Restructuring & Insolvency

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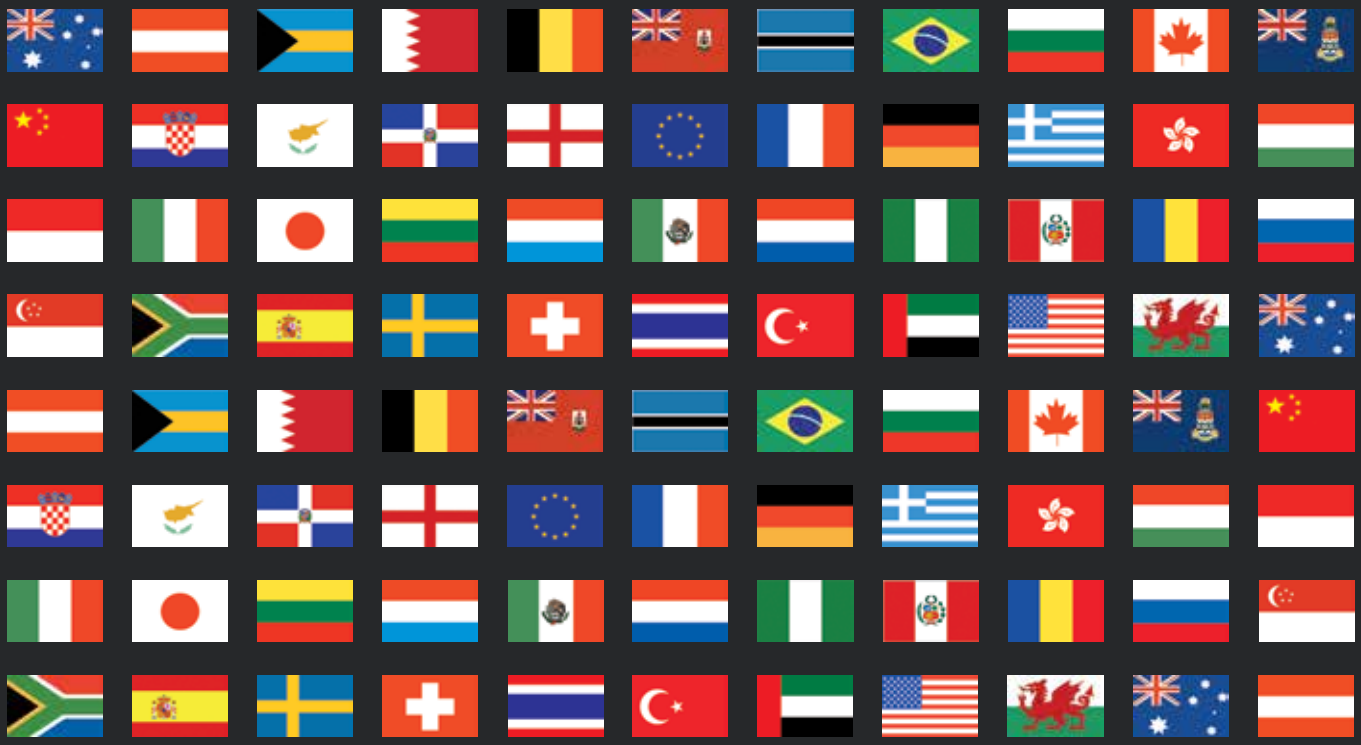

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GETTING THE DEAL THROUGH

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Restructuring & Insolvency 2016

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Cyprus

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Legislation

1 What legislation is applicable to insolvencies and reorganisations? What criteria are applied in your country to determine if a debtor is insolvent?

The Bankruptcy Law and the Bankruptcy Rules, as amended, relate to personal insolvency. Further, the Insolvency of Individuals (Personal Repayment and Relief Plans) Law 65(I)/2015 provides additional provisions for handling of insolvent individuals.

The Companies Law, as amended, governs corporate insolvencies and reorganisations. Amendments to the Companies Law passed earlier this year have introduced the notion of examinership into Cyprus law whereby companies may be reorganised in order to meet their financial obligations. Furthermore, the Companies Law allows for corporate reorganisations which under section 30 of the Income Tax Law 118(I) of 2002, as amended, includes the following: merger, division, partial division, transfer of assets, exchange of shares and transfer of registered office.

Certain provisions of the Bankruptcy Law regarding the rights of secured and unsecured creditors are also applicable to the winding up of insolvent companies.

Section 211(e) of the Companies Law, gives the Cyprus courts the power to issue an order for the winding up of a Cyprus company when the company is deemed 'unable to pay its debts'. According to section 212 of the Companies Law, a company will be deemed 'unable to pay its debts' (and therefore insolvent) if one of the following occurs:

- if the company fails to settle or secure a liquidated debt or obligation in excess of €5,000 within 21 days from receipt of a written demand from a creditor delivered to the registered address of the company requesting that the outstanding amount owed be settled;
- if an order for execution or any other proceeding is issued by a court on any judgment, decree or order in favour of a creditor of the company and that order is returned either fully or partially without being satisfied; or
- if to the satisfaction of the court it can be proven that the company is unable to pay its debts. In determining whether a company is unable to pay its debts, the court shall take into account the contingent and prospective liabilities of the company.

A similar test is applied for individuals but with a number of provisions and restrictions with respect to reasonable income allowing for the upkeep of the individual as well as for reasonable minimum assets that will allow him or her to earn income (tools, vehicle etc).

Courts

2 What courts are involved in the insolvency process? Are there restrictions on the matters that the courts may deal with?

