate liquidation are distinguished from those which are likely to provide better returns to creditors than liquidation.

Chapter VII- Conclusion

The insolvency laws of many European jurisdictions have undergone in depth reforms in advance of the recent financial meltdown which struck the corporate world. During the last two years, the global economy has witnessed, arguably, the most significant decline since the early 1930s. Accordingly, the crisis in the credit market triggered a large number of corporate failures, which had a domino effect and resulted in dramatic losses of jobs.[1] For instance, the high profile collapse of the investment bank, Lehman Brothers, resulted in the devastating loss of approximately 5,000 jobs in the United Kingdom.[2] It could be argued that the adverse effect of the financial demise emphasised the need for Member States to ensure that effective corporate rescue mechanisms are in place, so as to enable traumatised businesses to recover and to be restored to profitability. It has been argued that the appearance of large-scale insolvencies, including those of household names, have required insolvency law to be revisited so as to make a reassessment of its role in regulating the economy.[3]

---

[1] See A Sakoui "Bankrupt Europeans are flocking to London", 20th August 2010, Financial Times, available at: http://www.ft.com/cms/s/0/6f9338e6-ac7d-11df-8582-00144feabdc0.html, last accessed on 24th September, 2010.

[2] Citigroup has cut 400 staff in London; Bank of America, 650; Deutsche Bank 120 and Credit Suisse 150. Meanwhile, UBS and Goldman Sachs have each reduced staff by around 1,500 globally. See G Montia, "Lehman Brothers cuts London jobs", 11th March 2009, available at: www.bankingtimes.co.uk/11032008-lehman-brothers-cuts-london-jobs, last accessed on 24th September, 2010.

[3] P Omar, "French Insolvency Law: Remodelling the Reforms of 2005" (2009) 6 ICCLR 214-219, at p. 219.

Corporate rescue mechanisms afford financially troubled companies a second chance and provide them with an alternative solution to liquidation. The process of corporate reorganisation entails the involvement of a variety of actors. This thesis however focused on the role of what are considered to be the most significant parties in corporate rescue, namely directors, creditors, the courts and insolvency professionals.[4] Arguably, corporate rescue is only feasible if the mindset of all those 'key actors' is fundamentally shifted towards rescue. It is submitted that, where a rescue culture is embedded in the mindset of the parties involved in corporate restructuring, the initiation of proceedings may be crucially sought at an early stage, hence averting a later possibility of failure. It is evident that corporate rescue has attracted increasing interest in the last decades and, accordingly, insolvency law regimes have been reformed in Europe, so as to promote the establishment of a corporate rescue culture.

The thesis has provided a comparative analysis of the insolvency law regimes of France, Greece and the United Kingdom and attempted to identify the fundamental differences between the rescue laws of these jurisdictions. All of the three jurisdictions have recently undergone thorough reforms and introduced drastic changes in respect of their corporate reorganisation mechanisms. The thesis has placed particular emphasis on the United Kingdom administration proceedings and its Greek and French counterparts.

[4] For instance it is noteworthy that in the United Kingdom the process of corporate rescue is largely driven by insolvency professionals, whereas the process of rescue both in France and Greece remains largely court driven.

In the United Kingdom the first step towards the establishment of a corporate rescue culture was made, following the Cork Committee's proposals,[5] by means of reforms which led to the enactment of the Insolvency Act 1986,[6] which introduced the innovative administration proceedings and the CVA. The administration procedure, in particular, was introduced as a main weapon of company rescue[7] and was considered as a 'hybrid procedure' which combined the exceptional powers of administrative receivership with an altered set of objectives, based on a collectivity of approach and a rescue-oriented mission.[8] However, the administration procedure remained unattractive as a restructuring device until the enactment of the Enterprise Act 2002, which introduced revolutionary changes to what was regarded as a time-consuming, expensive and complex procedure. It is significant to note that the Enterprise Act promotes a 'second-chance culture' in the traditionally 'creditor-friendly' (especially secured creditor friendly) United Kingdom as it made provision for the abolition of the administrative receivership procedure. It could be argued that, although the individualistic administrative receivership procedure was abolished, the United Kingdom remains a (secured) creditor-friendly jurisdiction, as secured creditors still have a significant role to play in the administration process. As far as the effectiveness of the streamlined administration procedure is concerned, it could be argued that the high rates of use indicate that the procedure constitutes the main rescue device in the

[5] Report of the Review Committee on Insolvency Law and Practice, (Cmnd. 8558,1982) ('Cork Report')

[6] The Insolvency Act 1985 was consolidated as the Insolvency Act 1986.

[7] A Campbell, "Company Rescue: The Legal Response to the Potential Rescue of Insolvent Companies", (1994) 5(1) ICCLR 16-24.

[8] I Fletcher "UK Corporate Rescue: Recent Developments—Changes to Administrative Receiverships, Administration, and Company Voluntary Arrangements—the Insolvency Act 2000, the White Paper 2001, and the Enterprise Act 2002" (2004) 5 EBOR 119, 125.

