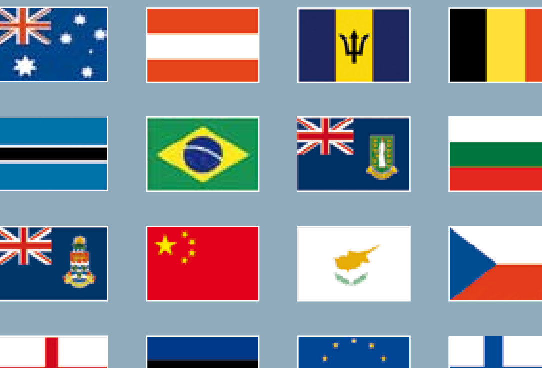
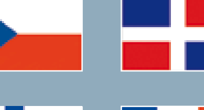
Restructuring and Insolvency

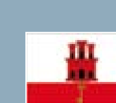
in 57 jurisdictions worldwide

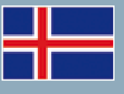
Contributing editor: Bruce Leonard

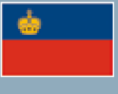
2009

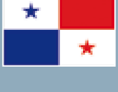












Published by

in association with:

Advokaturbüro Dr Dr Batliner & Dr Gasser
Andreas Neocleous & Co LLC
Appleby
Attorneys-at-Law Foigt & Partners/Regija Borenius
Bell Gully
Borenius & Kemppinen Attorneys at Law Ltd
Bowman Gilfillan
Cassels Brock & Blackwell LLP
Chancery Chambers
Charles Adams Ritchie & Duckworth
Djingov, Gouginski, Kyutchukov & Velichkov
Dundas & Wilson
Eugene F Collins
Felsberg e Associados
Freshfields Bruckhaus Deringer
Hassans International Law Firm
Headrick Rizik Alvarez & Fernández
Herzog, Fox & Neeman
Hoet Peláez Castillo & Duque Abogados
Liepa, Skopina/Borenius, Attorneys at Law
Lipman Karas
Logos Legal Services
Luiga Mody Hääl Borenius
Mayer Brown JSM
Mourant du Feu & Jeune
Oostvogels Pfister Feyten, Avocats à la Cour
Oscós Abogados
Osei-Ofei Swabi & Co
Ozannes
Öztekin & Co
Patton, Moreno & Asvat
Paul, Weiss, Rifkind, Wharton & Garrison LLP
Punuka Attorneys & Solicitors
Saah and Company
SCP Miriana Mircov Relicons SPRL
Setterwalls
Shearn Delamore & Co
Shin & Kim
Walder Wyss & Partners Ltd
Wardyński & Partners
Weil, Gotshal & Manges

Estonia

Jaanus Mody and Maarja Teder

Luiga Mody Hääl Borenius

1 Legislation

What legislation is applicable to bankruptcies and reorganisations?

Bankruptcy proceedings and reorganisations of insolvent entities are primarily governed by the Bankruptcy Act, in force since 2004. The Bankruptcy Act applies to the bankruptcy proceedings of both legal persons and individuals, which are carried out following generally the same procedure with only certain differences and exceptions in the case of individuals. Bankruptcy proceedings of two types of entities, namely credit institutions and insurance undertakings, are additionally regulated by the Credit Institutions Act and Insurance Activities Act respectively, which supplement or substitute parts of the regulations of the Bankruptcy Act.

The judicial procedure in bankruptcy proceedings is mainly regulated by the Code of Civil Procedure and the sale of debtor's assets must be organised in accordance with the Code of Enforcement Procedure, although these two acts are in some parts overruled by special provisions of the Bankruptcy Act. Finally, several other basic legal acts have relevance to bankruptcies and reorganisations, such as the General Part of the Civil Code Act, the Law of Obligations Act, the Law of Property Act, the Commercial Code and the Penal Code.

2 Excluded entities

What entities are excluded from bankruptcy proceedings and what legislation applies to them?

All individuals and legal entities may be subject to bankruptcy proceedings, with the only exceptions being the state, local government units and the Estonian Unemployment Fund. The aforesaid three legal persons in public law are excluded from bankruptcy proceedings altogether.

Special regulations apply to two specific types of legal entities: the Credit Institutions Act and Insurance Activities Act provide for specific rules to be followed in the bankruptcy proceedings of credit institutions and insurance undertakings respectively.

3 Secured lending and credit (immoveables)

What are the principal types of security devices that are taken on immoveable (real) property?

The principal type of security taken on immoveable property is the mortgage. A mortgage is established by a real right contract that is attested by a notary public and on the basis of which the mortgage is entered in the Land Register. In addition, a mortgage may be established by a court order (judicial mortgage) as a means of securing a claim. A mortgage does not presume the existence of a claim to be secured, but claims secured by pledges, including a mortgage, have a priority over other unsecured claims in bankruptcy proceedings.

4 Secured lending and credit (moveables)

What are the principal types of security devices that are taken on moveable (personal) property?

Security devices taken on moveable property are different types of pledges (rights of security). As will be seen below, a proprietary right may also be the object of a pledge, if it is transferable.

Possessory pledge

A possessory pledge is established when the pledged thing is transferred into the possession of the pledgee (or of a third person, whereas the pledgee obtains indirect possession of the thing) and the establishment of a possessory pledge is agreed upon. One thing may be encumbered with only one possessory pledge. The possessory pledge is accessory to the secured claim, that is, together with the termination of the claim the pledge is also terminated.

