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EFFECTS OF THE STAY OF INDIVIDUAL ENFORCEMENT ACTIONS ON SECURED CREDITORS IN RESTRUCTURING PROCEEDINGS

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ABSTRACT

The stay of individual enforcement actions is one of the essential tools in the restructuring framework. However, the imposition of a stay affects numerous creditors, especially secured ones. Although the adoption of the Restructuring Directive (EU) 2019/1023 aimed to promote a rescue culture in Europe, policymakers also viewed its provisions through the prism of balancing the interests of debtors and creditors. This article compares the European Union and United States rescue frameworks, analysing whether the stay in these jurisdictions is *(i)* automatic or dependent on the court's discretion, *(ii)* temporary or lasting within the whole period of restructuring, *(iii)* encompassing all secured creditors or enabling certain categories to lift the stay, and *(iv)* protective of the collateral market value during the stay (i.e., value-neutral). As a central point in this article, the author concludes that Directive (EU) 2019/1023 prescribes a short period of stay (up to 4 months), and that this relatively short duration was intended by the EU policymaker to hedge against the risk of collateral depreciation for secured creditors. Other means to protect the collateral value, as it stands today, are not provided in the Restructuring Directive and are left to be introduced in the Member States' national laws. In contrast, Chapter 11 of the US Bankruptcy

Code prescribes a stay that lasts until the end of the reorganisation case, but establishes the mechanisms to protect the decreased collateral value (e.g., by providing additional security, cash payments to cover the drop in value, or elevating the amount of secured creditors' claim, uncovered by collateral, to the administrative expense, etc.).

KEYWORDS

Chapter 11, Restructuring Directive (EU), secured creditors, stay of individual enforcement actions.

INTRODUCTION

Restructuring proceedings are gaining momentum in Europe. On 20 June 2019, the Directive (EU) 2019/1023 on restructuring and insolvency (the "Restructuring Directive") was adopted, marking a turning point in the EU insolvency law. As emphasised in doctrine, compared with the United States, it has taken some time for the European paradigm of insolvency and restructuring procedures to accept that they should be a tool to facilitate a going-concern rehabilitation of the business and to grant the debtor a second chance for the benefit of value maximisation.[1] It is hard to disagree with this statement. Businesses that previously contributed to economic development by generating tax revenues and providing jobs should be assisted in their rescue during turbulent times, rather than left with no alternative but to be liquidated in winding-up proceedings. With this, social policy is pursued first, and the interests of stakeholders, such as employees and society as a whole, are prioritised. Viewed through a social lens, restructuring cannot be merely a different mechanism of debt collection.[2] If creditors are allowed to recover claims or seize assets essential to the carrying on of the company's business without any restraint, it would ultimately frustrate the overall socially desirable goal of rescue. Consequently, we have a stay or moratorium on actions by creditors to collect claims or repossess property that is in the ailing company's possession.[3] As the Restructuring Directive aims to enhance the efficiency of reorganisation proceedings,[4] the stay of individual enforcement actions, which prevents creditors from pursuing debts, is one of such efficiency tools.[5]

However, the Restructuring Directive establishes that a debtor's interests shall be balanced against the competing interests of its creditors.[6] Therefore, the position of all creditors, both unsecured and secured, must be taken into account. While restructuring proceedings might be beneficial for unsecured creditors because, once a debtor's business value is maximised, higher returns are expected for them, this principle does not apply to secured creditors by default. Compared to unsecured creditors, it is not the insolvency estate's value as a whole but rather the value of their collateral that is

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1 David Christoph Ehmke et al., "The European Union preventive restructuring framework: A hole in one?" *International Insolvency Review* 28 (2019): 185.

2 Jennifer L. L. Gant, "The role of social policy in corporate rescue and restructuring: a messy business": 481; in: Paul J. Omar and Jennifer L. L. Gant (eds.), *Research Handbook on Corporate Restructuring* (Cheltenham: Edward Elgar Publishing Limited, 2021).

3 Gerard McCormack, *Corporate Rescue Law – An Anglo-American Perspective* (Cheltenham: Edward Elgar Publishing Limited, 2008), 174.

4 *Directive (EU) 2019/1023 on restructuring and insolvency*, Official Journal of the European Union (2019, No. L 172, art. 1(1)(c).

5 Barry Cahir and Michael Quinn, "Procedural features," *INSOL Europe Report* (November 2020): 8, para. 4.

6 *Directive (EU) 2019/1023 on restructuring and insolvency*, *supra* note 4, rec. 35.

of concern for secured creditors in restructuring.[7] If the collateral value significantly decreases during the stay of individual enforcement actions, secured creditors may find themselves in a much worse position than they were prior to the opening of the restructuring proceedings. Secured creditors' interests should not remain unaddressed, as they often represent the largest group among all creditors.[8] Against this background, this article examines how the stay of individual enforcement actions (the "stay") may maintain the efficiency of restructuring proceedings whilst addressing secured creditors' concerns about collateral value, balancing both sides' interests.

The article comprises the following parts: first, it delves into the nature and the legal framework of the stay, analysing how it should contribute to the efficiency of the restructuring proceedings; second, it looks into the methods of preservation of the collateral value during the stay; and third, it analyses exceptions where secured creditors are excluded from the stay coverage. The primary focus of this research constitutes Chapter 11 of the United States Bankruptcy Code ("Chapter 11") and the European Union Restructuring Directive ("Restructuring Directive"). The article also examines provisions of the UNIDROIT Convention on International Interests in Mobile Equipment 2001 that exempt certain secured creditors from the scope of the stay, criticising this approach as inconsistent with the principle of effectiveness of the restructuring proceedings. In conclusion, the article lists the measures available to secured creditors during the stay to protect their interests in the US and EU jurisdictions.

1. NATURE AND LEGAL FRAMEWORK OF THE STAY

The stay, or in some jurisdictions, moratorium, is understood as a measure that prevents the execution against the assets of the insolvency estate and the transfer or other disposition of any assets or rights of the insolvency estate.[9] For the purposes of this article, this measure will be further referred to as the stay, since this term is used in both Chapter 11 and the Restructuring Directive. It is commonly accepted that the function of the stay is to provide a debtor with the necessary time to negotiate a restructuring plan. Therefore, this period is described as a "breathing space" for a debtor.[10] Assuming there is no stay, creditors may seize or otherwise immobilise assets that are useful or essential to the carrying on of the debtor's business, thereby jeopardising the prospects of a successful restructuring.[11] To preclude this, the stay freezes and maintains the *status quo* between the debtor and its creditors until the restructuring plan is finalised. From a broader perspective, once a debtor is allowed to retain assets during the stay, it may rely upon their use as part of corporate reorganisation measures. Despite the common purpose, other peculiarities of the stay under Chapter 11 and the Restructuring Directive differ. In this respect, the stay has the following parameters, which are

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7 Eilís Ferran, Elizabeth Howell and Felix Steffek, "Secured Debt": 378; in: Eilís Ferran, Elizabeth Howell and Felix Steffek, *Principles of Corporate Finance Law* (Oxford: Oxford University Press, 2023).

8 Bob Wessels and Stephan Madaus (eds.), "Rescue Plan Issues: Procedure and Structure; Distributional Issues": 295, para. 671; in: Bob Wessels and Stephan Madaus (eds.), *Rescue of Business in Europe: A European Law Institute Instrument* (Oxford: Oxford University Press, 2020).

9 *UNCITRAL Legislative Guide on Insolvency Law*, United Nations Publication (2005, No. E.05.V.10), 7.