United Kingdom.[9] Finally, it has been argued that, beyond the numerous proposals for further reforms, the United Kingdom's current insolvency laws, in particular its restructuring and business rescue regime, is performing well and continues to compare favourably with its international peers.[10]

Moreover, France has a highly sophisticated insolvency law system. In particular, attempts to establish an effective reorganisation regime were initiated as early as 1967, where laws were especially designed to eliminate bankruptcy[11]. In addition, more drastic steps towards the establishment of a rescue culture were taken in France during 1985, where a new rehabilitation procedure, inspired by the United States bankruptcy law, was introduced with the aim of to safeguard financially distressed firms and to maintain activity and employment.[12] However, the Law of 1985 was strongly criticised for been exceptionally pro-debtor and, following strong lobbying from creditors, became subject to reforms in 1994. The Law of 1994 was aimed at improving the existing legal framework in order to make corporate rescue procedures more attractive and to reinforce those measures at the pre-insolvency stage dealing with informal arrangements. However, it has been contended that, although the law of 1994 redressed some of the rights of creditors during insolvency proceedings, it failed to introduce in-depth changes to the fundamental philosophy underlying the institutions of

---

[9] "Insolvency Statistics for England and Wales" (2009) 22(6), Insolv. Int., 94, at p. 94.

[10] Consultation: Encouraging Company Rescue- A Summary of Responses, November 2009, the Insolvency Service. Available at http://www.insolvency.gov.uk/ last accessed on 24th September 2010.

[11] Law 67-563 of 13rd July 1967 on judicial settlement, liquidation of goods, personal bankruptcy and criminal bankruptcies, implemented by Decree 67-1120 of 22nd December 1967.

[12] See Law 85-98 of 25th January 1985 on the judicial rescue and liquidation of businesses, implemented by Decrees 85-1387 and 85-1388 of 27th December 1985.

insolvency.[13] The failure of the Law of 1994 to establish an effective insolvency law framework coupled with the occurrence of a series of economic scandals arguably highlighted once again the need to reconsider the existing corporate reorganisation regime in France. Accordingly, after a prolonged consultation process the 2005 reforms emerged. The Law of 2005 introduces far-reaching reforms as not only does it place significant emphasis on and strengthen pre-insolvency procedures, but it also introduces a new debtor-in-possession procedure, namely the safeguard procedure, which is arguably intended to become the most significant tool of corporate reorganisation. It could be argued that the 2005 reforms and, in particular, the enactment of the safeguard procedure signify the intention of the legislator to encourage early intervention. Nevertheless, it is noteworthy that, soon after the introduction of the safeguard procedure, the need for additional reforms was expressed as flaws of the procedure became apparent in the *Eurotunnel* case. Accordingly, further reforms were introduced in February 2009. On the one hand, it could be argued that any discrepancies in the Law of 2005 have been effectively addressed by the 2009 reforms. On the other hand, the need for amendment in the corporate reorganisation regime of France could be perceived as a failure of the Law of 2005. Nevertheless, one is bound to agree that a significantly improved corporate reorganisation framework is in place which fits the needs of the French economy and society. Arguably, what remains is the shift of mindsets towards a rescue culture of the parties involved in insolvency proceedings. In the words of President Sarkozy 'the vision in France of a failure that is final must come to an end'.[14]

[13] P Omar, "Insolvency Law and Practice in France" available in GromeK Broc, and Parry, *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (Kluwer Law International, 2006) at p. 113.

[14] P Omar, note 3 above, at p. 219.

Furthermore, in 2007, the insolvency law regime of Greece was reshaped so as to embrace a second chance culture and to promote the idea of corporate rescue. It could be argued that the new Law of 2007 sets out an effective framework, which allows troubled companies to seek help at an early stage. In particular, the new conciliation procedure affords a real second chance to the debtor and encourages early intervention so as to prevent a subsequent failure of his business. The significant advantage of the procedure is that it enables the debtor to retain control of his company, while ensuring that a financial crisis is effectively averted. Arguably, the new Law of 2007 very effectively replaces the old fashioned insolvency law regime, which failed to offer any assistance to troubled companies. In fact, it appears that it is the Law of 2007 that for the very first time ensures the legal regime is genuinely geared towards corporate rescue. However, similarly to the regimes of France and the United Kingdom, it could be argued that it is a matter of time for the effectiveness of the new Law of 2007 to show.

Although one could argue that, due to social, historical, economic and political reasons, the approach towards corporate rescue in the United Kingdom is significantly different than France and Greece, it is argued, on the other hand, that all jurisdictions have encouraged the adoption of a debtor-in-possession regime in order to promote early intervention. In other words, it could be said that all three jurisdictions strive to achieve the same target, namely to promote the ideal of corporate rescue and to boost a 'second chance' culture. However, it appears that each jurisdiction seeks to achieve the same ends by using different means. Arguably, the differences of the procedures stem from the deeply rooted cultural, political, economic and historical circumstances which exist in each jurisdiction. For instance, it should be remembered that the United

Kingdom has a long standing 'creditor friendly' tradition, as opposed to the 'debtor-friendly' approach adopted by the French and Greek insolvency laws. An additional example of the different approach taken towards rescue in the United Kingdom is evident by the recent announcement of the Government of the intention not to afford super-priority status to creditors who advance new finance to companies seeking to restructure their affairs. It should be noted that France and Greece, loyal to their 'debtor-friendly' approach, embraced super-priority financing so as to facilitate the rescue of distressed companies. In contrast, in the United Kingdom, it was suggested that introducing super-priority financing would be wrong in principle and would create harmful uncertainty, as lenders, in fear of their security been overridden, would potentially increase the cost of lending.[15]

Furthermore, it should be noted that in light of the current recession, the European Union policy relating to insolvency law and corporate rescue, in particular, is of crucial significance. In fact in light of the financial crisis that struck Europe, it became apparent that insolvency law is at the heart of the debate; as a result a European Expert Law group in the field of reorganisation has been allocated the task to assist the European Commission with its preparatory work that is focused on the development of a European Union crisis management regime[16]. The thesis offered a detailed analysis of the EC Regulation on Insolvency Proceedings,[17] which arguably

[15] Consultation: Encouraging Company Rescue- A Summary of Responses, November 2009, the Insolvency Service, at p.11-12. Available at http://www.insolvency.gov.uk/, last accessed on 24th September, 2010.

