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# INSOLVENCY LAW GROUP

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# New Judgement by Austrian Supreme Court

In all European legal systems, one must distinguish between (i) such claims already existing at the time of the opening of the insolvency procedure and which entitle creditors only to a certain quota (let us call them **insolvency claims**) and (ii) other claims which arise during the insolvency proceedings and must be settled entirely by the liquidator out of the bankruptcy assets (let us call them **new claims**). Problems with classification and differentiation between these claims may come up in individual cases, though.

In a recent judgment, the Austrian Supreme Court had to deal with two different claims in this context: A landlord had not issued the statement of accounts regarding the annual running costs and had gone bankrupt. The liquidator had to issue the statement of accounts belatedly thus creating claims of the tenants for periods before the opening of bankruptcy (1st claim). The tenancy contracts also provided that the tenants' contributions to the building costs paid before the bankruptcy must be paid back in case the contracts were dissolved (2nd claim). Now, a tenant terminated her contract and filed a claim against the liquidator to pay both claims in full.

In both cases, the Austrian Supreme Court dismissed the claim and qualified the tenant's claims as mere insolvency claims on the grounds that these claims result from activities before the bankruptcy and had already been conditionally existent – at least on the merits - before the bankruptcy, even if they had become due and concrete only during the insolvency proceedings.

The Supreme Court's decision is welcome and appropriate because the bankruptcy assets cannot be held liable to pay back monies received before the opening of bankruptcy and which are no longer available in the assets. Only such claims shall qualify as new claims which have generated a return consideration for the bankruptcy assets during the insolvency proceedings.

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1. The Law of "Sauvegarde"

The Law of "Sauvegarde" adopted on July 26, 2005 came into force on January 1, 2006.
It was intended to anticipate difficulties of companies and introduced a new procedure called « safeguard of companies ».
As opposed to the traditional restructuring and liquidation procedures, the new procedure is meant for companies which are not yet in a state of suspension of payments, but are nevertheless experiencing difficulties which might lead to such a state.
The 500 safeguard proceedings opened in France in 2006 represent only 1% of the overall insolvency procedures. Only 13 % of the 500 proceedings ended up in restructuring or liquidation. This low rate can certainly be explained by the increasing ability to anticipate companies' difficulties.
Figures for the first half of 2007 show that safeguard procedures have increased by 8%, as opposed to 234 procedures initiated in the first half of 2006.

2. European regulation

The European regulation no 1346/200 on insolvency proceedings came into force on May 31, 2002.
This regulation acknowledges the concept of opening parallel insolvency procedures:
- insolvency proceedings are opened in the court of the state where the debtor's main interests is situated.
- parallel secondary procedures may be opened in other states where the debtor has an establishment.

The innovative European regulation provides that Member states should recognize without further formalities decisions in relation to insolvency proceedings opened in other Member States.

Since it came into force in 2002 the regulation's provisions were applied by French courts a number of times:
The Commercial court of Nanterre held on May 19, 2005 (ROVER FRANCE) that the initiation by a British court of insolvency proceedings against a company incorporated in France had to be recognized in France, notwithstanding the French grounds of public policy and order.
The limits in opening a procedure in France by other member states' courts were clearly specified by the European Court of Justice in the May 2nd, 2006 ruling (EUROFOOD IFSC Ltd, no C-341/04), and confirmed by the French Supreme Court in its ruling DAISYTECH dated June 27, 2006. According to these decisions article 26 of the regulation should be interpreted as follows: a member state may refuse to recognize insolvency proceedings opened in another member state, when the decision to initiate proceedings was made in breach of the fundamental rights of the individual, such as the right to be heard.
Lawyers are now faced with practical difficulties of applying this regulation before the clerk's offices of relevant courts.

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# Federal cabinet approved new draft law

On 22.08.2007 the federal cabinet (Bundeskabinett) approved a new draft law for submission to the Bundestag to change the insolvency code.

The draft contains some noticeable but at the same time controversial amendments. Thus reasons to reject discharge of residual debt shall be enlarged. According to the planned § 290 I No 7 discharge of residual debt shall be refused in case the common debtor as a director of a company does either contrary to duty not or not in time apply for an order of the court to institute insolvency proceedings.

