

SERIES LAW OF BUSINESS AND FINANCE

Editors

Sebastian Kortmann
Dennis Faber

Volume 4

PRINCIPLES OF EUROPEAN
INSOLVENCY LAW

Edited by

Prof. W.W. McBryde
Prof. A. Flessner
Prof. S.C.J.J. Kortmann

Law of Business and Finance
Volume 4

Kluwer Legal Publishers - 2003

PRINCIPLES OF EUROPEAN INSOLVENCY LAW

§ 1 Insolvency proceeding

§ 1.1

In an insolvency proceeding ("proceeding") the assets of an insolvent debtor are collected and converted into money to be distributed among the creditors ("liquidation"), or the liabilities of an insolvent debtor are restructured in order to re-establish the debtor's ability to meet liabilities ("reorganisation"). The proceeding can be a combination of liquidation and reorganisation.

§ 1.2

A proceeding can be opened when the debtor is unable or is likely to become unable to pay debts as they become due.

§ 1.3

The debtor or a creditor or a public authority can apply for the opening of the proceeding.

§ 1.4

Appropriate publicity must be given to the proceeding.

§ 2 Institutions and participants

§ 2.1

The proceeding is opened and supervised by the court. The law may provide that, when the debtor is a legal person, the proceeding can be opened by a formal declaration of the debtor.

§ 2.2

An administrator is appointed in order to carry out the liquidation or the reorganisation. The administrator must be independent and must act impartially.

§ 2.3

The debtor is under a duty to co-operate with the court and the administrator. If the debtor is a partnership, a company or other legal entity, this duty applies to its managing partners or directors.

§ 2.4

The creditors' collective interests may be represented by a meeting of creditors, a creditors' committee or a creditors' representative.

§ 3 Effects of the opening of the proceeding

§ 3.1

Assets belonging to the debtor at the time of the opening of the proceeding and assets acquired thereafter are included in the proceeding. When the debtor is a natural person certain assets are excluded from the proceeding.

§ 3.2

Upon the opening of the proceeding the powers to manage and dispose of the assets are transferred to the administrator.

§ 3.3

A claim against the debtor existing at the time of the opening of the proceeding ("insolvency claim") can be pursued only through submission and admission under the conditions of the proceeding, without prejudice to security rights and rights of set-off.

§ 3.4

Upon the opening of the proceeding a creditor with an insolvency claim cannot improve that creditor's position to the detriment of other creditors.

§ 3.5

Between the filing of the application and the opening of the proceeding, the court can take interim measures to preserve the debtor's assets.

§ 4 Management of the assets

§ 4.1

The administrator collects and manages the debtor's assets.

§ 4.2

Management actions of major importance may be subject to the consent of the court or the creditors.

§ 5 Obligations incurred by, and fees of, the administrator

§ 5.1

Obligations incurred by the administrator during the proceeding and the administrator's fees are to be funded from the debtor's assets and satisfied as they fall due, in priority to insolvency claims. If the assets are not sufficient to satisfy these obligations and fees, they are satisfied according to their ranking.

§ 6 Treatment of contracts

§ 6.1

The opening of the proceeding does not automatically terminate a contract to which the debtor is a party.

§ 6.2

The other party cannot enforce performance by the administrator.

§ 6.3

If the administrator demands performance of a contract which at the time of the opening of the proceeding neither party has fully performed, the debtor's obligations arising out of the contract must be satisfied as they fall due and in priority to insolvency claims.

If the administrator has decided not to perform such a contract, any claim of the other party based on non-performance of the contract is an insolvency claim.

The other party can demand that the administrator decides within a reasonable time whether to adopt the contract or not.

§ 7 Position of employees

§ 7.1

The administrator or the employee may terminate a contract of employment following special rules.

§ 7.2

An employee has a preferential ranking in respect of certain insolvency claims for wages and other sums due under the contract of employment or arising from its termination.

§ 7.3

A public fund is available to meet certain insolvency claims of employees for wages and other sums due under the contract of employment or arising from its termination. If the public fund pays the employee, it is subrogated in the rights of the employee.

§ 7.4

If the enterprise of the debtor, or any part of it, is transferred, the contracts of employment are automatically transferred to the purchaser of the enterprise.

§ 8 Reversal of juridical acts

§ 8.1

A juridical act unfairly detrimental to the creditors performed by the debtor within a certain period of time before the opening of the proceeding, is subject to reversal. The administrator can recover or seek annulment of any benefit which has been obtained from the debtor.

