CONFERENCE ON EUROPEAN RESTRUCTURING AND INSOLVENCY LAW

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Re: CERIL Statement 2022-1

Reporters: Prof. Ignacio Tirado and Prof. em. Bob Wessels[1]

CERIL Statement 2022-1 on Confidentiality, Secrecy and Privilege – The Position of the Insolvent Debtor

CERIL identifies that information plays a key role in the corporate insolvency process and preventive restructurings. With the EU Restructuring Directive (2019/1023) being silent on confidentiality, secrecy and privilege of information, this is CERIL's first report in a project on reviewing the preferred position of insolvent debtors, insolvency practitioners, and courts and other insolvency authorities. Taking the debtor's viewpoint, CERIL recognises the significance for a debtor to be able to keep certain information confidential, while identifying the need to impose a duty of disclosure on debtors.

[1] This Report is prepared by CERIL Working Party (WP) 13 on Confidentiality, Secrecy and Privilege. The WP that discussed and contributed to this Report consisted, in addition to Reporters, of the conferees participating in this WP. The reporters would like to express their gratitude for their extensive contributions to Gert-Jan Boon (Netherlands), Pavel Boulatov (Russia), Prof. Stephan Madaus (Germany), Grégory Minne (Luxembourg), Prof. Elina Moustaira (Greece), Siv Sandvik (Norway), the Hon Lady Wolffe (Scotland), as well as two observers, American College of Bankruptcy Fellows Victor Vilaplana (Practus LLP, the United States) and Prof. Jack Williams (Georgia State University, the United States).

The Reporters also express their sincere gratitude to Research Associate Dr. Shuai Guo, China University of Political Science and Law, for the preparation of a preliminary study and the assistance with drafting the text of this report, and our assistants Ms Defne Tasman, University of Antwerp, and Ms Yuchen Zhang.

In this report ('Confidentiality, Secrecy and Privilege – The position of the insolvent debtor'), CERIL firstly discusses disclosure of information of the insolvent debtor and its business to the general public, after which it focusses on the intricacies of the availability of information to creditors. Access to and availability of relevant information is a vital requirement for an efficient corporate restructuring process, allowing those who are involved in this process to act or decide on the basis of adequate information having been made available to them as freely and rapidly as is reasonably practicable. Statutory or contractual rules regarding confidentiality, secrecy and privilege of information may however hinder or limit the process of receiving information. Also, while CERIL recognises the significance of keeping some preventive restructuring proceedings confidential or private for the purpose of achieving better restructuring results, the need to impose the duty of disclosure on debtors is identified.

Based on these premises, CERIL has adopted seven recommendations that EU Member States may want to take into consideration when formulating or amending their preventive restructuring laws. The primary point of departure is a debtor's general duty to disclose information to creditors in preventive restructuring proceedings. The purpose of the duty to disclose is to ensure availability of all facts relevant to the assessment of a preventive restructuring request and a preventive restructuring plan, so that parties called to make a decision (such as a court or creditors) may make an informed judgment. However, in certain circumstances, a debtor should be allowed to keep certain information confidential (Recommendations 1 and 2). In particular, preventive restructuring proceedings may be kept confidential (or 'private') between a debtor and some of its creditors. The debtor will still be required to bear a general duty to disclose information to affected creditors in such preventive restructuring proceedings (Recommendation 3). Furthermore, a debtor's general duty to disclose information in preventive restructuring proceedings does not address unaffected parties (Recommendation 4).
In cross-border restructurings falling under the scope of the European Insolvency Regulation (recast), the law applicable with regard to matters of confidentiality and secrecy is the law of the state of the court where the insolvency proceeding is opened, i.e. the *lex fori concursus* (including its rules on private international law) (Recommendation 5).
International conventions (Rome I) should be modernised on the basis of the partly or full contractual nature of a restructuring plan or the provisions contained therein (Recommendations 6 and 7).

Concluding Note

This Statement and the full Report is available as Statement and Report 2022-1 on CERIL's website www.ceril.eu. This site also informs about the organisation of CERIL and its activities.

In the meantime, co-reporter Prof. Ignacio Tirado (ignacio.tirado@uam.es) welcomes the opportunity to further inform about this Statement and Report.

For further information regarding CERIL, please contact Prof. Reinout Vriesendorp (Secretary; info@ceril.eu).

On behalf of the CERIL Executive,

Bob Wessels
Chair