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Rescue of Business in Europe: The debtor-in-possession and small enterprises in distress

Report by **Gert-Jan Boon**, **Stephan Madaus** and **Bob Wessels**

On the occasion of the 10th anniversary of the European Law Institute (ELI), on 15 July 2021, a webinar was hosted on 'Rescue of Business in Europe - the Impacts of ELI's Work.'

Bob Wessels (Chair, Emeritus Professor of Law, Reporter of the ELI project; Honorary member of INSOL Europe) opened the webinar and briefly presented the output of the ELI Rescue of Business in Insolvency Law project, which he led together with **Stephan Madaus** (Professor, Martin Luther University Halle-Wittenberg) and with the assistance of **Gert-Jan Boon** (Researcher and Lecturer, Leiden Law School and INSOL Europe's YANIL-chair). He explained that the Report¹ covers a variety of themes on the rescue of financially distressed businesses, including matters of contract law, corporate law, procedural law and, evidently restructuring and insolvency law. The report, unanimously adopted by ELI in 2017, includes 115 recommendations and has served as an inspiration not only to EU legislators, but also to national ones, steering the debate in the academic literature while being translated into different languages, including Russian.

Two particular topics formed the basis of the discussion during the webinar, namely the role and function of the debtor-in-possession (DIP) and a special treatment for small enterprises.

Gert-Jan Boon, as the co-moderator, explained the ELI report's recommendations to formulate clearly the duties and liabilities of the debtor in order to take adequate measures to prevent the financial distress, and enhance the trust between the involved parties.

Hélène Bourbouloux (Judicial Administrator, Fhb, Paris) presented the French perspective on the DIP

principle. In France, several reorganisation proceedings exist: amicable, pre-insolvency and safeguard or rescue proceedings. In a nutshell, the loss of control of the debtor over its business is proportional to the level of difficulties and coercion of the procedure. The EU Preventive Restructuring Directive 2019/1023 (Directive) prescribes that the debtor should maintain total or partial control of the assets and day-to-day operation of its business in a preventive restructuring procedure. A practitioner in the field of restructuring can be appointed to assist the debtors and creditors in negotiating and drafting the plan. In France, both of these crucial measures have already been in place before the adoption of this Directive.

Alexander Zadorozhny (Attorney at Law, SynumADV, Moscow) presented an outward-looking perspective, the Russian legislation on DIP. Among the most common insolvency procedures in Russia is a so-called 'observation' procedure that enables the debtor to remain in possession. Only in exceptional cases of, for instance, violation of obligations to provide information or conducting certain transactions, the management can be removed and an interim insolvency practitioner can be appointed within the said procedure. Using the output of the ELI report, he emphasised two routes toward a DIP regime in Russia: having a debtor-in-possession as an autonomous party in the restructuring process and introducing special means to control its activity (e.g. by a court).

The small enterprise panel was introduced by the co-moderator **Stephan Madaus**. He explained that the traditional approach of insolvency law has been focussed on a standardised medium-sized firm and has widely missed the peculiarities of small firms, even

though they form more than 95% of all businesses in all jurisdictions. Only in recent years, the attention has gradually shifted towards micro, and small-sized business insolvencies, primarily through academic research and remarkable initiatives from standard-setting organisations such as the World Bank or the UNCITRAL Working Group V, to name but a few. Still, legislative reforms are yet to follow in many countries.

Irit Mevorach (Professor of International Commercial Law, University of Nottingham, UK) presented and explained the idea of a modular - country- and case-specific - approach, which is being developed by the UNCITRAL Working Group V in the forthcoming guide on simplified regimes for the micro and small entities. It aims to limit insolvency instruments for small entities to those needed in each case and jurisdiction, and includes features to address rational creditor apathy.

Andres F. Martinez (Senior Financial Sector Specialist, World Bank, Washington D.C.) outlined the World Bank's approach on the treatment of micro and small enterprises in insolvency in the recently updated principles. From the perspective of the World Bank, small businesses play a critical role in poverty reduction. In financial distress, they face a specific set of challenges including the lack of incentives to access insolvency proceedings, the passivity of their creditors, limited information and advice, problems accessing finance during insolvencies, and insufficient assets to fund insolvency processes.

A lively Q&A ended the webinar, the recording of which is available online.²

¹ The Report and further information on the project is available here: <https://europeanlawinstitute.eu/projects-publications/completed-projects-oid/insolvency/>.

² The recording is available here: <https://youtu.be/DXPPYUWof2M>.