Registered security over moveables

A patent, trademark, industrial design, utility model, variety, layout-design of an integrated circuit, motor vehicle or aeroplane, which is entered in a publicly accessible register, the maintenance of which is regulated pursuant to procedure provided by law, may be encumbered with a registered security over moveables. Creation of a registered security over moveables requires that the holder of the pledged object and the pledgee agree upon encumbering the object with a registered security and a relevant entry concerning the pledging is made in the corresponding register. The registered pledge does not presume the existence of a claim to be secured. Although the law provides for the possibility to encumber motor vehicles and aeroplanes and to enter such encumbrances in the respective registers, the validity and enforceability of these securities are questionable, because the respective registers are not publicly accessible or not maintained pursuant to the law, therefore one prerequisite for the creation of a registered pledge is not fulfilled.

Commercial pledge

An undertaking entered in the commercial register may establish a pledge on the undertaking's moveable property as security for a claim (commercial pledge), without the undertaking transferring possession of the pledgeable property. A commercial pledge extends to all moveable property of a company (including branch of a foreign company) or moveable property relating to the economic activity of a sole proprietor. The pledge extends to all encumberable property that belongs to an undertaking at the time the pledge entry is made and to property that the undertaking acquires after the pledge entry is made, with a few exceptions deriving from the law (eg, money, shares, stocks, promissory notes and other securities; property that has already been encumbered by a pledge). The commercial pledge does not restrict the right of the undertaking to use and dispose of the property encumbered with a pledge in the ordinary course of

business. A commercial pledge is created after a corresponding entry is made in the commercial pledge register, based on the commercial pledge contract between the undertaking (pledgor) and the pledgee. A commercial pledge does not presume the existence of a securable claim and does not extinguish with termination of a claim. Commercial pledge is probably the most common type of security taken on moveables.

Pledge of rights

A proprietary right (claim) may be the object of a pledge, if it is transferrable. As a general rule, the pledge of a right is established when the pledgor and the pledgee have concluded a written agreement concerning the establishment of a pledge. Establishment of the pledge does not require transfer of the pledged right to the pledgee; however, the use of the pledged right by the pledgor is somewhat restricted (the pledgee's consent is needed to terminate the pledged right by a transaction or alter the pledged right in a way that decreases the value of the right).

A specific form of pledging rights is the establishment of financial collateral, which may be used for pledging securities and financial claims. Another similar form of pledging rights is transfer of collateral, which can be regarded as a special form of assignment of claims. Transfer of collateral is not expressly regulated in the law, but is allowed and used in practice and has been recognised as a form of security interest also by the Supreme Court of Estonia.

Others

In addition, retention of title could be regarded as security taken over moveables.

5 Unsecured credit

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

Interim measures may be imposed by the court. In general, interim measures may be awarded to secure the execution of a future judgment, that is, one has to submit an action to court in order to apply for interim measures. As an exception, the court may award interim measures within one month before the claimant submits the action to the court. A special fee (security) of 5 per cent of the value of the requested interim measures, but not more than 100,000 kroons (approximately €6,390) has to be paid to the state in order to apply for interim measures, which is returned if the interim measures are awarded at least partially. In addition, interim measures may be requested and imposed in executive, administrative and criminal proceedings. No special procedures apply to foreign creditors.

6 Courts

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

Bankruptcy cases are considered as civil cases and are therefore heard exclusively by the general (civil) courts. Bankruptcy petitions are filed with and heard at the courts of first instance (county courts). All disputes related to the bankruptcy proceedings, including claims aimed at recovering the debtor's assets and disputes over the acceptance of claims, are also heard by the same (civil) court, even if these concern issues that would normally fall under the competence of an administrative court (for example, disputes over the existence or size of the debtor's tax debt). Similarly to other civil cases, the decisions and orders of the court of first instance (with some exceptions) may be contested by submitting an appeal to a circuit court and, in the last instance, an appeal in cassation to the Supreme Court.

7 Voluntary liquidations

What are the requirements for a debtor to commence a voluntary liquidation of its business? What are the effects of the commencement of the liquidation?

There are no special requirements for commencing voluntary liquidation if the debtor is solvent, that is, able to satisfy the claims of all creditors during the process of liquidation. Liquidation proceedings are commenced after shareholders have adopted a resolution to dissolve the company. A dissolution resolution is adopted if at least two-thirds of the votes of the shareholders who participate in the voting are in favour, unless there is a greater majority requirement prescribed in the articles of association. As a general rule the members of management board will also act as liquidators, whose task is to terminate the activities of the company, collect debts, sell assets and satisfy the claims of creditors. However, if during the process it should occur to the liquidators that the assets of the company are insufficient for satisfaction of all claims of creditors, the liquidators are obliged to submit a bankruptcy petition. Liquidation of the debtor will then take place through bankruptcy proceedings.

There are no major effects of the commencement of the liquidation. With the passing of the dissolution decision, the current financial year of the company shall end and a new financial year shall begin. Respective annual accounts shall be prepared by liquidators. In addition, the liquidators must promptly publish a notice of the liquidation proceeding in the Official Notices and also send a notice of liquidation to all known creditors, indicating that creditors are to submit their claims within four months after publication of the notice.

If the debtor is insolvent, then voluntary liquidation should in principle be impossible. According to the Commercial Code, members of management board are obliged to submit a bankruptcy petition of the company as soon as it becomes evident that the company is insolvent. Under such circumstances commencement of regular liquidation proceedings should be excluded. If insolvency is discovered by the liquidators of the company after liquidation proceedings have been commenced, as described above, then the liquidators also have a statutory obligation to submit a bankruptcy petition.

8 Involuntary liquidations

What are the requirements for creditors to place a debtor in involuntary liquidation? What are the effects of the commencement of the liquidation?

Creditors may place a debtor in involuntary liquidation by submitting a bankruptcy petition against the debtor, which may lead to liquidation of the debtor as a result of bankruptcy proceedings. The bankruptcy petition of a creditor must substantiate the debtor's insolvency secondly prove the existence of a claim against the debtor.

