THE IMPORTANCE OF THE "BREATHING SPELL" IN REORGANIZATION PROCEEDINGS

COMPARATIVE ANALYSIS OF THE BANKRUPTCY LAWS OF THE UNITED KINGDOM, THE UNITED STATES, AND SERBIA

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ABSTRACT

In 2020, the United Kingdom (UK) adopted the Corporate Insolvency and Governance Act[1] (CIGA) to eliminate the long existing deficiencies of bankruptcy/insolvency law[2] in the country. One of the main additions of the Act was the introduction of a standalone moratorium, previously unknown to the UK insolvency system. After many years of resistance to changes of the Insolvency Act 1986,[3] partially pressured by the unprecedentedly large number of insolvency cases caused by the COVID 19 pandemic, it was realized that successful restructuring[4] presumes a 'stay' – "*breathing spell*" for the debtor, or a "*time out*" from his creditors.[5] The 'CIGA moratorium' was modelled after the concept of automatic stay of the bankruptcy law of the United States (US) that has proven to be an important factor in conducting efficient reorganization proceedings. Reorganization proceedings of insolvent, or near insolvent companies materialize the second chance bankruptcy philosophy.[6] Increasing efficiency

[1]UK Public General Acts. The Corporate Insolvency and Governance Act 2020. https://bit.ly/440Im3F. (accessed 9 June 2023).

[2] In the United Kingdom the term „insolvency" has a broader meaning as a type of proceeding against companies and the term bankruptcy is used for proceedings against individuals. In the United States the term bankruptcy defines all forms of statutory procedures triggered by insolvency. In order to provide the uniformity of terminology from now on the term bankruptcy will be used for both within the meaning of United States law.

[3]UK Legislative Acts. Insolvency Act 1986. https://bit.ly/3qF3Cxk. (accessed 9 June 2023).

[4] The term restructuring is used in United Kingdoms and EU legislation while the term reorganization is used in the United States. In order to provide uniformity in this paper the general term used for these proceedings will be reorganization form now on.

[5] Norton Rose Fullbright, The UK Corporate Insolvency and Governance Act 2020: A move to a more debtor-friendly restructuring regime?, (2020), http://bit.ly/3o0KsRk. (accessed 9 June 2023).

[6] *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934): In this decision the Supreme Court described the purpose of bankruptcy law as a law that "gives to the honest but unfortunate debtor a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt."

reorganization/restructuring proceedings has been a top priority in according to the 2019 Directive as well.[7]

In the light of that, this thesis will provide an overview of the law and application of automatic stay in the US, the new moratorium brought by the UK CIGA[8] as well as the moratorium rules found in Serbia's Law on Bankruptcy.[9] The thesis will examine the positive and the negative aspects of the stay- to identify the strengths and weaknesses in each of the covered jurisdiction. Considering that the US model appears to be seen as the leading model in bankruptcy law globally, it's solutions will be used as the model that UK and Serbia's legal framework will be compared to. Finally, since Serbia is in the process of accession to the European Union[10] it is taking over *acquis communautaire* which presumes modernization of insolvency law, amongst other things. In the absence of a recommendation of a particular 'stay' model within the European Union, Serbia could look at such leading models as the United States or United Kingdom's. This is because the two mentioned jurisdictions have the most experience in the domain.

[7] EU Parliament and Council Directive, (2019), 2019/1023, L (172/18), http://bit.ly/3GuQq3e (accessed 20 April 2023).
[8] UK, The Corporate Insolvency and Governance Act 2020.
[9]Republic of Serbia. Acts of Parliament. The Bankruptcy Law (the Insolvency Law), (Official Gazette of the Republic of Serbia Nos. 104/2009, 99/2011, 71/2012, 83/2014, 113/2017, 44/2018 and 95/2018). https://bit.ly/42EEN25. (accessed 9 June 2023).
[10]SAA Agreement between the EU member states and Serbia. 2013/490/EU. 22 July 2013. https://bit.ly/43le8Zz. (accessed on 9 June 2023).

LIST OF ABBREVIATIONS

Abbreviation	Definition
UK	United Kingdom
US	United States
CIGA	Corporate Insolvency and Governance Act
UNCITRAL	United Nations Commission on International Trade Law
SEC	Securities and Exchange Commission
CVA	Company Voluntary Arrangement
SME	Small and medium Scale Businesses
BC	The Bankruptcy Code
PNRP	Pre-negotiated reorganization proceedings
CCIS	Chamber of Commerce and Industry of Serbia
LOBS	Law on Bankruptcy of Serbia
Restructuring Law	Law on Consensual Financial Restructuring

1. INTRODUCTION

1.1. On the importance of bankruptcy reorganizations

In today's economy, new businesses are established every day. However, the fact is that a lot of them fail to stay and compete on the market and are faced with "financial distress".[11] In order to create a strong, business friendly economy that promotes entrepreneurship, businesses need to be able to access credit in an easy and non-burdensome manner and at an affordable price.[12] This means that there should be efficient regulation that will assure potential creditors their loans will be paid back and that efficient mechanisms for their protection are available if a business faces bankruptcy.[13]

The purpose of reorganization is to keep the business alive, as "*a live business is worth more as a going concern than a forced sale or liquidation.*"[14] It is more economically efficient to save a business who's earning still exceed its expenses.[15] If a debtor is still able to produce positive earnings using the assets it owns, the creditors will be able to get paid out of the future earnings, too.[16]

Countries that have established well-functioning bankruptcy proceedings have a better chance in becoming known as "business friendly environments", considering they provide more

[11] Luisa Zhou, The Percentage of Businesses That Fail, (2023), http://bit.ly/3GARFy2; OECD, Report Surveying Businesses (2020), http://bit.ly/40WDP16. (accessed on 9 June 2023).
[12]"Resolving Insolvency Reforms - Doing Business - World Bank Group," 2019. https://bit.ly/3Phamfo. (accessed on 9 June 2023).
[13]World Bank Group, (2019), Doing Business Report, (2020), DOI:10.1596/978-1-4648-1440-2.
[14] Charles Jordan Tabb. "*The Future of Chapter 11*," SSRN Scholarly Paper (Rochester, NY, 1993), https://papers.ssrn.com/abstract=2316254. (accessed on 9 June 2023).
[15] Charles Jordan Tabb. Bankruptcy Law: Principles. Policies, and Practices. (2003). (Anderson Publishing Co. ed. 1, 2003). Chapter A.
[16] Ibid.

certainty for potential investors and creditors. This will not only allow already existing companies to grow but will also make the country more attractive for new businesses, allowing the country's market to grow. Even though having efficient liquidation proceedings, that allow businesses to exit the market burden free is needed, providing businesses in financial distress with a 'second opportunity' has been prioritized in the recent years.[17]

By now most of the world's developed economies have reformed their bankruptcy laws to provide an alternative to liquidation proceedings with the goal of rescuing the business known as: reorganization or restructuring proceedings[18]. Generally, business rescue is viewed as the more favorable option to liquidation.[19] If with some help and additional time a business might be able to continue its operations it will preserve the jobs of its employees, and will almost certainly ensure a higher recoverability rate than in liquidation proceedings for its creditors.[20]

This view has also been taken up by the Legislative Guide on Insolvency Law published by The United Nations Commission on International Trade Law (UNCITRAL) that states: "*the purpose of reorganization is to maximize the possible eventual return to creditors, providing a better result than if the debtor were to be liquidated and to preserve viable businesses as a means of preserving jobs for employees and trade for suppliers. With different constituents*

[17] Ibid.
[18] Reorganization is a type of proceeding that is used to provide the debtor with a "second chance" and a possibility to save his business by adoption and implementation of a reorganization plan. It is an alternative to liquidation proceedings. In the United Kingdom and EU these proceedings are known as „restructuring". The term reorganization is used in the United States and will be used for the purposes of this paper as the general term for these proceedings.
[19] *Principles for Effective Insolvency and Creditor/Debtor Regimes*, 2021st ed., Insolvency Assessment (World Bank, 2021), https://doi.org/10.1596/35506., 7.
[20] Ibid.

involved in reorganization proceedings, each may have different views of how the various objectives can best be achieved."[21]

Additionally, the World Bank in its 'Doing Business Resolving Insolvency Good Practices, Establishing Effective Reorganization Proceedings,' found that: "*The economies in which reorganization is the most common insolvency proceeding have the highest recovery rates*."[22]

Further, reorganization aims to restore the financial well-being and viability of a debtor's business so that the business can continue to operate through means that may include debt forgiveness, debt rescheduling, debt-equity conversions, and sale of the business (or parts of it) as a going concern. The ultimate purpose is to allow the debtor to overcome its financial difficulties and resume or continue its business operations."[23] However, in order for successful reorganization proceedings to exist, not only does the system need to have efficient legislation but also supportive and well educated judiciary.[24] Other important contributing factors include education of the market participants on the benefits of bankruptcy, lowering the bankruptcy stigma, and encouragement of participants to timely file petitions.

Considering that in the past two decades the world faced multiple economic crises, and as it is facing one currently, countries should focus on improvement and filling out the gaps that their reorganization provisions might have.[25] This would encourage their use and could possibly save many businesses that were "caught" by the crises.[26] However, countries that are faced with

[21]"UNCITRAL Legislative Guide on Insolvency Law | United Nations Commission On International Trade Law," Part 1 and 2. https://bit.ly/3Pfkt4g. (accessed 9 June 2023)., 209.
[22] Tabb and Brubaker, *Bankruptcy Law*.
[23]"Resolving Insolvency Reforms - Doing Business - World Bank Group."
[24]"Enforcing Contracts and Resolving Insolvency- Doing Business Reforms- World Bank Group.2019. https://bit.ly/3zKDkeB. (accessed 10 June 2023)., 54-60.
[25] Valentina Saltane, Rong Chen, Nuria Moya Guzman. "*Smart Lessons: real experiences, real development*." IFC document, 2013.https://bit.ly/43G1zru. (accessed on 9 June 2023)., 3.
[26] Ibid., 3.

intense bankruptcy stigma will have a hard time to convince creditors, directors and officers of the debtor to participate in reorganization proceedings, since they think bankruptcy has a negative connotation and signals the end of economic activity.[27] Despite the lawmakers effort to create a legal environment that would incentivize reorganization, these countries will face major challenges in order to shift the mindset of people to rescue oriented second chance philosophy mindset that is currently prioritized.[28] Finally, formally addopting and domesticating versions of reorganization laws into national legislation is not going to produce results by itself without tackeling the present stigma.[29]

1.2. On the importance of provisions allowing the debtor time to "breathe"

Many conflicts of interests arise upon filing for bankruptcy proceedings. The main being the conflict between the debtor and its creditors. The debtor facing financial distress might believe that it has a chance to "restart" its business and become profitable with appropriate help, financial incentive, and time. The creditors on the other hand are faced with the risk of not getting their money back from the debtor which will make them hurry to start collection proceedings, as soon as the debtor defaults. In countries without a stay, just as before the era of modern bankruptcy systems, the principle of "first come, first served" determined the amount that a creditor will be able to recover from the debtor.[30] The first creditor to take action against the debtor will be the first to obtain relief; all later creditors' claims will have to be settled out

The average recovery rate of economies that widely use a reorganization proceeding to preserve viable firms is more than two times higher than the recovery rate of economies where liquidation or foreclosure is the most used proceeding.

