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The journal of INSOL Europe
Summer 2017

Artificial Intelligence

Change is on its way

The reality show in Hungary

EECC Conference report

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- International Restructuring in London
- Brexit and the Insolvency Profession
- Warsaw Congress Preview
- Country Reports & Updates

... and more

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Welcome from the Editors


ANNEROSE TASHIRO


GUY LOFALK

Our struggle to make INSOL Europe's magazine better and better is greatly rewarded by you letting us have your articles and views on matters that are important for us as professionals and correspond to our desire to be updated in the development of cross-border insolvency. Your input means a lot to us. Thank you!

But before I get to write about the articles I cannot refrain from having a look at the world of today. Without going into too much cyclical analysis, in September next year we can count ten years from the Lehman crash which started an overall economic crisis. It's just a statistic, but it used to be the duration of a cycle between an economic recession followed by a boom, though these periods are more than unpredictable.

In the light of that, there are some other factors that invite us to be prepared for the future. It's hard to decide which one to start with, because of the number of choices. Maybe we should start with North Korea, which the other week sent back the 22-year-old student who just wanted a souvenir banner from his trip (he was in a coma for over 12 months and died days after his return). But North Korea has also performed nuclear testing and is working towards being able to reach the US coastline with missiles sometime soon. The uncertainty is matched on the other side of the Pacific by Commander in Chief, Donald Trump, who also has a record of unpredictability.

If we think the problems with North Korea will be sorted out, we can turn to Syria where US interests are at loggerheads with the Russian approach to the Syrian conflict, supporting Assad. It is worrying when two nuclear states' military forces risk to confront each other, even if not directly attacking each other.

Then we have the refugee crisis stemming first of all from the conflict in Syria, with the war between different factions and terrorist groups creating a refugee wave of immense proportions. The flood of refugees trying to get into Europe and the US from Syria is followed by the lesser stream from Africa. Instead of solving the causes of the refugee stream in the very area it stems from, Europe pays the costs of supporting those who manage to come to Europe, while women and children are left behind, or dying in the conflict areas or during the attempt to get to Europe. Why is Europe so unable to tackle this problem is a question that lacks an answer.

In the middle of all this we also have Turkey, whose new regime, proposed by President Erdogan, is concentrating the power by referendum unlike what we have seen in previous times when the military concentrated the power by military coups. Turkey is an important player in the Syrian conflict, as well as in many other conflicts in the area. There are more than 3 million refugees in Turkey and the number is increasing every hour. Most of them are waiting for a chance to enter Europe.

The debate around the refugees in Europe is intense and the questions of foreign culture and religion are now on the table, as refugee support and education mean high costs which need to be financed, usually from increased taxes on an aging European population.

Among the worrying issues we have some closer to our profession, like what will Brexit mean for English and European professionals. What will happen with British insolvency alternatives like the voluntary arrangement from a UK perspective? Will they lose ground in favour of other European procedures which then will get a chance to show what they can do?

Going back to the magazine and its content, we can read Christina Fitzgerald's article dealing exactly with some of the questions we have about Brexit and the IPs in the UK. Interesting reading!

As usual, for many of the other countries in our family, we have updates and reports from various areas. In that context, I'd like to draw your attention to the article on the latest EECC conference by Réka Korompay-Túróczi. I'd also like to mention Chris Laughton's report about the R3 and INSOL Europe joint conference.

Another article which I think is fascinating and quite unusual for our area of expertise is Louise Verrill's and Jane Colston's article on Artificial intelligence. Read it and please react on it. I think it is not only our field of work that is affected by AI, but most of what is around us. Will it serve us and can we control it? Stephen Hawkins thinks AI is one of the biggest threats to mankind…

Please also check the article in which Catarina Serra looks at the proposed EU Directive on pre-insolvency proceedings from another angle: it is quite surprising.

Finally, please also have a look at our President's column where he deals with a lot of what is going on in our organisation.

Last but not least I wish you all a very relaxing and joyful summer!

Guy Lofalk

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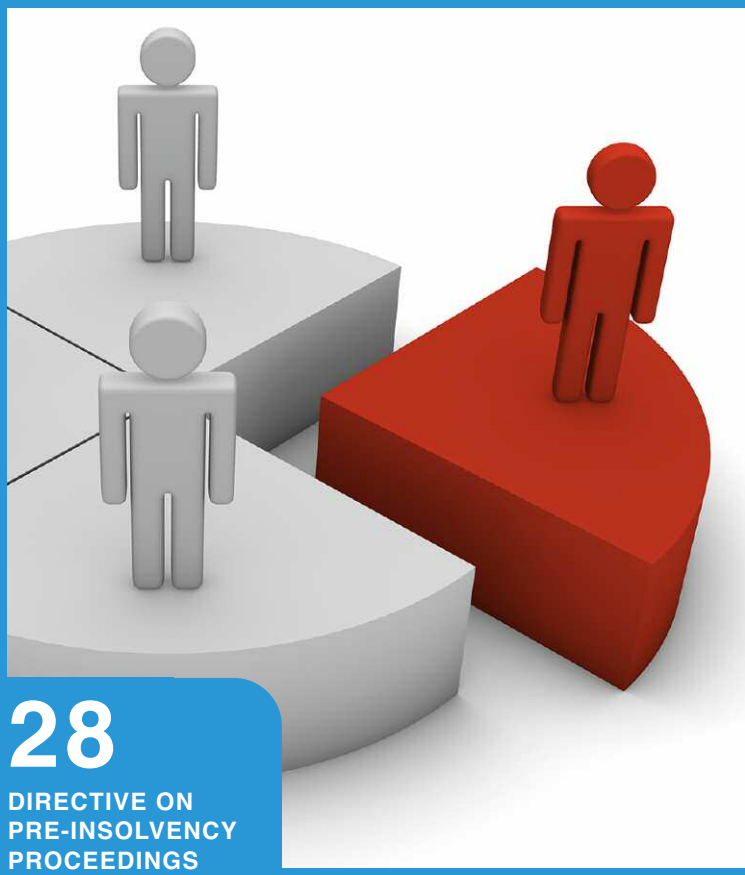

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Time to plan, review and improve

Photo by INDat

STEFFEN KOCH
INSOL Europe President

INSOL Europe's President, Steffen Koch, reports on a busy three months for the INSOL Europe family

> THE TASK FORCE WILL REVIEW OUR CURRENT STRATEGY AND ADAPT IT, IF NECESSARY, TO THE NEEDS OF OUR MEMBERS AND OUR PROFESSIONAL ENVIRONMENT

The last three months of a quite busy presidency have begun and the Executive, the Council and many members of our family are working hard to get the work done until we meet in Warsaw for our Annual Congress.

Strategic Task Force 2025

One of the key projects of my presidency is the "**Strategic Task Force 2025**" which I announced in my first column in Eurofenix as your President and which was unanimously adopted by the esteemed members of the Council during the Council meeting in Hamburg in April.

The 10 members of the task force are the following: Wolf Waschkuhn and Steffen Koch (Co-Chairs), Alastair Beveridge, Radu Lotrean, Piya Mukherjee, Alberto Núñez-Lagos Burguera, Catherine Ottaway, Alice van der Schee, Sabina Schellenberg and Ieva Strunkiene.

The Task Force will review our current strategy and adapt it, if necessary, to the needs of our members and our professional environment.

The task force members are currently working on the questionnaire which will be sent out to you before the summer break makes you happily leave your office for holidays. It will cover all the areas of interest of our members, such as the following that we have identified.

- Motivation to be (or become) a member of our INSOL Europe family.
- The position of the INSOL Europe family in comparison with other professional organisations.
- Reputation and public image.
- Utility of current services offered.
- Contribution to public policy development.
- Value for money.
- Sponsorship.

Each of these items is covered by a few questions. Bearing in mind that time is a precious commodity for each and every member, the questions will be as short as possible, estimating that answering the questionnaire will not take you longer than ten minutes! However, feel free to spend a little extra time and send us any comment that pops into your mind!

Your feedback will be of utmost importance for us and the more we receive the easier it will be for us to recognise what the INSOL Europe members think and what they expect from INSOL Europe. So please don't miss this opportunity to evaluate our organisation!

Joint events in Tel Aviv and Brussels

At the time of writing this column I just returned from two events where I initiated INSOL Europe's participation as co-host:

- **Tel Aviv:** A one-day joint INSOL International/ INSOL Europe seminar; and
- **Brussels:** The 6th European Insolvency and Restructuring Congress (EIRC) organised jointly by DAV (The German Bar Association's Section on Insolvency Law and Restructuring) and INSOL Europe.

Both events have been tremendous successes and I am pleased to report that our friends from INSOL International and DAV share this perception completely.

With regard to the Tel Aviv event I can briefly report that both the technical programme and the social events have been absolutely amazing. Those of you who were present will certainly share this view and I would like to extend my gratitude to each and every person involved in making this event so successful. A huge thank you goes to my friend Eitan Erez, our only Israeli member so far, who has put a tremendous amount of time and dedication into this project and did an absolutely marvelous job: *Dear Eitan, the INSOL Europe family and its president owe you a lot!*

You will find a first brief report from Eitan Erez at the end of my article.

As to the Brussels event I am happy to announce that DAV and INSOL Europe will enter shortly into an agreement in which both organisations agree to jointly host and organise this event in Brussels in the future!

INSOL Europe will thus be present in Brussels on a regular basis so that our connections to the EU Commission, the EU Council and other European institutions can be deepened together with our friends from DAV (headed by Jörn Weitzmann) who, in exchange, will gain access to our members' roll, as a source of participation and knowledge for this wonderful event. What could be better than this win-win situation?

The event itself provided again a high-level technical programme, thanks to the several speakers from the EU Commission, and an

Share your views!

excellent gala dinner closing it. Several speakers and/or attendees were members of INSOL Europe and the number will definitely grow in the future.

INSOL Europe High-Level Course on Insolvency Law in Eastern European Jurisdictions in Bucharest

Parallel to the Tel Aviv one-day joint seminar, the second module of the INSOL Europe High-Level Course on Insolvency Law in Eastern European Jurisdictions took place in Bucharest.

With 61 attendees registered, this High-Level Course is a landmark in INSOL Europe's mission to assist our Eastern European family members in developing their law and their skills together with high profile professionals from the INSOL Europe family. Amongst others, Prof. Ignacio Tirado and Alberto Núñez-Lagos Burguera were lecturing in Bucharest together with our Deputy President Radu Lotrean, who will report on the High-Level Course in the next edition of *eurofenix*.

INSOL Europe Case Register

I am also pleased to inform you that our EIR Case Register has been updated to serve you even better.

The INSOL Europe Case Register contains summaries of over 500 judgments, from the CJEU and first instance and appeal courts of the EU Member States, that consider significant points relating to the European Insolvency Regulation (EIR) or, from 26 June 2017 onwards, the EIR Recast.

Thus you can now consult various EC case laws, and decisions of the CJEU binding all Member States, though where the CJEU has given limited guidance on a particular area, courts may look to non-binding decisions of other courts in the Member States for guidance.

As it will take some months for the first case(s) based on the EIR Recast to reach the EU Court of Justice, practitioners will be very interested in the way other Member States across the EU are dealing with the new wording in the EIR Recast. Abstracts from key cases based on the EIR Recast will be added to the INSOL Europe Case Register as judgments are delivered from 26 June 2017 onwards.

Young members of INSOL Europe

By reviewing our membership structure, we found out that we have to do more to promote and incentivise younger members to join the INSOL Europe family.

We are currently discussing different approaches to achieve this goal as fast as possible, as younger members represent the future of our family. I am optimistic that after the Council meeting in Warsaw we will announce new measures designed to strengthen our younger membership.

My dear family members, you hopefully share my enthusiasm for our wonderful organisation which deserves a bit of your precious time. So think of that when you receive the membership questionnaire and take some minutes to work on it!

> **INSOL EUROPE WILL BE PRESENT IN BRUSSELS ON A REGULAR BASIS SO OUR CONNECTIONS TO THE EU COMMISSION AND OTHER EUROPEAN INSTITUTIONS CAN BE DEEPENED**

Success in Tel-Aviv, Israel, "the start-up nation"

The one-day joint seminar organised by INSOL Europe and INSOL International in Tel Aviv, Israel on June 27 attracted 120 participants from Israel, Europe, the U.S. and South Africa, *reports Eitan Erez, Chair of the Organising Committee.*

The president of INSOL Europe, Steffen Koch, and the president of INSOL International, Adam Harris, were both present at the seminar which took place at the Hilton Tel Aviv, overlooking the blue Mediterranean and the city of Jaffa.

Everyone present at this seminar found the panels fascinating and the subjects discussed enriching!

For instance, they learned about innovations in Europe regarding cross-border insolvency, the work of UNCITRAL, discussed the newly proposed Israeli insolvency law and the setting of the appropriate forum for discussing an international insolvency case (COMI).

The delegates also heard a fascinating lecture from Eli Reifman, who described Israel as "the start-up nation", a magnet for investors from around the world in the high-tech field.

Photo by Shlomi Yosef

Adam Harris and Steffen Koch (centre) with Eitan Erez, Chair of the Organising Committee (far right), and assistant on the Committee, Ofer Shapira (far left)

An interesting lecture by General Yom Tov Samia followed, who elaborated on the story of Israel's foundation and the geo-political situation in the Middle East.

The delegates had the opportunity to visit historical sites like Jerusalem, Bethlehem, Tiberias, Nazareth and Masada, as well as the bustling city of Tel Aviv, the white city that never sleeps.

The Organising Committee was chaired by Eitan Erez, who was assisted by his colleagues Shaul Kotler and Ofer Shapira. *They would be glad to see you next time!*

We welcome proposals for future articles and relevant news stories at any time. For further details of copy requirements and a production schedule for the forthcoming issues, please contact Paul Newson, Publication Manager: paulnewson@insol-europe.org

INSOL Europe now has several LinkedIn groups which you can join and then engage with its members:

- INSOL Europe (main group)
- Eurofenix: The Journal of INSOL Europe
- INSOL Europe Turnaround Wing
- INSOL Europe Financial Institutions Group
- Eastern European Countries' Committee
- INSOL Europe Anti-Fraud Forum

To join one of the groups, visit: **www.linkedin.com** and search for the group by name.

Make a comment!

Share your views!

You will have noticed that we have added QR Codes to every main article to encourage readers to give us their views. The QR codes take you the LinkedIn group for ***eurofenix*** (see above).

Of course, you are welcome to pass on your comments to any member of the Executive Committee, whether by email or in person!

Turnaround Wing Update

The Turnaround Wing is currently conducting a project related to the implementation of the Proposal for a Directive on preventive restructuring frameworks.

The key driver for the project is to discuss and conclude within the Turnaround Wing (i) which is the most efficient policy to implement the Directive once it is enacted and (ii) what could be the most generally acceptable content of the Directive within the framework the Directive grants to Member States.

The Turnaround Wing has not reached any conclusion yet but has been discussing several solutions, tools and approaches to these problems. *Inter alia* the tool of a model law based on the future Directive seems to be the most efficient tool to implement, in a uniform way, the Directive and avoid "legislative competition" among Member States and thus avoid forum shopping strategies.

As to the uniform context for such a model law, probably a combination of a liberal and broad content for the model law with low court intervention and more focus on the needs for crossborder transactions would make sense. The possibility will be suggested to Member States to maintain their more historical/local/traditional pre-insolvency restructuring frameworks with heavy court intervention adapted to the minimum requirements of the Directive, and to separately prepare a version adopting the minimum requirements of the Directive. In this way, they would avoid both regimes operating simultaneously, i.e. the traditional one for local restructurings and the one based on the proposed model law for crossborder and high profile restructurings.

The Turnaround Wing is anxious to have INSOL Europe members participating in this very interesting debate and welcomes their input. INSOL Europe has always been very active in the development of EU crossborder legislation and solutions and the Turnaround Wing has specialised in this task.

The Turnaround Wing has also updated its brochure which can be found on the website at: *https://www.insol-europe.org/turnaround-wing-introduction-and-members.*

Contact one of the joint-chairs for more information and to get involved:

Alberto Núñez-Lagos Burguera
alberto.nunez-lagos@uria.com

Rita Gismondi
rgismondi@gop.it

INSOL Europe High-Level Course Module II

The second Module of the INSOL Europe High-Level Course on Insolvency Law in Eastern European Jurisdictions took place from 29 June to 1st July 2017 in Bucharest at the CARO Hotel.

After bering provided with a general overview of international standards and best comparative examples concerning the main elements of business restructuring and insolvency by some international experts, the 61 Romanian lawyers, lenders, insolvency practitioners, auditors, judges, representatives of the National Institute of Magistracy, the National Institute for the Training of Insolvency Practitioners and the National Union of Insolvency Practitioners who participated in the first module, took part in an analysis covering all the main elements of the Romanian insolvency law, whose presentation was ensured by a local team of experts: Simona Milos (National Institute for the Training of Insolvency Practitioners), Irina Sarcane (Target), Andreea Deli (Deli and Partners), Vasile Godinca (CITR), Judge Flavius Motu (Cluj Specialised Court), Prof. Radu Bufan (Universitatea de Vest), Bogdan Biter (CONSULTA 99) and Mihaela Carpus-Carcea (European Commission Directorate-General for Justice and Consumers).

Then, a team of experts: Prof. Ignacio Tirado (Universidad Autonoma de Madrid, Spain), Prof. Janis Sarra (University of British Columbia, Canada), Prof. Christoph Paulus (Humboldt University Berlin, Germany) and Alberto Núñez-Lagos (Uría Menéndez, Spain) acted as discussants, assessing the Romanian insolvency system described by the local experts as against best practices, providing comparative examples, and helping to solve the problems they identified as the main hurdles in the Romanian practice.

