EUROPE, MIDDLE EAST AND AFRICA

RESTRUCTURING REVIEW

2022

Edited by
Céline Domenget Morin

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Europe, Middle East and Africa Restructuring Review 2022

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Preface

Welcome to the *Europe, Middle East and Africa Restructuring Review 2022* – a Global Restructuring Review special report.

Global Restructuring Review is the online home for all those who specialise in cross-border restructuring and insolvency, telling them all they need to know about everything that matters.

Throughout the year, the GRR editorial team delivers daily news, surveys and features; organises the liveliest events ('GRR Live') – covid-19, etc, allowing; and provides our readers with innovative tools and know-how products. In addition, assisted by external contributors, we curate a range of comprehensive regional reviews – online and in print – that delve deeper into developments than the exigencies of journalism allow.

The *Europe, Middle East and Africa Restructuring Review 2022*, which you are reading, is part of that series. It contains insight and thought leadership from 14 pre-eminent practitioners from those regions.

This edition comprises seven exceptionally well-written chapters and provides an invaluable retrospective and primer on restructuring practice in different markets, with a little crystal ball gazing thrown in. All contributors are vetted for their standing and knowledge before being invited to take part. Contributions are supported by footnotes and relevant statistics.

This edition covers England and Wales, Greece, the Netherlands, Portugal, Switzerland and the UAE.

A close read of these reviews always yields many nuggets. For this edition, these include the following:

- In England, there may now be distinction between term loans and revolving credit facilities in how they are treated under the new moratorium. Term loans may be the safer option.

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- In the Netherlands, the new restructuring tools in the WHOA have, so far, served more as a 'stick' for large restructurings, as in an unpalatable option used to shepherd stakeholders somewhere else (in this case to a UK-centred restructuring), than the carrot in their own right. But as jurisprudence builds from SME-related work – and there are 65 rulings now – that may well change.
- Recognition of foreign proceedings in the UAE looks ripe for some lawyerly innovation, with definite scope to exploit differences on recognition between the offshore and onshore systems that appear to exist.

We are indebted to our wonderful contributors, including the review's editor, GRR editorial board member Céline Domenget Morin, for their efforts. If you have any suggestions for future editions or want to take part – the review is put out annually – my colleagues and I would love to hear from you.

Please write to insight@globalrestructuringreview.com.

David Samuels
Publisher
February 2022

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Editor's Introduction

Céline Domenget Morin
Goodwin

In 2020, the restructuring market was living in a period where three major events were occurring simultaneously: the transposition into national law by the EU member states of Directive (EU) 2019/1023 on preventive restructuring frameworks (the Directive), Brexit and the covid-19 pandemic.

At that time, the financial support granted by many European countries to businesses, and temporary measures to suspend debtors' duty to file for insolvency and correlated debtors' liability and granting debtors' moratorium, led to record low numbers of insolvencies in many countries.

One year later, insolvencies are still far below the pre-crisis 2019 values. There are some discrepancies between the sectors – the travel, leisure and aeronautics industries continue to get hit, while other sectors have benefited from economic growth (which was particularly strong in 2021) and capital inflows.

At the time of writing, Europe, the Middle East and Africa (EMEA) are facing a fifth wave of the pandemic. In this context, certain countries, such as France, have decided to maintain certain measures (rescheduling of state-backed loans, extension of the availability period of state-backed funding lines).

While the impacts of the covid-19 pandemic for the global economy continue, the rise in inflation (especially the increase in price levels of energy and raw materials) and supply chain problems should impact businesses, especially in the industry sector, and lead to an increase in business insolvencies or preventive proceedings.

This edition of the *Europe, Middle East and Africa Restructuring Review* provides a general overview of domestic insolvency regimes, highlighting the reforms recently adopted, or soon to be adopted, to implement preventive restructuring frameworks in several jurisdictions in the EMEA.

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Development of preventive restructuring frameworks in the EMEA

The Directive was adopted on 20 June 2019, which marked the starting point for the two-year period during which EU member states had to transpose it into national law.

The covid-19 pandemic emerged in the midst of the transposition period. In certain jurisdictions, and considering the anticipated increased need for an efficient toolbox to restructure distressed companies, the pandemic acted as a catalyst for the adoption of new insolvency regimes.

Spain passed a new Recast Insolvency Act in May 2020, after four years of discussions on the draft, although some amendments are still required to fully transpose the Directive. In the Netherlands, the senate of the Dutch parliament passed the Act on Court Confirmation of Extrajudicial Restructuring Plans (WHOA) in October 2020. The WHOA came into force on 1 January 2021. In France, the temporary provisions adopted by the Executive Order of 20 May 2020 introduced a new money privilege in the context of safeguard proceedings, which is considered as one of the amendments of French insolvency law required by the transposition of the Directive. The order dated 15 September 2021, which came into force on 1 October 2021, integrated the Directive into French insolvency law. The temporary measures put in place by the Portuguese government have introduced some of the principles of the Directive through the combination of special revitalisation proceedings and the extrajudicial recovery process, which is available more broadly to companies facing difficulties in the context of the temporary measures put in place to face the effects of the covid-19 pandemic on businesses. In Greece, the new insolvency law came into effect on 1 June 2021.

Outside the European Union, the onset of the covid-19 pandemic in the first quarter of 2020 ensured that reform of the English insolvency frameworks, for which the government started consultations in 2016, returned to the top of the legislative agenda. The Corporate Insolvency and Governance Bill was published on 20 May 2020 and passed quickly through the legislative process, enabling its entry into force a few weeks later.