§ 8.2

Juridical acts subject to reversal include:

- a) A transaction with the intent of defrauding creditors;
- b) A transaction for inadequate countervalue;

- c) A transaction with a creditor for which no enforceable obligation existed;
- d) A transaction with a creditor after the filing of the insolvency application or in a situation of imminent insolvency;
- e) The creation of a security right to secure a pre-existing obligation.

§ 9 Security rights and set-off

§ 9.1

A security right continues to exist after the opening of the proceeding. Enforcement may be subject to special rules.

§ 9.2

An asset subject to a security right is realised by the administrator or the secured creditor. The secured creditor is entitled to the proceeds of such asset, up to the amount of the secured claim and subject to the rights of creditors with higher ranking claims.

§ 9.3

The opening of the proceeding does not prevent set-off.

§ 10 Submission and admission of insolvency claims

§ 10.1

Creditors must be informed of the time and place for submission of claims, the authority where claims must be submitted and whether secured claims must be submitted.

§ 10.2

A claim is submitted by a notification indicating the amount and nature of the claim and stating whether a preference or security right is invoked.

§ 10.3

An insolvency claim can be disputed by the administrator.

A disputed insolvency claim is admitted if and to the extent that the dispute is decided in favour of the creditor.

Pending the dispute, a disputed insolvency claim can be admitted conditionally.

§ 10.4

An unmatured insolvency claim is admitted for its discounted value.

An illiquid insolvency claim is admitted for its assessed value.

A conditional insolvency claim is admitted for its discounted value or conditionally for its full amount.

A non-monetary insolvency claim is converted into a monetary claim for its assessed value.

§ 10.5

A secured insolvency claim is admitted to the extent that it cannot be satisfied from the proceeds of the assets subject to the security right.

§ 11 Reorganisation

§ 11.1

In a reorganisation, the liabilities of the debtor are restructured on the basis of a reorganisation plan, stating the extent and the manner of such restructuring. A reorganisation plan may include further measures.

§ 11.2

A reorganisation plan can be presented by the debtor or the administrator.

§ 11.3

A reorganisation plan is approved or rejected by a vote of the persons affected by it, or by the court.

The approval of the reorganisation plan by a vote of the persons affected by it may be subject to:

- a) quorum requirement;
- b) the requirement of a qualified majority;
- c) the persons affected by the reorganisation plan voting in separate categories;

d) certain categories of affected persons having blocking votes.

A reorganisation plan approved by a vote of the persons affected by it needs the confirmation of the court.

§ 11.4

The confirmed reorganisation plan binds all persons affected by it, including persons who have not agreed and creditors who have not submitted their claims.

§ 11.5

The reorganisation plan does not affect the rights of creditors against third parties.

§ 12 Liquidation

§ 12.1

If and to the extent that there is no reorganisation, the administrator converts the debtor's assets into money and distributes it among the creditors. The assets can be realised separately or together, whether or not as a going concern.

§ 12.2

Creditors with insolvency claims have an equal right to be paid in proportion to and in accordance with the ranking of their claims. They are entitled to a distribution only if higher ranking insolvency claims can be satisfied to their full amount admitted.

§ 13 Closure of the proceeding

§ 13.1

In a reorganisation, the proceeding is closed either upon the confirmation of the reorganisation plan or upon its performance.

In a liquidation, the proceeding is closed after the realisation of all the debtor's assets and the distribution of the proceeds.

The proceeding is closed if there are insufficient assets to fund the proceeding.

§ 13.2

The debtor, if a natural person, may be discharged from debts remaining after liquidation. The discharge does not affect the rights of creditors against third parties.

When the debtor is a legal person, it will cease to exist following the closure of the liquidation.

§ 13.3

Assets discovered after the closure of a liquidation may give rise to a further liquidation.

§ 14 Debtor in possession

§ 14.1

The debtor may, subject to supervision, be allowed to manage and dispose of the assets. In this case the proceeding follows the Principles of §§ 1 - 13, except to the extent that they presuppose an administrator.

§ 14.2

In §§ 4.1, 5.1, 6.3, 7.1 and 10.3 references to the administrator are to be read as references to the debtor.

§ 14.3

The debtor does not have the power of the administrator to obtain reversal of a juridical act.