To substantiate the debtor's insolvency, the creditor must rely on at least one of the following circumstances:

- the debtor has failed to perform an obligation within 30 days after the obligation has fallen due and the creditor has cautioned the debtor in writing of the creditor's intention to file a bankruptcy petition (bankruptcy caution) and the debtor has thereafter failed to perform the obligation within 10 days;
- a failure to satisfy a claim against the debtor in execution proceedings within three months because of debtor's lack of assets or if it has become evident in the execution proceedings that the debtor's assets are not sufficient to cover all its obligations;
- the debtor has destroyed, hidden or squandered its property or made grave errors in management, as a result of which the debtor has become insolvent, or has intentionally caused its own insolvency in any other manner;
- the debtor has notified the creditor, the court or the public of its

inability to perform its obligations; or
- the debtor has left Estonia in order to evade performance of its obligations or is in hiding with the same purpose.

The creditor's claim against the debtor must have fallen due and the claim must also be clear, that is, the court must agree that there is no substantive dispute regarding the existence or the size of the claim. In order to protect the debtor, the law also prescribes minimum required size of the claim:
- 200,000 kroons in the case of a public limited company (approximately €12,800);
- 40,000 kroons in the case of a private limited company, general partnership or limited partnership (approximately €2,560); and
- 10,000 kroons in the case of other legal persons or an individual (approximately €639).

The bankruptcy petition submitted by a creditor will be discussed at a court hearing, where both the creditor and the debtor are present. Unless some circumstances precluding commencement of bankruptcy proceedings exist (eg, the claim is not clear or sufficiently large, the claim has been fulfilled or is entirely secured by a pledge, the bankruptcy petition is not substantiated, the creditor has failed to pay the requested amount in the court's deposit) the court shall most probably decide to commence bankruptcy proceedings. Commencement of bankruptcy proceedings does not mean that the debtor actually is permanently insolvent; it only means commencement of investigation into the debtor's financial situation. The investigation is conducted by an interim bankruptcy trustee, appointed by the court, who will finally prepare a report to the court regarding the debtor's financial situation and also give its opinion on the reasons of the debtor's insolvency. Calling this part of proceedings as commencement of bankruptcy proceedings is planned to be amended.

Measures for securing the bankruptcy petition may be demanded and applied by the court already before the insolvency proceedings are commenced, but commonly such measures are applied at the commencement of bankruptcy proceedings. To secure a bankruptcy petition, a court may apply all the measures prescribed for securing an action, but also to prohibit the debtor from departing from his or her residence or apply compelled attendance or arrest with regard to the debtor in accordance with the requirements of the Bankruptcy Act.

9 Voluntary reorganisations

What are the requirements for a debtor to commence a financial reorganisation? What are the effects of the commencement of the reorganisation?

A Reorganisation Act is planned to be adopted and enforced by 1 July 2009, but at present neither the Bankruptcy Act nor any other acts foresee the possibility for a debtor to commence reorganisation procedures. Specific regulations enabling reorganisation are today applicable only under the Credit Institutions Act and Insurance Activities Act. A kind of reorganisation, namely the rehabilitation of a debtor's enterprise, is possible also in the context of bankruptcy proceedings and is commenced on the initiative of the bankruptcy trustee. Rehabilitation of an enterprise means application of measures that enable satisfaction of the claims of creditors through continuation of the business activities of the debtor.

Reorganisation may also be initiated together with the conclusion of a compromise between the debtor and the creditors. Rehabilitation as part of a compromise may be proposed by the trustee and also by the debtor itself. The compromise agreement and rehabilitation plan must be approved by the majority of creditors and by the court. Approval of the compromise by the court terminates the bankruptcy proceedings, the debtor will regain control over the remaining assets and will proceed with rehabilitation of the enterprise under supervision of the trustee and the bankruptcy committee.

In principle it is possible that the debtor and its creditors agree on reorganisation of the debtor's business outside bankruptcy proceedings, but such agreement does not release the debtor's management board of their statutory obligation to submit a bankruptcy petition if the company is insolvent. Therefore, in practice, this is not a viable option.

10 Involuntary reorganisations

What are the requirements for creditors to commence an involuntary reorganisation? What are the effects of the commencement of the reorganisation?

Creditors can initiate reorganisation of the debtor's business only during bankruptcy proceedings (see also question 9). If the trustee finds that it is possible to rehabilitate a debtor's enterprise, he or she shall present a rehabilitation plan for approval already to the first general meeting of creditors. The general meeting shall either approve the rehabilitation plan, make a proposal to the trustee to submit a new rehabilitation plan or decide on the termination of the activities of the enterprise. If creditors approve of rehabilitation, this shall be carried out under the control of the trustee.

11 Mandatory commencement of insolvency proceedings

Are companies required to commence insolvency proceedings in particular circumstances (to avoid personal liability to directors and officers or otherwise)? In what circumstances must companies do so? If proceedings are not commenced, what liabilities can result?

The management board of a company is required to commence insolvency proceedings as soon as it has become evident that the company is permanently insolvent. If this should be the case, the bankruptcy petition must be submitted to the court promptly but not later than within 20 days after the date on which the insolvency became evident. One of the circumstances where a bankruptcy petition must be submitted is when the net assets of the company have decreased to less than half of the share capital, or less than the minimum amount of share capital provided by law (400,000 kroons for a public limited company and 40,000 kroons for a private limited company).

Failure to fulfil the obligation to submit a bankruptcy petition may bring about the liability of members of the management board for the damage caused to the company. In addition, failure to fulfil this obligation may also entail criminal liability of the members of the management board and punishment by a fine or up to one year's imprisonment.