10 Gerard McCormack, *The European Restructuring Directive* (Cheltenham: Edward Elgar Publishing Limited, 2021), 109; *Directive (EU) 2019/1023 on restructuring and insolvency*, *supra* note 4, art. 6(1); In *Re Inwood, US Court of Appeals for the Fifth Circuit* (1987, No. 808 F.2d 363); *On preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU*. European Commission, 2016, Working Paper SWD (2016) 357 final, para. 2.3.1 sec. A2.

11 Gerard McCormack, *supra* note 10, 110.

distinct under the US and EU frameworks, namely: *(i)* the moment of imposition, *(ii)* the scope of creditors it covers, and *(iii)* the duration, as will be demonstrated further.

Since the stay is understood generally as an intrinsic feature of the US reorganisation proceedings,[12] we initially examine the Chapter 11 framework, and then turn to the Restructuring Directive. Under Section 362 of Chapter 11, the stay commences at the time of filing for the opening of the restructuring proceedings and lasts until the proceedings are closed, dismissed, or a discharge is granted or denied. Since the stay takes effect by operation of law, the stay under Chapter 11 is called automatic.[13] In the words of the US Supreme Court,

> The automatic stay serves the debtor's interests by protecting the estate from dismemberment, and it also benefits creditors as a group by preventing individual creditors from pursuing their own interests to the detriment of the others.[14]

As the US commentators note, the stay prevents the "race to the courthouse" among creditors.[15] To elaborate on this point, aware of financial difficulties, creditors may accelerate enforcement efforts, resulting in the following consequences: *(i)* stripping a debtor of necessary assets for the prospective rescue, and *(ii)* leaving unsecured creditors without any means to satisfy their claims. To preclude this, the stay preserves the value as it stands, and once preserved, the restructuring proceedings seek to maximise the estate's going-concern value.[16]

By contrast, Article 6(1) of the Restructuring Directive does not entrench an automatic stay. It stipulates that judicial or administrative authorities may refuse to grant a stay of individual enforcement actions if it is not necessary or would not support negotiations for a restructuring plan. In this way, the Restructuring Directive places a burden on a debtor to demonstrate that creditors may pursue enforcement if a stay is not imposed. Section 362 of Chapter 11 presumes that it will actually be the case and, therefore, a debtor shall be entitled to the automatic stay by operation of law.[17]

Article 6(1) of the Restructuring Directive employs the phrase "may" and not "shall", which means that it is to each Member State's discretion to decide whether the stay is automatically applied. We analysed available reports on EU Member States, prepared within the "INSOL Europe/LexisPSL joint project on the implementation analysis of the Directive (EU) 2019/1023 in the EU Member States", to determine whether the imposition of an automatic stay is common across European Union jurisdictions. The reports have been presented in the form of a questionnaire, and our focus constituted Question 6, phrased as "*Is there any moratorium on claims to protect the debtor during the process?*"[18] We analysed whether each jurisdiction has at least one restructuring framework proceeding with an available automatic stay, based on the respondents' answers. Where the reports do not address whether the stay is imposed automatically

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12 Gerard McCormack, *supra* note 3, 79.
13 Nicolaes Tollenaar, *Pre-insolvency proceedings: a normative foundation and framework* (Oxford: Oxford University Press, 2019), 118.
14 *Chicago, Illinois v. Fulton et al., Supreme Court of the United States* (2021, No. 592 U.S. 154), 157.
15 John D. Ayer, Michael Bernstein and Jonathan Friedland, "An Overview of the Automatic Stay," *American Bankruptcy Institute Journal* 23 (2004): 1.
16 Ibid.
17 As an example of where creditors may wish to cooperate with a debtor, even without the imposition of a stay, is the internal financing within the corporate group. A subsidiary could be willing to assist its parent company (and vice versa) in a restructuring effort, resulting in the redundancy of the stay.
18 Links to the reports are listed and were accessed via: INSOL Europe, "INSOL Europe/Lexis+ UK Joint Project on EU Harmonisation Directive 2019/1023," *Consolidated Table* (March 2024).

or do not cover a particular jurisdiction, the other sources were analysed.[19] Results demonstrate that there is no uniform approach among EU Member States on whether the imposition of an automatic stay shall be deemed a necessary tool for efficient restructuring:

Table 1. Overview of automatic stay in the EU

Automatic stay	Countries	Overall number
Yes	Belgium, Croatia, Cyprus, Estonia, Finland, France, Greece, Ireland, Latvia, Lithuania, Malta, Poland, Portugal, Romania, Slovenia, Spain, Sweden	17
No	Austria, Bulgaria, the Czech Republic, Denmark, Germany, Luxembourg, the Netherlands, Hungary, Italy, Slovakia	10

In light of these divergent results, we purport to raise and delve into the question of how exactly the absence of an automatic stay endangers the efficiency of the restructuring proceedings (if it endangers at all). In this regard, the author examines the doctrinal perspective.[20] According to the scholarship, there are two core reasons, in a nutshell, for the automatic stay. First, creditors, who are aware of the financial difficulties of the debtor, may decide not to await the restructuring plan but rather take individual enforcement measures, leading to the diminution or dissipation of the assets of the estate.[21] Most likely, once in the knowledge of the ongoing restructuring efforts, the creditors would be willing to take assets or satisfy claims urgently, until it is not too late and the stay is granted. For example, the lack of access to information about a debtor's actual financial situation[22] may lead to pessimistic speculation about its viability among creditors and also prompt subsequent enforcement efforts. An automatic stay may prevent "anxious moves" of creditors toward enforcement.[23] Second, the stay enables

[19] Bob Wessels and Stephan Madaus (eds.), "Rescue of Business in Insolvency Law," *European Law Institute Report* (Vienna: 2017), 223; *Reorganisation Act of the Republic of Estonia*, Riigikogu (2008, No. RT I 2008, art. 11); *Restructuring of Enterprises Act of the Republic of Finland*, Ministry of Justice, (1993, No. 47/1993, sec. 19(1); Clifford, "Judicial reorganisation proceedings, version 2.0: Belgium finally implements the European Restructuring Directive," (July 2023) // https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2023/07/Judicial-reorganisation-proceedings-version-2.0-belgium-finally-implements-the-European-restructuring-directive.pdf; DLA Piper, "Non-insolvency procedures," *DLA Piper Real World* (March 2026) // https://www.dlapiperrealworld.com/law/index.html?t=finance&s=borrower-insolvency-enforcement&q=non-insolvency-procedures&c=PL; Legal 500, "Restructuring & Insolvency: Cyprus," (2024) // https://www.agplaw.com/wp-content/uploads/2024/01/AGPLAW-Legal-500-Cyprus-Comparative-Guide-Restructuring-and-Insolvency-2024.pdf; Mondaq, "Restructuring & Insolvency: Luxembourg," (2025) // https://www.mondaq.com/guides/results/13/1125/all/luxembourg-restructuring-insolvency; Refining Finance, "Chapter 15 in combination with a Swedish business reorganisation: a powerful alternative to Chapter 11," (April 2025) // https://refisthlm.se/news/chapter-15-in-combination-with-a-swedish-business-reorganisation-a-powerful-alternative-to-chapter-11/.

[20] Another important point to explore regarding the necessity of the automatic stay introduction under the EU framework is a statistical one, namely: (*i*) how often the debtors request the stay while filing for restructuring, (*ii*) how often the courts, in jurisdictions with a declaratory stay, grant or refuse the stay application, and (*iii*) whether companies that are not granted the stay are more likely, statistically, to enter liquidation. The author considers examining this empirical point in future research.

[21] John Francis Murphy, "The Automatic Stay in Bankruptcy," *Cleveland State Law Review* 34 (1985–1986): 568.

