Debtors in Possession

A COMPARATIVE LEGAL STUDY OF THE ROLE OF DEBTORS IN US, EU AND DUTCH RESTRUCTURING AND INSOLVENCY LAW

Proefschrift

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PREFACE

In 2021, the Dutch legislator introduced the WHOA as a Dutch preventive restructuring framework. The WHOA also became the implementation of the 2019 European Preventive Restructuring Directive. In accordance with the Directive, one of the key elements of the WHOA is that the debtor remains in control of its assets and the day-to-day operation of its business. Although this concept of the debtor in possession, or DIP, is not entirely new in the Dutch legal landscape, the WHOA marks a significant change in the perception of the debtor and of its involvement in proceedings of which the debtor itself is the subject. While it is true that the debtor still enjoys some form of autonomy in the Dutch suspension of payments, the WHOA is the first (pre) insolvency process in the Netherlands in which the debtor, as a starting point, retains full control.

The recent shift in focus from liquidation to preventive restructuring of viable companies, in which the debtor assumes the position of a DIP, raises all sorts of interesting questions. Especially since, until not too long ago, debtors who were unable to repay their debts in full were generally regarded with a hint of distrust. Can management genuinely act in the best interest creditors? Is a court-appointed, independent professional practitioner not better equipped to serve the interests of the creditors? How are the risks of having a debtor in charge best managed? Which lever of supervision is desirable and practical? The European legislator aims to encourage debtors to apply for a restructuring in an early stage and to avoid unnecessary costs by leaving them in control. What other advantages are conceivable, and how should they be assessed from the different perspectives of all actors involved in a restructuring or insolvency process? How does the DIP relate to these other actors? What are the rights and duties of a DIP?

These and many other questions are dealt with in this all-encompassing and well-structured dissertation by J.M.G.J. Boon. For his dissertation, the author conducted a thorough comparative research of the DIP concept in three legal systems: the US, the EU and the Netherlands. The dissertation is structured in three parts. The first part provides an in-depth analysis of DIP processes within the selected three legal systems. The author describes the emergence of the DIP in historical context and elaborates on the aspects of DIP processes in each legal system. The second section explores the theoretical foundations of the DIP phenomenon, focusing on the question: what justifies the existence of DIP processes? The third and final part entails a comparative analysis of the DIP, structured along four topics: the initiation of the DIP status, associated rights and duties, means of supervision and termination of the DIP status. Based on the US legal system, in which the DIP concept has been known for much longer than in the Netherlands and Europe, the author concludes his research with recommendations for improving DIP governance in the Netherlands.

Thus far, the phenomenon of the DIP has received little attention from both the WHOA legislator and the academic world. This dissertation provides more context and an in-depth understanding of the many aspects that come along with the introduction of a restructuring framework with the DIP as the central notion. The book is not only useful for Dutch legal practice, but also for legal professionals who are dealing with or are interested in the US Chapter XI procedure and want to understand the main features of that procedure and the role of the DIP therein. The editors are delighted to include this dissertation in our series.

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CHAPTER 1

Introduction

1.1 Debtor control in restructuring and insolvency law

A debtor not repaying its debts in full has always been a difficult sell for restructuring and insolvency laws. It is a profound example of debtors violating the deeply rooted civil law principle of *pacta sunt servanda*. Based on this maxim, the debtors' contractual counterparties should be able to rely on the performance of the obligations that debtors have entered into. The moral influence of this legal principle has been widely reflected in restructuring and insolvency laws over time. Consider the historic accounts of the personal forms of execution that could be taken by creditors in response to insolvent debtors. For instance, under the Twelve Tables (around 450 BC) debtors could be put into private bondage for non-payment of debts for 30 days. If the non-payment continued for 60 days or more, debtors could literally be cut into parts and be distributed *pro rata* among the creditors (*partis secanto*) or be sold as slaves.[1] It makes the later defamatory practices as well as debtor prisons look like light-touch approaches to deal with bankrupt debtors. Nonetheless, debtors have historically categorically been regarded with a lack of trust, as aptly reflected in the Roman law adage 'Failitus, ergo fraudatur'.[2] Clearly, forgiving insolvent debtors in restructuring and insolvency processes does not come easy.