[27] Tibor Tajti, "Bankruptcy Stigma and the Second Chance Policy: The Impact of Bankruptcy Stigma on Business Restructurings in China, Europe and the United States," *China-EU Law Journal* 6 (November 15, 2017), https://doi.org/10.1007/s12689-017-0077-z.

[28] Ibid. 1-2.

[29] Ibid. 7.

[30] Stanley D. Longhofer and Stephen R. Peters, "Protection for Whom? Creditor Conflict and Bankruptcy," *American Law and Economics Review* 6, no. 2 (2004): 249–84..

of the remaining assets, if any.[31] This encourages the creditors to race to grab the debtors assets and does not correspond with two functions of the bankruptcy process expressed by the Commission on the Bankruptcy Laws of the United States: "*to continue law-based orderliness*" upon debtors inability to pay of his debts; and the rehabilitation of debtor, or in other words providing the debtor with a "*fresh start*".[32]

Bankruptcy laws resolved this issue by creating a priority system for recovery of creditors' claims. But for this system to be effective, the creditors should not be able to enforce their rights outside of bankruptcy and because of that many bankruptcy laws include provisions that would "stay" creditors from such actions against the debtors' assets.

The UNCITRAL Legislative Guide defines "stay of proceedings" as the following: "*a measure that prevents the commencement, or suspends the continuation, of judicial, administrative or other individual actions concerning the debtor's assets, rights, obligations or liabilities, including actions to make security interests effective against third parties or to enforce a security interest; and prevents execution against the assets of the insolvency estate, the termination of a contract with the debtor, and the transfer, encumbrance or other disposition of any assets or rights of the insolvency estate*."[33]

The goal of the stay is to ensure that there is a balance between the debtors interests to reorganize his viable business, and the creditors interests for certainty, predictability and stability of contractual positions.[34] This gives the debtor the time it needs to draft a successful reorganization plan, without the constant fear that its creditors will leave him with no property

[31] Ibid.
[32] "Report of the Commission on the Bankruptcy Laws of the United States," *The Business Lawyer* 29, no. 1 (1973): 75–116.
[33] "UNCITRAL Legislative Guide on Insolvency Law | United Nations Commission On International Trade Law." para. 12.
[34] "Rescue of Business in Insolvency Law" (European Law Institute). 2017. https://bit.ly/400oUBq. (accessed 10 June 2023), 222.

and hence no business to operate. Where there is no effective stay of proceedings there is no incentive for creditors and other stakeholders to participate in business rescue regardless of the presence of a viable company and a modern restructuring framework.[35] For this reason, many international documents promote the inclusion of a comprehensive stay of proceedings provision against debtors' assets in order for reorganization proceedings to be efficient.[36]

1.3. The jurisdictions within the purview of the thesis

The United States has a long history of Bankruptcy laws and is often referred as the leader in Bankruptcy amongst practitioners, scholars, policy, and law makers. This is especially noticeable when it comes to Chapter 11 of the Bankruptcy Code (BC)[37] that regulates reorganization proceedings, considering the statistics on filed petitions.[38] Looking at the statistics, we can assume that both the debtors and the creditors have confidence in Chapter 11 reorganization proceedings. One of the key attributes of Bankruptcy proceedings in the United States is the automatic stay- a US specific type of stay of proceedings, execution, and collection. Because of the importance of this legal institution, the development factor of the United States Laws and abundant case law it seemed logical to use the United States as one of the jurisdictions of comparison.[39]

[35]Milo Stevanovich, Development of Reform Proposals to Better Resolve Insolvencies in the Caribbean (AIPA). 2021. https://bit.ly/43jSVPy, 25.
[36]"UNCITRAL Legislative Guide on Insolvency Law | United Nations Commission On International Trade Law." para. 28-29.
[37]U.S. Congress. House."U.S. Code: Title 11(The Bankruptcy Code)," 1978. https://bit.ly/3Nu9bYt. (accessed 9 June 2023).
[38]"Quarterly Bankruptcy Filings | United States Courts" (United States: United States Courts, December 2022), https://bit.ly/3CvH7xs. (accessed 9 June 2023). Table F.
[39]US Courts(2023), Chapter 11- Bankruptcy Basics, https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics. (accessed on 9 June 2023).

The United Kingdom has been chosen as the most attractive insolvency system in Europe, as well as an example of common law jurisdiction the idiosyncratic characteristic of which is it has had a long history of resistance to introducing a stay but has nevertheless relented in 2020. The Corporate Insolvency and Governance Act[40] amended The Insolvency Act of 1986[41] with the objective to promote the rescue of companies in financial difficulties.[42] Some of the key changes are: new " standalone moratorium" procedure, a new "restructuring plan", and prohibition of "*ipso facto*" clauses.[43] This Act is particularly interesting because it represents the biggest change to the Bankruptcy laws of the UK in the last 20 years.[44]

Lastly, Serbia will serve the example of a civil law jurisdiction, and a "developing bankruptcy system", also having in mind that "The Law on Bankruptcy of the Republic of Serbia" passed in 2009 did follow some of the resolutions implemented in the United States[45], such as a moratorium similar to the automatic stay and the prepack reorganization.

1.4. Research and Methodology Issues

The goal of this thesis is to examine the strengths and weaknesses of three different approaches to "a stay" in Bankruptcy Laws. This comparative analysis should also show whether improvements can be implemented into Serbian Law that is the youngest and the least tested of the three. The research will be done primarily based on the analysis of the United States Bankruptcy Code Article 362, United Kingdom's Corporate Insolvency and Governance Act

[40] UK, Corporate Insolvency and Governance Act 2020.
[41] UK, Insolvency Act 1986.
[42] "The New Corporate Insolvency and Governance Act: Implications for Asset-Based Lenders," http://bit.ly/3KNkvO7. (accessed on 9 June 2023).
[43] Ibid.
[44] Ibid.
[45] S.Spasic, „*Prepack as a chance for Serbian economy*", Pravo I privreda 7–9/2010, 243–257 and N. Nikolic (2011)„*Prepack: American and Serbian solution*", Pravo I privreda,4–6/2011; also USAID Bankruptcy and Enforcement Strenghtening Project provided technical assistance for the development of the Bankruptcy Law in Serbia.

2020 Part A1, and The Law on Bankruptcy of the Republic of Serbia Articles 62 and 93. Further research will consist of other relevant domestic laws, international standards and recommendations, law review articles and available case law. The thesis will consider the regulatory environment and factual circumstances that had impacted the development bankruptcy systems of each jurisdiction.

This thesis is limited to "desk research" which means it is limited to the review of documents that are available on the internet. Other limitations that were encountered are the inequality in the number of legal articles and case law that is available for each jurisdiction and their transparency. Nonetheless, despite these challenges, there are enough available materials to provide an adequate analysis and to reach conclusions.

1.5. Roadmap to thesis

The thesis will be divided into three chapters to provide the reader with clarity and an easy-to-follow structure. Each chapter will cover one jurisdiction. The first chapter will cover United States and will provide the analysis of the automatic stay found in Article 362 of the United States Bankruptcy Code.[46] The chapter will explain the historical and conceptual context; scope; commencement and duration; and relief from the automatic stay.

The second chapter will provide the analysis of the United Kingdom's Corporate Insolvency and Governance Act part A1 provisions on moratorium.[47] The chapter will explain the historical and conceptual context; scope; commencement and duration; and relief from the moratorium.

The third chapter will analyze The Law on Bankruptcy of the Republic of Serbia Articles 62 and 93 provisions on stay of execution and collection.[48] The chapter will explain the historical

[46] 11 U.S. Code § 362.
[47] UK, Corporate Insolvency and Governance Act 2020, part A1.
[48] Republic of Serbia, Law on Bankruptcy, art.62 and 93.

and conceptual context; scope; commencement and duration; and relief from the stay. This chapter will focus on the possibility of improvements of Serbia's Law on Bankruptcy through implementation of solutions previously mentioned in the first two jurisdictions.

2. UNITED STATES: AUTOMATIC STAY

2.1 Historical and conceptual context

The United States Constitution authorizes Congress to enact "uniform Laws on the subject of Bankruptcies."[49] However, until the 1890s, there was no long-term federal bankruptcy law.[50] For a long time, the English phrase that "*being a gentleman and engaging in business are mutually exclusive*" largely prevailed, while women were prohibited from entering most of the professions.[51] Bankruptcy was thus a tool available to a quite narrow slice of the population. Eventually American bankruptcy law abandoned the English, "merchant only" approach, and allowed all kind of debtors to apply for bankruptcy. At the time when Congress enacted the 1898 Bankruptcy Act, the first permanent federal bankruptcy law, business "bankruptcy" already encompassed two treads. Companies could have been liquidated, but an important culture of corporate reorganization, had simultaneously developed as part of federal jurisprudence and the use of the common law device of receiverships.[52] This was due to development of railroad corporations, and experience with more complex corporate bankruptcy cases.[53]

The 1938's Chandler Act[54] brought important amendments to the 1898 Bankruptcy Act. Railroads were allowed to keep their old receivership style provisions, but all other businesses

[49] U.S. Const. amend. I, § 8, cl. 4.
[50] "The Evolution of U.S.Bankruptcy Law: A Time Line," Federal Judicial Center, n.d.
[51] Stephen J. Lubben, *Some Historical Context* (Edward Elgar Publishing, 2021). https://bit.ly/3XcYCfI. 3-7.
[52] Ibid.
[53] Ibid.
[54] Vincent Leibell, Jr., "*The Chandler Act-Its Effect Upon the Law of Bankruptcy*," (Fordham Law Review 9, no. 3, January 1940), 380.

would have to reorganize under one of two new chapters. Chapter 10 covered all public companies, with cases subjects to the oversight of the Securities and Exchange Commission (SEC), while Chapter 11 was aimed at smaller companies. The Act mostly ended the practice of receivership thus disabling investment bankers to control the proceedings, required rather appointment of independent trustees to manage the proceedings, gave oversight authority to the Securities and Exchange Commission in Chapter 10, and made voluntary petitions more attractive to debtors[55].