[22] Felix Steffek, *Gläubigerschutz in der Kapitalgesellschaft: Krise und Insolvenz im englischen und deutschen Gesellschafts- und Insolvenzrecht (Creditor protection in limited liability companies: crisis and insolvency in English and German corporate insolvency law)* (Tübingen: Mohr Siebeck, 2011), 26: "In certain circumstances, such as after the company has become overindebted, managers and shareholders may be tempted, due to their diverging interests, to provide misleading information about the company's liquidity prospects or to fail to clarify corresponding misconceptions on the part of creditors."

[23] The author would like to note that US commercial law empowers a secured creditor to insert a "deems insecure" provision into its contract, authorising a creditor to accelerate the maturity of the entire debt and foreclose on collateral should it doubt a debtor's ability to repay in the future. In this situation, the extent of diminution or dissipation of the estate's assets will largely depend on who makes the first move:

the debtor to avoid the multiplicity of claims arising against him in different forums.[24] It is especially acute in the context of restructuring frameworks, which can operate as out-of-insolvency proceedings and may, hence, not trigger a one-forum venue for creditors' claims in the particular court that opened such proceedings.

The doctrine also contains opposing views regarding the necessity of the automatic stay. It is argued that the announcement of a stay may lead to unwanted publicity about the business's precarious financial position, which the company may wish to avoid.[25] As two German commentators emphasise,

> [g]iven that every party affected by the stay needs to be informed, a stay applicable to (almost) all business parties, such as suppliers, can cause quite a turmoil and rather worsen than improve the debtor's situation so that absence of an automatic stay and the flexibility to target only specific creditors can be considered a strength of the restructuring procedure.[26]

In this way, the moment of imposition and scope of the stay are intertwined. The INSOL Europe is also of the view that the discretionary limited stay permits targeting and informing only those creditors that will be affected by the restructuring plan; therefore, the INSOL Europe considers a non-automatic, limited stay as an advisable standard for policymakers ("a rule of thumb").[27] To compare, while under Article 6(3) of the Restructuring Directive, the Member State may choose whether to opt for either general, covering all creditors, or limited, covering one or more individual creditors or categories of creditors, Chapter 11 of the US Bankruptcy Code establishes a broader scope of stay, framing it as general.[28]

To summarise this part, the stay under Chapter 11 and the Restructuring Directive differ in both the moment of the imposition as well as the scope of creditors they cover. In contrast to the EU, the stay in the US reorganisation proceedings is imposed automatically from the moment a debtor requests the opening of the Chapter 11 case. In the EU, this is not harmonised, and Member States are allowed to leave the imposition of the stay as subject to the court's discretion. What also is not harmonised in the EU is the scope of creditors that the stay covers: the Member States are permitted to opt for either the general or limited stay, whilst the stay under Chapter 11 operates as general. In this respect, what can be mentioned is that the Restructuring Directive requires the Member States to afford the debtors with a stay under their legislative frameworks, but

either a creditor invoking the "deems insecure" clause or a debtor filing for Chapter 11 to trigger the stay. One may also consider that such acceleration clauses can appear in contracts other than governed by the US commercial law, since the "deemed insecure" provision is, in essence, the creature of contract law rather than of a statutory law of a particular jurisdiction. However, please note that if the only reason for filing Chapter 11 on behalf of a debtor is to trigger the stay or to protect the pledged assets, this will be deemed a bad-faith filing. See more in this respect: Darlene M. Nowak, "Standards for Insecurity Acceleration Under Section 1-208 of the Uniform Commercial Code: A Proposal for Reform," *University of Michigan Journal of Law Reform* 13 (1980): 623; Eric M. Sherman, "Chasing Perfection: Collateral Indications and Ambiguous Debtor Names on Financing Statements Under Article 9," *Boston College Law Review* 61 (2020): 2230; Antonio Sciarrotta, "Section 1112(b) of the Bankruptcy Code Allows a Bankruptcy Court to Dismiss a Case Filed in Bad Faith," *American Bankruptcy Institute Law Review XIII*, no. 18 (2021): 6-7.

24 John Francis Murphy, *supra* note 21, 568.

25 Jennifer Payne, "An Assessment of the UK Restructuring Moratorium," *Lloyd's Maritime and Commercial Law Quarterly* (2021): 464.

26 Stephan Madaus and David Ehmke, "Germany," in J. M. G. J. Boon, H. Koster and R.D. Vriesendorp (eds.), *Implementation of the EU Preventive Restructuring Directive, Part I* (Den Haag: Eleven, 2023), 77.

27 Ben Schuijling, "Stay of individual enforcement actions," *INSOL Europe Report* (April 2020): 9, 11, paras 4–5, 12. Nonetheless, the INSOL Europe, in para. 5, also warns that the "limited stay may provoke the affected creditor to sidestep the stay, for example, through a transfer of its affected claim to a third party."

28 Nicolaes Tollenaar, *supra* note 13, 118.

largely leaves it up to the national legislators to determine how the stay would operate in practice.

Another difference between Chapter 11 and the Restructuring Directive is the duration of stay. While the automatic stay remains in effect until the Chapter 11 case ends[29], Article 6(6) and Article 6(8) of the Restructuring Directive provide that the initial duration of stay shall not exceed four months, and that the total duration of stay, including extensions and renewals, shall not exceed twelve months. Subsequently, the EU stay is of a limited duration, so the US scenario, where the stay may last several years[30] seems infeasible in Europe. The question of whether this deliberate choice of the EU legislator was specifically made in view of secured creditors' interests is addressed in the second part of this article.

2. PROTECTION OF THE COLLATERAL VALUE DURING THE STAY

The EU policymaker characterises rights *in rem* as particularly significant rights and of considerable importance for the granting of credit.[31] However, an assessment of the mechanisms available to secured creditors to protect their rights would first require an analysis of the nature of the secured credit and the interests of secured creditors that might be adversely affected by the imposition of a stay. The doctrine defines a proprietary (*in rem*) right as a right over an asset, which is intended to secure payment of a debt. Such an asset is termed an encumbered asset, and a creditor who has acquired and holds a proprietary security right is termed a secured creditor.[32] Usually, after insolvency proceedings are opened, the proprietor of a right *in rem* continues to assert its right to segregation or to a separate settlement of the collateral security.[33] Following this, the question the author would like to consider at first, from the policy perspective, is why proceeds from the sale of an encumbered asset are not distributed among all creditors on a *pari passu* basis, but are instead reserved to satisfy a secured creditor's claim.[34] Analysing this point would further clarify the rationale for protecting the value of secured creditors' collateral during the stay in restructuring proceedings. The author identified the next three hypotheses to be assessed behind the assumingly strong position of secured creditors in restructuring and insolvency proceedings: *(i)* counterbalancing of the low interest rate gain, implied in a secured debt; *(ii)* stimulation of the loan granting on terms of security; and *(iii)* preservation of the pre-insolvency position.

