CERIL Report 2023-1 on

Confidentiality, Secrecy and Privilege – The Position of Insolvency Practitioners

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Reporters: Prof. Ignacio Tirado and Prof. em. Bob Wessels
Research Associate: Dr. Shuai Guo

CONFERENCE ON EUROPEAN RESTRUCTURING AND INSOLVENCY LAW

Contact
Prof. Reinout Vriesendorp
Leiden Law School
PO Box 9520
2300 RA Leiden
The Netherlands
E: info@ceril.eu

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Re: **CERIL Report 2023-1**

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

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[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.

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1. Introduction

In early 2020, the Conference on European Restructuring and Insolvency Law (CERIL) jointly initiated a project with the International Insolvency Institute (III) on confidentiality, secrecy and privilege in corporate insolvency and bank resolution. This project resulted in a book with the same title *Confidentiality, Secrecy and Privilege in Corporate Insolvency and Bank Resolution.*[2] This book is the first scholarly work in this legal area. It describes situations regarding confidentiality, secrecy and privilege of information that different stakeholders may encounter, including debtors, insolvency practitioners (IPs), courts and insolvency authorities, creditors, banks, resolution authorities, etc.

The current Working Party 13 of CERIL is established by CERIL following this previous work. The Working Party aims to provide a thorough analysis on confidentiality, secrecy and privilege matters in circumstances where the EU Restructuring Directive 2019/1023 ('EU Restructuring Directive') applies.[3] In general, information plays a core role in a corporate insolvency process. Access and availability of relevant information of the debtor and its business is a vital requirement for an efficient corporate restructuring process, making it essential that all who are involved in this process can act or decide on the basis of optimal information becoming available to them as freely and rapidly as is reasonably practicable. To limit information to its context of the EU Restructuring Directive, the term 'business related information', to indicate what information should be given access to, such as business structure, management, debtor's books, records, data, planning, operations or evaluation of activities etc. Yet, this information may not be available for them due to statutory or contractual rules regarding confidentiality, secrecy and privilege of information. The Working Party has been focusing on information within the field of insolvency law, underlining the importance of transparency of information towards everyone who has an economic interest in a case, in an application for restructuring and the voting process for adoption of a restructuring plan and a court's confirmation or approval of such plan.

The Working Party firstly examined the position of insolvent debtors and published its first report in May 2022 (CERIL Report 2022-1).[4]

Based on the previous research results, this second report continued to study the specific position of an insolvency practitioner (IP) in matters of confidentiality, secrecy and privilege in the context of the EU Restructuring Directive.[5] IPs, following the definition in the EU Restructuring Directive, refer to 'any person or body appointed by a judicial or administrative authority to carry out, in particular, one or more of the following tasks: (a) assisting the debtor or the creditors in drafting or negotiating a restructuring plan; (b) supervising the activity of the debtor during the negotiations on a restructuring plan, and reporting to a

[2] Bob Wessels and Shuai Guo, *Confidentiality, Secrecy and Privilege in Corporate Insolvency and Bank Resolution*, The Hague: Eleven International Publishing, 2020.

[3] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), OJ L 172/18.

[4] CERIL, 'Report 2022-1 on Confidentiality, Secrecy and Privilege – The Position of the Insolvent Debtor', 2022a, available at https://www.ceril.eu/news/ceril-report-2022-1-on-confidentiality-secrecy-and-privilege.

[5] Wessels and Guo, 2020, p. 47-58.

judicial or administrative authority; (c) taking partial control over the assets or affairs of the debtor during negotiations'.[6]

For clarification, 'debtors' in this report only refer to corporate debtors not being banks and other financial institutions.[7] This report is based on information available to the Working Party on 1 May 2023.

[6] Article 2(1)(12) EU Restructuring Directive.

[7] Article 1(2) EU Restructuring Directive.

2. The EU Restructuring Directive

The aim of the EU Restructuring Directive is '… to contribute to the proper functioning of the internal market and remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures concerning preventive restructuring, insolvency, discharge of debt, and disqualifications'.[8] In particular, the Directive aims to ensure that (i) 'viable enterprises and entrepreneurs that are in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating', that (ii) 'honest insolvent or over-indebted entrepreneurs can benefit from a full discharge of debt after a reasonable period of time, thereby allowing them a second chance', and that (iii) 'the effectiveness of procedures concerning restructuring, insolvency and discharge of debt is improved, in particular with a view to shortening their length'.[9]

The EU Restructuring Directive lays down rules on: (a) 'preventive restructuring frameworks available for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing the insolvency and ensuring the viability of the debtor'; (b) 'procedures leading to a discharge of debt incurred by insolvent entrepreneurs'; and (c) 'measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt'.[10] Preventive restructuring proceedings apply when there is only a likelihood of insolvency, with a view to 'preventing insolvency and ensuring their viability'.[11] The determination of 'likelihood of insolvency' is left for national laws to prescribe.[12] In preventive restructuring proceedings, debtors would 'remain totally, or at least partially, in control of their assets and the day-to-day operation of their business'.[13] It is common knowledge that these procedures share many similarities with Chapter 11 of the US Bankruptcy Code, in particular, the introduction of the concepts of debtor in possession (DIP), automatic stay and cross-class cramdown.[14]

Since the EU Restructuring Directive is a directive, it needs to be transposed into national laws. In February 2023 over twenty Member States have transposed the Directive into their national laws.[15]

[8] Recital (1) EU Restructuring Directive.

[9] Recital (1) EU Restructuring Directive.

[10] Article 1(1) EU Restructuring Directive.

[11] Article 4(1) EU Restructuring Directive.

[12] Article 2(2)(b) EU Restructuring Directive.

[13] Article 5(1) EU Restructuring Directive.

[14] See. e.g. Nicolaes W.A. Tollenaar, 'The European Commission's Proposal for a Directive on Preventive Restructuring Proceedings', *Insolvency Intelligence*, Vol. 30, No. 5, 2017, p. 65-81; David C. Ehmke et al., 'The European Union Preventive Restructuring Framework: A Hole in One?', *International Insolvency Review*, Vol. 28, No. 2, 2019, p. 184-209; Daoning Zhang, 'Preventive Restructuring Frameworks: A Possible Solution for Financially Distressed Multinational Corporate Groups in the EU', *European Business Organization Law Review*, Vol 20., No. 2, 2019, p. 285-318.

[15] See https://eur-lex.europa.eu/legal-content/en/NIM/?uri=CELEX:32019L1023.

3. IPs' power to obtain information

Insolvency practitioners (IPs) are designated with a broad range of powers to carry out their duties in insolvency proceedings, in particular, the power to collect information in relation to the insolvent debtor. First, IPs are empowered to access debtor's information, normally through the debtor's directors. This information will include the debtor's books, records and other data carriers of which the IP considers necessary knowledge for the proper performance of its task.[16] Second, IPs are empowered to request information from related persons. The United Kingdom (UK) Insolvency Act, for instance, prescribes that the court may require from 'any person [that] has in his possession or control any property, books, papers or records to which the [debtor] appears to be entitled … to pay, deliver, convey, surrender or transfer the property, books, papers or records to the office-holder'.[17] Relevant persons shall 'give to the office-holder such information concerning the company and its promotion, formation, business, dealing, affairs or property as the office-holder may at any time after the effective date reasonably require'.[18] These persons include: (a) 'those who are or have at any time been officers of the company'; (b) 'those who have taken part in the formation of the company at any time within one year before the effective date'; (c) 'those who are in the employment of the company, or have been in its employment (including employment under a contract for services) within that year, and are in the office-holder's opinion capable of giving information which he requires'; (d) 'those who are, or have within that year been, officers of, or in the employment (including employment under a contract for services) of, another company which is, or within that year was, an officer of the company in question'; and (e) 'in the case of a company being wound up by the court, any person who has acted as administrator, administrative receiver or liquidator of the company'.[19] Similarly, in Belgium: 'When there are serious, specific and consistent presumptions that the applicant or a third party is in possession of a document proving the existence of a cessation of payments, the conditions for determining the date of cessation of payments, the opening of a judicial reorganization procedure or a relevant document concerning other decisions that may be taken during the insolvency proceedings the delegated judge or the examining magistrate may, at the request of the interested parties order that the document or a copy thereof be attached to an insolvency file'.[20]

In 2014, Lord Collins explained the origin of the power to access information in *Singularis Holdings Limited v PricewaterhouseCoopers*:

> This is an exclusively statutory power, which goes back a very long way. As early as the Statute of Bankrupts Act 1542, the authorities (including, among others, the Lord Chancellor and the Chief Justices) were given power to examine on oath persons who

[16] As an example, see Art. 371 paragraph 8 of the Dutch Bankruptcy Act, providing that the debtor or its directors, the shareholders and supervisory directors, if any, and the employees of the debtor shall provide all information the restructuring expert requests and in the manner he specifies. They shall inform the restructuring expert on their own initiative of facts and circumstances that they know or ought to know are relevant to the restructuring expert for the proper performance of his tasks and provide him all cooperation necessary

[17] Section 234(2) UK Insolvency Act 1986.