12 Doing business in reorganisations

Under what conditions can the debtor carry on business during a reorganisation? What conditions apply to the use of assets and to creditors who supply goods or services after the filing? What are the roles of the creditors and the court in supervising the debtor's business activities?

See question 9 regarding the possibility of reorganisations.

Regarding reorganisation during bankruptcy proceedings, considering that the bankruptcy decision deprives the debtor of the right to administer its assets and this right is transferred to the trustee, it is the bankruptcy trustee that conducts the business activities of the debtor during reorganisation. While conducting reorganisation, the bankruptcy trustee certainly relies heavily on the experience and know-how of the debtor and its management bodies, but the latter are not allowed to take any independent action. On the other hand, if

a rehabilitation plan is approved together with a compromise agreement between the debtor and creditors, approval of the compromise and rehabilitation plan marks the termination of the bankruptcy proceedings and the debtor regains control over its assets. In this case, the debtor will usually be entitled to conduct its business activities independently, though strictly following the agreed rehabilitation plan.

Reorganisation within bankruptcy proceedings is carried out under the control of the bankruptcy trustee, whose activities are supervised by the creditors through the bankruptcy committee and also by the court. Creditors also exercise control over the debtor's business through their right to terminate the activities of the rehabilitated enterprise at any time, if they find that rehabilitation has failed regardless of the rehabilitation plan. If reorganisation is conducted according to a compromise that includes a rehabilitation plan, then fulfilment of the rehabilitation plan is again supervised by the bankruptcy committee. The court's supervision is limited to the right of annulment of the compromise if the debtor does not or is unable to fulfil its obligations under the compromise, which brings an end to rehabilitation as well.

13 Rejection and disclaimer of contracts in reorganisations

Can a debtor in a reorganisation reject or disclaim an unfavourable contract? Are there contracts that may not be rejected? What procedure is followed to reject a contract and what is the effect of rejection on the other party?

In most cases, a trustee can decide whether to perform the unperformed contractual obligations of the debtor or abandon the performance of such obligations. If a trustee continues to perform an obligation of the debtor or notifies the other party of his intention to perform the obligation, the other party to the contract must continue performance of its obligations. Creditors who have a claim against the bankruptcy estate arising from the provision of goods or services after the commencement of bankruptcy proceedings, and creditors who have continued performance of their obligations towards the debtor in reliance of the trustee's promises, are creditors of consolidated obligations and will receive satisfaction from the bankruptcy estate before any distribution payments are made to other (regular) creditors.

14 Sale of assets

In reorganisations and liquidations, what provisions apply to the sale of specific assets out of the ordinary course of business and to the sale of the entire business of the debtor? Does the purchaser acquire the assets 'free and clear' of claims or do some liabilities pass with the assets?

After sale of moveable assets that are encumbered with a security over moveables (see question 4), the right of security is terminated. In the event of sale at auction of the debtor's immoveable assets encumbered with a mortgage, the real rights encumbering the immoveable with a ranking lower than the real right (mortgage), according to which forced sale of the immoveable may be demanded, are deemed to have extinguished.

If a purchaser buys an enterprise that is defined as an economic unit through which an undertaking operates, the purchaser also acquires the obligations of this enterprise. The only case where obligations do not pass to the purchaser of an enterprise is when the sale takes place by the bankruptcy trustee or a bailiff (transfer of enterprise on the basis of law). Sale during voluntary liquidation is not considered as a transfer taking place on the basis of law.

15 Stays of proceedings and moratoria

What prohibitions against the continuation of legal proceedings or the enforcement of claims by secured and unsecured creditors are imposed by legislation or court order in liquidations and reorganisations? In what circumstances may secured or unsecured creditors obtain relief from such prohibitions?

At present only a bankruptcy decision prohibits creditors to enforce their claims against the debtor. Exceptions are made only under Credit Institutions Act and Insurance Activity Act.

Once bankruptcy is declared, claims may be enforced only as foreseen by bankruptcy proceedings, further interests are not calculated. All court proceedings pending against the debtor shall be terminated (claims refused).

16 Arbitration processes in bankruptcy

How frequently are arbitration procedures used in insolvency proceedings? What limitations are there on the availability of arbitration procedures in insolvency cases? In insolvency proceedings, will the court allow arbitration proceedings to continue after an insolvency case is opened?

Estonian legislation does not provide regulations regarding arbitration under bankruptcy proceedings.

Only the general civil courts have the competence to hear bankruptcy cases and declare entities or individuals bankrupt.

After commencement of bankruptcy proceedings of a debtor the latter continues its existence and business, subject to certain restrictions that may be imposed by the court (eg, restriction of the debtor's right to dispose of its assets). Therefore, if at the time of commencement of insolvency proceedings the debtor is party to either court or arbitration proceedings, the proceedings are allowed to continue. After the court has declared the debtor's insolvency, court and arbitration proceedings that have been initiated by the debtor are not automatically terminated. The fate of these proceedings will be decided not by the court, but by the bankruptcy trustee, who has assumed the power to represent the debtor in all disputes. Actions regarding monetary claims against the debtor are terminated upon declaration of bankruptcy (regardless if they are at court or arbitration) and claims may be filed against the debtor under bankruptcy proceedings.

17 Set-off and netting

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

In general, the creditors' right of set-off is not limited. If a creditor had the right to set off the claim thereof against the claim of the debtor before the declaration of bankruptcy, the creditor may set off the defended claim also after the declaration of bankruptcy. A petition for setting off a claim may be submitted until the last distribution proposal is submitted to the court.