First, in a perfect market, secured creditors may be willing to lend at lower interest rates, whereas unsecured creditors may, conversely, demand higher interest rates.[35] Though in a different context than insolvency, the UK court observed that a reasonable commercial party, "*would naturally want to secure the best possible deal and leap on any opportunity to drive the price down*."[36] Collateral, in this paradigm, is viewed as the tool to push the "price" of a loan down. Nevertheless, an opposing view in doctrine is also present, with some authors arguing that the request to provide collateral, for example, for SMEs, may rest solely on the higher risk of default rather than

29 Ibid., 119.
30 Ibid., 150.
31 *Regulation (EU) 2015/848 on insolvency proceedings (recast)*, *Official Journal of the European Union*, 2015, no. L 141, rec. 68.
32 Teemu Juutilainen, *Secured Credit in Europe: From Conflicts to Compatibility* (Oxford: Hart Publ., 2018, 1).
33 *Regulation (EU) 2015/848 on insolvency proceedings (recast)*, *supra* note 31, rec. 68.
34 Teemu Juutilainen, *supra* note 32, 1.
35 Eilís Ferran et al., *supra* note 7, 379.
36 Veranova Bidco LP v. Johnson Matthey PLC et al., *High Court of Justice of England and Wales* (No. [2026] EWHC 1021 (Comm), para. 90).

decreasing the interest rate.[37] This point can be supported by the empirical research, according to which the most common collateral providers are found among SMEs, not large corporates.[38] Another empirical research, which was particularly focused on the relation between collateral and interest rate, concluded that,

> [f]irms that pay higher interest rates also pledge more collateral, but pledging more collateral is not associated with higher rates. This <...> suggests that the use of collateral might be driven by a variety of mechanisms related to its role as an enforcing, incentivizing, or screening device.[39]

Overall, there can be a number of reasons for requesting collateral, which should not be limited to the interest rate only, and may be associated with a higher risk of default, driven by: *(i)* the company's size, *(ii)* the company's involvement in risky commercial ventures, *(iii)* the larger amount of debt,[40] *(iv)* the longer repayment period, etc. Since not only the negotiated interest rate amount, but also other considerations may motivate a financier to request collateral, we should consider other alternative hypotheses.

Second, separating collateral from the overall insolvency estate might encourage potential lenders to require security when dealing with borrowers, rather than relying on their precarious liquid assets. We note in this respect the motivational part of the *Bäck v. Finland* case, examined by the European Court of Human Rights ("ECHR"). In this case, the applicant argued that his property rights were breached, given that his claim was satisfied in the insolvency proceedings to a significantly lesser extent than the borrowed amount. In the counterargument, the Finnish Government relied on the unsecured creditor's status of Mr Bäck.[41] The ECHR's position could significantly affect the legislative frameworks among Member States of the Council of Europe, triggering the intervening submissions on behalf of several governments. In the submission of the United Kingdom, for example, its representatives stated that

> creditors such as the applicant could protect their position by not dealing with a particular debtor; by inquiring into the debtor's financial position; by asking for a security; by taking out an insurance policy; or by obtaining a guarantee from a third party. At any rate, creditors were presumed to be acting in the knowledge of insolvency law and its consequences.[42]

In other words, by requiring security, a creditor acts responsibly and mitigates future commercial risks. However, in our view, it still does not fully explain the rationale behind the entitlement of secured creditors to collateral in restructuring and insolvency proceedings. Policymakers could have argued that their collateral must be auctioned and its proceeds distributed on a *pari passu* basis, since a creditor could have opted for other, more reliable means of securing a debt, such as insurance or a guarantee. Another counterargument that policymakers could employ (analogous to what, actually,

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[37] Eilís Ferran et al., *supra* note 7, 381; Teemu Juutilainen, *supra* note 36, 1.
[38] John Armour, *Should We Redistribute in Insolvency?* (Centre for Business Research Working Paper No. 319, University of Cambridge, March 2006), 16.
[39] Andrea Bellucci, Alexander Borisov, Germana Giombini and Alberto Zazzaro, "Estimating the Relationship between Collateral and Interest Rate: A Comparison of Methods," *Finance Research Letters* 43 (2021): 5.
[40] Saul Levmore and Hideki Kanda, "Explaining Creditor Priorities," *Virginia Law Review* 80 (1994): 2108.
[41] *Bäck v. Finland*, European Court of Human Rights (2004, No. 37598/97, para. 51).
[42] Ibid., para. 36.

the ECHR itself did in *Bäck*) is that once a creditor enters into a loan relationship, it accepts the commercial risk of financial loss.[43]

It seems that the most appropriate answer to the question at hand lies in the need to preserve, to the greatest extent possible, creditors' pre-insolvency positions. Once the restructuring proceedings are opened, the pre-insolvency entitlement should still be upheld.[44] Secured creditors, unlike those whose claims were not backed by collateral, could have already swiftly enforced their claims (under the caveat that the debtor defaulted).[45] In contrast, unsecured creditors could not enforce their claims in full even prior to the stay, due to insufficient uncollateralised assets available to the debtor. Against this economic backdrop, this would be unfair to prejudice secured creditors' commercial expectations and deprive a secured creditor of its entitlement to collateral.

However, if such importance is ascribed to collateral, why should it remain together with a debtor in restructuring proceedings instead of being enforced immediately by a secured creditor? This point has been addressed in the US case law (e.g., *In re Heritage*, *Gold Star* cases). The US courts note that reorganisation must allow a debtor to retain and use collateral to generate income to make payments to creditors.[46] In other words, keeping collateral outside the restructuring proceeding would disable their expected outcome - maximisation of the business's value. For further analysis, we treat the principle of safeguarding pre-insolvency entitlements as a starting point.

Assumingly, the stay favours mainly unsecured creditors, given that the core interest of this group of creditors may constitute the increased value of the estate as a whole (surplus), distributed among them on a *pari passu* basis later.[47] Through this prism, not only is the pre-insolvency entitlement of unsecured creditors preserved, but their position is improved to some extent. But while the firm's value goes up, there is no guarantee that the collateral value will not go down or, at least, remain flat. The prejudicial effect the stay poses on a secured creditor is that it may recover substantially less than it was entitled to before the stay. Subsequently, it is unsecured creditors who might be more interested in remaining informed about a debtor's managerial decisions, their reasonableness, financial statements, and improvements in financial performance, as all of this has direct implications for the business's value maximisation. In contrast, secured creditors have only one primary interest in restructuring proceedings: the fate of the collateral securing their debt, rather than the fate of the debtor itself.

Although secured creditors may be affected by the stay imposed in liquidation proceedings as well, it is considered that restructuring proceedings last longer[48] and, consequently, lead to uncertainty and even detriment for secured creditors. The author would like to exemplify this point. The duration of the stay may especially harm the financial collateral. Financial instruments, forming this type of security, are highly volatile.[49] Furthermore, if a distressed debtor used the equity to secure obligations, the

[43] Ibid., para. 62.
[44] Gerard McCormack, *supra* note 3, 175.
[45] To the contrary, if a debtor is not in default, a secured creditor is not in a position to accelerate the debt maturity unless the "deems insecure" or a similar acceleration clause is inserted in the contract. Consequently, it is the initiation of the insolvency proceedings that triggers the ability of the secured creditor to proceed against collateral.
[46] *In re Heritage Highgate, Inc.*, US Court of Appeals for the Third Circuit (2012, No. 679 F.3d 132); Gold Star Constr., *Inc. v. Cavu/Rock Props. Project I, LLC.*, US Court of Appeals for the Fifth Circuit (2016, No. 637 F. App'x 123).
[47] David Christoph Ehmke et al., *supra* note 1, 185.
[48] Bridgewood, "How Long Does the Insolvency Process Take?" (September 2023) // https://bridgewood.co.uk/how-long-does-the-insolvency-process-take-a-guide-for-company-directors/
[49] On factors behind the volatility, see Roni Bhowmik and Shouyang Wang, "Stock Market Volatility and Return Analysis: A Systematic Literature Review," *Entropy* 22 (2020): 1–2.

price of its shares may decline drastically due to the company's unstable financial position and, subsequently, lower demand for its shares on the stock exchange, depending on how the market participants predict the company's recovery. Volatility and even greater unpredictability considerations also apply to digital assets, which are becoming more and more usable as a means to secure a debt.[50] Other types of assets that secure the debt may also drop in value during the stay because of amortisation, unexpected market crises, etc.

Devalued collateral would not only be against the preservation of the pre-insolvency entitlement principle, but also against the best-interest-of-creditors test, applicable on an equal footing in both the US and EU insolvency frameworks. The essence of this test is that a creditor's position in restructuring shall not be worse than it could be in liquidation proceedings.[51] Therefore, legislators have to come up with the instruments to protect secured creditors' interests in restructuring proceedings. Below, we address the mechanisms for preserving collateral value during the stay by first analysing relevant provisions of Chapter 11 and then turning to the Restructuring Directive's provisions.

