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The journal of INSOL Europe
Winter 2017/18

Annual Congress

Report from Warsaw

Seeking Safe Harbour

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- New Pragmatism in the 21st century
- Insolvency proceedings of tomorrow
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Welcome from the Editors


FRANK HEEMANN


CATARINA SERRA

The New Year started very soon for Eurofenix, in fact even before 2017 ended.

Last October, at the INSOL Europe Congress in Poland, Frank Heemann and I were appointed joint editors-in-chief of *Eurofenix*. This is, therefore, a very special occasion for us, as it is our first editorial. We feel extremely proud and hope to be worthy of the trust placed in us by the Executive Board of INSOL Europe.

Thanks are in order, on our part and (we are sure) on behalf of the rest of the editorial board and the readers, to the former joint editors-in-chief, Annerose Tashiro and Guy Lofalk. For a long time Annerose and Guy have been at the steer of this important publication and managed to improve it in multiple ways. Annerose and Guy: we feel honoured to be your successors and count on you of the Proposal to continue to take part in the success of *Eurofenix*!

Working alongside with us will be our colleagues on the executive committee of *Eurofenix* and, among them, Florica Sincu and Paul Newson, who have been a reference to us from the start. They share the very rare quality of being kind and good spirited, yet sharp and meticulous. They shaped *Eurofenix* to what it is and hopefully will keep on being.

This means that there will be no break from the past, at least in what regards *Eurofenix*. As to the rest, let us wait and see.

2018 represents the first year of the enactment of the Recast Regulation on insolvency proceedings which will surely bring further developments, if nothing else, at least a few concerning the Proposal for a Directive on the preventive restructuring frameworks.

At the current stage, it is possible to say that insolvency is becoming more and more non-insolvency oriented, since the focus is shifting towards pre-insolvency scenarios and the rescue of businesses.

Pointing in that direction is, for one, the Academic Forum Conference, which unfolded in October around the topic of "*The Rise of Preventive Restructuring: Challenges and Opportunities*", as reported by Jenny Gant. Just as illustrative was INSOL Europe's Annual Congress, which also took place last October in Warsaw. Titled "*Preventive Restructuring: Sunset on Insolvency?*", the idea underlying the presentations was "the shift in the approach to the way in which insolvency, restructuring, turnaround and like terms are viewed", as Paul Omar puts it in his Congress report.

Talking about a shift in the approach to insolvency and, ultimately, to economy, we may encounter an original and interesting proposal in the article written by Grzegorz Kolodko, the keynote speaker at the Congress: new pragmatism. It is a new economic theory which emphasizes the role of non-economic factors and supranational and global aspects of economy. Could this be the way to go? Let us have a look.

One of the core ideas of new pragmatism is sustainability or, to be precise, triply – economically, socially and environmentally – sustainable development. Sustainability is not an unfamiliar concept. But it is a word to revisit and, for Tuula Linna, an important keyword for the future of insolvency proceedings. In her article, she submits that the insolvency proceedings of tomorrow should be sustainable through alternative dispute resolution (ADR).

Another important concept for new pragmatism is globalisation, which is envisaged as an irreversible process which imposes the need to harmonise the laws, a need which is clear for the majority of insolvency experts, particularly for those with cross-border insolvency concerns.

The attempts to harmonise bring up for discussion, once again, the Recast Regulation and the Proposal for a Directive, underlining their importance. As already noted, they will take centre stage and continue to raise questions. For instance, may the Nordic bankruptcy convention be used as a vehicle to "seek safe harbour" under the Recast Regulation, as argued by Erik Selander, in the article on the Nordic forum-shopping?

For more information, also have a look at the technical insight, by Emma Inacio, which focuses precisely on the European Parliament draft report of 22 September 2017 on the Proposal for a Directive.

On the subject of harmonisation, it is unconceivable nowadays to disregard independent organisations. Please have a look at the article on the Conference of European Restructuring and Insolvency Law (CERIL), written by its chair, Bob Wessels. CERIL gathers multinational restructuring and insolvency experts and is aimed at the improvement of legal and practical frameworks at national and European levels. It has already borne fruit with a report on transaction avoidance laws entitled "*Clash of principles: equal treatment of creditors vs protection of trust*" here summarised by Reinhard Bork, the chair of the respective working group.

Also worthy of consideration are, in the first place, the report of the European Law Institute (ELI) on business rescue, with recommendations for a legal framework enabling the further development of coherent and functional rules for business rescue in Europe, presented by Stephen Madaus and Bob Wessels, and, secondly, the INSOL Europe and CERIL joint project to create second-generation communication and cooperation guidelines (CoCo Guidelines).

In conclusion, there will be no lack of topics to read and to think about in 2018, since the early start and throughout the year. We hope to keep providing food for thought not only via the articles but also via the regular columns (news and events, book reviews, technical insights and updates, conference and country reports, etc.).

Needless to say, all contributions, from either INSOL Europe members and non-members, that may improve the quality of our journal, expand and diversify its contents are extremely important to us and will be very welcome.

Cheers and a happy New Year!

Catarina & Frank

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A fruitful year for a flourishing family

RADU LOTREAN
INSOL Europe President

Radu Lotrean begins his tenure as President of INSOL Europe with a look back at an abundant year of changes and achievements

> INSOL EUROPE NEEDS A SET OF STRATEGIES TO GUIDE ITS DEVELOPMENT AND PREPARE FOR THE CHALLENGES THAT LIE AHEAD

We are approaching the end of a very fruitful year for our organisation.

Looking back to this year's achievements, the East European Countries' Committee Conference in Budapest, with the regional hot topic "*Winding up of (assetless) companies in Central-Eastern Europe – The reality show*", was an absolute success! The conference gathered together a record number of attendees – more than 295 delegates from 16 countries. Over 30% of Hungary's IPs participated and had the opportunity, through interactive discussions and valuable case studies, to absorb new information and hopefully get a new perspective on the nation's particular legislative problems regarding the winding-up of assetless companies and crisis management, as well as tracking, recovering and selling assets.

Our INSOL Europe Annual Congress in Warsaw, Poland, focused on "*Preventive Restructuring: Sunset on Insolvency?*" – one of the burning issues of our time. Over 400 delegates had the chance to immerse themselves in the presentations, especially those regarding the practical implications of the preventive restructuring directive and the challenges faced by today's businesses. The presentations also illustrated real-life examples of innovative and creative approaches in distressed situations.

As Brexit has been a daily headliner of the world's news for the past year and a half, one of the most anticipated and discussed panel was '*Brexit: Impact on European restructurings*'. The panel analyzed various cross-border insolvency and restructuring situations, emphasising the "before and after".

Another theme that took delegates by surprise and was received with great enthusiasm was "*Legal Tech/ Internet 4.0. How will technology change the industry?*" – a theme that I am sure will be present in our future conferences as well. We have a lot to learn from our Dutch colleagues' example. After all, the future of any profession is mirrored in technology; in the insolvency field, the modernisation and innovation of procedures is reflected by conducting such legal proceedings online, by using digital case files, and so on.

New projects

This year we also launched two powerful projects, the INSOL Europe High Level Course on Insolvency Law in Eastern European Jurisdictions and the Strategic Task Force 2025.

The High Level Course on Insolvency, first held in Romania, has put together an exquisite programme, reuniting worldwide experts on insolvency, such as Prof. Ignacio Tirado (Universidad Autonoma de Madrid, Spain), Prof. Irit Mevorach (University of Nottingham, UK), Prof. Riz Mokal (Barrister, South Square and (Hon.) University College London, UK), Prof. Janis Sarra (University of British Columbia, Canada), Prof. Christoph Paulus (Humboldt University Berlin, Germany), Prof. Michael Veder (Radboud University Nijmegen, Resor, The Netherlands), INSOL Europe's past President Alberto Núñez-Lagos (Uría Menéndez, Spain), Mihaela Carpus-Carcea (Directorate-General for Justice and Consumers, European Commission) as well as local experts, professors, IPs and judges. As Module I "*International best practice and comparative examples*" and Module II "*An analysis of the main elements of the local system*" were a great success, we are looking forward to the third module for which participants will be challenged to write an essay of about 10,000 words on a selective topic. A committee will review the papers, choose the best for each topic and those selected will present their essay at the final workshop of the course. As of today, Poland is the proposed host country for our next High Level Course on Insolvency.

New strategies

The Strategic Task Force is also a powerful and much needed project started in 2017.

INSOL Europe, an organisation that is constantly growing, needs a set of strategies to guide the development and prepare for the challenges that lie ahead. We had a great start this year, with the Strategic Task Force questionnaire that elicited opinions on the many aspects of the current membership, motivation and aspirations of the members. We will design the

Share your views!

future of our organisation keeping up with the modern technology challenges and the needs of our members.

New collaborations

This year we have also collaborated very well with INSOL International, and this joint approach has culminated in the resounding success of the Tel Aviv Conference and the Joint Lenders Group Panel in London.

Our future strategy is to keep close to similar professional organisations such as AIJA, ABI, AAA, TMA and so forth.

This year we have also striven to help shape tomorrow's insolvency laws by participating with our specific insolvency expertise and unique international experience at UNCITRAL's Working Group V, and by keeping in close touch with the European Commission.

New blood

INSOL Europe believes in investing in fresh and enthusiastic people and thus, we try to promote young members and professionals passionate about their field. They can lay a foundation for new initiatives in our organisation, share their know-how and connect with other like-minded people.

In October, George-Luis Harang took over the Young Members Group as Co-chair together with Anne Bach and Sabina Schellenberg (who will step down next year). With a special focus on recruitment, they brought a fresh take in supporting younger insolvency field professionals and in building up a network where they can establish international contacts and exchange their experience and knowledge.

A great news is that Slavomir Cauder (after stepping down from the Young Members Group management), is following Alistair Beveridge as Co-chair of the Financial Institutions Group. We also congratulate Piya Mukherjee (Denmark) for being appointed INSOL Europe's new Vice President. In addition, Ms. Mukherjee has assumed the role of Recruitment Chair for 2017-2018.

Steffen Koch handing over the presidency of INSOL Europe to Radu Lotrean at the Annual Congress in Warsaw

New leaders

On the administrative team we have three new members, reputed professionals: Paul Omar as Technical Research Co-ordinator, Niculina Șomlea as Secretary of the Eastern European Countries Committee and Ian Cooper as VAT Consultant.

We also have two new editors-in-chief of this very magazine: Catarina Serra and Frank Heemann, whose steering and input we look forward to from this edition onwards.

New goals

My personal goals as President are to focus on recruitment in several important countries not represented in the INSOL Europe Council (30 members are needed according to our Constitution – and we have currently in Belgium: 24 members, in Luxembourg: 16 members, in Portugal 20, in Slovakia: 10, in Hungary: 16, in Estonia: 10, and in Greece: 8) and to establish strong, durable connections with all local bodies and share our knowledge with all European countries through our High Level Course on Insolvency.

I would like to end by thanking again our 2017 President, Steffen Koch, for his invaluable contribution to the organisation, our Director of Administration, Caroline Taylor, for her outstanding service to the INSOL Europe family, and the Executive, the Council members, the Secretariat and the Working Groups for all of their hard work. ■

> **INSOL EUROPE BELIEVES IN INVESTING IN FRESH AND ENTHUSIASTIC PEOPLE AND THUS, WE TRY TO PROMOTE YOUNG MEMBERS AND PROFESSIONALS PASSIONATE ABOUT THEIR FIELD**

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

LinkedIn

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!

Presidents meet in India

Steffen Koch and INSOL India President, A. S. Chandhiok

INSOL Europe's President Steffen Koch (at the time) was pleased to meet his counterpart in INSOL India, President A. S. Chandhiok, at the Insolvency Summit 2017 in Mumbai, 22-23 September 2017.

Mr Koch was invited to speak on two panels about the (continental) European approach on various issues relating to the new "Insolvency and Bankruptcy Code" which was introduced less than a year ago by the Indian government.

The first panel Mr Koch was invited to join was "*Earning your Crust: How insolvency professionals get remunerated.*" A lively debate on various issues e.g. "Should IP fees be market driven or regulated?" was initiated by this presentation where Mr Koch illustrated the remuneration models in various jurisdictions around Europe. His examples were well received and the audience was really keen to hear about best practices in Europe on a whole range of issues related to the subject.

The second panel to which Mr Koch was invited was "*Creditors and Debtors: Friends or foes - Does the blame game continue?*" on which he also gave a short presentation.

Another lively debate followed on various issues amongst the panel members and the audience, where Mr Koch gave various examples on different approaches throughout Europe, e.g. debtor in possession regime versus creditor in possession regime.

The President of INSOL India thanked the President of INSOL Europe for sharing his / European views with the Indian insolvency community. Both Presidents agreed that the cooperation between the two Associations should be deepened in the future.