The 3rd module will take place online. Details are on our website: www.insol-europe.org/education/courses2017

We are grateful to CITR or sponsoring our Educational Course in Romania.

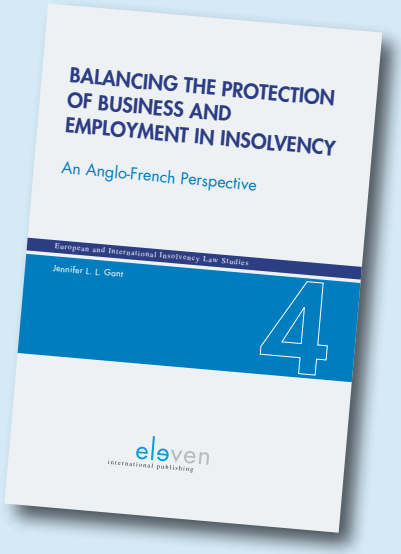
10 years of the Insolvency Research Group

Professor Rebecca Parry has taken over as Director of the Centre for Business and Insolvency Law (CBIL) at Nottingham Law School (NLS), and reports on the busy last few months as the Insolvency Research Group celebrates its 10th year.

"On the research front, NLS are proud to announce the publication of Jennifer Gant's book, Balancing the Protection of Business and Employment in Insolvency (Eleven Publishing, 2017), *see box right*.

We continue to work on many different projects, including writing and collating reports for the INSOL Insolvency Practitioner Project (Rebecca Parry, Paula Moffatt, Jennifer Gant and Alexandra Kastrinou) and the EU Insolvency Regulation research conducted through the University of Leeds (Alexandra Kastrinou). We have also been active on the teaching side. Our students on the dual LLM degree with Radboud University continue to produce excellent work. I was a guest lecturer in Italy and in October we will welcome the first students on our exciting new LLM in International Financial Law.

There have also been some staffing changes and we gratefully acknowledge the work of former Director of the Centre, David Burdette, who has taken up a position with INSOL International, and Paul Omar, also formerly of the Centre, who is maintaining a high profile internationally in his work in insolvency law."



We are pleased to welcome the fourth book in *Eleven Publishing*'s European and International Insolvency Law Studies Series, Balancing the Protection of Business and Employment in Insolvency: An Anglo-French Perspective by Dr Jennifer L L Gant of the Centre for Business and Insolvency law, Nottingham Trent University.

This book explores aspects of how to balance effective business rescue and employment protection as these concepts tend to conflict in law and policy. Employees attached to the sale of a business can represent a liability, reducing its intrinsic value and deterring business acquisitions in view of the employment liabilities that transfer by operation of the Acquired Rights Directive. This book discusses how a balance might be sought between these conflicting policy objectives.

Gant's book presents an investigation based on a comparative legal historical analysis of the approaches taken to balancing employment protection and business rescue in the United Kingdom and France, chosen due to their legal and political influence in the EU and their archetypically different legal systems. This approach is useful as a background to future reform efforts as it explains how particular jurisdictions might receive and then implement such reforms given the underlying aims of business rescue and employment protection policies.

Available from the Eleven Publishing Website in both hard copy and e-book form for €65. ISBN 978-94-6236-755-5

McCann FitzGerald's Jane Marshall elected to prestigious American College of Bankruptcy

In a ceremony in Washington, D.C. Jane was inducted into Class 28 and become the first Irish person to have been elected to the College.

Jane Marshall was President of INSOL Europe from 2000-2001 and is presently a consultant in McCann FitzGerald's Restructuring & Insolvency Group.

Welcoming the appointment, Managing Partner Barry Devereux, said: "Jane is one of the leading experts in the area of restructuring and insolvency and we are extremely proud of her achievement in receiving this well-deserved and esteemed international honour. This announcement represents industry recognition of Jane's standing globally in the Restructuring & Insolvency field."

The American College of Bankruptcy is an honorary professional and educational association of bankruptcy and insolvency professionals. Professionals who are invited to join as fellows must meet strict criteria to be eligible for selection, including the highest standard of professionalism, ethics, character, integrity, professional expertise and leadership, contributing to the enhancement of bankruptcy law and insolvency law and practice.

Reforms of the new European Regulation on Insolvency Proceedings, Romania

Radu Lotrean reports from the recent 1-day seminar held in Bucharest.

"I believe there are three things that can produce an effective, memorable conference: interesting subjects and speakers, good event management and an engaging audience. In my opinion, the conference "*Reforms of the new European Regulation on Insolvency Proceedings*" organised by the Romanian-American University, INSOL Europe and the Nicolae Titulescu University on 27 April 2017, at the Romanian-American University, Bucharest, has fulfilled all of the above criteria.

The speakers, renowned specialists in insolvency law, professors, judges, lawyers, insolvency practitioners, representatives of the Ministry of Justice and the Romanian National Trade Register Office, presented highly current topics in the field of domestic and cross-border insolvency.

Topics included an analysis of the recast European regulation and particularly considered specific aspects regarding issues arising from the impact of cross-border insolvency in/with the Romanian business environment, both in Romania and abroad, as well as how the provisions of the new European regulation can help address them.

Together with the engaging audience, consisting of mostly insolvency professionals, the speakers created almost a brainstorming session regarding some controversial aspects of domestic insolvency. In those moments, audience and speakers where brought on an equal footing, charged with improvement ideas/ law solutions.

As the INSOL Europe representative, I had the pleasure of opening the conference and detailing a little bit the history of INSOL Europe, and the wonderful advantages of being a member. I was delighted to discover an important number of insolvency specialists were INSOL Europe members and also to discover interest among the young participants and students. I also had the pleasure of presenting an overview of the insolvency field, in numbers.

I believe that supporting local conferences will enhance INSOL Europe notoriety and it will ultimately bring new members."

INSOL International Global Insolvency Practice Course

INSOL International is pleased to announce the 8th graduating class of the Global Insolvency Practice Course. The successful participants, nine of whom are from Europe, are now formally recognised as a 'Fellow, INSOL International'. Full details are on our website at: www.insol-europe.org/news/insol-international-press-releases

INSOL Europe contributes to the UNCITRAL Working Group V

INSOL Europe attended the 51st session of the Working Group V (Insolvency law) held in New York from 10 to 19 May 2017 in its capacity as guest international non-governmental organisation ("NGO") with observer status, *reports Florian Bruder.*

Other observers included the American Bar Association, INSOL International, the International Bar Association, the International Insolvency Institute, la Fondation pour le droit continental, the European Investment Bank, the International Women's Insolvency and Restructuring Confederation, the Law Association for Asia and the Pacific and the Union Internationale des Avocats.

Our INSOL Europe delegation was headed by its President Steffen Koch and also included myself. The purpose of our attendance was to represent INSOL Europe's views on matters where we believe that our organisation has specific international insolvency expertise. Our delegation engaged in numerous discussions with delegations of the Working Group so as to help facilitate the deliberations of the Working Group at this 51st session.

During the 51st session, the UNCITRAL Working Group V focussed on three topics, namely:

1. A/CN.9/WG.V/WP.147 - Insolvency of micro, small and medium-sized enterprises

In previous sessions the Working Group V and the Commission noted the importance of the insolvency of micro, small and medium-sized enterprises ("MSME") and the Commission mandated Working Group V to develop appropriate mechanisms and solutions to resolve the insolvency of MSMEs. In particular, Working Group V should aim to tailor the mechanisms already provided in the Legislative Guide to specifically address MSMEs and develop new and simplified mechanisms. A special need for those mechanisms to be equitable, fast, flexible and cost efficient was identified.

A group of delegates, professors and practitioners noted that most insolvency regimes are designed for larger enterprises and presented a modular approach to the MSME insolvency regime in order to best address the important role of the entrepreneur and the individual needs in insolvencies of MSMEs. The Working Group agreed that work could proceed by examining each of the topics addressed in the Legislative Guide on Insolvency Law and considering whether the treatment provided was appropriate and necessary for an MSME insolvency regime.

2. A/CN.9/WG.V/WP.145 - Recognition and enforcement of insolvency-related judgements: draft model law

Based on the mandate by the Commission to develop a stand-alone model law providing for the recognition and enforcement of insolvency-related judgements, Working Group V had identified key issues to be addressed by such an instrument in previous sessions. In preparation of the 51st session the delegation of Canada submitted comprehensive comments on the draft model law (A/CN.9/WG.V/WP.148). A revised draft text based on comments made in the 50th session was presented by the Secretariat. Both were discussed intensively by Working Group V with regard to the scope of the instrument and various other matters.

Inter alia, a draft preamble was adopted reiterating that this instrument should complement any legislation which has been enacted based on the Model Law on Cross-Border Insolvency and not replace or discourage any States from enacting such legislation. Also, the definition of "insolvency-related judgement" was further discussed, in particular whether a wording similar to the one used in the European Insolvency Regulation (EU) 848/2015 should or should not be adopted.

3. A/CN.9/WG.V/WP.146 - Facilitating the cross-border insolvency of multinational enterprise groups: draft legislative provisions

In previous sessions, Working Group V had developed daft legislative provisions facilitating the cross-border insolvency of multinational enterprise groups. The consolidated draft legislative text presented to Working Group V in the 51st session incorporated the key principles and provisions identified in previous sessions addressing:

(a) coordination and cooperation of insolvency proceedings relating to an enterprise group;

(b) elements needed for the development and approval of a group insolvency solution involving multiple entities;

(c) the use of so-called "synthetic proceedings" in lieu of commencing non-main proceedings;

(d) the use of "synthetic proceedings" in lieu of commencing main proceedings; and

(e) approval of a group insolvency solution on a more streamlined basis by reference to the adequate protection of the interests of creditors of affected group members.

The draft text was, again, intensively discussed. *Inter alia*, it was clarified that an enterprise group member whose centre of main interest is located in another State may participate in proceedings with respect to another group member without necessarily having to develop a group insolvency solution resulting in planning proceedings. This clarifies that cooperation and coordination on the one side and planning proceedings on the other side are distinct stages but both allow to develop a group insolvency solution. The institution of planning proceedings with the appointment of a group representative is not necessary to enjoy full participation. A revised draft was developed which will be submitted to Working Group V for further consideration in the 52nd session.

The above documents together with additional working papers (namely commentary and notes prepared by the Secretariat) are available on the UNCITRAL webpage: *www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html.*

Our delegation left with the impression that the work regarding the recognition and enforcement of insolvency-related judgements, as well as the facilitation of the cross-border insolvency of multinational enterprise groups are well-progressed and that Working Group V makes a lot of efforts to finalise both draft texts in the next sessions.

We are looking forward to continuing the work at the next session which is tentatively scheduled to be held in Vienna in December 2017.

Inaugural Cross-Border Corporate Insolvency and Commercial Law [CI&CL] Research Group Conference & Symposium

Eugenio Vaccari, PhD Candidate at City, University of London, reports from the successful event held on 6 April 2017.

The full day event, sponsored by Thomson Reuters and promoted by INSOL Europe and INSOL International, counted contributions from more than 70 people. On the day of the conference, contributors from twelve jurisdictions presented the results of their research. The debate that followed allowed the contributors and the organising committee to progress their research, especially in regards to improving or facilitating the application of the law in the considered countries (national recommendations), and challenging ongoing trends and established policy recommendations by adopting a proactive approach toward legal reform at an international level (general guidelines).

Thanks to its success and the positive feedback from the audience, Prof. Jason Chuah, head of the Academic Department at City, University of London, confirmed that the university will continue to support the activity of the research group alongside the organisation of an insolvency conference. Similar conferences are therefore due to take place on an annual basis at the City, University of London premises.

The programme covered a broad area of insolvency-related topics. After a light breakfast, Dr. Julia Constantino Chagas Lessa (City, University of London) and Dr. David Burdette (INSOL International) chaired the first two sessions reserved for doctoral candidates and early career academics. The proposed papers covered a wide range of substantive issues. They also evidenced a tendency in PhD studies to focus on comparative and empirical research, with emphasis placed on the analysis of legal changes and hurdles in developing and emerging countries.

The programme continued with a lecture given by Prof. Andrew Keay (Centre for Business Law and Practice at the University of Leeds) on the prospects and obstacles of harmonising avoidance rules in European Union insolvencies. In his speech, Professor Keay drew on the evidence collected during a research project coordinated by his university, and funded by the European Union, aimed at mapping and comparing Member States' insolvency legislation on a wide variety of matters.

With specific reference to avoidance rules, Professor Keay highlighted the most significant differences currently existing between national laws. In his paper, he considered the factors that ought to be addressed to formulate a harmonised scheme for avoidance rules in insolvency. The critical assumption behind his thinking is that, while harmonisation is a commendable goal, how it is done, and what must be taken into account are issues of equal gravity.

In line with the concerns raised by the lecture, some of the papers critically analysed the progress achieved by the Member States in reforming their national statutes on the basis of recommendations and proposals issued by the European Commission. Participants learnt of the initiatives and preliminary reforms undertaken in countries such as Italy, Germany and the United Kingdom. They could also appreciate how, despite the EC's efforts, insolvency rules and statutes continue to remain fragmented. Speakers generally argued that national policy makers felt the duty to consider EU (non-binding) proposals against a wide variety of business and legal cultures, thus falling short of the European harmonisation goal.

The recent decision of the UK government to trigger the negotiations for leaving the European Union, following the results of the 2016 referendum, provided a basis for further debate that this event will produce on the evolution of insolvency law, this time from a British rather than European perspective. In particular, Hamish Anderson examined the possible need for further reform of domestic law in response to 'Brexit'.

In his presentation, Anderson highlighted the implications that Brexit could have on future recognition of UK insolvency proceedings and schemes of arrangement within the European Union, considering that only a limited number of EU countries have so far adopted the UNCITRAL Model Law on Cross-Border Insolvency (whose scope is much more limited than the Insolvency Regulation no. EC/1346/2000, due to be replaced by the recast EU/2015/848).

The conference concluded with a thought-provoking presentation by Prof. Yvonne Joyce (University of Glasgow), which revealed - based upon the results of an empirical study - how insolvency proceedings are subject to intangible 'relational' forces including personal agendas and transitions in political ideology. In doing so, the paper aimed to explain how these forces may consequently impact upon corporate governance during such proceedings.

Moreover, her ongoing research aims at revealing how ethical forces may operate in a way which tempers commercial pressures placed on accountancy practitioners - an area in which Professor Joyce has considerable knowledge and expertise, given her status as a qualified Chartered Accountant.

Finally, the insolvency day event was closed by a symposium organised by the Cross-Border Corporate Insolvency and Commercial Law [CI&CL] Research Group, a non-profit collaborative network of scholars, professionals and industry insiders, which promotes the research on cross-border issues in insolvency law.

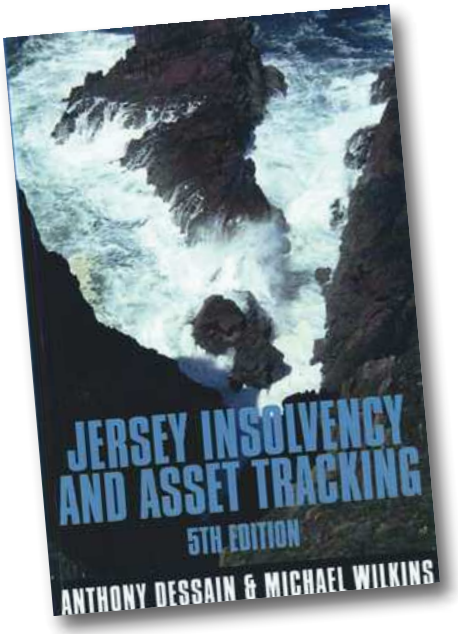
The symposium represented an occasion for four round tables to debate the preliminary results of a study carried out in 36 jurisdictions, which focused on the treatment of executory contracts in insolvency law. The study adopted a truly global perspective. It aimed at mapping the existing law on the topic, investigating the primary 'drivers' behind recent reforms, and establishing a set of criteria to evaluate the reasonableness and efficiency of national policies.

Book Review:
Jersey Insolvency and Asset Tracking

Publisher: Key Haven Publications
Authors: Anthony Dessain and Michael Wilkins
Published: 2016, 5th Edition
Length: cvii and 583 pages
Price: £195.00
ISBN: 978-1-901614-67-1

The law on insolvency in the Channel Islands has roots both in the customary law of Normandy as well as influences from civil law developments in neighbouring France and, more lately, in the influence, as far as corporate liquidation is concerned, of comparable rules in the United Kingdom. Similar observations may be made of the laws in relation to property, taking security and procedural matters such as litigation and recovery, where the origins of the provisions may lie equally in civil and common law roots.

As a mixed jurisdiction, the law in Jersey provides a fascinating insight into the juxtaposition of rules from different legal families and how these are articulated. Providing an understanding of these areas of law is the function of this work, co-authored by Anthony Dessain, senior partner in Bedell Cristin and a prominent Jersey advocate, and Michael Wilkins, till recently the Viscount of the Royal Court in Jersey, the official office-holder in bankruptcy in that jurisdiction.



The main aim of the text is to cover the Jersey law of insolvency, together with sufficient contextual elements to enable an appreciation of the differences between Jersey law and other systems. Thus, the work, now in its 5th edition, starts with a brief introduction to the Jersey legal system and court structure, followed by detailed chapters on asset recovery and claimants' rights around insolvency, including details of a variety of asset security regimes as well as connected enforcement and procedural issues.

Two ancillary chapters cover directors' duties and liabilities as well as piercing the veil in the context of corporate bodies and trusts, particularly important given the prevalence in Jersey of financial investments structured by using a variety of bodies both incorporated and not.