Insolvency proceedings are handled by the district courts. For personal insolvencies, the district court of the district where the individual is located is the applicable court where the insolvency will be processed. Applications to liquidate (wind up) a company must be submitted to the district court of the district where the registered office of the company is located.

Excluded entities and excluded assets

3 What entities are excluded from customary insolvency proceedings and what legislation applies to them? What assets are excluded from insolvency proceedings or are exempt from claims of creditors?

Under the relevant legislation, there is no exclusion of any entity, corporate or personal, from insolvency proceedings, other than the Central Bank of Cyprus, which is established constitutionally. Special arrangements apply to the resolution of banks and other financial institutions. In corporate proceedings no assets are excluded from claims of creditors other than those that are not beneficially owned by the debtor (ie, property held on trust). In individual insolvencies, a person may apply to the courts in order to request an order for the relief from debts whereby the debts are erased by the court if the individual has a monthly available income of less than €200 (which is calculated on the basis of a formula taking into account all sources of income and other maintenance expenses), assets of less than €1,000 and is a resident of Cyprus. Under the same law, assets do not include chattels that are necessary in order for the individual to maintain a minimum quality of life (books, tools, white goods, vehicles etc). Special provisions for specialised equipment for medical needs also apply.

Public enterprises

4 What procedures are followed in the insolvency of a government-owned enterprise? What remedies do creditors of insolvent public enterprises have?

Government-owned enterprises, otherwise known as semi-governmental organisations (such as the Cyprus Telecommunications Authority, the Cyprus Electricity Authority, the Ports Authority, etc), are incorporated based on a separate law that is enacted for each such organisation. Normally there are no provisions in the law regarding the dissolution and liquidation of such organisations. In the event that the enterprise must for whatever reason be liquidated, the specific law relating to such an enterprise is amended and special provisions for liquidation and dissolution are introduced therein.

An example of a semi-governmental body that has been dissolved is the State Fairs. This was dissolved on the basis of an amendment to the State Fairs Authority Law, which resulted in the transfer of all moveable and immoveable property owned by the Authority, and any rights or obligations of the Authority relating to such property, to the government.

Protection for large financial institutions

5 Has your country enacted legislation to deal with the financial difficulties of institutions that are considered 'too big to fail'?

Cyprus has implemented the Resolution of Credit and Other Institutions Law 17(I)/2013 (the Resolution Law) that allows the Resolution Authority of Cyprus, comprising the Central Bank of Cyprus, to take steps in order to maintain stability in the banking and financial services industry and that grants the power to the Resolution Authority to adopt and implement resolution measures regarding affected institutions. The Resolution Law is modelled on the later introduced EU Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 (as amended) (BRRD). The Resolution Law was implemented ahead of the above EU Directive due to the difficulties faced by Cypriot banks in 2013. Although the provisions of Law 17(I)/2013 have yet to be amended or replaced in

order to bring it in line with the provisions of the BRRD, its provisions as currently in force embody the basic principles and tools suggested by the BRRD.

Secured lending and credit (immoveables)

6 What principal types of security are taken on immoveable (real) property?

Mortgages allow the beneficiary thereof to, inter alia, sell, repossess the property or to start a foreclosure procedure. A mortgage constitutes a contractual right for the benefit of the mortgagee and constitutes a charge on the property. Mortgages under Cyprus law can either be legal or equitable. A legal mortgage is the common type of security granted over immoveable property in Cyprus and it gives a legal right in the property. It must be registered at the Land Registry of the district where the immoveable property is located. If such mortgage is given by a Cyprus company, it must also be registered with the Department of the Official Receiver and Registrar of Companies (ROC). An equitable mortgage grants equitable rights to the lender rather than a legal right.

Following an interested party's application the court may issue an order for the registration of a memorandum on real estate, filed at the Land Registry Office.

Secured lending and credit (moveables)

7 What principal types of security are taken on moveable (personal) property?

In Cyprus moveable property is considered to be any property not falling within the definition of immoveable property. It therefore includes shares, securities, financial instruments, cash, goods, equipment, trading stock, works of art, aircraft and ships.

The most common type of security taken over shares is a pledge, which sometimes includes a fixed charge. A pledge can also be taken on bank accounts. While the pledge is not registrable as a charge under section 90 of the Companies Law, fixed charges are registrable with the ROC.

A lien, whether a common law legal lien or an equitable lien, can also be taken on moveable property, usually goods, that are being transported. The lien gives the holder the right only to retain the debtor's property until payment and does not include a right of sale. Therefore, a carrier's lien, that is to say his or her right to retain possession of the goods, is extinguished against payment of transport costs.

Retention of title (or *Romalpa* clauses – after the English case of *Alumimium Industrie Vaassen BV v Romalpa Alumimium Limited*) is also used, providing that the title to the goods remains vested in the seller until certain obligations, usually payment of the purchase price, are fulfilled by the buyer.

Goods, equipment and company assets are most commonly secured by a floating charge, that is to say a security interest that 'floats' until an event of default occurs or until the company goes into insolvent liquidation, at which time the floating charge is said to 'crystallise' and attaches to all the relevant assets. The floating charge has the advantage of allowing the debtor to deal with the assets in the ordinary course of business. In practice floating charges are created over the whole business and undertaking of a company, present and future.

Ship mortgages over Cyprus-registered vessels are used extensively in ship finance transactions. The same are registrable with the Registrar of Cyprus ships or at the Cyprus consulate overseas; if the mortgaged vessel is owned by a Cyprus company, the mortgage must also be registered with the ROC.