Indeed, the current Vice-President of INSOL Europe Piya Mukherjee has already had talks with the President of INSOL India during a private visit to India on how to strengthen the relations between the two associations in the future. *A story to be continued...*

CERIL: Independent think tank in European restructuring and insolvency matters launched

This year, the Conference of European Restructuring and Insolvency Law, CERIL, has been established. CERIL is an independent non-profit organisation of restructuring and insolvency practitioners, academics and judges committed to the improvement of legal and practice frameworks at national and European levels. Its primary purpose is to advise on technical and policy issues relating to restructuring and insolvency laws, regulation and practice, and any related laws in Europe. *Bob Wessels reports.*

CERIL is established by a group of academics and practitioners with extensive experience of working in the reform of insolvency laws at national and European level as well as advising international organisations active in the insolvency field. Founders and conferees of the invitation-only group include members of the European Commission Experts' Group in Restructuring and Insolvency (who have been advising the European Commission on its proposal for a preventive restructuring framework as well as those involved in the European Law Institute's report on Rescue of Business in Insolvency Law, which was published in September 2017.

Presently, the organisation is close to its maximum of 75 conferees, representing over 25 European countries. From the Leiden Law School, professor Reinout Vriesendorp is CERIL's secretary, and professor Bob Wessels (past Chair of the Academic Forum of INSOL Europe) is chairing CERIL. Other members of its Executive are professor Ignacio Tirado, Universidad Autónoma of Madrid; Senior Legal Consultant World Bank (Financial Sector), Giorgio Corno, Esq., Studio Corno Avvocati Milan, Italy, professor Ian Fletcher QC (hc), Emeritus Professor University College London, UK, professor Tuula Linna, University of Helsinki, Finland and professor Stephan Madaus, University of Halle-Wittenberg, Halle, Germany. As founding conferees, they felt the moment was there to establish a collective authority as the obvious point of reference for national legislators and policy-makers, as well as acting as a source of expert advice for the EU institutions and other multiparty organisations.

Participants contribute views, on a non-partisan basis, based on their knowledge and experience as practitioners, judges and academics. They also reflect the diversity of national insolvency systems and legal traditions in Europe.

European insolvency law is stepping into a next phase of its development, with renewed cross-border rules and the proposal mentioned. Its volume increases, including rules for groups of companies and duties for insolvency practitioners and courts. This all affects also national legal domains, such as corporate law, contract law, securities law and procedural law.

The vision behind CERIL is to provide a unique independent perspective to endorse significant long-term improvements in restructuring and insolvency systems across the Europe. CERIL maintains a platform allowing for the exchange of ideas and in-depth discussions. It will also conduct joint studies and provide statements of advice on technical and policy matters with view to supporting legislative initiatives at national and European levels.

Products presently in preparation include the role of shareholders in a restructuring, more particularly related to debt-for-equity swaps, specific matters of directors' liability, acts detrimental to an insolvency estate, improving professional and ethical rules applicable to insolvency practitioners, and consumer rights in a restructuring or insolvency of a retailer.

The first fruit of collaborative research and discussion was published in September 2017 and concerns the clash of principles in European transaction avoidance laws: equal treatment of creditors versus protection of trust. The website (www.ceril.eu) has published CERIL's Statement and the report (Report 2017/01), on which it rests, prepared by a working party, chaired by professor Reinhard Bork, University of Hamburg. *See page 36 of this edition for a summary article of the paper*.

INSOL Europe Council 2017

Newly elected members of the INSOL Europe Council met current members of the Council at the Annual Congress in Warsaw to discuss plans for the forthcoming year. A full list of all the changes is shown on our website at: www.insol-europe.org/about-us/council-elections

From left to right standing: Robert van Galen (Neths), Caroline Taylor (UK), Marcel Groenewegen (Neths), Pawel Kuglarz (Poland), Frank Tschentscher (Germany), Rita Gismondi (Italy), Steffen Koch (Germany), Chris Laughton (UK), Marc Andre (France), Frances Coulson (UK), Giorgio Cornu (Italy), Alastair Beveridge (UK), Vicente Estrade (Spain), Thomas Bauer (Switzerland). **From left to right seated:** Alice van der Schee (Neths), Sabina Schellenberg (Switzerland), Hans Renman (Sweden), Simona Milos (Romania), Wolf Waschkuhn (UK), Catherine Ottaway (France), Piya Mukherjee (Denmark), Radu Lotrean (Romania).

Other members present: Marc Udink (Neths), Neil Cooper (UK), Jim Luby (Ireland), Susanne Fruhstorfer (Austria), Alberto Nunez-Lagos (Spain) and Marc Senechal (France).

Eastern European Countries' Committee Conference 2018 31 May-1 June, Riga (Latvia)

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Business Crisis at the core of Rome Insolvency Conference

The Faculty of Law of LUISS (the Italian Free University of the Social Sciences) hosted a gathering in Rome on 3-4 November 2017, which brought together some 60 practitioners, academics and judges from across Italy and further afield to speak on topics related to business crisis and the impact on Italian and international cases. *Antonio Leandro (Professor, Bari University and Member of the Scientific Committee for the LUISS Masters in Insolvency Law) and Paul Omar report.*

The event, titled "*Cross-Border Business Crisis: International and European Horizons*", was organised by Professor Antonio Leandro (University of Bari) and Judge Luciano Panzani (President, Rome Court of Appeal). The intention behind the conference was to reflect current developments in international and cross-border insolvency of relevance to practice in Italy and also to promote the Faculty's new Masters on Restructuring, which will be launched in the coming academic year.

Over the one and a half days, three sessions focused, respectively, on "*International and European Policies on Business Crisis*"; "*Regulation 2015/848 within the European System of Private International Law*" and "*Cross-border Insolvency and the Italian Legal Order: Old and New Challenges*". Within the first session, speakers dealt with topics as diverse as the influence of international standards on insolvency, the impact of Brexit on cross-border reorganisations, bank crisis and the recent Draft Directive on Preventive Restructuring. The second session, under the aegis of the Recast EIR, covered various key topics, such as COMI, synthetic secondaries and the relationship of the text with the Brussels I-*bis* and Draft Directive measures. In the final session, focusing on the Italian legal order, themes canvassed included the influence of protocols on Italian legal practice, the role of out of court processes and arbitration as well as the influence of *ordre public* issues in the context of cross-border cases.

The conference was particularly timely given Italy will be seeing reforms introduced in the early new year both to domestic law and to the way in which courts will be able to organise cross-border cooperation and communication.

Find out more about LUISS at: www.luiss.edu

Financial Institutions Group and Lenders Group meet to discuss the impact of the next financial crisis

On 11th October INSOL Europe's Financial Institutions Group and INSOL International's Lenders Group held an inaugural joint seminar at the offices of The Commonwealth Bank of Australia. After a quick introduction by Matthew Phipson of Commonwealth Bank, the presidents of INSOL Europe (Radu Lotrean) and INSOL International (Adam Harris) gave very warm welcomes to all and endorsed strongly the collaboration between the two organisations. *Alastair Beveridge & Florian Joseph report.*

The panel was introduced by Derek Sach, chair of INSOL International's Lenders Group, who advised the audience about the current project, being led by Stephen Foster of Hogan Lovells, with the title "*What will next time look like?*". He referenced the historic effectiveness of the London Approach and the very extensive experience around in relation to complex restructuring but wondered how that might work given new ECB regulations and new accounting standards.

The chair of the panel, Professor John Kay (a renowned economist) started the discussion with his view on the different approaches taken to regulation in 1) financial services (written by lawyers and based on prescriptive rules and regulations) and 2) utilities (written by economists and based on structures and incentives) – he felt that the economists' approach had probably been more effective, albeit not perfect. He felt that the financial crisis in 2008/9 had demonstrated a failure in regulation and he was concerned that adding more regulation may not be the answer and may have unintended consequences.

Stephen Foster then turned the discussion to the new IFRS9 rules and the move from provisioning on incurred losses (current rules) to lifetime expected losses (new rules from January 2018). He stated that for 1 in 6 banks this would result in a predicted need of a 50% increase in capital base and that for 80% of banks it would result in higher provisions. The likely consequence was that banks would have to sell positions early (or potentially commence enforcement earlier) which would provide opportunities for secondary buyers. He also mentioned the restrictions in certain leveraged transaction documents of either white list (restricting lenders ability to sell) or need for borrower approval which might act to impede attempts to sell and result in an impasse.

Alistair Dick (PriceWaterhouseCoopers) took a slightly different tack talking about how the rules would impact companies/borrowers – he was concerned that it might actually restrict the availability of credit to companies at precisely the time they needed it most and that this could be very problematic. The inconsistent approaches in different countries to dealing with borrower and ultimately bank liquidity challenges was recognised as an issue, generally, which has continued since the crisis. Overall he felt that trading of debt positions (which was expected to be a consequence of the new rules) was a good thing for the market and would help with the recycling of capital.

The discussion reverted to regulation with Simon Samuels (Veritum Partners) – in particular the differences between the regulated and un-regulated players. He felt that banks had had more capital than they really needed pre-crisis and were now being asked to increase that substantially – he felt this was an inefficient use of capital. Concerns were raised that Basel IV with its risk weighted floor provisions meant that banks would not only be encouraged (by the rules) to sell bad assets; they would also be encouraged to sell good ones. He reminded everyone that IFRS9 was just about recognition of the losses – not about the amount of loss actually incurred – and that any dramatic event could quickly eat up capital reserves because of the way provisions would have to be accounted for from 2018.

Stephen Kirk (Pelham Capital) started boldly stating that poor regulation caused the crisis, poor new regulation was stifling recovery and that Donald Trump's newly announced Treasury White Paper on bank de-regulation was ultimately the right way to go. A combination of low interest rates, high amounts of litigation and crushing regulation has led to banks being a very bad investment in recent years – he illustrated the extent of the value destruction by comparing the values of two very large banks which were now roughly 10% of the value they previously had. Overall he felt the US was going in the right direction by proposed reductions in regulation, the UK was too

hawkish and that after many years the ECB was starting to get a grip on European banks and making good progress.

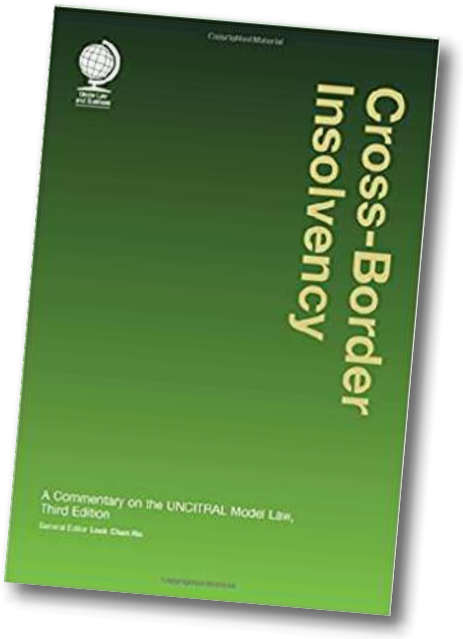
Professor Kay then talked about his concern that too many stakeholders were pretending to have a level of knowledge about the world which they just didn't have. He queried whether in reality we are being naïve about what we expect regulation to actually be able to achieve. In his view the ECB was moving away from using models (as they can only really do so much with limited knowledge, often inviting the user to start with the desired result and work backwards) but at the same time IFRS9 was moving towards more modelling use.

A vigorous discussion then took place on the purpose of banks (where the panel had differing views), concentration risk and the benefits of diversification and the potential to split banks as between mortgage lending (still a huge part of many banks and generally done OK) from commercial and consumer lending. Without conclusion and out of time the session was wrapped up after questions by Alastair Beveridge (AlixPartners and Co-Chair of the INSOL Europe Financial Institutions Group).

An audience of around 50, drawn from an extensive spread of lenders and advisers, attended the session and the drinks and canapes which were available after the session. Another successful collaboration to add to the Tel Aviv conference in June this year. *INSOL Europe and INSOL International hope to be able to organise a further joint seminar early in 2018 to continue this fascinating debate.*

Book Review:

CROSS-BORDER INSOLVENCY A Commentary on the UNCITRAL Model Law



Look Chan HO (ed.)

**Globe Business Publishing,
4th edition, 2017,
968 pages (in 2 volumes),
ISBN 978-1-911078-21-0, £295**

The UNCITRAL Model Law on Cross-Border Insolvency 1997 (the "Model Law") has now reached the ripe old age of 20. It forms part of an international insolvency continuum that has seen, in the past few decades, the production of the Istanbul Convention 1990, the European Insolvency Convention 1995 and the European Insolvency Regulation 2000 (recently "recast" in 2015). Unlike some other texts in this field, the Model Law itself is a relatively brief document covering four key areas: scope, rules for access, the effects of domestic recognition and, perhaps the most important, rules for co-operation and co-ordination of simultaneous proceedings. Since the Model Law first appeared, it has gained adherents at a steady pace, with major commercial jurisdictions being represented among the number, a factor that has stimulated its take up by developing and emerging states, a process also encouraged by the international institutions that have added adoption of the Model Law to the list of recommended reforms to domestic insolvency law. The latest adherent, Singapore, adopted the Model Law earlier this year, adding to the grand total of 45 jurisdictions now using the text.