[16] See N Wouters, "The EU Framework for Cross-Border Crisis Management in the Banking Sector" INSOL WORLD, Third Quarter, 2010, at p. 17.

[17] Council Regulation (EC) No.1346/2000 of 29 May 2000, OJ 2000 L160/1.

constitutes a very useful tool in cases where cross-border insolvency proceeding are involved, as it is designed to co-ordinate such proceedings. The Regulation is of great importance to Member States, as it defines jurisdiction in cross-border insolvency proceedings. In other words, the Regulation, depending on the interpretation given to the concept of COMI, indicates whether main insolvency proceedings may be initiated in one Member State or another. However, it is noteworthy that the Regulation is a conflict of laws measure, as there is no harmonisation of insolvency procedures within the European Union. Finally, it should be mentioned, although not within the ambit of this thesis, that there is harmonisation in other areas of European law that may affect the course of insolvency proceedings, such as state aid and protection of employment rights.

Finally, with regard to the legislator's methodical efforts to promote the prevention of corporate failure, it could be argued, in light of the practical application of the law, that, whether the reforms have delivered what they were expected to, is a matter for time to show. However, in the current recessionary economic climate, it could be argued that the reformulated insolvency law regimes of the three jurisdictions will be put to the test as the persistent challenge of ensuring financial stability lies ahead. It has been reported that a sharp worsening of the insolvency trend will be witnessed, at least up to the end of 2009 and that it is unlikely that the levels of business insolvencies will abate.[18]

[18]On insolvency forecasts see: http://www.eulerhermes.com/en/documents/pr_intl_insolvencies_4june09_en_final.pdf/pr_intl_insolvencies_4june09_en_final.pdf , last accessed 24th September. 2010.

It should be noted that, although the legislative reforms in each jurisdiction are geared towards the promotion of a rescue culture, they should not nevertheless be accompanied by great expectations, as, in the words of Lyon-Caen, it is rather naïve to expect that corporate failures will be eliminated simply by means of law. Arguably, corporate failures have their roots in economic, political and social phenomena, which are beyond the control of law[19].

[19] See M Campana, "A Critical Evaluation of the Development and Reform of the Corporate Rescue Procedures in France" in K Gromek Broc and R Parry, *Corporate Rescue in Europe: An overview of Recent Developments from Selected Countries in Europe*, (Kluwer Law International, 2004) at p. 47.

Bibliography

Books:

Anagnostou, E., *Law 2601/1998 on 'Financial aid to private investments for the economic and regional state development'* (Ipirotiki Publications, 1998-1999).

Armour, J., "Should We Redistribute in Insolvency", in Getzler, J., and Payne, J., (eds), *Companies Charges Spectrum and Beyond* (OUP, Oxford, 2006).

Bailey, E., *Voluntary Arrangements* (2 nd edn, LexisNexis Butterworths, 2006).

Belcher, A., *Corporate Rescue: A Conceptual Approach to Insolvency Law* (Sweet & Maxwell, London, 1997).

Belcher, A., *The Economic Implications of Attempting to Rescue Companies*, *in Insolvency Law: Theory And Practice*, edited by H Rajak, (Sweet & Maxwell, 1993).

Bell, J., "English Law and French Law – Not So Different?" in M Freeman & R Halson *Current Law Problems* (Oxford University Press, 1995)

Bhandari, J., and Weiss, L., *Corporate Bankruptcy: Economic and Legal Perspectives* (Cambridge, 1996)

Carruthers, B., and Halliday, T., *Rescuing Business: The Making of Corporate bankruptcy Law in England and the United States* (Clarendon Press, Oxford, 1998).

Campana, M., "A Critical Evaluation of the Development and Reform of the Corporate Rescue Procedures in France" in Gromek Broc, K., and Parry, R., *Corporate Rescue in Europe: An overview of Recent Developments from Selected Countries in Europe* (Kluwer Law Intrenational, 2004)

Cotterrell, R., *Law, Culture and Society: Legal Ideas in the Mirror of Social Theory* (Ashgate, 2006).

Davies, P., *Gower and Davies' the Principles of Modern Company Law* (7 th edn, Sweet & Maxwell, London, 2003).

Davies, S., QC (ed), *Insolvency and the Enterprise Act 2002* (Jordans, Bristol, 2003).

Finch, V., *Corporate Insolvency Law: Perspectives and Principles* (2nd edn, CUP, Cambridge,
2009).

Fletcher, I., *Insolvency in Private International Law* (2nd Ed, 2005, Oxford).

Fletcher, I., Insolvency in Private International Law, Supplement to the 2nd Edition, (2007, Oxford)

Flood, J., and Skordaki, E., "Normative Bricolage: Informal Rulemaking by Accountants and Lawyers in Megainsolvencies", in Teubner, G., (ed), *Global Law Without A State* (Aldershot: Dartmouth, 1997).

French, D., Mayson, S., and Ryan, C., *Mayson, French & Ryan on Company Law* (24 th edn, OUP, Oxford, 2007).

Georgakopoulos, L., *Egxeiridio Emporikou Dikaiou* (Vol.3) "Ptoxeysi Kai Exygiansi" (1997).

Goode, R., "The Case for the Abolition of the Floating Charge", in Getzler, J., and Payne, J., (eds), *Companies Charges Spectrum and Beyond* (OUP, Oxford, 2006).

Goode, R., *Principles of Corporate Insolvency Law* (3 rd edn, Sweet & Maxwell, London, 2005).