Finally, the reorganization proceedings were completed in the 1978 Bankruptcy Law. At that time, the economy of the United States was experiencing a period of slow growth and high inflation, characterized by a combination of high unemployment, rising prices, and slow economic growth. The Vietnam War had also placed a significant strain on the government's finances, contributing to a large budget deficit. At that time the Congress embraced the idea that it is "*more economically efficient to reorganize then to liquidate, as reorganization preserves assets and jobs*".[56] In addition, Congress believed that assets would preserve greater value if used in industry for which they have been designed[57] and the Chapter 11 of the Bankruptcy Code in 1978 was seen as a significant step forward in improving the bankruptcy laws to better meet the needs of struggling businesses. The Law consolidated chapter 10 and Chapter 11, and among many other structural and legislative changes introduced the concept of automatic stay.

To this day the automatic stay remains one of the most important mechanisms in liquidation proceedings, but it is a crucial element for successful chapter 11 bankruptcy proceedings.[58] It

[55] Ibid.
[56] H. Michael Bradley and Michael Rosenzweig, *"The Untenable Case for Chapter 11*," (The Yale Law Journal 101, no. 5, 1992): 1043, https://doi.org/10.2307/796962.
[57] Ibid.
[58] Charles Jordan Tabb, *The Law of Bankruptcy*, Fifth edition, Hornbook Series (St. Paul, MN: West Academic Publishing, 2020).

takes effect when the petition for bankruptcy is filed, without the need for any additional action of the debtor or the court.[59] The main characteristics of the stay are that: it is an injunction; it is automatic; it is self-executing; and sanctions can be imposed upon it's breach. [60] To make this clearer once the petition is filed and the stay is triggered it works as an injunction and prohibits any attempts of interference with the property of the estate.[61] Generally, injunction is a court order used to make a person act or stop acting a certain way in order to prevent irreparable harm or injustice, meaning it has remedial purpose. In the case of automatic stay the only difference is that there is no need for a court order to make the stay "*good against the world*" as the name itself implies that it is "automatic".[62]

The automatic stay preserves the bankruptcy estate while the proceedings are on-going. There are two main goals of the stay. On one hand, stay benefits the creditors by protecting them from one another since they have to abide to predetermined priority order. This allows for the creation of equal opportunity and fair system for repayment of creditors' claims. The courts have also taken this view in a number of decisions: "The stay shields creditors from one another by replacing 'race' and other preferential systems of debt collection with a more equitable and orderly distribution of assets. It encourages rehabilitation."[63]

On the other hand, the stay benefits the debtor because it stops "creditor harassment" which gives him enough time to take necessary steps to come up with a reorganization plan. The stay doesn't apply only to the debtor and creditors, but also to collection agencies, government entities and other parties in the bankruptcy proceedings. It creates an injunction against litigation, lien enforcement or other actions taken against a debtor or the estate to either enforce

[59] Ibid.
[60] Charles Jordan Tabb. Bankruptcy Law: Principles. Policies, and Practices, Chapter 4.
[61] Ibid.
[62] Ibid.
[63] *Domenico Tringali v. Hathaway MacHinery Company, Inc,* No. 800 F.2d 173 (Court of Appeals for the Seventh Circuit September 4, 1986).

or collect pre-petition claims.[64] This is an important characteristic of the automatic stay since it allows courts to resort to contempt of court powers to sanction ones infringing it. Overall, the automatic stay is an efficient mechanism for maintaining the status quo between claimants in the bankruptcy proceedings.[65] Provisions on the automatic stay can be found in section 362 of United States Bankruptcy Code.[66]

2.2. The scope of the stay

When it comes to the scope of the automatic stay, we need to look at it from two perspectives. Firstly, we need to understand what property does the function of the stay apply to and who does it affect? Secondly, we should answer which actions does it apply to?

The answer to the first question is simple. The function of the automatic stay is limited to the protection of the bankruptcy estate, within the meaning of Section 541 (a)(1) of the Bankruptcy Code.[67] This section provides a broad definition of all property that is included in the debtor's estate, and a list of assets that can be exempt. This can shortly be explained as: all legal or equitable interest of debtor in property.[68] The stay only applies to property that the debtor has interest in as of commencement of the case and to pre-petition claims.[69]

The code also defines that the stay is applicable to all entities.[70] The Bankruptcy Code defines "entity"-as "*any "person, estate, trust, governmental unit, and the United States trustee*."[71]

[64] Charles Jordan Tabb. "*Bankruptcy Law: Principles. Policies, and Practices."* Chapter A.
[65] Ibid.
[66] 11 U.S. Code § 362.
[67] 11 U.S. Code § 541(a)(1).
[68] "The Automatic Stay: What Creditors Need to Know," The National Law Review, accessed June 10, 2023, https://www.natlawreview.com/article/automatic-stay-what-creditors-need-to-know.
[69] Ibid.
[70] 11 U.S. Code § 362(a) includes the word "entity" as a part of the definition of the stay.
[71] 11 U.S. Code § 101 (15) gives a definition of entity.

There are some situations when the stay will not apply, for example when a governmental unit is enforcing police or regulatory power.[72] Typically, the stay applies only to parties to the proceedings. The United States Courts have usually refused to extend the stay to non-debtor third parties like officers and principals.[73] There are some exceptions, the most known being the *A.H. Robins Co. v. Piccinin* case where the Court found that the stay may be extended effect non-debtor parties if there are "*unusual circumstances*".[74] This can only apply if the debtor and non-debtor parties are so closely connected that the judgement against the non-party debtor would affect the debtor as if it was a judgement against himself.[75]

When it comes to establishing which actions does the automatic stay apply to, the list is quite long. An article published in the National Law Review nicely condensed the exceptions of the Bankruptcy Code Section 362 (a) into eight categories of actions that are stayed:

1. *"The commencement or continuation of a judicial, administrative or other proceeding against the debtor to recover on a pre-petition claim against a debtor;*
2. *The enforcement of a pre-petition judgment against the debtor or its property;*
3. *Any act to obtain possession of the debtor's property or to exercise control over such property;*
4. *Any act to create, perfect or enforce a lien against the debtor's property, subject to certain exceptions, including mechanics liens;*
5. *Any act to create, perfect or enforce a lien against the debtor's property for pre-petition claims;*

[72]11 U.S. Code § 362(b) (4).
[73]Gucci America, Inc. v. Duty Free Apparel, Ltd., No. 328 F. Supp. 2d 439 (S.D.N.Y. 2004 June 24, 2004).
[74] A.H. Robins Co., Inc. v. Piccinin, 788 F.2d 994 (4th Cir. 1986).
[75]Ibid.

6. *Any act to collect, assess or recover a pre-petition claim against the debtor;*

7. *Set offs of any pre-petition debt owing to the debtor, and;*

8. *The commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.*[76]

However, the Code also provides certain exceptions to the previous list. According to Section 362(b) the stay does not apply to commencement or continuation of criminal proceedings, various proceedings regarding family law, collection of domestic support obligations, suspension of a driver's license, certain tax and medical obligations.[77]

2.3. The commencement and duration of the stay

The automatic stay goes into effect immediately upon the debtor's filing of petition for chapter 11 bankruptcy proceedings. The name itself tells us that it has automatic character meaning that no separate court decision is required for the stay to apply. To go beyond, there is no requirement for the serving of notice in order for the stay to take effect upon third parties which makes it fully self-executing.[78]

The stay also has temporary character and is supposed to last only until necessary to process bankruptcy proceedings.[79] The provisions regarding automatic termination of the stay are found in Section 362(c) (1) and (2).[80]

[76] 11 U.S. Code § 362(a); "The Automatic Stay: What Creditors Need to Know," The National Law Review, https://www.natlawreview.com/article/automatic-stay-what-creditors-need-to-know. (accessed 10 June 2023).
[77] 11 U.S. Code § 362(b).
[78] Charles Jordan Tabb, *The Law of Bankruptcy*. 237. para. 3.2.
[79] Charles Jordan Tabb, *The Law of Bankruptcy*. 278. para. 3.15.
[80] 11 U.S. Code § 362(c).

In reorganization cases the stay will most often cease to exist by court's confirmation of the reorganization plan. This is because the confirmed plan replaces the pre-petition existing contracts with new ones and the property of the estate seizes to exist.[81] The confirmation of the plan discharges the debtor from previously existing debts and from then on he is bound to comply with the obligations as arranged in the plan."[82]

Otherwise, the stay is also terminated if the case is closed, it is dismissed, or discharge is granted by court.[83] The latter of the three requires further attention and will therefore be discussed in the next section.

2.4. Relief from the stay

Automatic stay can sometimes remain in effect for a very long time, enabling the secured creditors to seek recourse from their collateral.[84] The Bankruptcy Code provides the secured creditor with the option to ask for relief from the court in certain situations as prescribed by the Code. Relief can also be requested by unsecured creditors but it usually occurs only when the unsecured debt is non dischargeable, for this reason the primary focus in on secured creditors.

Ability to request a relief is of particular importance in chapter 11 cases where the stay usually stays in effect the longest, because of the lengthy and complex negotiations. The congress therefore carefully considered the interest of the secured creditors against the goal of the proceedings in order to create a balancing solution.[85] The opinion that the secured creditor has interest in the property collateral that deserves protection both under Fifth Amendment of the

[81]11 U.S. Code § 362(c)(2).
[82]11 U.S. Code § 1141(d)(1).
[83]11 U.S. Code § 362 (c)(2).
[84]Charles Jordan Tabb, *The Law of Bankruptcy*. 285. para. 3.17.
[85]Ibid.

