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The International Comparative Legal Guide to:

Corporate Recovery & Insolvency 2014

8th Edition

A practical cross-border insight into corporate recovery and insolvency work

Published by Global Legal Group, in association with CDR, with contributions from:

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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
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Printed by
Ashford Colour Press Ltd
June 2014

ISBN 978-1-910083-04-8
ISSN 1754-0097

Strategic Partners

MIX
Paper from responsible sources
FSC® C011748

General Chapters:

Country Question and Answer Chapters:

Chapter 26

Malta

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1 Issues Arising When a Company is in Financial Difficulties

1.1 How does a creditor take security over assets in Malta?

As a general principle of Maltese law, the assets of a debtor, present and future, constitute the common security for the satisfaction of all his creditors. The value of such security, however, depends on the consistency of a debtor's estate and whether it is sufficient to repay all creditors or otherwise. Of course, the creation of security interests becomes an important matter when creating rights of preference in favour of certain creditors over specific assets of a debtor.

The manner in which security interests are created depends principally on the nature of the asset over which such security is to be created, and whether the asset is a movable or an immovable asset.

In the case of movables (movables are defined in the Civil Code, Chapter 16 of the Laws of Malta), which include rights, debts (receivables), and other assets which are movable by their very nature, the security would take the form of a pledge, or in those cases covered by the financial collateral regulations, an assignment by way of collateral.

In the case of immovables or rights over immovable property, security is created by way of a notarial deed and can consist of a general hypothec, which is a charge over all assets, present and future, of a debtor, or a special hypothec which is a charge created over a specific immovable.

Another form of security that can exist over both movables and immovables is privilege – this can only be created in those instances where the law itself deems the situation of a creditor to deserve such protection, for instance the Maltese Civil Code creates a special privilege in favour of a seller over the thing sold for any part of the price which remains unpaid. If the asset is a movable, then there is no requirement for a notarial deed and registration whilst in the case of an immovable, it can only become validly enforceable if created by a notarial deed and duly registered in the appropriate public registry.

1.2 In what circumstances might transactions entered into whilst the company is in financial difficulties be vulnerable to attack?

Transactions entered into six months before the dissolution of a company are deemed to be a fraudulent preference under the Companies Act (Companies Act, Chapter 386 of the Laws of Malta) and are liable to be declared void if: (a) the transaction is of a gratuitous nature; or (b) the transaction is of an onerous nature – if it constitutes a transaction at an undervalue or if it gives a preference, unless the creditor can show that he did not know and had no reason to believe that the company was likely to be dissolved by reason of insolvency.

1.3 What are the liabilities of directors (in particular civil, criminal or disqualification) for continuing to trade whilst a company is in financial difficulties in Malta?

Directors are subject to obligations and duties stemming chiefly from the Companies Act. These rules are complemented by the provisions enshrined in the Civil Code pertaining to fiduciary duties and, in the case of public listed companies, the Listing Rules and the Code of Good Corporate Governance (the Code is not mandatory in application but rather sets out rules of best practice, and listed companies are to comply or explain their non-compliance in an annual report to shareholders).

Criminal Offences

Pursuant to the Companies Act, the directors of a company may be liable for certain conduct prior to, and in the course of, the winding up of the company. The Companies Act lists a number of offences (which are punishable by imprisonment, or a fine, or both) relating to, *inter alia*, the concealment or fraudulent removal of the company's property, the material omission of statements relating to the affairs of the company, and the obligation to keep proper accounts. In particular, directors may be liable for wrongful trading where a company has been dissolved and is insolvent and it appears that a person who was a director of the company knew, or ought to have known, prior to the dissolution of the company, that there was no reasonable prospect that the company could avoid dissolution due to insolvency. A director may also be liable for conduct during the course of winding up, that is, for fraudulent trading if it appears that any business of the company had been carried on with intent to defraud creditors of the company or creditors of any other person or for any fraudulent purpose.

Disqualification Orders

A director may be subject to a disqualification where he is found guilty of an offence under the Companies Act. However, disqualification orders may not be issued against directors for offences punishable with a fine.

Civil Liability

It is pertinent to note that the provisions of the Companies Act providing for the criminal liability of directors are without prejudice to any other offences or remedies under any other law. By way of example, directors may be liable for any ensuing damages from the breach of their fiduciary duties enshrined in the Civil Code.