[18] Section 235(2)(a) UK Insolvency Act 1986.

[19] Section 235(3) UK Insolvency Act 1986.

[20] Art. XX.6 Book XX of the Belgian Code of Economic Law (Livre XX Code de droit économique). See also Arts 21, 26-27.

> were suspected of having property (including debts) belonging to the debtor. The Joint Stock Companies Act 1844 gave a similar power to the court in the case of companies, and there is a continuous line of statutory authority in both corporate and personal insolvency confirming (and extending) the power thereafter to the present day.[21]

In *British & Commonwealth Holdings Plc (Joint Administrators) v Spicer & Oppenheim*, the court confirmed that the power to order production of documents extends to all documents that the administrator reasonably requires to see to carry out his functions.[22] In particular, when an office holder is appointed, he 'faces the obvious difficulty or disadvantage that he is a stranger to the company's affairs', so that these powers to access information aim at 'overcom[ing] the difficulty or disadvantage by allowing the office holder to acquire (cheaply and, if appropriate, quickly) the knowledge that the company over which he is appointed should possess'.[23]

In short, IPs need to gain sufficient information to perform their duties. However, such right is not unconditional. A proper balance test may need to be conducted. In the above *British & Commonwealth Holdings Plc (Joint Administrators) v Spicer & Oppenheim* case, the court emphasised that 'the applicant must satisfy … that, after balancing all the relevant factors, there is a proper case for such an order to be made'.[24] To be more specific, 'where the administrator reasonably requires to see the documents to carry out his functions … the production does not impose an unnecessary and unreasonable burden on the person required to produce them in the light of the administrator's requirements'.[25] For instance, if a liquidator is using the application to obtain evidence or admissions for use in an intended negligence or other action against the joint receivers, but not for the purpose of gathering information to decide on the merits of an action, such purpose would be deemed improper.[26]

In addition, there are special conditions under which certain information needs to be protected and cannot be disclosed.[27] First, personal-identifiable information should be protected for the purpose of safeguarding the privacy of individuals. The US Bankruptcy Code protects minor children by allowing a non-public record keeping track of their names.[28] Also, the US Federal Rules of Bankruptcy Procedure requires only the filing of 'the last four digits of the social-security number and taxpayer-identification number', 'the year of the individual's birth', 'the minor's initials', and the 'the last four digits of the financial-account number'.[29] Second, certain business secrets need to be protected, especially for those of commercial value.[30] Section 107(b) of the US Bankruptcy Code prescribes that, upon the request of a party in interest, or a bankruptcy court's own motion, the bankruptcy court can

[21] Singularis Holdings Limited v PricewaterhouseCoopers [2014] UKPC 36.

[22] British & Commonwealth Holdings Plc (Joint Administrators) v Spicer & Oppenheim [1993] AC 426.

[23] Ibid., p. 428-429.

[24] Ibid.

[25] Ibid.

[26] Re Galileo Group Limited [1998] 1 BCLC 318.

[27] Wessels and Guo, 2020, p. 46. This paragraph follows the first report.

[28] 11 USC §112.

[29] US Federal Rules of Bankruptcy Procedures, Rule 9037 (Privacy protection for filing made with the Court).

[30] For instance, intellectual property. See Wu, 2009, p. 488.

order not to disclose: (i) 'a trade secret or confidential research, development, or commercial information'; or (ii) 'scandalous or defamatory matter'.[31] In Belgium, '[t]he public prosecutor and the debtor may at any time obtain communication of the data collected during the examination as well as of the report referred to in Article XX.28. The judge-rapporteur or the president of the chamber determines, however, which elements cannot be communicated when their disclosure would be likely to compromise the professional secrecy of the debtor.'[32] Similarly, in Germany, debtor's disclosure is limited to the information concerning restructuring, but not personal information. In Russia, information related to medical information or pure personal information should not be disclosed.[33]

The EU Restructuring Directive, however, does not provide specific provisions on these matters. In particular, appointing an IP is not mandatory under the EU Restructuring Directive.[34] When appointed, an IP normally takes up the duties of safeguarding the interest of the parties where a general stay of individual enforcement actions is imposed. An IP also assists the debtor and creditors in negotiating and drafting a restructuring plan where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down, or it is requested by the debtor or by a majority of the creditors provided the cost is borne by the creditors.[35] The IP's power of information access is not explicitly regulated in the Directive, however, this power is necessary for the IPs to perform their duties and will already be or should be prescribed in national laws.

The Working Party discussed the ratio and scope of such a duty of disclosure. In line with CERIL Report 2022-1, a distinction should be made with regard to a specific reference time to decide what information must be made available for the IP, by the debtor, its board members, its shareholders and – as the case may be under national law – its employees.

In this respect, three dates will be relevant (i) the date the request for a preventive restructuring proceeding is made, (ii) the dates during which an IP (depending on the scope of its role) is preparing for negotiations for a plan with creditors and/or shareholders, and (iii) the day for the vote on the restructuring plan, which evidently is a later moment. It is recalled that the recommendations made in CERIL Report 2022-1 followed the distinction made in Section 1125 of the US Bankruptcy Code prescribing 'postpetition disclosure and solicitation' by the debtor and stipulating that disclosure should be made to hypothetical investors typical of the holders of claims or interests of the relevant class, that is, creditors

[31] 11 USC §107(b). See also US Federal Rules of Bankruptcy Procedures, Rule 9018 (Secret, confidential, scandalous, or defamatory matter).

[32] Art.XX.26 Book XX of the Belgian Code of Economic Law (Livre XX Code de droit économique).

[33] An insolvency administrator must maintain confidentiality of the information protected by law, such as personal information, trade secret, commercial information or information covered by bank-client privilege. An insolvency administrator's breach of this requirement is a ground for civil, administrative or criminal liability (Articles 20.3 (3) and 213.9 (10) of the Russian Insolvency Law). After the court introduces receivership, the information about the debtor's financial statement ceases to be confidential (Article 126 (1) of the Russian Insolvency Law).

[34] Article 5(2) EU Restructuring Directive ('Where necessary, the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall be decided on a case-by-case basis, except in certain circumstances where Member States may require the mandatory appointment of such a practitioner in every case.').

[35] Article 5(3) EU Restructuring Directive.

and other stakeholders, for them to 'make an informed judgment about the plan'. The necessity for the IP to be sufficiently informed at different stages will include different information.

As follows from the recommendations in CERIL Report 2022-1, as a principle, the debtor bears a general duty to disclose information to creditors in preventive restructuring proceedings, to make available all facts relevant to the assessment of a preventive restructuring request as well as a preventive restructuring plan, to allow anyone addressed (such as a court or creditors) to make an informed judgment. It concerns the provision of information that the debtor knows or should consider to be important for the effective implementation of any preventive restructuring at issue.

The duty to disclose information rests on the debtor itself and is realised on the debtor's own initiative and includes the duty to actively keep the information up to date during the full process, including the process towards an approved and confirmed preventive restructuring plan.

In relation to the IP, disclosure at the time of filing for a restructuring request mainly concerns information concerning the financial and operational status of the debtor, provided by the debtor itself. Information available during preparations and negotiations up to the voting process will come from a wider circle of addressees and will include additional information concerning the feasibility and enforceability of the plan.