US Constitution[86] and as a matter of policy was the view of both the congress and the Supreme Court.[87] It was confirmed by the decision in *Louisville Joint Stock Land Bank v. Radford* in which Supreme Court found that the bank could not be deprived of private property without just compensation.[88] The tension between secured creditors interests and debtors' interests has been resolved by inclusion of an article that allows relief from the stay upon certain conditions.[89]

The article has two fundamental premises that will determine if the creditor has a chance to be granted relief. The simpler is found in the article 362(d)(2) that states that the creditor may be granted relief if he proves that the debtor has no equity in the specific property and that property is not necessary for effective reorganization.[90] In chapter 11 proceedings specifically the debtor will sometimes be allowed to continue using the property even if he has no equity but the property plays an important factor in his reorganization.[91] In this situation the debtor will remain the holder of the property, but he will be obliged to make payments to the actual owner.

When secured creditors are at stake the key question is whether the collateral is needed for successful reorganization? If the answer is yes, the court should not allow the secured creditor to enforce its security interest on the collateral. The creditor bears the burden to prove that the

[86] U.S. Const. amend. V: The Fifth Amendment creates limitations for Governmental powers in both criminal and civil procedure and establishes the obligation of due process and obliges the Government to provide just compensation.
[87] 11 U.S. Code § 362(c).
[88] *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (6th Cir. 1935): the Court held that the Frazier-Lemke Act took away too many of the collective rights of a farm mortgagee and therefore was invalid under the Fifth Amendment.
[89] 11 U.S. Code § 362 (d)(1) and (2).
[90] Charles Jordan Tabb, *The Law of Bankruptcy*. 309. para. 3.24.
[91] Ibid., 287, para 3.17.

first condition mentioned above is met.[92] If he succeeds, the burden shifts to the debtor in possession or the trustee to oppose him on this.[93]

Courts have developed a test whereby the debtor needs to prove both the necessity and the feasibility of the reorganization in order to resist relief from the stay when it comes to secured creditors.[94] While proving necessity usually does not create a problem in this situation, proving feasibility is quite a hard task for the debtor.[95] The posed question is whether the debtor actually has to prove that the reorganization will be successful in the end in order to prove feasibility?[96] The prevailing view is that the debtor must prove that there is "*reasonable possibility for a successful reorganization within a reasonable time*" as stated by the court in the *United Savings Association v. Timbers of Inwood Forest Associates* decision.[97] Courts estimation of this requirement will be strongly dependent on the time frame of the case. It is less likely that the court will grant relief to the creditor right at the beginning of the proceedings where the debtor is only starting to develop a plan and can provide limited information on it's possible solution.[98] In this situation courts have a tendency to give the debtor a chance.[99] However, the creditor may make multiple attempts to get relief and the court is likely to become more understanding on his behalf as the proceedings go on.[100]

[92] Ibid.
[93] Ibid.
[94] Ibid., 307, para 3.23.
[95] Ibid., 308.
[96] Ibid., 309, para 3.24.
[97] *United Savings Association of Texas v. Timbers of Inwood Forest Associates*, Ltd., 484 U.S. 365 (1988).
[98] Charles Jordan Tabb, *The Law of Bankruptcy*. 310.
[99] Ibid.
[100] Ibid.

Another option that a creditor has for relief, when relying on article 362(d) (2), is to prove that that the debtor will not be able to succeed in getting the reorganization plan approved, which can only be applied if the secured creditor has the position to veto the plan.[101]

Article 362(d) (1) states that the creditor can get a relief from the stay if the creditor proves "*cause*" and there is a "*no adequate protection of the interest in property*." [102] Whether there is cause is determined on case-to-case basis, since the code does not provide definition of the term itself.[103]

When it comes to provision of adequate protection it rests on the protection of property under the Fifth Amendment, but its scope is determined by the Bankruptcy Clause.[104] Congress has emphasized the policy that a secured creditor should not be deprived of his right in the property.[105] The idea is to provide alternative means for the creditor to realize his rights, that should not interfere with the goal of the proceedings, but would still provide him with the same value.[106] The Bankruptcy Code does not define what adequate protection is and it is on the courts to determine this in each individual case.[107] The basic idea is to protect the value of the creditors collateral.

An addition to article 362 (d)(1) and (2) is "*ex parte"* relief found in 362 (f) that gives the creditor the ability to seek relief to prevent irreparable damage if the damage would occur under the normal time procedure.[108]

[101] Ibid. 311, para 3.24.
[102] 11 U.S. Code § 362 (d)(1).
[103] *Izarelli v. Rexene Prod. Co. (In re Rexene Prod. Co.) 141* B.R. 574, 576 (Bankr. D. Del. 1992).
[104] Charles Jordan Tabb, *The Law of Bankruptcy*. 290.
[105] Ibid.
[106] Ibid. 291. para 3.18.
[107] Ibid.
[108] Ibid. 288.

Finally, a dilemma over the secured creditors right to preserve "equity cushion" – an amount by which the value of the collateral exceeds the values of the debt – under the adequate protection provisions of the law was resolved negatively.

The courts rejected such standings, as the rationale for adequate protection relates only to protecting the value of the property, not to protect creditors against delay in their repayments.[109] Still, if the creditor is over-secured, the secured claim will include the post-petition interest rates, up to the value of the collateral, as a partial concession to the fact that money does lose its value over the time.

[109] Ibid. 301-302. para. 3.20.

3. UNITED KINGDOM: CIGA MORATORIUM

3.1. Historical and conceptual context

In 1977, the UK government commissioned a review of insolvency law and practice chaired by Sir Kenneth Cork.[110] The resulting report, known as the Cork Report, was published in 1982 and recommended significant modernization and reform of UK insolvency laws, including the introduction of new business rescue procedures such as Administration and Company Voluntary Arrangement (CVA).[111] A White Paper, entitled "A Revised Framework for Insolvency Law," was subsequently issued in 1984, which led to the enactment of the Insolvency Act 1986.[112] Both the Administration and CVA schemes were consolidated in the 1986 Insolvency Act, and implemented in detail by the 1986 Insolvency Rules.[113] Since then, the law has undergone periodic reviews and revisions, with the most recent revision in 2020. The following text will focus on the analysis of the new standalone moratorium introduced by the 2020 revision of the Insolvency Law in the United Kingdom (CIGA moratorium), firstly examining its legislative background.

Already the 1982 Cork Report suggested that a restructuring moratorium should be introduced in the United Kingdom.[114] With no movement towards its introduction, the question was again raised during the UK Company Law Review that occurred in 2001 but it was seen as an "*issue of insolvency*" and thus remained intact.[115] Further considerations were taken in 2009-10 when

[110]United Kingdom, House of Commons, Trade and Industry Committee, Cork Report, (December 20, 1999), https://bit.ly/42J0oGB. (accessed 6 June 2023).
[111] Ibid.
[112] "Revised Framework for Insolvency Law: White Paper," May 21, 1984, RF 3/61, The National Archives, Kew.
[113] UK. Insolvency Act 1986, part 1 and 2: UK.Insolvency Rules 2016. Part 2 and 3.
[114] Jennifer Payne, "An Assessment of the UK Restructuring Moratorium," SSRN Scholarly Paper (Rochester, NY, January 4, 2021). https://doi.org/10.2139/ssrn.3759730. 5.
[115] Company Law Review, Modern Company Law for a Competitive Economy – Final Report, URN 01/943, 2001 (CLR, Final Report), para. 13.11.

the Insolvency Service issued a consolidation document on corporate rescue,[116] followed by new proposals in 2016.[117] None of these documents seemed to be successful enough to instigate the introduction of moratorium provisions into United Kingdom's insolvency laws.

The possible explanation to why, after years of resistance, has the United Kingdom surrendered this fight is perhaps the fact that it was losing attractiveness as a restructuring center.[118] In recent years, other jurisdictions had introduced their own restructuring arrangements that were rivals to the United Kingdom's.[119] Most of which provided a stay similar to the United States "*automatic stay*".[120]

Consequently, the United Kingdom's Government conducted consultations on Insolvency and Corporate Governance in 2018, as part of its efforts to improve the country's insolvency laws and corporate governance framework.[121] The consultation aimed to gather views from stakeholders on the effectiveness of the existing insolvency laws and corporate governance practices, and to identify areas where improvements could be made.[122] The government recognized that the insolvency landscape had changed significantly since the last major reform in 2002,[123] and that there was a need to update the laws to ensure they remained fit for purpose in the modern business environment. Additionally, the government was keen to explore ways of improving the ability of companies to rescue themselves as going concerns, and to ensure

[116]ILA Technical Committee, "Encouraging Company Rescue- Response of Insolvency Lawyers' Association" September 2009. https://bit.ly/42DZ2wI. para. 2.8, accessed on 10 June 2023).
[117] United Kingdom, Insolvency Service, "A Review of the Corporate Insolvency Framework: A Consultation on options for reform" May 2016. https://bit.ly/3NucbUJ. (accessed on 10 June 2023).
[118] UK. Cork Report 1999. 6.
[119] Ibid.
[120] Ibid.
[121]BEIS, "Insolvency and Corporate Governance: Government Response," March 2018. https://bit.ly/3CvEv2T. (accessed 10 June 2023).
[122] Ibid.
[123] UK Public General Acts, Enterprise Act (2002), s 250 inserting ss 72A-72G into the Insolvency Act (1986).

that the insolvency framework supported this objective.[124] Still after this attempt there was a period of 18 months where no action whatsoever was taken, only after the relisation that COVID 19 pandemic will cause seuvere financial distress to businesses was the issue again found on the reform agenda.[125] As a result the Governement introduced the Corporate Insolvency and Governance Act (CIGA) 2020.[126] The measures in CIGA reflect the government's commitment to improve United Kingdoms's insolvency laws and corporate governance practices to support business rescue and restructuring efforts.