Chapter 5 is the core of the work covering all that might be termed "bankruptcy", from winding up procedures under company law to the classic (*cessions de biens* and its dependent enforcement procedures as well as *remise de biens*) and modern (*désastre*) procedures in the law of insolvency. It also covers recent developments in practice that have seen the treatment of local analogies to workouts and pre-packs.

The tome is then rounded off with three chapters on cross-border insolvency, the impact of human rights in insolvency and an envoi on Jersey's position as an international finance centre. Further glosses on issues raised in the text are provided by the inclusion of extended (and more detailed) commentaries in the appendices. In summary, this is a very detailed text that offers a well-written and considered exposition of insolvency and related property and company law rules in Jersey. It should readily find a place on the shelves of anyone who has dealings in that jurisdiction.

Review by Paul Omar.

INSOL Europe Council Elections

This is the time of year when we consider retirements from and elections to our Council.

Countries with 30 or more members are entitled to a reserved seat on Council and in October this year, a vacancy will arise for the United Kingdom reserved seat following the appointment of Alastair Beveridge as Vice President last year and also for Italy as Antonio Tullio will have completed his first three-year term of office. Mr Tullio is eligible to stand again for re-election against other nominations for one further three-year term of office. Therefore, members from Italy and the United Kingdom will receive an email requesting nominations for candidates from their own country.

In the meantime, one non-reserved seat vacancy on Council (which may be occupied by any country) will also become available as Martine Gerber (Luxembourg) will have completed her maximum of two x three-year terms of office.

Closing date for nominations: 21 July 2017

Information about how to nominate a candidate has been emailed to members. Contact Caroline Taylor, INSOL Europe's Director of Administration at carolinetaylor@insol-europe.org if you have not received your copy of the nomination form.

From Approximation to Harmonisation of the IPs' Education

Emmanuelle Inacio takes a closer look at the harmonisation of the education of Insolvency Practitioners across Europe

EMMANUELLE INACIO
INSOL Europe Technical Officer

The issue related to harmonisation of law could be illustrated by referring to the following quote from the famous French geographer Daniel Faucher: "Europe is too big to be united. But too small to be divided. Her double destiny lies there".

As regards the issue of harmonisation of European insolvency law, and more specifically, harmonisation of the regulation of those who mainly apply insolvency law across the European Union – the insolvency practitioners according to the European terminology – the question is to assess whether harmonisation of regulation of insolvency practitioners at European Union level is worthwhile and achievable.

Indeed, the insolvency practitioners are a key part of an effective insolvency system[1]. As the Austrian Professor Ernst Jaeger underlined: "*the choice of the insolvency practitioner is the fateful question of the insolvency proceedings*"[2].

> THE QUESTION IS TO ASSESS WHETHER HARMONISATION OF REGULATION OF INSOLVENCY PRACTITIONERS AT EUROPEAN UNION LEVEL IS WORTHWHILE AND ACHIEVABLE

At a European level, under the Recast European Insolvency Regulation of 20 May 2015, the insolvency practitioners are defined as "*any person or body whose function, including on an interim basis, is to: (i) verify and admit claims submitted in insolvency proceedings; (ii) represent the collective interest of the creditors; (iii) administer, either in full or part, assets of which the debtor has been divested; (iv) liquidate the assets referred to in point (iii), or (v) supervise the administration of the debtor's affairs*"[3].

Therefore, it is essential that the insolvency practitioners are appropriately qualified and possess the knowledge, experience and personal qualities that will ensure not only the effective and efficient conduct of the insolvency proceedings but also that there is confidence in the insolvency regime[4].

Comparative research on the role of insolvency practitioners was conducted by UNCITRAL[5], World Bank[6], European Bank for Reconstruction and Development[7], University of Leiden[8] and University of Leeds[9] and it appears that the laws of EU Member States have different rules on the insolvency practitioners' qualification, licensing, appointment, supervision and discipline, ethics, legal powers and duties and remuneration. Based on this research, Recommendations, Principles and Guidelines were although formulated on common key features.

If INSOL Europe's 2010 Report on "Harmonisation of insolvency law at EU Level"[10], presented to the European Parliament Committee on Legal Affairs, identified a number of areas of insolvency law that are apt for substantive harmonisation, however, regarding the qualifications and eligibility for the appointment, licensing, regulation, supervision and professional ethics and conduct of insolvency representatives, because of the substantial differences between EU Member States, harmonisation was not deemed necessary until a further harmonisation of substantive insolvency law and company law has been achieved.

In 2016, the INSOL Europe's Working group "Insolvency Office Holders (IOH) Forum" presented a new comparative analysis on the issue under consideration and concluded that due to the heterogeneity of the regulation of insolvency within the European Union, only minimum standards should be set up[11]. The IOH Forum defined eight minimum standards based on the EBRD Principles (and recommended by the University of Leeds), concerning: (i) licensing and registration; (ii) regulation, supervision and discipline; (iii) qualification and training; (iv) appointment system; (v) work standards and ethics; (vi) legal powers and duties; (vii) transparency and (viii) remuneration. They have been submitted by the IOH Forum to the Directorate-General for Justice and Consumers of the European Commission on 25 July 2016[12]. But the IOH Forum emphasised that these minimum standards should not be imposed on the insolvency profession, whose diversity of regulation should be respected.

However, the IOH Forum recommended to enhance the approximation of the insolvency practitioners by the professionals themselves. According to the IOH Forum, the exchange of knowledge and best practice standards, peer reviews and cross-border training should be encouraged. To this end, any Continuing Professional Education (CPE) system in the Member States should be encouraged and even allowed to include theoretical and practical

training in other Member States.

The approximation of the insolvency practitioners by the exchange of know-how would then lead to harmonisation on the long run instead of imposing rules that could affect the economic health and proper functioning of Member States.

On 22 November 2016, the European Commission has presented the long-awaited Proposal for a "Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures amending Directive 2012/30/EU"[13]. Included in Title IV of the Draft Directive are proposals aimed at increasing the efficiency of restructuring, insolvency and second chance which concern the qualification, training, appointment, supervision and remuneration of insolvency professionals.

The Proposal states that the Member States should ensure that the insolvency practitioners are properly trained and supervised in the carrying out of their tasks, that they are appointed in a transparent manner with due regard to the need to ensure efficient procedures and that they perform their tasks with integrity. Insolvency practitioners should also adhere to voluntary codes of conduct aiming at ensuring an appropriate level of qualification and training, transparency of the duties of such practitioners and the rules for determining their remuneration, the taking up of professional indemnity insurance cover and the establishment of oversight and regulatory mechanisms which should include an appropriate and effective regime for sanctioning those who have failed in their duties. The Proposal adds that such standards may be attained without the need in principle to create new professions or qualifications[14].

The Proposal seems in fact to establish minimum standards very similar to those set up by INSOL Europe's IOH Forum and to respect the diversity of existing regulations.

Regarding education, the Proposal states that the Member States shall ensure that mediators, insolvency practitioners and other practitioners appointed in restructuring, insolvency and second chance matters receive the necessary initial and further training which will indeed ensure that their services are provided in an effective, impartial, independent and competent way in relation to the parties[15]. Similarly, regarding the members of the judiciary and administrative authorities dealing with restructuring, insolvency and second chance matters, the Member States shall ensure that they receive initial and further training to a level appropriate to their responsibilities which will ensure that they have the necessary expertise and specialisation[16].

The Proposal explains that given the enhanced cooperation mechanisms between courts and practitioners in cross-border cases set up by the Recast European Insolvency Regulation of 20 May 2015, the professionalism of all actors involved needs to be brought to comparable high levels across the Union[17].

Thus the Proposal puts the emphasis on education, which has also been highlighted by our IOH Forum.

High-level training

In line with the IOH Forum's conclusions and the EC Proposal regarding education of insolvency practitioners and of the members of the judiciary and administrative authorities, the INSOL Europe High-Level Course on Insolvency Law in Eastern European Jurisdictions was launched in 2016. This ambitious educational course aims to assist Eastern European Jurisdictions' transition to a fully modern, efficient and best practice-compliant insolvency system.

For its first edition, the High-Level Course is being held in Romania and is receiving the full support and cooperation of the Minister of Justice and the National Institute of Magistracy. The National Institute for the Training of Insolvency Practitioners also offered full support to the High-Level Course on Insolvency Law and decided to grant 20 CPE points – which is the maximum – for the more than 60 Romanian lawyers, lenders, insolvency practitioners, auditors, judges, representatives of the National Institute of Magistracy who are attending the Educational course and exchanging their knowledge and experience.

The Director of the Programme of the High-Level Course – Prof. Ignacio Tirado (Universidad Autonoma de Madrid, Spain) - and the Local Director – Radu Lotrean (CITR, Romania) – formed panels of national and international experts who will deliver a one-year programme, with three on-site training rounds in Bucharest in order to help the professionals to acquaint themselves with international standards and best comparative examples from restructuring and insolvency practice as well as with detailed insights on the local insolvency system.

This INSOL Europe Educational Course received the support of Mihaela Carpus-Carcea, Legislative Officer of the European Commission, who not only provided the audience with the presentation of the Proposal of the European Commission for a Directive on preventive restructuring frameworks but will analyse the compliance of the current Romanian System with the mentioned Proposal in a workshop.

Driven by this success, INSOL Europe intends to reiterate the "INSOL Europe High-Level Course on Insolvency Law" in Budapest next year.

No doubt that harmonisation of education of insolvency practitioners and members of the judiciary and administrative authorities is worthwhile and achievable and we are proud that INSOL Europe contributes to bring all actors involved to comparable high levels of education across the Union. ■

THE PROPOSAL SEEMS IN FACT TO ESTABLISH MINIMUM STANDARDS VERY SIMILAR TO THOSE SET UP BY INSOL EUROPE'S IOH FORUM

Footnotes:

1 Tirado, I., *Issues Note on Insolvency Representatives* (draft), The World Bank, 2011.
2 Jaeger, E., *Konkursordung Grosskommentar*, 1901.
3 Article 2(5).
4 UNCITRAL, *Legislative Guide on Insolvency Law*, 2004, p. 174.
5 Idem.
6 WORLD BANK, World Bank Principles for Effective Insolvency and Creditors' Rights Systems, 2016.
7 EBRD, Assessment of Insolvency Office Holders: Review of the profession in the EBRD region, 2014.
8 INSOL Europe, Statement of Principles and Guidelines for Insolvency Office Holders in Europe, 2015 (available at: www.insol-europe.org/download/resource/167). The INSOL statement is based on research conducted by Leiden University (available at: http://www.tri-leiden.eu/project/categories/ioh-project/).
9 University of Leeds, *Study on a new approach to business failure and insolvency Comparative legal analysis of the Member States' relevant provisions and practices*, Study requested by the European Commission (Directorate-General for Justice and Consumers), Tender No. JUST/2014/JCOO/PR/CIVI/0075, 2016.
10 INSOL Europe, *Harmonisation of Insolvency Law at EU Level*, Study requested by the European Parliament's Committee on Legal Affairs (Directorate General for Internal Policies, Policy Department: Citizens' Rights and Constitutional Affairs), Note PE 419.633, 2010.
11 https://www.insol-europe.org/ioh-forum-introduction-and-members
12 Cf Inacio E., Issues and challenges facing insolvency office holders in Europe, Eurofenix 2016 Autumn Edition, pp 8-9.
13 http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50043.
14 Recital 40, articles 24 to 27.
15 Article 24.
16 Article 26.
17 Recital 39.

EECC Conference Report 2017

Réka Korompay-Túróczi, a member of the Technical Committee for this year's event, gives us her personal review of the conference in Budapest, Hungary and a report on the main topics of discussion

RÉKA KOROMPAY-TÚRÓCZI
HAIP/FOE, Hungary

I was just sitting at my computer when I received a letter from INSOL Europe, announcing that Budapest had been discussed as a possible host for the 13th Eastern European Committee Conference in 2017.

For years I was present at various regional INSOL Europe conferences with my colleagues, but, if some of you remember, I am proud to say that Budapest was honoured to host the first EECC conference ever, in 2005. So, naturally we were happy to say yes to the task, as our dreams were to be part of a memorable conference with INSOL Europe.

As the representatives of the only Hungarian professional insolvency body, namely, the Hungarian Association of Insolvency Practitioners (HAIP/FOE) we are proud to admit that we have excellent contacts with our regional Member associations, which is why it was of outmost importance for us to make sure to involve the Hungarian audience as much as possible, in order to broaden our otherwise rather closed world, and to make sure that our professionals could get a glimpse of the international practice.

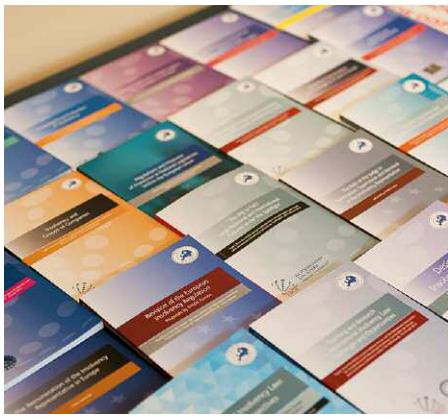
According to the Hungarian law, we regularly take part in compulsory professional training programmes organised internally for us, so we came up with the idea to integrate this conference as one of the stages of further training. Following the agreement with the state training body, we offered 12 credit points instead of the usual 8 credits, for participation at the event. A plus was that INSOL Europe provided a Hungarian-English interpreter for the whole period of the conference. These facts naturally acted as a great driving force for our professionals to attend the event, so that an excellent number of attendees was reached (285).

> **THE NUMBER OF PARTICIPANTS (285) WAS ONLY LIMITED BY THE CAPACITY OF THE CONFERENCE ROOM!**

We also put great emphasis on presenting interesting lectures both to the Hungarian and the foreign delegates. Choosing the main theme of the conference, we made a conscious decision to present a real situation. We were interested to understand if the other countries struggle with similar issues as in our own country. Therefore, the eye-catching main title of the conference was not a random choice: The reality show. We were interested in bringing real life situations, and not idealistic theories, under the spotlight.

The conference was introduced by the CEO of Erste Bank Hungary, Mr. Jelasity Radovan, an internationally renowned financial expert. He presented the effects of the financial crisis and of the bank loans in Hungary with impressive ease, professionalism and remarkable knowhow. I daresay it was a highly appropriate introduction of the overall situation.

We were then presented with a bouquet of topics that are our region's most relevant issues and all the real problems were freely discussed by the delegates with the professional panellists, the best of which I have summarised here.



More photos from the event can be viewed on our website: www.insol-europe.org/gallery/eecc-hungary-2017

INSOL EUROPE PRESENTED A COMPREHENSIVE LECTURE ABOUT FURTHER HIGH-LEVEL EDUCATION

Winding up of (assetless) companies in Central-Eastern Europe – The reality show

We were presented with an overall view of the different simplified proceedings in various countries. In Hungary, these proceedings account for approximately 90% of the overall portfolio of companies in insolvency, where the liquidation commissioner only has to consider a small package of documentary material, especially in the case of companies with less assets or none.

The IP's guaranteed fee covers primarily the operating costs. We are constantly striving to ensure that liquidity inspectors can again experience the beauty and the complexity of insolvency proceedings, with the diversity of professional requirements and statutory infrastructure requirements, by inspecting reorganisation, bankruptcy or continuing procedures. We wondered whether this simplistic tendency is typical of other countries as well.

Non-performing loans / Crisis management and bankruptcy of financial institutions after the financial crisis

The topic is not country-specific and is still on the menu. The exchange of experience between the banking sector, debt management and insolvency experts served as an interesting topic for discussion.

The new European insolvency regulation 2015/848 and harmonisation of insolvency law

This topic could not be left out, as change is around the corner again, and further codifying of the European regulation is just ahead of us. Our international conference was, I think, the best forum for drawing attention to this because the anticipated changes could be brought to the direct attention of the professionals. Highly respected judges and academics pointed out the most important issues.

Harmonisation of education of IPs across Europe, practicalities

European harmonisation of national insolvency laws has already begun, not only at the procedural but also at the regulatory level. Thus, it is necessary to standardise training, to present the international rules, and to have a uniform method of education. INSOL Europe presented a comprehensive lecture about further high-level education, and the practitioners' already gained experience on the occasion of the first such programme achieved this year in Romania.

I must mention that we are very happy and particularly pleased to hear that Hungary is considered by INSOL Europe for a second such high-level training programme in 2018.

Directors' liability across Europe

It is an ever interesting issue, since the directors' liability has a significant impact in insolvency proceedings. In Hungary,

sanctions against former heads of companies are tightening in both financial and criminal terms. Hopefully, we shall experience its effect in practice more and more. International solutions were presented by the participants of the panel.

Practical solutions of selling assets

Electronic sales in insolvency proceedings are just starting in Hungary. Therefore, this new field requires continuous improvement, but according to statistics, the potential for meeting revenue growth with supply and demand has greatly improved. In order to create an even better, more efficient procedural interface, it was essential to highlight foreign examples and share the experiences of the managers of online sales systems.

And finally...

In addition to the excellent lectures, the conference opening dinner on Thursday at Manna restaurant, was spent in an excellent mood: lounge atmosphere, quiet Gipsy music, a pleasant May evening on the terrace and delicious Hungarian flavours and wines at a restaurant located at the top of the tunnel leading to the iconic Chain Bridge. The pictures shown speak for themselves.

The young professionals let off steam after the conference at an impressive outing: there were relaxed, spontaneous discussions on sofas, in the company of delicious drinks at one of Budapest's's most popular bars.