We – and for debtors especially – have moved a long way since. The times have changed, and current-day (market) economies have become more considerate of the fact that economic life includes that the business life cycle of corporate debtors can involve so-called economic 'dips'. As Balzac portrays vividly in his novel on the life of César Birotteau, an honest trader's commercial success may not only be dependent on himself, as such, honest but unfortunate traders may also face insolvency.[3] In fact, the phenomenon of financial distress is inherent to a functioning market economy and can be the result not only of factors internal to a debtors (or directors') conduct, but also the result of external

1 Twelve Tables, III.1-6; Obenchain 1928, p. 170-177. Although not the dominant view, some authors have interpreted partis secanto not as 'sharing' the debtor's body but merely sharing the debtor's estate. See further: Radin 1922, p. 33-34.

2 B. de Ubaldi (1327-1400), as cited by Hilverda 2009, p. 3. Also cited as '*decoctor ergo fraudator*' (De ruysscher 2017, p. 33).

3 See De Balzac 1837 (*in extenso*), which gives a vivid portrayal of the rise and fall of debtors in the French financial market of the 19th century.

(market) developments.[4] This presents an inherent role for restructuring and insolvency laws when addressing financial distress, to take account of the very diverse problems that a debtor('s business) is facing.

Punitive approaches to debtors in restructuring and insolvency laws have largely been abandoned,[5] which has opened room to reimagine the role that debtors can play. Over time, the position of debtors has evolved, guided by the principle of value maximisation of the estate and the pursuit of continuity.[6] The current rise of (preventive) restructuring processes – among others as a result of the Preventive Restructuring Directive (2019/1023) (PRD 2019) – has sparked renewed interest in the governance of such processes. In particular, the shift from liquidation toward restructuring has also prompted legislators to revisit the role debtors have in the governance of these processes.

When companies are active in the ordinary course of business, it is self-evident that companies – as well as entrepreneur(s)) – are in full control of the proverbial 'steering wheel' of their business. Companies themselves, through their corporate bodies, create a mission and vision, set objectives, and formulate the strategy to achieve these objectives. They can take all legal actions necessary to execute this strategy by exercising control over their assets and by entering into legal obligations.[7] However, this does not imply that companies and their corporate bodies are without limitations in exercising such control. For instance, legal regimes impose various measures to protect creditors and regulate the role of individual corporate bodies. This can be found in various areas of law,[8] including general civil law (consider the civil law *actio pauliana*),[9] but especially in company law itself.[10] In the last few decades, there has been increased consideration of how to ensure that companies – more specifically their corporate bodies – engage in a 'proper' exercise of their rights in ways that serve objectives extending beyond the scope of strict shareholder value. This has been laid down, in particular, in company laws and

4 See on this also Adriaanse 2005, paras. 2.2, 3.2, 3.3.1 and 3.4.1. Compare also Haentjens 2021, p. 62, 70-71 and 73, noting that insolvency is a phenomenon inherent to market economies, yet insolvency law, especially liquidations and dissolution of ineffective businesses, may not always provide an adequate mechanism in case of viable businesses.

5 Restructuring and insolvency regimes still reflect traces of these approaches, see for instance Dutch, which allows to commit debtors (or their directors), for failing to adequately comply with their obligations in a Dutch bankruptcy process (Article 87 DBA), or in case of a culpable or fraudulent bankruptcy (*eenvoudige* or *bedrieglijke bankbreuk*), as follows from Articles 340, 342 and 343 DBA). See also: Wessels 2018, at 1023-1027a.

6 See for instance Verougstraete 2007, p. 245.

7 Compare Articles 3:32 and 2:5 DCC.

8 In addition, such limitations also follow from other areas of law, including criminal law and administrative law which fall outside the scope of this study.