If a claim is contingent upon a suspensive condition, is not yet due at the time of the declaration of bankruptcy or is not directed at the performance of obligations of the same type, the claim may be set off only when the suspensive condition has arrived, the claim has fallen due or the obligations have become obligations of the same type. Set-off is not permitted if the suspensive condition of the debtor's claim arrives or the claim falls due before the creditor would have the right to set off the claim thereof.

A claim acquired through assignment may be set off in bankruptcy proceedings only if the claim was assigned and the debtor was notified of the assignment in writing not later than three months

before the declaration of bankruptcy. A claim against the debtor that is acquired through assignment shall not be set off if the claim was assigned within the preceding three years before the commencement of the bankruptcy proceedings and the debtor was insolvent at the time of the assignment and the person who acquired the claim was or should have been aware of the insolvency at the time of the assignment.

18 Intellectual property assets in insolvencies

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

There are no specific regulations regarding handling of IP rights under bankruptcy. Regarding general regulation, see question 13.

19 Post-filing credit

Does your country's insolvency system allow a debtor in a liquidation or reorganisation to obtain secured or unsecured loans or credit? What priority is given to such loans or credit?

Yes, this is allowed and no specific restrictions apply. In such transactions, the debtor is represented by the bankruptcy trustee (not the management board). According to the general rule, debts that arise during bankruptcy proceedings are settled before other debts.

20 Successful reorganisations

What features are mandatory in a reorganisation plan? How are creditors classified for purposes of a plan and how is the plan approved? Can a reorganisation plan create releases in favour of third parties, and, if so, in what circumstances?

At present, a reorganisation can take place only in bankruptcy proceedings as a compromise.

A compromise proposal shall set out to what extent and by which date the debtor must pay the debts. The compromise proposal shall contain proof that the debtor is able to pay the debts to the extent and by the date indicated. If the debtor engages in business or professional activity, the plan for continuing the business or professional activity and the rehabilitation plan of the enterprise shall be annexed to the proposal.

Creditors are classified into two categories by the nature of their claims: claims covered by pledge and other claims.

A compromise is made at a general meeting of creditors concerning all claims against the debtor that have been filed by the time of making the compromise (compromise decision). A compromise is deemed to be made if at least half of the creditors present whose claims constitute at least two-thirds of the total amount of all claims vote in favour. A creditor whose claim is secured by a pledge is allowed to vote on a compromise only if the claim is not fully secured by the pledge. In such case, the claim of the pledgee shall be taken into account in voting only to the extent that the claim would presumably not be satisfied out of the proceeds of the sale of the pledged object. In the event of a dispute, the size of the secured part of the claim shall be determined by the bankruptcy trustee. If invocation of a claim arising from the right of security of a creditor who is the pledgee is requested to be precluded for more than 90 days by a compromise proposal, the claim of the creditor who is the pledgee shall be fully taken into account in voting.

The bankruptcy trustee must immediately submit the compromise decision to the court for approval and the court shall make the respective decision within 15 days. A court shall not approve a compromise if the compromise has been made in violation of the requirements of the law or by fraud. If a court refuses to approve a compromise decision due to violation of the requirements of the law in the making of the compromise, the trustee shall call a new general meeting of creditors within 15 days as of the court's decision on refusal to approve the compromise. The creditors, the debtor and the trustee may file appeals against a ruling by which the court has approved or refused to approve a compromise. Appeals in cassation may be filed against the circuit court ruling on the appeal against the ruling. This right of appeal makes adoption of a compromise extremely difficult. A trustee shall publish a notice concerning the approval of a compromise in the Official Notices.

There is no specific regulation regarding releases in favour of third parties.

21 Expedited reorganisations

Do procedures exist for expedited reorganisations?

Expedited reorganisations are not foreseen in Estonian legislation.

22 Unsuccessful reorganisations

How is a proposed reorganisation defeated and what is the effect of the plan not being approved? What happens if there is default by the debtor in performing an approved plan?

A compromise may be disputed by any creditor. Until appeals, which normally take approximately one year, the compromise is not enforced, which in practical terms means that it is very difficult, if not impossible, to effectively have a compromise unless all creditors agree.

If the debtor fails to perform the duties arising from the compromise, a court may annul the compromise by a ruling. A request for the annulment of a compromise may be submitted only during the term of validity of the compromise. If a compromise is annulled, the bankruptcy proceedings shall be reopened by the same court ruling. If a compromise is annulled, the creditors whose claims were decreased by the compromise have the right to submit their claims in the initial amount, taking into account the amounts already received by the creditors.

A creditor whose claim arose during the term of validity of the compromise is required to notify the trustee of his claim not later than within two months after publication of the notice of nullification. The claims to which a compromise applied are deemed to be defended. Claims arising during the term of validity of the compromise shall be defended pursuant regular proceedings.

23 Bankruptcy processes

During a bankruptcy case, what notices are given to creditors? What meetings are held? What committees are or can be formed? What powers or responsibilities do these committees have? May creditors initiate proceedings to pursue remedies against third parties?

After declaration of a debtor's bankruptcy, the court shall immediately publish a bankruptcy notice in the Official Notices. The notice shall be repeated if necessary. In addition, the bankruptcy trustee shall notify all creditors known to the trustee of the bankruptcy order and the time and place of the first general meeting of creditors. The notice shall also set out the consequences of failure to submit claims within the specified term. Creditors are not individually notified only if there are more than 100 creditors known to the trustee, in which case the publication of the bankruptcy notice shall be sufficient.

The trustee shall notify the creditors of the time, place and agenda of all general meetings of creditors either by publishing a notice in

the Official Notices or in some other manner at least five days before the date of the meeting.