The reason is to counteract cases –which in practice are not so seldom- that after directors of companies that are sued for damages by the insolvency administrator applied for discharge of residual debt on their own person. Should the planned regulation be admitted to the law the legal advice of directors during a crisis of the company will gain even more importance.

Prevailing comment is that in summer 2008 the law in this or an altered version will be passed.

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# Institute of restructuralization in the slovac law system

Restructuralization is a new legal term, that was brought into the Slovak insolvency law in January 2006 as a part of a huge reform of insolvency law. The former basic statute, regulating bankruptcy was enacted 15 years ago. This regulation offering the debtors and also the trustees in banruptcy a possibility of manipulation with the bankrupt's estate. As a result the enforcement of the debts within the bankruptcy procedure sank to 10 percent. According to the report of the World Bank: „The law environment for setting up of the rights of the creditor and the enforceability of the debts is in general considered as inconvenient. The failures of the legislative system contributed to the decrease of bank-portfolio quality and a damping of the bank credit growth." Decree of bankruptcy was assigned as the worst possibility for the creditor to enforce the debts.

As a result a new Bankruptcy and restructuralization law nr. 7/2005, with effect from the first of January 2006 was enacted. The goal of the new legislation was to hinder the loss of the bankrupt's estate value in the period immediately before the beginning of the procedure and also during the procedure and also to provide faster process of bankruptcy and to settle measures to speed up the actions of the involved parties.

The main aim of the restructuralization is to enable the debtors already decreed bankruptcy , or immediately before bankruptcy to avoid their extinction. Restructuralization is so to say the debtors last chance. Restructuralization is admittable only in case that this process can provide higher satisfaction of the creditors than in case of bankruptcy. The debtor must prove, that he is able to produce a sufficient amount of money to consecutively pay all the debts, as it is given in the restructuralization plan. Shall the debtor fail to produce the planned amount of money and the bankruptcy trustee reaches the decision that the restructuaralization cannot be successful, the restructuralization shall convert to a bankrupt.

In spite of all the benefits and improvements of the new legislature after the first year of operation of this statute there has only been one successful restructuralization. This may on one hand be a result of the strict formal rules and a great dependency on the mutual communication between the creditor and debtor, on the other hand it's an logical consequence of a small legislative pressure on the insolvent companies to revitalize, and also a lack of responsibility powered by the absence of effective punishment of the management of the bankrupted companies. A change of legislation aiming to the criminalize the high management of the companies would persuade the company leaders to try more effectively to find a way to save their companies using the well prepared institute of restructuralization.

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# OPMAAT ONDERNEMINGSRECHT

**Dutch trustee on top of the world**
There are many complaints about the Dutch insolvency law, that this law too much and unnecessary would have drawn companies. But an international comparison of the American National Bureau of Economic Research shows, that things nowhere in Europe are better fixed than in the Netherlands.

**Case: Will your hotel survive the trustee?**
What will happen in your country with a hotel company, which could not pay the bills? What are the steps, which you have to make based on the legislation and regulation? And do you expect that the hotel company will go bankrupt? These and other questions sent four economists – Simeon Djankov, Oliver Hart, Caralee Mcliesh, and Andrei Shleife, from the World Bank and Harvard – last year to trustees in 88 different countries. The researchers had thought a comprehensive case concerning a hotel company with payment difficulties. The case was being set up that throughout an economic point of view it would be optimal if the hotel company – after intervention of the trustee – would make a restart. One of those research questions of the economists were: in which country succeed the trustees to reach that optimum?

The result was alarming. In only 36 % of the countries the hotel company survives the interference of the trustee. Especially the slowness of the procedures leads to unnecessary sale of the insolvent estate. Rich countries perform better than poor countries. Exceptions are France, Germany, Switzerland, and Italy, where slow procedures or high costs are killing the hotel company. Botswana, Mexico and Columbia are pointed out positively between the poor countries: if the hotel company would have been performed in one of those countries the restart would have been succeeded.