I think we can easily and humbly state that we have closed a successful conference with the largest number of participants so far in the history of the EECC. The number of participants (285) was only limited by the capacity of the conference room! The executives of HAIP / FOE feel particularly happy about the fact that these 285 participants were present at the event.

It was a great experience to collaborate with the INSOL Europe team, where we met a professional, flexible and humane approach to all issues.

Thank you for your support and your expertise! We look forward to meeting you at the next conference! ■

The EECC Conference 2018 will be held in Riga, Latvia and more details will be announced soon.

> **CHANGE IS AROUND THE CORNER AGAIN, AND FURTHER CODIFYING OF THE EUROPEAN REGULATION IS JUST AHEAD OF US**

Warsaw: Looking ahead to our Annual Congress and Academic Conference

Emmanuelle Inacio provides a taste of the forthcoming Annual Congress in Warsaw, whilst Anthon Verweij previews the Annual Academic Forum Conference

EMMANUELLE INACIO
INSOL Europe Technical Officer

The INSOL Europe Annual Congress will be taking place in Warsaw from 5-8 October 2017. For more information visit: www.insol-europe.org/events

Share your views!

Let's go to Warsaw: The phoenix city rebuilt from the ashes!

Our Annual Congress venue this year won't be in a picturesque city by the Southern shore, during the Indian summer, caressed by the sea breeze… No. This year we will offer you more: we will offer you a Central European capital which was Fryderyk Chopin's and Maria Skłodowska-Curie's home, which has passed from darkness to light, which has the youngest Old Town in the world included in the UNESCO's World Heritage List, which is one of Europe's most dynamically developing metropolitan cities. Indeed, this year we will offer you Warsaw, the city that gained the title of the "Phoenix city rebuilt from the ashes" where over 90% of Varsovians are happy with their life there.

Our upcoming Annual Congress will focus on one of the most burning issues of our time for our organisation: "**Preventive Restructuring: Sunset on Insolvency?**"

We have long waited for the arrival of the Proposal for a Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, which was published on 22 November 2016 by the EU Commission.

The aim of the Proposal is, above all, to enhance the rescue culture in the Member States by establishing a mandatory stay; leaving the debtor in possession while the restructuring plan is being negotiated; providing for restructuring plans to be approved by majority votes of affected classes and cross class cram-down or cram-up; removing any blocking power of the money creditors or shareholders; allowing for DIP financing in Europe; and reducing the role of the courts to plan confirmation to bind dissenting affected creditors. In other words, to provide the Members States with the required tools to allow viable businesses to be restructured, rather than being forced into liquidation.

Against this background, the panel led by Adrian Thery (Garrigues, Spain) will discuss the scope, contents and future legislative process of this preventive restructuring directive and the panel assembled by Alberto Núñez-Lagos (co-chair of the Turnaround Wing/Uría Menéndez, Spain) will analyse the practicalities of its legal implementation.

Moreover, the current preventive restructuring frameworks will be discussed by a panel led by Prof. Bettina Nunner-Krautgasser (University of Graz, Austria). Due to Brexit, as the United Kingdom is unlikely to implement the Directive, it may still choose to adopt similar provisions. Therefore, Frances Coulson (Moon Beever, UK) will lead a debate on the comparison between the preventive restructuring directive and the UK Insolvency Service 2016 Review Proposal in a break-out-session.

Another hot topic, the practicalities of the European Insolvency Regulation Recast will be presented by a panel under the guidance of Stan Brijs (NautaDutilh, Belgium) as the EIR Recast has arisen from the ashes of its predecessor and mainly applies from 26 June 2017. Bartosz Merczynski (Allen & Overy, Poland) will chair a panel focussing on group insolvencies and the panel led by Susanne Fruhstorfer (Taylor Wessing, Austria) will deal with the establishment of Insolvency Registers in all the Member States and their Interconnection.

As the central theme of our Annual Congress is rebirth, the impact of Brexit on restructuring proceedings will also discussed, as presented by a panel chaired by Mark Fennessy (Proskauer, UK).

We will also provide you with real life examples of creative approaches in financial distress situations that are facing companies dealing with customers and the supply chain in a break-out-session lead by David Conaway (Shumaker, USA).

Furthermore, a panel moderated by Graham Lane (Willkie Farr, UK) will show the use, abuse and inspiration of Chapter 11 in European restructuring, DIP financing will be treated by a panel led by Devi Shah (Mayer Brown, UK) and prepacks by Audrey Molina (Dentons, France).

Regarding innovative approaches, Joanna Goodman, UK, journalist specialised in technology, particularly Legal IT, will lead a panel on Legal Tech/Internet 4.0. and will explain to us how technology will change the industry.

Last but not least, this year our Annual Congress will benefit from the services of a financial journalist who will act as a facilitator in order to ensure the development of our programme.

We trust this does enhance your understanding of what INSOL Europe's Annual Congress in 2017 is all about and that it is an event not to be missed!

Beginning of the end or end of the beginning: the rise of preventive restructuring

With the introduction of the proposed directive on preventive restructuring in November 2016 the European Commission has taken further steps towards substantive harmonisation of insolvency law within Europe. It is therefore only fitting that the Academic Forum will be hosting a conference on "**The Rise of Preventive Restructuring: challenges and opportunities**" in Warsaw later this year.

During the conference presenters and participants will delve into the various challenges and opportunities that surround preventive restructuring procedures. These issues range from procedural aspects of preventive restructuring frameworks and the balancing act between efficiency and integrity during preventive restructuring attempts, to instruments to facilitate such preventive restructuring like, for example, automatic stay, protection of new and interim financing as well as distinguishing the difference between proper use or possible abuse of such preventive insolvency procedures.

In light of the proposed directive by the European Commission the board of the Academic Forum of INSOL Europe has set up a conference programme where several of these challenges and opportunities will be discussed in depth and where presenters will offer insights and thought provoking opinions. During the conference session on *Interim Financing for preventive restructuring schemes* Professor Jennifer Payne from the University of Oxford will present a comparative analysis of the proposals for new and interim financing. Furthermore, Professor Leonie Stander will provide a comparison of Southern Africa's business rescue and compromise procedures in relation to the proposed directive during the conference session on *Harmonisation and preventive restructuring procedures*. The first day of the conference will end with the traditional *Shakespeare Martineau Lecture* which will this year be given by Professor Bruce Markell from Northwestern University. Professor Markell will critically review the proposals of the European Commission from an American perspective.

A new feature during the Academic Forum conference is the *Shakespeare Martineau Practitioners' Forum* where the risk of abuse with regard to preventive restructuring will be the topic of debate. During this forum Janice Denoncourt from Nottingham Law School will discuss asset partitioning by means of IP rights and Christina Fitzgerald and Tania Clench from Shakespeare Martineau will delve into the interesting issue of abuse versus loan-to-own strategies.

All in all, the conference agenda is designed to explore the various aspects of preventive restructuring and above all to test the limits of the proposed directive. We look forward to seeing you there! ■

ANTHON VERWEIJ
Secretary, INSOL Europe
Academic Forum

The Academic Forum of INSOL Europe will be hosting its Annual Conference in Warsaw from 4-5 October 2017. For more information visit the Academic Forum Event Page at: www.insol-europe.org/academic-forum-events.

R3 & INSOL Europe International Restructuring Conference report

Chris Laughton reports from the 14th joint conference between R3 and INSOL Europe which took place on 19 May 2017

CHRIS LAUGHTON
Partner, Mercer & Hole, London (UK)

> THE 14TH R3 AND INSOL EUROPE INTERNATIONAL RESTRUCTURING CONFERENCE HELD IN LONDON ON 19 MAY 2017 WAS THE BEST OF THE SERIES SO FAR

The fourteenth R3 and INSOL Europe International Restructuring Conference held in London on 19 May 2017 was the best of the series so far. It gives the course directors, Glen Flannery and Nico Tollenaar, a challenge to live up to next year!

Richard Fisher of South Square began a series of case reviews with commentary on the very recent UK Supreme Court decision in the Lehman insolvencies[1], analysing the English courts' approach to foreign currency losses as a result of claims being fixed in GBP at the date of insolvency. Richard had sympathy with the dissenting views of Lord Sumption and Lord Clarke on this point, suggesting that a debt "rumbles along in the background" during the insolvency process and he questioned whether currency losses not being payable at all from the insolvent estate overturned the principle of "creditors first, members last". The majority of the court (together with the writer and some of the other course delegates) saw the underlying debt being replaced with the specific rights provided to creditors under the statutory insolvency regime. They accepted the rough justice of creditors neither having to repay currency gains nor receiving payment for currency losses.

Richard went on to remind delegates of the coming into force of the Recast European Insolvency Regulation on 26 June 2017. He also briefly discussed various ECJ decisions on changes of registered office[2]; rights in rem[3]; failing to prove on time[4]; whether the financial collateral directive applies to ordinary bank accounts[5]; and the rights of employees not working in a Member State[6].

Henry Phillips of South Square explored the developing Scheme of Arrangement jurisprudence in relation to jurisdiction, notice and evidence, by reference to a variety of cases including DTEK[7] and Indah Kiat[8]. He also discussed the issue of submission to the jurisdiction having to be actual (whether expressed or implied) in cases of foreign default judgements such as Vizcaya[9]; and explained that the Winding-Up Directive may override the Lugano Convention by reference to the Tchenguiz case[10].

John Willcock of Global Turnaround chaired a panel on market developments, reminding delegates of changes to UK experience since the days of the London Approach. Leo Plank of Kirkland and Ellis outlined a lag in German developments, whilst noting that a revised insolvency regime has led to German banks exiting and hedge funds buying into distressed situations (a trend accompanied by many burnt fingers!). Juan Ferré of Jones Day identified structural changes in Spanish banking from 2012/13, including the establishment of SAREB (a government "bad bank") and an influx of distressed investors. Reinhard Dammann of Clifford Chance similarly saw French banks now selling and certain hedge funds buying distressed positions, but he emphasised that "loan to own" was difficult as France is not creditor friendly, "social restructuring" and the need for government support being key to distressed investment success. There was general consensus that banks sell out rather than work out; funds drive major restructurings; local cultural input is key to restructuring success; receptive and respectable funds are welcome participants in continental Europe; and aggressive and small funds face high risks.

Fred Hodara of Akin Gump led a fascinating panel discussion on mediation in insolvency, which contrasted US and UK experiences and explained the Nortel mediation as a prelude to the afternoon's case study. To many of the delegates unfamiliar with it, the US mediation system, as explained by Jack Esher of CB Insolvency, a mediator, appeared at times to be more like non-binding arbitration – and some aspects, such as judges mediating, would not work in the UK. The cost of Chapter 11 proceedings is a driver of large US insolvency mediations: UK mediations are smaller and appear less necessary as there are other mechanisms for

dialogue between parties. There were several failed mediation attempts in Nortel over six years, both before and after parallel trials in the US and Canada. Abid Qureshi of Akin Gump suggested that the failures were partly caused by mediation being attempted too early, before the facts and the law became sufficiently clear, and that it is crucial to choose the right mediator and mediation process, especially in cross-border matters. Kevin Lloyd of Debevoise & Plimpton agreed, and he added that there were too many diverse interests and strong views to allow mediation to work in the Nortel case until the risk of uncoordinated appeals in different jurisdictions drove the parties to settlement.

Before the delegates were allowed to break for lunch, Radu Lotrean, the Deputy President of INSOL Europe, introduced the association and presented comparative European Insolvency statistics. Notable points were 5% growth in UK insolvencies forecast for 2017, matched only by Turkey; and a broad correlation between recovery rate, time to closure and cost of insolvency proceedings, with Norway, Finland, UK, Denmark, Ireland and Germany leading on those measures.

Michael Veder of Radboud University, Nijmegen avoided any risk of afternoon somnolence amongst delegates with a reminder of the key features of the European Commission's Proposed Restructuring Directive, presented in an entertaining double act with Nico Tollenaar. I can reveal the votes of the delegates on Nico's proposals;

- There needs to be more than a likelihood of insolvency to allow proceedings: 0% in favour!
- Limited court involvement is good and should be maintained: 87% in favour
- Creditors may propose a competing plan: 86% in favour

The impact of those views on the European Parliament's response to the Commission's proposed draft directive remains to be seen…

Emma Lovell, R3's COO, spoke eloquently and encouragingly about R3's current strategic review, with particular emphasis on challenges posed by Brexit and the need for R3 to be at the centre of the debate about maintaining the benefits of both the European Insolvency Regulation and the Recast Brussels Regulation. The R3 position on Brexit is set out on the R3 website[11]. Dialogue with the UK Government has stalled as a result of the general election, but R3's lobbying in the interests of the profession will resume after 8 June!

The day ended (apart from continuation of the networking that had gone on throughout the breaks between plenary sessions) with a Nortel case study – and a Brexit deviation! Patricia Godfrey of CMS chaired a discussion examining Nortel from the perspectives of several participants: Alan Bloom of EY, the UK and EMEA liquidator; Malcolm Wier of the Pension Protection Fund ("PPF"), a major unsecured creditor; Derek Adler of Hughes Hubbard, Alan's US counsel; Mike Jervis of PwC, an advisor to the PPF; and Gabriel Moss QC of South Square.

Alan Bloom recounted the multi-jurisdictional simultaneous filing in January 2009 for seventeen European estates with their COMI in England and Wales, alongside the US chapter 11 and the CCAA filing of the Canadian parent. Restructuring was explored but within three months the exercise became a global asset disposal programme, one highlight of which was Google and Apple raising auction bids in $250,000,000 steps! Ultimately $7.5 billion was realised and then the fun began. Derek Adler explained the complexities of the parallel US/Canada trial designed to resolve how the funds were to be allocated between the estates. The judges followed none of the insolvent estates' proposals, choosing instead the "pro-rata to creditors" proposal of the creditors' committee and the PPF. Mike Jervis observed that EMEA-wide cooperation had been crucial for the PPF and that, as Alan Bloom had said, a single small group of professionals acting for the seventeen EMEA estates had been a positive feature. Comparisons with the Lehman and OW Bunker insolvencies

"RADU LOTREAN, THE DEPUTY PRESIDENT OF INSOL EUROPE, INTRODUCED THE ASSOCIATION AND PRESENTED COMPARATIVE EUROPEAN INSOLVENCY STATISTICS"

PANELLISTS AND DELEGATES AGREED ON THE VALUE OF COOPERATION BETWEEN OFFICE HOLDERS, COURTS AND INSOLVENCY REGIMES

emphasised the benefit of close cross-border cooperation. Other key requirements had been careful and continuous contingency planning and might ideally have included a joint information platform and an independent financial coordinator. Malcolm Wier explained defined benefit pension schemes and the roles of the Pensions Regulator and the PPF (effectively a financial institution, which will take on the assets and liabilities of schemes whose employer is insolvent, if they meet certain criteria).

Gabriel Moss then explored section 426 Insolvency Act 1986, the UNCITRAL Model Law and the common law as features of UK law that will survive Brexit. He suggested that as the UK had not chosen to opt out of the European Insolvency Regulation, it might seek to opt in to a bilateral arrangement with the EU after Brexit, although he acknowledged that some German academics take the line of "no cherry picking"! Without a bilateral treaty the UK will be treated as a "third country" by the EU 27 after Brexit. Problems would include the lack of reciprocity in the UK's implementation of the Model Law, whereby any foreign office holder may be recognised in the UK, and the similar one-sidedness if the UK simply imports the European Insolvency Regulation into UK law in a "Great Repeal Act": UK office holders need to be able to obtain recognition in the EU.

Panellists and delegates agreed on the value of cooperation between office holders, courts and insolvency regimes. The Judicial Insolvency Network guidelines were mentioned, producing the suggestion of a global insolvency court and an international insolvency convention (already under consideration by the International Bar Association). Finally, predictions were of somewhat more insolvencies, although even those who identified a corporate distress bubble could not identify the catalyst that would lead to it bursting. Uncertainty abounds and, as for Brexit, we're not there yet! ■

Footnotes:

1 The Joint Administrators of Lehman Brothers Limited v Lehman Brothers International (Europe) (In Administration) [2017] UKSC38
2 Leonmobili v Homag (C-353/15), May 2016
3 SCI Senior Home v Gemeinde Wedemark (c-195/15), 26 October 2016
4 Enefi Energiahatekonysagi Nyrt v Directia Regionala a Finantelor Puplice Brasov (C-212/15), 9 November 2016
5 Private Equity Insurance Group SIA v Swedbank AS (C-156/15), 10 November 2016
6 Ellinko Dimosio v Stroumpoulis (C-292/14), 25 February 2016
7 re DTEK plc [2016] EWHC3563
8 Re Indah Kiat International Finance Co BV [2016] EWHC246(Ch)
9 Vizcaya Partners Limited v Picard [2016] UK PC
10 Tchenguiz v Kaupthing and anor [2017] EWCA Civ 83
11 www.R3.org.uk/media/documents/policy/policy_papers/Brexit/R3_briefing_on_Brexit_and_the_UK's_insolvency_and_restructuring_regime_(December_2016).pdf

Artificial Intelligence: Change before you have to

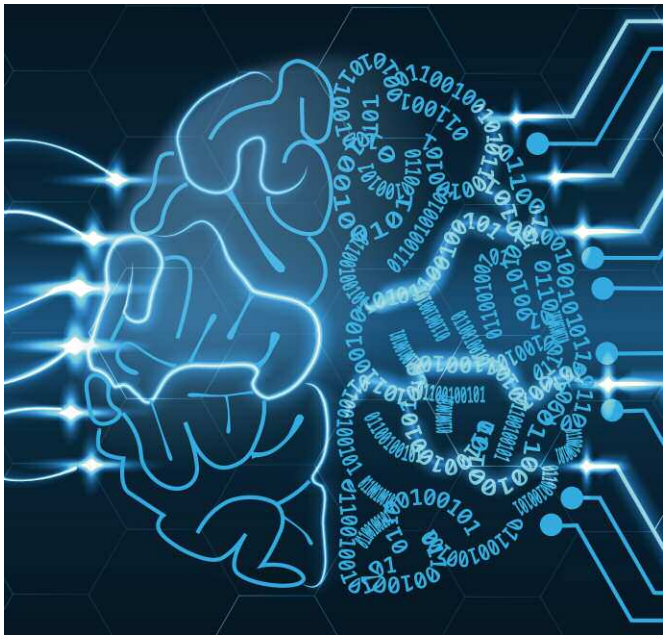
Jane Colston and Louise Verrill report on the use of Artificial Intelligence in the insolvency profession

Artificial intelligence (AI) is prevalent in the news, billed as a super intelligence. As the quip goes: it is hard to make predictions especially about the future but the predictions are that we may get to Artificial Super Intelligence (i.e. when they are way smarter than us) by 2045-2060.