2 Formal Procedures

2.1 What are the main types of formal procedures available for companies in financial difficulties in Malta?

Under Maltese corporate recovery law, there are two formal procedures available to companies experiencing financial difficulties:

(i) **The court-supervised "company recovery procedure"** (Companies Act, Chapter 386 of the Laws of Malta – section 329B): In brief, this is a court-supervised procedure whereby a company which is unable to pay its debts or is imminently likely to become unable to pay its debts is, upon application to court, placed under the company recovery procedure with a view to rehabilitating its business. Under this procedure, a special controller is appointed by the court to take over and manage the affairs of the company for an initial period of 12 months which may be extended.

The company recovery procedure is attractive to both creditors and shareholders primarily because it enables the implementation of a judicially sanctioned recovery plan against the vote of hold-out minorities. Moreover, throughout the period during which the company recovery procedure is in force, a moratorium with respect to the following actions comes into, and remains, in force until the termination of the procedure: (i) any new or pending winding up application is stayed; (ii) no resolution for the dissolution and consequential winding up of the company may be passed; (iii) the execution of monetary claims against the company are stayed; (iv) no landlord may terminate a lease for failure to comply with the terms of the tenancy; (v) no measures may be adopted to enforce security or to repurchase goods in possession of the company under a hire-purchase agreement; (vi) no executive or precautionary act or warrant may be made against the company; and (vii) no court proceedings can be instituted or continued against the company.

(ii) **The "compromise" or "arrangement" procedure** (Companies Act, Chapter 386 of the Laws of Malta – section 327 and section 329): Under this procedure, the court may sanction a proposed arrangement or compromise between a company and its creditors (or any class thereof), or between a company and its members (or any class thereof) which has been approved by a majority of three-quarters (¾) in value of creditors or members (or the separate classes thereof), as the case may be. The judicial sanction of a compromise or arrangement incentivises shareholders and/or creditors to give their vote of approval to the proposed arrangement or scheme. The "compromise" or "arrangement" procedure also follows the democratic majority-rule approach disallowing hold-out minorities to hinder the implementation of a recovery scheme. Typically, shareholders and creditors are hesitant to approve an agreement proposed by the company out of concern that their rights will be undermined and tend to prefer that the company enters into insolvency proceedings on the basis that they will emerge from such proceedings "in the money". The decision to opt-out of proposed restructuring arrangements is ordinarily adopted by senior lenders and secured creditors.

2.2 What are the tests for insolvency in Malta?

A company is deemed to be insolvent under Maltese company law if the company is unable to pay its debts.

Pursuant to the Companies Act, a company is deemed to be unable to pay its debts if: (a) a debt due by the company has remained unsatisfied in whole or in part after 24 weeks from the enforcement of an executive title against the company by an executive act; or (b) if it is proved to the satisfaction of the court that the company is unable to pay its debts, account being taken also of contingent and prospective liabilities of the company.

2.3 On what grounds can the company be placed into each procedure?

There are certain conditions which must be satisfied for a company to benefit from the company recovery procedure and the "compromise" or "arrangement" procedure, respectively.

Company Recovery Procedure

The company recovery procedure's availability is limited to companies which are "*unable or imminently likely to become unable to pay its debts*". The natural consequence of this requirement is that companies are unable to utilise this procedure to restructure their debt under the supervision of the court unless a company is insolvent or if it is amply clear that said company is on the brink of insolvency. Accordingly, the company recovery procedure cannot be availed of by companies to restructure their debt as a preventive measure at an earlier stage of the company's lifetime.

A company will only be placed under the company recovery procedure if the court believes that the procedure is likely to attain one of the following purposes: (i) the survival of the company as a viable going concern in part or in whole; or (ii) the sanctioning of a compromise or arrangement between the company and any of its creditors or members. Moreover, when making a company recovery order the court must give particular consideration to the best interests of the creditors, shareholders and of the company itself, as well as the possibility of safeguarding employment.

"Compromise" or "Arrangement"

The compromise or arrangement proposed must be between a company which is unable to pay its debts (and its creditors or members (or any class of them). Accordingly, the "compromise" or "arrangement" option is only available to insolvent companies (The "compromise" or "arrangement" procedure is also available in certain circumstances where the court is of the opinion that there are grounds of sufficient gravity which would have otherwise warranted its dissolution and consequential winding up). Pursuant to the Companies Act, an "arrangement" is defined as including "*a reorganisation of the company's share capital by the consolidation of shares of different classes or by the division of shares into shares of different classes, or by both of those methods*".

As outlined in question 2.1, the scheme must be approved by a majority of three-quarters (¾) in value of the creditors or members, as the case may be, of the distressed company.