9 Article 3:45 DCC.

10 For the Netherlands, this follows both from EU and national legislation. At the EU, level this includes, for instance, the safeguards incorporated in transposing the Second Council Directive (Directive 77/9/EEC) introducing safeguards with respect to maintenance and alteration of legal capital of public limited companies. At the national level it entails, for instance, the power of the Dutch Enterprise Chamber of the Amsterdam Court of Appeal that can impose, for cause, interim measures on companies (Articles 2:356 and 2:358 Dutch Civil Code (*Burgerlijk Wetboek;* DCC)). See for further examples: Eidenmüller 2018, p. 1018.

has also been promoted through corporate governance codes.[11] Although the resulting rules impose restrictions on – or maybe better: provide guidance for – companies, these rules are typically subject to restrictions. Their effectiveness is limited because of the restrictions to their scope or their legal bindingness and enforceability, and they may apply in particular to companies that operate on a going-concern basis. As a result, these governance rules leave considerable discretion to a company (and its directors).[12] Therefore, in the ordinary course of business, companies and/or the directors have ample freedom to exercise control over their assets and in conducting their business activities.

When financial distress surfaces, this can have a radical impact on the scope of control exercised by debtors in the context of restructuring and insolvency law. As a debtor's financial distress increases, the primary interest of a debtor (gradually) shifts away from the mere companies' interest toward that of the general body of creditors.[13] When debtors, creditors and/or other stakeholders authorised to do so resort to domestic restructuring and insolvency tools to address the financial distress, this inevitably impacts the legal or at least effective control a debtor has over its estate. This is most clear in the traditional and most common insolvency processes which are aimed at liquidation, such as the Dutch bankruptcy proceeding. In such processes, debtors are typically (nearly) fully divested in favour of a court-appointed practitioner (*curator*).[14] It is a mechanism to protect the estate against actions that could be taken by creditors as well as debtors.[15] It is this practitioner who takes over most, if not all, control over the debtor's estate, leaving only little control that can still be exercised by the debtor.[16] There are strongly held beliefs that the exercise of this control over a debtor's estate and affairs is best to be done by a practitioner, who is independent and impartial, and adequately trained to pursue maximisation of value. Generally, such shifts in the governance over the estate are motivated by the need to secure maximisation of value for the general body of creditors and to promote time and cost efficiency.[17] In restructuring-oriented processes, there may also be restrictions imposed on debtors in exercising control over their assets. In particular, this may be the result of the appointment of a practitioner. However, in contrast to liquidation-oriented processes, it is not uncommon that even when a practitioner is appointed, a debtor remains

11 On the role of corporate governance codes, consider for instance: MacNeil & Esser 2022, p. 371-385; Marchetti & Passador 2024; Lokin & Veldman 2019, p. 50-60.

12 Although one could point at the many open norms such as for tort (*onrechtmatige daad*) that directors of companies are bound to in their conduct, also in the ordinary course of business, the application of such norms do not deprive debtors (and their directors) from the legal and *de facto* control over their assets and allow for much discretion.

13 Compare also Gurrea-Martínez 2021, p. 1 et seq, discussing the escalating commitment of directors toward creditors as the debtor's financial distress increases. See for instance *BTI 2014 LLC v. Sequana SA and others* [2022] UKSC 25, at 12, 45, 81-83, 147-148, 176-177, 246, 256 and 303. Here, the UK Supreme Court emphasised that when a company borders insolvency or becomes insolvent, the director's duty toward the company is extended to include the interests of the company's general body of creditors. When the financial distress is increasing, the directors are under a growing duty to give priority to the creditor's interests.

14 See in particular Articles 23 and 68(1) DBA. Compare also IMF, *Orderly & Effective Insolvency Procedures: Key Issues*, Washington: IMF, 1999 (IMF Report 1999), p. 57.

15 UNCITRAL Legislative Guide 2004, p. 30 and 161.

16 See further: UNCITRAL Legislative Guide 2004, p. 161; IMF Report 1999, p. 57.

17 Bork 2017, at and 4.27 et seq; IMF Report 1999, p. 57.

fully or partially in control and continues to have (some) possession or control over its estate.[18] Nonetheless, unrestricted exercise by debtors and/or their corporate bodies may risk hampering the restructuring efforts. Conflicts of interests may arise, for instance for directors of a debtor that in pursuing their interests could hamper the pursuit to maximise the value of the estate. As a result, it is necessary to provide adequate governance for the exercise by debtors of their rights in restructuring and insolvency processes.