**Dutch trustee**
The Dutch trustee succeeds brilliant. Not only the Dutch Insolvency Act enables him to save the hotel, as well as the costs of the procedures are not more than 1 % of the value of the hotel company. Only in Singapore are the costs of the procedure just as cheap as in the Netherlands. However, the Dutch trustee is not extraordinary quick. The procedure takes almost 1,5 year eventually.

**Efficiency represented as a percentage of the value**
The researchers constructed a special measure for the efficiency of the whole process, in the course of which the most important variables were the costs, the duration and the rather or not succeeding of the restart. The efficiency was being represented as a percentage of the value of the hotel, which was being saved eventually. In the Netherlands the efficiency of the procedures amounts to a greatly 95 %. Only in Japan and Singapore things are more efficient being take care off. In Sweden only remains 86% of the value of the hotel company. In Germany – were the hotel company not succeeds to make a restart – only remains 57 %. Last comers are Turkey (only 7% remains) and Angola (only 1% remains).

The performance of the Dutch trustee is even better than represented in the priority list.
The research shows namely too, that in countries with a from origin French Law system - - like the Netherlands - the efficiency is above average low. A British Law System rather depresses the costs. Especially the slow and complex procedures of the French system make the system inefficient. Thanks to Napoleon. But the legislator and trustee have greatly conquered aforementioned disadvantage too.

Top 10 most efficient insolvency law:
1. Singapore;
2. Japan;
3. The Netherlands;
4. Taiwan;
5. Canada;
6. United Kingdom;
7. Finland;
8. Norwegian;
9. Belgium;
10. New-Zealand;

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# HOW TO PROTECT YOUR CREDIT

In our daily job as Lawyers in Spain for foreign clients, we face two main problems when dealing with the insolvency of one of its debtors, speaking in general terms:

1.-How to have your credit accepted:

For Spanish creditors is usually easier to know if a debtor has solvency problems than for a foreigner creditor, so, as soon as you hear about those problems, you should try to confirm them.
If an insolvency procedure has already begun, your credit may appear, appear mistaken or not appear at all in the provisory Balance of the debtor, so you should try to contact as soon as possible the Managers of the Insolvency named by the Court, in order to solve that question.
Once your credit appears in that Balance, you will receive a letter from those Managers asking for documents to have it accepted in the final Balance. That letter will give you a period of 1 month to deliver those documents, beginning from the last advertisement of the procedure, so foreign creditors are in an obvious disadvantage: they may not know when the period of 1 month ends, not to speak of the loss of time in translating the letter, the answer and the documents, and to send them in time to Spain.
As a conclusion, the foreign creditor should seek immediate advice of a Spanish Lawyer from the very first moment.

2.-How to be aware of the next steps:

If you have managed to have your credit accepted, the only news that you will receive next will be in order to discuss the agreement about payments or closing the company proposed by the debtor, usually in a General Meeting of Creditors.
That means that, in fact, you have not been aware of what has happened meanwhile (not even of the final report from the Managers of the Insolvency), so you may not have enough basis to react to that proposal of agreement.
Before the Law 22/2003, if you wanted to be informed about the procedure, you had to contact a Lawyer and also name, signing a special power at a Public Notary, a professional to represent you in the Court (called "Procurador" in Spain). The problem was that then you received all the documentation, even if it was not interesting for your credit, and that meant lots and lots of paper, daily or weekly.
Now you are able to ask at any time information to the Court, but you will also need to name a Lawyer and a Procurador unless you want to come from time to time to Spain.
So the second conclusion is that, to avoid surprises, a foreign creditor should be closer to the procedure by naming a Spanish Lawyer and Procurador, because, if you have any chance to protect your credit, you should not miss it.

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# NEW LIABILITIES FOR COMPANY DIRECTORS IN CASE OF INSOLVENCY

Since 1 September 2006 company directors face new liabilities in case of insolvency of their company.