Where the Financial Collateral Law 43(I)/2004 (FCAL) and EU Directive 2002/47/EC (FCD) are applicable, perfection requirements such as registrations with the ROC or special requirements of witnessing of documents (eg, pledges) under the Contract Law, do not need to be satisfied; further, there are no restrictions on enforcing security in insolvency situations: for instance, where a company is in the process of being wound up, the collateral taker retains the right to deal with its security, including a fixed or floating charge, upon crystallisation, for its own purposes.

Unsecured credit

8 What remedies are available to unsecured creditors? Are the processes difficult or time-consuming? Are pre-judgment attachments available? Do any special procedures apply to foreign creditors?

Any creditor (whether local or foreign) can bring actions against individuals and companies at the place of residence or registered office respectively in order to recover debt. If the creditor has reasons to believe that the debtor may dispose of assets in order to avoid debt recovery, an injunction may be sought from the district court in order to freeze assets. No other pre-judgment procedures exist. Once the creditor has obtained a judgment against the debtor, a number of enforcement tools exist in order for the creditor to recover the debt. Some examples include writ of execution for the sale of moveables, charges over immoveable property, orders for the delivery or possession of goods and bankruptcy proceedings, garnishee proceedings, writ of delivery of goods, possession of land and writ of sequestration.

It should be noted that during an examinership procedure unsecured creditors are prohibited from bringing an action.

Where the claim of the unsecured creditor is substantiated, such creditor may initiate the procedure for the winding up of the company (see question 10).

Voluntary liquidations

9 What are the requirements for a debtor commencing a voluntary liquidation case and what are the effects?

The shareholders of a company express their wish to liquidate the company by written instructions to the board of directors. The directors proceed to pass a resolution to discontinue the company's activities, to close its bank accounts and to instruct the auditors to prepare financial statements. The auditors perform their audit and provide the board with an up-to-date balance sheet. The final tax return of the company is then submitted to the tax authorities. The next step is for the board to make a full enquiry into the affairs of the company with a view to forming the opinion that the company will be able to pay its debts in full, within a period not exceeding 12 months from the commencement of the winding up and prepare a declaration of solvency. An extraordinary general meeting is convened and held where the shareholders appoint a liquidator to act for the purposes of the winding up. The appointed liquidator must be licensed as an insolvency practitioner and must meet the criteria set out in the recently enacted Insolvency Practitioners Law 64(I) of 2015 (the Insolvency Law) (specifically section 14) and the Insolvency Practitioners Regulations of 2015.

The company must be able to meet its debts in order to enter into a voluntary liquidation. If, during the liquidation process, the company is found to be insolvent, the creditors may appoint an alternate liquidator in which case the liquidation will be converted to a creditors' liquidation.

Involuntary liquidations

10 What are the requirements for creditors placing a debtor into involuntary liquidation and what are the effects?

Any creditor may apply to the district court where the debtor is located in order to apply for the liquidation of the debtor. In order to successfully place the debtor in liquidation, the creditor must prove to the court that the debtor is unable to pay his or her debts (section 211(e), the Companies Law) as per the insolvency test set out in question 1.

In addition to this, a creditor may also apply for the liquidation of the debtor if the execution or other process issued on a judgment against the company in favour of a creditor of the company is returned unsatisfied. Another option is to prove to the satisfaction of the court that the value of the assets of the company is less than the amount of its liabilities, taking into account the contingent and prospective liabilities of the company.

Voluntary reorganisations

11 What are the requirements for a debtor commencing a formal financial reorganisation and what are the effects?

The latest amendment of the Companies Law, passed into law in mid-2015, has introduced the concept of examinership in Cyprus law. Examinership is a process providing for the financial reorganisation of a viable company with liquidity problems and that aims to keep the business alive and pay back creditors over time. It also seeks to provide relief from actions of

creditors of the company so that the company has the time to reorganise its financial affairs.

The court may appoint an examiner (an individual who fulfils the criteria of insolvency practitioners) in the event that the company fulfils the following criteria (section 202A (1)):

- the company is open to claims or will be unable to service its debts;
- no liquidation against the company has been published in the official gazette of the Republic of Cyprus; and
- no court order has been issued for the liquidation of the company;

The court will only issue an order for examinership if the company is found to be a 'going concern' (section 202A (3) and has a reasonable prospect of survival. This is determined by a report that is prepared by an independent adviser (who is either the auditor of the company or a person who has the qualifications to act as an auditor), which is attached to the application for examinership and must provide basis to the court that there are reasonable prospects of survival (as defined in section 202B (3) and (4)).

Applications for examinership may be made by the following interested parties (section 202B):

- the company itself;
- any creditor or future creditor, including a company employee;
- members of the company who, at the time of the application, hold no less than 10 per cent of the paid capital of the company that has voting rights attached to it;
- a guarantor of the company; and
- any entity as listed above, jointly or severally.

With the submission of an application for the appointment of an examiner the company is under court protection for a period of four months. During this period a receiver cannot be appointed and the company cannot be placed under liquidation (section 202H). In addition, no actions can be made against assets of the company without the consent of the examiner (this includes mortgages, confiscations and lease agreements).

Involuntary reorganisations

12 What are the requirements for creditors commencing an involuntary reorganisation and what are the effects?

The examinership scheme, as described above in question 11, allows for the procedure to be commenced by either the company or members of the company (voluntary) or by creditors or guarantors (involuntary) or by a mixture of all the above-mentioned interested parties. The process remains the same in all eventualities and therefore there are no alternate effects other than those described above in question 11.