AI is often met by fear. We all know the story of Frankenstein, written 200 years ago: an AI creature turns on his creator. Concerns abound e.g. about ethical/privacy/social and economic considerations. The founder of Microsoft and one of the world's richest men, Bill Gates, suggested that robots that take human jobs should be taxed.

The other view is wonder. Professor Stephen Hawking said: "*The potential benefits of creating intelligence are huge, we cannot predict what we might achieve when our own minds are amplified by AI. Every aspect of our lives will be transformed. In short, success in creating AI could be the biggest event in the history of our civilisation.*"

AI is not be feared but has to be understood. There's a need, for example, for further transparency from those who have created the algorithms behind the AI, so there is clarity as to how they have been developed and what biases have been factored in thereby allowing the results to be understood as much as possible.



AI is a catch-all term, covering a range of underlying technologies in the sphere of:

- cognitive/thinking computing;
- machine learning; and
- robotics

Machine learning is a type of AI that provides computers with the ability to learn and keep learning without being explicitly programmed with set rules. The computer programme teaches itself when exposed to new data. It ferrets out correlations including hidden or not obvious relationships and is intelligent in the sense that it makes decisions based on the data's analysis. We have increasingly capable technology not least because of the investment being ploughed in, for instance:

- In the last three years Google is reported to have invested $1 billion into AI focussed businesses.
- In 2016 The United Arab Emirates are reported to have approved a $67 billion budget to fund innovation.

AI in the legal/insolvency, business reconstruction and recovery space is making haste, slowly. A common refrain: "*But you cannot replace what I do with a computer. As well as skill and learning, I bring judgment, creativity and ethics.*"

Reflect on this: IBM's ground breaking Watson computer is being used to diagnose cancers

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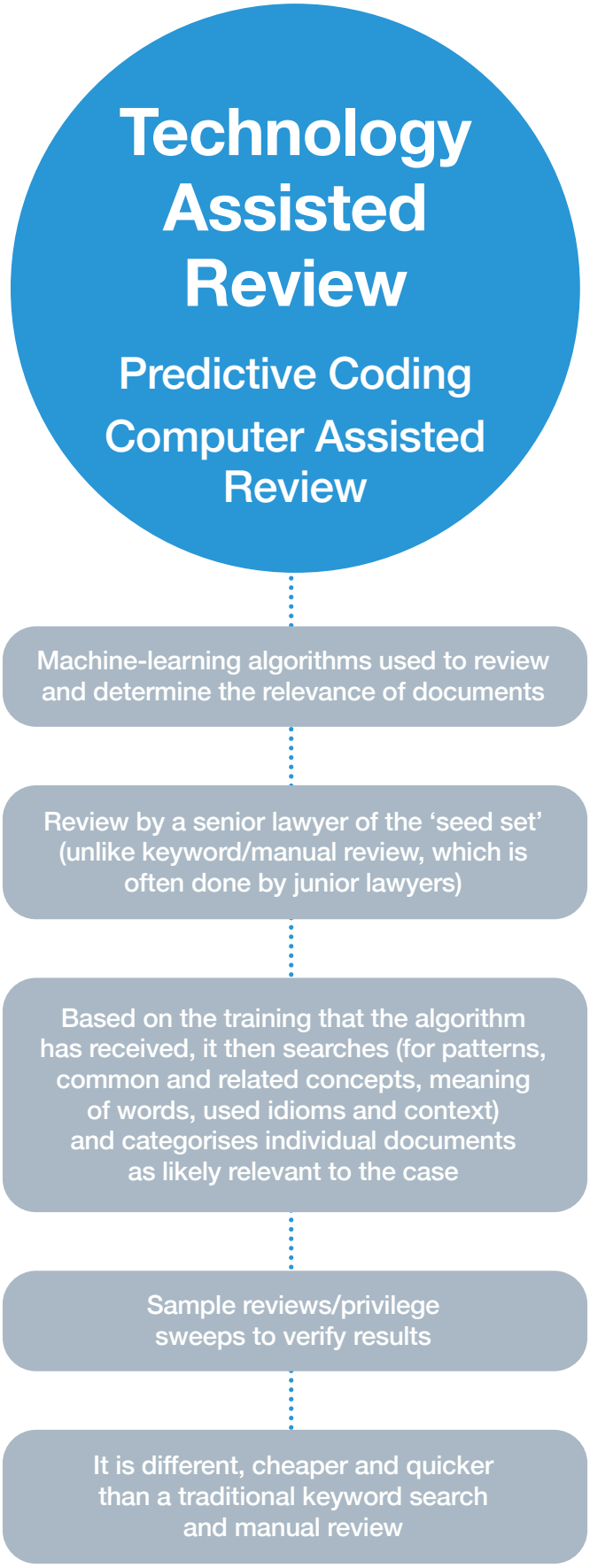


with an accuracy rate of about 90%. The implications for lawyers and insolvency practitioners are obvious.

The Lord Chief Justice of England and Wales agreed and said in October 2016: "*It is probably correct to say that as soon as we have better statistical information, artificial intelligence using that statistical information will be better at predicting the outcome of cases than the most learned Queen's Counsel.*"

Lawyers and insolvency practitioners have to confront the fact that legal and insolvency services will soon be organised and delivered differently. The data explosion means the use of technology has to be embraced in order to ensure that data does not overwhelm but is exploited.

While law enforcement agencies and some courts have embraced the use of capable technology, lawyers/insolvency practitioners in many jurisdictions are interested, but in a disinterested way. Some believe that technology is not relevant to them as it is not often used or are wary of it but, given the international nature of business and litigation, adoption rates will accelerate quickly. The drivers are mostly clients and businesses demanding commoditisation and criticising lawyers/insolvency practitioners for being too slow and expensive when technology could be used to make them faster and cheaper. Many courts, especially in jurisdictions like England and Wales, are also driving the change so as to ensure efficient access to justice and a break from the "tyranny of paper".

Those who are reluctant to embrace technology will find clients and many courts saying their reluctance should not cause extra costs for them or their opponents. It is, therefore, key that lawyers and insolvency practitioners skill up and understand the available technology rather than perhaps leaving it to the youngest person on the team to grapple with.

Technology Assisted Review

There are a lot of analytics out there to aid processing data quickly. For example, in a few short years the use of Technology Assisted Review (TAR) or predictive coding has increased (*see diagram left*).

Public regulators and law enforcement authorities in a number of jurisdictions are cooperating and investigating exponentially quicker using this kind of technology.

In February 2017 the Financial Times reported that David Green, UK SFO Director General, said that the robot technology the SFO had used in the Rolls Royce bribery investigation was able to "*learn… and bolster its own knowledge base to help identify relevant material…*" It was "*more effective, more efficient and more accurate than human intervention.*" Quite an endorsement.

The courts in the U.S., Ireland and England and Wales have begun to bless the use of predictive coding, as well as seeking to become more techie themselves.*

Court approval of TAR

Courts have been dismissive of two myths:

- Keyword searches and human review are accurate and are the golden standard.
- TAR has to be held to a higher standard than keywords or manual review.

In the U.S. in *Da Silva Moore v. Publicis Groupe*, 287 F.R.D. 182, 183 (S.D.N.Y. 2012) the court said:

- "While this Court recognises that [TAR] is not perfect, the Federal Rules of Civil Procedure do not require perfection."
- "Statistics clearly show that [TAR] searches are at least as accurate, if not more so, than manual [keyword] review."

In *Hyles v New York*, Judge Peck said: TAR is "cheaper, more efficient and superior to keyword searching."

Jurisdictions where Courts have approved the use of TAR	Comment
Australia	Supreme Court of Victoria Practice Direction 2017, Practice Note SC Gen 5: Technology in Civil Litigation – TAR accepted. May be compelled.
Ireland	*Irish Bank Resolution Corporation Ltd and others v Quinn and others* [2015] IEHC 175.
UK	Parties agree: *Pyrrho Investments Ltd v MWB Property Ltd & Or* [2016] EWHC 256 (Ch) Court imposed: *Brown v BCA Trading* [2016] EWHC 1464 (Ch).
US	*Da Silva Moore v Publicis Groupe*, 287 F.R.D. 182, 193 (S.D.N.Y. 2012) The Courts have not compelled parties.

Best practice when using TAR

Best practice when using TAR includes the following considerations.

- Decide to use it early.
- Commit to it as there is a substantial front-loading of time and costs involved in uploading the data and training the system to determine relevance.
- Have a senior person, knowledgeable about the matter, review a seed set of documents to "teach" the algorithm what documents are relevant/"Hot".
- Cooperate with your opponents or the law enforcement agency as to a protocol of use consisting of:
  - the identification of the TAR system to be used;
  - the definition of the data sources and size;
  - the documents to be included (such as custodians' information, date range) or excluded (e.g. insufficient text for analysis);
  - the need for culling (best practice is not to cull the data set e.g. by first running key word searches); and
  - seed size and identification of the reviewers.
- Work in close partnership with the person who knows how the "black box" algorithm works. It is essential to work closely with the technology service provider in order to identify where the mismatches may be with your opponent, to make sure the technology is explained in the right way to the clients and the court and lastly, to learn what is the best training the algorithm should receive. ■

IT IS KEY THAT LAWYERS AND INSOLVENCY PRACTITIONERS SKILL UP AND UNDERSTAND THE AVAILABLE TECHNOLOGY RATHER THAN PERHAPS LEAVING IT TO THE YOUNGEST PERSON ON THE TEAM

Footnote:
From April 2017 many sections of the High Court of England and Wales require electronic filing (which means litigants are required to issue claims, file documents and pay court fees online). There are several benefits including the electronic case file being available online to the parties and the judge 24/7.

When is TAR useable?	Yes	No
Relevant to:	Criminal investigations Review of voluminous data to get to the "hot" documents efficiently Disclosure in common law jurisdictions	
Volume of Dataset		Less than 100,000
Nature of documents	Language based data including foreign languages	Images, numbered based documents, short text documents
Minimum sample set to be reviewed in order to train the algorithm	1600 – 1800 documents	
Set up Time	6 weeks (estimate)	
Cost (approx.)	The overall costs of TAR should be considerably lower because the number of documents that have to be manually reviewed will represent just a small proportion of the data set. In *Pyrrho Investments Ltd v MWB Property Ltd & Or* [2016] EWHC 256 (Ch) the cost estimate for the use of TAR was between approx. £182k to £469k. In *Brown v BCA Trading* [2016] EWHC 1464 (Ch) the cost estimate was approx. £140k	

The impact of the Directive on shareholders, companies' directors and workers

Catarina Serra looks at the proposed Directive on pre-insolvency proceedings from another angle

CATARINA SERRA
Professor at the
University of Minho, Portugal

As widely announced, the so-called "Proposal for a Directive on pre-insolvency proceedings" was made public before 2016 ended (on 22 November)[1].

With a view to a minimum harmonisation of substantive insolvency law, the future Directive aims to put in place common principles and rules to improve the efficiency of the Member States' restructuring and insolvency laws[2], particularly in respect to preventive restructuring frameworks.

It is hardly noticeable at first sight but the amendments put forward in the Proposal go far beyond the borders of insolvency or pre-insolvency law. They cross over to the fields of company law and even labour law, affecting not only the usual players (debtor and creditors) but also the other companies' stakeholders, namely the shareholders, the companies' directors, and the workers.

When enacted and transposed into the national laws, the Directive will have an impact on the legal status of these individuals, as a result of several measures, especially the possibility of derogating the requirement for a shareholders' meeting and the shareholders' pre-emption right to new shares in capital increases, a wrongful trading rule for directors and the special treatment of workers. All for the sake of restructuring.

> THE AMENDMENTS PUT FORWARD IN THE PROPOSAL GO FAR BEYOND THE BORDERS OF INSOLVENCY OR PRE-INSOLVENCY LAW

Undermining shareholders' rights

One of the most impressive measures of the Directive is the possibility of derogating some of the rules consecrated in the so-called "Second Company Law Directive (Recast)" (also known as "Directive on shareholders' rights")[3].

Pursuant to Article 32[4], a paragraph is added to Article 45 of the Second Company Law Directive, determining that Member States shall derogate from Article 19 (1), Article 29, Article 33, Article 34, Article 35, Article 40 (1) (b), Article 41 (1) and Article 42 to the extent and for the period that such derogations are necessary for the establishment of the preventive restructuring framework provided for in the future Directive on pre-insolvency proceedings.

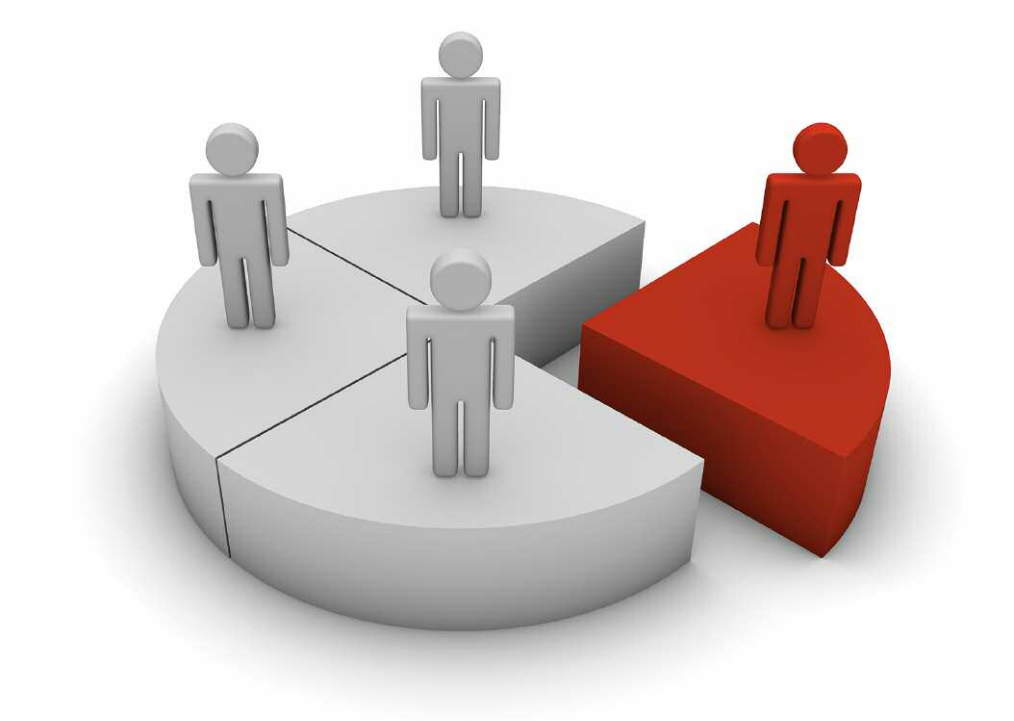
The above mentioned provisions require that a general meeting of shareholders takes place in certain situations (serious loss of the subscribed capital, increase in capital and reduction of the subscribed capital when there are several classes of shares, when there is a compulsory withdrawal of shares and when there is a withdrawal of shares acquired by the company itself or by a person acting in his own name but on behalf of the company) and that, when capital is increased by consideration in cash, the shares are offered on a pre-emptive basis to shareholders in proportion to the capital represented by their shares.

The goal pursued by the European legislator is easy to grasp: prevent shareholders from jeopardising the restructuring effort[5]. Let us bear in mind, though, that the derogations touch sensitive matters of company law and, more importantly, their accommodation in the legal systems of Member States will trigger the need for a careful coordination between insolvency law and company law frameworks. This will make it quite a challenging task for domestic legislators.

Placing (more) responsibility on directors

Article 18 lays down a rule on directors' duties in the vicinity of insolvency. According to this provision, Member States shall establish rules to ensure that, where there is a likelihood of insolvency, directors have the following obligations:

(a) to take immediate steps to minimise the loss for creditors, workers, shareholders and other stakeholders;
(b) to have due regard to the interests of creditors and other stakeholders;
(c) to take reasonable steps to avoid insolvency; and
(d) to avoid deliberate or grossly negligent conduct that threatens the viability of the business.



> IN ACCORDANCE WITH ARTICLE 9 (2), "MEMBER STATES MAY ALSO PROVIDE THAT WORKERS ARE TREATED IN A SEPARATE CLASS OF THEIR OWN"

The link between this provision and Section 214 of the English Insolvency Act (wrongful trading)[6] immediately stands out. Resorting to the legislator's own words, directors are expected "to take every step with a view to minimising the potential loss to the company's creditors"; otherwise, they will be held liable.