1.2 Corporate restructuring and insolvency governance

There has been limited attention for the role of corporate governance of debtors in the context of restructuring and insolvency processes. A company's corporate governance, which is shaped especially by its Articles of Association, applicable company law, corporate governance codes and/or shareholder and intercreditor agreements[19] play an important role when a company operates on a going-concern basis. From a corporate governance perspective, the control exercised by corporate debtors remains in principle unaltered when a debtor faces financial distress or when restructuring and insolvency processes have been commenced.[20] Alternatively, corporate governance in the good times is better referred to as 'blue skies' corporate governance. Although the open norms may leave space for considering the creditor interest,[21] it leaves a void by largely ignoring the full company lifecycle and fails to explicitly address 'bad weather' corporate governance in times of financial distress.[22] Whereas financial distress and the failure of businesses seem an inherent economic risk, this is not sufficiently covered by general corporate governance frameworks.

For corporate debtors, corporate governance and corporate laws on the one hand and restructuring and insolvency laws on the other hand are often considered as separate realms by legislators and academics alike. However, this misrepresents the importance of governance when debtors face financial distress. For instance, Frost observes that corporate governance principles hold through also in the context of insolvency.[23] Fur-

18 Consider for instance the Dutch suspension of payments (Articles 214(2) and 228 DBA), involving the mandatary appointment of a joint administrator operating alongside a debtor in every legal action taken by a debtor during the process.

19 It must be noted that, although there is no general rule in Dutch company law, shareholder agreements can include provisions requiring shareholders to contribute in case of financial distress, see further Kemp 2015.

20 For instance, the Dutch Corporate Governance Code 2022 does not consider the impact of (impending) insolvency, other than that bankruptcy may interfere with the principal objective of company to pursue its continued success (explanatory note to Principle 1.1). At the same time, company law neither fully ignores the impact of financial distress, as follows for instance from Article 2:108a DCC, which requires the board of a public limited company to call a General Assembly within three months after the equity of a company has fallen to an amount equal to or less than half of the paid-up and called-up capital. Notably, as required for implementation of Article 17 Second Council Directive (77/91/EEC), this is only required for public limited companies, not for private limited companies. See further on this: Alan 2001, p. 26 et seq; Olaerts 2007, para. 3.4.1; Reumers 2020a, para. 7.1.2.

21 See Verstijlen 2021, paras. 2.2 and 2.3.

22 Compare Frost 1998, p. 105-106 and 110-111.

23 Frost 1998, p. 111.

thermore, Eidenmüller describes insolvency law as 'corporate governance under financial distress.'[24] Skeel goes further and suggests that corporate governance and – what he calls in the American fashion – corporate bankruptcy are in fact complementary and interdependent.[25] The function of restructuring and insolvency laws can be seen as an extension of corporate governance,[26] in particular when viewed through the lens of the principal-agent theory, addressing specific principal-agent conflicts of how control over the estate is exercised in the context of (pre-)insolvency.[27] Therefore, corporate restructuring and insolvency processes can be considered as governance models.[28] Subject to certain economic circumstances (meeting a (pre-)insolvency threshold), and for specific purposes (including maximisation of the value of the estate and possibly rescue of the business) a restructuring and insolvency regime imposes governance rules on a debtor to address a debtor's internal and external governance questions. Restructuring and insolvency laws do so by providing statutory and judicial controls that replace or alter (in part) the pre-existing market, corporate and contractual controls.[29]

