

International Insolvency Law Review

www.IILR.Beck.de

IILR

Editors-in-Chief

Dr. Christian Bärenz
GÖRG Lawyers, Cologne
Michael Dahl
GÖRG Lawyers, Cologne
Michael Martinez Ferber, LL.M.
Audicon AG, Frankfurt a. M.

Editorial Board

Mark Broude
Latham & Watkins, New York
Prof. Leif M. Clark
US Bankruptcy Court,
San Antonio
Hans-Gerd H. Jauch
GÖRG Lawyers, Cologne
Jennifer Marshall
Allen & Overy, London
Sofia Martins
Uría Menéndez, Lisbon
Alberto Nunez-Lagos
Uría Menéndez, Madrid
Luciano Panzani
Supreme Court of Cassation,
Rome
Prof. Dr. Christoph G. Paulus, LL.M.
Humboldt-University, Berlin
Adolfo Rouillon
The World Bank, Washington D. C.
Prof. Dr. Heinz Vallender
Insolvency Court, Cologne
Prof. Ray Warner
St. John's University, New York
Prof. Bob Wessels
University of Leiden, Leiden

Content

Editorial

Articles

- Bob Wessels
COMI: Are English courts coming-out? 2
- Christoph G. Paulus
A Bank's Insolvency: Irritating Connections Between
a Virtual and the Real World in "Second Life" 10
- Heinz Vallender
"Increasing the chances of restructuring through an
extrajudicial restructuring procedure?" 13
- Renato Rordorf
Cross Border Insolvency 16
- Hans-Peter Kirchhof
Cross Border Insolvency (Part 2) 23
- Judgements
- European Court of Justice, September 10, 2009 – *German
Graphics v. Holland Binding* 27
- High Court of Justice, February 11, 2009 – "Nortel Group" 47
- Federal Court of Australia, April 17, 2009 – *Hur v. Samsung
Logix Corporation* 51

free copy

Verlag C. H. Beck
München · Frankfurt a. M.

1/2010

Pages 1–56



0350201001

Professor Dr. Christoph G. Paulus*

A Bank's Insolvency: Irritating Connections Between a Virtual and the Real World in "Second Life"

A rather uncommon form of both internationality and insolvency evolves when and if a virtual bank in a virtual surrounding such as the internet-portal 'Second Life' goes bust. As silly as this might appear on first sight – it gains seriousness when and if real-life-losses are connected with such incident. This is exactly what happened only recently and what sooner or later might turn into real legal stuff!

A. The facts

Second Life is a world in the internet's virtual no(or every)where where every real person on this real globe can slip into a personality selected individually by him- or herself rather than allotted to him by fate. As an avatar (that is how these "beings" are called) one lives a life like in the real world: engaging in social interaction with other avatars, doing business or just hanging around. Not really suprisingly: it is a growing world – so much so that things there begin to overlap and intermingle with the real world here. This refers not so much to what is well known already from other computer games or videos – namely the phenomenon of addiction of the natural persons behind the avatars to the fantasy world which calls for a kind of help against oneself. No – more stunning, in second life the overlapping and intermingling goes further and stretches out to business and money. Real world businesses engage as virtual world businesses. And they earn money thereby – not only virtual money but also real money since there is convertability of the virtual dollar into the real one.

No wonder – at least not for lawyers – that the quest for establishing rules in Second Life increases. Like in all earlier incidents – well known to legal historians – when a number of people came together and created some kind of societal life among themselves, there is a point from which the demand for ordering the living together becomes irresistible if such society is to endure.¹ But whereas in earlier cases the need for a legal framework was fully served by developing merely some (in modern terminology) criminal and private law instruments – at least for an initial period, the demand in their modern counterparts is a bit more sophisticated: it extends not only additionally to the control of commercial engagement but also to administrative control and even insolvency law!

* Professor of Law, Humboldt-Universität zu Berlin, Germany.

¹ See, for instance, in the German legal literature Klickermann, *Virtuelle Welten ohne Rechtsansprüche?*, MMR 2007, 766; for the 'U.S.', see just Chin, *Regulating Your Second Life*, 42 Brooklyn L.R., 1303 (2007).

B. The legal implications

As a matter of fact, rather than of law, the two latter areas played a decisive role in an incident which occurred only recently in Second Life: part of the social activities one could engage in was gambling. Of course, what real life persons love to do in Las Vegas, Monte Carlo or Hong Kong they also want to do in the virtual world – all the more so since there the gambling rules were unrestricted by any public order. To be sure: there is a particular currency in Second Life, called Linden Dollars – freely convertible to real life money! If one wants to pay anything there or if one wants to gamble one needs Linden Dollars. Thus, one could not only play in virtuality (with the converted real life money) but also play what was forbidden in reality. The emphasis, however, is on “was”; i. e. the past-tense. Since it was obviously the American FBI which disapproved of what was going on in this part of the world. This institution – probably guided by the American understanding of what is admissible and what is forbidden gambling – had the operator of Second Life, Linden Labs situated in the US, shut down the places where the avatars were gambling. This is the control part and, thus, the realm of administrative law.

The insolvency part flows from the closing of the gambling houses: now that the avatars could not spend their monies any more in those gambling houses they wanted to change it back into real life money in their Second Life banks. However, the run was so enormous that one of the biggest banks there, Ginko Financial, had to stop service to its clients and had to shut down business – thereby doing what in real life is one of the most feared economic horror scenarios as this more often than not has the potential to initiate a systemic crisis.² In legal terms, however, this is an insolvency case – irrespective of the fact that Ginko Financial has issued bonds to its unpaid clients; they are rated as junk-bonds.

C. The potential consequences

The case raises countless legal issues and problems – apart from and in addition to the fascinating aspect of almost anthropological dimensions: namely the demonstration of how legal orders come into existence and what the driving forces are behind such development. To name but a few of those problems: which real life law shall be applicable when it comes to the question of whose gambling rules are to be applied in Second Life? If the answer depends on where the server is located – and assuming this were in the US – does that mean that people from Germany, South Africa, or Japan are also subject to these rules – with the result that Second Life (with respect to the gambling control) is treated as the 51st US State? Does this imply that the bank would be subject to the US Bankruptcy regime – even though the real life individual behind Ginko Financial is a Brazilian citizen? If this were the case, does that also mean that this Brazilian could sue the US authorities – in the US or in Brazil or in (allegedly not yet existing) Second Life – because they have not intervened earlier or right at the beginning against the forbidden gambling?³ Would this imply that a banking licensing system has to be introduced in the virtual world? And finally – how are all these questions to be answered if the server were located in a different jurisdiction or

² Almost needless to mention in this context and in these the Lehman Brothers.

off-shore or if there were more than one server each one of them located in a different jurisdiction?

D. An outlook

Irrespective of whether Second Life will continue to exist or not and irrespective also of how the aforementioned questions will be answered by individual courts on this globe – it is fair to assume that the idea behind and the concept of Second Life has its future in Web 2 and, all the more, in Web 3. Given this, it is also fair to state that lawyers do have (or at least will have) the task to develop a legal framework which is appropriate to the needs and “realities” of such virtual world, i.e. a truly global law applicable there. What is really irritating here, however, is the gliding crossover from the real world into a virtual one – one stumbles right into the philosophical question: what is the reality?