The accommodation of such a regime in the national laws of certain Member States may give rise to concern for it represents the adoption of criteria which are, at the same time, broader and more imprecise than the ones used in a significant part of European jurisdictions[7]. It is undisputed that the regime places (more) responsibility on directors, imposing on them a set of serious duties. But the results of an extended application are unpredictable: only where national courts feel confident in applying vague legal concepts may the broadness of the regime translate into an increase in the number of cases that end up with the liability of directors. And even if this is the case, not all is perfect. In fear of being held liable, directors will be risk-averse and, what is more, will demand higher remunerations.

Enhancing the protection of workers

The preferential treatment granted to workers under the Directive may be viewed as threefold and lies on:

(1) the workers' possibility to form a separate class of their own;
(2) the exemption from stay of individual enforcement actions for workers; and
(3) the enhanced protection for work already carried out.

In accordance with Article 9 (2), "Member States may *also* provide that workers are treated in a separate class of their own". The Proposal provides, in general, for the treatment of affected parties in separate classes for the purpose of voting on the adoption of the restructuring plan, the class formation criterium being the similarity of claims or *interests* likely to justify a homogenous group with commonality of interest. The reference to the similarity of *interests* (not just claims) and the word "also" in the part of the provision referring to the possible formation of a separate class for workers suggest that the workers may present themselves as a class *even when they do not hold claims or irrespective of that capacity*.

Under Article 6 (3), Member States shall ensure that the workers' outstanding claims are spared the effects of the stay of individual enforcement actions to the extent that Member States do not provide for an appropriate protection by other means or, more precisely, if they do not ensure that the payment of such claims is guaranteed at a level of protection at least equivalent to that provided for under the relevant national law transposing Directive 2008/94/EC[8]. This means that the workers may continue to bring enforcement actions against the debtor with a view to obtaining the payment of their outstanding claims. The possibility is in accordance with the rule, laid down in Article 6 (2), that the stay may be general, covering all creditors, or limited, covering one or more individual creditors. Even so, it should be noted that the only exception expressly provided for in the Proposal regards the workers' claims.

Finally, pursuant to Article 17 (1) and (2) (c), Member States shall ensure that the payment of worker wages for work already carried out is not declared void, voidable or unenforceable as acts

Share your views!

> IN THE WORST-CASE SCENARIO, THE PROPOSAL UNVEILS THE CURRENT TRENDS OF INSOLVENCY LAW AND THIS ALONE MAKES IT WORTH CONSIDERING

detrimental to the general body of creditors in the context of subsequent insolvency procedures, unless such transactions have been carried out fraudulently or in bad faith. There is a presumption that this work is carried out to further the negotiation of a restructuring plan confirmed by a judicial or administrative authority or closely connected with such negotiations.

Final remarks

Some tend to underestimate the anticipated changes based on the (little) value of the Proposal, which, to be sure, is deprived of legal force. Furthermore, it is not certain that the Directive will be approved in the terms laid down in the Proposal, or at all. Should the latter be the case, we would just be waiting for Godot…

Nonetheless, it is not wise to ignore the Proposal. In the worst-case scenario, the Proposal unveils the current trends of insolvency law and this alone makes it worth considering. At best, the Directive will be approved as usual and will confirm the amendments put forward by the Proposal.

As discussed above, some of the amendments will be surprising for those who remain unaware of the connecting links between the insolvency law and the other legal branches[9]. The truth is that the recent (re)focus of the insolvency law on business/corporate restructuring[10], with the subsequent need for it to address the companies' everyday problems (pre-insolvency and other distress situations), is leading to an extension of its scope and of the universe of affected parties. Today, insolvency law may indeed be envisaged as "corporate governance under financial distress"[11]. This is one thing that was made quite clear by the Proposal. ■

Footnotes:

1 The Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU. (available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52016PC0723&from=EN).
2 See Emmanuelle Inacio, "The European Commission's Directive Proposal for common principles and rules on preventive restructuring frameworks, insolvency and second chance", Eurofenix, Winter 2016/2017, 66, 12-13.
3 Directive 2012/30/EU of the European Parliament and of the Council of 25 October 2012.
4 All Articles without references regard the Proposal.
5 See Explanatory Memorandum and Recital 44.
6 Also worth mentioning is Section 172, Subsection 3, of the English Companies Act.
7 See, for instance, in Germany, *Insolvenzverschleppungshaftung*.
8 Directive 2008/94/EC of the European Parliament and of the Council of 22 October 2008 on the protection of employees in the event of the insolvency of their employer.
9 On the subject see Karsten Schmidt, "Interaction of Corporate Law and Insolvency Law: German Experience and International Background", Rebecca Parry / *Paul Omar (Eds.), International Insolvency Law – Future Perspectives – The Edwin Coe Lectures delivered at the INSOL Europe Academic Forum Annual Conferences 2008-2014*, 2015, 125 ff.
10 Historically speaking, insolvency is an instrument designed for the world of commerce. For a long time, it was exclusively applied to merchants and companies.
11 See Horst Eidenmüller, "Comparative Corporate Insolvency Law", European Corporate Governance Institute (ECGI) – Law Working Paper n.º 319/2016, at 2 (available at https://ssrn.com/abstract=2799863).

The importance of a strong insolvency and restructuring regime for the UK economy

Christina Fitzgerald writes on the implications of Brexit for the insolvency profession in the UK

Since 31 May 2002, the European Insolvency Regulation ("EIR") has had direct effect in England and Wales.

This allows for the automatic recognition across Europe of insolvency proceedings in EU Member States. This means that Licensed Insolvency Practitioners ("IPs") can take control and realise the assets of an insolvent company or of an individual who is bankrupt in another EU Member State quickly, cheaply and efficiently. This avoids the need for IPs to apply to the Court in the relevant jurisdiction to ask for recognition of their powers to act and then to apply for the repatriation of assets to the UK. In summary, it provides for rules on the choice of law, the recognition and enforcement of judgments and co-operation between IPs.

On 5 June 2015, the European Insolvency Regulation (recast EIR) was published and is now due to apply to this jurisdiction from 26 June 2017. It extends to all EU Members, except Denmark. The recast EIR contains a codification of the method of determination of centre of main interest (COMI) designed to curb forum shopping. Courts are positively obliged to examine COMI and determine whether proceedings are main or just territorial. The scope is widened to include rescue and pre-insolvency proceedings as well as liquidation. The recast EIR introduces a new definition of "establishment", it introduces "synthetic" secondaries and creates national electronic searchable databases linking them up to create a central European database.

The concern is that the UK government, once Brexit becomes formal, will not reach any agreement which would have the effect of maintaining the benefits afforded by the recast EIR. R3, the UK's insolvency and restructuring trade body, has called on the UK government to ensure that the benefits of the EIR and the recast EIR are preserved in negotiations via an equivalent treaty between the UK and the EU. This would ensure that the UK's insolvency proceedings are automatically recognised across the EU, helping to maintain the UK's status as an attractive place to do business.

Areas of concern

The UK's preparations to leave the EU coincide with the publication of the Directive on "Insolvency Restructuring and Second Chance". As sponsors of The Academic Forum of INSOL Europe, we know that this will be the focus of the conference being held in Warsaw in October 2017.

One area of concern which has been identified by our European colleagues (and with all due respect to Rolef Weijs of the University of Amsterdam and our intellectual debates on this issue) is the risk of abuse that the contemplated preventive restructuring schemes could bring. We have seen the "loan to own" scams experienced in America under Chapter 11 and in Australia. Such strategies involve opportunistic and sophisticated financial investors acquiring debt in financially distressed companies, generally at a fraction of its face value. Member States will be asked to consider these issues when implementing the Directive.

New tools

Brexit may not have such a detrimental effect from the UK's perspective as regards this Directive. The government launched a consultation in the summer of 2016 on the "Corporate Insolvency Framework" and proposed the introduction of new tools to support business rescue, including a "moratorium" and a new restructuring tool.

The UK is considered to be an excellent restructuring hub and we have an excellent framework within the combined insolvency and company legislation. However, other jurisdictions are developing and reforming, including the EU countries, Singapore and the US with the ABI review of Chapter 11. The UK has also suffered in the World Bank rankings (following a switch in the ranking's methodology to favour US-style frameworks), moving from 6th position in 2012 to 13th position in 2017 and the consultation and

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> **"THE UK'S PREPARATIONS TO LEAVE THE EU COINCIDE WITH THE PUBLICATION OF THE DIRECTIVE ON "INSOLVENCY RESTRUCTURING AND SECOND CHANCE"**

> INSTIGATION OF THESE NEW TOOLS WAS MOOTED TO BE UNDERTAKEN BY QUALIFIED IPS, SUITABLY EXPERIENCED ACCOUNTANTS AND SOLICITORS ACTING AS THE SUPERVISOR

recommendations are considered to be a determined effort to boost the UK's position in these rankings.

According to the UK proposals, the new moratorium would be available to all businesses and would last for up to three months with the possibility of an extension. This would provide a "gateway" for a business to consider its options for a rescue plan. An authorised Supervisor would be involved in the application process and would monitor the company's compliance, ensure that the company's management is not abusing the moratorium and to bring the moratorium to an end if there is evidence of abuse. Fundamentally the directors would retain control of the affairs during the moratorium. The Supervisor would be prevented from taking any subsequent formal insolvency appointment as an IP.

Under these proposals, instigation of these new tools was mooted to be undertaken by qualified IPs, suitably experienced accountants and solicitors acting as the Supervisor. There has been no final determination on this point. However, the feedback has been that only IPs could be effective undertaking the role and that they alone are properly regulated. Commentators suspect that it will be restricted to IPs but will leave the door open for other suitably regulated professions in the future. That is not what the Directive above provides. It introduces the terms "managers" and "supervisors" who are not necessarily qualified IPs and this has given rise to concerns of having unethical, untrained or unregulated "Supervisors".

Eligibility tests

Under the UK proposals, in order to benefit from the protection of the moratorium, a company will have to satisfy a set of eligibility tests and qualifying conditions. These will include having sufficient funding to trade during the moratorium, being insolvent or in financial distress, not having been in administration in the previous twelve months and having a reasonable prospect of compromise or arrangement with creditors.

Under the Directive, Member States will be permitted to afford grantors of new and interim financing priority in the context of any subsequent liquidation compared to other creditors who would otherwise have superior or equal claims to money or assets. The Directive requires Member States to rank new and interim financing senior to ordinary unsecured claims. Unlike the Directive, the UK proposals to not consider the implementation of "super-priority" as it was considered that there were sufficient private equity investors in the industry without having to introduce this.

Reducing costs

Another driver behind the UK proposals was to reduce restructuring costs. It should be noted that trading debts and the Supervisor's costs incurred during the moratorium would be paid first as an expense. Any unpaid debts would benefit from a first charge if the company were to enter into a formal insolvency process.

As regards the moratorium, how will this affect creditors and suppliers? In relation to creditors, the proposals provide that they will be sent a copy of the application for the moratorium and they will have a right of challenge during the first 28 days. Creditors will have the right to request information from the Supervisor and to apply to Court and to challenge unfairly prejudicial acts of the company's directors in Court. Suppliers of essential supplies may be forced to continue to supply the company, provided that the supplies are paid for. Questions still remain as to the definition of "essential supplies" and what safeguards should be put in place to protect suppliers.

The proposals are designed to

introduce a flexible restructuring plan in which companies will be able to bind all creditors to that plan. It is intended that "cram down" provisions will be introduced allowing for a plan to be imposed on a junior class of creditors even if they vote against the plan, as long as they are no worse off than in a liquidation. In relation to the voting mechanism, for a class to vote in favour 75% of creditors by value, and more that 50% by number must agree to the plan.

Feedback

There has been no official feedback on these proposals in the UK so far, and the government was continuing to consult on proposals at the start of 2017. The announcement of next steps has been further delayed by the Government's decision to hold a surprise general election in June. The UK's unique reputation for insolvency and restructuring work will be fiercely guarded by R3 and we will make sure the profession's views on the proposed reforms are heard by policy makers.

The Directive contemplates a moratorium which can be renewed for up to four months. In complex matters the stay may be extended for up to twelve months. Which suppliers can afford not to be paid in that time period? What if the supplier is unable to supply the goods ordered and cannot terminate the contract? Member States may well seek to adopt the approach suggested in the UK.

The Directive also introduces rules to allow entrepreneurs to benefit from a second chance as they will be fully discharged of their debts after a maximum period of three years. The government in the UK has not needed to focus on this aspect of the Directive because in the UK, a bankrupt is usually fully discharged after just 12 months.

The COMI migrations in the past led other EU countries to change their legislation in line with UK law. From a European insolvency perspective, it would be very disappointing if ties were cut which have grown over the years. The UK should appreciate that it can benefit from future close ties and the continent should understand that the UK can remain a source of inspiration for the future direction of European insolvency law.

Brexit presents a challenge for the UK's insolvency and restructuring profession and it is important that the profession's concerns are taken on board by the government as part of its negotiations with the EU. As chair of R3 in London and the South East, I will be working with the profession and government to mitigate some of the challenges posed by Brexit and maximise potential opportunities. ■

"BREXIT PRESENTS A CHALLENGE FOR THE UK'S INSOLVENCY AND RESTRUCTURING PROFESSION AND IT IS IMPORTANT THAT THE PROFESSION'S CONCERNS ARE TAKEN ON BOARD BY THE GOVERNMENT"

Paymill GmbH: Successful transfer of German internet based payment system

Florian Pfoser and Vincenz von Braun report on the Munich start-up sold to a new investor just three months after provisional debtor-in-possession insolvency is ordered

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VINCENZ VON BRAUN
Partner, anchor Rechtsanwälte, Munich, Germany

Following successful provisional debtor-in-possession insolvency proceedings led by attorney Vincenz von Braun and a team from anchor Rechtsanwälte working in close collaboration with the provisional insolvency monitor, attorney Dr. Christian Gerloff (Gerloff Liebler Rechtsanwälte), Munich financial technology start-up Paymill GmbH has been transferred to the Swiss investor, Klick & Pay, in what is known as a reorganisation by transfer.

Under the terms of the reorganisation, the company's management had to make only 18 of the original 65-strong workforce redundant.

Initial situation

Founded in 2012, Paymill GmbH is a financial technology start-up with a staff of 65 that acts as an online payment service provider (PSP) processing credit cards, SEPA (Germany only) and PayPal used for payment. The software solution developed by Paymill GmbH allows online traders and service providers from throughout Europe to receive payments on websites and mobile applications (apps) using these payment methods in more than 100 currencies. The service provided by Paymill GmbH meets the highest security standards (it has its own risk & fraud management system) and complies with the common industrial standards. The sales processed by online traders using the interface provided by Paymill GmbH were collected by the banks and paid directly to the traders after deducting fees for the debtor and the banks.

As Paymill GmbH lacked a banking licence, it was not allowed to manage customers' money. That set significant limits on growth and margins, and the bank charges payable were among the reasons why Paymill GmbH was unable to cover its costs when offering its services on the market. The management had therefore already been seeking a banking licence for the company soon after it was founded. However, all attempts foundered on a failure to satisfy the strict requirements of the supervisory authority, BaFin.

In December 2015, following discussions with various strategic investors that continued to make progress into April 2016, it seemed likely that Paymill GmbH would bring an investor process to a successful conclusion. The interested party was a German banking subsidiary specialising in payment transactions. However, the proposed deal collapsed shortly before confirmation due to a board decision taken by the potential investor immediately before the appointed notarisation date. To enable further sales negotiations with potential investors to continue, the partners of the sole shareholder provided further financial resources at the start of 2016. Again, however, negotiations with another investor came to nothing because of the risks of a share purchase.

With the sole shareholder not granting any further bridging loans, on 22 April 2016 the management decided to file a petition for insolvency, already prepared under the guidance of attorney Vincenz von Braun of anchor Rechtsanwälte, with the Munich local court (insolvency court). The petition requested that (provisional) debtor-in-possession management be ordered pursuant to sections 270 et seq. of the German Insolvency Code (InsO). The management also proposed that insolvency expert Dr. Christian Gerloff be appointed insolvency monitor. Vincenz von Braun joined the management team of the company in order to ensure that the specific requirements of insolvency law were met. The Munich local court (insolvency court) ordered provisional debtor-in-possession insolvency in a ruling of 26 April 2016.

Initial measures

Together with a team from anchor Rechtsanwälte, the management team – now strengthened by Vincenz von Braun – informed all staff, customers and service providers, ensured the preliminary financing of the insolvency benefits and held intensive negotiations with the largest (assignee) creditors, who ultimately guaranteed the financial resources to continue the business as a going concern.

The intense efforts of several anchor partners and lawyers, particularly in the first few days of the proceedings, helped to stabilise business operations swiftly and engender new trust among the workforce, service providers and customers. This enabled the company to continue business operations without any outwardly apparent changes despite the insolvency situation and persuade both customers and service providers to continue working with Paymill GmbH. In fact, the company even achieved some of the best results in its history in the month after filing the petition. In parallel, the management team prepared an M&A process in partnership with anchor Rechtsanwälte and with KPMG as management consultants. Despite the very tight timetable, this structured process resulted in approaches to 57 potential investors, 28 of whom signed non-disclosure agreements. These 28 investors were given access to an already prepared data room and an opportunity to find out more about the particular characteristics of Paymill GmbH in a number of discussions with the management and KPMG. Five potential investors ultimately submitted indicative offers. Concrete negotiations were held with 3 investors from France, England and Switzerland.

Particular challenges

It was clear to everyone involved that a reorganisation was only possible by way of a sale of all assets to an investor (known as a reorganisation by transfer). There were no options for an insolvency plan. Given the expected negative operating result, continuation after the three-month insolvency benefits period came to an end on 30 June 2016 was out of the question. The assets therefore had to be sold by 1 July 2016.