In ongoing debates on corporate governance, restructuring and insolvency governance should be observed as a core topic, not to be overlooked or disregarded. Whereas 'regular' corporate governance focusses primarily on the so-called 'vertical' agency problem between owners (principals) and their managers/directors (agents), restructuring and insolvency laws extend this by focussing though, not exclusively, on the agency problems between creditors (principals) and their debtor (agent), as well as by creditors among each other.[30] Given their overriding nature, restructuring and insolvency laws have a pivotal impact on the governance of debtors, in addition to the pre-existing corporate governance.[31] This is not only because new actors are introduced, including insolvency courts and practitioners, but also because it entails new roles for debtors, including their corporate bodies. Considering the multiplicity of agency problems, restructuring and insolvency law is challenged with a balancing exercise of how to involve various actors in restructuring and insolvency processes, in particular the debtors,[32] its creditors and shareholders, as well as the court and court-appointed practitioners.[33] This entails the statutory framework facilitating their involvement in a restructuring or insolvency process but also more generally the overall suitability of the governance in these restructuring and insolvency processes. As highlighted already in the Cork Report 1982, '[t]he success of any insolvency system (…) is very largely dependent upon those who administer it. If

24 Eidenmüller 2018, p. 1018.
25 Skeel 1998, p. 1327-1329, 1377 and 1379.
26 Expressing some caution on interference of restructuring and insolvency law with corporate governance, see: UNCITRAL Legislative Guide 2004, p. 171.
27 Jensen & Meckling 1976, p. 305 et seq; Armour, Hansmann & Kraakman 2017a, p. 29-30; Armour, Hertig & Kanda 2017b, p. 109-110.
28 See Tollenaar 2016, para. 4.1 pointing this out in discussing processes aimed at adopting a (restructuring) plan.
29 Compare Frost 1998, p. 113.
30 Armour, Hertig & Kanda 2017b, p. 109 et seq.
31 See also Timmerman 2021, p. 249 et seq.
32 See on this, for instance, Cepecs & Kovač 2016, p. 79 et seq.
33 In some jurisdictions appointment of practitioners may also be performed by administrative authorities, such as the US Trustee in the USA and the Insolvency Service in the UK.

they do not have the confidence and respect, not only of the courts and of the creditors and debtors, but also of the general public, then complaints will multiply and, if remedial action is not taken, the system will fall into disrepute and disuse.'[34] While this quote relates in particular the position of practitioners, it seems to me applicable broader that that, at least to debtors when they are involved in administering the process.

In the field of restructuring and insolvency law there has already been ample research investigating the role of court-appointed practitioners, as well as how the interests of creditors should be looked after, and more specifically, how the estate should be administered in order to maximise the value for the general body creditors.[35] In particular, independent and impartial practitioners, with relevant expertise and experience are often preferred in liquidation-oriented processes to resolve a debtor's financial distress.[36] There has been less consideration of the position of debtors and their corporate bodies in such processes. Conventional wisdom suggests limited involvement of debtors in favour of independent court-appointed practitioners. This may be due to the lack of creditors' trust in debtors – possibly as a result of the interference with moral, social and/or legal norms – as creditors risk not being paid in full. Furthermore, the reliability of debtors may be undermined by the breach of contractual obligations. Notably, this may also be the result of a debtor's (supposedly) inappropriate or even fraudulent conduct or other forms of conduct that are detrimental to the general body of creditors, as well as for conflicts-of-interest because of pursuing (self-)interests. Furthermore, as aptly pointed out by the International Monetary Fund (IMF), debtors may also be incentivised to pursue restructuring when the chances of successfully restructuring have diminished or disappeared:

> 'if a debtor perceives that it has everything to gain (the stay on creditors) but nothing to lose (no loss in control in the business), it may be tempted to utilize the rehabilitation procedures when rehabilitation is clearly not possible. Specifically, a debtor that is no longer viable may attempt to use rehabilitation proceedings solely to delay the inevitable, with the consequence that the assets of the debtor continue to be dissipated.'[37]

Such risks should not be overlooked, nor do they alone provide a sufficient basis for a 'hard and fast rule' that debtors should be fully divested with the mandatory appointment of practitioners in restructuring and insolvency processes. Corporate restructuring and insolvency governance is there to ensure that there are adequate 'safeguards against

34 Report of the Review Committee on Insolvency Law and Practice 1982, par. 732 (also known as the Cork Report 1982, named after the chair of the Review Committee).