Goode, R., *Commercial Law* (3rd edn, Penguin Books, 2004)

Gromek Broc, K., and Parry, R., (eds), *Corporate Rescue: An Overview of Recent Developments from Selected Countries in Europe* (Kluwer Law International, 2004).

Gromek Broc, K., and Parry, R., (eds), *Corporate Rescue: An Overview of Recent Developments from Selected Countries* (2nd edn, Kluwer Law International, 2006).

Keay, A., "A Comparative Analysis of Administration Regimes in Australia and the United Kingdom" in Omar P., *International Insolvency Law: Themes and Perspectives* (Ashgate Publishing, 2008)

Keay, A., and Walton, P., *Insolvency Law, Corporate and Personal* (Pearson Education, 2003)

Kiikeri, M., *Comparative Legal Reasoning And European Law,* (Kluwer Law International 2001).

Kotsiris, L., & Hatzinikolaou-Aggelidou, R., *The Law of Rejuvenation And Liquidation Of Problematic Companies* (Sakkoulas Publications, Athens, 1998).

Kotsiris, L., "The New Bankruptcy Code of Greece" available at: www.insol.org/emailer/november2007_downloads/newbankruptcycodeofgreece.doc .

Law, J., *Introduction: Monsters, Machines and Sociotechnical Relation*s, in his (Ed.), *A Sociology of Monsters: Essays on Power, Technology and Domination* (1991)

Liakopoulos Th., *The Law of Rejuvenation And Liquidation Of Companies* (Sakkoulas Publications, Athens, 1994).

McCormack, G., *Secured credit Under English And American Law* (Cambridge, 2004)

McCormack, G., *Corporate Rescue Law: An Ango-American Perspective* (Edward Elgar 2008)

Milman, D., *Corporate insolvency law and practice* (Sweet & Maxwell, 1994).

Milman, D., and Mond, D., *Security and Corporate Rescue*, (Hodgsons, Manchester, 1999).

Mokal, R., *Corporate Insolvency Law: Theory and Application* (OUP, Oxford, 2005).

Morris, R., *Early Warning Indicators of Corporate Failure* (Ashgate, 1997).

Moss, G., Fletcher, I., and Isaacs, S., (Editors and authors), *The EC Regulation on Insolvency Proceedings* (Oxford University Press, 2002).

Moss, G., Fletcher, I., and Isaacs, S., (Editors and authors), *The EC Regulation on Insolvency Proceedings* (Oxford University Press, 2009).

Omar, P., & Sorensen, A., *Corporate Rescue Procedures in France*, (Kluwer Law International,1996).

Omar, P., *European Insolvency Law* (Ashgate Publishing, 2004)

Omar, P., *International Insolvency Law: Themes and Perspectives* (Ashgate Publishing 2008).

Omar, P., "The Progress Of Reforms to Insolvency Law and Practice In France" in Broc, K., and Parry, R., *Corporate Rescue in Europe: An overview of Recent Developments from Selected Countries in Europe* (Kluwer Law International, 2004)

Parry, R., *Corporate Rescue* (Sweet & Maxwell, London, 2008).

Patsis, M., *The Law of Bankruptcy*, (Sakkoulas Publishers, Athens, 1999)

Prentice, D., Oditah, F., and Segal, N., "Administration: Part II of the Insolvency Act 1986", in Ziegel, J., (ed), *Current Developments in International and Comparative Corporate Insolvency Law* (Clarendon Press, Oxford, 1994).

Rokas, N., *Issues of Insolvency Law*, (Sakkoulas Publications, Athens, 1997).

Rider, B., *Proprietary Rights and Unsecured Creditors, in the Realm of Company Law* (The Hague: Kluwer International, 1998)

Sealy, L., and Milman, D., *Annotated Guide to the Insolvency Legislation 2005/2006* (8 th edn, Sweet & Maxwell, London, 2005), Vol 1.

Sealy, L., and Milman, D., *Annotated Guide to the Insolvency Legislation 2006/2007*

(9 th edn, Sweet & Maxwell, London, 2006), Vol 1.

Tully, S., *Research Handbook On Corporate Legal Responsibility* (Edward Elgar Publishing, 2005)

Watson, A., Legal Transplants: An Approach to Comparative Law (Edinburgh, 1974)

Wood, P., *Principles of International Insolvency* (Sweet & Maxwell 2007)

Yeung, K., Private Enforcement Of Competition Law', in C McCrudden, (ed) *Regulation And Deregulation* (Oxford: Clarendon Press, 1999)

Journals

Aghion, P., Hart, O., & Moore, J., "The Economics of Bankruptcy Reform" (1992) 8 Journal of Law, Economics and Organisation 523.

Alderton, J., "The EC Regulation on Insolvency Proceedings Streamlining Cross-Border Insolvency?" (2006) 3(5), Int. Corp. Rescue, 257.

Armour, J., and Deakin, S., "Norms in Private Insolvency: the 'London Approach' to the Resolution of Financial Distress" (2001) 1 JCLS 21.

Armour, J., and Frisby, S., "Rethinking Receivership" (2001) 21 O.J.L.S. 73.
Armour, J., and Mokal, R., "Reforming the Governance of Corporate Rescue: The Enterprise Act 2002" [2005] LMCLQ 28.

Armour, J., & Mokal, R.J., "Reforming the Governance of Corporate Rescue: The Enterprise Act 2002" (2005) 1(Feb) LMCLQ 28.

Arsalidou, D., "The Impact of s.214 of the Insolvency Act 1986 on Directors' Duties"(2000) 21 Co.Law. 19.