It was critical for the success of the proceedings that the trust of the employees and customers be regained as quickly as possible. The workforce consists to an overwhelming extent of young, well-trained staff. Highly sought after on the labour market, they found themselves the subject of intense interest from competitors as soon as the insolvency became known.

On the customer side, the problem was that a loss of the technical solution could have resulted in a significant decline in revenue, particularly among key accounts, and the contractual ties were essentially meaningless, since payment flows could be diverted to other suppliers within a very short space of time. If they had had any doubts concerning the reorganisation efforts, therefore, these customers could have terminated their business relationship with Paymill GmbH very quickly and moved to a different supplier. It also became apparent that a service provider and also competitor of Paymill GmbH was attempting to exploit the uncertainty caused by the insolvency situation to solicit customers unfairly. Negative consequences for the reorganisation were only avoided through a successful application to the Munich regional court for a temporary injunction, enabling negotiations to be held on equal terms.

The sale

The sale process involved all-day negotiations with the French and the Swiss investors – both of whom already had the absolutely essential banking licence – in the offices of anchor Rechtsanwälte. A verbal agreement was first achieved with the French investor. Despite the considerable pressure on time and the verbal agreement, the management and anchor Rechtsanwälte also continued negotiations with the Swiss investor. During these negotiations this investor improved its initial offer significantly. This ultimately enabled the creditors to achieve the best possible resolution proceeds.

The sale of the assets was executed on 1 July 2016 immediately following the opening of insolvency proceedings and the consent of the provisional creditors' committee and the insolvency monitor. Vincenz von Braun and the team from anchor Rechtsanwälte will continue the debtor-in-possession insolvency process after the transfer of the business operations in order to wind up the remaining shell of Paymill GmbH and ensure the satisfaction of the secured and unsecured creditors as soon as possible in coordination with the insolvency monitor, Dr. Christian Gerloff.

Conclusion

The proceedings show that (provisional) insolvency proceedings in debtor-in-possession cases can be an appropriate strategic means of reorganising young companies especially. Negative operational developments and obstacles to growth can be eliminated in particular with the help of an experienced investor, allowing the focus to be directed back to the core products and the future business strategy.

The greatest advantage of debtor-in-possession insolvency is the positive signal it sends to customers, suppliers and employees that business operations are to be maintained and that the insolvency court is persuaded of the suitability and competence of the existing management team. This is aided by the speed with which an investor process can be driven forward because the existing management team remains in place.

For investors, it offers a unique opportunity to explore new product ideas and tap into growth markets while at the same time having confidence in a functioning business operation without the risk of hidden legacy burdens. Nevertheless, the critical key to success is close, professional collaboration geared towards the interests of the creditors and other stakeholders between the existing management, reorganisation experts and the supervising insolvency monitor as well as consistent transparency vis-à-vis the insolvency court. ■

> **(PROVISIONAL) INSOLVENCY PROCEEDINGS IN DEBTOR-IN-POSSESSION CASES CAN BE AN APPROPRIATE STRATEGIC MEANS OF REORGANISING YOUNG COMPANIES**

Share your views!

The French insolvency regime moves forward

Jean-Luc Vallens gives us his run-down on the latest news about the French insolvency regime

JEAN-LUC VALLENS
Judge, Colmar Court of Appeal, France

In the last few months, a set of new measures has been implemented in order to improve the efficiency of the commercial justice in France. These measures cover the substantive insolvency law as well as the institutional framework.

New measures relating to the substantive insolvency law

Facilitating out-of-court agreements

The information of staff representatives

In order to facilitate out-of-court agreements, the Law n°2016-1547 of 18 November 2016 allows the directors engaged in negotiations with creditors not to inform the staff representatives about the opening of a *mandat ad hoc* (C. com., art. L.611-3 al. 3) or a conciliation procedure (C. com., art. L.611-6 al. 3). This measure prevents the director from being prosecuted on the basis of the Labour Law. According to the Labour Code, the director has to notify the financial difficulties the company is facing to the representatives of employees.

However, the obligation introduced by the Ordinance n°2014-326 of 12 March 2014 still remains, namely the obligation of information of the employee representative committee or the staff representatives when the debtor seeks the court's approval ('homologation') (C. com., art. L.611-8-1).

Conciliation proceedings as an alternative to safeguard proceedings

The Law n°2016-1547 of 18 November 2016 also allows the court to suggest the debtor to apply for the opening of a conciliation procedure when the latter does not comply with the requirements for the opening of safeguard proceedings (C. com., art. L.621-1 al. 3). In particular, it relates to cases where it seems that the debtor does not suffer from difficulties that he cannot overcome.

The President of the Court has to deal carefully with this new legal incentive as he or she should not give the feeling that his (her) opinion is already clear about the financial difficulties of the debtor and a possible insolvency.

Rescue plan: new shareholders and managers

New rules have also been introduced by the Law of 18th November 2016 with regard to the modifications deemed to be necessary for the adoption of a rescue plan. Before, the Law provided for the minimum conditions to be met by the meetings of shareholders after the approval of a rescue plan. The voting process within the meetings of shareholders should now take place before the adoption of the rescue plan by the court. In addition, courts will have the possibility to decide that the changes required by the plan will be agreed by only a simple majority of shareholders (C. com., art L.626-3).

Disqualification of directors regarding the failure to file for insolvency

In France, it is possible for courts to order the disqualification of directors from any kind of business when they do not file for insolvency within a specific time limit of 45 days since the cessation of payments.

However, the Law n°2015-990 of 6th August 2015 has introduced an additional condition: the failure of the director has to be voluntary (C. com., art. L.653-8). It creates more difficulties for practitioners and courts, for which the intent of the director is not easy to put forward… In practice, such a condition of disqualification is indeed rarely used alone and is often joined to other cases of mismanagement linked with personal use of assets belonging to the company or rules of accounting.

Personal liability of directors regarding managerial misconduct leading to the inadequacy of assets

Directors may have to pay the debts of the company in case of break of duties. The personal liability of directors that courts may order in case of misconduct is now *more than before* limited:

> **THE PERSONAL LIABILITY OF DIRECTORS THAT COURTS MAY ORDER IN CASE OF MISCONDUCT IS NOW MORE THAN BEFORE LIMITED**

directors are no longer personally liable in case of a simple negligence in business. The purpose of this change highlights the wish of the French legislator to support directors acting in good faith (C. com., art. L.651-2 al.1, introduced by the Law n°2016-1097 of 9 Dec. 2016).

It is however more a signal than a real change: practitioners and courts usually admit such personal and financial liability only in case of severe misconduct or fraudulent behaviour of the directors.

Protection of the main residence of an individual entrepreneur

By way of principle, the personal flat or the home of individual entrepreneurs, considered as their main residence, cannot be any more seized by the liquidator in case of insolvency proceedings (C. com., art. L.526-1, introduced by the Law n°2015-990 of 6th August 2015). It is important to note that such a protection is valid without any legal publication (it was not the case before).

However, one important exception is provided by the legislator: the debtor may deviate from this legal rule in favour of a targeted creditor. That grants creditors a real shield in case of a subsequent cessation of payments, but other creditors won't be any more entitled to get funds from the sale of these assets.

Professional recovery proceedings for individual entrepreneurs (C. com., art. L.645-1)

Since the former reform enacted in 2014, it is possible for individual entrepreneurs with few assets (less than €5000) and no employee to obtain a discharge for their unpaid debts. It implies a short enquiry of 4 months but without the current effects of real collective proceedings.

The conditions for the individual entrepreneur to access to the so-called "*Professional recovery proceedings*" are similar to those of liquidation proceedings, namely to be in a state of cession of payments

where a reorganisation is manifestly impossible. These proceedings do not however apply to debtors acting in bad faith.

Since the new Law of 18th November 2016, such a procedure is also available for debtors who are active and those who have stopped their activity for less than one year before.

New measures relating to the institutional framework

New fees structure for French administrators and liquidators

Decree n°2016-230 of 23 February 2016 provides for a new fees structure applicable to administrators and liquidators (C. com., art. R. 663-3 & seq; art. A. 663-3 & seq.).

The new provisions are the result of the wish to control the costs of French insolvency proceedings. But the intention is also to proceed by means of successive small-scale tinkering in the regulation process of the profession of administrator and liquidator.

Commercial judges

New rules have been enacted by Act 2016-1547 of 18 November 2016 with regard to the status of judges acting within commercial courts.

Among the most important ones, the law has introduced a *mandatory initial and continuous training* in legal, economic and accounting matters. In case of non-compliance with these new rules (entry into force on 1st November 2018), the judges will have no choice but to resign from their position.

In addition to the introduction of *new ethical rules*, the French commercial judges are also required to complete a declaration of interests to indicate any personal interests, subject to criminal sanctions. The aim is to avoid any conflict of interests with their official duties.

The law also makes clear that the judges dealing with commercial cases are subject to specific prohibitions. In particular, they cannot be lawyers, clerks, insolvency practitioners nor members of Parliament, and so on… Besides, there is a general limit which is provided by the law as commercial judges should resign after 14 years of service. ■

> **THE NEW PROVISIONS ARE THE RESULT OF THE WISH TO CONTROL THE COSTS OF FRENCH INSOLVENCY PROCEEDINGS**

Share your views!

The case of Arcapita and the role of U.S. courts in international restructurings

Brad Geer, Anne Davey, and Zachary Cohen report on a case involving a foreign entity using Chapter 11, and some interesting global litigation

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United States Bankruptcy Courts, particularly in New York and Delaware, are some of the most preferred courts for multinational corporate bankruptcy filings.

This trend has been on display throughout the most recent credit cycle, as companies with global operations and assets (think shipping) have frequently selected the U.S. as their destination of choice for reorganisations and recapitalisations. There are a number of advantages foreign companies enjoy when choosing the U.S. for dealing with distress, as well as pitfalls and limitations that companies and their advisors should be mindful of.

The Chapter 11 cases of Arcapita Bank B.S.C.(c) ("Arcapita" or the "Company") and its subsidiaries present a compelling case study for the benefits and potential pitfalls of relying on U.S. Bankruptcy Courts. Arcapita was a leading global manager of Shari'ah-compliant alternative investments and operated as an investment bank. It was not a domestic bank licensed in the United States, and it did not have any branches in the United States. However, Arcapita did have an office in Atlanta. The Company was headquartered in Bahrain and regulated under an Islamic wholesale banking license issued by the Central Bank of Bahrain (CBB). Arcapita's subsidiaries were holding companies that held minority ownership interests in a global portfolio of operating companies, and AIHL, a wholly owned subsidiary of Arcapita, was incorporated as a Cayman Islands exempt company in 1998 for the purpose of holding Arcapita's ownership interests in its investments.

Like virtually all private equity institutions and investment banks, Arcapita was adversely impacted by the global economic downturn, and it was especially hard hit by the debt crisis in the Eurozone. This hampered the Company's ability to obtain liquidity through capital markets and resulted in a reduction in asset values (and concomitant difficulties in monetising certain of the Company's illiquid and complex assets owned by the Company's affiliated portfolio companies). As a result, Arcapita did not have adequate liquidity to repay its $1.1 billion unsecured murabaha, Shari'ah-compliant syndicated facility, due March 28, 2012 (the "Syndicated Facility"). Prior to filing for Chapter 11 protection, Arcapita's management team actively engaged in discussions with lenders in the Syndicated Facility regarding potential out-of-court restructuring scenarios. Arcapita, however, was unable to achieve the 100% lender consent required under a Shari'ah-compliant facility in order to fulfil the terms of an out-of-court restructuring.

Additionally, one or more hedge funds that were minority participants in the Syndicated Facility – and which, according to Arcapita, "purchased their interests at deep discounts and were seeking to leverage their opposition to a restructuring to obtain a buyout at par, while other lenders may well receive a less favourable treatment—threatened action that would have, if successful, undermined the Company's going concern value to the detriment of other creditors and stakeholders."[1] The threats, according to Arcapita's management, included "involuntary and value-destructive straight liquidation proceedings in the Cayman Islands," and forced Arcapita to consider reorganisation options under the laws of various other jurisdictions. Arcapita ultimately believed that Chapter 11 was the most effective vehicle for implementing a comprehensive restructuring plan that would maximise recoveries for all creditors and stakeholders. On March 19, 2012, Arcapita filed its voluntary petition for Chapter 11 bankruptcy protection in the Southern District of New York.

Given the diversity of creditors in the Syndicated Facility and their competing interests, Chapter 11 proved to be an effective instrument for Arcapita to implement its restructuring. Creditors in the Syndicated Facility were composed primarily of non-U.S. lenders who favoured a "kick the can down the road"

approach that would include modifications to the Syndicated Facility, including maturity extensions and no reduction in principle. On the other hand, the minority holders described above were looking for an immediate payoff at par. Additionally, other U.S. creditors were well versed in U.S. bankruptcies and were willing to make sacrifices in the form of principal haircuts in order to maximise their ultimate recoveries. The Chapter 11 process forced the entire creditor group into a single voting class, which allowed for the restructuring to go effective despite hold-outs and competing priorities, by obtaining the requisite class majority (at least two-thirds in amount and more than one-half in number of those voting).

While Chapter 11 benefited the Arcapita estate by binding most creditor hold-outs, it was not completely successful in binding all non-U.S. interested parties. Arcapita is still litigating with several Middle Eastern banks on retrieving certain cash deposits, displaying the limitations that U.S. Courts sometimes have in influencing international entities. Pre-petition, Arcapita deposited approximately $35 million of cash into several healthy Middle Eastern banks that were also pre-petition unsecured creditors in Arcapita. Arcapita has direct claims to withdraw the $35 million in order to distribute the funds in accordance with its plan of reorganisation. However, the Middle Eastern banks have asserted that they have set off rights against their unsecured claims and therefore will not release the cash. The litigation has been ongoing for over four years.

As displayed in the case of Arcapita, there are a number of advantages foreign companies enjoy when choosing the U.S. for dealing with financial distress. Chapter 11 of the U.S. Bankruptcy Code is one of the best-developed insolvency regimes in the world, allowing for a level of predictability for stakeholders. One of the most appealing features of Chapter 11 is its ability to solve the "hold out" problem. In the absence of 100% lender consent, it is often difficult to accomplish a balance sheet restructuring on an out-of-court basis. This condition holds true in the U.S. and internationally. However, Chapter 11 allows for the confirmation of a reorganisation plan with less than unanimous stakeholder support through section 1129 and other provisions of the U.S. Bankruptcy Code. If a debtor can obtain the requisite class majorities (at least two-thirds in amount and more than one-half in number of those voting) and/or meets the other tests for confirmation under Chapter 11, all dissenters and abstainers will be bound by the plan.[2]

Enforceability is another appealing feature of Chapter 11. In the case of the U.S. and other major financial centers, the issue of enforcing a court's rulings on creditors not based in that court's jurisdiction is largely mitigated. This is because most institutional creditors have some sort of presence in the U.S. or another major financial center. That is to say, odds are high that most creditors will have a presence in the U.S., so debtors can realistically expect that a U.S. Bankruptcy Court's decisions will be enforced. However, as was the

"THERE ARE A NUMBER OF ADVANTAGES FOREIGN COMPANIES ENJOY WHEN CHOOSING THE U.S. FOR DEALING WITH FINANCIAL DISTRESS"

> THE U.S. HAS LONG BEEN ONE OF THE MOST POPULAR VENUES FOR MULTINATIONAL CORPORATE BANKRUPTCY FILINGS

case in Arcapita, the benefit of enforceability is not always guaranteed.

Another of the most obvious advantages of Chapter 11 is the automatic stay provided for in Section 362 of the U.S. Bankruptcy Code. This is an automatic injunction that comes into immediate effect upon the filing of a Chapter 11 petition. It bars any party from taking steps to pursue or enforce claims against the debtor or the property of the estate outside of the bankruptcy proceedings. It has worldwide effect, and the consequences for violating it can be severe.[3]

Filing in the U.S. also creates a bankruptcy estate made up of the debtor's entire property, "wherever located." This allows corporations to administer all of their assets around the world without commencing procedures in each jurisdiction where they do business or own assets.[4] Finally, a foreign entity only needs minimal ties to the U.S. to qualify for relief under U.S. bankruptcy laws. Section 109 of the U.S. Bankruptcy Code, entitled "Who may be a debtor," provides that "only a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor."[5] The U.S. Bankruptcy Code does not specify a specific minimum amount or threshold of property that is required to be in the United States in order for an entity to be a debtor in a U.S. bankruptcy case. In fact, the most common way to satisfy the property requirement is to have a bank account in the U.S. or pay a U.S. law firm a retainer on behalf of the debtor and its affiliates. A bank account with only $100 suffices, and the account can even be open shortly before a bankruptcy filing.[6] Thus, it is relatively easy to qualify as a debtor in U.S. Bankruptcy Courts.

The U.S. has long been one of the most popular venues for multinational corporate bankruptcy filings. This should not be a surprise to most restructuring professionals, given the many benefits that foreign companies enjoy when choosing the U.S. Courts (including the ability to bind hold-outs, enforceability, the automatic stay, and the ease with which a foreign company can qualify as a debtor in the U.S.). We would expect this trend to continue as the U.S. Bankruptcy Code continues to be one of the best-developed insolvency regimes in the world, and the case of Arcapita provides a useful case study of the benefits and pitfalls multinational corporations can face when relying on U.S. Bankruptcy Courts. ■

Footnotes:

1 Declaration of Henry A. Thompson in Support of the Debtors' Chapter 11 Petitions and First Day Motions and in Accordance with Local Rule 1007-2, In re: Arcapita Bank B.S.C(C), et al., Case No. 12-11076
2 Crossing Borders: International Reorganizations, By James H.M. Sprayregen and David A. Agay, February 10, 2010
3 DOES CHAPTER 11 WORK FOR FOREIGN SHIPPING COMPANIES?, Maritime Reporter and Engineering News, April 2013
4 Absolute Priority, Coming to America; Corporate Bankruptcy Tourism, November 11, 2014
5 New York Law Journal, Using the Bankruptcy Code For International Restructuring, June 13, 2016
6 Section 109(a) – Filing a Chapter 11 Case for a Foreign Business, Maurice Horwitz, June 8, 2015

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Country Reports

Summer 2017

Updates from The Czech Republic, The Netherlands, Lithuania

The Czech Republic: Creditors with secured contingent and future claims have gained more certainty

On 1 July 2017, an extensive amendment to the Insolvency Act shall take effect.