35 See De Leo 2021; De Kloe 2023; Tollenaar 2016; Harmsen & Reumers 2021, to mention a few.

36 In addition to academic literature, this has resulted in various sets of principles, guidelines and recommendations on the professional conduct and ethics of practitioners. Consider for instance: European CoCo Guidelines 2007; EBRD IOH Principles 2007; IE IOH Principles and Guidelines 2014; IAIR Principles 2018; INSOL International, Ethical Principles for Insolvency Professionals, 2019. Compare also IE Restructuring and Turnaround Professionals Guidelines 2015. Whereas the aforementioned instruments have been adopted by international or regional standard-setting organisations, this is also done also at the domestic level. In the Netherlands, which includes for instance the INSOLAD Praktijkregels 2019.

37 IMF Report 1999, p. 57.

abuse by one stakeholder/constituency seeking to extract wealth at the expense of others.'[38] Mandatory divestment of debtors reflects the ancient approach where there was an even stronger moral and legal disapproval toward a debtors' inability to meet its obligations, with defamatory practices and by imposing punitive measures.[39] In fact, it may be questioned whether the interests of the general body of creditors, and more broadly other stakeholders in restructuring and insolvency law processes, could not be better off with the active involvement of debtors in restructuring and insolvency processes, instead of relying solely on practitioners. For instance, the involvement of debtors (and/or its directors) may help to limit the disruption of a debtor's business operations, and the negative effects of restructuring and insolvency stigma in its relations with suppliers and customers. Furthermore, debtors themselves will be able to contribute by using their knowledge and expertise of the business and the market to resolve the financial distress. This may open opportunities to find mutually beneficial solutions for debtors and their stakeholders.

1.3 The emergence of DIPs in restructuring and insolvency law

Interest in the active involvement of debtors in restructuring and insolvency processes differs between countries. Some authors have pointed at cultural and social differences in considering whether debtors should be involved.[40] Yet, there is a tendency in favour of more debtor involvement, especially in recent years.[41] In its 1999 report, the IMF observed on the governance of insolvency processes that:

> 'In the case of rehabilitation procedures, some countries have opted for full debtor control (debtor-in-possession), while others have either given a court-appointed administrator full authority or have established some form of power-sharing arrangement between the debtor and the administrator.'[42]

In recent years, various legislators have employed legislative initiatives in which they have revisited the role that debtors can play. While debtors are the subject of each restructuring and insolvency process, legislators have gradually considered any substantive involvement of debtors. Oftentimes, this has emerged in the context of restructuring-oriented processes, allowing a pre-petition debtor to remain at least partially in control over the estate and its affairs. Legislators as well as academics have regularly used the term 'debtor in possession'

38 Eidenmüller 2017, p. 286.

39 See on this Graeber 2011, portraying the evolving perspectives of mankind with debts.

40 McCormack 2007, p. 522 et seq, discussing differing approaches in the US, UK and Germany toward debtor involvement in restructuring and insolvency processes. See also Westbrook 1990, p. 88, noting: 'In the U.S. a variety of factors, including a deep emotional commitment to the entrepreneurial ethic, make the owners of the corporation central to a salvage proceeding. In the UK, the prevailing view seems to be that the prior owners were the ones whose venality or incompetence created the problem, and their interests disappear from moral or legal consideration once a formal proceeding has begun. Americans are much more willing to believe that financial difficulty is the result of external forces and that preservation of the company, not just the business, is a crucial social concern'.

41 See generally on this Rotaru 2019, p. 4 and 41.

42 IMF Report 1999, p. 10.

(DIP) to describe this phenomenon. This terminology seems derived from the United States (US), where in a Chapter 11 (Reorganisation) proceeding of the US Bankruptcy Code (USBC), a debtor formally becomes a DIP in a Chapter 11 case. In these cases, by default, no practitioner will be appointed. As a consequence, the debtor maintains the full control as DIP. This is the so-called 'fundamental' DIP concept of Chapter 11 USBC.[43] Similar approaches have also been developed – without always referring explicitly to a debtor as a 'DIP' – in legal frameworks in other legal regimes.[44] This includes longstanding processes in France (including in particular the (accelerated) safeguard (*sauvegarde (accélerée)*) as well the judicial reorganisation (*redressement judiciaire*)); Canada (with the Companies' Creditors Arrangement); and the United Kingdom (UK) (with primarily the Part 26 Scheme of Arrangement, and since 2021 the Part 26A Restructuring Plan), to name a few.