Apart from financial reorganisations as above, a creditor of the company may initiate the procedure for the reorganisation of a company by making an application in a summary way requesting a meeting of the creditors. If the court orders the convening of such meeting and if a majority in numbers representing three-fourths in value of the creditors agree to any compromise or arrangement, the compromise or arrangement shall, if sanctioned by the court, be binding on all the creditors or the class of creditors, or on the members or class of members, as the case may be, and also on the company or, in the case of a company in the course of being wound up, on the liquidator and contributories of the company. The compromise or arrangement includes merger, division, partial division, transfer of assets, exchange of shares and transfer of registered office.

Mandatory commencement of insolvency proceedings

13 Are companies required to commence insolvency proceedings in particular circumstances? If proceedings are not commenced, what liabilities can result? What are the consequences if a company carries on business while insolvent?

In order for a company itself to be able to commence liquidation proceedings, it must be able to satisfy all creditors (current and expected). Therefore, the directors of the company must declare that the company is solvent for the purposes of the voluntary liquidation. Any director making a declaration of solvency for such purposes without having reasonable grounds for making such a statement, commits an offence and on conviction is liable to imprisonment or to a fine or to both. If the liquidator who is appointed within the course of a voluntary liquidation is of the opinion that the company will not be able to meet its obligations and pay all debts, he or she must call a meeting of creditors and supply them with all information regarding the company's financial position and affairs. From that meeting onwards, the voluntary liquidation is converted to a creditors' liquidation.

Where the company continues trading while being insolvent, the directors face the risk of incurring personal liability charges for fraudulent trading (see question 39), however, such claims are rare in Cyprus.

Doing business in reorganisations

14 Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use or sale of the assets of the business? Is any special treatment given to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities? What powers can directors and officers exercise after insolvency proceedings are commenced by, or against, their corporation?

The examiner, during the period of examinership, has the following powers that are prescribed in section 202ib:

- to convene, set the agenda and preside over a director and shareholder meeting;
- to cancel or correct any action or omission, behaviour, decision or contract against the company; and
- to notify any third person that has contracted with the company that a provision of their contract is not binding to the company in the event that this provision affects the survival of the company in a negative manner.

The company during the examinership period continues business as usual, under the restrictions and provisions contained in the law that will allow the examiner to assess and reorganise the financials of the company.

The examiner has the following powers in relation to secured assets (as per section 202ΙΣΤ):

- the general right to handle and dispose of secured assets after applying to the court for a such permission;
- in the event of sale of assets covered by a floating charge, the possessor of the charge has the same priority given under the floating charge;
- in the event of sale of assets covered by a fixed charge, the possessor of the charge will be paid the whole amount that corresponds to the secured assets from the net proceeds of the sale; and
- in the event that the net proceeds are less that the market value of the asset, the court may decide the amount that must be added to the net proceeds in order to repay the possessor of the fixed charge.

The officers of the company are required to assist and aid the examiner in his role (section 202ΙΓ). In addition, the court may order that the examiner assumes the powers and duties of the directors of the company (section 202ΙΔ). The court, before making such order, will take into account whether the affairs of the company are conducted in such a manner that may possibly affect the wellbeing of the company, its employee or its creditors as a class. Also, it will take into account whether it is advisable, in order to preserve assets or to safeguard the interests of the interested parties, that the exercise of powers by the board of directors or the management of the company is curtailed or regulated.

After insolvency proceedings are commenced and a liquidator is appointed, unlike examinerhsip, the directors no longer have any powers to manage the company and its business.

Stays of proceedings and moratoria

15 What prohibitions against the continuation of legal proceedings or the enforcement of claims by creditors apply in liquidations and reorganisations? In what circumstances may creditors obtain relief from such prohibitions?

When a winding-up order has been made or a provisional liquidator has been appointed, no action or proceeding shall be proceeded with or commenced against the company except by leave of the court and subject to such terms as the court may impose.

At any time after the presentation of a winding-up petition, and before a winding-up order has been made, the company, or any creditor or contributory:

- where any action or proceeding against the company is pending in any court, may apply to the court for a stay of proceedings; and
- where any other action or proceeding is pending against the company, may apply to the court to restrain further proceedings in the action or proceeding.

If the company is undergoing examinership proceedings, no claims can be brought or orders made against the company.

Post-filing credit

16 May a debtor in a liquidation or reorganisation obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

Under the Bankruptcy Law, a bankrupt individual may not obtain credit of more than €650, or enter into trade, without disclosing that he or she is bankrupt. Such debts will rank after all other debts and shall not have priority over existing debt. If he or she does so, including entering into trade on the basis of a name other than that under which he or she was declared bankrupt, then such person is guilty of a crime and is imprisonable for a period of up to three years.

Insolvent companies cannot enter into further transactions after a liquidation order (unless they exit liquidation following an arrangement with their creditors), the liquidator, as per section 233, is entitled to raise money on the security of the assets.

Under examinership rules, further credit may be obtained as it is important for the success of the examinership. The examiner has the ability to certify certain new expenses are 'expenses which have been duly incurred'. This includes obtaining further credit to the company as a provision for new credit facilities is contained in the law (necessary and duly obtained further expenses). Creditors who have granted such facilities to the company are to be repaid before all other creditors (except creditors who have fixed charges). In addition, it is worth mentioning that utilities (such as water, electricity and telecommunication services) are obliged to continue providing services to the company during the protection period, given that the expenses made during the protection period will be considered 'necessary expenses'.

Set-off and netting

17 To what extent are creditors able to exercise rights of set-off or netting in a liquidation or in a reorganisation? Can creditors be deprived of the right of set-off either temporarily or permanently?