Creditors shall also be informed by a notice in the Official Notices of the time and place for examining the (preliminary) distribution proposal and the possibility to file objections to the proposal with the court. In addition, a trustee shall publish a notice in the Official Notices concerning the approval of a compromise and if this should later be annulled and the bankruptcy proceedings reopened by the court, the court shall publish a respective notice in the Official Notices.

Creditors exercise their rights by participating and voting at general meetings of creditors. During the bankruptcy proceedings creditors must convene on several meetings:

- the first meeting of creditors where the bankruptcy committee is elected, the trustee is approved and the termination of the debtor or continuation of its business is decided;
- meetings for defence of claims;
- meeting to decide approval of a compromise; and
- meetings to decide other questions that are in the competence of creditors, such as supervision of the trustee's activities, release and appointment of (new) members of the bankruptcy committee and deciding on their remuneration, or if the general meeting performs the tasks of the bankruptcy committee, taking decisions regarding sale of debtor's assets etc.

At the first creditors' meeting, the creditors shall elect a bankruptcy committee and decide the number of members in the committee (at least three, not more than seven). If there are fewer than five creditors altogether, they may decide not to elect a bankruptcy committee, in which case the duties of the bankruptcy committee shall be performed by the general meeting of creditors. The duties of the committee are to protect the interests of all the creditors, monitor the activities of the trustee and perform other duties provided by law. The bankruptcy committee verifies whether the activities of the trustee are expedient and in compliance with the law, and monitors the business activities of the debtor for such purpose. The bankruptcy committee has the right to examine the trustee's file, to demand additional information and documents if necessary, and to monitor the trustee's economic activities related to the management of the bankruptcy estate.

As a rule the creditors can not initiate proceedings to pursue remedies against third parties. The creditors may pursue debtor's claims only regarding the (limited) liabilities of members of the management board and supervisory board and shareholders.

24 Insolvency of corporate groups

In insolvency proceedings involving a corporate group, are the proceedings by the parent and its subsidiaries combined for administrative purposes? May the assets and liabilities of the companies be combined into one pool for distribution purposes?

No, they are not combined and can not be pooled.

25 Modifying creditors' rights

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

The size and rank of creditors' claims are determined by the meeting of creditors after all claims have been heard and defended. If a creditor's claim has not been ranked according to his or her expectations, the creditor can submit a claim to the court within one month and the court may change the priority of the claim. Acceptance of the creditor's claim may be demanded in court only to the same extent and on the same grounds as when defending the claim before the creditors' meeting. In practice such claims by creditors are not very frequent, but there have been a few cases where the court has satisfied such a claim.

26 Enforcement of estate's rights

If the insolvency administrator is without assets to pursue a claim that is available to the estate, are there procedures by which the creditors can pursue the estate's remedies? If so, to whom do the fruits of the remedies belong?

If the bankruptcy trustee is without assets to pay the stamp fee on a claim, the court may free the trustee of these costs. The court may also grant state legal aid by appointing an attorney at the expense of the state to assist the trustee.

As a rule the creditors can not pursue the debtor's claims against third parties. The creditors may pursue debtor's claims only regarding the liabilities of members of the management board and supervisory board and shareholders. The fruits of the remedies belong to the estate. There has not been any substantial corresponding case law.

27 Claims and appeals

How is a creditor's claim submitted and what are the applicable time limits? How are claims disallowed and how does a creditor appeal a disallowance? Are there any provisions that deal with the purchase, sale or transfer of claims against the debtor?

Creditors have to submit their claims to the bankruptcy trustee within two months from the day the bankruptcy decision is published in the Official Notices. The claims have to be submitted in written form, the application must include the claim's substance, basis and amount, as well if it is a claim secured by a pledge. Proof of these circumstances has to be submitted and the claim has to be signed by the creditor or by a proxy, in which case the power of attorney has to be submitted.

A creditor whose claim is secured by a pledge is deemed to have lost its right of security if the claim has not been submitted by due date (and the deadline has not been restored) and the creditor was informed by the trustee of the time and place of the first creditors' meeting and was warned of the results of failing to submit a claim.

28 Priority claims

What are the major governmental and non-governmental privileged and priority claims in liquidations and reorganisations? Which priority and privileged claims have priority over secured creditors?

There is no difference between governmental and non-governmental claims. The claims have the following priority ranks:

(i) claims secured by pledge (in the amount of the corresponding pledge coverage);
(ii) accepted claims submitted within the foreseen deadline (two months from publishing the bankruptcy notice); and
(iii) accepted claims submitted after the named deadline.

29 Liabilities that survive insolvency proceedings

Do any liabilities of a debtor survive insolvency so that they are enforceable against the debtor after it has reorganised?

At present, there are in general no independent reorganisation possibilities foreseen in the law, only bankruptcy proceedings, which in some cases may lead to a (successful) reorganisation of the debtor. Bankruptcy proceedings generally do not terminate any claims. After the end of bankruptcy proceedings, the creditors may submit their remaining claims in the ordinary manner. A debtor who is an individual may apply to the court to be released from his or her

obligations and the court may do so after five years have passed from the beginning of the corresponding proceedings.

30 Distributions

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

After the last meeting for the defence of claims, the trustee shall prepare a distribution proposal. The distribution proposal is submitted to the bankruptcy committee and to the court and a corresponding notice is published in the Official Notices. With the consent of the bankruptcy committee the trustee may submit a preliminary distribution proposal before the ending of defence of claims. A court shall decide on the approval of a distribution proposal by a ruling within 10 days after the expiry of the term for filing objections.