This is the fourth edition of the work, which covers the changes needing to be taken on board occurring in the five years elapsing since the third edition appeared, including the coverage of new adherents to the Model Law, the voluminous case law which has accompanied the use of the text in existing adopters as well as the production by UNCITRAL of a Revised Guide to Enactment and Interpretation in 2013 intended to support states wishing to adopt the Model Law. This edition, as with the previous ones, begins with a preface and overview serving to highlight some of the background to the Model Law itself and some of the issues that have characterised the adoption of the Model Law in the jurisdictions under review. The text then follows with 21 country chapters covering nearly all of its adopters.

In each chapter, the authors contributing to this edited work, mostly drawn from the practising world with input from one or two academics, recount the process of adoption and implementation of the Model Law, detail the domestic provisions that give force to its text, including any omissions of or variations from its stipulations or practice in relation to this experienced elsewhere. They also chart any further domestic provisions that may have a bearing on the operations of the Model Law and describe any limitations to its use within the domestic context. Many of the chapters are straightforward accounts of the domestic adopting provisions with any case law fleshing out its operations being cited. In some jurisdictions, where cross-border insolvency law is still in its infancy, a recent adoption often means that there is little guidance on how the Model Law's provisions will be interpreted by the courts. In some others though, especially in the case of the United States, extensive references are included to the volume of case law that has been generated under the text and some of the more illustrative cases are analysed in some detail.

The text overall is easy to read. Key concepts are addressed in a clear and consistent fashion, given the common arrangement of the chapters. The information in the footnotes, where included, is also very useful by providing references to other relevant material. The chapters contain much detailed information, some presented in tabular form, while the text overall is completed by tables of cases, domestic legislation, European provisions and other treaties/conventions as well as Model Law provisions, all cross-referenced to the text. In the second volume, into which this work has for the first time been divided, there are two appendices containing the Model Law and both versions of the accompanying Guide to Enactment (original and revised), given the continuing authoritative status of the first of these, as well as an extensive index.

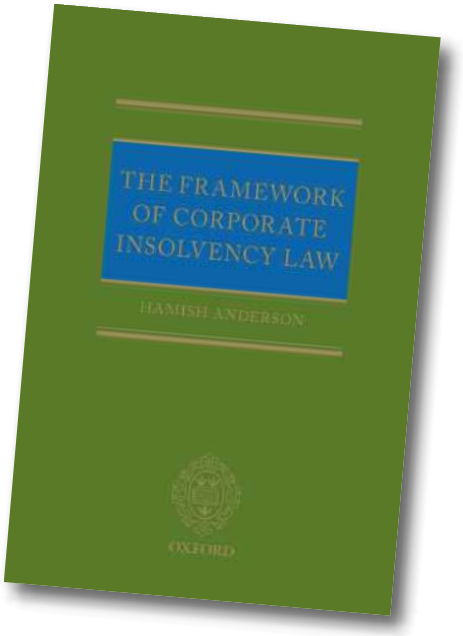
In summary, this is an invaluable reference text on how the Model Law has thus far been adopted. It serves as a useful *aide-mémoire* to the status of the text in the jurisdictions covered and is thus of great utility to a range of potential users. For these and many other reasons, the work can only be recommended as an essential component of a cross-border insolvency library.

Paul J. Omar, Technical Research Co-ordinator, INSOL Europe

If you have a new book to review or preview, please let us know and we will consider it for a future edition. Contact Paul Newson (paulnewson@insol-europe.co.uk) for more details.

Book Review:

The Framework of Corporate Insolvency Law



Hamish Anderson

Oxford University Press, 2017
1st Edition 304 pages, Hardback,
ISBN 978-0-19-880531-1, £125

Hamish Anderson has written this book at the end of his long career in private practice during which he specialised in corporate insolvency and restructuring matters. In the preface, he describes the book as neither a textbook nor a reference book, but complementary to both in that it considers the concepts that lie behind the current law.

The book is wide ranging in its coverage. It begins with a consideration of the policy that lies behind insolvency law and its objectives, recognising the balance that has to be maintained between providing terminal procedures and procedures that will enable the rescue of viable businesses, even if only in part. Anderson recognises a number of areas where reform may be beneficial, one example being a rationalisation of the different insolvency procedures, on the basis that several achieve the same outcome. His analysis of case law, both in a UK and cross-border context, is excellent throughout. He provides interesting insights and commentary on a number of issues such as the role of company voluntary arrangements, pre-packs, the nature of transaction avoidance and the ranking of claims.

The book has a clear structure and is well written. Its concise style and short chapters make it accessible to the reader. It is up to date, reflecting the recent legislative changes to both UK and EU insolvency law and brings a wealth of experience to the discussion.

It is this, coupled with the depth of its coverage, that makes this an invaluable text for academics and practitioners alike.

Dr Paula Moffatt, Reader in Law, Associate Professor, Centre for Business and Insolvency Law, Nottingham Law School, Nottingham Trent University, UK

Book Preview:

The Bankruptcy Reform: A guide to law 155/2017

On 11 October 2017, the Italian Senate approved the law delegating the Government to reform the existing bankruptcy law, dating from 1942. This new book by Giorgio Cherubini analyses the main change represented by the introduction of an alert procedure to prevent the risk of default when it is still possible.

The term 'bankruptcy' disappears from the Italian law and is replaced by the term "judicial dissolution"; the receiver takes the leading role in the new proceedings, with greater powers than the current ones and is the one who can file the claims currently handled by the shareholders and the creditors.

The alert phase can be activated directly by the debtor or by the court and in the first case the entrepreneur who promptly activates the alert or takes advantage of other *ad hoc* proceedings for the amicable conclusion of the crisis will enjoy judicial benefits.

When examining the proposals, priority is given to those that grant business continuity, as long as they function to the best of the creditors' satisfaction, considering the judicial dissolution as an *extrema ratio*. The procedure aims to reduce the duration and cost of the insolvency procedures by giving more power to the management body.

ISBN: 978-88-916-2596-0
https://www.maggiolieditore.it

Responses to the proposed directive

EMMANUELLE INACIO
INSOL Europe Technical Officer

Emmanuelle Inacio summarises some of the feedback to the European Union's legislative process on preventive restructuring frameworks

> THE PROVISIONS OF THE PROPOSAL LIMITING THE CIRCUMSTANCES IN WHICH A PRACTITIONER IN THE FIELD OF RESTRUCTURING MAY BE APPOINTED ARE AMENDED

As a reminder, on 22 November 2016, the European Commission has presented a 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[1] (the Proposal).

By letter of 23 November 2016, the European Commission transmitted the Proposal, which is subject to the ordinary legislative procedure, to the Council and the European Parliament.

The **European Economic and Social Committee** (EESC), which is the voice of the organised civil society in the EU, delivered its opinion on 29 March 2017[2]. If the EESC supported the Proposal, this consultative body would prefer to see the proposal take the form of a regulation and not be afraid to move towards the maximum possible harmonisation of current systems. The EESC insisted that an obligation on for the company management to inform and consult employees prior to and during negotiations be formally specified in the Directive.

In particular, greater attention should be given to the workers' interests during the early restructuring phases, and similarly, during the insolvency proceedings, explicit reference should be made to Article 5(2) of Directive 2001/23/EC[3] in order to protect the workers' rights in this context. Finally, the EESC recommended that the Directive incorporate the key principle of guaranteeing the status of all the workers as priority creditors in all Member States.

Even if it has not been consulted on the proposed Directive, the **European Central Bank** (ECB) delivered its opinion on 7 June 2017[4], considering that the proposed Directive falls within its scope of competence. Although the proposal introduces a number of highly relevant minimum harmonisation measures for existing restructuring frameworks, the ECB considered it does not take a holistic approach towards harmonising insolvency laws across the Union, including both restructuring and liquidation, nor does it attempt to harmonise core aspects of insolvency law such as:

(a) the conditions for opening insolvency proceedings;
(b) a common definition of insolvency;
(c) the ranking of insolvency claims; and
(d) avoidance actions.

While the ECB fully recognises the considerable legal and practical challenges that developing a holistic approach would involve, due to the far-reaching changes to commercial, civil and company laws that would need to accompany such an endeavour, more ambitious action needs to be undertaken to lay a common ground for a substantive harmonisation of Member States' insolvency laws, thus ensuring a more comprehensive harmonisation in the long term and contributing to a well-functioning Capital Markets Union.

The **European Parliament's Legal Affairs Committee** (JURI) appointed Angelika Niebler (EPP, Germany) as rapporteur and she presented her draft European Parliament Legislative Resolution (Draft Resolution) on the Proposal to the Council on 25 September 2017 containing 85 amendments[5]. 296 amendments to the Draft Report have been tabled on 16 November 2017[6].

The Proposal introduces an obligation for all Member States to ensure that, where there is a likelihood of insolvency, debtors have access to a preventive restructuring framework that enables them to restructure their debts or business and to benefit from a stay of individual enforcement actions if, and to the extent that, such a stay is necessary to support the negotiation of a restructuring plan. The Draft Resolution proposes a definition of "likelihood of insolvency" that means a situation in which the debtor is not insolvent according to the national law, but in which there is a real and serious threat to the debtor's future ability to pay the debts as they fall due.

Regarding the role of the practitioner, the provisions of the Proposal limiting the circumstances in which a practitioner in the field of restructuring may be appointed are amended. Indeed, the Draft Resolution requires that the Member States should provide that the supervision of a restructuring procedure by a practitioner in the field of restructuring is mandatory. Moreover, the Draft Resolution adds that all Member States shall require the appointment of a practitioner in the field of restructuring at least: (a) where the debtor is granted a stay of individual enforcement actions;

(b) where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down; (ba) where it is requested by the debtor or by a majority of the creditors.

Similarly, the provisions of the Proposal limiting the involvement of a judicial or administrative authority to where it is necessary and proportionate are not mandatory in the Draft Resolution.

The Proposal allows a cross-class cram-down mechanism if the restructuring plan is not supported by the required majority in each class of affected parties, leading to a dissenting voting class. In the case of a cross-class cram-down, the restructuring plan must always be confirmed by a judicial or administrative authority. The cross-class cram-down mechanism is subject to a number of minimum harmonised requirements in order to ensure that the rights of the parties involved are appropriately protected.

This means that the plan must be supported by at least one class of affected creditors, and dissenting voting classes must not be unfairly prejudiced under the proposed plan. The Draft Resolution proposes the plan must be supported by the majority of classes. The Member States also have the option of increasing the minimum number of classes required to support the plan "to the extent that that minimum number covers still the majority of classes", adds the Draft Resolution.

Regarding the question of maximum duration of stay, the Proposal requires the Member States to allow the debtor to apply for a general or limited stay of individual enforcement actions to support the negotiations of a restructuring plan of up to 4 months, which can be extended or renewed for up to 12 months by the judicial or administrative authorities, precluding the opening of insolvency proceedings, security enforcement, and any contractual rights of termination or acceleration. The Draft Resolution and amendments require that the maximum duration of stay goes from two months extended or renewed up to 18 months.

Regarding the rules to provide a second chance for entrepreneurs, the Proposal states that the Member States are required to ensure that honest over-indebted entrepreneurs may be fully discharged from their debts after maximum three years and have the benefit of short disqualification orders without the need to re-apply to a judicial or administrative authority. The Draft Resolution states that the period of time after which over-indebted entrepreneurs may, for the first time, be fully discharged from their debts after they have undergone an insolvency procedure shall be no longer than three years. Some amendments propose to extend this period to five years.

On his notes of 23[7] & 30[8] November 2017, the Presidency invited the Coreper/Council (Justice and Home Affairs) to discuss whether they can agree to extending flexibility for the Member States by providing them with an option to introduce or maintain a viability test under national law, provided that the assessment has the purpose to exclude debtors with no prospect for viability and can be carried out without detriment to the debtor's assets.

The Council was invited to agree on the principle that, where there is more than one class of affected parties participating in the adoption of the restructuring plan and the required majority is not reached in one or more voting classes of affected parties, the restructuring plan may still be confirmed by a judicial or administrative authority, provided that the requirements for such cross-class cram-down, as agreed during future discussions at technical level, are met. This is without prejudice to the outcome of the future discussion on class formation at technical level.

The Council was also invited to discuss whether they can agree that there should be a harmonised discharge period of up to three years, subject to limitations in cases where such a discharge or discharge period is not deemed to be appropriate.

The **Committee on Employment and Social Affairs** (EMPL), a Committee of the European Parliament, which delivered its opinion on 5 December 2017, also shared that a matter of concern of the Proposal is the fact that workers employed in companies are, as creditors, being placed on the same footing as banks or any other equity holders[9]. The **Committee on Economic and Monetary Affairs** (ECON), which delivered its opinion on 7 December 2017[10], emphasizes inter alia on the need to provide specific support to SMEs in the Directive.