Section 361 of Chapter 11 establishes the institute of adequate protection specifically for secured creditors. Its mechanism can be invoked when the value of the asset that secured creditors hold an interest in decreases due to the automatic stay provision.[52] Thereby, secured creditors are grouped into two categories: undersecured, whose collateral diminishes in value during the stay, and oversecured, protected by means of a surplus in property, forming the difference between the collateral value and the amount of a creditor's claim. In other words, undersecured creditors are those whose security is worth less than the value of their debt.[53] The US judicial practice places the burden upon an applicant to demonstrate their undersecured status.[54] Upon establishment of this status, an adequate protection might be granted by a court to an undersecured creditor through three means: (1) requiring to make a cash payment or periodic cash payments to the extent that the stay results in a decrease in the value of its collateral; (2) providing an additional or replacement lien to the extent that the stay results in a decrease in the value of its collateral; or (3) granting such other relief, other than entitling the creditor to compensation as an administrative expense, as will result in the obtainance by him of the indubitable equivalent of a decrease in the value of its collateral, as per Section 361. One of the examples of the "other relief" is the guarantee given by a third party. In contrast, elevating a claim to administrative expense status means that it will rank before the unsecured creditors, but after secured creditors, at the plan confirmation stage. Therefore, the US law excludes such an option as too uncertain to be meaningful.[55] Nonetheless, Section 507(b) of Chapter 11 authorises the allowance of an administrative expense claim when the adequate protection provided

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50 Matthias Haentjens and Matthias Lehmann, "The law governing secured transactions in digital assets": 456; in: Andrea Bonomi and Shaheeza Lalani (eds.), *International and Comparative Business Law and Public Policy* (Leiden: Brill, 2023).

51 Jonathan Hicks, "Foxes guarding the henhouse: the modern best interests of creditors test in Chapter 11 reorganizations," *Nevada Law Journal* 5 (2005): 831; José Garrido, Chanda DeLong, Amira Rasekh and Anjum Rosha, "Restructuring and Insolvency in Europe: Policy Options in the Implementation of the EU Directive," *International Monetary Fund Working Paper* (May 2021): 21.

52 Claudia A. Restrepo, "A Pro Debtor and Majority Approach to the Automatic Stay Provision of the Bankruptcy Code – In re Cowen Incorrectly Decided," *Boston College Law Review* 59 (2018): 551.

53 *Vanston Bondholders Protective Committee v. Green*, Supreme Court of the United States (1946, No. 329 U.S. 156).

54 *United Timbers Association of Texas v. Timbers of Inwood Forest Associates Lt*d, Supreme Court of the United States (1988, No. 484 U.S. 365).

55 Gerard McCormack, *supra* note 3, 166.

to a secured creditor fails.[56] To this end, administrative expense relief might be available if an adequate protection mechanism fell short of preserving the collateral value, so a secured creditor may compensate for the decreased value by elevating its claim in this amount above those of other unsecured creditors. In conjunction, these two reliefs (adequate protection and administrative expense) frame the stay for secured creditors as value-neutral in relation to collateral.

In a nutshell, adequate protection provides an undersecured creditor with the substitution of its diminished value. Interestingly, one commentator observes the position of oversecured creditors as a significantly weaker one in comparison with undersecured creditors:

> Our vigilant creditor was punished for his vigilance by being forced to devour his own collateral. On the other hand, his brother - a prodigal son who had allowed his collateral to shrink to the amount of the debt - was entitled to new security as adequate protection.[57]

However, we would note that oversecured creditors are entitled to another incentive: payment of interest from the security surplus.[58] In contrast, the US judicial practice establishes that it would be unfair to allow an undersecured creditor to recover interest from the estate before unsecured creditors have recovered any principal.[59]

For the sake of objectivity, the flip side of the coin should be mentioned regarding the effect that the secured creditors' protection under Chapter 11 may play on the position of unsecured creditors and the debtor itself. An elaborate mechanism for protecting the interests of undersecured creditors by means of adequate protection or administrative claim, as well as payment of interest from the security surplus to oversecured creditors, risks depriving unsecured creditors of a substantial insolvency estate amount. In other words, this may limit the means of satisfying the unsecured claims. In these circumstances, the unsecured creditors' position appears precarious since they are not entitled to any similar protection.[60]

On top of that, in many cases, once a debtor files to open the restructuring proceedings, the vast majority of its assets are already encumbered in favour of numerous secured creditors.[61] Simply put, to the largest extent (if not all), assets of a debtor are already under the security package.[62] How should adequate protection be given in this case? If there is no means to guarantee adequate protection, Section 361 of Chapter 11 entitles a secured creditor to request a bankruptcy court to grant relief from the stay. Or, even more, the existence of only pledged assets on the debtor's side (which implies that secured creditors, as a group, would largely have no estate to be granted

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56 Julia A. Goatley, "Adequate Protection and Administrative Expense: Toward a Uniform System for Awarding Superpriorities," *Michigan Law Review* 88 (1990): 2170.
57 James J. White, "Death and Resurrection of Secured Credit," *ABI Law Review* 12 (2004): 146.
58 Gerard McCormack, *supra* note 3, 80.
59 *Vanston Bondholders Protective Committee v. Green*, *supra* note 53.
60 However, should no equity exist in the bankruptcy estate to favour unsecured creditors, the reorganisation case will be barred from commencement: "*a factor indicative of a bad faith filing is that the debtor has few or no unsecured creditors who would benefit from equity in the property*", see in Antonio Sciarrotta, *supra* note 23, 5.
61 Vincent Van Hoof, "Taming the Secured Creditors: Restraints and Protection during the Pre Insolvency Stay": 164; in: Jennifer L. L. Gant (ed.), *Harmonisation of Insolvency and Restructuring Laws in the EU* (Nottingham: INSOL Europe, 2020).
62 Sarah Paterson, "Finding our way: secured transactions and corporate bankruptcy law and policy in America and England," *Journal of Corporate Law Studies* 18 (2018): 249.

adequate protection from) may indicate the bad-faith filing[63], so the case will be barred from reorganisation but rather be deemed appropriate for liquidation under Chapter 7.

Now, we turn to the analysis of the Restructuring Directive's provisions. How did the EU legislator take into cognisance the problem surrounding the impact of the stay upon collateral value? At first glance, the answer may seem to be that this issue remains omitted on the EU level. Recital 37 of the Directive expressly states that its scope does not cover provisions on compensation or guarantees for creditors whose collateral is likely to decrease in value during the stay. Does it mean that, as it stands today, the protection of secured creditors' interests is largely unaddressed in the EU restructuring law? We would argue that, in framing the provisions on stay in the Restructuring Directive, the legislator took into cognisance the interests of secured creditors by capping the overall duration of the stay and making its length predictable. According to Article 6(6) of the Restructuring Directive, the initial duration of a stay shall be limited to a maximum period of no more than four months. Our statement that the EU policymaker addressed the interests of secured creditors by putting a cap on the duration of stay is based on the *travaux préparatoires* of the Restructuring Directive. For instance, the Commission Recommendation C(2014) 1500 stipulates in its paragraph 13:

> the duration of the stay should strike a fair balance between the interests of the debtor and of creditors, and in particular secured creditors. The duration of the stay should therefore be determined on the basis of the complexity of the anticipated restructuring, and should not exceed 4 months.[64]

It is interesting that the Restructuring Directive echoes this paragraph in its current Recital 35; however, the Directive slightly paraphrases it, stating that the stay should serve the interests of the debtor and all its creditors, without placing emphasis on any particular creditor group. Another preparatory treatise, Commission Staff Working Document 2016/0359 (COD), goes further and reveals that stakeholders in the financial sector raised the duration of stay as a factor affecting their interests.[65] Overall, from the Restructuring Directive's preparatory work, it follows that a four-month stay limit is set out with a view to the detriment the longer duration may cause to secured creditors.