The CIGA was designed to provide temporary assistance to companies and directors during the COVID-19 crisis, as well as to upgrade the United Kingdom's business rescue restructuring toolkit.[127] After the consulatations in 2018 the Government once again suggested the introduction of a new standalone moratorium that would give companies a formal "breathing space" in which they can pursue a rescue or restructuring plan.[128] The justification is that the only viable option for companies facing financial distress at the time, was to enter into formal insolvency proceedings, such as administration or liquidation, which could be costly and time-consuming.[129] As a result provisions on the new standalone moratorium were included in the CIGA which recieved Royal Assent on 25 June 2020.[130]

The Act also includes other important novelties to the United Kingdom’s Insolvency system such as the new restructuring plan, the ability to "cram-down" the plan on dissenting creditors

[124] UK Insolvency Service. Review 2016. para. 8.7.
[125] Ali Shalchi, “New Business Support Measures: Corporate Insolvency and Governance Act 2020,” *Briefing Paper*, June 14, 2023, https://bit.ly/3NeuJHa. 7-9.
[126] UK. Corporate Insolvency and Governance Act 2020.
[127] UK. Acts of Parliament. “Corporate Insolvency and Governance Act 2020: Explanatory Notes.” (King’s Printer of Acts of Parliament). https://bit.ly/3X8EpYv . (accessed 10 June 2023). 4.
[128]UK, Department for Business, Energy and Industrial Strategy (BEIS). "*Insolvency and Corporate Governance: G*overnment Response," 26 August 2018. https://www.gov.uk/beis.
[129] UK. “Corporate Insolvency and Governance Act 2020: Explanatory Notes.” para. 7-12.
[130] UK. “Corporate Insolvency and Governance Act 2020: Explanatory Notes.”

and shareholders, and a ban on "ipso facto" clauses. This is of great importance because prior to the CIGA, the primary options for restructuring a company in financial distress in the United Kingdom were administration proceedings and company voluntary arrangements (CVAs) only.[131] However, these procedures required a company to meet certain criteria and obtain the approval of creditors or the court.[132] Introduction of these new measures made the United Kingdom's Insolvency Law much more aligned with the United States chapter 11 proceedings.[133]

One of the new measures, the standalone moratorium is now a part of the Insolvency Act 1986 and has replaced the previously existent Schedule A1 moratorium which could have only applied to small businesses, but was not widespread in use.[134] The function of the new moratorium is to prohibit creditors actions against the company without the court's permission during the time it is in force.[135] The CIGA moratorium is made to be free standing; meaning that it is not connected to a particular insolvency proceeding or possible rescue process.[136] In other words, the company may go to the court to apply for the moratorium prior to initiation of any type of insolvency proceedings. The company can end up recovering without any further process, undergo sale or choose one of the formaly viable options, inlcuding the new restructuring plan.[137]

[131] Vanessa Finch and David Milman, Corporate Insolvency Law: Perspectives and Principles, vol. 17, no. 4. (Cambridge University Press, 2017). 201-211.
[132] Ibid.
[133] Ali Shalchi, "New Business Support Measures: Corporate Insolvency and Governance Act 2020". 4.
[134] Peter Walton and Jacobs Lazelle,"Corporate Insolvency and Governance Act 2020 - Interim Report March 2022*"* (The Insolvency Service December 19, 2022). https://bit.ly/3NwZ59d. (accessed 9 June 2023)
[135] Ali Shalchi, "New Business Support Measures: Corporate Insolvency and Governance Act 2020". 11-12.
[136] Ibid. 11.
[137] Ibid.

The CIGA moratorium provides a number of significant differences to the existing moratorium available in administrative proceedings and CVA moratorium that it replaiced, regarding:[138]

1. Eligibility: the administrative proceedings and the CVA moratorium have certain eligibility criteria that companies must meet to enter the moratorium. A company practically has to be insolvent to enter into an administration moratorium,[139] and only small businesses could apply for the moratorium in CVAs, provided they meet certain conditions.[140] In contrast, the new standalone moratorium is available to any company that is experiencing financial difficulties or is likely to experience financial difficulties in the near future, and does not require the company to reach the stage of insolvency.[141]

2. Duration: The still existing moratorium in administrative proceedings and the former moratorium in CVAs have different time limits for their duration. For example, an administration moratorium can last for up to one year, and a CVA moratorium can last for up to 28 days.[142] In contrast, the new standalone moratorium can last for up to 20 business days initially, with the possibility of extending the moratorium for a further 20 business days or longer with the agreement of creditors.[143]

3. Debtors protection from creditors: Both CVA and administration moratorium allowed creditors to take legal action against a company during the moratorium, in cases where

[138]Nigel J. Isherwood, "Coronavirus and Corporate Insolvency: A Comparative Analysis of the Corporate Insolvency and Governance Act 2020," Aberdeen Student Law Review 11 (2022). 110.

[139] UK. Insolvency Act 1986, Schedule B1, para. 10.
[140] Lorraine Conway, "Company Voluntary Arrangements (CVAs)," 6944 (House of Commons, June 11, 2019), 12.
[141] Ali Shalchi, "New Business Support Measures: Corporate Insolvency and Governance Act 2020." 12.
[142] Lorraine Conway, "Company Voluntary Arrangements (CVAs). 11.
[143] Ali Shalchi, "New Business Support Measures: Corporate Insolvency and Governance Act 2020." 14-15.

the have court grants them permission.[144] The CIGA moratorium provides higher level of protection from legal action of creditors, with only limited exceptions.[145]

4. The role of the monitor: In administrative proceedings the appointed insolvency practitioner, known as the „administrator" takes on the role of „the manager of the company" and is appointed by the court or in certain cases, by the holder of the floating charge.[146] In contrast, the CIGA moratorium allows directors of the company to remain in charge of managing the business, and to choose the monitor who will oversee the proceedings, provided the monitor meets certain eligibility criteria and are not conflicted.[147]

The introduction of the CIGA has been seen as a positive step for companies in financial distress in the UK, as it provides them with greater flexibility and protection than the previous options of administration and CVAs.[148] Many practitioners welcomed the new moratorium as a useful tool for struggling companies to pursue a rescue or restructuring plan.[149] However, there are also concerns about the usefulness of the moratorium for companies that are having more complex financial difficulties because of the relatively short time frame the moratorium is supposed to last.[150] The company may ask for an extension from the court but this is conditioned by factors like creditors consent and is still limited to maximum 12 months. On the other hand, there is a question to what extend will small and medium scale enterprises (SMEs) be able to

[144] Ibid.
[145] UK. Insolvency Act 1986, Part A1, Chapter 4.
[146] UK. Insolvency Act 1986, Schedule B1, para. 10-13 and 14-21.
[147] UK. Insolvency Act 1986, Part A1, Chapter 4 (13) A22.
[148] Norton Rose Fulbright. "The New Corporate Insolvency and Governance Act: Implications for Asset-Based Lenders."
[149]Elisha Juttla, "UK Insolvency Service Publishes Final Review on CIGA," *Global Restructuring Review*, December 22, 2022, https://globalrestructuringreview.com/article/uk-insolvency-service-publishes-final-review-ciga. (accessed 10 June 2023).
[150] Peter Walton and Jacobs Lazelle, Interim Report March 2020.

keep up with the cost and complexity of the new moratorium.[151] According to Insolvency Service monthly statistics, 33 Moratoriums were obtained between 26 June 2020 and 28 February 2022.[152] This is quite a small number considering the time span, which also gives us a perspective on the efficiency of the new moratorium.

3.2. The Scope of the CIGA moratorium

The new moratorium in chapter 4 of the Insolvency Act 1986 is dedicated to the regulation of its effects on the debtor and its creditors. Only a company can apply for the moratorium as a debtor, if it is eligible under the provisions of the CIGA.[153]

Before analyzing the effects of the moratorium, it should be noted to what debts and liabilities it applies to. Overall, the CIGA moratorium will apply to pre-moratorium debts. Pre-moratorium debts are defined as debts that existed before the moratorium was in effect or debts arising from an obligation the company undertook prior to its effect, but for which the claim becomes due after the effect.[154] However, CIGA moratorium only applies to certain pre-moratorium debts, there are debts for which the company will not get a payment holiday.[155] This in a way resembles exceptions in United States Bankruptcy Code mentioned in the prior chapter,[156] though the subjects of the exceptions are quite different.[157] While exceptions from the automatic stay are mostly concerning administrative fees and obligations, the CIGA also

[151] Jennifer Payne, "An Assessment of the UK Restructuring Moratorium,"
[152]The Insolvency Service. "Monthly Insolvency Statistics: February 2022," Company Rescue. https://bit.ly/3CzIKdA. (accessed 10 June 2023).
[153] UK. Insolvency Act 1986, Schedule ZA1 para. 1.Certain types of companies, such as banks, insurers, companies involved in PPP projects, and those that have issued debt of £10 million or more, cannot make use of the moratorium procedure.
[154] UK. Corporate Governance and Insolvency Act 2020, Chapter 4, part 3.
[155] UK. Corporate Governance and Insolvency Act 2020, Chapter 4, part 3 (a) to (f).
[156] 11 U.S. Code § 362(a) and (b).
[157] 11 U.S. Code § 362(a) and (b).

includes payments for goods and services supplied during the moratorium, or debt payments and labilities arising from financial contracts.[158]

A thing to mention is the exclusion of accelerated debt from the priority pre-moratorium financial debts if the company enters into insolvency proceedings subsequently.[159] This is particularly important because there was a concern that if creditors accelerated pre-moratorium financial debt the moratorium would result in failure since the company in most cases would not be able to pay the accelerated amount.[160] The creditors would have thereafter been able to obtain super priority for their claims.[161] This exception can be justified by the fact that the only case regarding the moratorium, considered by the High Court, actually involved default on a loan that in effect resulted in acceleration of a second loan given by the same creditor.[162] The company is also responsible for obligations that arise from moratorium debts, meaning debts or liabilities that the company becomes subject to during the moratorium or after the moratorium is no longer in effect but as a result of an obligation taken on during the moratorium.[163]

Now that the extension of debts and liabilities that are covered by the moratorium has been clarified, the focus should be reoriented on determining which creditors actions does the moratorium apply to. Firstly, creditors are restricted from commencing any type of insolvency proceedings offered in the United Kingodom during a moratorium. The moratorium is a separate „standalone“ proceeding and is not conditioned by filing for insolvency, unlike the

[158] 11 U.S. Code § 362(a) and (b).
[159] UK. Insolvency Act 1986. ss. 174A(3)(4).
[160] UK Parliament House of Commons, Lords Amendments To The Corporate Insolvency and Governance, 13, para. 69. https://bills.parliament.uk/bills/2739/publications. (accessed on 10 June 2023).
[161]Cathryn Musscutt, Paul Williams
"The Corporate Insolvency and Governance Act: The Moratorium and Just How 'Super' Is Super Priority?," Restructuring Matters. July 13, 2020, https://bit.ly/3XcNv6v. (accessed 10 June 2023).
[162]"High Court Rules on First Contested UK Standalone Moratorium Process | Perspectives & Events | Mayer Brown," https://bit.ly/3Xd2BJc. (accessed 10 June 2023).
[163] UK. Corporate Governance and Insolvency Act 2020, Chapter 8, ss. A53.