On 7 & 8 December 2017, the Council held a debate on the European Commission's Proposal[11]. Ministers focused on the viability of the topics of viability of the debtor, the cross-class cram-down mechanism and on the second chance for honest entrepreneurs.

In some aspects there was a certain common ground, but further work at technical level is needed to address the concerns expressed, in particular on the cross-class cram-down and the discharge period.

To be continued… ■

Footnotes:

1 http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50043
2 http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A52016AE6275&from=DE
3 http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32001L0023
4 http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX%3A52017AB0022&from=DE
5 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-610.684+01+DOC+PDF+V0//EN&language=EN
6 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-613.399+02+DOC+PDF+V0//EN&language=EN
7 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL%3AST_14734_2017_INIT&from=EN
8 http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL%3AST_15201_2017_INIT&from=EN
9 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-601.220+05+DOC+PDF+V0//EN&language=EN
10 http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+COMPARL+PE-608.079+02+DOC+PDF+V0//EN&language=EN

FURTHER WORK AT TECHNICAL LEVEL IS NEEDED TO ADDRESS THE CONCERNS EXPRESSED, IN PARTICULAR ON THE CROSS-CLASS CRAM-DOWN AND THE DISCHARGE PERIOD

Share your views!

Sunset on Insolvency? Preventive restructuring in the spotlight at Warsaw

Paul Omar reports on the 36th Annual Congress in Poland

PAUL OMAR
INSOL Europe
Technical Research Officer

The brave new world foretold by Aldous Huxley was on show in Poland at INSOL Europe's annual conference. Modestly subtitled "Sunset on Insolvency", the presentations collectively hinted at a shift in the conception of and approach to the way in which insolvency, restructuring, turnaround and like terms are viewed.

From the outset, the keynote theme in the sessions was one of modernity and change. "Embrace it or perish" was the oft-repeated mantra. While outside the weather was inclement, on Friday morning indoors the light was firmly shining on the latest highlights in the world of insolvency. A fulsome introduction from the first of two keynote speakers, Professor Grzegorz Kołodko, on the need to be mindful of the interconnectivity of law, politics and society, provided a thoughtful beginning to the conference, while the moderation of events led by Sally Bundock of the BBC never failed to lift spirits and keep the material flowing.

> FROM THE OUTSET, THE KEYNOTE THEME IN THE SESSIONS WAS ONE OF MODERNITY AND CHANGE

Place of honour

In place of honour on the programme, the Draft Directive on, *inter alia*, Preventive Restructuring (and hence the conference caption), received the attention of speakers drawn from the membership of the Expert Group, whose travails in 2016 led to its drafting. Michał Barłowski, Michael Veder and Nora Wouters led the audience through a discussion of the highlights of the text, still considered a work in progress, particularly as the anticipated date of enactment may not be till mid-2018 at the earliest. By contrasting the text with analogous domestic law processes in some Member States that have already anticipated the move towards such preventive procedures, the panel were able to give examples of differences in the way solutions have been found for critical issues such as the automatic stay, cram-down, plan voting, court supervision as well as dealing with the complexities of groups.

The summary of views on the text was that it formed a good attempt at capturing the latest insolvency phenomenon representing a move towards more upstream treatment of financial restructurings. However, the text does need more fine-tuning to be able to ensure it remains relevant given likely practice developments.

The session that followed also sought to anticipate, this time the changes in both political and legal processes consequent on the Brexit vote and what it may mean for cross-border restructurings. This was underlined in the context of a fictional case study that proceeded on the basis of the worst case scenario positing that no text will govern the relationship between the United Kingdom and the European Union at the time of Brexit.

While the assumptions appeared unpalatable, the principle of "hope for the best, prepare for the worst" was very much in evidence in the responses the panel (Chris Laughton, Giuseppe Scotti and Annerose Tashiro) gave to the development of individual jurisdiction-based responses to the problem. The impression the panel gave was that, while the political outcome continues to be fluid and unpredictable, already

Professor Grzegorz Kołodko delivered his keynote speech to a packed house on the first day

Sally Bundock of the BBC opened proceedings and kept the material flowing

Chris Laughton discussing Brexit and what it may mean for cross-border restructuring

practitioners are having to be creative in crafting adaptable and flexible structures to respond to a range of situations that might emerge as part of the final settlement. This hopefully will contain some measure useful for cross-border restructurings, thus avoiding recourse to the deficiencies of classic private international law rules that are not uniform between jurisdictions.

Following on from this thought-provoking debate, the break-out sessions kept delegates entertained before lunch by considering the transition from what is the present practice environment to what may be its future with panels featuring experts from Italy, the Netherlands, Spain, Sweden, Romania, the United Kingdom and the United States. Topics as diverse as insolvency issues surrounding the supply chain and DIP-financing fuelled the debate surrounding innovations in practice now developing into the norm.

In these two panels in particular, the flavour of discussions was decidedly practical, dissecting what happens in relation to credit extensions, sales in the insolvency zone, payment default remedies as well as developing issues connected to DIP financing, such as conditions for access as well as any available alternatives.

The remaining two sessions focused on the future shaping of insolvency law and featured sessions on the influence of Chapter 11 on the Draft Directive as well as comparisons with reform proposals already afoot in the United Kingdom. These sessions had a very comparative legal flavour to them with the panels also raising topical points on the importance of procedural propriety and the spectre of abuse of processes as issues stimulating concern within law reform agendas. Moreover, members of both panels made cogent recommendations for improvements to the text.

Keeping things practical

The afternoon returned to considerations of the immediate future, given the recent entry into force of the Recast EIR and the likely finalisation of the Draft Directive as it reaches a critical point in the legislative process. Here, the accent was on keeping things practical, as a mixed panel of academics, practitioners, judges (Reinhard Bork, Stan Brijs, Christina Fitzgerald, Bartosz Groele and Rimvydas Norkus) placed the emphasis on keeping abreast with the information and, particularly, the case-law as it starts to respond to the innovations of the Recast text.

Although the terms of the instrument are now universally well-known, the speakers on the panel cloaked the text in very practical flesh by guiding the audience through major critical issues arising from a simulated case study, including the scope of the text, its jurisdictional rules, the position of secondary proceedings, information and publicity requirements as well as the question of the new-style group coordination proceedings.

The consensus here was that the text, in seeking to absorb the lessons of experience of its predecessor and provide some innovation reflecting changes in practice, has in turn created new challenges that must be met by more adjustments to the practice environment.

Continuing the conference theme, the second afternoon session, reporting back on the Turnaround Wing Project on the Draft Directive, dissected some of the impediments in national law to successful implementation of the proposal. Echoing some of the earlier discussion in the morning, the panel speakers (Alberto Nuñez-Lagos, Catherine Ottaway, Robert van Galen and Wolf Waschkuhn) suggested that the Draft Directive text represented

> **THE BREAK-OUT SESSIONS KEPT DELEGATES ENTERTAINED BEFORE LUNCH BY CONSIDERING THE TRANSITION FROM WHAT IS THE PRESENT PRACTICE ENVIRONMENT TO WHAT MAY BE ITS FUTURE**

Plenty of opportunity to network and make new connections

Cezary Stypułkowski launching the second day with his keynote speech on the rise and fall of Polish banking

> **THE EMPHASIS IN THE SESSIONS ON THE SECOND DAY OF CONFERENCE WAS FIRMLY ON LOOKING FORWARD**

an attempt to mediate between different philosophies and approaches to restructuring across member states.

As it was undesirable for Europe, as a whole, to be without a competitive restructuring framework, a critical element in group reorganisations and rescues, the text should be introduced as swiftly as possible. However, there is also a need to avoid divergences in the way the text is subsequently implemented, which might require some fine-tuning of its contents to anticipate the diversity of the domestic law positions in the member states.

Following a brief promotion of the revised INSOL International Principles on Multi-Creditor Workouts, the final session of the day reviewed group insolvencies and the latest in news and views from the coalface on how the Recast EIR's chapter dedicated to the group phenomenon might actually be made to work. Here, the contributions of speakers from Germany, Poland, the Netherlands and Switzerland gave an understanding of how individual country approaches to the group phenomenon, more developed historically in the German-speaking world, contributed to the inclusion of the framework in the Recast text and also the difficulties for some member states in conceptualising the way such frameworks might operate.

Adam Harris of INSOL International

Looking forward

In a way, the final thoughts of the Friday afternoon set the scene for what happened on the Saturday. Led by the second keynote speaker, Cezary Stypułkowski, who charted the rise and fall of Polish banking and the business environment, the emphasis in the sessions on the second day of conference was firmly on looking forward. Leading the agenda out was a finely honed technical analysis in the form of a case study on the workings of preventive restructuring frameworks generally seen through the lens of a number of different national systems.

Speakers from Austria, Germany and Poland highlighted some crucial differences currently existing and how these might be alleviated or exacerbated were the Draft Directive text introduced in its present form.

Again continuing the theme already explored in both main conference and breakout sessions, speakers suggested practical steps that could be explored in practice to ensure the operation of the text as well as possible amendments to its terms that could be explored if the legislative schedule permitted.

Following the mid-morning break, sessions on technology and

Share your views!

Robert Hänel presenting on preventive restructuring frameworks

The stunning Gala Dinner entertainment left guests with a warm glow on a cold evening

Sally Bundock kept the schedule on track despite many lively discussions

the issue of the interconnectivity of insolvency registers (key to gaining access to information) showed that the future was to be digital. Changes would undoubtedly come, both panels thought, in not just adaptations to practice, but also in the conceptualisation of what will form the insolvency environment in years to come. A coda on pre-packs, an ever-timely reminder of how practical conferences are, concluded the programme for the day before the envoi from Steffen Koch who also formally introduced his successor, Radu Lotrean, to the membership.

Sunset on proceedings

A free afternoon then beckoned for some delegates with a final chance to explore Warsaw and its diverse architectural styles. The Gala Dinner, always a highlight of the conference weekend, took place at the (very appropriate in light of the morning's theme) Warsaw Technological University. The atrium, which also contains a memorial to Marie Curie, one of its celebrated alumnae, was the focus of a night of entertainment, both traditional and innovative. Thus, the final sunset on events in Warsaw occurred. Until Athens next year! ■

"I was a first-time attendee at the Annual Congress in Warsaw.

I was thoroughly impressed by the high turnout and enthusiasm exhibited at the event. The topics addressed by the various panels and speakers were thought provoking and cutting edge. I felt as if I was getting a real good insight into the future of the insolvency practice in the European theatre on a real time basis.

If you are looking to mingle, network and learn from arguably the highest concentration of European insolvency professionals at one setting, then INSOL Europe's Annual Congress is the place to be. If my travel schedule permits, I am looking forward to attending the conference next year in Athens."

Lynn Harrison 3rd, Partner Curtis, Mallet-Prevost, Colt & Mosle LLP

> **SESSIONS ON TECHNOLOGY SHOWED THAT THE FUTURE WAS TO BE DIGITAL**

More photos from Warsaw can be viewed on our website: www.insol-europe.org/gallery

Academic prelude to a Conference

Paul Omar and Jennifer Gant report on the 13th Academic Forum Conference

PAUL OMAR
INSOL Europe
Technical Research Officer

JENNIFER GANT
Chair, YANIL

Share your views!

13: Unlucky for some, but not for the Academic Forum, whose 13th annual conference was staged in Warsaw this year.

The city, home to Frédéric Chopin and Marie Curie, welcomed the academics under skies heavy with the autumn rain. The overall theme of the occasion was "**The Rise of Preventive Restructuring: Challenges and Opportunities**", taking into account the publication, less than a year ago, of the EU Draft Directive on Preventive Restructuring.

Of course, contemporary events were also featured, such as the spectre of Brexit and the perennial topics of business rescue and preservation of employment, all set against the background of the draft text, still going through the long legislative process at the time of printing.

Comparative law, social policy

The first day revolved around a combination of comparative law and social policy. Jennifer Payne (Oxford) presented a paper, co-authored with Janis Sarra (British Columbia), offering an insight into how Canadian and US practice did or did not resemble the proposals put forward in the draft directive, while Rolef de Weijs (Amsterdam) highlighted a particular worry about the possibility of abuse in the context of DIP-financing.

Jennifer Gant (Nottingham Trent) raised the issue of how social policy concerns motivating the production of the draft directive could be squared with the text, especially in light of the challenges for cross-border organisation laid down by Brexit. A further paper around this theme by Rick Aalbers (Leiden) questioned whether the data actually bore out the claims for employee retention posited by strategic bankruptcy filings, using the example of the Netherlands. In between, Leonie Stander (NWU Potchefstroom) compared how South African business rescue measured up against the European initiative.

