

## If you're the IP, I'm the Pifor

Bob Wessels\*

\* Prof. em. of international insolvency law, University of Leiden, the Netherlands. Since 2010 Expert counsel to the European Commission in matters of (cross border) reconstruction and insolvency law.

A practitioner is someone who is qualified or registered to practice a particular occupation or profession such as medicine or law. They can also be affiliated to a certain segment of a profession. Article 2(5) of the new European Insolvency Regulation (EIR 2015) that enters into force on 26 June 2017 introduces the term “insolvency practitioner”. The term “insolvency practitioner” replaces the term for this person chosen under the existing Insolvency Regulation (EIR 2000), “liquidator”. That term was unfortunate, as many of my British colleagues the last decades were keen to observe. The term, however, reflected the (perceived) nature of member states’ insolvency proceedings at the time of concluding the text of the regulation, now some two decades ago.

In German, “insolvency practitioner” under the EIR 2015 is translated as “*Verwalter*”, in French as “*praticien de l’insolvabilité*”, and in the Netherlands as “*insolventiefunctionaris*”. The latter term – a combination of “insolvency” and “functionary” – is odd and means insolvency official or functionary; perhaps the drafter wished to express the “public function” a court appointed “*curator*” (administrator) possesses.

Who are those insolvency practitioners? Recital 21 to the EIR 2015 is very straightforward in providing that insolvency practitioners “... are defined in this Regulation and listed in Annex B”, although it misses the word “exhaustively” as it uses for the insolvency proceedings listed in annex A (see recital 9 to EIR 2015). Recital 21 goes on to say: “... Insolvency practitioners who are appointed without the involvement of a judicial body should, under national law, be appropriately regulated and authorised to act in insolvency proceedings. The national regulatory framework should provide for proper arrangements to deal with potential conflicts of interest.” The recital therefore contains a rather weak invitation to regulate non-court appointed insolvency practitioners with professional and ethical rules, but leaves no indication for the elements to regulate. It is also unclear whether the last sentence – regarding conflict of interest – only applies to these non-court appointees or also to court-appointed insolvency practitioners.

According to article 2(5) of the EIR 2015, an insolvency practitioner (IP) means any person or body whose function, including on an interim basis, is to: verify and admit claims submitted in insolvency proceedings; represent the collective interest of the creditors; administer, either in full or in part, assets of which the debtor has been divested; liquidate the assets referred to in point; or supervise the administration of the debtor’s affairs. Performing only one of the activities mentioned can be enough to be characterised as an insolvency practitioner. The definition makes clear that the IP could be a person or body only representing creditors or only supervising the administration of the debtor’s affair, therefore making room for a debtor in possession to be in control of its assets and affairs. See my article on the introduction of the debtor in possession in the EIR 2015 in the October issue of *GRR*. Also available at <http://bobwessels.nl/wp/wp-content/uploads/2017/02/GRR-Oct-16-EU-welcomes-the-DIP.pdf>

The persons or bodies referred to in the first subparagraph of article 2(5) are listed in annex B to the EIR. Annex B lists some hundred national names for such persons or bodies that are active in restructuring and insolvency according to the national law of the member state in which the proceedings were opened. These “bodies” could for instance be the member states’ “Insolvency Services”, such as the Insolvency Service for Ireland.

The German insolvency law Professor Jessica Schmidt (in: Peter Mankowski, Michael Müller and Jessica Schmidt, *EuInsVO 2015. Europäische Insolvenzverordnung 2015. Kommentar*, München: Verlag C.H. Beck, 2016) submits that “body” refers to a “legal person”, for there are EU member states where such a legal person can (or must) act as an insolvency practitioner. This is the case in Hungary and Spain. I doubt however whether the drafters had this in mind. The German term for body is “*Stelle*”, which I think means “*function*”, where the Dutch translation is “*instantie*” – authority, agency or body – which relates to a body empowered to act as indicated in article 2(5).

Can a court be an insolvency practitioner? The description of “insolvency practitioner” also allows a court to qualify as such an IP where such court is, according to its domestic law, performing functions relating to the administration of the debtor’s assets. Examples in annex B include “*De gedelegeerd rechter/Le juge-délégué*” (the delegated judge) in Belgium, or the “*Insolvenzgericht*” and “*Konkursgericht*” (insolvency court) in Austria.