Recommendation 1

1.1 The insolvent debtor or its directors and shareholders and supervisory directors, if any [as well as those employed by the debtor] have the obligation of full and frank disclosure and/or duty of fair presentation, that is, to provide the IP with all information required of it, in the manner thereby determined.

1.2 Both for the insolvent debtor as well as for other parties under the duty to provide business related information, this is information which the debtor or the other parties know or should understand to be important for the effective implementation of any preventive restructuring at issue, including any relevant pre-insolvency information referred to in Recommendation 5.

1.3 Both the debtor and the other parties will inform the IP on their own initiative of facts and circumstances which they know or ought to know are relevant to the proper performance of the IP's task.

1.4 The duty to provide business-related information includes the duty to actively keep the information up to date during the full process, including the process towards an approved and confirmed preventive restructuring plan.

1.5 Except in the context of the application of the provisions of this section, the restructuring plan expert will not share the information obtained with third parties.

In CERIL Report 2022-1 considerations were given to the possibility of an appeal mechanism in cases where the IP and the insolvent debtor or the other parties have different views regarding the provision of information. These different views could also relate to confidential

information, regarded as such by the party invoking it (such as personal-identifiable information as well as certain business secrets). Although an appeal mechanism prescribed in national laws should also be applicable, the report does not interfere with such procedural or constitutional rights to appeal under each Member State's national laws. However, from the perspective of ensuring a swift and efficient process, the report recommends an appeal proceeding should not have an automatic suspension effect on preventive restructuring proceedings, provided interests of stakeholders are protected. An appeal against the court's decision on whether (or not) to grant disclosure usually does not affect restructuring strategies exercised by debtors or restructuring experts. However, under certain circumstances, judges may rule that an appeal may lead to the suspension of a restructuring proceeding, for instance, when the information is necessary for creditors to approve or disapprove a restructuring plan.

Notably, a tool introduced by the International Bar Association (IBA) can be useful. Under Article 3(8) of the IBA Rules on the Taking of Evidence in International Arbitration, if the party has an objection to some or all of the documents requested and the propriety of this objection can be determined only by review of the document, the arbitral tribunal may determine that it should not review the document. In that event, the arbitral tribunal may, after consultation with the parties, appoint an independent and impartial expert, bound to confidentiality, to review any such document and to report on the objection. To the extent that the objection is upheld by the arbitral tribunal, the expert shall not disclose to the Arbitral Tribunal and to the other Parties the contents of the Document reviewed.

Recommendation 2

2.1 In making available all business related information, under certain circumstances, a debtor and any other party should be allowed to keep certain information confidential.

2.2 EU Member States should enact or amend an appropriate system for ensuring that certain information should remain confidential. Such a system could include 'sealing' of information.

2.3 EU Member States should lay down explicitly in their laws an option to submit any controversies as to whether certain information is confidential to a court, or an independent third party, to allow it to decide whether certain information should be disclosed.

2.4 To ensure swift and efficient proceedings, an appeal to (higher) courts against the court's decision should not have an automatic suspension effect on preventive restructuring proceedings.

4. Confidentiality of preventive restructuring proceedings

Generally, insolvency proceedings are collective proceedings usually under the supervision of a court, the nature of which requires publicity so that stakeholders can join the proceedings on an equal basis. Especially in traditional liquidation proceedings, notice of insolvency is declared to the public. Preventive restructuring proceedings, however, may be different, in the sense that keeping a preventive restructuring proceeding confidential is preferred, because it gives debtors a breathing time without disclosing to the public the problems they are experiencing, in order to avoid reputation risks.[36] Establishing a 'confidential' (or: 'private') preventive restructuring proceeding may, however, limit its cross-border effectiveness.

In 2022, CERIL has signalled that the EU Insolvency Regulation (EIR 2015) in itself is basically designed for traditional asset-oriented insolvency proceedings that include the mandatory creation and administration of an estate, the verification of claims and the realisation and distribution of value, provided for by a court-appointed IP. In case national preventive restructuring proceedings are listed on Annex A of the EIR 2015, additional legislative steps are necessary to provide cross-border certainty. In case such national preventive proceedings are not listed in Annex A, other rules providing for a cross-border effect (eg Brussels Ibis Regulation or a Member States' own national rules) will not or only partially provide cross-border effectiveness.[37]

Leaving aside the question of cross-border effect, for the position of the IP it is relevant to make a distinction between 'public' and 'confidential' preventive restructuring proceedings in combination with the question whether all creditors and shareholders are affected by a restructuring plan or only a selection of them.

The Directive sets out the definition of 'affected parties', which include workers, (classes of) creditors and equity holders whose claims and interests are directly affected by the restructuring plan.[38] Even though a preventive restructuring proceeding is 'confidential', disclosure by a debtor should still be made to creditors in the negotiating process whose interests will be affected by the restructuring plan. Oftentimes, conditions and procedures for keeping a preventive restructuring plan confidential are prescribed in national laws. Examples are the Netherlands and Germany.[39] In preventive restructuring proceedings, it is an accepted practice that under certain circumstances, a debtor only intends to negotiate with a small group of creditors (for instance, financial creditors/banks) but not trade creditors, for the purpose of keeping its business operating, instead of adopting a 'wholesale'

[36] Wessels and Guo, 2020, p. 64-66.

[37] CERIL, 'CERIL Statement 2022-2 on Cross-Border Effects in European Preventive Restructuring', 2022b, available at https://www.ceril.eu/news/ceril-statement-2022-2-on-cross-border-effects-in-european-preventive-restructuring.

[38] Article 2(1)(2) EU Restructuring Directive.

[39] For instance, since 1 January 2021, the Dutch Bankruptcy Act (DBA) contains a new fourth chapter, containing the WHOA (Wet Homologatie Onderhands Akkoord). It provides that a restructuring plan may be proposed in either a 'confidential' or 'private' ('*besloten*') pre-insolvency plan procedure or a public pre-insolvency plan procedure, but subject to the court's review. In Germany, preventive restructuring proceedings are private by default.

restructuring.[40] The debtor may therefore only enter into agreements with some creditors such as financial creditors but not all. When adopting restructuring plans, '[p]arties that are not affected by a restructuring plan shall not have voting rights in the adoption of that plan'.[41] The position of 'unaffected' parties follows from Article 15(2) of the EU Restructuring Directive, which provides that EU Member States shall ensure 'that creditors that are not involved in the adoption of a restructuring plan under national law are not affected by the plan'. As Recital 64 explains, the Directive's purpose is that the binding effects of a restructuring plan are limited to the group of affected parties that were involved in the adoption of the plan. It is to be decided by EU Member States '… to determine what it means for a creditor to be involved, including in the case of unknown creditors or creditors of future claims'.[42] Although there may be uncertainty as to which claims will be affected by the plan, there is no provision with regard to unaffected parties.

Do IPs bear a duty to communicate any information to unaffected creditors if the whole proceeding is confidential? Following the analysis in CERIL Report 2022-1, a distinction is made between the commencement of a preventive restructuring proceeding and the approval of a restructuring plan by a judicial or administrative authority.[43] When a preventive restructuring proceeding is commenced, the debtor is only intended to conclude agreement with certain but not all of its creditors. Specialised IPs may be appointed in this process to assist debtors and affected creditors. The whole process may be kept confidential thus there is no need to inform unaffected creditors.

When a restructuring plan is approved by a judicial or administrative authority, the plan is intended to affect the debtor's business and operations. However, when deciding whether to confirm a restructuring plan, a judicial or administrative authority only need to consider whether "notification of the restructuring plan has been given in accordance with national law to all affected parties".[44] This provision indicates that unaffected creditors are left out, although national laws may provide otherwise. Accordingly, it is up to national laws to prescribe the duty of IPs in relation to communication with unaffected parties. Under Dutch and German law, there is the general presumption of *Treu und Glauben* (good faith), where under national law existing contracts with unaffected parties remain intact and, hence, these parties will remain unaffected. These rules may serve as a basis for such a duty.

In the matter of disclosing information by the debtor CERIL Report 2022-1 has recommended that – although a proceeding is 'confidential' - a debtor will be required to bear a general duty to disclose information to affected creditors (Recommendation 3), but that this duty does not concern unaffected parties (Recommendation 4.1).