Workpacks for all delegates

American perspective

The comparative and international flavour of the first day's sessions was returned to in the Shakespeare Martineau Lecture that concluded the day, given this year by Bruce A. Markell (Chicago Northwestern), which closed the loop opened by Jennifer Payne and Janis Sarra, by speaking from an American perspective about the draft directive and whether it was likely to match the aspirations it appears to contain. The detailed analysis here of law and practice amply justified Professor Markell's reputation as a noted expert in American insolvency law. A reception and dinner ended the day overall with the opportunity to network, to catch up with old friends and to absorb the lessons of the day over a few convivial drinks.

Bright young things

On the second day, bright and early, the Young Academics' Network in Insolvency Law (YANIL) kicked off the crowded agenda with a trio of papers showcasing the diverse and innovative research being carried out by younger scholars across

Delegates paid close attention to the diverse presentations

Europe. Margarita Khrapova (Moscow State) talked of reforms of the bank resolution regime in Russia set against developments in the economy, while Niels Pannevis (Radboud Nijmegen) delved into his doctoral research to draw a picture of the (woeful) position of subordinated creditors in insolvency proceedings. Ending the session, Ilya Kokorin (Leiden) spoke of recent developments aimed at minimising exposure to liability in financially distressed companies.

Choice and risk

The morning continued with presentations on the functioning of the Recast EIR thrown into relief by the draft directive, Nicolò Nisi (Martin Luther University) choosing to discuss the new "Group Coordination Proceeding" and how the two texts might function in tandem as far as group structures are concerned, while Tomáš Richter (Prague Charles) analysed the issues surrounding non-liquidation type secondary proceedings and their continued utility.

Ending this session, Paul Omar (De Montfort) gave a view on the choices facing cross-border restructurings in the face of Brexit-related risks, the theme of risk being returned to in the Shakespeare Martineau Practitioners Forum, presented this year by Christina Fitzgerald and Tania Clench (Shakespeare Martineau), that closed the day focusing on the abuse within preventive restructuring schemes.

With a farewell by Michael Veder (Radboud Nijmegen), the academics were sent on the way to enjoy the sights of Warsaw and ponder on the future role of preventive restructuring as part of the insolvency toolkit. ■

"It was a great experience to participate in the INSOL Europe Academic Forum Conference.

Not only was it my first time attending such a high-profile insolvency related event, but also the time to present my research and share ideas about the challenges and opportunities brought up by the rise of the business rescue culture in Europe.

Thought-provoking discussions, practical and academic insights, views from various jurisdictions and, of course, the rather homelike atmosphere of Warsaw, all made this experience unforgettable.

The most valuable outcome of the Forum for me is the expanded network of like-minded professionals and the desire to write and innovate."

Ilya Kokorin, Lecturer, Leiden University, The Netherlands

"THE YOUNG ACADEMICS' NETWORK IN INSOLVENCY LAW KICKED OFF THE CROWDED AGENDA WITH A TRIO OF PAPERS SHOWCASING THE DIVERSE AND INNOVATIVE RESEARCH BEING CARRIED OUT BY YOUNGER SCHOLARS ACROSS EUROPE"

Christina Fitzgerald presenting the Shakespeare Martineau Practitioners Forum

"One Belt, One Road": Promoting cross-border insolvency cooperation in China

Bingdao Wang explores the opportunities arising from the "One Belt, One Road" initiative in China

Bingdao Wang is the winner of the 2017 Richard Turton Award.

Bingdao is currently a third year PhD candidate at University of Leeds, UK. His research focuses on the development of cross-border insolvency law in developing countries and explores how experiences from Europe and other developed jurisdictions would help the imperative insolvency system reforms in emerging markets.

Bingdao was invited to the Annual Congress in Warsaw to receive his award.

An abbreviated version of his award winning paper is presented here. The full version and further information about the award can be found on line at www.insol-europe.org/richard-turton-award

Share your views!

The "One Belt, One Road" Initiative (the Initiative) is one of the most important foreign policies that the Chinese government has been actively promoting since 2013.

"One Belt" refers to the "Silk Road Economic Belt", which was based on the historical trade routes through Eurasia region. "One Road" refers to the Maritime Silk Road, which focuses on linking China with Europe through the Pacific Ocean. The areas proposed by the Initiative would cover about 70% of the world population and 55% of the global GDP.[1] With the expansion of the Initiative, cross-border legal issues have attracted more attention. This article is trying to explore the cross-border insolvency issues associated with the development of the Initiative and to underline that it is necessary to develop a multilateral guidance for effectively solving cross-border insolvency issues among participating countries.

The nature of the Initiative

The proposed Initiative is trying to encourage international cooperation in different areas, including trading, investment, infrastructure and energy. The uniqueness of the Initiative is that it does not try to achieve geopolitical integration among countries; the cooperation is based on policy communication and objective coordination, so it will be an open and flexible process.[2] More importantly, the Chinese government also made it clear that, in order to benefit wider areas, the ambitious plan is not limited to the area of the Silk Road, but it is open to all the countries and international and regional organisations for engagement.[3]

Bingdao Wang receiving his award from Marc Udink at the Gala Dinner in Warsaw

Specifically, the Initiative focuses on five tasks, which are policy communication, the connectivity of infrastructure construction, facilitating investment and trading, improving financial cooperation integration and people-to-people communication.

One difficulty that many Western commentators are facing is how to define the Initiative proposed by China.[4] Especially from the legal point of view, it is difficult to give it an appropriate conceptual analysis.[5] Some argued that the purpose of the Chinese government is to build a regional economic integration.[6] However, the action plan also emphasised that the free flow would be achieved through in-depth regional economic cooperation and policy coordination; so it would be an open and flexible economic system balancing the different countries' benefits.[7]

The fact that the Initiative is open to all countries or organisations to join also illustrates it is beyond regional or other boundaries. Additionally, there are no conventional arrangements or conventions for countries to sign under the Initiative, and in-depth governmental cooperation would be achieved through making full use of the existing agreements at bilateral, regional or multilateral levels. Based on those special factors, the "One Belt, One Road" Initiative should be defined as a new model of global governance.[8] This new model explores new methods of international cooperation at a more integrated level.[9]

The Initiative and cross-border insolvency

As noted by the Supreme People's Court in Opinions on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road", "to establish the international cooperation system, rule by law is an important safeguard and judicial assistance is

indispensable."[10] Specifically, since one of the priority is to facilitate investment and trade among the involved countries, it is foreseeable that commercial and investment activities would experience a significant growth with conditions such as lower trading barriers and better supporting policies. As a result, the demand for cross-border dispute solutions is bound to increase. Therefore, the Supreme Court further noted that building an effective system for solving cross-border legal issues is essential for the Initiative, which should eliminate legal uncertainties and promote commercial stability.[11]

Currently, most Asian countries are still applying the traditional territorial approach to solve cross-border insolvency issues. Some countries have addressed cross-border issues under the domestic insolvency system, but those laws usually have some limitations in practice. For instance, under the Chinese insolvency system, the recognition of foreign proceedings will be decided based on the existence of the principle of reciprocity or bilateral agreement between China and the foreign country.[12] However, among those countries covered by the Initiative, only one-third of them has signed bilateral agreements on judicial assistance and judgment recognition with China and some of those agreements do not cover insolvency issues.[13]

The application of reciprocity largely depends on whether the foreign courts have recognised similar Chinese cases before. Those bilateral approaches only can provide solutions for issues between two countries, so they do not have any regional or international effects. Since the Initiative is trying to develop a free trading network between the involved countries, it needs an effective and harmonious cross-border insolvency standard that could be accepted by the participating jurisdictions. The Chinese Supreme Court recommended that in order to create a better trading environment China should be more active in establishing and promoting relevant international rules.[14]

It would be a challenging job to develop an international cross-border insolvency regime since such a system would need to balance all different legal systems and legal cultures. So far, the most successful international experiences for establishing cross-border insolvency systems are the UNCITRAL Model Law on Cross-Border Insolvency and the EU Insolvency Regulation.[15] Both regimes were established based on the concept of modified universalism. The UNCITRAL Model Law has been recognised as an effective and acceptable system that can be adopted by different legal systems.[16] However, the Model Law has not been very popular among Asian countries. Currently only three Asian countries (Japan, South Korea and Singapore) have adopted the UNCITRAL Model Law.[17] Compared with the flexibility of the Model Law, the EU Insolvency Regulation has more binding features among Member States. Under the Regulation, the rules for jurisdiction and the choice of law are relatively clear, and the automatic recognition among all Member States makes multinational insolvency more efficient.

It is no doubt that a multilateral system like Europe's insolvency regime is preferred for the economic system proposed by the Initiative. But it would be extremely difficult to achieve such a regime among the participating countries. Firstly, the European Union is a highly-integrated political organisation, so that the operation of its insolvency regulation is supported by unified legal and political agreements among all Member States. As mentioned above, the Initiative is trying to promote a flexible free-trading network and not a common market, and there are no binding agreements to be signed by participants. Secondly, another factor to consider is that most of the Asian countries covered by the Initiative are at very different stages of development in terms of insolvency law. Many of them do not have a well-established insolvency system or experiences dealing with cross-border insolvency cases. So the diversities would be too huge to let a unified law operate.

Since neither of the international regimes can be directly applied to the Initiative, it is suggested that a Cross-Border Insolvency Guidance Manual should be developed to establish main principles for effectively solving cross-border insolvency issues. The nature of the guidance would be a soft legal tool able to facilitate the treatment of multinational insolvency cases among the countries covered by the Initiative.

The contents of the Guidance Manual should include a series of legal principles and suggestions, which should be borrowed from the UNCITRAL Model Law and the EU Insolvency Regulation. For example, a general solution should be established, based on modified universalism, and it should focus on recognition of foreign proceedings and cooperation among relevant parties and courts. In order to achieve that, the concept of centre of main interests (COMI) should be introduced in order to define different types of insolvency proceedings. The ways of communication and assistance among courts also should be included. Also, a court decision made on the basis of those principles should be respected by the other participating countries' courts. The soft nature of the Guidance Manual must be consistent with the objective of the Initiative. If a country is willing to join the Initiative for the purpose of seeking common benefits, it should also be willing to follow the legal guidance. ■

MOST ASIAN COUNTRIES ARE STILL APPLYING THE TRADITIONAL TERRITORIAL APPROACH TO SOLVE CROSS-BORDER INSOLVENCY ISSUES

Footnotes:

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16 S. Chandra MOHAN, "Cross-border Insolvency Problems: Is the UNCITRAL Model Law the Answer?" (2012) 21 (3) International Insolvency Review 199
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The complex landscape of Nordic Forum Shopping

The Nordic legal landscape with regard to cross-border insolvency proceedings has become significantly more complex over the last decade or so, as the authors explain

> REGIONAL UNIFORMITIES ARE BEING SUPERSEDED BY SUPRA-NATIONAL COLLABORATIONS ON A MUCH FARTHER-REACHING SCALE

Denmark, Norway, Sweden, Finland and Iceland are often referred to as 'The Nordics' seeing as they are, in most metrics, quite similar; the languages are mostly similar, the historic throwbacks are nearly identical, and the legal backdrop is largely uniform due to longstanding and widespread coordination efforts between the varying governments.

In 1933 the 'Nordic Bankruptcy Convention' entered into force, providing a legal framework for cross-border recognition and enforcement of bankruptcies between the participating countries (Denmark, Sweden, Norway, Iceland and Finland). The scope of the convention is limited to bankruptcies and compulsory arrangements with creditors, the latter of which no longer exist in all the participating countries.

The regional uniformities are, however, being superseded by supra-national collaborations on a much farther-reaching scale, e.g. the European Union. Denmark, Sweden and Finland are members of the EU, but Norway is only part of the European Economic Community. Furthermore, due to its opt-outs, Denmark is not part of the EU Justice and Home Affairs cooperation and therefore the European Insolvency Regulation ('EIR') does not apply to Denmark (and the request for a parallel agreement has been declined or at least sidelined pending the Brexit negotiations).

The Scandinavian legal landscape with regard to cross-border insolvency proceedings has therefore become significantly more complex over the last decade or so. Denmark and Norway have no automatic

recognition of foreign insolvency proceedings in place, and vice versa (apart from Scandinavian bankruptcies), and there is no automatic stay of enforcement for such foreign proceedings, either.

The recast EIR grants jurisdiction to open (main) insolvency proceedings in the courts of the Member States where the debtor has its center of main interest ('COMI', as explained further below) and confines the other Member States to opening secondary proceedings, provided the debtor has assets there. It also lays out more or less specific guidelines/ requirements for cooperation between the insolvency courts and insolvency practitioners in the various Member States, and it allows for the appointment of an independent coordinator of insolvency proceedings regarding groups of companies.