Bazinas, G., "EU Regulation on Insolvency Proceedings: The First Year and the Outlook From Greece" available at www.iiiglobal.org

Bird, C., "The London Approach" (1996) 12 *Insolvency Law & Practice* 87.

Black, B., Cheffins, B., Klausner, M., "Liability Risk for Outside Directors: A Cross Border Analysis" European Financial Management (2005) 11(2) 153.

Bos, T. M., "The European Insolvency Regulation and the Harmonisation of Private International Law in Europe" (2003) NILR, 31.

Bradley, C., "Corporate Control: Markets and Rules" (1990) 53 M.L.R, 170

Brown, T., "The £1bn Legacy for Woolies Creditors" Daily Mail, 4 February 2009, available in http://www.thisismoney.co.uk/markets/article.html?in_article_id=472791&in_page_id=3#.

Bufford, L., "Global Venue Controls Are Coming: A Reply to Professor LoPucki" (2005) 79(104) Am. Bankr. L. J. 105.

Burbridge, P., "Cross-Border Insolvency within the European Union: Dawn Of A New Era", (2002) 27(5) E.L.Rev. 589

Campbell, A., "Company Rescue: "The Legal Response To The Potential Rescue of Insolvent Companies" (1994) 5(1), ICCLR, 16

Chapman,A., "The European Union Insolvency Regulation: An Unfinished Task" available at www.insolvency.ca/docs/writingAwards/2006/Paper_Chapman_2nd%20place_2006_Competition.pdf

Charlwood, A., "Actions Against an Administrator before and after the Enterprise Act 2002", (2004), 17(3), Insolv. Int.48.

Cohen, M. "Re DKLL Solicitors: Obtaining an Administration Order to Facilitate a Pre-Packaged Sale of the Business and Assets, in the Face of Opposition from the Majority Creditor" (2007) 4(4) International Corporate Rescue 221.

Cook, C., "Wrongful Trading Is it a Real Threat to Directors or a Paper Tiger?" [1999] Insolv. L. 99.

Crystal, M., and Mokal, R., "The Valuation of Distressed Companies: A Conceptual Framework, Part I" (2006) 3 *International Corporate Rescue* 63.

Crystal, M., and Mokal, R., "The Valuation of Distressed Companies: A Conceptual Framework, Part II" (2006) 3 *International Corporate Rescue* 123.

Davies, S., "Pre-Pack: He Who Pays the Piper Calls the Tune", (2006) 16 Recovery (summer) 17.

Davis, N., "The Rescue Culture in the United Kingdom" (1997) 2 *Insolvency Litigation and Practice* 1.

Dawson, K., "The jurisdiction of the English courts under the EC Regulation on insolvency proceedings" (2003), Insolv. L., 226.

De la Porte, C., "Is the Open Method of Co-ordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?" (2002) 8(1) E.L.J., 38

Didier, I., "Creditors' Rights in France after the Reforms of 26 July 2005- Part II" (2007) 4(5) Int. Corp. Rescue, 241.

Di Luigi, C. M., “The Insolvency Regulation: A Criticism Of The Jurisdiction Paradigm” (2006) 3(6), Int. Corp. Resc. 340.

Dupoux, C., & Marks, D., “Chapter 11 a la Française: French Insolvency Reforms” (2004) 1(2) Int. Corp. Rescue 74.

Dupoux, C., & Marks, D., “French Bankruptcy Law: Putting the Safeguards in Place” (2006)3(4) Int. Corp. Rescue 209.

Ellis ,M., “The Thin Line in The Sand: Pre-packs and Phoenixes”, (2006) 3 Recovery (Spring).

Ferris, S., & Lawless, R., “The expenses of Financial Distress: The Direct Costs Of Chapter 11” (2000) 61 University of Pittsburgh Law Review 629.

Finch, V. (1999), “Security, Insolvency and Risk: Who Pays the Price?” 62 Modern Law Review 633.

Finch, V., “Control and Coordination in Corporate Rescue” (2005) 25 *Legal Studies* 374.

Finch, V., “Controlling the Insolvency Professionals” (1999) Insolv. L. 228.

Finch, V., “Doctoring in the Shadows of Insolvency” [2005] J.B.L. 690.

Finch, V., “Prepackaged administrations: bargains in the shadow of insolvency or shadowy bargains” [2006] J.B.L. 568.

Finch, V., “Reinvigorating Corporate Rescue” [2003] J.B.L. 527.

Finch, V., “The Recasting of Insolvency Law” (2005) 68 M.L.R. 713.

Fletcher, I., “UK Corporate Rescue: Recent Developments—Changes to Administrative Receiverships, Administration, and Company Voluntary Arrangements—The Insolvency Act 2000, The White Paper 2001, and The Enterprise Act 2002” (2004) 5 EBOR 119.

Fletcher, I., “Phoenix Companies: Exceptions from the Restriction On The Re-Use of Company Names” (1987) J.B.L. 395.

Fletcher, I., “Living Interesting Times – Reflections on The EC Regulation On Insolvency Proceedings: Part 1”, (2005) Insolv. Int.

Fletcher, I., “Better late Than Never: The UNCITRAL Model Law Enters Into Force In Great Britain” (2006) 16 Insolv. Int.

Flood, J., & Skordaki, E.,. “Normative Bricolage: Informal Rule-Making by Accountants And Lawyers in Mega Insolvencies, 1997 Global Law Without A State” available at http://www.johnflood.co.uk/pdfs/Normative_Bricolage_Insolvency_1997.pdf

Flood, J., & Skordaki, E., “Insolvency Practitioners and Big Corporate Insolvencies”. Research Report No.43. ACCA. Certified Accountants Educational Trust. London, 1995.