What deserves analysis is Article 6(9)(c) of the Restructuring Directive, which determines that Member States shall provide in their national laws that judicial or administrative authorities could lift the stay if its imposition imposes an unfair prejudice upon a creditor. The notion of "unfair prejudice" under Article 6(9) of the Restructuring Directive can be, actually, associated with the drop in collateral value, given the following explanation contained in Recital 37,

> a single creditor or a class of creditors would be unfairly prejudiced by the stay if, for example, their claims would be made substantially worse off as a result of the stay than if the stay did not apply".

Recital 34 of the Restructuring Directive goes even further, stipulating that for a secured creditor, the "*stay [c]ould cause unfair prejudice, such as by way of an uncompensated loss or depreciation of collateral*." What it means is that secured creditors' protection is limited on the EU level only to lifting the stay as a relief, and other

[63] Antonio Sciarrotta, *supra* note 23, 7–8.
[64] *On a new approach to business failure and insolvency*, European Commission, 2014, Recommendation No. 2014/135/EU.
[65] Working Paper SWD(2016) 357 final, *supra* note 10, para. 2.3.1 sec. A2.

mechanisms of secured creditors' protection may not appear in the Member States' restructuring frameworks unless their national legislators wish so.

However, the "unfair prejudice" notion appears rather vague in terms of protecting the secured creditors' interests because: *(i)* it is self-intuitive to assume that it covers secured creditors whose collateral is seized in perishable goods or similar assets (coal, fuel, etc.), but it is not clear what other secured creditors are covered by its scope; *(ii)* it is unclear when the worse off is substantial and when it is not substantial enough to request the relief; and *(iii)* the "unfair prejudice" definition is not provided in Article 2 but rather emanates from Recitals 34, 36, and 37 of the Restructuring Directive, which are important but not binding for the interpretation of the provisions of the Restructuring Directive[66]. To this end, for now, it is unclear what exactly is meant by "unfair prejudice" and what specific secured creditors it protects. Since Article 6(9)(c) of the Restructuring Directive supposedly protects only the collateral which is subject to a substantial worse off and excludes other types of collateral which may also depreciate (though not that significantly), the author is not in a position to conclude that the stay under the Restructuring Directive is framed as value-neutral.

The short period of a stay is not a "silver bullet" against collateral depreciation. Obviously, the asset market value may drop even within a single month.[67] In the author's view, secured creditors should be afforded greater protection at the EU level rather than merely lifting the stay. As possible solutions, an equitable substitution from the insolvency estate might be provided for a secured creditor corresponding to the collateral value drop, or the corresponding amount of claim can be elevated to a priority claim. With this, the author does not call upon to incorporate all US-model collateral protection mechanisms, but rather strives to open the room for discussions on what tools can be used to protect the interests of secured creditors, taking into account the foreign experience.

Despite the striving of the EU legislator to frame the stay "as short as possible", Article 6(8) of the Restructuring Directive permits the prolongation of the stay for up to twelve months. Recital 35 notes that it might be reasonable to prolong the stay in cases of complex restructurings. It is hard to disagree with this. Reorganisation involving large enterprises with numerous creditors, or several distressed companies, like in cross-border restructuring schemes, should indeed be afforded a longer period to negotiate the restructuring plan (especially, taking into account the coordination issues in cross-border restructuring cases).

But why should the debtors be limited to four months *ab initio* and only then be entitled to request continuation? In our view, the current rules on the initial stay duration of four months for complex reorganisations, with a possible extension up to twelve months, though seemingly intended to promote legal predictability, do not do so to the fullest extent. This is because a creditor's position still remains precarious, as the exact period of non-enforcement is a matter of question rather than definite knowledge. Therefore, we suggest that the Restructuring Directive may provide that the stay period lasts 12 months, without singling out the initial and extension periods, for large

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66 *Patrick Grégor Puppinck and Others v. European Commission, Court of Justice of the European Union* (2019, No. C-418/18 P, paras. 34, 75–76).

67 ACOSS and UNSW Poverty and Inequality Partnership, "COVID-19: Housing Market Impacts and Housing Policy Responses – An International Review," (2022) // https://povertyandinequality.acoss.org.au/covid-19-housing-market-impacts-2/

enterprises and cross-border restructuring cases.[68] At first glance, a longer period of stay disadvantages creditors, particularly secured ones. However, we aim to demonstrate that it would confer certain benefits for them. It may be of use not only for legal certainty but also serve as a tool in tackling the forum shopping strategies ("insolvency tourism"[69]) of debtors that purport to restructure in the US.

As a first note, the CJEU maintains its policy of avoiding forum shopping.[70] But how does the insolvency tourism actually harm creditors? On the one hand, reorganisation in a jurisdiction other than that of the initial establishment may benefit creditors (especially, unsecured ones) if it ultimately results in maximising the debtor's business value. On the other hand, it prejudices creditors because the US jurisdiction was unpredictable to them at the time of contracting the loan. While granting a credit, a reasonable financier does not exclude the possibility that its debtor may enter insolvency proceedings. Instead, it expects the opening of insolvency proceedings in the place of the debtor's corporate establishment, as indicated in their loan agreement, and may factor in certain risks associated with this jurisdiction's insolvency framework. This expectation falls short when the transfer of establishment occurs, and a creditor is only informed about this shortly before the restructuring proceedings are opened. Should a creditor purport to request EU courts not to recognise the opening of the US forum-shopped proceedings as its remedy? This effort will most likely be fruitless, given the doctrine of comity, maintained by courts in cross-border cases. Moreover, should a creditor purport to enforce its claim abroad despite the US stay, it might be subject to liability for the stay breach under US law.[71] In addition, a creditor's interest lies in reducing the costs associated with the realisation of their rights.[72] In the forum shopping situation, the associated costs for a lender can increase, for example, due to seeking legal advice when filing claims and participating as a creditor in a sophisticated Chapter 11 procedure.

At the end of the day, this article suggests that the EU policymakers should try to "compete" with Chapter 11 and take steps to incentivise large companies to be restructured in Europe rather than in the US. According to the most recent research, analysing foreign enterprise filings under Chapter 11 for the years 2012-2024, there have been 59 foreign enterprise Chapter 11 filings, 24 of which involved European debtors.[73] As certain commentators note, the number of European debtors seeking rescue in the US has the potential to go up in the future.[74] The features of the US stay (e.g., its automatic application, durability) appear to be key reasons why EU-operating companies choose Chapter 11 to file for restructuring in the US rather than in Europe.[75] So, ironically, the stakeholders (financiers and other potential creditors) who participated in the

[68] The author acknowledges that this point would also benefit from the empirical research, examining the typical length of different types of reorganisations, the frequency with which courts grant the extension to twelve months and in which type of cases, as well as the degree to which lifting the stay results in higher or lower rates of successful reorganisations, which is planned for further research.

[69] Paul J. Omar, "The Inevitability of Insolvency Tourism," *Netherlands International Law Review* 62 (2015): 429.

[70] *Wiemer & Trachte GmbH v Zhan Oved Tadzher*, Court of Justice of the European Union (2018, No. C-296/17, para. 34); *Christopher Seagon v Deko Marty Belgium NV*, Court of Justice of the European Union (2009, No. C-339/07, para. 23).