31 Transactions that may be annulled

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

Pursuant to the Bankruptcy Act, the court may under certain conditions revoke (annul) transactions that were concluded by the debtor before the declaration of bankruptcy and which damage the interests of the creditors. A transaction concluded between the commencement of the bankruptcy proceedings and the declaration of bankruptcy is deemed to damage the interests of the creditors, in all other cases the damage to the interests of creditors must be ascertained separately. The court may recover transactions concluded up to five years before the commencement of the bankruptcy proceedings, but the preconditions for revocation may be different depending on the time of concluding the transaction. A claim of revocation must be submitted within three years as of the declaration of bankruptcy.

In addition to the general grounds of annulment, the Bankruptcy Act law provides special regulations applicable to the revocation of certain types of transactions: gratuitous contracts, marital property contracts between the debtor and his or her spouse or the agreement on the division of their joint property concluded to the detriment of the debtor, performance of a financial obligation to the benefit of a creditor and grant of security by the debtor.

If a court revokes a transaction by way of recovery procedure, the other party is required to return the proceeds of the transaction to the bankruptcy estate together with the civil fruits and other gain. Where the other party knew of the grounds of recovery, he or she must also compensate for the gain that could have been received for the recovered assets if these had been managed properly.

32 Proceedings to annul transactions

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

In general, if a transaction subject to recovery is concluded between the commencement of the bankruptcy proceedings and the declaration of bankruptcy, the transaction is deemed to damage the interests of the creditors. There are different burdens of proof regarding earlier transactions depending on the time and nature of the transaction and the counterparty (related parties).

After declaration of bankruptcy transactions may be attacked only by the bankruptcy trustee (before declaration of bankruptcy creditors may submit corresponding claims if they have not been able to satisfy their claims in execution proceedings). At present, there is no reorganisation possibility in Estonia.

33 Directors and officers

Are corporate officers and directors liable for or can they be made to pay obligations owed by their corporations?

In principle the corporate officers and directors are liable in private and public limited liability companies only for violation of due care in performing their obligations. They are liable before the company but can not be held directly liable before third parties (company's creditors).

34 Duties of directors to creditors prior to bankruptcy

Do corporate directors and officers have any liability for pre-bankruptcy actions by their companies? Can they be made subject to sanctions or penalties for other reasons?

In principle the corporate officers and directors are liable in private and public limited liability companies only for violation of due care in performing their obligations. The only bankruptcy-specific obligation is related to late submission (non-submission) of the bankruptcy petition.

35 Creditors' enforcement

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

Outside of court proceedings, assets may be seized by bailiffs, which requires a corresponding enforcement instrument (not necessarily always a court order, but for example also tax orders, notarised mortgage agreements containing debtor's consent to be subject to immediate compulsory enforcement after the claim falls due). In addition, assets may in general also be seized without a court order in criminal, tax and other administrative proceedings.

36 Corporate procedures

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

In general, the company's management board has to submit the company's bankruptcy petition within 20 days as of the date on which the company's permanent insolvency became evident. The company has to submit a bankruptcy petition if its net assets have decreased to less than the minimum requirements for share capital or to less than half of the actual share capital (and no other measures are taken to solve the situation). If general liquidation proceedings have been commenced and the liquidator finds that there are not enough assets to cover all the company's debts, the liquidator has to file for bankruptcy. After a company has been declared bankrupt by a court decision, a corresponding notice is recorded in the Commercial Register (bankrupt). Thereafter the creditors' meeting decides whether to liquidate the company or to continue its business. Upon liquidation the company is finally erased from the Commercial Register.

37 Conclusion of case

How are liquidation and reorganisation cases formally concluded?

At present, there are no insolvency-related reorganisation cases, only bankruptcy cases. After declaration of bankruptcy the debtor or the bankruptcy trustee may submit a compromise proposal and this needs to be approved by the creditors and the court.

Update and trends

The efforts of Estonian legislators are at present mainly directed at creating possibilities for reorganisation. This is planned to be achieved first and foremost by passing the Reorganisation Act, which is the first piece of legislation dealing comprehensively with the questions of restructuring and reorganisation of companies. A large part of the other planned legislative amendments are concerned with the legal status of bankruptcy trustees and ways of improving the efficiency and quality of their work.

Voluntary liquidation decisions may be adopted by shareholders, the decision is registered at the Commercial Register. After liquidation proceedings the liquidators submit an application to the Business Register for deletion of the company from the Business Register.

The court may decide to liquidate a company if the shareholders have not taken the corresponding decision (question 36) or if the company is without a management board for two years and other grounds foreseen in law.

38 UNCITRAL Model Law

Is the adoption of the UNCITRAL Model Law on Cross-Border Insolvency under consideration in your country? If so, what is the present status of this consideration?

Adoption of the Model Law is not under consideration at present.

39 International cases

What recognition or relief is available concerning an insolvency proceeding in another country? How are foreign creditors dealt with in liquidations and reorganisations? Are foreign judgments or orders recognised and in what circumstances? Is your country a signatory to a treaty on international insolvency or on the recognition of foreign judgments?

With Estonia's accession to the European Union on 1 May 2004, Council Regulation (EC) No. 1346/2000 of 29 May 2000 on Insolvency Proceedings became directly applicable in Estonia. This regulation governs the recognition and enforcement of judgements of the courts of EU member states in bankruptcy cases. In accordance with the regulation, judgments of the courts of other member states in bankruptcy cases are recognised in Estonia with no further formalities, and vice versa. The recognition and enforcement of court decisions in civil matters made by a foreign state other than an EU member state is governed by the Code of Civil Procedure. According to the general rule, such court decisions are subject to recognition in Estonia, except where:

- recognition of the decision would be clearly contrary to the essential principles of Estonian law (public order);
- the defendant or other debtor was unable to reasonably defend the rights thereof (eg, was not duly served the court summons), unless there was a reasonable opportunity to contest the decision and he or she failed to use it;
- the decision is in conflict with an earlier decision made in Estonia in the same matter between the same parties or if an action between the same parties has been filed with an Estonian court;
- the decision is in conflict with a decision of a foreign court in the same matter between the same parties which has been recognised or enforced in Estonia earlier;
- the decision is in conflict with a decision made in a foreign state in the same matter between the same parties which has not been recognised in Estonia, but is subject to recognition or enforcement in Estonia; or
- the court that made the decision could not make the decision in compliance with the provisions of Estonian law regulating international jurisdiction.