Flood, J., “CVAs: A Neglected Lifeline?” (1994) 86(7) C.A, 31.

Flynn, D., “Pre-Pack Administrations- A Regulatory Perspective”, (2006) 3 Recovery (Summer).

Franken, S., “Creditor and Debtor Oriented Corporate Bankruptcy Regimes Revisited” (2004) 5 EBOR 645.

Friedman, J., “What courts do to secured creditors in Chapter 11 cram down” (1993) 14 Cardozo L. Rev. 1495.

Frisby, S., “In Search of a Rescue Regime: The Enterprise Act 2002” (2004) 67 MLR 247.

Frisby, S., “Making a Silk Purse out of a Pig’s Ear-*Medforth* v. *Blake & Ors”* (2000) 63, MLR 413.

Gillespie, J., “Transplanted Company Law: An Ideological And Cultural Analysis Of Market entry in Vietnam”, (2002) 51 Comp. L. Q., 641

Godfrey, P., & Nield, S., “The Wrongful Trading Provisions: All Bark and No Bite” (1995) 11, I L & P 140.

Goldring, J., and Phillips, M., “Rescue and Reconstruction” (2002) 15 Insolv. Int. 75.

Good, R., “Is the Law Too Favourable To Secured Creditors?”(1984) 8 Canadian Bus.L.J. 53.

Haravon, M., “Recent developments in France under the EU Regulation 1346” (2005) 18(8), Insol. Int. 118

Hiestand, L., & Pilkington, C., “CVAs: A Restructuring Tool for the Future” (2006) 38 Recovery.

Ho, L., Perfecting the Union, Perfecting Universalism, Published version in (2009) 2 Corporate Rescue and Insolvency 71, also available in http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/research/corpdocs/Universalism.pdf

Ho, L., C., Interrogating and indulging prepacks: *Re Kayley Vending*, (2009) 2 Corporate Rescue and Insolvency 168.

Hughes, C., “Management Rescue Orbis in ‘Pre-pack’ sale” (2008) 5 February Financial Times.

Hunter, M., “The Nature and Functions of A Rescue Culture” [1999] J.B.L. 491.

Hunter, M., The Draft EEC Convention: A Further Examination, (1976) 25 ICLQ 310

Hyde, M., & Taylor, S., "The EU Insolvency Regulation" available in www.europeanrestructuring.com/05intro/008_013.htm

Jadot, R., & D'Orgeval, L., "The Reform of French Insolvency Proceedings", (2005) 2(1)Intern.Corp. Rescue 16.

Jackson, T., & Kronman, A., "Secured Financing and Priorities among Creditors" (1978-1979) 88 Yale L. J. 1143.

Jones, B., "The Difficulty of Proving Fraudulent Trading" (2007) 16(9) Insolv. Int. 69.

Keay, A., "Wrongful trading and the liability of company directors: the theoretical perspective" (2005) 25 *Legal Studies* 431.

Keay, A., "Wrongful trading and the point of liability" (2006) 19 Insolv. Int. 132.

Kahn-Freund, "On Uses and Misuses of Comparative Law", (1974) 37 Mod.L.R.

Kermanidis, G., "Corporate Rescue Procedures" available at: http://www.ebeth.gr/eb/STH_meeting_bankruptcy.asp.

Klissouras, C., & Sakkas, Y., "A practical insight to cross-border Corporate Recovery & Insolvency: Greece" (2008) The International Comparative Guide to Corporate recovery & Insolvency, available at http://www.iclg.co.uk/khadmin/Publications/pdf/2008.pdf.

Legrand, P., "How to Compare Now", (1996) 16, Legal Stud. 232

Legrand, P., "European Systems Are Not Converging" (1996) 45(1) I.C.L.Q, 52

Linklater, L., "The Enterprise Act: Fulfilling Great Expectations" (2003) 24(8) Comp. Law. 225.

Linklater, L., "The Enterprise Act: New Economic Dawn or Disaster" (2004) Comp. Law. 33.

Lockerbie, A., & Godfrey, P. "Pre-packaged Administration: The Legal Framework" (2006) Recovery (summer) 22.

Lopucki, L., & Whitford, W., "Corporate Governance in the Bankruptcy Reorganisation of Large Publicly Held Companies,"(1993) 141, U.Pa.L.Rev.

MacDonald, S., "Turnaround Finance" (2002)Winter Recovery 26.

Mason, S., "Pre-packs from the Valuer's Perspective", (2006) 19 Recovery (Summer).

Maunder, C., "Bondholder Schemes of Arrangement: Playing the Numbers Game" (2003)16(10), Insolv. Int. 73.

McCormack, G., “Control and corporate rescue – an Anglo-American evaluation” (2007) 56 I.C.L.Q. 515.

McCormack, G., “Superpriority new financing and corporate rescue” [2007] J.B.L. 702.

McNight, A., “The Reform Of Corporate Insolvency Law in Great Britain”, (2001) 16(8/9) J.I.B.L. 213.

Menjucq, M., & Dammann, R., “Regulation No.1346/2000 in Insolvency Proceedings: Facing The Companies Group Phenomenon” Business Law International, (2008) 9(2), 145.

Milman, D., “Corporate Insolvency in an Era of Increased Legal Complexity”, (2004) 25(1) Comp. Law. 2.

Milman, D., “Moratoria on enforcement rights: revisiting corporate rescue” [2004] *Conveyancer and Property Law* 89.

Milman, D., “Enterprise Bill” (2002) 4(Jul) Insolvency L.J. 119.

Mokal, R., “Administrative Receivership and Administration—An Analysis” (2004) 57 *Current Legal Problems* 355.