automatic stay in the United States that cannot be imposed outside of the bankruptcy proceedings. Hence, no petition can be presented for the winding up of the company, no administration application may be made, and no administrative receiver of the company may be appointed, among other restrictions throught the duration of the moratorium.[164] Second, there is a restrictions on enforcement and legal proceedings during a moratorium, including the fact that a landlord or other person to whom rent is payable may not exercise a right of forfeiture, and no legal process (including legal proceedings, execution, distress or diligence) may be instituted, carried out or continued against the company or its property, except with permission from the court.[165]

The next section is focused on the holder of the floating charge, a security device unknown to the United States and therefore not relevant to the automatic stay provisions of the Bankruptcy Code.[166]In the United Kingdom, however, this is a routinely used security device that allows creditors to have a charge over all shifting assets of a company-debtor. As it is used together with fixed charges – covering fixed assets of the company-debtor – they in tandem are strong securities. The floating charge gets a priority position upon crystalization that usually occurs when debtor defaults and is thus transformed into a fixed charge over the assets that were in debtors possesion in that moment. As crystallization normally occurs later in time, the holder of a floating charge would rank after the holders of fixed charges on movables and mortgage on real property, unpaid moratorium debts and pre-moratorium debts without a payment holiday, emloyee liabilities, administrative fees and expences and preferential creditors. If the CIGA moratorium is not in effect, the holder of a qualifying floating charge might, in certain

[164] UK. Insolvency Act 1986, Part A1, Chapter 4 (13) A20.
[165] UK. Insolvency Act 1986, Part A1, Chapter 4 (13) A21.
[166] It is important to note that the United States do have a similar instrument called "floating lien", in which case upon filing for bankruptcy and crystallization of the assets covered by the floating lien the creditor immediately gets a priority position in bankruptcy proceedings.

cases determined by law, be allowed to appoint an administrator of its choice in order to "speed up" insolvency proceedings.[167] This however is only possible in exceptional cases where the chargee has a charge over "*all or substantially all of debtors property*" and is regulated by The Insolvency Act Schedule B1, known as The Enterprise Act.[168] In other cases the court appoints the administrator. The moratorium forbids the holder of an uncrystallised floating charge on the property of a company to cause the charge to crystallize or impose any restriction on the disposal of the company's property.[169]

The Act allows creditors to enforce securities that were given by the company during the effect of the moratorium but only if granted by the monitor.[170] This still falls under the provision that no security, except certain financial collateral, can be enforced without the permission of the court.[171]

It would be beneficial to give a brief explanation on the role of the monitor introduced by CIGA. The monitor should be an insolvency practitioner.[172] His role is to supervise the company's affairs during the moratorium and to determine if the company may be saved as a going concern.[173] He ensures that the company is complying with the moratorium requirements, provides ongoing oversight and is responsible for safeguarding the interests of stakeholders and ensuring that the process is fair and transparent.[174] The directors of the company remain in their positions to run the business, but they must provide requested information to the monitor, as

[167]UK. Insolvency Act 1986, Schedule B1, para. 14-21: The administrator's obligation upon appointment by the holder of the floating charge is to make sure that he is paid out of his security.
[168] UK. Insolvency Act 1986, Schedule B1, para. 14.
[169] UK. Insolvency Act 1986, Part A1, Chapter 4 (13) A22.
[170] UK. Insolvency Act 1986, Part A1, Chapter 4 (13) A23.
[171] UK. Insolvency Act 1986, Part A1, Chapter 4 (13) A21(c)(i).
[172] UK. Insolvency Act 1986, Part A1, Chapter 5 A35.
[173] UK. Insolvency Act 1986, Part A1, Chapter 5 A34.
[174] UK. Insolvency Act 1986, Part A1, Chapter 5 A35.

failure to do so leads to termination of the moratorium.[175] The monitor can seek court directions and can end the moratorium if certain conditions are met.[176] Challenges to the monitor's actions can be brought by creditors or affected parties, but no compensation can be ordered.[177]

Lastly, certain limitations are also imposed on the debtor-company during the moratorium. First there is a limitation of the company's right to obtain credit of more than 500 pounds without informing the potential creditor that the moratorium is in force.[178] Next, the company may grant security but only upon monitors consent; the company is not allowed to enter into market contracts; pre-moratorium debts of certain value, that are subject to payment holiday may be paid only if allowed by the monitor or pursuant a court order; the company cannot dispose of property without the consent of monitor or the court except in ordinary course of business.[179]

3.3. The commencement and duration of the CIGA moratorium

Unlike the United States Chapter 11 automatic stay, that automatically applies once the proceedings are commenced, the CIGA moratorium does not have the same characteristic. This is because the moratorium is a standalone procedure that does not attach to the commencement of an insolvency case.[180] This does not eliminate the possibility of the moratorium being used as a pre-cursor to an insolvency process if the company wishes so.[181]

[175] UK. Insolvency Act 1986, Part A1, Chapter 5 A36.
[176] UK. Insolvency Act 1986, Part A1, Chapter 5 A38.
[177] UK. Insolvency Act 1986, Part A1, Chapter 5 A42.
[178] UK. Insolvency Act 1986, Part A1, Chapter 4 (13) A25.
[179] UK. Insolvency Act 1986, Part A1, Chapter 4 (13) A25 to A29.
[180] UK. Corporate Insolvency and Governance Act 2020. ss. 1-6 and Schs. 1-8, which introduces new provisions into the Insolvency Act 1986 (for Great Britain) and into the Insolvency (Northern Ireland) Order 1989 (for Northern Ireland).
[181] UK. Corporate Insolvency and Governance Act 2020.

Also, to obtain the moratorium, the directors of the company have to file various documents to the court.[182] In case of a foreign company, or a company facing outstanding winding up petition[183], the directors filing is not considered enough and they must apply to the court which will then determine whether the moratorium should be allowed.[184] The idea of the CIGA was that companies of all sizes are eligible to use the new moratorium.[185] This is a hard task to achieve especially having in mind that previous experience with CVA moratorium that was specifically available to small companies was rarely put in use.[186] It seems likely that the complexity and the costs of the procedure could again create obstacles in case of SME's.[187]

Even though the CIGA moratorium is a debtor in possession procedure, meaning that the directors continue to run the company while the moratorium is in effect, the central role of the procedure is the monitor. For this reason, the documents necessary for the moratorium to take effect must include the name of the proposed monitor and his consent to take this position, as well as his opinion that the moratorium will result in the rescue of the company as a going concern.[188] The directors also must file a notice that the company is or is likely to become unable to pay its debts. Once all necessary documents have been filed to the court the moratorium comes into force.[189] When there is a requirement for court application in cases of foreign companies or companies that are subject to outstanding winding up procedures, the moratorium comes into force once the court issues an order. There are no requirements for the directors to give notice to creditors about their intention to obtain the moratorium, not even when it comes

[182] UK. Insolvency Act 1986, Part A1, Chapter 2., ss. A3.
[183] Winding up proceedings are actions taken in order to end business affairs and obligations in order to terminate the business and they and they also include liquidation of companies assets.
[184]UK. Insolvency Act 1986, Part A1, Chapter 2, ss. A4 and A5.
[185]UK. Insolvency Act 1986, Part A1, Chapter 1, ss. A2.
[186]Payne, "An Assessment of the UK Restructuring Moratorium." 7.
[187] Ibid.
[188] UK. Insolvency Act 1986, Part A1, Chapter 2., ss. A6.
[189] UK. Insolvency Act 1986, Part A1, Chapter 2, ss. A7.

to the qualifying floating charge holder. However, once the moratorium is in place directors or the monitor are required to notify all creditors otherwise, they commit offence.[190] There is still a lot of space for further interpretation of the commencement provisions of the CIGA moratorium.[191] The main question one could ask is what test should the monitor apply when deciding if the moratorium is likely to result in company rescue.[192] This is yet to be defined and depends on future court decisions.[193]

Initially the moratorium lasts 20 business days from the day it is in force.[194] After this period the moratorium may be extended. Without creditors' consent, the moratorium may be extended for additional 20 business days, upon submission of necessary files to the court, while with creditors' consent, the moratorium may be extended for a total period of up to 12 months.[195] An extension beyond 12 months can be granted by court, but creditors have to consent to this extension, as well as the one granted before.[196] In this case the court will examine in what way is the interest of pre-moratorium creditors affected in order to decide whether an extension should be granted.[197] Also, if a company has plans to propose a CVA, the moratorium will be extended until the proposal is disposed of.[198] It is clear that the short length of the new moratorium was used as a creditor protection mechanism. The additional 20 days extension, still does not come anywhere close to the three months period proposed by the Insolvency Service.[199] There is valid objective to protect creditor but it is questionable whether the decision

[190] UK. Insolvency Act 1986, Part A1, Chapter 2, ss. A8.
[191] Nigel J. Isherwood, "Coronavirus and Corporate Insolvency: A Comparative Analysis of the Corporate Insolvency and Governance Act 2020." 123.
[192] Ibid.
[193] Ibid.
[194] UK. Insolvency Act 1986, Part A1, Chapter 3, ss. A10.
[195] UK. Insolvency Act 1986, Part A1, Chapter 3, ss. A10-A12.
[196] UK. Insolvency Act 1986, Part A1, Chapter 3, ss. A13.
[197] UK. Acts of Parliament. "Corporate Insolvency and Governance Act 2020: Explanatory Notes." 19.
[198] UK. Insolvency Act 1986, Part A1, Chapter 3, ss. A14.
[199] Payne, "An Assessment of the UK Restructuring Moratorium." 14.

to make the moratorium so short decreases it's sufficiency, especially if companies are entering complex restructuring procedures.[200]

The moratorium terminates upon the end of the initial 20 days, and when extended upon the end of the extension period.[201] Automatically, the moratorium terminates if the company enters into a UK Scheme of arrangements, a Restructuring Plan, or certain other insolvency procedures in the UK.[202] The monitor himself has an obligation to terminate the moratorium if he no longer thinks that the company can be rescued; the rescue has been achieved; he is unable to perform his functions; the company cannot pay pre-moratorium debt that has no payment holiday or its moratorium debts.[203] In the only existent court case regarding CIGA moratorium the judge, Sir Alastair Norris, further clarified this obligation: "*the monitor's decision can only be challenged if it is made in bad faith or no reasonable monitor could have made the same decision which provides the monitor with considerable discretion on whether to terminate the moratorium and some protection to the monitor*."[204] This can be useful guidance to monitors in the future.