Set-off is available to creditors, subject to provisions contained in the Companies Law. In addition, the court may, at any time after making a winding-up order, make an order against any contributory to pay more money due from him to the company.

The Bankruptcy Law provides that in the case of mutual debts, mutual claims and mutual transactions existing between a creditor and the debtor then an account is taken of all the claims on either side and they are set off against each other and the difference is payable by the net debtor to the net creditor. The only exception is in the case of debts created by the debtor after the insolvency proceedings were initiated where the creditor was aware of the existence of such proceedings at the time of the creation of the debt.

Set-off or netting is further allowed on the basis of the FCAL, which provides that on the occurrence of an enforcement event, the collateral taker shall be able to realise any financial collateral provided under and subject to the terms agreed in a security financial collateral arrangement. It further provides that if an enforcement event occurs while any obligation of the collateral taker to transfer equivalent collateral under a title transfer financial collateral arrangement remains outstanding, the obligation may be the subject of a close-out netting provision and that a close-out netting provision can take effect in accordance with its terms notwithstanding the commencement or continuation of winding-up proceedings or reorganisation measures in respect of the collateral provider or the collateral taker. Netting provisions are additionally protected under Directive 2001/24EC on the reorganisation and winding up of institutions and the respective national Business of Credit Institutions Laws and Co-operative Societies Law 22/1985.

Sale of assets

18 In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets? In practice, does your system allow for 'stalking horse' bids in sale procedures and does your system permit credit bidding in sales?

When a company has entered liquidation, the liquidator, having assumed control of the company, is entitled to sell any of the company's assets in the way he or she considers most advantageous (ie, auction, private contract). The liquidator may sell assets that are not used as security for creditors (floating charged assets can be sold with the consent of the chargor). The transfer of undertakings as a whole imposes restrictions on the transfer of employees. There are no specific provisions that restrict the use of 'stalking horse' bids as the sale process is at the discretion of the liquidator or examiner (under general duties towards creditors and other interested parties). Credit bidding is permitted as no restrictions exist under the law, again this is at the liquidator's or examiner's discretion.

Intellectual property assets in insolvencies

19 May an IP licensor or owner terminate the debtor's right to use it when an insolvency case is opened? To what extent may an insolvency administrator continue to use IP rights granted under an agreement with the debtor? May an insolvency representative terminate a debtor's agreement with a licensor or owner and continue to use the IP for the benefit of the estate?

As Cyprus law is silent on this issue one has to look at the licence agreement between IP licensor and the debtor or licensee. The licence agreement may contain a provision giving the right to the licensor to terminate the licensee's right to use it; or the licence may contain a provision to the effect that the IP right is terminated automatically upon insolvency. Neither the Bankruptcy Law nor the Intellectual Property Rights Law give any guidance.

A company's liquidator will be able to continue to use IP rights for the benefit of the winding up, unless the licence agreement provides for instance that the right is automatically terminated when insolvency proceedings commence.

The ability of the insolvency representative to terminate the debtor's agreement with a licensor or owner and nevertheless continue to use the IP for the benefit of the estate seems illogical.

Rejection and disclaimer of contracts in reorganisations

20 Can a debtor undergoing a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party? What happens if a debtor breaches the contract after the insolvency case is opened?

The Companies Law contains adequate provisions that enable the court to make any order to amend contracts in order to facilitate the process of reorganisation. The examiner has a wide range of power to amend existing contracts. The consequences of a debtor breaching a contract after the insolvency case is opened depend on the terms of the contract; any claims under such contracts would be ranked as unsecured.

A liquidator is allowed to disclaim onerous property, including contracts. In such case where any part of the property of a company which is being wound up consists of immoveable property burdened with onerous covenants, of unprofitable contracts, by reason of its binding the possessor thereof to the performance of any onerous act, the liquidator of the company may with the leave of the court and within the course of a specific period, disclaim onerous property.

Arbitration processes in insolvency cases

21 How frequently is arbitration used in insolvency proceedings? Are there certain types of insolvency disputes that may not be arbitrated? Will the court allow arbitration proceedings to continue after an insolvency case is opened? Can disputes that arise in an insolvency case after the case is opened be arbitrated with the consent of the parties? Can the court direct the parties to such disputes to submit them to arbitration?

An insolvency process is itself a public process that affects the rights of several third parties that have contractual relations with the company or individual. Therefore, these rights cannot be enforced through an arbitration process that requires consent and is usually private. In addition, under the Companies Law, the courts have jurisdiction over corporate and individual insolvencies, and only the courts may order liquidations. In the event of a shareholder dispute that leads to an application for liquidation before a court, it may be possible to resort to arbitration if all parties consent, prior to the court ordering the liquidation of the company. In these cases, shareholders' disputes may be arbitrated but failing this, a liquidation order will not be issued by the arbitration tribunal or body.

Successful reorganisations

22 What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan release non-debtor parties from liability, and, if so, in what circumstances?

The court, as per section 202KE, needs to approve the financial reorganisation plan and decide whether it will approve the proposals for a debt repayment plan. The court must take into account whether the proposals are just and equitable (under principles of equity) under the following principles set out in the law:

- the resuming of normal business activities;
- avoiding employee redundancies; and
- safeguarding creditors so that they are not in a worse position than they would be if the company were to commence liquidation proceedings.

Creditors are classed as secured and unsecured creditors under the plan prepared by the examiner. Officers of the company cannot be released from their liability against the company in the event fraudulent transactions had been made in relation to preferential treatment of creditors before the examinership period.