Mokal, R., “An Agency Cost Analysis of the Wrongful Trading Provisions” (2000) 59 CLJ 335.

Mokal, R., “On Fairness and Efficiency” (2003) 66 M.L.R. 452.

Mokal, R., “The Harm Done by Administrative Receivership” (2004) 1 *International Corporate Rescue* 248.

Monsèrié-Bon, M. and Saint-Alary-Houin, C., **“**La loi des sauvegarde des enterprises: nécessité et interêt d'une réforme annoncée” (Recueil Dalloz, 2008)

Moss, G., “Comparative Bankruptcy Cultures: Rescue or Liquidations Comparison of Trends in National Law-England” (1997) 23, Brook. J. Intl L. 115.

Moss, G., “When Is a Proceeding Opened?” (2008) 21(3) Insolv. Int. 33.

Moss, G., Asking the Right Questions? Highs and Lows of the ECJ Judgement in Eurofood, (2006) 19(7), Insolv. Int., 97

Moss, G., “A Very Peculiar Establishment” Insolv. Int. (2006) 19 (2), 20.

Moss, G., “Skeleton Argument on Behalf of the Petitioners, In the Matter of Enron Directo SL” available at www.iiiglobal.org

Moss, G., “Group Insolvency-Choice of Forum And Law; The European Experience Under the Influence of English Pragmatism” (2007) 32 Brook. J. Int’l L.1005.

Moss, G., “The Triumph of “fraternité”: ISA Daisytek SAS” available at www.iiiglabal.org, last accessed on 18th October 2010.

Moss, G., & Paulus, C., “The European Insolvency Regulation- the Case for Urgent Reform” (2006) 19 (1), Insolv. Int., 1-5.

Omar, P., “France: The Regime Governing Directors’ Liability in Insolvency and Reform Perspectives” (2004) 25(12) Comp. Law. 378.

Omar, P., “French Insolvency Law: Remodelling the Reforms of 2005” (2009) 6 ICCLR 214.

Omar, P., “French Insolvency Law: The 2004 Project and Reform Perspectives”, (2005) 2(2) Int. Corp. Rescue, 65.

Omar, P., “Thoughts on the Purpose of Corporate Rescue” (1997) 4 Journal of International Banking Law 127.

Omar, P., “Defining Insolvency: The Evolution of the Concept of ‘Cessation de Paiements' in French Law” (2005) 2 E.B.L.R 311.

Omar, P., “The European Insolvency Regulation 2000: A Paradigm of International Insolvency Co-Operation” (2003) 1(1) Bond Law Review.

Omar, P., “The European Initiative on Wrongful Trading” (2003) 6 Insolv. L., 239.

Omar, P., “The Future of Corporate Rescue legislation In France: Part 1: History And reforms” (1997) 8(4) I.C.C.L.R. 129.

Omar, P., “The European Initiative On Wrongful Trading”, (2003) Insolv. L. 239

Omar, P., & Sorensen, A., “The French Experience Of Corporate Voluntary Arrangements”, (1996) 7(3) ICCLR 97.

Omar, P., “French Insolvency Reforms Aim to Help Businesses” Eurofenix (2008-9)34 Winter 28.

Omar, P., “Reforms to Lender Liability in France”(2006) 3(5) Int.Corp.Rescue277-284.

Patsis A., & Associates, “Basic Innovations of the New Insolvency Code” 21/2/2008, available at: http://www.capital.gr/law/articles.asp?id=454119

Paulus, C., “The aftermath of "Eurofood" - BenQ Holding BV and the deficiencies of the ECJ decision” Insolv. Int. (2007) 20(6), 85.

Pochet, C., "A Corporate Governance And Bankruptcy: A Comparative Study", 2002, Centre de Recherche en Gestion, Cahier de Recherche no. 2002-152.

Phillips, M., & Goldring, J., "Rescue and Reconstruction", (2002) 15(10) Insolv. Int. 75.

Prentice, D., "Bargaining in the Shadow of the Enterprise Act 2002" (2004) 5 EBOR 153.

Qi, L., "Availability of continuing financing in corporate reorganizations: the UK and US perspective" (2008) 29 Comp. Law. 162.

Qi, L., "The rise of prepackaged corporate rescue on both sides of the Atlantic" (2007) 20 Insolv. Int. 129.

Rainey, K., The European Insolvency Regulation and the Treatment of Group Companies: An Analysis, (2006) 3(6), Int. Corp. Rescue, 322.

Rajak, H., "The Enterprise Act and Insolvency Law Reform" (2003) 24 Comp. Law. 3.

Reitz, J., "How to do comparative law" (1998) 46 *American Journal of Comparative Law* 617.

Rizzi, R., & Caldwell, G., "Insolvency: Europe's Doomed Quest for Harmony" (2002) 21(10), IFLR 31.

Rutstein, M., "Voluntary Arrangements: Contracts or Not? Part1" (2000) 13(1) Insolv. Int.1.

Rutstein, M., "A Wind Blows Through An English Brothel" (2010) 3(4) CRI 156.

Simmons, M., "Wrongful Trading" (2001) 14 Insolv. Int. 13.

Skeel, D., "The Past, Present and Future of Debtor In Possession Financing" (2004) 25 Cardozo L. Rev. 1905.

"Stay Ordered Because Of French Sauvegarde Proceedings" – Case Comment, (2007)20(3) Insolv. Int. 46.

Stein, E., "Uses, Misuses And Non uses Of Comparative Law", (1977) 72 (No.2) U. L. Rev., 198

Stevenson, M., "The Enterprise Bill 2002-A Move Towards A Rescue Culture" (2002) 15(7) Insolv. Int. 51.