The Nordic Bankruptcy Convention, on the other hand, does not specifically address the matter of international jurisdiction and, instead, merely states that "*If bankruptcy proceedings are opened against a debtor in one contracting state, they will also encompass the debtor's assets in the other states.*", cf. Article 1 of the Convention. The Convention, therefore, relies entirely on national jurisdiction regulations and widens the scope of those regulations to also encompass the other Nordic countries on the proviso that the business had its 'seat' in the state opening the proceedings (without providing any guidance on how to determine the location of that seat). The Convention therefore relies on a single, regional, type of insolvency proceedings instead of main and secondary proceedings in each contracting state. This regional use of *lex concursus,* however, is limited to insolvency-related matters like the filing and adjudication of claims, waterfall priority, claw back, announcement in each state's official gazette etc. whereas, for instance, rights *in rem* follow *lex rei seitus*.

Danish and Norwegian Insolvency courts will claim jurisdiction if the debtor's habitual place of business is located in Denmark or Norway, respectively.

Norwegian Insolvency law is, however, rapidly moving towards adopting the concept of COMI in determining jurisdictional issues. This process is now formalised by adding a new chapter to the Norwegian Bankruptcy Act, which is expected to enter into force later this year. The new Norwegian legislation also introduces the concept of secondary insolvency proceedings, which will enable the opening of limited bankruptcy proceedings against foreign companies operating in Norway, essentially mirroring the possibility for secondary proceedings under the recast EIR.

Finland and Sweden are bound by the recast EIR and their insolvency courts will have jurisdiction to open main insolvency proceedings if the debtor's COMI is situated in Finland or Sweden, respectively.

Can international recognition be established?

This Danish and Norwegian lack of reliance on the debtor's place of its registered office raises the question of whether the Nordic Bankruptcy Convention can be used as a vehicle to obtain the otherwise lacking international recognition of Danish or Norwegian insolvency proceedings and to obtain an EU-wide stay of enforcement proceedings against the debtor's foreign assets.

The EIR(r) concept of COMI should be an established (although slightly vague) concept by now, being the place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties, cf. EIR(r) article 3(1). The EIR(r) provides specific rebuttable presumptions regarding the COMI for legal persons and natural persons, both individuals exercising business activities and private individuals, but according to Recitals 23-34 the aim of the regulation is not to hinder COMI-relocations (i.e. 'Forum Shopping') per se, but only to curtail fraudulent or abusive relocations.

Therefore, the EIR(r) certainly accepts that bankruptcy proceedings can be opened in one member state against a company even though the place of that company's registered office is located in another state.

With Norway moving towards this same concept of COMI, the jurisdictional issue is rapidly becoming a non-issue in relation to Norwegian businesses. Danish jurisdiction regulations, however, rely on the debtor's habitual place of business (or residence in case of non-business natural persons), which at best could be construed to be a quasi COMI-like rule.

Therefore, the requisite alignment between the different Nordic countries' jurisdictional regulations seems possible, which could allow for beneficial COMI-relocations.

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> THERE IS NO COMPLETE OVERLAP BETWEEN THE RECAST EIR AND THE NORDIC BANKRUPTCY CONVENTION

What would the specific purpose of such relocations be, seeing that the Nordic insolvency regimes are already quite similar?

As Danish and Norwegian insolvency practitioners will tell you, there are two very significant shortcomings to Danish and Norwegian cross-border insolvency proceedings which all claim to have universal effect. There are (i) no guarantees of international recognition, and (ii) no automatic stay of enforcement against assets located in other jurisdictions, unless such jurisdictions offer unilateral recognition on their own accord, i.e. Germany, Belgium, Spain and Finland.

If it is possible for a Danish or Norwegian company to "seek safe harbor" under Swedish or Finnish jurisdiction, that would activate the recast EIR, including the automatic EU-wide recognition and stay of enforcement proceedings. The Swedish/Finnish insolvency proceedings would also enjoy automatic recognition throughout the Nordics by virtue of the Nordic Bankruptcy Convention.

It should be noted, however, that there is no complete overlap between the recast EIR and the Nordic Bankruptcy Convention. The recast EIR applies to Swedish and Finnish bankruptcies, reconstructions and schemes of arrangements, whereas the Convention only applies to bankruptcies. Therefore, any Danish or Norwegian company seeking refuge under the recast EIR will be forced to do so through bankruptcy proceedings if they wish to maintain recognition throughout the Nordics.

How would one go about doing this?

Danish and Norwegian companies are not allowed to shift their registered office outside of their respective countries, but seeing that jurisdiction under the recast EIR is based on the COMI of the debtor and not the registered office, the registered office can remain in place.

To effectively shift a company's COMI, its strategic management (as opposed to the day-to-day management) needs to be relocated to Sweden/Finland, which is certainly a lesser task than moving the entire business.

Furthermore, it must be demonstrated to the outside world that the shift of COMI has taken place. As stated by the European Court of Justice (the "CJEU") in the *Eurofoods* (case C-341/04) and the *Interedil* (case C-396/09) cases, the factors surrounding the shift must be both objective and ascertainable by third parties in order to rebut the presumption of the registered office determining jurisdiction.

Therefore, the mere fact that a parent company located in another Member State in fact directs the debtor's actions is insufficient to shift COMI to that Member State, seeing that the respective circumstances are not readily apparent and ascertainable for the outside world. The CJEU has also given an example at the other end of the spectrum: a letterbox company which only does business in another state than the one in which it is registered will have its COMI in that other state. The CJEU does, however, not give much specific guidance as to the broad spectrum of cases between these two extremes.

Conceivably then, if the shift was reflected in the debtors' outgoing communication, e.g. listed in auto signatures, invoices, letters, website etc., the shift should meet the 'ascertainable by third parties' test and therefore be acknowledged by the courts under the recast EIR as being genuine.

This effect of publicly "advertising" one's COMI, even if doing so is unintentional, is demonstrated in an English case (*Thomas & another v Frogmore Real Estate Partners & others* [2017] EWHC 25 (Ch)) where the deciding metric for determining whether the company's respective COMI was in Jersey or in the UK was their publicly known ties with an English agent and an English financer who had funded their English real estate investments. These factors, which were apparent and ascertainable by third parties, led to the company's COMI being considered to be in the UK under the EIR.

As stated above, Norway is implementing a COMI-based jurisdiction mirroring that of the recast EIR, so that the Norwegian companies should not face jurisdictional resistance in this regard.

Under Danish law, the jurisdictional issue is slightly more complex. Danish insolvency courts will claim jurisdiction if the debtor conducts business in Denmark (i.e. the overall management of the debtor takes place in Denmark), or, alternatively (if no business is conducted in Denmark) if the debtor's habitual residence/registered office is located in Denmark. This suggests that even if a Danish company were to shift COMI to another country, Danish courts would still claim jurisdiction by virtue of the Danish registered office (which can't be shifted abroad under Danish company law). That suggestion is certainly correct if the shift is made to an EU country (other than Sweden or Finland) or a non-EU country, due to the fact that the Danish insolvency law does not recognise foreign insolvency proceedings. It should be noted, however, that the Danish case law appears to be non-existent on this matter.

However, if the shift is made to Sweden or Finland and bankruptcy proceedings are opened there, the Nordic Bankruptcy Convention would apply and prevent the Danish courts from opening competing bankruptcy proceedings, because the Convention supersedes the Danish jurisdictional regulation.

So it appears that it is in fact possible to use the Nordic Bankruptcy Convention as a vehicle to "seek safe harbor" under the recast EIR and thereby obtain recognition throughout the EU.

> IT IS IN FACT POSSIBLE TO USE THE NORDIC BANKRUPTCY CONVENTION AS A VEHICLE TO "SEEK SAFE HARBOR" UNDER THE RECAST EIR AND THEREBY OBTAIN RECOGNITION THROUGHOUT THE EU

Who would be the most likely candidates for such a shift?

As alluded to earlier, this form of COMI relocation is 'only' relevant for debtors who could benefit from the application of the recast EIR, i.e. debtors with assets located in other EU countries who would otherwise risk that those assets become subject to singular enforcement proceedings to the benefit of the most vigilant creditor. In this situation, the general body of creditors could conceivable benefit from the COMI relocation due to the safeguards put in place by the recast EIR.

This argument also counters the reservations stated in the recitals of the recast EIR regarding abusive or fraudulent COMI relocations, the desired outcome being to protect the general body of creditors as such and not to unduly target specific creditors or groups of creditors.

It is furthermore limited to debtors located in states which are contracting parties under the Nordic Bankruptcy Convention, as this convention is used as the vehicle to activate the recast EIR.

A practical example is that of the companies in the distressed Norwegian oil sector, where we have seen a significant uptick in bankruptcies in recent years, but any Danish or Norwegian business with assets in other EU jurisdictions could likewise benefit from such a COMI relocation.

As stated above, this legal patchwork is at the crossroads of the EU law, the Nordic Bankruptcy Convention and the national law in each of the Nordic countries and therefore contains many more facets than may be described in this article.

As the Nordic Bankruptcy Convention conveys jurisdiction throughout the Nordics to the opening court, any company considering shifting its COMI to Sweden or Finland should thoroughly analyze and weigh the cons and pros associated with submission to that court's insolvency proceedings and *lex fori concursus*. ■

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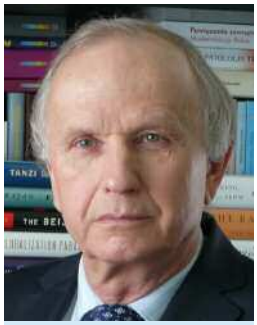
New Pragmatism: In quest of economics and development policy in the 21st century

Prof. Grzegorz W. Kolodko outlines the concept as presented at the Annual Congress in Warsaw



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New pragmatism is an original paradigmatic and heterodox theoretical concept of the economic science, which attempts to address the current civilizational challenges and the future determinants of the functioning of economic systems.

New pragmatism strives to develop the economic theory in a direction that allows a more in-depth and accurate cognition of the economic reality than the one offered by orthodox theories. At the same time, it is an outline of a theory that is strongly applicative in nature and immanently combines the scientific cognition (positive perspective) and formulating indications and recommendations for application (normative perspective). This, indeed, is the base on which to shape the economic policy and strategy for development, both of which determine the world's civilizational development.

The limits of orthodox economics

Economics in its present orthodox form (mainstream economics) exhausts its cognitive and applicative capabilities. Even though critical voices have already been heard earlier, these days, especially ever since the financial crisis of 2009-09, the view that traditional economics is not able to properly explain the contemporary economic phenomena and processes, let alone propose effective solutions for economic policy, has been gaining more and more ground.

In recent years, one can observe a deepening gap between the fast changing economic reality and the capacity for scientific investigation of it. Cognitive economics basically concerns the past, while the problems it is expected to solve emerge in the present time and affect the future, hence the current state of economic knowledge permanently lags behind the challenges that need to be intellectually tackled. The principal difference between the traditional economy addressed by the "old" but still applicable economics, especially the neoclassical or Keynesian theory, and the modern economy and economy of the future, which need a "new" economics, stems from two reasons.

Firstly, in the "old" economy both the rules of its functioning and the criteria for evaluating its quality were strictly economic in nature, as defined by neoclassical economics. Non-economic factors – though sometimes taken into account in theoretical analyses, to a relatively greater extent in institutional and behavioural economics, and to a small degree in mainstream economics – were not treated as something substantial. Economics was mostly focused on issues such as efficiency and competitiveness of the economy and its balance and economic growth factors. At the same time, the theoretical foundations of the predominant trends of economic theory were based on three key assumptions: rationality of decisions made by economic entities, principle of profit maximisation as the driving force behind economy, and intrinsic effectiveness of the unregulated market mechanism. At present, all these assumptions have become disputable.

Secondly, the "old" economy was shaped by national economies. Consequently, the state's economic functions were also limited to the scale of national economies. Hence, what was the major object of macroeconomic studies was national economies and economic policies pursued within national states, and the economic relationships between states. It was not until several decades ago, due to the increasing globalisation and regional integration processes, that more attention started to be given to supranational and global aspects of economy.

Modern non-economic determinants

These days, the situation is changing. Firstly, though financial and technological factors are still of great significance, the functioning and the expansion of economies are strongly determined by non-economic factors: cultural, political and social ones.

Determinants of this type have a great impact – often comparable to the one exerted by purely economic determinants the orthodox economic theory mostly deals with – on the quality of the economy and on its capacity for durable and sustainable development or, looking at it from a different perspective, they are major causes of economic crises, both their financial and social aspects.

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Therefore, in order to understand the driving forces behind the present-day changes it's not enough to examine the economic aspects of their functioning. One needs to look at a broader picture and reach deeper, for cultural, political, social, historical and geographical determinants.

Furthermore, the barriers between national economies and the borders between countries are becoming blurred. Even if they still remain in place here and there, new technologies and institutions enable an easy and fast global capital transfer independently from formally existing borders, and both spreading and accessing information is becoming increasingly easy for billions of consumers and producers. Hence, the economic policy conducted at the level of national states must adapt to external circumstances.