In Europe, broad interest in involving debtors in restructuring and insolvency processes started in 2011. Both the European Parliament (EP) and the European Commission (EC) started to actively promote the development of a so-called 'rescue culture' in this policy shift. The continued involvement of debtors in addressing a debtor's financial distress has featured as a key element.[45] Revisiting the position of debtors, for legal persons, and the board of directors, has also been part of this process.[46] Here, DIPs have been introduced, in particular, to promote timely action by debtors and to prevent liquidation. This form of governance in restructuring and insolvency processes has been put on the agenda especially in the context of processes available at a pre-insolvency stage, when debtors are not yet insolvent, but there is a likelihood of insolvency.[47] Although there has been criticism on shifting the focus toward restructuring, this criticism has not severely interrogated the impact on the governance involving DIPs.[48] With limited discussion, the EU has incorporated the DIP also as a legal concept in the European Insolvency Regulation (recast) (EIR 2015),[49] recognising DIPs as actor in cross-border insolvency cases. In addition, the PRD 2019 has required all EU Member States to introduce restructuring frameworks – such as the Dutch *Wet homologatie onderhands akkoord* (Act on the confirmation of an extra-judicial plan;

43 11 USC § 1101; ABI Report 2014, p. 21 ('A fundamental feature of chapter 11 of the Bankruptcy Code is the "debtor in possession" concept').

44 ABI Report 2014, p. 24.

45 See in particular EP resolution of 15 November 2011 with recommendations to the Commission on insolvency proceedings in the context of EU company law (2011/2006(INI)) (EP Resolution (2011)) and Commission Recommendation on a new approach to business failure and insolvency, 12 March 2014, C(2014) 1500 final (EC Recommendation (2014)).

46 See on this for instance Business Rescue Report 2020, p. 134 et seq; Van Galen 2014, para. 3. See also Reumers 2015, p. 489, discussing various means to promote restructuring in time, and who considers the DIP principle as a procedural, personal impetus for debtors.

47 See Articles 3, 4(1) and 19 PRD 2019.

48 See for instance Verdoes & Verweij 2018, who criticise the premises of the logic to promote corporate rescue; Eidenmüller 2019, critiquing the EU legislator's approach in harmonising preventive restructuring frameworks. Compare also Van Amsterdam 2004, para. 1.1.5, commenting that rescue is not a one-size-fits-all solution for distressed debtors.

49 Article 2(3) Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

WHOA) – which provides for a DIP.[50] Through these legislative initiatives, the EU has become a driver in revisiting the governance of restructuring and insolvency processes. More recently, in the 2022 EC's Proposal for an Insolvency Directive (EC Proposal (2022)), the DIP was reiterated as a form of governance in the context of both the so-called 'pre-pack proceedings' as well as the simplified winding-up of micro-enterprises, embracing a clear move away from practitioners and toward DIP controlled regimes.[51]

This trend is also reflected in instruments of standard-setting organisations. Consider for instance the Legislative Recommendations on Insolvency of Micro- and Small Enterprises by the United Nations Committee on International Trade Law (UNCITRAL) which promote involvement of DIPs in particular for the purpose of reorganisation. In addition, a DIP may also be involved in the liquidation of a debtor's estate.[52] Another example is the 2021 version of the World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes (World Bank Principles 2021), which pays particular attention to the role debtors can play in the context of micro and small and medium-sized enterprise (MSMEs).[53]

1.4 Involving debtors in restructuring and insolvency governance: a balancing exercise?

Whereas the majority of restructuring and insolvency processes are commenced by debtors,[54] there have been limited considerations on the specific involvement of debtors – as DIPs – in the governance of restructuring and insolvency processes. When referring to actors, reference is typically made to courts and practitioners, and not so much to debtors or DIPs.[55] However, in its 1999 study on orderly and effective insolvency proceedings, the IMF raised several essential questions on DIPs, including:

> '[t]o what extent should a debtor be displaced from the management and control of the enterprise once insolvency proceedings commence?'[56]

From the growing number of restructuring and insolvency processes providing explicitly or implicitly for a DIP today, one finds a partial answer to the aforementioned question. There has also been extensive academic attention for corporate restructuring-oriented processes in recent years. However, this has been less so with respect to the involvement

50 Article 5 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (PRD 2019). See also Veder 2021a, p. 99, noting that DIP processes were already in place in various EU Member States before implementation of the PRD 2019.