[71] John A. E. Pottow and Jason S. Levin, "Rethinking Criminal Contempt in the Bankruptcy Courts," *Law & Economics Working Papers* 126 (2017): 51.

[72] Felix Steffek, *supra* note 22, 62–63.

[73] Patrick Potter, "Foreign Enterprise Chapter 11s: The More Things Change, the More They Stay the Same," *International Insolvency & Restructuring Report 2024/25* (2024): 64.

[74] Oscar Couwenberg and Stephen J. Lubben, "Corporate Bankruptcy Tourists," *The Business Lawyer* 70 (2015): 720.

[75] Ibid., 744.

Restructuring Directive's draft discussions and called upon the EU legislator to set up a non-automatic limited EU stay of two-three months[76], may later find themselves in an automatic general US stay lasting two-three years if their debtors relocate. Supposedly, more lenient conditions for large corporations to pursue restructuring in Europe (e.g., a longer stay than 4 months) may affect their decisions not to move their restructuring proceedings. On balance, secured creditors should be afforded other tools to protect their interests, rather than a cap on the stay duration alongside the vague chance of lifting the stay.

To conclude this part, the stay may be detrimental to secured creditors if the value of their collateral declines during the stay period. As it stands today, there are two primary approaches to address this issue: *(i)* where the stay lasts for a longer period, a creditor may be afforded a part of a debtor's estate to cover the drop difference (US approach); or *(ii)* through limiting the duration of a stay to a particular period (EU approach).

The following third section examines whether the unnecessarity of a secured asset for prospective restructuring proceedings (as laid down in the UNCITRAL Legislative Guide[77]) should be invoked as a stand-alone ground for the relief from stay or complement other grounds, for example, the undersecured status of a creditor.

3. SECURED CREDITORS EXEMPTED FROM THE SCOPE OF STAY

The "side effect" the stay produces upon secured creditors should not only be viewed through the economic prism (decrease in collateral value) but also examined from the encroachment upon the right to property perspective (deprivation of possession). For example, in the UK judicial practice, it is held that the stay does have an expropriatory effect to the extent it disables the exercise of proprietary rights.[78] This approach is reflected in certain EU Member States, which consider the imposition of a stay as an interference with constitutionally protected property interests.[79] In light of these holdings, we note that the commonly accepted practice among human rights courts and investment tribunals is that expropriation must *(i)* serve the legitimate aim, *(ii)* be necessary to achieve this aim, and *(iii)* be proportionate to that aim. To constitute legal expropriation, all of these criteria shall be present together.[80] Put differently, if expropriation is necessary but disproportionate to the aim pursued, or is not supported by a legitimate aim, the expropriation lacks legality. As such, the following three criteria require separate assessments for our analysis at hand: *(i)* the aim of restructuring proceedings; *(ii)* the necessity of collateral for reorganisation prospects; and *(iii)* the proportionality between the aim and detriment caused to secured creditors.

Turning to the aim of the restructuring proceedings, for example, the ECHR, in *Bäck v. Finland*, considered that affording a debtor the opportunity to seek debt adjustment

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[76] Working Paper SWD(2016) 357 final, *supra* note 10, para. 5.2.2.
[77] *UNCITRAL Legislative Guide on Insolvency Law*, *supra* note 11, 95.
[78] *Re Atlantic Computer Systems plc (No. 1)*, England and Wales Court of Appeal (1990, No. EWCA Civ 20, paras. 27, 28, 36).
[79] Barry Cahir and Michael Quinn, *supra* note 5, 10, para. 12.
[80] Pedro Nikken, "Balancing of Human Rights and Investment Law in the Inter-American System of Human Rights": 264; in: Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009); *Beyeler v. Italy*, European Court of Human Rights (2000, No. 33202/96, paras. 108–114); Jeff Waincymer, "Balancing Property Rights and Human Rights in Expropriation": 301–302, in: Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, Francesco Francioni (eds.), *Human Rights in International Investment Law and Arbitration* (Oxford: Oxford University Press, 2009).

and the associated compulsory transfer of property from one individual to another may constitute a legitimate means of promoting the public interest.[81] The exact interest the State might have while assisting a distressed debtor was explained, for instance, by the US Supreme Court, as granting "*a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt.*"[82] In the context of corporate restructuring proceedings, by permitting a debtor to be rescued (rather than being wound up), the State not only gives an opportunity to rearrange a debtor's business anew but also alleviates commercial risks that the business conduct implies. At first glance, this may appear to contradict the economic principle of minimal governmental interference, except to correct market failures.[83] However, the market actually benefits from this governmental step. It reinforces competition, keeping viable "players in the game" (competitors) and helping to prevent the market from becoming a "one team" playing field (monopolisation). In addition, once reorganisation is complete, the debtor continues to generate tax revenues and create new jobs, benefiting society as a whole. Accordingly, we would formulate the legitimate purpose (public interest) of the restructuring proceedings as the support of entrepreneurial activities and the development of the economy.

After addressing the aim, we turn to the conditions of necessity and proportionality. The article, in this part, examines whether secured creditors shall be exempted from the stay coverage due to *(i)* the unnecessarity of their collateral for the restructuring proceedings, and *(ii)* the disproportionality of the burden the stay creates upon them. If either of these two options is at stake, secured creditors' interests should be protected through either *(i)* granting them the right to request lifting a stay, or *(ii)* excluding them from the stay's scope from the very moment of a stay commencement by operation of law. To this end, we examine the approach suggested in the UNCITRAL Legislative Guide and then turn to the approaches laid down in Chapter 11 and the Restructuring Directive. At the very last, we address whether exempting the creditors protected by security in items listed under the UNIDROIT Convention on International Interests in Mobile Equipment 2001 (the "Cape Town Convention") is justified by either of unnecessarity or disproportionality.

First, the UNCITRAL Legislative Guide suggests that, where the encumbered asset is not needed for the reorganisation, secured creditors should be afforded relief from the stay.[84] In turn, Section 362 of Chapter 11 determines two grounds that must be present in conjunction to relieve a secured creditor from the stay: *(i)* such a creditor is not adequately protected, and *(ii)* collateral is not necessary to an effective reorganisation. To invoke Section 362, the US Supreme Court sets out a two-step framework: initially, the creditor bears the burden of proving its inadequately protected (undersecured) status; once that is established, the debtor bears the burden of demonstrating the necessity of the property in question for the rescue success.[85] In comparison, the Restructuring Directive lists the cases permitting creditors to lift the stay in Article 6(9), but it does not name among them the unnecessarity of collateral for the prospects of the restructuring proceedings. In our opinion, such a condition should have been listed therein, and, furthermore, the unnecessarity alone would suffice for relief, without the

81 *Bäck v. Finland*, *supra* note 41, paras. 59–60.
82 *Local Loan Co. v. Hunt*, Supreme Court of the United States (1934, No. 292 U.S. 234).
83 Jennifer L. L. Gant, *supra* note 2, 476.
84 *UNCITRAL Legislative Guide on Insolvency Law*, *supra* note 9, 95.
85 *United Timbers Association of Texas v. Timbers of Inwood Forest Associates Ltd*, *supra* note 54.

need to be anchored to the drop in collateral value - this stems from the necessity as a stand-alone condition in the context of legal expropriation, as elaborated above. To prove the necessity of the asset for its rescue, a debtor should demonstrate how exactly it intends to use an encumbered asset to generate extra value of its estate.