2.4 Please describe briefly how the company is placed into each procedure.

An application for the company recovery procedure may be made by: (i) the company following an extraordinary resolution; (ii) the directors, following a decision of the board of directors; or (iii) the creditors of the company representing more than half in value of the company's creditors. The application must include specific information including the full facts, circumstances and reasons which led to the company's inability or imminent inability to pay its debts. It must also include a statement as to how the financial and economic situation of the company may be improved in the interests of creditors, employees and the company itself. After hearing the application, the court may either dismiss the application

or make a company recovery order within the time-limit set out by law, that is, within 20 days from the date of filing of the application.

The procedure for the sanctioning of the "compromise" or "arrangement" by the court would typically involve the following steps:

(i) an application is first made to the court by the company or any creditor or member requesting the court to convene a meeting of creditors or members (or the classes thereof), as the case may be (the application may be made by any member, creditor or the liquidator where the company is being wound up);

(ii) a meeting of creditors or members (or the classes thereof) (as convened by the court) is held for the approval of the proposed compromise or arrangement; and

(iii) an application is made to court to sanction the compromise or arrangement.

2.5 What notifications, meetings and publications are required after the company has been placed into each procedure?

No notifications, meetings or publications are required to be made with respect to interested parties under the company recovery procedure. At the termination of the company recovery order, the special controller's report indicating whether the company can continue as a going concern will be submitted by the Registrar of Courts to the Registrar of Companies in Malta for registration. However, the recovery plan drawn up by the special controller will not be delivered to the Registrar of Companies.

Where a meeting of creditors or members is convened in terms of the "compromise" or "arrangement" procedure, certain company law requirements must be adhered to by the company. In particular, every notice summoning the meeting of creditors or members must contain a statement explaining the effect of the compromise or arrangement and stating any material interests of the directors whether in their capacity as directors, members or creditors. It is in the discretion of the court to determine the manner in which members or creditors are summoned. Accordingly, the court may determine the time, place, and the period of notice required for the convening of a meeting of creditors or members and whether all interested parties are to be notified of the fact that the company is undergoing the procedure. Where a court order is given by the court under this procedure, such order will have no effect unless a certified copy of such order is registered with the Registrar of Companies in Malta. A copy of such order must also be annexed to the company's memorandum and articles of association of the company.

It is pertinent to note that no publications of the fact that the distressed company is entertaining the "compromise" or "arrangement" option or the company recovery procedure are made throughout the procedure.

Public Listed Companies

Where the company concerned is a company whose securities are listed on a regulated market in Malta, a company announcement should be made to the market in accordance with the Listing Rules stipulating that the company is insolvent and an application has been submitted in court to undergo the company recovery procedure or the "compromise" or "arrangement" option, as the case may be.

2.6 Are "pre-packaged" sales possible?

Pre-packs are not a technical term of art that has any significance in insolvency legislation and practice. However, what is typically considered as a "pre-pack" in UK corporate insolvency practice can possibly be implemented by judicial sanction under: (i) the company recovery procedure; or (ii) the "compromise" or "arrangement" process. There are advantages and disadvantages to the combination of pre-packs with either or both options. It is imperative that, when opting to implement either of the procedures with a pre-pack, the ultimate aim is to obtain judicial sanction within the least possible period of time with minimal court involvement.

Where a pre-pack is combined with the company recovery procedure, the company benefits from the moratorium (referred to in question 2.1). It is submitted that, on the basis of the availability of the moratorium, this is the preferred route for the success of a "pre-packaged" sale. On the other hand, the advantage of opting for the judicial sanction of a "pre-packaged" sale by virtue of the "compromise" or "arrangement" option is that the scheme documentation providing for the "pre-pack" may be enforced without the consent of all the creditors or shareholders, as the case may be, thus enabling the company to cram down on dissenting shareholders. Generally, the "compromise" or "arrangement" procedure involves more court involvement and, accordingly, may not be considered to be an expedited restructuring tool in the context of pre-packaged sales. As a general observation, the judicial sanction of pre-packed sales can be achieved in tighter time frames under the company recovery procedure rather than the "compromise" or "arrangement" option.

Notwithstanding the above, pre-packed sales are liable to attack under the company recovery procedure on the basis that they contradict one of the primary purposes of such procedure, that is, the survival of the company as a going concern. This is because "pre-packed" sales ordinarily concern the transfer of assets to a new company, leaving the transferring distressed company as an insolvent shell. It may be argued that it is survival of the business of the company which is to be preserved and this may be achieved by virtue of a pre-packaged sale. Although there is no jurisprudence to this effect, the fact that "pre-packed" sales may be attacked on such basis cannot be excluded.

3 Creditors

3.1 Are unsecured creditors free to enforce their rights in each procedure?

Under the company recovery procedure, unsecured creditors (and shareholders) are not free to enforce their rights against the company. Indeed, by virtue of the moratorium, a characteristic of the company recovery procedure: (i) new or pending winding up applications are stayed; and (ii) no resolution for the dissolution and consequential winding up of the company may be passed. The moratorium is in force during the period in which the company recovery procedure or until the application is dismissed.