Stolowy, N., "Transparency and Prevention for Corporate Bankruptcy: A US- France Comparison" (2009) 6 J.B.L, 525

Swain, C., “A Move Towards A Stakeholder Society?” (2003) 19 Insolvency Law & Practice 7.

Theron, C., & Pellier, V., “Why Did the French Invent the Rescue Procedure?” (2007) Summer, Eurofenix, 19.

Tilbrook, L., “Corporate Rescue Reform in the UK”, J.I.F.M., 2000, 2(3), 65.
Tribe, J., “Company Voluntary Arrangements and Rescues: A New Hope and a Tudor Orthodoxy” (2008) 9 J.B.L. 454.

Tribe, J., “The Reform of UK Corporate Insolvency Laws: CVAs, the Conservatives and Chapter 11” (2009) 47 International Accountant, 20.

Vallens, J., “Flexibility in France” (2009) Summer, Eurofenix 22.

Wallace, P., & Bewick, S., “TXU- CVA’s vs.425 schemes” (2006) 3(2) Int. Corp. Rescue 69.

Walton, P., “Prepackaged administrations—trick or treat?” (2006) 19 Insolv. Int.113.

Watson, A., “Comparative Law And Legal Change”, (1978) 37 Cambridge L.J., 313

Watson, A., “*Legal Transplants and European Private Law*” (December 2000) 4.4 Electronic Journal of Comparative Law, http://www.ejcl.org/ejcl/44/44-2.html

Webb, D., “An Economic Evaluation of Insolvency Procedures in the United Kingdom: Does the 1986 Insolvency Act Satisfy the Creditors’ Bargain?” [1991] Oxford Economic Papers 144

Wessels, B., “Accommodating Cross-Border Co-ordination: European Communication and Co-operation Guidelines for Cross-Border Insolvency” (2007)4 (5), Int. Corp. Rescue, 250.

Willcock, J., “Whose COMI Is It Anyway?” (2005) Eurofenix, Summer.

Wouters, N., “The EU Framework for Cross-Border Crisis Management in the Banking Sector” INSOL WORLD, Third Quarter, 2010.

Wruck, K., “Financial Distress, reorganisation and Organisational Efficiency” (1990) 27 Journal of Financial Economics 419.

Zacaroli, A., “The Powers of Administrators Under Schedule B1 Prior To The Creditors’ Meeting-Transbus International Limited” (2004) 1 (4) International Corporate Rescue.

Reports, Documents & Conferences papers:

Armour, J., Hsu, A., and Walters, A., *The Impact of the Enterprise Act 2002 on Realisations and Costs in Corporate Rescue Proceedings*, A Report Prepared for the Insolvency Service in December 2006.

Didier, I., *Pre-Packs-French Style,* Paper presented to the INSOL Europe Annual Congress in Stockholm on 1-4 October, 2009.

Flood, J., Abbey, R., Skordaki, E., and Aber, P., *The Professional Restructuring of Corporate Rescue: Company Voluntary Arrangements and the London Approach*, ACCA Research Report No.45 (1995).

Frisby, S., *Report on Insolvency Outcomes*, Paper presented to the Insolvency Service in August 2006.

Frisby, S., *A Preliminary Analysis of Prepackaged Administrations*, Report to The Association of Business Recovery Professionals in August 2007.

Frisby, S., *SIP16: The Creditor's Perspective*, Paper presented to the Insolvency Service Annual Conference, 10th November 2009.
Katz, A., and Mumford, M., *Study of Administration Cases*, Report to the Insolvency Service in October 2006.

Parry, R., *Co-operation In Areas Not Directly Addressed Under the EU Regulation 1346/2000, Differences Between Common Law and Civil Law Jurisdictions*, Paper presented on 5th November 2007 at: A Law School mini-conference, University of Hull.

Tomasic, R., *Creditor Participation in Insolvency Proceedings*, Report presented in OECD Meeting held on 27-28 April 2006.

Walters, A., *Regulating the Insolvency Office Holder Profession Across Borders*, available in Crossing (Dutch) Borders In Insolvency- Papers From the INSOL Europe Academic Forum and Meijers Institute of the Leiden Law School Joint Insolvency Conference, Leiden The Netherlands, 5-6 June 2006.

INSOL International Case Study Series 1, *Eurotunnel Plc & Eurotunnel S.A. And Associated Companies*, 2nd August 2006 and 15th January 2007, available at http://www.rovigo.ro/images/INSOLInternationalTechnicalCaseStudy1.pdf

Report: A *Review of Company Rescue and Business Reconstruction Mechanisms*, Insolvency Service. (London: HMSO, 2000).

Report: *Harmonisation of Insolvency Law at EU Level*, 26th April 2010, INSOL Europe, at the request of the European Parliament, Direcorate General For Internal

Policies, Policy Department C: Citizens' Rights and Constitutional Affairs. Available at: http://www.insol-europe.org/eu-research/.

Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558, 1982)

Report on the First Six Months' Operation of Statement of Insolvency Practice 16, available at http://www.insolvency.gov.uk/insolvencyprofessionandlegislation/policychange/sip16-final.pdf

R3, *Corporate Insolvency In The UK: A Decade Of Change*, available at: http://www.r3.organisation.uk/publications

Philippe & Partners and Deloitte & Touche, *Bankruptcy and A Fresh Start: Stigma on Failure And Legal Consequences Of Bankruptcy*, (Brussels July 2002) p. 1-2. Available at: http://europa.eu.int/comm/enterprise/entrepreneurship/support_measures/failure_bankruptcy/stigma_study/report_gree.pdf .