Expedited reorganisations

23 Do procedures exist for expedited reorganisations?

There is no method by which the financial reorganisation is expedited or prepackaged as the process under examinership is relatively brief. It aims to bring a company back to sustainability within a short period of time, with each case examined on its own merits. Depending on the complexity of the financial reorganisation, the time taken for the negotiation process with creditors may vary.

Unsuccessful reorganisations

24 How is a proposed reorganisation defeated and what is the effect of a reorganisation plan not being approved? What if the debtor fails to perform a plan?

If the proposal does not meet the criteria described above in question 2 it will be most likely be rejected by the court. In this case, the company will exit the examinership court protection phase (as per section 202KΘ) and will be open for claims to its liquidation. Upon confirmation of the reorganisation plan by the court, the proposals become legally binding on all shareholders, creditors and other interested parties (section 202KE). The proposals must be applied and effected, the latest, within 30 days from the court confirmation (section 202KE(10)). Upon activation of the reorganisation plan, the company ceases to be under court protection and the appointment of the examiner is terminated (section 202KΘ).

Insolvency processes

25 During an insolvency case, what notices are given to creditors? What meetings are held? How are meetings called? What information regarding the administration of the estate, its assets and the claims against it is available to creditors or creditors' committees? What are insolvency administrators' reporting obligations? May creditors pursue the estate's remedies against third parties?

When a liquidator is appointed in a company, a copy of the order appointing them is delivered within three business days to the ROC, which registers it and publishes the appointment on its official website (section 219 (1)). The creditors of the company are allowed to form a committee and select the liquidator they wish to represent them in their claims against the company (section 228A). Creditors and contributors of a company may form separate committees in order to select a liquidator. The law provides for the eventuality that these committees do not agree and provide that a third person may be appointed or two persons jointly.

The initial appointment of a liquidator is the official receiver of Cyprus. Following this appointment, which is made for an interim period, the creditors will then meet to appoint a liquidator of their choice. For purposes of convenience, the official receiver may also suggest a liquidator who will be appointed by the court instead of the official receiver. The liquidator of the company will publish in newspapers and the official gazette the fact that he has been appointed and will invite all creditors of the company to submit their claims to him.

The liquidator is required under the law to publish all relevant facts of the company and to maintain records books, financial statements and minute books in which he is responsible for the filings (section 235). Under section 237, the liquidator is also required to submit to the official receiver at any time as it may be requested and at least twice annually for as long as he is appointed as liquidator. Audited accounts are to be sent to the creditors and contributors of the company by post (section 237(5). The official receiver also has a wide range of powers available to him that enable the request of information at any time and for any question to be made to the liquidator of a company (section 238).

According to section 240, the creditors who may have formed a committee to appoint the liquidator have the authority and powers to aid the liquidator in his role as well as supervise his functions. Such committees have the power to initiate claims for the company against third parties along with the liquidator.

Enforcement of estate's rights

26 If the insolvency administrator has no assets to pursue a claim, may the creditors pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

As discussed above, the liquidator will take the role of the company and will be able to pursue all claims on behalf of the company. The creditors may pursue the estate's remedies, although in normal circumstances the claim would be pursued at the expense of the company. It is for the liquidator and the creditors to decide whether it is worth pursuing a claim and how this will be best handled. Assignment of a cause of action to one of the creditors may occur if the rights of other creditors are not violated; alternatively, the cause of action may be assigned to the creditors as a class, in both instances the claim will still be pursued in the name of the company. The company will not be liquidated until the remedies from the claim have been received. There is a variety of case law on this matter under Cyprus and English law; although it has not yet been clarified whether assignment to a third party of a bare cause of action (non-tortuous) that is being promoted before the courts by a company placed under liquidation is permissible or not. Drawing guidance from English judgments, such assignments are contrary to public policy and will not be enforced.

Creditor representation

27 What committees can be formed (or representative counsel appointed) and what powers or responsibilities do they have? How are they selected and appointed? May they retain advisers and how are their expenses funded?

Committees can be formed by the creditors and the contributories of the company separately. Their powers and duties are further discussed above in question 25. Such committees are formed and organised by each class separately and choose representatives to protect their interests.

Insolvency of corporate groups

28 In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be pooled for distribution purposes? May assets be transferred from an administration in your country to an administration in another country?

Each company is considered a separate legal entity and as such each company is subject to separate procedures. Cyprus law does not provide for this, either administratively or for the purposes of aggregation of assets and liabilities.

Claims and appeals

29 How is a creditor's claim submitted and what are the time limits? How are claims disallowed and how does a creditor appeal? Are there provisions on the transfer of claims? Must transfers be disclosed and are there any restrictions on transferred claims? Can claims for contingent or unliquidated amounts be recognised? How are the amounts of such claims determined?

Creditors who wish to have their debts processed must deliver proof of their debt to the administrator of the company (in the case that a liquidator, receiver or examiner has not been appointed yet, they will need to apply to the office of the official receiver) within a period of 35 days from the date of the publication, which may be extended. Their proof must be verified, in the form of a court sworn affidavit, and attaching a detailed statement of accounts and vouchers to verify the claim. All proofs will be open to other creditors who have submitted claims. The administrator will have the right to redeem the security of the secured creditor or has the option to apply to the court in order to realise the property comprising the security.

Modifying creditors' rights

30 May the court change the rank of a creditor's claim? If so, what are the grounds for doing so and how frequently does this occur?

As explained in question 37, the court may invalidate a charge granted by a company and remove the status of secured creditor. This can be made under a number of provisions set out in the Companies Law.