Even though it is logical that the monitor who is responsible for overlooking the moratorium process has the obligation to terminate the moratorium in previously mentioned situations, this can limit its application because of the carve-out provisions' moratorium is subject to.[205] These provisions state that the company does not have a payment holiday from "*debts and liabilities arising under contracts involving financial services*",[206] which includes bank made loans. As banks are usually major creditors, the carve-out will most likely lead to the termination of the moratorium, if the company is not able to pay these loans and does not have the support of the

[200] Ibid.
[201] UK. Insolvency Act 1986, Part A1, Chapter 3, ss. 13C.
[202] UK. Insolvency Act 1986, Part A1, Chapter 3, ss. A15.
[203] UK. Insolvency Act 1986. Part A1, Chapter 5, s. A36.
[204] *In Re Corbin & King Holding Ltd* [2022] EWHC 340 (Ch).
[205] Scott Attkins, "Evaluation of the UK's CIGA Reforms:," *Nortom Rose Fullbright*, April 26, 2023.
[206] UK. Insolvency Act 1986. Part A1, s A18(3)(f).

bank.[207] This is specifically problematic for big enterprises relying on bond funding as it limits their ability to use the CIGA moratorium, and thus limits their chances for restructuring.[208]

3.4. Relief from the CIGA moratorium

Under the new standalone moratorium there are no provisions that would grant creditors the type of relief that they can be granted under the United States article 362.[209] The reason for this is that the CIGA moratorium affects all creditors without many possibilities for exclusion of a particular creditor, making the procedure quite inflexible.[210] This could create a problem for companies that are using a scheme of arrangements, meaning they have a court approved agreement between them and only a subset of their creditors.[211]

The only option that disagreeing creditors are left with is to try to terminate the moratorium as a whole. This can only be done by challenging monitor's actions in the court, since he is the one that estimates whether the company fulfils required conditions for the moratorium to remain in effect.[212] This right was not only created for creditors, directors and members of the company but also for any third party negatively affected by it: such third parties can also apply for termination on this basis.

One important note is that the court may terminate the moratorium only if the challenge is based on the monitors failure to end the moratorium when he is obliged by reasons stated in law and

[207] Attkins, "Evaluation of the UK's CIGA Reforms:"
[208] Ibid.
[209] 11 U.S. Code § 362.
[210] Payne, "An Assessment of the UK Restructuring Moratorium." 10.
[211] Ibid.
[212] UK. Insolvency Act 1986, Part A1, Chapter 6, ss. A42.

reflected upon in the previous chapter.[213] In all other situations under this section the court will keep the moratorium intact but apply certain measures to fix the circumstances.[214]

The creditors and company members can also apply for termination of the moratorium based on the directors actions.[215] In this case they will have to prove that directors "*unfairly harmed"* their interests or that an "*act or omission of the directors causes or would cause them harm."*[216] The court is not obliged to end the moratorium in this case, it may do so if it finds this to be the best solution.[217]

The *Minor Hotel Group DMCC v Dymant & Anor* case, that was mentioned in the previous section, also gives us perspective on where the court stands when it comes to termination of the moratorium. The main question was whether the monitor broke his obligation when he decided not to terminate the moratorium because of the debtor's inability to pay its debt, which implied the question of whether the stay should be lifted.[218] Regarding the implied question, the court stated that "*when considering the circumstances of the case as a whole the adopted approach needs to be flexible and commercially realistic*."[219] Additionally, the court compared the harm that would be suffered by the debtor versus the lender in case the moratorium was to be terminated.[220] The final decision was in favor of the debtor and the moratorium remained intact. This case obviously shows that courts will not easily decide to terminate the moratorium in favor of the secured creditor, thus making the moratorium a strong protection device.

[213] UK. Insolvency Act 1986, Part A1, ss. A42(5).
[214] UK. Insolvency Act 1986, Part A1, ss.A42(3)
[215] UK. Insolvency Act 1986, Part A1, Chapter 6, ss. A23.
[216] UK. Insolvency Act 1986, Part A1, Chapter 6, ss. A23.
[217] UK. Insolvency Act 1986, Part A1, Chapter 6, ss. A23.
[218] *Minor Hotel Group MEA DMCC v Dymant & Anor* [2022] EWHC 340 (Ch), 17 February 2022, para. 11.
[219] Ibid., para. 25.
[220] Ibid., para. 39-41.

4. SERBIA: THE LAW ON BANKRUPTCY MORATORIUM

4.1. Historical and conceptual context

After the breakup of socialist Yugoslavia, Serbia legislated the new Law on Bankruptcy in 2004. Even though this Law brought significant improvements and changes to bankruptcy proceedings in Serbia it has been changed not long after, in 2009. This is because of numerous problems detected during its enforcement. This revision was also influenced by the economic crises happening at the time.

The Law on Bankruptcy of 2009 (LOB) is still in effect but has undergone many amendments throughout the years, with the last one in 2018.[221] The Law on Bankruptcy recognizes two possible proceedings the debtor is entitled to choose: liquidation and reorganization proceedings, including pre-negotiated reorganization proceedings (PNRPs).[222]

The 2009 Law on Bankruptcy took over the concept of moratorium that had existed in the Law on Bankruptcy Procedures from 2004. Before that, during the validity of the "socialist" Law on Compulsory Settlement, Bankruptcy and Liquidation[223] the only similar measure that could be established is a temporary injunction on the side of the debtor, for the purpose of securing of creditors' claims. The moratorium provisions are protective measures and they were legislated with the idea to follow international standards on the treatment of secured creditors, to facilitate the reorganization of the debtor.[224] The moratorium applies *ex lege* once the bankruptcy

[221]Republic of Serbia, Acts of Parliament, The Bankruptcy Law (the Insolvency Law), (Official Gazette of the Republic of Serbia Nos. 104/2009, 99/2011, 71/2012, 83/2014, 113/2017, 44/2018 and 95/2018).
[222] Republic of Serbia. The Law on Bankruptcy, Article 1.
[223]SFRY, Law on Compulsory Settlement, Bankruptcy and Liquidation ("Official Gazette of the SFRY", no. 84/89 and "Official Gazette of the SFRY", no. 37/93 and 28/96).
[224] EU Parliament and Council Directive, (2019), 2019/1023, L (172/18), http://bit.ly/3GuQq3e (accessed 20 Apr. 2023).

proceedings have been initiated or as a security measure during the preliminary proceedings.[225] If the moratorium is imposed as a security measure it does not apply *ex lege*, it applies after the judge makes decision.[226]

Apart from The Law on Bankruptcy, Serbia has also adopted The Law on Consensual Financial Restructuring in 2015 (hereinafter: the "Restructuring Law"), impacted by global and European trends.[227] This Law allows the debtor and its creditors to make a voluntary agreement that redefines their obligations without the involvement of court. The only institutional body taking part in these arrangements is the Chamber of Commerce and Industry of Serbia (CCIS) through mediators chosen from their list.[228] The Restructuring Law also includes a provision on "moratorium of debts" however, the moratorium applies only if it is based on a voluntary agreement between the debtor and his creditors, meaning it is not obligatory.[229]

4.2. The Scope of the moratorium

As it has been mentioned previously, the moratorium found in Serbian Law on Bankruptcy can be imposed as a security measure,[230] during the preliminary proceedings and, or automatically arises once the bankruptcy proceedings have been commenced. In both cases the moratorium

[225] Republic of Serbia. The Law on Bankruptcy, Article 93 and 62.
[226] Republic of Serbia. The Law on Bankruptcy, Article 62.
[227] Republic of Serbia, Acts of Parliament, Law on Consensual Financial Restructuring of Companies (the Restructuring Law) (Official Gazette of the Republic of Serbia, No. 89/2015).
[228] Republic of Serbia, Restructuring Law. Article 15.
[229] Republic of Serbia. Restructuring Law. Article 13.
[230] The term "security measure" does not mean security device. It is a measure that can be imposed by court in order to maintain the value of debtors property and is regulated by The Law on Bankruptcy.

serves as a measure that prohibits enforced execution of individual creditors' claims. The ban covers only the bankruptcy estate as defined by The Law on Bankruptcy Section VI.[231]

During the preliminary proceedings the judge may issue an order for a security measure to prevent any changes to debtors' assets, *ex officio* or upon prior request of the creditor. The judge will include such a measure in the decision for initiation of preliminary bankruptcy proceedings, to limit the debtor's ability to dispose of his property and the creditors' ability to enforce their claims or start legal proceedings against the debtor. The goal is to prevent diminishing of the bankruptcy estate before the official proceedings have started. The judge may choose one or more security measures that are prescribed by the LOB: prohibition of payments from the debtors' account; prohibition of disposal of debtors' property; prohibition or temporary disposition of execution against the debtors' assets.[232]

After the preliminary proceedings have ended, the *ex lege* moratorium applies. This happens with the decision to open the main bankruptcy proceedings, and imposes prohibition of execution against the debtors estate as well as prohibition of any other measures concerning the debtors estate, except procedural costs.[233]

4.3. The commencement and duration of the moratorium

The previous section explained that the Law on Bankruptcy of Serbia differentiates the moratorium imposed as a security measure in the preliminary proceedings and *ex lege* moratorium that applies once the judge issues a decision on commencement of the official bankruptcy proceedings as one of the consequences of initiation of bankruptcy proceedings.

[231] Bankruptcy estate is is defined as all assets of the debtor in Serbia and abroad according to the day od the start of the proceedings as well as assets that the debtor aquires during proceedings.
[232] Republic of Serbia. The Law on Bankruptcy, Article 62.
[233] Republic of Serbia. The Law on Bankruptcy, Article 93.