Conversely, under the "compromise" or "arrangement" option, unsecured creditors may enforce their rights pending the court's approval or dismissal of the proposed scheme. Unlike the company recovery procedure, there is no stay on creditor actions under the "compromise" or "arrangement" option. In the event that a winding up application is filed in court against the company and a winding up order is made, the distressed company may no longer have the possibility to enter into the company recovery procedure. Once the "compromise" or "arrangement" is accepted by the court, it is binding on all shareholders or creditors and the company itself.

3.2 Can secured creditors enforce their security in each procedure?

Secured creditors are subject to the moratorium that would be in force under the company recovery procedure. In particular, throughout such procedure, no measures may be adopted to enforce security or to repurchase goods in possession of the company under a "hire-purchase" agreement. This is without prejudice to any other enforcement action which is prohibited from being instituted under the moratorium. The moratorium is in force during the period in which the company recovery procedure or until the application is dismissed.

Under the "compromise" or "arrangement" option, secured creditors may enforce their security against the company throughout the procedure. No stay on creditor actions against the company is envisaged under this option.

3.3 Can creditors set off sums owed by them to the company against amounts owed by the company to them in each procedure?

Creditors may exercise their right to set-off sums owed to them by the company against sums they owe to the company in each procedure. With particular reference to the company recovery procedure, the moratorium on creditor enforcement actions does not encompass a stay on set-off of mutual dealings. Contractual set-off and netting clauses endure the onset of insolvency and remain enforceable in accordance with their terms against the company.

4 Continuing the Business

4.1 Who controls the company in each procedure? In particular, please describe briefly the effect of the procedures on directors and shareholders.

When the company recovery procedure is in force, the management, control and administration of the company is placed in the hands of a special controller appointed by the court for a specified period. During such period as the special controller is in office, the powers of the company, its directors or its officers are suspended unless the consent of the special controller to exercise a general or particular power is obtained. In particular, the special controller has the power to remove directors of the company and to call meetings of members and creditors.

Under the "compromise" or the "arrangement" option, the board of directors continues to control the company and are not ousted from office on the commencement of such procedure. Within the ambit of their duties under this procedure, the directors must summon the meeting of creditors or members in the manner directed by the court and send any necessary notices or announcements to such shareholders or members on behalf of the company. Upon the order of the court to accept or dismiss the proposed scheme, the directors must file such order with the Registry of Companies.

4.2 How does the company finance these procedures?

There is no set way in which a company would finance these procedures, however expenses related to such procedures would normally be financed out of the assets of the company with creditor/court consent, where applicable.

4.3 What is the effect of each procedure on employees?

Pursuant to the Companies Act, the special controller appointed under the company recovery procedure may not terminate the employment of company employees without the prior authorisation of the court. Moreover, the termination of any contract of employment must be necessary, in the opinion of the special controller, for the continuation of the company as a viable concern. The court, when making an order under this procedure must take into account the possibility of safeguarding employment as appears to be reasonably and financially possible in the circumstances.

In terms of Maltese company recovery law, there are no particular effects on employees under the "compromise" or "arrangement" option. Nevertheless, the notice summoning the meeting of creditors/members for the approval of the scheme must include a statement on the effect of the compromise or arrangement. This should include any detrimental effects it may have on the rights of employees.

4.4 What effect does the commencement of any procedure have on contracts with the company and can the company terminate contracts during each procedure?

The commencement of the "compromise" or "arrangement" option does not have any effect on contracts with the company and the company may terminate contracts, where permissible, under the terms of the particular contract. Where the company recovery procedure is in force, claimants for debts due under a contract with the company may not institute any enforcement actions against the company. Moreover, the special controller may not engage the company into any commitment of more than six months in duration.

5 Claims

5.1 Broadly, how do creditors claim amounts owed to them in each procedure?

No special procedure under Maltese law is accorded to creditors where a formal company recovery procedure is underway. Creditors may file an application in court to obtain an executive title declaring the debt due. Alternatively, creditors who are present in Malta and whose debt is certain, liquidated and due and does not exceed the amount of EUR 23,293.73 may file a judicial letter in court. The latter procedure is a fast-track procedure which contemplates no active court involvement in rendering the claim an executive title.

The Code of Organisation and Civil Procedure (Chapter 12 of the Laws of Malta) provides an exhaustive list of executive titles. Creditors in possession of an executive title may enforce their debt without further recourse to the courts of Malta.