The amendment brings several substantial changes to a number of aspects pertaining to insolvency proceedings, including security of future or contingent claims (including bank guarantees), the assessment of a company's insolvency and the discharge from debts. This report focuses on the position of creditors with secured contingent and future claims.

Security on contingent claims and future claims

Insolvency proceedings are commenced upon the entitled person filing the insolvency petition to the relevant insolvency court, which is then published by the court in the publicly available insolvency register. One of the most substantial effects of the commencement of insolvency proceedings is that a security interest relating the assets owned by the debtor or other assets belonging to the insolvency estate may be created or executed only pursuant to the statutory conditions of the Insolvency Act. Indeed, only the so-called debtor-in-possession financing (in Czech: *úvěrové financování*) enables the creation of "new security interest".

The mentioned rule of the automatic moratorium has led to various disputed issues, including for example the question whether in case of a pledge on a stock in a warehouse, items arrived to the warehouse after the commencement of the insolvency proceedings are still pledged in favour of a secured creditor. The Supreme Court rightfully answered in the affirmative.

Similarly, a related question has arisen in the context of the then applicable Bankruptcy and Resolution Act in the ELMA-THERM case. In the judgment, the Supreme Court has concluded that a bank is not entitled to the satisfaction of its claim against a bankrupt arising from collateral if the bank performed in compliance with a bank guarantee only issued in favour of the bankrupt after the declaration of bankruptcy, although the pledge securing the bank guarantee had been entered in the land register before bankruptcy was declared.

Insolvency practitioners feared that the Supreme Court would come to the same conclusions under the current Insolvency Act. In fact, our clients experienced that insolvency trustees had embarked on denying their claims on the basis of the ELMA-THERM case in similar scenarios. Against this background, the amendment of the Insolvency Act overrides the Supreme Court's judgment.

The legislator's intention was to ensure that a bank or a person performing under a bank or financial guarantee following the commencement of insolvency proceedings should be regarded as a secured creditor on condition that the right to satisfaction from the security of a recourse claim against a debtor was entered in the land register before the initiation of the insolvency proceedings. Similarly, this rule is to apply to secured future claims arising after the initiation of insolvency proceedings.

Although the majority of the insolvency practitioners probably agree that the ELMA-THERM case was rather the issue, which should be overcome by interpretation rather than legislative intervention, secured creditors generally welcome the amendment. In practice, insolvency trustees have already in many instances recognised the security interest of our clients, that they originally intended to deny. ■

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> THE MENTIONED RULE OF THE AUTOMATIC MORATORIUM HAS LED TO VARIOUS DISPUTED ISSUES

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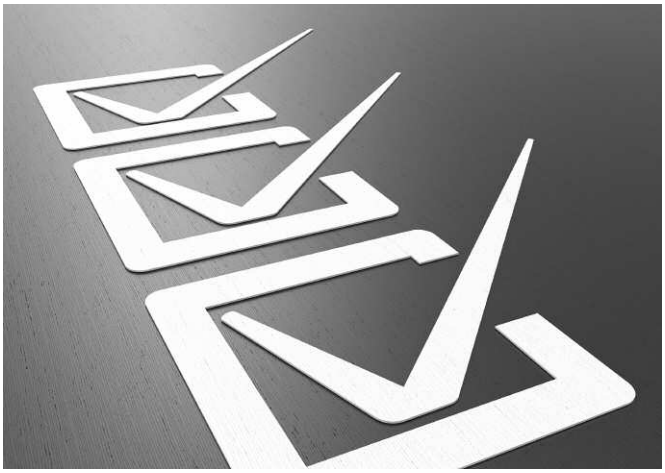
Lithuania:
Avoidance actions and good faith – what to observe when doing business with Lithuanian companies

Recent Lithuanian case law confirms that businesses ought to be very cautious and take active steps before entering into transactions with Lithuanian companies potentially facing difficulties.

Otherwise, they risk having to return what they received from the transaction if insolvency proceedings are opened against the company and the administrator brings a claw-back claim.

Lithuanian insolvency administrators examine the debtor's transactions concluded within the 36 months before the opening of the proceedings. They must start avoidance actions against the debtor's counterparty if the conditions for an *actio pauliana* claim are met.[1] One of the conditions is the bad faith of the debtor's counterparty at the moment of the transaction. A counterparty acted in bad faith if it knew or should have known that the transaction would violate other creditors' rights. This is the case if it can be shown that the counterparty knew or should have known that the transaction will cause or aggravate the debtor's insolvency.[2]

The Lithuanian law presumes the good faith of parties to a transaction. This presumption applies also to *actio pauliana* cases. However, recent court practice appears to result in a shift in the burden of proof, as courts tend to tolerate superficial allegations by the claimant administrator that the counterparty knew about the debtor's (imminent) insolvency. It is then left to the defendant counterparty to prove that it had acted in good faith and had performed actions required by current court practice. For this, the defendant must show that it checked and analyzed the publicly available information that might



have shed light on the financial situation of its business partner. This includes checking the pledge, mortgage, arrest and the commercial registers. From the latter the most recent available financial statements should be obtained. At least for long standing relationships courts also require the counterparty to discuss with its business partner about the financial situation, such as obligations towards other creditors, obligations secured by pledge or mortgage and their maturity dates and the status of pending court cases.[3] Some judgments seem to indicate that the pledge on all the debtor's assets can be in itself sufficient for the court to conclude that the counterparty acted in bad faith when entering into the transaction with the debtor.[4]

Courts tend to apply these criteria in a rather formalistic way having little regard to whether meaningful information is or even could be obtained by adhering to the 'checklist'. For instance, pledging assets is standard practice necessary to obtain financing and does not necessarily indicate financial problems. Also, financial statements are of limited use for understanding the liquidity situation of a company, even more so if the statements are months or even years old. And asking your business partner if it faces insolvency is not necessarily likely to prompt an honest answer. Interestingly, in a recent decision, the court interpreted the mere existence of credit risk insurance coverage to the detriment of the insured foreign creditor of the Lithuanian debtor rather than acknowledging that the insurer had monitored the financial standing of the Lithuanian debtor and at the time the disputed transaction was made had neither terminated the insurance coverage nor otherwise flagged warning signals.[5]

Therefore, companies are well advised to follow the 'checklist' developed by recent case law before entering into business transactions with Lithuanian companies. Otherwise, there is a considerable risk that in an *actio pauliana* case they (shift in the burden of proof!) cannot prove performance of the formal background checks. As a results courts are likely to conclude that the defendant company had acted in bad faith and decide the case in favour of the administrator. ■

> **COMPANIES ARE WELL ADVISED TO FOLLOW THE 'CHECKLIST' DEVELOPED BY RECENT CASE LAW BEFORE ENTERING INTO BUSINESS TRANSACTIONS WITH LITHUANIAN COMPANIES**

Footnotes:

1 Courts declare a transaction void and apply restitution under *actio pauliana* rules if these conditions are met: (1) the creditor has a clear and unambiguous claim against the debtor, (2) the transaction at hand violates the rights of the other creditors of the debtor, (3) the debtor did not have a duty to enter into the transaction, (4) the debtor and the creditor were not acting in good faith since they knew or should have known that the transaction will be to the detriment of the rights of other creditors.

2 Decision of the Lithuanian Supreme Court (LAT) of 2 October 2013, civil case 3K-3-463/2013. Lithuanian Appeal Court (LApT) of 2016 October 13, civil case e2A-813-464/2016.

3 LApT, *ibid.*; LAT, *ibid.*

4 LApT; LApT, decision of 11 May 2017, civil case e2A-245-178/2017.

5 LApT, 13 October 2016, *ibid.*

The Netherlands:
The legislative programme 'Recalibration of Bankruptcy Law'

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In November 2012 the Dutch legislator launched the legislative programme 'Recalibration of Bankruptcy Law'.

This legislative programme steadily makes progress and is based on three pillars: (i) enhancing the possibilities for corporate restructuring, (ii) modernisation of the bankruptcy procedure and (iii) combating bankruptcy fraud.

The first two pillars of the legislative program

The first pillar – to strengthen the possibilities for corporate restructuring – *inter alia* contains draft bills on the introduction of a statutory base to the practice of pre-packs and on the introduction of a compulsory debt restructuring composition (outside bankruptcy). The second pillar – the modernisation of the bankruptcy procedure – contains a draft bill that entails several amendments to the current Dutch bankruptcy procedure, e.g. the use of electronic means of communication will be implemented and a deadline will be introduced for creditors to file their claims.

The third pillar of the legislative program

The third pillar of the legislative program – the combating of bankruptcy fraud – is nearly completed. This pillar contains three bills, of which two have entered into force on 1 July 2016: the bill on director disqualification under civil law (*de Wet civielrechtelijk bestuursverbod*) and the bill on the revision of the criminalisation of bankruptcy fraud (*de Wet herziening strafbaarstelling faillissementsfraude*). The third (draft) bill under this pillar, the bill on the strengthening of the position of the bankruptcy trustee (Wet versterking positie curator), has been adopted by the Dutch Upper House on 21 March 2017. It is expected that this bill will enter into force soon, possibly as per 1 July 2017.

The strengthened position of the bankruptcy trustee

In what way is the position of the bankruptcy trustee strengthened? It must be noted that with this bill the bankruptcy trustee gets the statutory duty to investigate whether there have been irregularities that have (partly) caused the bankruptcy, that have complicated the liquidation of the bankrupt estate or that have increased the deficit in the bankruptcy. In essence, the bankruptcy trustee will have the task to identify fraud. In the event that fraud has been identified, the bankruptcy trustee shall inform the supervisory judge privately and may – after liaison with the supervisory judge – notify or report this to the competent authorities. Also, the bankruptcy trustee has to mention this in the liquidation report.

Furthermore, the position of the bankruptcy trustee is strengthened through the expansion of the obligations of the bankrupt to provide information to and to cooperate with the bankruptcy trustee. This means that the bankruptcy trustee must be informed by the bankrupt of all facts and circumstances that are relevant for the bankruptcy, whether or not this has been asked. Also, the bankruptcy trustee must be informed about foreign assets, such as real estate and bank accounts in foreign countries. The bankrupt must also thereto cooperate in full with the bankruptcy trustee. When a legal person, a commercial partnership or a limited partnership is declared bankrupt, such obligations also apply to (indirect) directors, supervisory directors, partners and *de facto* directors as well as to persons that have had these positions in a period of three years prior to the bankruptcy. The bankrupt also needs to directly provide his or her records and to make these records legible through encryption keys. Likewise, all professional third parties that keep (part of) the records of the bankrupt, such as accountants, will have the obligation to provide these records to the bankruptcy trustee together with the means to make the records legible, when asked to do so.

Please note that this bill is applicable on bankruptcy proceedings that have been opened after the bill has entered into force, possibly as per 1 July 2017. ■

> **THE POSITION OF THE BANKRUPTCY TRUSTEE IS STRENGTHENED THROUGH THE EXPANSION OF THE OBLIGATIONS OF THE BANKRUPT**

Applying the Regulation (EU) 2015/848 on insolvency proceedings

Myriam Mailly, Technical Officer of INSOL Europe, writes about what insolvency practitioners need to know before applying the Regulation (EU) 2015/848 on insolvency proceedings (hereafter "EIR 2015 (recast)") which entered into force on 26 June 2017

MYRIAM MAILLY
INSOL Europe Co-Technical Officer

Corrigendum to Regulation (EU) 2015/848 (OJEU of 21 December 2016)

The initial version of Article 84(1) of the EIR 2015 (recast) covered only insolvency proceedings opened after *26* June 2017, while Article 84(2) stated that "*Regulation (EC) No 1346/2000 shall continue to apply to insolvency proceedings which fall within the scope of that Regulation and which have been opened before 26 June 2017*".

As a result, neither EIR 2000 nor EIR 2015 (recast) would have been applicable for cross-border insolvency proceedings opened by a court on the day of 26 June 2017.

By the corrigendum published on 21 December 2016, that problem is now fixed: the EIR 2015 (recast) is applicable on 26 June 2017.

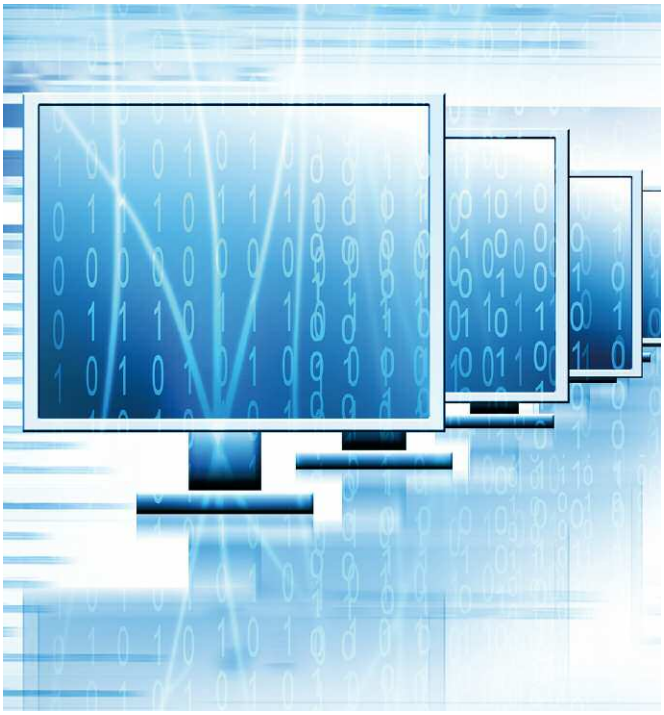
Updated Annexes to Regulation (EU) 2015/848 (OJEU of 3 March 2017)

Regulation (EU) 2017/353 of 15 February 2017, replacing Annexes A and B to Regulation (EU) 2015/848, has been published on 3 March 2017.

This Regulation takes into account the information notified to the Commission by Poland, on the substantial reform of its domestic law on restructuring taking effect as of 1st January 2016. That is why Poland requested to change the lists set out in Annexes A and B to the Regulation (EU) 2015/848 accordingly.

It is however important to bear in mind that since the Annexes are an intrinsic part of the Regulation, they are directly applicable in the Member States. That is why, insolvency practitioners are highly recommended to check the latest version of the Annexes before applying the EIR 2015 (recast).

> **ARTICLE 24 OF THE EIR 2015 (RECAST) REQUIRES EU MEMBER STATES TO PUBLISH RELEVANT INFORMATION IN A PUBLICLY ACCESSIBLE ONLINE REGISTER**



Updated information related to national and EU insolvency laws on the basis of Article 86 of the EIR 2015 (recast)

Article 86 of the EIR 2015 (recast) which entered into force on 26 June 2016 aims mainly at making a short description of national legislations and procedures relating to insolvency available to the public, and in particular related to the matters listed in Article 7(2) ("the law of the State of the opening of proceedings").

As of 29 June 2017, a short description of national legislations and procedures

relating to the matters listed in Article 7(2) are available for the nineteen following jurisdictions: Austria, Bulgaria, Croatia, Cyprus, Czech Republic, Estonia, Finland, France, Germany, Greece, Italy, Malta, Poland, Portugal, Romania, Slovenia, Spain, Sweden and the United Kingdom.

Standard forms to be used by insolvency practitioners on the basis of Article 88 of the EIR 2015 (recast)

Standard forms in all official languages of the European Union have been published on 22 June 2017 by the European Commission.

First of all, these standard forms will allow Member States to make conditional, via the system of interconnection, the access to information regarding insolvent individuals, upon the verification of the existence of a legitimate interest for accessing such information (Article 27(4)).

Secondly, insolvency practitioners will be required to send a copy of the standard form for lodging of claims together with their notice, so as to inform immediately the known foreign creditors of the opening of insolvency proceedings (Articles 54 and 55). Please note that the EIR 2015 (recast) makes clear that the consequences of the incomplete filing of the standard forms should however remain a matter for the national law.

Thirdly, a standard form will be created for insolvency practitioners appointed to represent any member of a group of companies, allowing them to object within 30 days of receipt of the notice

- against the request for the opening of group coordination proceedings;
- against the inclusion within the group coordination proceedings of the insolvency proceedings in which they have been appointed; or
- against the person proposed as a coordinator (Article 64).

Next steps: establishment and interconnection of national insolvency registers (2018-2019)

To better ensure that creditors and courts receive relevant information and to prevent parallel proceedings being opened, Article 24 of the EIR 2015 (recast) requires EU Member States to publish relevant information in a publicly accessible online register. The deadline for establishing such national registers for national governments is 26 June 2018. Once established at a national level, these registers will be interconnected via the European e-Justice Portal by 26 June 2019.

If you are curious or too impatient, be aware that you can already have access to the pilot project involving the following Member States: Austria, the Czech Republic, Estonia, Germany, Latvia, the Netherlands, Slovenia and Romania. ■

Links relating to this article and other relevant information are available on the INSOL Europe website at: www.insol-europe.org/technical-content/european-insolvency-regulation

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