Priority claims

31 Apart from employee-related claims, what are the major privileged and priority claims in liquidations and reorganisations? Which have priority over secured creditors?

In the case of winding up or liquidation of a company, claims will rank in priority over any other unsecured claims save for preferential debts, which are mandatorily preferred by law and the order for the distribution of the assets will be as follows:

- the costs of winding up, including disbursements and the fees of the liquidator and any other appointed persons;
- the preferential debts as the same are outlined in section 300 of the Companies Law (local and government taxes due within the 12 months before the insolvency, any unpaid wages and social security contributions for the employees and any unpaid compensation for personal injury during working hours);
- the secured creditors, namely those who have a mortgage or similar security;
- the unsecured ordinary creditors;
- the deferred debts (for example, sums due to the members of the company such as dividends declared but not paid); and
- any surplus will be distributed among the members of the company.

Employment-related liabilities in restructurings

32 What employee claims arise where employees are terminated during a restructuring or liquidation? What are the procedures for termination?

During a financial restructuring of a company, the examiner must safeguard as many employee positions as possible, which will, however, enable the company to have a sustainable future. The contractual and legal duties of the company towards the employees in relation to remuneration as well as compensation in the event of dismissal will apply.

Pension claims

33 What remedies exist for pension-related claims against employers in insolvency proceedings and what priorities attach to such claims?

It is common that pension fund arrangements in Cyprus are made through provident funds whereas the employee and the employer will have defined contributions for the duration of the employment. Unpaid contributions to the employees' provident fund by the company will rank as a preferential claim.

Environmental problems and liabilities

34 In insolvency proceedings where there are environmental problems, who is responsible for controlling the environmental problem and for remediating the damage caused? Are any of these liabilities imposed on the insolvency administrator, secured or unsecured creditors, the debtor's officers and directors, or on third parties?

The liquidator of a company will be responsible for handling all matters relating with the company as he will effectively take over the management of the company. Therefore, any environmental obligations will be dealt with as they arise. Under section 304, the liquidator is permitted (with the court's approval) to dispose of any onerous property. Although we are not aware of any reported cases that deal with environmental liabilities, we can assume that if there is an environmental concern, the court is likely to issue an order for the control of the environmental problem that will be binding on the company.

Liabilities that survive insolvency proceedings

35 Do any liabilities of a debtor survive an insolvency or a reorganisation?

Under liquidation, no liabilities of the debtor will survive, as the company will eventually be dissolved. In an examinership, the company, if the examinership is successful, will be able to continue business as normal, and therefore liabilities will continue to exist. In the case of transfer of undertakings, employee rights will be transferred.

Distributions

36 How and when are distributions made to creditors in liquidations and reorganisations?

Distributions are made to creditors after the liquidator and examiner have processed all claims and have valued and sold, reorganised or realised all assets of the company, including any possible set offs and nettings that are applicable. Creditors will then receive compensation from the company, according to the priority of claims and according to the percentage that each creditor will receive given the capabilities of the company to make such payments.

Transactions that may be annulled

37 What transactions can be annulled or set aside in liquidations and reorganisations and what are the grounds? What is the result of a transaction being annulled?

Any transaction made by the company (a wide-ranging concept that includes payments, deliveries of goods, mortgages and conveyancing, as well as executions or other acts relating to property made or done by or against a company within six months before the commencement of its winding up is considered to be a fraudulent preference against its creditors and invalid. On the question of fraudulent preference, the court will look into the intentions behind the transaction. The onus is on those who claim to avoid the transaction to establish what the debtor actually intended and that the actual intention was to make a preference among creditors. Floating charges are also valid up to the extent of any cash paid to the company at the time of the creation of the charge unless it is proven that the charge was made while the company was solvent. The liquidation test described in detail above (excess of assets over liabilities and ability to pay debts as they fall due) will apply in the same manner.

Proceedings to annul transactions

38 Does your country use the concept of a 'suspect period' in determining whether to annul a transaction by an insolvent debtor? May voidable transactions be attacked by creditors or only by a liquidator or trustee? May they be attacked in a reorganisation or a suspension of payments or only in a liquidation?

See question 37.

Directors and officers

39 Are corporate officers and directors liable for their corporation's obligations? Are they liable for pre-bankruptcy actions by their companies? Can they be subject to sanctions for other reasons?

The general provisions of fraudulent trading allow for the court to pursue directors personally, in order to pay creditors who have been defrauded due to the directors' misconduct. It should be noted that this claim has a high standard of proof. In addition to the above, directors may be personally liable under several other legislations mainly involving the tax obligations of the company.

Groups of companies

40 In which circumstances can a parent or affiliated corporation be responsible for the liabilities of subsidiaries or affiliates?

Every company is considered to be a separate legal entity, despite corporate group arrangements. Parent companies and associated companies cannot be liable for other companies of the same group except in the event where guarantee agreements have been entered into and given as security for their liabilities. The provisions of fraudulent trading, as per section 311, allow for the court to pursue directors personally, in order to pay creditors who have been defrauded due to the directors' misconduct.

Insider claims

41 Are there any restrictions on claims by insiders or non-arm's length creditors against their corporations in insolvency proceedings taken by those corporations?

Non-arms' length creditors will rank pari passu with other unsecured creditors. There is no rule that will restrict them in their claim, unless they fall under preferential treatment of creditors or fraudulent transactions as explained in questions 37 and 38 respectively.

Creditors' enforcement

42 Are there processes by which some or all of the assets of a business may be seized outside of court proceedings? How are these processes carried out?