5.2 What is the ranking of claims in each procedure? In particular, do any specific types of claim have preferential status?

Both the company recovery procedure and the "compromise" or "arrangement" option do not lay down any specific hierarchical structure of creditors. In terms of the company recovery procedure the court must take into account the company's survival as a viable going concern together with the best interests of creditors, shareholders and employees, however, in no instance is there reference to the preferential status of creditors. The ranking of

creditors' claims is determined by the nature of the claim and any security which may have been taken to secure that claim – these are matters determined in line with the general civil law and the ranking of creditors.

5.3 Are tax liabilities incurred during each procedure?

The distressed company is not subject to any particular tax liability in terms the company recovery procedure or the "compromise" or "arrangement" option. Depending on the recovery plan or compromise or arrangement implemented, tax may be charged where the implementation of such plan, agreement or compromise involves the transfer of assets or the receipt of income.

6 Ending the Formal Procedure

6.1 What happens at the end of each procedure?

At the end of the company recovery procedure, the special controller will submit a written report to the court giving his opinion as to whether the company has a reasonable prospect of continuing as a viable going concern and will be able to pay its debts in the future. Where it is the opinion of the special controller that the company has a reasonable prospect of continuing as a viable going concern, it shall draw up a detailed recovery plan (the recovery plan must include proposals for the company to continue as a viable going concern, proposals in relation to financial resources, the retention of employees and the future management of the company and the manner in which the claims of creditors (in whole or in part) shall be paid). The court may either reject the recovery plan or approve it in whole or in part. Where accepted, the plan will be binding on all interested parties. Similarly, with respect to the "compromise" or "arrangement" option, compromises or arrangements which have been sanctioned by the courts are binding on shareholders or creditors and the company.

7 Restructuring

7.1 Is a formal procedure available to achieve a restructuring of the company's debts in Malta?

Companies which are insolvent may use the company recovery procedure or the "compromise" or "arrangement" option described above to restructure their debts.

7.2 If such a procedure is available, is a debt for equity swap possible and how are existing shareholders dealt with?

A debt for equity swap may be judicially sanctioned under the "compromise" or "arrangement" option. As a general observation, there are certain Maltese company law requirements to be taken into account for the implementation and enforceability of a debt for equity swap which, under Maltese law, is classified as an issue of shares for consideration in kind. Amongst other things, an expert report detailing the valuation of the company's debt must be drawn up and the necessary corporate resolutions, passed.

7.3 Can dissenting creditors be crammed down?

Minority hold-out creditors may be crammed down under the "compromise" or "arrangement" procedure. Where the court sanctions a compromise or arrangement which has been approved by a majority of three-quarters (¾) in value of creditors (or class thereof), the "compromise" or "arrangement" so sanctioned by the court will be binding on all creditors, irrespective of the vote of dissenting creditors. Likewise, the recovery plan approved by the court under the company recovery procedure is binding on all interested parties, including dissenting creditors. Although under both procedures, dissenting creditors may be crammed down, under the company recovery procedure, creditor actions are stayed throughout the duration of such procedure, whereas under the "compromise" or "arrangement" option, dissenting creditors may attempt to enforce their claims due to the lack of an imposition of a moratorium.

7.4 Is consent needed from other stakeholders for a restructuring?

A restructuring made under the company recovery procedure and the "compromise" or "arrangement" procedure may be brought by such persons and in the manner set out in question 2.3 above. The consent of any other stakeholders other than the persons mentioned therein is not required.

8 International

8.1 What would be the approach in Malta to recognising a procedure started in another jurisdiction?

Malta, as a Member State of the European Union, is subject to the provisions of Council Regulation (EC) No. 44/2001 on the jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (the "**Brussels Regulation**") as well as the provisions of Council Regulation (EC) No. 1346/2000 on insolvency proceedings (the "**Insolvency Regulation**"); these regulations are directly applicable to Maltese law. It is a moot point as to whether the recognition of company recovery proceedings commenced in another jurisdiction fall within the ambit of the Insolvency Regulation or the Brussels Regulation. The Insolvency Regulation provides for the automatic recognition of any judgment opening insolvency proceedings. From a strict reading of the Regulation, however, company recovery procedures do not fall within this provision of the Insolvency Regulation. Nevertheless, the Insolvency Regulation makes reference to the Brussels Regulation for the recognition of other foreign procedures. Pursuant to the Brussels Regulation, a court order given in a Member State will be recognised in other Member States without any special procedure being required. Accordingly, the typical procedure to be applied for the recognition of a court order issued by a court of an EU jurisdiction, is an application to the respective court in Malta requesting recognition of the foreign court order on the basis of the Brussels Regulation.

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