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[40] Dennis J. Connolly, 'Current Issues Involving Prepackaged and Prenegotiated Plans' Norton Annual Survey Bankruptcy Law, Vol. 2004, 2004, p. 2; Horst Eidenmüller, Comparative Corporate Insolvency Law, In: Jeffery N. Gordon, Wolf-Georg Ringe (eds) *The Oxford Handbook of Corporate Law and Governance*, Oxford: Oxford University Press, 2018, p. 1003-1036.

[41] Article 9(2) EU Restructuring Directive.

[42] As an example, Recital 64 EU Restructuring Directive mentions that EU Member States should be able to decide how to deal with creditors that have been notified correctly but that did not participate in the procedures.

[43] Article 10 EU Restructuring Directive. See Lorenzo Stanghellini, Riz Mokal, Christoph G. Paulus and Ignacio Tirado (eds) *Best Practices in European Restructuring: Contractualised Distress Resolution in the Shadow of the Law*, Milano: Wolters Kluwer Italia, 2018, available at http://www.codire.eu/publications/.

[44] Article 10(2)(c) EU Restructuring Directive.

The Working Party has developed a different view with regard to any information an unaffected party may wish to receive. The Working Party adds to its considerations that a restructuring plan is an agreement between the insolvent debtor and a group of (selected and affected) creditors. It is a specific contract in the sense that it needs homologation/approval from a court. As an agreement, it will, in addition to specific procedural rules in the context of the restructuring, be subject to a Member State's general rules of contract law. The restructuring plan, as a contract, interferes, changes or in any other way affects a party's initial right under the original contacts with these creditors. These original contracts will remain unaffected by the restructuring plan for those creditors which are not included in the restructuring plan.

Nevertheless, these existing contracts with these parties (suppliers or buyers, creditors or debtors) remain intact. These existing contracts are, in many jurisdictions, also subject to the principles of reasonableness and fairness. It will be these rules that are the source for the insolvent debtor to inform these unaffected creditors.

Recommendation 3

3.1 In confidential or private restructurings, only in cases described in national law will the IP bear a duty to inform on any matter towards unaffected parties.

3.2 Where under national law existing contracts with unaffected parties remain intact, specific national rules of contract law can prescribe a duty for the insolvent debtor to inform any unaffected parties.

5. Duty of confidentiality and attorney-client privilege

5.1 The duty of confidentiality for IPs

The United Nations Commission on International Trade Law (UNCITRAL) published in 2004 its original Legislative Guide on Insolvency Law, laying emphasis on the confidentiality issue. In particular, para. 28 states:

> Often the information to be provided by the debtor or concerning the debtor will be of a commercially sensitive nature, confidential or subject to obligations owed to other persons (such as trade secrets, lists of customers and suppliers, research and development information, professional secrets or privileged or otherwise confidential information) and may belong either to the debtor or to a third party, but be in the control of the debtor. It is desirable that an insolvency law include provisions to protect these types of information from abuse by creditors or other parties who are in a position to take advantage of it in insolvency. In order to balance the debtor's obligation of protection against its obligation to provide information to the insolvency representative, the court or the creditors, the obligation to observe confidentiality and protect this information may also need to apply to parties connected to the debtor, the insolvency representative, creditors generally, creditor committees and third parties.[45]

The duty of confidentiality is imposed on insolvency representatives/practitioners and creditors. The UNCITRAL Guide emphasized that '[i]t may also be appropriate for an insolvency law to impose a duty of confidentiality on the insolvency representative … Observation of confidentiality may be particularly important where the insolvency representative has the power to compel disclosure of information and documents in the course of an examination of the debtor'.[46]

The Working Party concurs with these statements. As an ethic and professional rule, an IP should bear the duty of confidentiality for the information he or she obtained in the insolvency proceedings. Indeed, the duty of confidentiality for IPs has been codified in several national regulations. For example, in Canada, Section 40 of the Bankruptcy and Insolvency Act stipulates '[t]rustees shall not disclose confidential information to the public concerning any professional engagement'.[47] For another example, in the UK, the Insolvency Practitioner Code of Ethics requires that '[a]n Insolvency Practitioner should respect the confidentiality of information acquired as a result of professional and business relationships and should not disclose any such information to third parties without proper and specific authority unless there is a legal or professional right or duty to disclose'.[48] Moreover, '[c]onfidential information acquired as a result of professional and business relationships should not be used for the personal advantage of the Insolvency Practitioner or third parties'.[49]

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[45] UNCITRAL Legislative Guide, Para. 28. See also paras. 52 and 115.

[46] Ibid., para. 52.

[47] Section 40 of the Canada Bankruptcy and Insolvency Act.

[48] UK Insolvency Practitioner Code of Ethics §4(d).

[49] Ibid.

Since 2021, the Dutch WHOA stipulates that restructuring plan experts (who are appointed by courts and act to replace debtors to offer a restructuring plan to the creditors and shareholders of a debtor), and observers (whose task it is to supervise the realization of the restructuring plan prepared by the debtor), shall – except in the context of the application of the provisions of the WHOA-section in the Dutch Bankruptcy Act - not share information with third parties.[50] In civil law jurisdictions, the basis for confidentiality lies in domestic legislation or court orders. However, there is also the possibility that in practice, other institutions (standard-setting bodies or code-of-conduct providing committees) could also deal with it.

As indicated in the European Law Institute's (ELI's) Rescue of Business in Insolvency Law report of 2017:

> Soft law instruments like codes of conduct should be used to establish a culture of trust building workout negotiations amongst repeat players (like banks, suppliers, union representatives, insurers etc.). Such codes should follow the example of existing codes and provide for standstill agreements, confidentiality agreements, the way to organise and control a full disclosure (including the flow of information), and for rules how to conduct negotiations (including an option to involve third parties to act as supervisors or mediators). Member States should ensure that the relevant professional bodies are consulted and involved in the creation of such soft law instruments and that they take into account best practices as set out in principles and guidelines developed or adopted by European and international non-governmental organisations active in the area of restructuring and insolvency.[51]

As the EU Restructuring Directive clearly stipulates, 'Member States may encourage the development of and adherence to codes of conduct by practitioners',[52] it is suggested that these codes of conducts should include the duty of confidentiality for IPs in preventive restructuring proceedings.

Recommendation 4

4.1 An IP shall not share information, which is known to it in its function, with third parties, unless in the context of the application of the provisions of the national insolvency or restructuring proceeding in which it is appointed.

4.2 The duty of confidentiality of the IP should be laid down in primary legislation or primary legislation will empower other bodies to further regulate matters which can be included in a Code of Conduct.

5.2 Attorney-client privilege

Since many IPs are lawyers per se, a closely related issue to 'confidentiality' is the existence of the attorney-client privilege. In examining the meaning of this privilege, this section breaks down into two issues: first, can the attorney-client privilege apply when an IP appointed by a court seeks to obtain information from the debtor's pre-insolvency attorney? Second,

[50] Articles 371(9) and 380(4) of the Dutch Bankruptcy Act.

[51] ELI, 'Rescue of Business in Insolvency Law', 2017, Recommendation 1.22.

[52] Article 27(3) EU Restructuring Directive.

when a professional lawyer is hired by an insolvent debtor as a restructuring expert, can this lawyer invoke attorney-client privilege to shield his or her obligation – once formal proceedings have commenced – to disclose information to the court or a court-appointed IP? We commence with some general observations.