The legislator created a joint liability between the director and his company for tax obligations and social security obligations:

1. Tax obligations (VAT payment or withholding tax): A joint liability for the payment of the tax debt due by the company if the default in payment results from a fault committed by the director in the management of the company. A director is defined as the person who in fact or in law has or had the power to manage the company.
2. Social security obligations: A joint liability for all or some of the contributions due to the National Social Security Office (RSZ/ONSS) at the moment an insolvency is pronounced. The regime provides that it is necessary to prove serious misconduct during the five years prior to the insolvency with a causal link to the insolvency or to prove that some of the company directors were involved in at least two insolvency proceedings in the last five years.

The aim of the legislator was to reduce the number of successive insolvency proceedings which is certainly legitimate. Nevertheless, risks for company directors are further increased, creating the need, more than ever, for perfect information on the professional activities, present and past, of their managing partners.

If a company or a director wants to know more about the mandates of a Belgian citizen we can help you to provide this information.

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# IMPORTANT INSOLVENCY RULING BY THE ENGLISH COURTS

The Court of Appeal recently made an important ruling in a matrimonial case concerning a bankrupt.

Under English Law, a Trustee in Bankruptcy (Trustee) has control over the assets of an individual when he or she is made bankrupt. The Trustee has the power to challenge a transaction made by the bankrupt within a period of five years before the bankruptcy if the transaction amounted to a transfer at an undervalue; in other words, if the bankrupt did not receive proper consideration (ie full value) in return for the transaction.

In the case of Haines –v- Hill & Another, Mr Haines made a transfer of his interest in jointly owned property in the course of matrimonial proceedings between himself and his wife. He was, however, subsequently declared bankrupt within a period of five years of the transfer and his Trustee challenged the Order as a transaction at an undervalue. The Judge in the High Court found in favour of the Trustee that the transfer was a transfer at an undervalue and should be set aside.

The Court of Appeal overturned this decision.

The Court of Appeal said that the rights of a wife to apply for relief in matrimonial proceedings was a statutory right and her agreement to compromise this right amounted to valid consideration, so that Mr Haines had in fact received full value for the transfer of his interest in the property. The Court of Appeal ruled that the transaction should not, therefore, be set aside. There was no suggestion in this case that there was collusion between the parties against the interests of Mr Haines's creditors, nor that there was fraud, mistake or misrepresentation which would otherwise give the Trustee the right to attack the transaction.

This is an important decision for both matrimonial and insolvency lawyers in England & Wales and provides clarification of the Courts' approach in such cases. There will be greater certainty between couples who are involved in divorce settlements and Trustees in Bankruptcy will be aware that their powers to attack such settlements are limited, unless there are circumstances in which collusion, fraud, mistake or misrepresentation can be proved.

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# The role and importance of bankruptcy proceedings in the fight against White Collar Crime

Insolvency Law and most of the respective statutory provisions have been adopted from Austria and therefore basically the same rules and procedures as in Austria apply also in the Principality of Liechtenstein.

Because of the importance of company formation and administration in Liechtenstein – there are approx. 80'000 legal entities established in Liechtenstein – insolvency proceedings as well as mandates as a trustee in bankruptcy form an important part of our daily business. We are as lawyers appointed by the court as trustees in bankruptcy and are then obliged to dissolve the bankrupt company, initiate respective liability proceedings and finally report to the creditors and to the court.

A further important point in connection with insolvency proceedings results from our practice involving asset recovery for the victims of cases of fraud and the like, as well as for national governments in cases of corruption. With the help of insolvency proceedings and related criminal charges you are often in a position to recover substantial assets for the victims of fraud or defrauded national governments and agencies. Insolvency laws and related regulations form an important part of our strategig actions in the course of handling respective cases of asset tracing and recovery.

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# The Limited Liability Company Act new measures to collect distributed assets in insolvency proceedings

The Limited Liability Company Act new measures to collect distributed assets in insolvency proceedings

The Limited Liability Company Act entered into force on September 1st, 2006. The Act includes regulations, which are applicable in many insolvency proceedings.

The Act prohibits company management from distributing company`s assets in the event that the distribution will cause the insolvency of the company. On the other hand, the Act gives new measures for an administrator to have the company´s distributed assets returned in insolvency proceedings.