The bankruptcy judge initiates the preliminary proceedings after he receives a request for initiation of bankruptcy proceedings.[234] He does this by issuing a decision on initiation of preliminary bankruptcy proceedings.[235] During this time the judge examines whether the legal conditions for commencement of bankruptcy proceedings have been met, and in case they are, the judge proceeds to make a decision on initiation of official bankruptcy proceedings. This is also the time the judge may impose a security measure against debtors' estate.[236]

A security measure may be imposed upon the request of the person filing for preliminary proceedings, or by the bankruptcy judge *ex officio*, if he finds that this is necessary to prevent change or diminishing of debtors assets until the official proceedings start.[237] The judge includes security measures in the decision on initiation of preliminary bankruptcy proceedings and the decision is then made public and sent to all subjects or registries that have the duty to abide by it.[238] Even though publicity of security measures seems quite important as one whole article has been dedicated to it, it is not clear from its wording if this is a condition in order to impose sanctions for the breach.

The security measure stays in force until the end of the preliminary proceedings, but the judge has the right to revoke the measure at any prior time.[239]

As for the moratorium on execution and settlement proceedings, it automatically applies upon initiation of the bankruptcy proceedings.[240] The judge is not required to include such a measure

[234] Republic of Serbia. The Law on Bankruptcy, Section II.
[235] Ibid.
[236] Republic of Serbia. The Law on Bankruptcy, Article 62.
[237] Ibid.
[238] Republic of Serbia. The Law on Bankruptcy, Article 63.
[239] Republic of Serbia. The Law on Bankruptcy, Article 63.
[240] Republic of Serbia. The Law on Bankruptcy, Article 91.

in the decision on initiation of proceedings, it applies *ex lege,* meaning it becomes effective the day the decision is made public on the courts bulletin board.[241]

To issue the previously mentioned decision, the judge is required to hold a hearing on initiation of bankruptcy proceedings, no further than 30 days after the preliminary bankruptcy proceedings have been initiated.[242] This means that the security measure could stay in effect for 30 days or until the judge issues the decision on initiation of bankruptcy proceedings. The *ex lege* moratorium remains in effect until the decision on closure of bankruptcy proceedings, until the adopted reorganization plan becomes legally binding and effective or until the moratorium is lifted by the judge.

The situation is more complex when bankruptcy proceedings are initiated together with the submission of the reorganization plan, otherwise known as pre-negotiated reorganization plan. In this case the bankruptcy judge issues a decision on initiation on preliminary bankruptcy proceedings until the reorganization plan is adopted or denied by the court.[243] During this time the court may impose a security measure, as discussed previously.[244] This measure can last up to maximum six months.[245] Since the Law on Bankruptcy allows appeals on the decision on acceptance or denial of the reorganization plan the decision to adopt or deny the plan does not become legally binding until the deadline for the appeal has passed or until all allowed remedies have been exploited.[246] The Law also gives an additional 30-day period after the decision becomes effective before the execution of the reorganization plan may start even though the plan is supposed to become effective from the day provided in the plan.[247] In practice, this

[241] Republic of Serbia. The Law on Bankruptcy, Article 73.
[242] Republic of Serbia. The Law on Bankruptcy, Article 68.
[243] In the Bankruptcy Law this as called „pre-packaged reorganization“ and is differentiated from regular reorganization proceedings.
[244] Republic of Serbia. The Law on Bankruptcy, Article 159.
[245] Republic of Serbia. The Law on Bankruptcy, Article 159b.
[246] Republic of Serbia. The Law on Bankruptcy, Article 166.
[247] Republic of Serbia. The Law on Bankruptcy, Article 165a.

creates a situation where if the adoption of the reorganization plan falls within the six months the security measure remains in effect, the measure gets extended for additional six months until the plan becomes legally binding and effective. This affects creditors as the value of the debtors' assets might depreciate and the creditors cannot ask for relief since their obligations are now regulated by the adopted plan.

In practice the moratorium imposed as a security measure could be in effect for quite a long time considering the procedural requirements in the Law. During a conversation with a Serbian legal practitioners, this was detected as one of the problems that creditors may come across during the proceedings and the main way for debtors to take "advantage" of procedural rules. Foreign Investors Council also recommended there should be a limit to the possibility to adopt moratorium as a security measure during the adoption of pre-packaged reorganization plans.[248] In addition to this, it does not help that the Serbian Bankruptcy system is weak and neither the debtors nor the courts have deep understanding of bankruptcy proceedings.

4.4. The relief from the moratorium

Certain creditors or the bankruptcy administrator can make a request to the court to lift the moratorium, if the creditor can prove that the property that is used as a security for his debt hasn't been properly protected and the claim is due in full or partially.[249] The Law provides a *numerus clausus* of reasons when the judge has an obligation to lift the stay.[250] Instead of termination of the moratorium the judge may provide adequate protection for the property in

[248] Foreign Investors Council, White Book: Proposals for improvement of the business environment in Serbia, 2022, pg. 93-94.
[249] The Bankruptcy Law (the Insolvency Law), (Official Gazette of the Republic of Serbia Nos. 104/2009, 99/2011, 71/2012, 83/2014, 113/2017, 44/2018 and 95/2018), Article 93a.
[250] Ibid.

question, for example by ordering the debtor to repair or insure the property, or to give a part of the profit earned by its use to the creditor.[251]

As an alternative to termination of the moratorium, the LOB also allows the judge to impose one of the other measures prescribed. For example the judge may make the debtor pay a fee to the creditor in order to compensate the depreciation of the secured property; exchange the secured property for another or add additional security; pay a part of the profits that are made by the use of the secured property; to fix, maintain, insure or in other way take care of the property; or any other way the compensation can be achieved the judge finds appropriate.[252]

The bankruptcy judge also has an obligation to lift the moratorium upon the request of the secured, or lien creditor,[253] who proves his claim is due in full or partially, if the property it is secured with is not of relevance for reorganization or bankruptcy proceedings and the secured property is worth less than the secured creditors claim.[254] The judge may not lift the moratorium if the bankruptcy administrator proves that the property is necessary for reorganization. This could raise a question of imbalance between the secured creditors and lean creditors and the administrator, since it seems like he will more likely prove the necessity of property for reorganization then the other way around.

The judge issues a decision on revocation of the moratorium and once the decision becomes effective the bankruptcy administrator does not have the right to dispose of the property in question.

[251] Ibid.
[252] Ibid.
[253] The Law on Bankruptcy defines lien creditors as creditors that have security on the movable property, real estate or rights of the debtor and who are registered in public records or registers. They differentiate from secured creditors as they do not have a monetary claim against the debtor that is secured by security interest. This would be the case where a loan was secured by the property of a third person whom then files for bankruptcy.
[254] Republic of Serbia. The Law on Bankruptcy, Article 93b.

The revocation of the moratorium lasts for nine months from the day the decision becomes effective. If the creditor fails to sell the property and distribute the cash within this time frame the moratorium becomes effective again.[255]

[255] Republic of Serbia. The Law on Bankruptcy, Article 93g.

CONCLUSION

To promote "business rescue" culture countries need to have efficient procedures, that require a "breathing space" during which the debtor is "shielded" from his creditors, so he can recover. Creditors also benefit from this, since they should be able to recover more of their claim in the "long run", with the debtor continuing its business, where there is such a chance. This also reduces creditors pressure to "run" to start court proceedings against the debtor.

The United States automatic stay has a long history and is an integral part of bankruptcy proceedings. It is an institute that is well known by bankruptcy practitioners, trustees and judges and there seems to not be a lot of problems with its execution. It is broader than the moratoriums in United Kingdom and Serbia and is the "easiest" to understand, as it is automatic and the provisions that regulate it are quite clear. There is not a lot of discussion on whether the stay should exist or not and most of the court cases regarding the stay are regarding creditors request for relief. The stay is a highly respected injunction in the US and it is difficult to misuse, which is probably influenced by the fact that the bankruptcy courts have a good understanding of its purpose.

The United Kingdom, on the other hand, has tried to bypass the implantation of a similar institute to automatic stay. Throughout the years they did include moratorium in certain insolvency proceedings, but they were obscure, not easily attainable and in case of proceedings like CVAs, only available for certain companies. Even with a history of strong resistance towards implementation of anything similar to the US automatic stay into their laws, UK gave in, so it would remain competitive on the insolvency market. The implementation of the CIGA moratorium was justified by the COVID 19 crises, even though talks about its introduction were present for years. Still, the UK did not copy the US automatic stay in full. The CIGA moratorium is a lot shorter; is not automatic; and is not connected to any particular type of

insolvency proceedings. However, it is a good solution where the insolvency system is distinguished by a variety of rescue proceedings a company can opt for. Even though we can assume that the CIGA moratorium will never be as efficient as the United States automatic stay, it is a step in the right direction and seems to be a fine compromise for the UK pro-creditor system. With the scarce number of cases and the short period since the moratorium has been enacted, as well as many critiques, only time will prove its usefulness.

Finally, Serbia seems to have sort of a mixture between the US and the UK systems. It does have an automatic moratorium, but the moratorium does not start once the bankruptcy case is filed. The existence of preliminary bankruptcy proceedings postpones this. This is a peculiarity of Serbian Law compared to United States where the automatic stay is born upon filing of a bankruptcy petition.

As mentioned, during the preliminary proceedings' security measures are available and have the same effect, but they are dependent on whether the judge considers them to be necessary. Even though the Serbian law does predict a moratorium, it seems that the factual situation in Serbia has not yet reached the point where this measure is used in accordance with its function. Interviewing practitioners in Serbia, the moratorium was associated mostly with a way that debtors "misuse" the law, to prolong the proceedings. Furthermore, the low level of development and awareness about the bankruptcy system and its purpose do not seem to help with this issue. The debtors are usually not cooperative, and the courts seem to have trouble with execution which in the end hurts the creditors. This could be solved either by better education on bankruptcy that would result in reduction of bankruptcy stigma or by incorporating a measure similar to Anglo-Saxon contempt of court[256] into Serbian Law. Until these deficiencies have been dealt with it is hard to say that an institute like the automatic stay

[256] Contempt of Court is disobedient or disrespectful behavior towards the Court of Law for which the judge can impose a fine. It is an institute of Anglo-Saxon Legal systems.

could work in Serbia in the same way as it works in the United States. However, an institute similar to the CIGA moratorium, that would serve as a standalone moratorium, could make a difference in case of an out of court procedure like the one found in Serbia's Law on Consensual Financial Restructuring.[257] This would provide the debtor with an appropriate amount of time to negotiate with its creditors and possibly make an arrangement that would better suit them both. Implementation of a standalone moratorium could increase the use of the Restructuring Law, which would reduce the burden of courts and could provide a cheaper alternative to bankruptcy proceedings.

[257] Republic of Serbia, Restructuring Law.

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