The general rule of attorney-client privilege in insolvency proceedings is firstly revisited. Entering into an insolvency proceeding substantively alters pre-insolvency legal relations. As an example: '… upon the filing of a bankruptcy petition, the relationship between the attorney and his client changes as the Bankruptcy Code provides for the appointment of a trustee who succeeds to many of the interests of the debtor'.[53] It is suggested in a study preceding this report that a distinction should be made between corporate debtors vis-à-vis individual debtors.[54]

For corporate debtors, the succession theory applies as a company can only act through its agents, that is, its managers.[55] However, when a company becomes insolvent, its former agents are replaced by an IP who succeeds in the rights and obligations of the former managers and that acts as the representative of the company.[56] These rights include a pre-insolvency attorney-client privilege. In the landmark case *Commodity Futures Trading Commission (CFTC) v. Weintraub*, the US Supreme Court has confirmed that in case of a change in control of a corporate entity, in a bankruptcy case, the attorney-client privilege passes to the person in control, ie the trustee. The Court held too that a Chapter 7 trustee of a corporation has the power to waive the attorney-client privilege.[57] In other words, the debtor's power to invoke attorney-client privilege for pre-insolvency communications passes on to (in the USA) a trustee and, consequently, it lies in the area of the trustee's own discretion. It should be noted that an appointed creditors' committee will not share the debtor's privilege. Under German law, the IP can waive any privilege on behalf of the debtor, provided that he can demonstrate that it is part of its mandate which is to administer the estate.[58]

On the contrary, for individual debtors, in the UK case *Leeds & Hellard v. Lemos & ord*, the Court held that legal professional privilege does not automatically vest in a trustee in the bankruptcy of an individual; legal professional privilege is a fundamental human right, and express statutory powers would be necessary to deprive the bankrupt of that right; the

[53] In re Miller Op No 98-3141, 2000 Bankr. Lexis 355 (N.D. Ohio 1 February 2000) (citing Gresk v. Brown (In re Brown), 227 B.R. 875, 879 (Bankr. S.C. Ind. 1998)).

[54] Wessels and Guo, 2020, p. 32-43.

[55] McClarty v. Gudenau & Sullivan, Ward, Bone, Tyler & Asher, P. C., 166 B.R. 101 (E.D. Mich. 1994) (citing In re Hunt, 153 B.R. 445, 452 (Bankr. N.D. Tex. 1992)).

[56] See also Citibank, N.A. v. Andros, 666 F.2d 1192 (8th Cir. 1981); In re O.P.M. Leasing Services, Inc., 670 F.2d 383 (2nd Cir. 1982); In re Boileau, 736 F. 2d 503 (9th Cir. 1984)(the court extended the Weintraub principle beyond trustees and held that an examiner is also entitled to assert or waive the privilege) (an examiner is usually appointed for the purpose of investigating alleged dishonesty, fraud, incompetence, misconduct or mismanagement of the debtor by its current management, 11 US Code §1106(a)(3) and (b); however, a court may empower an examiner to perform managerial functions normally carried out by a trustee, 11 US Code §1106(b)). See also Shuai Guo, 'Klaus Müller v Germany, No. 24173/18, 19 November 2020', *International Corporate Rescue*, Vol. 18, No. 3, 2021, p. 227-229.

[57] CFTV v. Weintraub, 471 U.S. 343 (1985).

[58] In 2021, the German Federal Court held that the IP is able to waive confidentiality of the debtor if confidentiality is meant to protect the debtor and to the extent the waiver is needed to administer the estate (BGH, 27.1.2021 – StB 44/20, NZI 2023, 337).

bankrupt would therefore need to waive privilege or consent to the use of the privileged documents.[59] In *Foxley v. United Kingdom*, the European Court of Human Rights also affirmed that correspondence between an attorney and his client is of a confidential nature, on the basis of Article 8 of the European Convention on Human Rights (ECHR), including in insolvency proceedings.[60] In short, attorney-client privilege is a basic human right and cannot be deprived of from individual debtors even when they are insolvent.

Now the two questions. As to the first question (can the attorney-client privilege apply when an IP appointed by a court seeks to obtain information from the debtor's pre-insolvency attorney?), based on these premises, the answer is rather easy. Depending on different types of debtors, attorney-client privilege can or cannot apply when an IP appointed by a court seeks to obtain information from the debtor's pre-insolvency attorneys.

However, the answer - that an individual insolvent debtor cannot be deprived of attorney-client privilege - may be influenced by EU law. The EU Restructuring Directive explicitly excludes debtors that are 'natural persons who are not entrepreneurs'.[61] The EU Restructuring Directive deals with distressed individuals only in their role as entrepreneur (including have a role in a firm without legal personality) in a discharge of debt procedure.

In a more common setting, the rules on corporate debtors apply. Yet, the EU Restructuring Directive allows for a DIP procedure, where debtors retain and control their own business and operations of the company, including the attorney-client privilege. Authorities may appoint an IP to assist debtors and creditors in negotiating and drafting restructuring plans, but they do not necessarily need to get, to own, or to have the power to dispose of the debtors' assets or attorney-client privilege.[62] In countries where the corporate debtor has the power to waive the attorney-client privilege for pre-insolvency communications, only when the IP assumes control over the business does it succeed to the attorney-client privilege and thus can decide on its own.

In the second question, a professional lawyer is hired by an insolvent debtor as a restructuring expert. Can this lawyer invoke attorney-client privilege to shield his or her obligation – once formal proceedings have commenced – to disclose information to the court or the court-appointed IP? This second question relates to restructuring specialists themselves hired by a debtor. In the context of the EU Restructuring Directive, IPs are limited to restructuring specialists appointed by judicial or administrative authorities.[63] The question then is limited to whether those restructuring specialists can enjoy attorney-client privilege.

References could be made to several previous cases. In *Akers v Lomas (Re Trading Partners Ltd)*, Patten J was put in a position to balance two conflicting interests: the need of a liquidator to obtain the working papers of receivers appointed under a debenture and the requirement for the receivers to comply with confidentiality agreements and maintain the

[59] Leeds & Hellard v. Lemos & ord [2017] EWHC 1825 (Ch).

[60] Foxley v. United Kingdom, 20 June 2000, no. 33274/96. See also reported in Foxley v. United Kingdom (33274/96) (2001) 31 E.H.R.R. 25; [2000] 6 WLUK 523 (ECHR).

[61] Article 1(2)(h) EU Restructuring Directive.

[62] Article 5(2) and (3) EU Restructuring Directive.

[63] Article 2(1)(12) EU Restructuring Directive.

rights on materials subject to legal professional privilege.[64] The judge ultimately ruled that the respondents are entitled to 'exclude from or redact in any of that material references which are either privileged or contain a commentary which they regard as sensitive and confidential'.[65] In *Green v Chubb*, the court put limitations on the office-holder's right of obtaining the debtor's property and affairs: '… ordinarily it should not be used to obtain sight of confidential material or communications passing between receivers and the debenture holders'.[66] Generally, restructuring experts are acting in a similar position and similar circumstances as receivers appointed by debenture holders. Restructuring experts are appointed for the purpose of business rescue and should be protected from further disclosing their information such as business strategies unless statutory or case laws prescribe otherwise.[67] It is noted that restructuring experts are not only lawyers but also accountants, turnaround specialists or financial advisors. These professionals also enjoy certain privileges, based on national law or applicable professional rules. Restructuring experts selected from these professionals should also be able to use these same privileges as lawyers do in similar situations.[68]

Recommendation 5

5.1 If IPs are succeeding to debtors' attorney-client privilege, they can obtain information from debtor's pre-insolvency attorneys, by waiving the privilege, subject to national laws. If in such a situation a court decision is needed, the court may be guided by the rules that conflicting values should be balanced between the need of an IP to exercise its functions, i.e. the general principle of law of maintaining professional privilege versus the necessity to obtain information with the goal of efficient administration of the estate.

5.2 Restructuring experts (accountants/financial advisors) acting under national laws should also enjoy privileges similar to those of attorneys appointed by debtors.

5.3 Where possible in restructuring plans the debtor should include provisions in relation to an attorney-client privilege and those other parties who would be able to invoke this privilege.

[64] Akers v Lomas (Re Trading Partners Ltd) [2002] 1 BCLC 655.

[65] Ibid., para. 21.

[66] Green v Chubb [2015] EWHC 221 (Ch), paras. 25-26 (citing Gomba Holdings UK Ltd v Minories Finance Limited [1998] 1 WLR 1231, and Hamilton v Oades (1989) 166 CLR 486).

[67] For instance, documents obtained pursuant to a search order were not protected by privilege as the iniquity exception applied. See Lakatamia Shipping Company Limited and other v Nobu Su and others [2022] EWHC 3115.

[68] In exceptional cases it may be possible that a restructuring plan will be confirmed/homologated, with as a result that the original entity, holding the privilege, is transformed into two post-confirmation entities. In such cases it is recommended that the restructuring plan should be the place to draft a solution for the 'passing on' of the privilege. It should be encouraged that parties involved agree on express language to make certain which party can invoke the privilege. It is acknowledged that the binding nature of any provision in this regard ultimately in the hands of the court.