Under the Act, the company´s assets shall not be distributed, if it is known or should be known at the time of the distribution decision that the company is insolvent or that the distribution will cause the insolvency of the company. In such circumstances, prohibition to distribute the company´s assets covers all transactions that reduce the assets of the company.

The distribution of assets shall be based on the latest adopted and audited financial statements. The essential changes in the financial position of the company after the completion of the financial statements shall be taken into account in the distribution.

Assets received from the company in contravention of the Act shall be refunded, if the recipient knew or should have known that the distribution was in violation of the Act.

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# A reform of the Polish Bankruptcy and Arrangement Law stopped by political alterations

## Concepts of the new law of consumer's insolvency.

New extraordinary parliament election in Poland that took place on 21 October 2007 stopped ongoing procedures of a reform of the Bankruptcy and Arrangement Law of 28 February 2003.
A Parliament of a new term does not continue works started by a previous Parliament. It means that all parliament works on a reform have to be started from the very beginning, including introducing projects of law changes into the Parliament by subjects entitled to legislative initiative. In the previous Parliament there were three projects of extensive changes, and two of them concerned introduction into Polish legal system personal insolvency, i.e. insolvency of an overly indebted consumer. The problem of consumer insolvency seems to be a burning question for a Polish economy. On one hand introducing a new solution for consumers shall help them to settle a problem of inability to pay off their debts, whereas on the other it shall assure creditors who cannot effectively lead execution proceedings a possibility to satisfy their claims within already tried out bankruptcy proceedings.

It is expected that projects of changes of the Bankruptcy and Arrangement Law will be presented to the new Parliament and that the Parliament shall issue a regulation on a consumers' bankruptcy. After having recognized the previous projects of changes there are in principle two concepts of new legal provisions, and their main assumptions are as follows:

1. A circle of debtors entitled to the insolvency proceedings
The first concept provides that new instruments shall be applied to all debtors (i.e. to those who became insolvent because of objective reasons and to those who are guilty of their bad financial condition), according to the other proposal an institution of bankruptcy proceedings shall be applied only to those debtors who are not guilty of their insolvency (insolvency proceedings may be started only for those debtors who deserve that).
Remarks: The second solution is called "a deserved new start" and shall be considered as an adjusted to the European model of consumers' insolvency which is contrary to liberal American model of "fresh start".

2. Subjects entitled to file a motion for consumer's insolvency
According to the first project only a debtor would be entitled to start insolvency proceedings concerning his estate, whereas the second project provides that both a debtor and creditors would be authorized to file a motion for consumer's insolvency.

3. The authority entitled to examine cases of consumer's insolvency
According to one of the proposals an extrajudicial authority could judge such cases, and the other idea is that these are common courts which should consider such cases.
Remarks: There are already numerous departments handling with bankruptcy and arrangement cases in common courts in Poland and they may be treated as properly prepared to recognize cases of consumers' insolvency.

With regard to the above mentioned, insolvency of consumers is an important issue and a decision on introducing a regulation in this matter will be probably undertaken by the new Parliament. It is to be decided on the shape of changes of the Polish insolvency law, which certainly will be of great importance for Polish economy.

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# The new Insolvency Act in the Czech Republic