Old theories versus new reality

These two qualitative differences between the "old" and the "new" economy cause the orthodox macroeconomic theories to lose their *raison d'être* as tools for economic system description and analysis. These differences are so substantial that they make it virtually impossible to adapt the old theories to the new reality. From the point of view of neoclassical theory, it is impossible to defend the assumption of a narrowly defined rational behavior of economic agents (*homo oeconomicus*), and from the point of view of Keynesian theory – the assumption of effectiveness of an economic policy conducted at the national state level.

Consequently, one needs to change the paradigmatic economic theory. New economics must create a new epistemological perspective for analysing economic phenomena and present new and enriched methods, and research and analytical tools. And that's exactly the purpose of new pragmatism.

New pragmatism as a heterodox theoretical concept fits squarely in the sequence of views of philosophers and economists (Adam Smith, John M. Keynes, John K. Galbraith, Douglass C. North, Edmund S. Phelps, Joseph E. Stiglitz) who believed the meaning and purpose of economics as a science is to find the rules governing the functioning of a good economy in specific temporal and spatial conditions rather than to look for universal timeless economic laws. Thus, in the new pragmatism, economics is seen as a science that is:

1. Descriptive, explanatory and evaluative;
2. Contextual;
3. Complex;
4. Multidisciplinary; and
5. Comparative.

New pragmatism sees globalisation – the historical and spontaneous process of liberalising and integrating various markets into one interconnected worldwide system – as an irreversible process. Hence, what becomes the fundamental economic problem of modern times is an effective coordination of economic policy and developmental strategies at global level and reinstitutionalisation of global economy.

Good versus bad economics

Economics as defined by new pragmatism is a science that is deeply embedded in humanist and anthropocentric axiology, a science that is not indifferent to great problems and ailments of the contemporary world and in which a prescriptive approach is equally important as the descriptive one. Thus defined economics, in its descriptive aspect, can evaluate and distinguish between "good" and "bad" economies (economic systems), and in its prescriptive aspect, it can indicate solutions leading to "good" economies and suggest active development programs that are effective in different situations.

The new pragmatism can and should co-shape the economic future of the world based on the principle of moderation and triply – economically, socially and environmentally – sustainable development. The fundamental message of new pragmatism seems deeply humanistic and embedded in the best tradition of modern thought. The surrounding reality in all of its dimensions: natural, cultural, social, political, economic and technological, can be grasped intellectually to a great extent. This grasp will be the greater, the broader and deeper look we have at this reality: interdisciplinary and unorthodox, critical and progressive, brave and unconventional. ■

Further reading:

• Bałtowski (2017). *Evolution of economics and the new pragmatism of Grzegorz W. Kolodko*, "TIGER Working Paper Series"
• Kolodko, Grzegorz W. (2011). *Truth, Error and Lies: Politics and Economics in a Volatile World*, Columbia University Press: New York
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THE VIEW THAT TRADITIONAL ECONOMICS IS NOT ABLE TO PROPERLY EXPLAIN THE CONTEMPORARY ECONOMIC PHENOMENA AND PROCESSES HAS BEEN GAINING MORE AND MORE GROUND

Insolvency proceedings of tomorrow

Prof. Tuula Linna examines the future of Alternative Dispute Resolution (ADR), Design Thinking and Sustainability in insolvency proceedings

TUULA LINNA
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The notion that procedural law embodies a formal law that drags slowly, trying to comply with social development and value changes, only being renewed under duress when resources are reduced, is probably right, but also wrong.

Litigation law does move slowly and resists change, but this rigidity is offset by alternative dispute resolution (ADR) which supplements and enriches traditional adversarial legal procedures. Regarding insolvency proceedings, much has changed in the European legal system. The new European Insolvency Regulation (recast EIR) has been applicable since last summer, and the EU Commission's proposed restructuring Directive, COM(2016) 723 final, is subject to discussions within the Council and its preparatory bodies.

So far, the main focus has been on how to develop insolvency proceedings themselves. Some attention has also been paid to ancillary proceedings which derive directly from insolvency proceedings and are closely linked with them, such as avoidance actions (see Articles 6 and 16 of the recast EIR). However, the normal civil disputes that fall within the scope of the Brussels I Regulation have not been the subject of discussions in the insolvency context. Such disputes may concern, *inter alia*, the existence or amount of a creditor's receivables, property belonging to the estate or allowance disputes among a group of companies.

As an ineffective and outdated dispute-resolution system might impede even the most-refined insolvency proceedings, a well-founded question is whether insolvency regimes have caught up with the development of ADR processes. An evident progression from liquidation to restructuring proceedings has taken place, but how about the transition from adversarial litigation to ADR in insolvency-connected civil disputes?

Modern developments in the ADR field have led to procedural design with combinations of different kinds of ADR processes. From China to the US, mediation-arbitration (Med-Arb) systems, with many variations, have been in use for decades. Even if there are problems, especially regarding confidential

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information in systems with only one neutral party, benefits also seem to be evident. The Declaration of Policy in the US Alternative Dispute Resolution Act of 1988 puts it beautifully:

> *"[A]lternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements."*

In that light, the legislation gives authority to each US district court to use ADR in all civil actions, including adversarial bankruptcy proceedings (see also 28 US Code §651).

In Europe, we could advance in the same direction – and go even further – by extending ADR to pre-insolvency proceedings, collective insolvency proceedings as well as ancillary and non-ancillary insolvency-connected disputes. For example, mediation, based on expert evaluation, in which the parties have not revealed confidential information in *ex parte* discussions, might not necessarily raise problems, even if the same neutral party continues as an arbitrator (or as one of the arbitrators) after an unsuccessful mediation. The benefit is that the neutral party, now the arbitrator, is already acquainted with the case.

There may be no reason, however, to be too confident. Process material, in particular, collected in a facilitative mediation process, may not provide proper grounds for arbitration, in which the process requires more discipline regarding, *inter alia*, the claim and its alteration, or preclusion and also the burden of proof. On the other hand, many European countries, without burdensome discovery systems, could cope with this problem quite well. Certainly, fewer problems will surface when mediations succeed. Then the same neutral party, as an arbitrator, can confirm the settlement as an arbitral award (Med-MiniArb) for enforceability, according to the New York Convention of 1957. However, in liquidation proceedings, enforceability is usually not important, as the insolvency practitioner distributes the assets to the creditors. In restructuring proceedings, however, the situation is different.

The collectivity of insolvency proceedings means that in the insolvency context, ADR processes are multi-party proceedings or else, the outcome of two-party ADR has to be accepted by all affected parties. Mediation in a multi-party context is still a challenge. Currently, the evolution of procedural law is an interesting phenomenon. There is a transition from formal procedural thinking to discussions on the functions of the processes and, after that, the criteria for a fair trial came into the spotlight. What next, however?

ADR combinations for improving the processes express, arguably, procedural-design thinking with sustainability as a meta-theory. To put it simply, sustainability means saving something for the future and includes aspects of social, human, economic and environmental sustainability. Insolvency proceedings can be sustainable, resource-wise, in two senses.

The first is that the outcome of insolvency proceedings should be designed to save economic and human resources, i.e. jobs, business relationships, property values, non-material achievements and marketing efforts. That is why the preferred choice is fresh financing in pre-insolvency or formal restructuring proceedings. Nevertheless, in liquidation proceedings, one also encounters the reality that many existing resources can be saved by selling the businesses as a going concern and, in the case of a group of companies, by maintaining synergy-producing structures.

The second is that the procedure itself should utilise resources wisely, including efficient dispute-resolution mechanisms. In disputes between natural persons, fair-trial requirements are crucial, whereas, in commercial disputes, there is usually no such need to protect the parties. For example, in mediation based on expert evaluations, the parties might agree the same neutral party can continue as an arbitrator without disqualification.

When proceedings are responsive to sustainability, the focus is not on the past but on the future. For example, instead of harsh cross-class cram-down voting, mediation could lead to an amicable outcome. That would be advisable, especially when some of the parties might have common future business interests. The combinations of ADR processes in an insolvency context (for example, Ins-Med-MiniArb), instead of insolvency connected litigation (Ins-Lit), could perhaps help insolvency proceedings reaching this double sustainability. As long as costs remain reasonable, no major problems should occur with systems that include different neutral parties at each stage.

In the future, however, insolvency practitioners could possibly, according to service-design thinking (SDT), offer their services on a broader basis and, if the parties so wish, act as neutral parties in insolvency-linked ADR regarding dissent in collective insolvency proceedings and ancillary or non-ancillary insolvency-linked disputes. In the best-case scenario, time and costs will be saved. In fact, mediation will let the parties retain control over outcomes and preserve prospects for future business relationships. ■

WHEN PROCEEDINGS ARE RESPONSIVE TO SUSTAINABILITY, THE FOCUS IS NOT ON THE PAST BUT ON THE FUTURE

Business Rescue in Europe: Strengthening the role of practitioners and courts

Stephan Madaus and Bob Wessels report on their latest research in this area

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Preventive restructuring frameworks

An important legislative development in Europe dates from around a year ago. In November 2016, the European Commission presented its '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' ('Proposal for a Restructuring Directive (2016)').[1]

Recital 1 of the Proposal Restructuring Directive (2016) sets out its goal: 'The objective of this Directive is to remove obstacles to the exercise of fundamental freedoms, such as the free movement of capital and freedom of establishment, which result from differences between national laws and procedures on preventive restructuring, insolvency and second chance. This Directive aims at removing such obstacles by ensuring that viable enterprises in financial difficulties have access to effective national preventive restructuring frameworks which enable them to continue operating; that honest over indebted entrepreneurs have a second chance after a full discharge of debt after a reasonable period of time; and that the effectiveness of restructuring, insolvency and discharge procedures is improved, in particular with a view to shortening their length.' The Proposal contains an Explanatory Memorandum (23 pages) and the text with 47 recitals and 36 Articles. In contrast, the earlier Recommendation of March 2014, on which the Proposal is based, had a total of 20 recitals and 36 recommendations.[2]

The Proposal is based on seven '… key principles in order to ensure insolvency and restructuring frameworks are consistent and efficient throughout the EU:

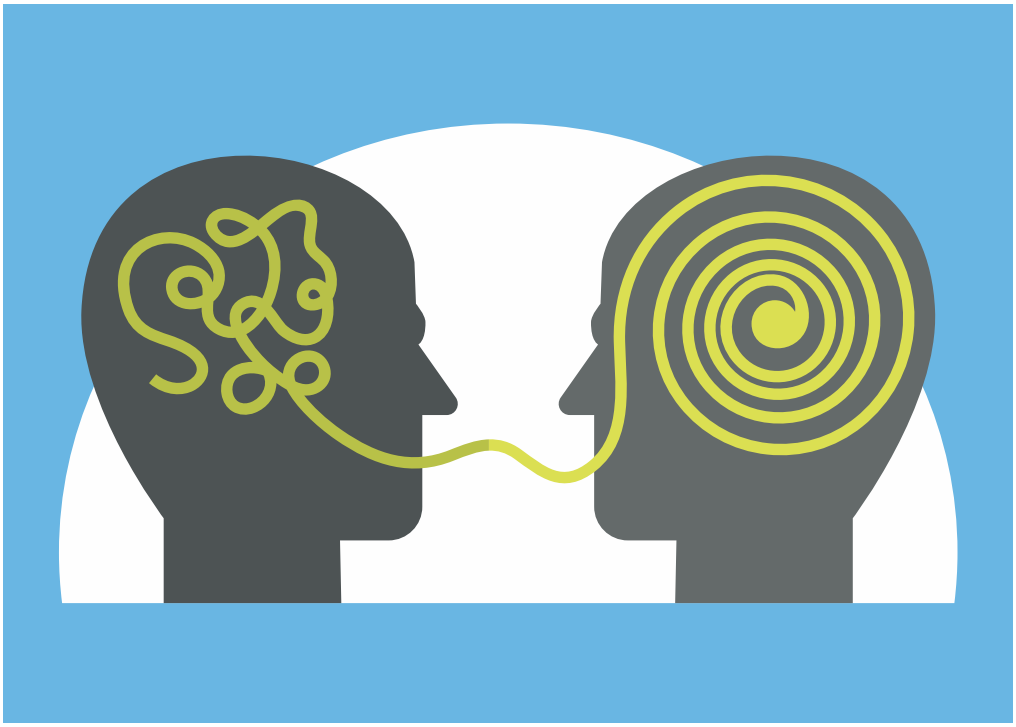
(i) Companies in financial difficulties, especially SMEs, will have access to early warning tools to detect a deteriorating business situation and ensure restructuring at an early stage.
(ii) Flexible preventive restructuring frameworks will simplify lengthy, complex and costly court proceedings. Where necessary, national courts must be involved to safeguard the interests of stakeholders.
(iii) The debtor will benefit from a time-limited 'breathing space' (or: stay) of a maximum of four months from the enforcement action in order to facilitate negotiations and successful restructuring.
(iv) The dissenting minority creditors and shareholders will not be able to block restructuring plans but their legitimate interests will be safeguarded.
(v) New financing will be specifically protected increasing the chances of a successful restructuring.
(vi) Throughout the preventive restructuring procedures, workers will enjoy full labour law protection in accordance with the existing EU legislation.
(vii) Training, specialisation of practitioners and courts, and the use of technology (e.g. online filing of claims, notifications to creditors) will improve the efficiency and length of insolvency, restructuring and second chance procedures.