6. Cross-border issues

In the EU, cross-border insolvency is regulated under the European Insolvency Regulation (recast) (EIR 2015). However, the EIR 2015 does not specifically address confidentiality, secrecy or privilege matters, nor does the EU Restructuring Directive prescribe cross-border issues. The EU Restructuring Directive does however clearly state that the '[EIR 2015] covers preventive procedures which promote the rescue of economically viable debtors as well as discharge procedures for entrepreneurs and other natural persons'.[69] This demonstrates the intention of the EU legislators to include preventive restructuring proceedings within the scope of the EIR 2015.

In 2022, discussions have developed on whether preventive restructuring proceedings, implemented in EU Member States as indicated by the EU Restructuring Directive fall within the scope of the EIR 2015. The premise of whether the EIR 2015 applies to preventive restructuring proceedings has been be extensively studied, the result of which have been laid down in a report, published in 2022.[70] This report calls for 'any earlier, if not immediate, action of the European Commission towards the adoption of a special cross-border framework for restructuring proceedings that could be included (as a specific chapter) in the EIR or take the form of a separate Regulation'.

In the remainder of this Report, it is assumed that a preventive restructuring proceeding indeed falls within the scope of the EIR 2015.

6.1 European Insolvency Regulation

Based on this assumption that the EIR 2015 applies to cross-border preventive restructuring proceedings, the *lex fori concursus* (including its rules on private international law) applies, following Article 7(1) of the EIR 2015. This provision prescribes that '[s]ave as otherwise provided in this Regulation, the law applicable to insolvency proceedings and their effects shall be that of the Member State within the territory of which such proceedings are opened'.[71] The exceptional provisions only regulate third parties' right *in rem*, set-off, reservation of title, contracts relating to immoveable property, payment systems and financial markets, contracts of employment, effects on rights subject to registration, European patents within unitary effect and Community trademarks, detrimental acts, protection of third party-purchasers, effects of insolvency proceedings on pending lawsuits or arbitral proceedings.[72] These exceptions do, however, not relate to matters concerning confidentiality, secrecy and privilege in the meaning as addressed in this report.

For the topic of attorney-client privilege the English case *Re Hellas Telecommunications (Luxembourg) II SCA* is relevant.[73] In this case, which dates from pre-Brexit, the debtor's COMI was in the UK, and liquidators were appointed to seek orders for production of

[69] Recital (12) EU Restructuring Directive.

[70] CERIL, 'CERIL Statement 2022-2 on Cross-Border Effects in European Preventive Restructuring', 2022b, available at https://www.ceril.eu/news/ceril-statement-2022-2-on-cross-border-effects-in-european-preventive-restructuring.

[71] Article 7(1) EIR 2015.

[72] Articles 8-18 EIR 2015.

[73] *Re Hellas Telecommunications (Luxembourg) II SCA* [2013] BPIR 756.

documents, including some that belonged to a firm of Luxembourg lawyers, NautaDutilh. Those Luxembourg lawyers refused to disclose information to the English liquidators based on Luxembourg professional secrecy rules. The court was faced with the question of which law should apply in a cross-border insolvency setting: the law governing the privilege – Luxembourg law – or the law of the main insolvency proceedings – English law? The court held that English law should apply, that is, the law of the place where the main insolvency proceedings had been opened.[74] Therefore, the English liquidators had powers to access documents of Luxembourg lawyers, unless a Luxembourg court would refuse to recognise and enforce English judgments based on the public policy exception provision in the EIR[75] or would be refused based of the rules of Brussels I.[76]

However, this outcome has been questioned by CERIL, adopting the Working Party's views in CERIL Report 2022-1, published in 2022.[77] CERIL takes the position that it is unreasonable for a Luxembourg lawyer to bear a duty under English laws, since the Luxembourg lawyer is not allowed to practice in the UK respectively it has to bear the consequences of such a duty and provide documents or information the addressed lawyer itself, under its laws, is not allowed to share with others. As a provisional conclusion the Working Party expressed the view that the matter of a statutory privilege for the attorney-client relationship should be determined by the laws applicable to such a privilege.

In the Netherlands, Dutch in-house lawyers registered at the Netherlands Bar must demonstrate their independence by signing the professional statute available via the Netherlands bar association website. So-called 'visiting in-house lawyers' (lawyers – i.e. the equivalence of an 'advocate' – registered to the bar in an EU member state, jurisdictions within the European Economic Area and Switzerland) are subject to the same rules as Dutch attorneys and must therefore also sign the professional statute available via the website of the Netherlands Bar Association or a similar agreement that sufficiently ensures their independence toward their employer, provided that this is permitted under the laws of their country of origin. In a recent judgment, the Netherlands Supreme Court held that in general the right of non-disclosure in the Netherlands can be invoked with regard to activities as a lawyer, if (i) the foreign lawyer has a right of non-disclosure under the law of the country of origin in relation to the relevant activities, and (ii) provided that in case these activities in the Netherlands would have been performed by a lawyer registered in the Netherlands, the right of non-disclosure could also be invoked. [78] This situation leads to the question whether invoking attorney-client privilege in cross-border cases must prove dual-acknowledgment of such privilege in both countries.

In CERIL Report 2022-1 the following position has been taken: the interest of the legal profession being protected by professional secrecy rules is a value to consider. The same is true concerning protecting by rules regarding confidentiality and secrecy the debtor is a party to. The Working Party has not found any justification not to apply the fundamental rule

[74] In non-insolvency proceedings, English courts also apply the *lex fori concursus*, the law of the state of the court where a proceeding is brought (including its rules on private international law). See *Re the RBS Rights Issue Litigation* [2016] EWHC 3161 (Ch).

[75] Article 26 EIR 2000, in effect prior to the EIR 2015.

[76] Regulation (EU) No 1215/2012. Article 32(2) EIR 2015.

[77] CERIL, 2022a.

[78] HR 24 May 2022, ECLI:NL:HR:2022:760.

of the law applicable in cases determined by the EIR 2015. It is therefore inferred that matters concerning confidentiality, and secrecy fall under Article 7 and thus are subject to the law of the state of the court where the insolvency proceeding is opened. The position is again held in this report. It is recommended that the topic should be dealt with in any future new cross-border legislation for preventive restructuring proceedings.

It is also suggested that the court should decide according to its national law, that is *lex fori concursus*. In particular, when attorney-client privilege is deemed as falling under the scope of 'public policy', it cannot be violated. In a recent case, the English court was faced whether to grant disclosure to a US trustee information of ongoing lawsuits involving the Chinese debtor who petitioned Chapter 11 protection in Connecticut. The English court firstly recognised the legitimate status of the Chapter 11 trustee and made the decision based on English law. Significant considerations were given to the necessity of the trustee to obtain information for the benefit of the debtor's estate and general interests of creditors, as well as sufficient safeguard measures to ensure privileged documents are not disclosed to third parties.[79]

Meanwhile, the following should be noted. In 2020 UNCITRAL agreed on the importance of the issue of (cross-border) asset tracing and the usefulness of offering guidance to States in this area in order to facilitate the use of asset tracing and recovery mechanisms in the cross-border context. At its sixty-second session in April 2023, Working Group V (Insolvency Law) will discuss a consolidated draft in the form of a descriptive, informational and educational text.[80] The draft text discusses, amongst other things, the approach in a cross-border context of the issue of information which can be commercially sensitive, confidential, protected by personal data standards, or subject to obligations owed to other persons (e.g. trade secrets, lists of customers and suppliers, research and development information, professional secrets or privileged information). Compared to the agenda of the Working party, the envisaged scope is much broader. Where the insolvency representative's powers will include the right of access to, and use of, confidential or classified information, the legitimate interest of who can demonstrate such an interest requires the establishment of an appropriate balance. Moreover, access to registers may be limited or conditional and should be aligned with digital facilities. Generally, courts will have a wide discretion.

The Working Party has briefly discussed this development. It suggests to not further discuss the topic under the application of the Insolvency Regulation and await UNCITRAL developments, to avoid duplication of work, although CERIL specifically focuses on Europe.[81] The Working Party also suggest not to provide one or more recommendations, holding on to the position taken in (and summarised above in) CERIL Report 2022-1, published in 2022.[82]

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[79] Luc A Despins v Ho Wan Kwok [2023] EWHC 74 (Ch).