The legal regulation of bankruptcy in the Czech Republic is still contained in the Act on Bankruptcy and Settlements No. 328/1991. This Act was one of the first acts passed after the year 1989 and it solved the question, which had not been solved about forty years before.
Consequently, this act has been stigmatized by time of its origin and all amendments (together about …. Amendments!!) to this act were making up for the problems incurred in use.
On this account, the legislator has decided not to solve the bankruptcy law by another amendments to the act, but to carry out a radical legal regulation – to pass a completely new act. The result is the Insolvency Act No. 182/2006.
The new Insolvency Act will come into force on January 1, 2008 and it is quite extensive enactment – it contains more then 450 paragraphs. It features plenty of new elements not contained in the legal order of the Czech Republic till this time.
First of all, leaving the solution to the failure in the way of the only bankruptcy proceeding with the liquidating impact for the legal entities is ranked among these new elements.
The Insolvency Act allows for several variants of solution to the failure – for example a reorganization, a discharge from debts or a system with choice of different variants of the failure solution.
The new act reflects also the European Union law, especially solutions to the failure of certain legal entities, when these proceedings are specifically regulated in the act.
The position of insolvency administrator (hitherto administrator of the bankruptcy assets) is also new regulated. Specific examinations were established for the administrators and their liability is also notably enlarged.
The next significant fact is a passage of judgment agenda to the electronic platform while establishing the Insolvency Registry. This Registry will perform many tasks including the information if somebody filed for solution to the failure at the court.
The substantial change against the present regulation is that the new Insolvency Act institutes general principles, which are distinctive for the bankruptcy law. These principles are defined in the § 5 IA, but only demonstratively. The fundamental principle is the defence of the participants against unjust injury or favouritism of another participant.
Further, pursuant to temporary provisions of the new Insolvency Act, two systems of debtor's failure solution will be working for a relatively long time, sc. proceedings according to the present regulation (Act on Bankruptcy and Settlements No. 328/1991) in the proceedings initiated till the effect of the new Insolvency Act, and proceedings pursuant to new legal regulation in the proceedings initiated after the effect of the Insolvency Act.
Nevertheless, the new Insolvency act is regarded as a positive step in the Czech legal system and it brings new and much more particular regulation of bankruptcy problems.

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# Principles of insolvency law in Estonia

Under Estonian law bankruptcy is defines as insolvency of a debtor declared by a court judgment. A person is insolvent if (a) the person is unable to satisfy the claims of the creditors and (b) such inability is not temporary.

A bankruptcy petition may be filed by the debtor or a creditor on the basis of which the court commences bankruptcy proceedings and appoints an interim trustee. Bankruptcy proceedings shall not be initiated in case the total amount of the claims which are the basis for the bankruptcy petition of the creditor does not exceed 200 000 EEK (~12800 EUR) in the case of a AS-type public limited company, 40 000 EEK (~2600 EUR) in the case of a OÜ-type private limited company, general partnership or limited partnership, or 10 000 EEK (~640 EEK) in the case of other legal persons or a natural person.
If the debtor is found insolvent the court declares bankruptcy.
Main consequences of declaration of bankruptcy are following: (a) the debtor's assets become the bankruptcy estate, it is important to note that the estate is not a separate legal person but a pool of assets, (b) the right to administer the debtor's assets is transferred to the trustee and (c) if the debtor is a natural person, he or she is deprived of the right to enter into transactions relating to the bankruptcy estate, if the debtor is a legal person, the debtor is deprived of the right to enter into any transactions.
Creditors are required to notify the trustee of all their claims against the debtor which arose before the declaration of bankruptcy not later than within two months as of the date of publication of the bankruptcy notice. Claims of the creditors are satisfied out of the assets of the debtor pursuant to following ranking order:

1. accepted claims secured by a pledge which were filed within the specified term. The payments relating to the bankruptcy proceedings (claims arising from the consequences of exclusion or recovery of assets, the maintenance support paid to the debtor and his or her dependants, consolidated obligations and the costs of the bankruptcy proceedings) shall be deducted from these payments, but not more that 15/100 of the sale receipts;

2. other accepted claims which were filed within the specified term;

3. claims which were not filed within the specified term but were accepted.
Courts exercise supervision over the lawfulness of bankruptcy proceedings and perform other duties provided by law. Yet in general the role of court in the procedure is of lesser importance in comparison with that of the general meeting of the creditors that has the right to decide upon all important matters concerning the bankruptcy procedure.
In case of legal persons, bankruptcy proceedings usually conclude with the liquidation of the company. Yet the law offers also alternatives like compromise (agreement between a debtor and the creditors concerning payment of debts and involves reduction of the debts or extension of their terms of payment) or rehabilitation (application of measures which enable satisfaction of the claims of the creditors through continuation of the business activities) of the debtor. The trustee may commence rehabilitation immediately after the declaration of bankruptcy. Unfortunately bankruptcy proceedings are usually commenced so late that rehabilitation of the enterprise proves to be impossible.