Foreign judgments are recognised in Estonia without further formalities, but a court ruling is required in order to enforce the judgment, except if otherwise provided in the law or international treaties. Estonia has concluded relevant treaties on the recognition and enforcement of judgments with Russia and Ukraine (also with Latvia, Lithuania and Poland, now members of the EU).

If a debtor from another EU member state has been declared bankrupt, EC Regulation No. 1364/2000 enables Estonian creditors to participate and submit their claims in insolvency proceedings taking place in the other state, or to initiate secondary insolvency proceedings in Estonia.

In bankruptcy proceedings in Estonia foreign creditors may be required to submit additional corporate documents and similar proof, but in general the treatment of local and foreign creditors is the same.

Estonia is not a signatory to any treaty on international insolvency.

40 Cross-border insolvency protocols and joint court hearings

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

To our knowledge, Estonian courts have not entered into any cross-

LUIGA MODY HÄÄL BORENIUS

Jaanus Mody **jaanus.mody@lmh.ee**

Pärnu rd 15
10141 Tallinn
Estonia

Tel: +372 6651888
Fax: +372 6651899
www.lmh.ee

border insolvency protocols or other arrangements to coordinate proceedings with courts in other countries, nor have any joint hearings with foreign courts been held in cross-border cases.

41 Pending legislation

Is there any new or pending legislation affecting domestic bankruptcy procedures, international bankruptcy cooperation or recognition of foreign judgments and orders?

Three major legislative amendments regarding insolvency proceedings are planned, some of which are already under discussion in the parliament and others will be sent there soon:

- a draft Reorganisation Act has passed the first reading in parliament and is planned to be adopted and enforced by 1 July 2009. This act will provide a legal basis for reorganisation of entities that have financial difficulties, for use as an alternative to bankruptcy proceedings;
- a packet of amendments to the Bankruptcy Act, revision in full, is under consideration. The general structure and basic principles of the current act should not be amended, with a few exceptions: formation and structure of a bankruptcy estate, which will be granted passive legal capacity; wider powers for the court to declare bankruptcy, also in cases where the debtor has not submitted a bankruptcy petition and no creditor has shown to have a clear claim against the debtor, but the judge nevertheless finds the company to be insolvent; procedural amendments regarding commencement of bankruptcy proceedings); and
- major amendments regarding the status of bankruptcy trustees are planned. Among other changes, it is proposed to give auditors and bailiffs the right to act as bankruptcy trustees without passing an exam (similarly to attorneys at present).

Estonia	
	Applicable bankruptcy law, reorganisations: liquidations
	Bankruptcy Act, Code of Civil Procedure, Code of Enforcement Procedure, Commercial Code, Credit Institutions Act, Insurance Activities Act.
	Customary kinds of security devices on immoveables
	Mortgages.
	Customary kinds of security devices on moveables
	Possessory pledge, registered security, commercial pledge, pledge of rights (claims).
	Stays of proceedings in reorganisations/liquidations
	At commencement of bankruptcy proceedings the court orders a stay on enforcement procedures against the debtor. After declaration of bankruptcy all court proceedings against the debtor are terminated.
	Duties of the insolvency administrator
	Main duties are to investigate the reasons of debtor's bankruptcy, sell debtor's assets, revoke transactions, submit civil claims and institute criminal charges upon violations of due care and criminal offences of debtor's management board or other officers.
	Set-off and post-filing credit
	Generally allowed, main exceptions regarding acquired claims.
	Filing claims and appeals
	Claims to be filed within two months after publication of bankruptcy notice (bankruptcy decision). Bankruptcy decision may be appealed to higher courts, but is subject to immediate execution.
	Priority claims
	Claims secured by a pledge.
	Major kinds of voidable transactions
	Transactions concluded under market value; preference of some creditors over the others.
	Operating and financing during reorganisations
	No reorganisation possible at present.
	Requirements for approval of reorganisations
	No reorganisation possible at present.
	Liabilities of directors and officers
	Liabilities may arise upon violation of due care and late filing of bankruptcy petition.
	Pending legislation
	• Reorganisation Act; • amendments to Bankruptcy Act; • legislative regulation regarding status of bankruptcy trustees.

Annual volumes published on:

- Air Transport
- Anti-Corruption Regulation
- Arbitration
- Banking Regulation
- Cartel Regulation
- Construction
- Copyright
- Corporate Governance
- Dispute Resolution
- Dominance
- e-Commerce
- Electricity Regulation
- Environment
- Franchise
- Gas Regulation
- Insurance & Reinsurance
- Intellectual Property & Antitrust
- Labour & Employment
- Merger Control
- Mergers & Acquisitions
- Mining
- Oil Regulation
- Patents
- Pharmaceutical Antitrust
- Private Antitrust Litigation
- Private Equity
- Product Liability
- Project Finance
- Public Procurement
- Real Estate
- Restructuring & Insolvency
- Securities Finance
- Shipping
- Tax on Inbound Investment
- Telecoms and Media
- Trademarks
- Vertical Agreements

For more information or to purchase books, please visit:
www.GettingTheDealThrough.com

Strategic research partners of the ABA International section

The Official Research Partner of the International Bar Association

 ISSN 1468-3180