51 Article 22(4) and 43 Proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 7 December 2022, COM/2022/702 final. See also Pool, Boon & Vriesendorp 2023.

52 UNCITRAL Legislative Guide 2021, Recommendations 14-17.

53 World Bank Principles 2021, Principles C19.5 and C19.6.

54 For the US see: Hynes & Walt 2020, p. 1127-1130.

55 Westbrook et al. 2010, p. 203; Fletcher & Wessels 2012, at 94; Dirix 2014, p. 3-38; IE IOH Principles and Guidelines 2014; IAIR Principles 2018; INSOL International Ethical Principles 2019.

56 IMF Report 1999, p. 10.

of debtors in such processes. In particular, there is not much literature yet that provides for an in-depth analysis of the role of DIPs in restructuring and insolvency laws.[57] The reason for this is not obvious. Although some have considered the DIP a non-essential aspect of restructuring and insolvency law,[58] others point at the complexity of the topic:

> 'the debtor-in-possession approach is a complex one that requires detailed consideration not only because it depends upon strong corporate governance rules and institutional capacity, but also because it affects the design of a number of other provisions of an insolvency regime (e.g. preparation of the reorganization plan, exercise of avoidance powers, treatment of contracts and obtaining post-commencement finance)'.[59]

More critically, Korch notes that a DIP model presents problems for the governance of a restructuring and insolvency process:

> 'The debtor-in-possession model causes major corporate governance problems because the debtor's management has huge incentives to favor some parties over others before or in bankruptcy, e.g., through fraudulent conveyances or preference transfers. Control mechanisms, conversely, are weak.'[60]

At the same time, others have pointed at the DIP as a 'core concept' or a 'principle' of restructuring and insolvency law.[61] For instance, Mennens has advocated that the DIP model is a principle of pre-insolvency plan processes (freely translated):

> 'Principle 6: Debtor retains control over its estate and the business
> The debtor should retain its powers to administer and dispose of assets during a pre-insolvency plan process. However, there should be effective counterbalancing of this freedom when the interests of capital providers require so in a specific case.'[62]

Absent a critical assessment of the role of debtors in restructuring and insolvency law, it is left unaddressed how involvement of debtors in restructuring and insolvency processes should be orderly and effectively regulated:

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57 There is a limited body of literature analysing the role of DIPs in restructuring and insolvency processes, however, typically more limited in scope. Consider for the Netherlands in particular: Boon 2021, p. 71-79; Mennens 2020, at 238-246. For the DIP in EU law, consider in particular: Reumers 2020b, p. 29-37; Boon 2020b, p. 426-435; Veder 2021a, p. 97-103; Bork & Van Zwieten 2022; Nijnens 2023. In the US, there has been more generous attention to the DIP, for instance in the ABI Report 2014, p. 21-25, 194-200, see also: Norton 2025, at 93:1-93:4 and 127:1-127:4; Kelch 1992, p. 1323 et seq; Pottow 2019, p. 205 et seq. For Germany and Austria, it must be said, there is more consideration for DIPs compared to the Netherlands, see in particular Hübler 2013; Rost 2015.

58 Couwenberg & Lubben 2015, p. 56.

59 UNCITRAL Legislative Guide 2004, p. 166.

60 Korch 2018a, p. 411. Compare also Zaretsky 1993, p. 916; Lipson & Marotta 2016, p. 1, pointing also at difficulties with a DIP model, including agency conflicts.

61 UNCITRAL Legislative Guide 2004, p. 28; JCOERE Report 2 2020, p. 169; EC Impact Assessment (2016), p. 18. See also Section 3.2.4.

62 Mennens 2020, p. 209.