The Gulf states, already severely impacted by declining oil revenues over the past years, did not wait for the covid-19 pandemic to strengthen their regularity frameworks to provide modern, flexible procedures to restructure underperforming businesses. Their new regulations, adopted between 2016 and 2018, have been largely inspired by Chapter 11 of the US Bankruptcy Code (Chapter 11).

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Brexit and the Directive: the end of the supremacy of the scheme of arrangement?

Although not considered as insolvency proceedings listed in Annex A of Regulation (EU) 2015/848 on insolvency proceedings, the English scheme of arrangement has been widely used by European debtors over the past 15 years to implement financial restructurings. The member states started reacting, in a rather dispersed manner, from the mid-2000s, as they amended their national insolvency regimes on several occasions. The lack of coordination between the member states in amending their insolvency regimes, combined with the analysis made by the European Commission that the differences between the different insolvency regimes were an obstacle to the free movement of capital, led the European Commission to propose a first draft of the Directive in November 2016.

The Directive that was finally adopted by the European Commission on 20 June 2019 is largely inspired by Chapter 11, with the introduction of the cross-class cramdown, homogeneous classes of creditors and the absolute priority rule, among other things.

Owing to Brexit, the United Kingdom is outside the scope of the Directive. In this context, several countries, such as the Netherlands and Ireland, have communicated very early on that they could become the preferred jurisdiction for cross-border restructuring.

In this context, the Corporate Insolvency and Governance Act (CIGA), which came into force on 26 June 2020, appears to be a solution to the risk of a loss of competitiveness of the scheme of arrangement for major cross-border financial restructuring. It introduced the restructuring plan, which is similar to schemes of arrangement on many aspects but with some significant developments that are included in the Directive, such as the cross-class cramdown and the absence of the majority in number requirement to vote in favour of the plan within each class of creditors. The competitiveness of this 'super scheme' for cross-border restructuring will also depend on the likelihood of recognition of the plan in other jurisdictions, which remains uncertain in this context post-Brexit.

Regardless of the situation on the recognition of plans adopted through either schemes of arrangement or the CIGA, the transposition in the EU member states of identical rules, inspired by Chapter 11, such as homogenous classes of creditors, the cross-class cramdown, debtor-in-possession financing, the priority rule and creditors' best interests, will reduce the distinction between the restructuring regimes. Cultural differences will remain, however – most likely through different approaches

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in case law. It would, therefore, be interesting to observe in the coming years whether the combination of Brexit and the transposition of the Directive will put an end to forum shopping.

Looking ahead

At the time of writing, the Directive has not yet been transposed in many European countries and the number of applications of the WHOA in the Netherlands, restructuring plans in the United Kingdom and the new accelerated safeguard in France remains limited.

In the context of the covid-19 pandemic, and unstable economic and geopolitical environments, governments are paying (and will continue to pay) attention to the best way to preserve the continuity of businesses, which can limit the number of large matters in the near future that are essential to assess the practices in different countries.

Without waiting for transposition of the Directive by all the European countries, the European Commission announced in November 2021 that it will propose an initiative by the third quarter of 2022 that will seek to harmonise targeted aspects of the corporate insolvency framework and procedures, considering that national insolvency laws continue to differ markedly.

As readers will discover, this is an interesting period, and many aspects of the laws regarding insolvency and pre-insolvency are expected to be further refined and enhanced to meet the needs of debtors, creditors and others.

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CÉLINE DOMENGET MORIN

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With over 15 years of experience, partner Céline Domenget Morin heads Goodwin's financial restructuring practice in Paris. She specialises in guiding distressed corporations, as well as their shareholders and creditors, through judicial or out-of-court restructurings. She also advises investors seeking opportunities, including in distressed businesses. Drawing on her thorough understanding and experience of French and European restructuring and insolvency law, Céline handles complex out-of-court (ad hoc mandate and conciliation) and insolvency (safeguard, accelerated safeguard and bankruptcy) proceedings. She also has significant experience in distressed mergers and acquisitions and insolvency proceedings litigation.

Céline co-heads the turnaround committee at France Invest and is a board member of the Association pour le Retournement des Entreprises.

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Goodwin is a leading, global law firm, with over 1,800 lawyers in 13 offices across the United States, Asia and Europe.

Goodwin's global financial restructuring team is widely recognised as one of the industry's leading restructuring groups, with a long track record in complex restructuring matters. The firm's global team works across jurisdictions with international and domestic investors, creditors, debtors, purchasers, financial institutions, insolvency practitioners and directors on restructuring issues around the world.

The Paris financial restructuring team acts across the full range of restructuring and insolvency matters, providing a combination of technical and sophisticated advice to distressed corporations, as well as their shareholders and creditors, in both out-of-court proceedings (ad hoc mandate and conciliation) and insolvency proceedings (safeguard, reorganisation and liquidation) and insolvency-related litigation. The team also provides advice to investors seeking opportunities, including in distressed businesses.

Drawing from the firm's global and integrated platform, the firm's Paris-based lawyers regularly work with practitioners across offices and practices to provide tailor-made services and to secure the success of clients' international restructuring projects.

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As well as daily news, Global Restructuring Review curates a series of comprehensive regional reviews. This volume, the *Europe, Middle East and Africa Restructuring Review 2022*, contains insight and thought leadership from 14 pre-eminent practitioners. Inside you will find chapters on England and Wales, Greece, the Netherlands, Portugal, Switzerland and the UAE, highlighting changes in law and practice, and identifying some of the unresolved issues of the day.

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