Annex B forms (as does annex A) an integral part of the EIR 2015. With respect, I think this has been overlooked by the England and Wales High Court in *Re Nortel Networks* on 11 February 2009 (*Re Nortel Networks SA & Ors* [2009] EWHC 206 (Ch)), when it considered that the duty of “liquidators” to cooperate across borders, as provided in article 31 of the EIR 2000, is to be treated by the courts of member states as incorporating or reflecting a wider obligation, which extends to the courts that exercise control of insolvency procedures in their respective jurisdictions, referring to a judgment of the Vienna Higher Regional Court. There is no general duty for courts to cooperate in a cross-border context, as the High Court seems to suggest, because the Vienna court in the case at hand did not act “as a court”, but as a “liquidator”, as provided for in annex C of the EIR 2000, now annex B of the EIR 2015.

Article 2(5)’s definition of an IP includes a person or body who functions “on an interim basis”. The definition should be read against the background of recital 15, providing that the EIR 2015 “...should also apply to proceedings that, under the law of some member states, are opened and conducted for a certain period of time on an interim or provisional basis before a court issues an order confirming the continuation of the proceedings on a non-interim basis. Although labelled as ‘interim’, such proceedings should meet all other requirements of this Regulation.” The position of an “interim” has been dealt with in conjunction with the term “opening” of insolvency proceedings in the famous, 10 year old *Eurofood* case of 2 May 2006. Now there can be no doubt that an interim IP has the power to request for the opening of secondary proceedings.

## **The Pifor**

Recently, in European insolvency lingo, the “practitioner in the field of restructuring” has been introduced. Let’s call him or her “Pifor”. In November 2016, Vera Jourová, EU commissioner for justice, consumers and gender equality proposed a directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures (restructuring directive). The proposal generally is seen as a welcome initiative. See <http://bobwessels.nl/2017/02/2017-02-doc2-notes-for-ep-on-proposal-restructuring-directive/>

Article 2(15) of the restructuring directive proposal provides the following: “(15) ‘practitioner in the field of restructuring’ means any person or body appointed by a judicial or administrative authority to carry out one or more of the following tasks: (a) to assist the debtor or the creditors in drafting or negotiating a restructuring plan; (b) to supervise the activity of the debtor during the negotiations on a restructuring plan and report to a judicial or administrative authority; (c) to take partial control over the assets or affairs of the debtor during negotiations.”

In all three tasks there is an activity in relation to the debtor. Where article 5 of the proposal determines that member states introduce the concept of debtor in possession (in a preventive restructuring procedure the debtor remains totally, or at least partially, in control of their assets and the day-to-day operation of the business), a judicial or administrative authority can appoint a practitioner in the field of restructuring. Member states may require the appointment of a Pifor where the debtor is granted a general stay of individual enforcement actions or where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down.

Member states also shall ensure that there is a safe harbour for transactions carried out to further the negotiation of a restructuring plan confirmed by a judicial or administrative authority or closely connected with such negotiations, unless such transactions have been carried out fraudulently or in bad faith. Where such a transaction enjoys this type of protection, member states may require that “... transactions such as new credit, financial contributions or partial asset transfers outside the ordinary course of business made in contemplation of and closely connected with negotiations for a

restructuring plan” be approved by a Pifor, or by a judicial or administrative authority, in order to benefit from the protection.

A Pifor? Is that an IP or is it another animal in the restructuring and insolvency zoo? Article 24 of the proposal for a restructuring directive requires member states to ensure that members of the judiciary and of other competent authorities are properly trained and specialised in restructuring, insolvency and second chance matters, and the same applies to “... mediators, insolvency practitioners and other practitioners appointed in restructuring, insolvency and second chance matters” (article 25(1)). Practitioners appointed in restructuring? Shouldn’t that be: “practitioners in the field of restructuring”?

In article 25(2) member states are obliged to “... encourage, by any means which they consider appropriate, the development of, and adherence to, voluntary codes of conduct by practitioners in the field of restructuring, insolvency and second chance, as well as other effective oversight mechanisms concerning the provisions of such services.” Where articles 26 and 27 require member states to set rules for Pifors for eligibility, selection, appointment, removal, oversight, fee-determination and sanctions, it is clear that a Pifor is a new kid on the block.

It remains to be seen whether the Pifor has a bright future ahead.

*This is a slightly adapted version of a regular column Bob Wessels is writing for Global Restructuring Review (GRR) on the topic of cross-border restructuring and insolvency in a European context. GRR is a subscription-only publication, but here is a link to the full piece, which appeared in December 2016, on GRR’s website at <http://globalrestructuringreview.com/>*