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THE EUROPEAN RESTRUCTURING DIRECTIVE

GERARD McCORMACK

[Edward Elgar, 2021 | ISBN: 978 1 78990 880 0 | Pages: 336 pp | List price: £145]

Book Review

Kayode Akintola*

Let us begin this book review by considering the broad context in which it is situated. Credit is – as it has been for centuries – the lifeblood of commerce in many economies. The use of credit in financing transactions distinctively accentuates the risk of default by a debtor and its insolvency. It should therefore come as no surprise that the treatment of creditors has attracted a vast amount of legislation, case law, as well as legal and economic commentary. That said there has been a transmutation of this creditor-centric view of insolvency into a more debtor-centred one, with the emergence of the so-called ‘rescue culture’ or ‘rescue ideology’, which tries to facilitate the restructuring of honest-but-hapless insolvent businesses or entrepreneurs, secure a full discharge of their debt where possible, and ultimately give them a second chance. Yet, there has been a palpable concern, backed by data, as to whether or not we can (or ought to) rescue in insolvency. This is where Directive (EU) 2019/1023 (the European Restructuring Directive/the Directive) and Gerard McCormack’s expert analytical commentary on the Directive come in to play. In a sense, the Directive adds another string to the bow of the rescue culture by setting out rules on preventive restructuring frameworks for debtors in financial difficulties when there is a likelihood of insolvency, with a view to preventing insolvency and restoring the viability of the debtor. Gerard McCormack, like an expert archer, forensically examines the strengths and limits of this latest string.

The book is a comprehensive account on the background and content of the Directive. In particular, Gerard McCormack analyses pertinent legal and commercial issues relating to the moratorium or stay on litigation and other enforcement actions against the distressed business, rescue or new financing, creditor treatment (including their class rights), the new restructuring plan, the role of the courts or administrative authority, as well as the impact of the Directive on globalisation in terms of its transposition into national legislation. The book is lucid, while adopting contextual and comparative approaches in its rigorous analysis so as to deepen the reader’s understanding of an otherwise intensely technical aspect of commercial law.

The book is constituted of eight broad chapters. Chapter 1 introduces the book by examining key features of the Restructuring Directive against the backdrop of recommendations that led to the Directive. A crucial element of this chapter is a juxtaposition of the Directive with international

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developments in the world of restructuring, including Chapter 11 of the US Bankruptcy Code and while readers would be pleased to see the parallels between the two regimes in terms of debtor-in-possession (DIP), moratorium, cram-down provisions and DIP financing, Gerard McCormack's observations on the nature of the present context of Chapter 11 in terms of asset sales and the evolution of the business landscape since its enactment are fundamental (1.67). Chapter 2 explores controls, including the stay mechanism, for the recognition and enforcement of preventive restructuring procedures across Europe. The chapter examines the role of the recast Insolvency Regulation in this context, highlighting its insolvency prevention feature and its underlying principle of comity (2.28). Chapter 3 discusses the crucial issues of who may enable a distressed debtor to access the restructuring procedures and who is in control of the debtor during the restructuring procedure. It contains useful comparative analysis to the US Chapter 11 and UK Scheme of Arrangements (including the new Part 26A Restructuring Plan) procedures. The reader will observe that while the Directive envisages initiation of restructuring proceedings by the debtor, creditor initiation is not precluded. A further significant discussion in this chapter is the DIP feature, which leaves the debtor in control of its assets and day-to-day operation of the business (3.40). Chapter 4 examines moratoria on the enforcement of rights against a debtor, examining the reasons for and key features of the moratoria. The chapter closes with a discussion of the policy to preclude creditors from relying on contractual expedients, including so-called *ipso facto* clauses, that may enable them to withhold performance, terminate, accelerate or modify executory contracts to the detriment of the debtor during the moratorium (4.45). Chapter 5 scrutinises the Directive's policy on new and interim financing in Articles 17 and 18. It contains a crucial observation that the policy does not require member states to give providers of these credit super-priority financing as would be found in Section 364 of the US Bankruptcy Code (5.04). Nevertheless, on the whole, the Chapter espouses a key truth: finance is crucial to commercial life. While we have always accepted that finance is required to start and manage a business, readers of this text will also understand the role of new finance in precluding - and rescuing a business in - insolvency. Put differently, creditor interests and debtor rescue are not necessarily mutually exclusive phenomena. Chapter 6 examines restructuring plans and their conformation by judicial or administrative authorities. Readers will be delighted to find analysis of practical issues relating to class composition, the cross-class cram-down and absolute priority (6.23 and 6.56). Chapter 7 explores the Directive's coverage on the discharge of debt incurred by insolvent entrepreneurs as well as those on restructuring frameworks for financially distressed debtors. The author clarifies the scope of the Directive in this context, highlighting the fact that the definition of insolvent entrepreneurs in Article 2(9) of the Directive does not apply to natural persons ("consumer debtors") who are not carrying on trade or business (7.01). The chapter also explores the appealing feature of a full and automatic discharge from debts within 3 years from the commencement of the procedure or confirmation/implementation of a repayment plan, without need to apply to the court or administrative authority (7.18). Chapter 8 concludes the book with a critical evaluation of the Directive's provisions on enhancing the efficiency of restructuring, insolvency and debt discharge

procedures, including the early warning systems, role and qualification of insolvency/restructuring practitioners, courts and administrative authorities as well as use of electronic means of communication to discharge necessary functions.

In light of the UK's withdrawal from the EU, readers interested in the UK restructuring landscape would also benefit from comparisons the book has made between aspects of the Directive and current UK law. Indeed, as is noted in the book, the changes to the UK law brought by the Corporate Insolvency and Governance Act 2020 ensure that the UK is substantially compliant with the Directive. While such compliance is not mandated, it is commercially sensible if the UK is to retain its continental and global appeal as a legal and business hub.

This book is further proof of its author's commitment to remain at the forefront of developments in this area of law while providing prescient guidance. The book is a highly recommended guide on the Directive for insolvency lawyers, practitioners and policy makers, as well as the uninitiated reader.

We may close this book review with Gerard McCormack's incontrovertible verdict on the European Restructuring Directive:

“ [it] is a game-changer, bringing about rescue for financially distressed businesses, and relieving highly indebted entrepreneurs of their debts, giving them a ‘fresh start’ free from debt. The Directive will create and preserve jobs and foster economic growth, support cross-border cooperation and economic integration, facilitate access to credit and build a more economically inclusive society.”