Assets may be seized with out-of-court pledge enforcement, where the company is obliged to deliver the pledged assets to the pledgor in the event of default. An alternate process whereby assets of a company may be seized out-of-court is when a receiver is appointed in a company under a contractual obligation, in order to seize assets and then resign once these assets have been sold for the benefit of the other party. Following receivership, a company may continue its business operation.

Corporate procedures

43 Are there corporate procedures for the liquidation or dissolution of a corporation? How do such processes contrast with bankruptcy proceedings?

Aside from the liquidation proceedings that require court involvement, where the ROC has reasonable cause to believe that a company is not carrying on business or is in operation or where the directors of the company fall below the minimum number stipulated in the company's articles of association or where the company fails to file any document as required pursuant to the Companies Law, it may commence the procedure for the strike-off of the company, which following the relevant notifications and publications results in the striking of the company off the registry. This procedure may also be initiated by the shareholders, the directors or other officers.

The the company can within a period of 20 years from the date of dissolution be restored following a court application by an interested party and the liability, if any, of every director, managing officer and member of the company shall continue and may be enforced as if the company had not been dissolved.

Conclusion of case

44 How are liquidation and reorganisation cases formally concluded?

In the case of a members' voluntary liquidation, as soon as the affairs of the company are fully wound up, the liquidator will draw up an account of the winding up showing how it has been conducted and the manner in which the property of the company has been disposed of, and will call a general meeting of the company to explain this. This meeting is called via an advertisement in the gazette, published at least one month before the meeting. Within one week after the meeting, the liquidator sends to the ROC a copy of the account, and shall make a return of the meeting and its date. The ROC on receiving the account and the return, will proceed with registering the same and at the expiration of three months from the registration of the return the company shall be deemed to be dissolved.

In the case of a dissolution by the court, when the affairs of a company have been completely wound up, the court, if the liquidator makes an application, shall make an order that the company be dissolved. A copy of the order is filed at the ROC which records the dissolution.

In the case of a reorganisation within the meaning of section 198 of the Companies Law an official copy of the order granted by the court must be delivered to the ROC otherwise it shall have no effect and a copy of every such order is annexed to every copy of the memorandum of the company issued after the order has been made. Furthermore, the provisions set out in the arrangement agreed between the companies in question must be performed.

International cases

45 What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments? Has the UNCITRAL Model Law on Cross-Border Insolvency been adopted or is it under consideration in your country?

Cyprus has not enacted any separate law for the adoption of the UNCITRAL Model Law on Cross-Border Insolvency. However, since 1 May 2004 Cyprus is a full member of the European Union and therefore bound by the terms of Regulation 1346/2000.

Recognition of foreign insolvency proceedings in Cyprus can be effected through the following.

- Regulation 1346/2000, which is applicable to all member states except Denmark. The Regulation separates the possible insolvency proceedings that may be taken into two broad categories; the main insolvency proceedings and the secondary insolvency proceedings. The cornerstone for establishment of jurisdiction in the courts of one member state for the main proceedings is where the centre of a debtor's main interests are. Secondary proceedings may be opened subsequently to the main proceedings in another member state if the debtor has an establishment in the territory of this state. The Regulation provides that judgments handed down by a court whose judgment concerning the opening of proceedings is recognised in accordance with article 16 and that concern the course and closure of insolvency proceedings and compositions approved by that court shall also be recognised with no further formalities. 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.
- The Credit Institutions Reorganisation and Winding-Up Directive (2001/24/EC), which creates rules to ensure that reorganisation measures or winding-up proceedings adopted by the administrative or judicial authorities of the home state of an EU credit institution are recognised and implemented throughout the Community. The

Directive provides that, with some exceptions, the national law of a credit institution's home state will apply in the event of a reorganisation or winding-up proceedings, including in respect of its branches in other member states.

COMI

46 What test is used in your jurisdiction to determine the COMI (centre of main interests) of a debtor company or group of companies? Is there a test for, or any experience with, determining the COMI of a corporate group of companies in your jurisdiction?

In accordance with Regulation EC 1346/2000 on Insolvency Proceedings, the 'centre of main interests' 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. Article 3 of the Regulation provides that in the case of a company or legal person, the place of the registered office shall be presumed to be the centre of its main interests in the absence of proof to the contrary.

Cross-border cooperation

47 Does your country's system provide for recognition of foreign insolvency proceedings and for cooperation between domestic and foreign courts and domestic and foreign insolvency administrators in cross-border insolvencies and restructurings? Have courts in your country refused to recognise foreign proceedings or to cooperate with foreign courts and, if so, on what grounds?

EC Regulation 1346/2000 aims to create more efficient and effective cross-border insolvency proceedings in order to promote the proper functioning of the internal market.

The Regulation enables the main insolvency proceedings to be opened in the member state where the debtor has the centre of his main interests. These proceedings have universal scope and aim at encompassing all the debtor's assets. The Regulation permits secondary proceedings to be opened to run in parallel with the main proceedings.

The Regulation does not apply to insurance undertakings, credit institutions (including cooperative companies), certain investment undertakings and collective investment undertakings.

Cross-border insolvency protocols and joint court hearings

48 In cross-border cases, have the courts in your country entered into cross-border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries? Have courts in your country communicated or held joint hearings with courts in other countries in cross-border cases? If so, with which other countries?

Cyprus has not entered into any cross-border insolvency protocols or other arrangements that enable the court to coordinate proceedings with other countries or hold joint hearings. As a member of the EU, Cyprus applies Regulation 1346/2000 that aims to create a framework for the commencement of proceedings and for automatic recognition and cooperation between the different member states.

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