In contrast, we consider that the proportionality requirement is intertwined with the collateral value, and not its utility for rescue purposes. A debtor may know how to turn an asset into a workable tool of its rescue, but if it results in the diminishment of the collateral value to the "bottom", it may convert a secured creditor's claim into a *de facto* unsecured one. The disproportionality aspect is more critical for a lender, as it deprives the security of its most essential function. Therefore, a stronger remedy is required, such as the right to foreclose rather than merely the right to request a lift. The UNCITRAL Legislative Guide names the worse off of collateralised perishable goods during the stay as an example of such an imbalanced situation.[86] However, we would delve further into the financial instruments, as the protracted enforcement of the latter may render them worse off as well. Section 361 of Chapter 11 excludes from the stay scope certain transactions carried out by participants of financial markets, for example, the exercise by a commodity broker, forward contract merchant, stockbroker, financial institution, financial participant, or securities clearing agency of their contractual right under security agreements. As such, Chapter 11 establishes *ratione personae* (participant of a financial market) and *ratione materiae* (rights under security agreement) criteria for the stay exemption. In the EU context, provisions of Directive 2002/47/EC on financial collateral arrangements ("FCD") should be analysed. Under Article 31(1)(b) of the Restructuring Directive, it applies without prejudice to the FCD, meaning that in case of conflict, the FCD must prevail. Article 4(5) of the FCD obliges Member States to ensure that a financial collateral arrangement can take effect in accordance with its terms, notwithstanding the commencement or continuation of reorganisation measures. Since the CJEU explained in *Swedbank* that the aim of the FCD is to contribute to the stability of the financial system[87], not only does the *ratione materiae* become determinative to invoke Article 4(5) of the FCD, but also the *ratione personae*. Therefore, we refer to Article 2 of the FCD, which states that a collateral taker shall be a public authority, a financial institution, or a central counterparty, and that financial collateral shall consist of cash credited to a bank account or financial instruments. Overall, for the stay exemption purpose, both the US and EU frameworks consider not only the nature of the encumbered object but also the importance of the collateral holder's smooth functioning for the economy. To note, though this approach serves legal predictability and fairness principles, it may result in a situation where financiers force companies to secure their obligations with certain types of collateral as a precondition to granting the credit. Another question is whether unpredictable fluctuations in the value of other objects, such as digital assets, should warrant an exemption, and this point is up for debate.

Last but not least, the Cape Town Convention in its Article 30(1) lays down the rule according to which, in insolvency proceedings against the debtor, an international interest is effective if, prior to the commencement of the insolvency proceedings, that interest was registered in conformity with this Convention. In light of the above, the

[86] *UNCITRAL Legislative Guide on Insolvency Law*, *supra* note 9, 95.
[87] *Private Equity Insurance Group SIA v Swedbank AS*, Court of Justice of the European Union (2016, No. C-156/15, para. 51); *Directive 2002/47/EC on financial collateral arrangements*, *Official Journal* (2002, No. L 168, recs. 16–17).

definitions of "insolvency proceedings" and "international interest" as per the Cape Town Convention must be examined. Under Article 1(l) of the Convention, the reorganisation measures fall within the scope of the insolvency proceedings. Pursuant to Article 1(o) and Article 2(3) of the Convention, an international interest is understood as the debt secured by the following items: airframes, aircraft engines and helicopters; railway rolling stock; and space assets. The United States and the European Union are contracting parties to the Cape Town Convention, meaning that this exception affects their legislative frameworks governing the stay in a way that permits a secured creditor to foreclose on the listed assets. However, is it justifiable by the unnecessariness of such assets in rescue or disproportionate detriment that their non-enforcement brings upon a creditor? Assets in question are most likely to be collateralised by creditors who deal with debtors in the air or railway industries. They primarily represent either vehicle components or vehicles themselves; therefore, their use constitutes the core of transportation activities. Assumingly, their exclusion may significantly affect a debtor's ability to generate profit and, subsequently, to maximise the business's value. Thus, we conclude that these assets are necessary for the purposes of restructuring proceedings. As for the value of these assets, they are not subject to market volatility as financial instruments are. Needless to say, the nature of this type of property is not akin to perishable goods either. Therefore, their non-enforcement would not cause insurmountable detriment to a creditor. We assume that leaving such assets together with a debtor would not be disproportionate by default.

The provisions of the Cape Town Convention appear to confer a strong bargaining position on secured creditors. It is because the only way for a debtor to keep an exempted asset is through the consent of secured creditors. The consent is likely to be obtained by promising creditors bonuses in the form of equity, other debtor's property, etc. However, if creditors still decide to foreclose, a mere debt-collection process follows, creepingly turning the restructuring into liquidation.[88] Transportation services are labour-intensive by nature; therefore, the liquidation of a carrier may entail a significant number of job cuts. To substantiate this point, we rely on the Report prepared by the International Transport Workers' Federation:

> Within one year, the world's largest airlines had accumulated over USD $320bn in debt, up from USD $60 billion in pre-Covid times. By the end of March 2020, 12 airlines had already entered bankruptcy, and by the end of the year this reached 25, including major national carriers Air Italia, LATAM, Avianca and AeroMexico. All airlines cut their capacity dramatically, slashing routes and announcing huge redundancy programs. The most significant announcements came from legacy carriers, many of which announced job cuts in the tens of thousands. [...] For example, British Airways announced 12,000 job cuts [...].[89]

Therefore, we consider that, rather than a secured creditor, a debtor operating in the transportation industry should be afforded priority in this situation. The Cape Town Convention significantly tips the balance in favour of secured creditors, which, in the circumstances described, would not be justifiable.

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[88] Jennifer L. L. Gant, *supra* note 2, 481.

[89] International Transport Workers' Federation (ITF), "Employer responses to Covid-19 in the aviation industry," *Research Report* (August 2022).

CONCLUSIONS

The stay of individual enforcement actions is one of the restructuring proceedings' facilitation tools, and one of its major roles is to enable the negotiations of the restructuring plan. Also, the stay serves to preserve a debtor's assets from creditors, who may purport to enforce their claims promptly upon becoming aware of the debtor's financial difficulties. In US practice, the stay is imposed automatically from the moment of Chapter 11 case filing, whereas the Restructuring Directive does not require Member States to grant an automatic stay to debtors. In other words, Member States may, in their national laws, provide that the imposition of a stay is left up to the discretion of a judicial or administrative authority. Another difference between the stays under the US and EU restructuring frameworks is the scope of creditors they cover. Chapter 11 establishes the general stay, whilst the Restructuring Directive permits Member States to opt for either the general or the limited stay, which covers particular creditors.

While the stay is in effect, the interests of secured creditors may be adversely affected by a decline in the collateral's value, so a secured creditor is left with a significantly smaller portion of its claim than it would have been entitled to prior to the commencement of the stay. Since, under US bankruptcy law, the stay lasts until the Chapter 11 case's closure, the mechanism of "adequate protection" for secured creditors is introduced. Namely, a secured creditor may be afforded the compensation equal to the difference between the collateral value and the claim. If the adequate protection falls short of preserving the collateral value, a secured creditor's claim in the diminished part is elevated to the administrative expense, reserving priority over unsecured creditors. In turn, the Restructuring Directive adopts another approach: it does not establish an analogous mechanism to the "adequate protection" or administrative expense; instead, the Restructuring Directive fixes the duration of the stay to a certain limited period. Overall, the means of protecting the secured creditors' interests are largely left to the Member States legislators' discretion to be introduced on the national level: i.e., it is advisory to protect secured creditors' collateral value, but not mandatory.

Last but not least, subjecting a creditor to the effect of the stay, in the author's view, shall be necessary to achieve the objectives of the restructuring proceedings and proportionate to those objectives. Where an asset cannot be utilised efficiently by a debtor during restructuring proceedings (e.g., as a means of generating the surplus), it may be deemed unnecessary to the debtor's rescue prospects and entitle a creditor to request lifting the stay. Where certain assets, given their nature, like volatility, risk becoming disproportionately worthless during the stay, a secured creditor should not fall under the stay's scope by operation of law.

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