[80] See A/CN.9/WG.V/WP.186 (Civil asset tracing and recovery tools used in insolvency proceedings; Note by the Secretariat).

[81] As a brief remark, national law plays an important role in this regard. For instance, in Germany, there is no duty to disclose information of third parties. The IP can, through the debtor, access information of contractual partners. But if the information lays elsewhere, it is difficult to obtain that information merely based on the duty. A way around this issue is to open a non-main proceeding in the country and the use the abilities provided under that law to compel third parties to disclose information and recognize

[82] CERIL, 2022a.

6.2 Rome I Regulation

Confidentiality or secrecy could be the result of an agreement (an independent confidentiality agreement) or a specific clause included in the restructuring proposal. In such a case the Rome I Regulation[83] may play a role. Rome I Regulation applies, 'in situations involving a conflict of laws, to contractual obligations in civil and commercial matters'.[84] There cannot be any doubt that confidentiality/secrecy as discussed in this report is a civil and/or a commercial matter. However, the Rome I Regulation excludes ten topics from its scope.[85] One of the exclusions concerns 'questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body' (Article 1(2)(f) Rome I Regulation).

The question of whether the Rome I Regulation can apply to preventive restructuring proceedings has been raised in our previous CERIL Report 2022-1.

Simply put, there are two opposite positions towards this issue. One argument could be that preventive restructuring proceedings are excluded from the scope of Rome I since such proceedings are related to the law of companies, especially to possible affected parties being shareholders, the 'internal organisation or winding-up of companies' or even 'the personal

[83] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L 177/6.

[84] Article 1(1) Rome I Regulation.

[85] Article 1(2) Rome I Regulation provides that the following shall be excluded from the scope of the Regulation:
"(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 13;
(b) obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;
(c) obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;
d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;
(e) arbitration agreements and agreements on the choice of court;
(f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;
(g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or unincorporated, in relation to a third party;
(h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;
(i) obligations arising out of dealings prior to the conclusion of a contract;
(j) insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (14) the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work."

liability of officers and members as such for the obligations of the company or body'. The rather narrow interpretation given by the CJEU seems to support this argument.[86]

On the other hand, in parallel to schemes of arrangements, propositions have also been made that in preventive restructuring proceedings the debtor and its creditors reach contractual arrangements amending previous contractual relationships, especially when the specific restructuring plan only alters contractual arrangements between a debtor and its creditors but not its shareholders or investors;[87] Therefore, such contractual arrangements should fall under the scope of Rome I Regulation.

In terms of confidentiality, secrecy and privilege matters, if a separate and independent confidentiality agreement is signed, the agreement should be deemed as a contract and, consequently, would be subject to Rome I Regulation. The agreement does not affect others not being parties to the agreement. However, the situation may be more complex if no separate agreement is signed, and the confidentiality, secrecy and privilege matters are intertwined with the whole preventive restructuring proceedings and/or restructuring plans. The determination of the applicable law needs to revert to the precondition question of whether the Rome I Regulation can apply to preventive restructuring proceedings.

Even if preventive restructuring plans as such can be categorised as contract law matters within the scope of Rome I Regulation, the question then rises: which law applies? A basic principle under Rome I Regulation is freedom of contract or party autonomy, where parties may choose the applicable law of a contract.[88] When a choice of law provision is missing in the restructuring plan, the applicable law then may be the 'the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence',[89] or the law of the country with which the restructuring plan is most closely connected.[90]

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[86] In CJEU 7 April 2016, Case C-483/14 (*KA Finanz AG v Sparkassen Versicherung AG Vienna Insurance Group*) reference was made to the Report on the Convention on the law applicable to contractual obligations by professors Giuliano and Lagarde (OJ 1980 C 282, p. 1), that questions governed by the law of companies or other bodies corporate or unincorporated were not included within the scope of the Rome Convention in view of the work being conducted on the subject of company law within the European Communities: 'It is also clear from the report that contracts governing the winding-up of companies, such as mergers or groupings of companies, are listed among those covered by the exceptions set in Article 1(2) of the Rome Convention. The Convention does not therefore apply to the merger of companies.' See also the English case *Re Gatagroup Guarantee Ltd* [2021] EWHC 304 (Ch), in which the court categorised preventive restructuring proceedings as insolvency proceedings.

[87] See, e.g., Arthur Swierczok, 'Recognition of English solvent Schemes of Arrangement in Germany', *The King's Student Law Review*, Vol. 5. No. 1, 2014, p. 78-91. *Cf.* Brenda Hannigan, *Company Law*, 2nd edn, Oxford: Oxford University Press, 2009, paras 26–101 (arguing the Rome I cannot apply because schemes/restructuring proceedings are not private contractual matters but statutory procedures).

[88] Article 3(1) Rome I Regulation.

[89] Article 4(2) Rome I Regulation.

[90] Article 4(3) and (4) Rome I Regulation.

However, a contradictory view may be raised when (cross-class) cramdown is applied, where a preventive restructuring plan is reached by statutory rules rather than full agreement among all affected parties. In such a case, Rome I Regulation cannot apply.[91]

In CERIL Report 2022-1, it was noted that examples as presented shortly above lead to the conclusion that the application of the Rome I Regulation in preventive restructuring proceedings may encounter difficulties and uncertainties. The Working Party maintains its recommendation that future legislative clarification is needed. Rome I Regulation is different from EIR 2015 in that it usually does not apply to ongoing proceedings with multiple parties. It is therefore recommended that the Rome I Regulation in the near future considers its position with regard to specific arrangements dealing with insolvency-like preventive restructuring proceedings. In that regard it adds another existing international legal framework (in addition to e.g. the EIR 2015) that is an inadequate tailor-made framework to facilitate the cross-border effects of preventive restructuring proceedings, see CERIL Report 2022-2.

Recommendation 6

Rome I may apply in preventive restructuring proceedings, provided restructuring plans are considered as contracts. Yet, it is recommended that legislators formulate more explicit rules on this matter.

6.3 Cooperation and coordination

Cooperation and coordination between courts and insolvency practitioners are promoted in the EU. In 2012, the American Law Institute ('ALI') and the International Insolvency Institute ('III') published its ALI-III Global Principles for Cooperation in International Insolvency Cases and Global Guidelines ('Global Principles and Guidelines').[92] These ALI-III Global Principles and Guidelines 2012 subsequently formed a solid basis for a set of tailored principles, published in 2015, for use under the regime of the EIR 2015, which apply to insolvency proceedings opened in the European Union as of 26 June 2017. They are named EU Cross-Border Insolvency Court-to-Court Cooperation Principles and Guidelines (also known as the EU JudgeCo Principles and Guidelines).[93] As to the matter of cooperation between courts, especially those with a common law background, in 2017 the Judicial Insolvency Network (JIN) was established. It also published the JIN Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters and in 2019 the Modalities of Court-to-Court Communication.[94] All three sets of principles and guidelines reflect best

[91] Lucas Kortmann and Michael Veder, 'The Uneasy Case for Schemes of Arrangement under English law in Relation to non-UK Companies in Financial Distress: Pushing the Envelope?', *Nottingham Insolvency and Business Law e-Journal*, Vol.3, 2015, 239–161,224 (arguing the Rome I cannot apply because dissenting creditors are bound by schemes/restructuring plans).

[92] ALI and III, 'Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases' (2012), available at www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf. In August 2017, III re-posted the ALI-III Global Principles for Cooperation in International Insolvency Cases 2012 on its website available at www.iiiglobal.org.

[93] Information can be accessed at Leiden University, 'EU JudgeCo Platform', available at www.universiteitleiden.nl/en/research/research-projects/law/eu-judgeco-platform.

[94] Information can be accessed at JIN website available at www.jin-global.org.

practice, resulting in their non-binding characters. The JIN Guidelines are approved for use by some ten courts, all located outside the EU.[95]

In these international models, confidentiality is also a major concern, for example, Principle 8(c) of the ALI-III Global Principle and Guidelines, Guideline 8(iii) of the EU JudgeCo Principles and Guidelines, Guideline 8(iii) of the JIN Guidelines.[96] Similarly, the EIR 2015 itself specifies that mutual communication of any information which may be relevant for the other proceedings when cooperating and coordinating in cross-border insolvency proceedings should take place as soon as possible, 'provided appropriate arrangements are made to protect confidential information'.[97] Therefore, communication cannot take place when other confidentiality duties may be violated, for example, the legal protection of trade secrets.[98] Sharing information should also be justifiably restricted in reorganisation proceedings 'where its continued ability to operate in the market and the protection of value may require confidentiality'.[99]

Usually, sharing non-public (e.g. commercially sensitive) information should be subject to confidentiality arrangements.[100] In cross-border (group) insolvency, protocols are often used to address cooperation issues.[101] In these protocols, a confidentiality clause is a common standard clause.[102] In 2021 a multi-jurisdiction European Commission-funded research project on cross-border insolvency, a European Model Protocol was proposed, with confidentiality requirements on information sharing between different jurisdictions.[103] However, not all cooperation and communication protocols approved by courts have incorporated the duty of confidentiality.[104] It is not clear how a breach of the duty of confidentiality would affect the protocol or communication/information sharing, yet it should be acknowledged that national laws on confidentiality should be obeyed.

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[95] As an example, since 2017 the Chancery Guide, for England & Wales, the Chancery Division (one of the three Divisions of the High Court of Justice) refers to the three sets. The same references have been made in a recent version of the Chancery Guide, see https://www.judiciary.uk/wp-content/uploads/2022/08/Chancery-Guide-2022-28-7-22.pdf

[96] Wessels and Guo, 2020, p. 66-67.

[97] Articles 41(2)(a) and 56(2)(a). See for rather similar wording also Articles 41(2)(a) and 57(2) EIR 2015.

[98] Daniele Vattermoli et al. (eds) *Transnational Protocols: A Cooperative Tool for Managing Cross-border Insolvency*, Milan: Wolters Kluwer Italia, 2021, p. 115.

[99] UNCITRAL Legislative Guide, Chapter III, para.30.

[100] Kokorin and Wessels, 2021, p. 121. Under the Dutch WHOA, as noted in par. 5.2, it is stipulated that the restructuring plan expert will only share the information obtained with other parties insofar as this is necessary in the context of the realization of the restructuring plan. No sharing of information is allowed with third parties. composition. The Minister of Justice noted that depending on the circumstances, it may be appropriate that the restructuring expert does not share information with a third party until he has agreed confidentiality with that third party under the usual conditions. See Explanatory Memorandum, Parliamentary Papers II 2018/19, 35 249, no. 3, p. 42.

[101] *Ibid.* See also Ilya Kokorin and Bob Wessels, *Cross-border Protocols in Insolvencies of Multinational Enterprises Groups*, Cheltenham: Edward Elgar, 2021.

[102] E.g. the European Model Protocol, Article 15(5), see Vattermoli et al., 2021, p. 153 (fn 16) and p. 441. See also Kokorin and Wessels, 2021, p. 215-126 (Commodore Protocol), p .221 (Everfresh Protocol), p. 250 and 256 (Inverworld Protocol), p. 282, 283 and 285 (Lehman Brothers Protocol), p. 295 (Madoff Protocol).

[103] Article 15(3) and (5) European Model Protocol, available at https://stephanmadaus.de/wp-content/uploads/2021/06/European-Model-Protocol-with-guide-to-implementation-2021-ebook-English.pdf.

[104] For example, Mosaic Protocol, para. 11(b).

In cross-border preventive restructuring proceedings, there may also be cooperation between courts, practitioners, or between courts and practitioners, who need to share information with each other. In such processes, confidentiality should be a consideration when deciding about such cooperation.

Recommendation 7

Confidentiality arrangements should be in place to protect sensitive and non-public information when cooperation and coordination happen in cross-border preventive restructuring proceedings.

7. Concluding remarks

This report is the second one of WP 13's project on confidentiality, secrecy and privilege matters in relation to the EU Restructuring Directive. It focuses on the IPs' angle. In a cross-border context, the Working Party suggests waiting for the work of UNCITRAL Working Party V (Insolvency Law) regarding civil asset tracing and recovery tools used in insolvency proceeding.

Against this background and based on the forgoing, CERIL has adopted the following recommendations to EU Member States to take into account when formulating their preventive restructuring laws:

Recommendation 1

1.1 The insolvent debtor or its directors and shareholders and supervisory directors, if any [as well as those employed by the debtor] have the obligation of full and frank disclosure and/or duty of fair presentation, that is, to provide the IP with all information required of it, in the manner thereby determined.

1.2 Both for the insolvent debtor as well as for other parties under the duty to provide business related information, this is information which the debtor or the other parties know or should understand to be important for the effective implementation of any preventive restructuring at issue, including any relevant pre-insolvency information referred to in Recommendation 5.

1.3 Both the debtor and the other parties will inform the IP on their own initiative of facts and circumstances which they know or ought to know are relevant to the proper performance of the IP's task.

1.4 The duty to provide business related information includes the duty to actively keep the information up to date during the full process, including the process towards an approved and confirmed preventive restructuring plan.

1.5 Except in the context of the application of the provisions of this section, the restructuring plan expert will not share the information obtained with third parties.

Recommendation 2

2.1 In making available all business related information, under certain circumstances, a debtor and any other party should be allowed to keep certain information confidential.

2.2 EU Member States should enact or amend an appropriate system for ensuring that certain information should remain confidential. Such a system could include 'sealing' of information.

2.3 EU Member States should lay down explicitly in their laws an option to submit any controversies as to whether certain information is confidential to a court, or an independent third party, to allow it to decide whether certain information should be disclosed.

2.4 To ensure swift and efficient proceedings, an appeal to (higher) courts against the court's decision should not have an automatic suspension effect on preventive restructuring proceedings.

Recommendation 3

3.1 In confidential or private restructurings, only in cases described in national law will the IP bear a duty to inform on any matter towards unaffected parties.

3.2 Where under national law existing contracts with unaffected parties remain intact, specific national rules of contract law can prescribe a duty for the insolvent debtor to inform any unaffected parties.

Recommendation 4

4.1 An IP shall not share information, which is known to it in its function, with third parties, unless in the context of the application of the provisions of the national insolvency or restructuring proceeding in which it is appointed.

4.2 The duty of confidentiality of the IP should be laid down in primary legislation or primary legislation will empower other bodies to further regulate matters which can be included in a Code of Conduct.

Recommendation 5

5.1 If IPs are succeeding to debtors' attorney-client privilege, they can obtain information from debtor's pre-insolvency attorneys, by waiving the privilege, subject to national laws. If in such a situation a court decision is needed, the court may be guided by the rules that conflicting values should be balanced between the need of an IP to exercise its functions, i.e. the general principle of law of maintaining professional privilege versus the necessity to obtain information with the goal of efficient administration of the estate.

5.2 Restructuring experts (accountants/financial advisors) acting under national laws should also enjoy privileges similar to those of attorneys appointed by debtors.

5.3 Where possible in restructuring plans the debtor should include provisions in relation to attorney-client privilege and those other parties who would be able to invoke this privilege.

Recommendation 6

Rome I may apply in preventive restructuring proceedings, provided restructuring plans are considered as contracts. Yet, it is recommended that legislators formulate more explicit rules on this matter.

Recommendation 7

Confidentiality arrangements should be in place to protect sensitive and non-public information when cooperation and coordination happen in cross-border preventive restructuring proceedings.

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In Report 2023-1 on Confidentiality, Secrecy and Privilege – The Position of Insolvency Practitioners, the Conference on European Restructuring and Insolvency Law (CERIL) highlights 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, CERIL has studied the preferred position of insolvent debtors, insolvency practitioners and courts and other insolvency authorities. Taking the IP's viewpoint, CERIL recognises the significance for an IP and the interests it has to take into account to have access to, and availability of, relevant information as a vital requirement for an efficient corporate restructuring process.

About CERIL

CERIL is an independent non-profit, non-partisan, self-supporting organisation of approximately 90 lawyers and other restructuring and insolvency practitioners, law professors, and (insolvency) judges committed to the improvement of restructuring and insolvency laws and practices in Europe, the European Union, and in its Member States.

Website: www.ceril.eu | Email: info@ceril.eu

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