European-wide research

Under the auspices of the European Law Institute (ELI) the authors have conducted research on the topic of Business Rescue in Insolvency Law. ELI is an independent non-profit organisation established in 2011 to initiate, conduct and facilitate research, make recommendations and provide practical guidance in the field of European legal development.

In early 2014 we started a two-stage project. The first stage comprised the drafting of National Inventory and Normative Reports by National Correspondents (NCs) from 13 EU countries. The Reporters decided that it would be impractical and unnecessary to generate reports on all 28 EU Member States. Instead, we selected 13 EU jurisdictions to be a representative sample of the legal traditions and range of insolvency and restructuring laws and practices across Europe.

The sample includes all major EU economies (Germany, France, UK, Italy, Poland, Spain, The Netherlands, Belgium, Austria), a representative of the Nordic States (Sweden), the Baltic States (Latvia) and representatives of smaller economies (Hungary, Greece). The selection was approved by the Advisory Committee and the Board of ELI.



> PROBLEMS IN THE HANDLING OF RESTRUCTURING OR INSOLVENCY CASES OFTEN STEM FROM THE WAY PEOPLE UNDERSTAND (OR NOT) AND USE (OR MISUSE) THE LAW

Developments in non-selected EU Member States have, of course, not been ignored. In this regard, we have studied national laws and comparative studies from nearly all EU Member States, therefore, including states in the Northern and Eastern region of Europe, which are absent in the National Reports. Fortunately, there has been a significant amount of recent literature offering detailed analysis of national insolvency laws across Europe.

The relative weak presence in the set of National reports of EU Member States in Central- and South-Eastern Europe and in the Nordic countries was compensated by further study of general national insolvency law overviews (particularly those focused on restructuring regimes) of Central-Eastern European Member States or Northern Europe. In addition, an Inventory report on international recommendations from standard-setting organisations, such as UNCITRAL and World Bank, was prepared.[3]

The second stage consisted of drafting the ELI Instrument on Business Rescue with recommendations for a legal framework enabling the further development of coherent and functional rules for business rescue in Europe. During the Academic Forum's Annual Conference on 21 and 22 September 2016 in Cascais we were able to discuss several themes.[4] It resulted in our 'ELI Business Rescue Report', which was approved by the respective bodies of ELI at their Annual Conference in Vienna (Austria) on 6 September 2017. The report consists of 115 recommendations which are developed on more than 375 pages.[5]

The Report presents recommendations on a variety of themes affected by the rescue of financially distressed businesses. The Report's ten chapters cover:

1. Actors and procedural design
2. Financing a rescue
3. Executory contracts
4. Ranking of creditor claims; governance role of creditors
5. Labour, benefit and pension issues
6. Avoidance transactions in out-of-court workouts and pre-insolvency procedures and possible safe harbours
7. Sales on a going-concern basis
8. Rescue plan issues: procedure and structure; distributional issues
9. Corporate group issues, and
10. Special arrangements for small and medium-sized enterprises (SMEs) including natural persons (but not consumers).

Actors in restructuring and insolvency

From our National Correspondents we have taken that inefficiencies or problems in the handling of restructuring or insolvency cases often stem from the way people understand (or not) and use (or misuse) the law rather than from the legal framework itself. The law in the books is only one aspect of a functioning legal system, with the law in practice being the more important other one. In matters of restructuring and insolvency it is many times the actors (e.g. insolvency practitioners, turnaround managers, courts) and their behaviour that shape the outcome of a legal framework which is why we looked at actors first and we recommend lawmakers to do the same.

The way people act can, of

Share your views!

PRACTITIONERS ARE WELL ADVISED TO PARTICIPATE IN THE DETERMINATION OF THE RULES WHICH APPLY TO THEIR FUTURE WORK

course, be influenced by legal rules. Here, duties to act in a specific way are important, professional and ethical standards in particular. But even more important is a legal framework which includes the right incentives for all stakeholders, meaning that lawmakers should also consider factors like conflicts of interest, remuneration, reputation, integrity, developing and maintaining skills and experience. In our Report, we have set out our views in relation to courts, mediators and supervisors, insolvency practitioners and – a rather new actor in the restructuring arena – the debtor (in possession).

The ultimate goal of our European-wide research was to design (elements of) a legal framework that will enable the further development of coherent and functional rules for business rescue in Europe. This includes certain statutory procedures that could better enable parties to negotiate solutions where a business becomes distressed. Such a framework also comprises rules to determine in which procedures and under which conditions an enforceable solution can be imposed upon creditors and other stakeholders despite their lack of consent.

The topics addressed in the report are intended to present a tool for better regulation in the EU, developed in the spirit of providing a coherent, dynamic, flexible and responsive European legislative framework for business rescue. Addressees, generally, are Member States and/or the European Commission. And, may we add, practitioners themselves. They should be invited the take into account our recommendations when discussing professional rules in national professional bodies for insolvency practitioners, turnaround professionals or judges or during INSOL Europe's conferences.

Where the substantial rules are changing, the profession will change too, and practitioners are well advised to participate in the determination of the rules which apply to their future work. ■

Footnotes

1 See (COM)(2016) 723 final ('Restructuring Directive). See for all related documents http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50043.
2 For an overview, see Stephan Madaus, The EU Recommendation on Business Rescue – Only Another Statement or a Cause for Legislative Action Across Europe?, in: 27 Insolvency Intelligence 2014, no. 6, p. 81 et seq.; Bob Wessels, Rescue on the rise', eurofenix Autumn 2014, p. 12-15; Emmanuelle Inacio, The European Commission's Proposal for common principles and rules on preventive restructuring frameworks, insolvency and second chance, eurofenix Winter 2016/2017, p. 12-13.
3 By Gert-Jan Boon, University of Leiden, under the supervision of the Reporters.
4 See Myriam Mailly, Harmonisation of the European Insolvency Law, eurofenix Winter 2016/2017, p. 18-20.
5 The full report will be published by Oxford University Press soon. The source of the report and the suggested citation is: Wessels, Bob and Madaus, Stephan, Business Rescue in Insolvency Law - an Instrument of the European Law Institute (September 6, 2017). Available at SSRN: https://ssrn.com/abstract=3032309, or alternatively: Wessels, Bob and Madaus, Stephan, Business Rescue in Insolvency Law - an Instrument of the European Law Institute (September 2017). Available at http://www.europeanlawinstitute.eu/fileadmin/user_upload/p_eli/Publications/Instrument_INSOLVENCY.pdf.

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Clash of Principles: Equal treatment of creditors vs. protection of trust

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How far are the transaction avoidance laws in the Member States of the EU supported by the principles of equal treatment of creditors and protection of trust? This was the research question considered by the Working Group of the Conference on European Re-structuring and Insolvency Law (CERIL)[1] – with surprising results.

When considering the harmonisation of the European insolvency law, transaction avoidance laws are often laid out as a primary consideration. However, a comprehensive analysis is often missing. The working group dealing with "transactions avoidance laws", made up of 18 researchers who represent 17 jurisdictions and led by this author, has therefore decided to use a principle-oriented analysis[2] to examine transaction avoidance laws in their jurisdictions. This method began with neither the practical problems, nor the pre-existing norms. Instead, in the first instance, the fundamental principles governing transactions avoidance laws were considered and subsequently the national insolvency laws were analysed. The results can be summarised as follows[3].

All examined jurisdictions contain both the principle of equal treatment of creditors and the principle of trust protection as core pillars of their transaction avoidance laws. However, the examination helped to form a more precise picture. First of all, the principle of equal treatment of creditors plays a meaningful role in transaction avoidance laws, but only ever in cases of preferences. The defendant, in the instance of the proceedings, has to have been an (future) insolvency creditor, so that their security or satisfaction can be seen as a breach of the principle of equal treatment of creditors. Transactions at an undervalue and transactions defrauding creditors are based on different fundamental principles with which this pilot project did not concern itself.

The principle of protection of trust is also recognised in all of the examined jurisdictions. Nonetheless, there remain clear differences in the detailed answer to the question of how the two opposing fundamental principles are to be brought into an appropriate balance, in which circumstances the trust of creditors is worthy of protection, so that they would be entitled to keep what has been granted to them.

With regards to preferences, all considered jurisdictions shared the view that, on the principle of equal treatment of creditors, they had to provide the possibility of avoidance in certain circumstances. The preferential security or satisfaction of a creditor is not acceptable when this happens in the context of an insolvency case. As it is more or less a matter of coincidence when such a case is applied for or opened, it seems unreasonable to restrict the application of the principle of equal treatment of creditors to already opened proceedings rather than to expand it to a particular period of time before the opening of the proceedings. The beginning of an insolvency proceeding can happen at an earlier, but also a later, time. It is, therefore, a matter of pure luck if the creditor satisfaction is successful and does not falter on the opening of the proceedings. This justifies moving the principle of equal treatment of creditors to an earlier point in time albeit not unrestrictedly. All the jurisdictions explored respect the proposition that the creditors' trust that they may keep what has been granted to them deserves some protection.

A first step in this direction is the requirement that the debtor, at the time of the performance, has to be substantively insolvent. The principle of equal treatment of creditors is a principle of insolvency law which cannot be applied when the debtor was not (yet) insolvent at the given time. As a result, many jurisdictions expressly require the substantive insolvency of the debtor. Two others (Malta and Poland) introduce this requirement indirectly by allowing the creditor the defence that he was not aware of the debtor's insolvency at the given time. In addition, these jurisdictions have a fixed avoidance period prior to the beginning of proceedings, which silently establishes the irrefutable presumption of substantive insolvency.

This leads to the relationship between substantive insolvency and the suspect period. In France, this period covers the entire phase in which the debtor has ceased his payments and is therefore substantively insolvent (with an upper limit of 18 months). In most other Member States, the suspect period is shorter, generally three or six months prior to the beginning of the insolvency

> THE PREFERENTIAL SECURITY OR SATISFACTION OF A CREDITOR IS NOT ACCEPTABLE WHEN THIS HAPPENS IN THE CONTEXT OF AN INSOLVENCY CASE

proceedings. A third group, as mentioned above, does not recognise substantive insolvency as a reason for avoidance, working instead with a fixed suspect period (in which the substantive insolvency is presumed). On average, the trust in the insolvency-safety of the performance is protected when the timeframe between the legal act and the beginning of proceedings is longer than six months.

The number of avoidable actions is further reduced in all considered jurisdictions (with the exceptions of the Czech Republic and Spain) through the addition of mental elements. Most avoidance rights require the defendant to be aware of the substantive insolvency of the debtor or – which comes very close to this – the disadvantage to creditors (in particular, this is the case in the Netherlands, Portugal, Slovenia and Sweden, but also to a certain extent in France and Germany). The fact that the subjective requirements are linked to the defendant in this way demonstrates the perfect fit to the principle of protection of trust: one who knows about the financial crisis of the debtor cannot legitimately expect to be protected.

As an intermediate conclusion, one can establish that the rules around preferences almost perfectly mirror the fundamental principles. On the one hand, the national legislatures demand (directly or indirectly) the substantive insolvency of the debtor at the given time, which is both required and justified by the principle of equal treatment of creditors. On the other hand, the legitimate expectations of the creditors are (objectively) protected through suspect periods and through the requirement that the defendant was aware of the substantive insolvency of his debtor. Notwithstanding differences in the detail – the length of the suspect periods being a key example – all jurisdictions share this approach.

Two jurisdictions are exceptional. In Spain, neither the substantive insolvency of the debtor is necessary, nor are there any subjective requirements. If one takes into account the relatively long avoidance timeframe of two years, from which only the current operations of the debtor are exempted, little room remains for the principle of protection of trust. The law of England and Wales follows a completely different approach. The decisive mental element is, here, not the knowledge of the defendant but the desire of the debtor to treat the defendant preferentially. This has nothing to do with the principle of protection of trust because, in this approach, nothing rests on the trust of the creditor.

Many national jurisdictions provide additional constraints as well as extensions. For example, avoidance is facilitated – and thereby the principle of protection of trust restricted – in many jurisdictions, when the defendant concerned is a person with a close relationship to the debtor (including shareholders). In contrast, the principle of protection of trust is often indirectly strengthened by placing the burden of proof on the insolvency administrator, as well as through statutes of limitations.

In all, it has proven to be promising to assess the national insolvency regulations with a principle-oriented approach. The efforts to understand insolvency law are rewarded by considering the fundamental principles and their manifestation in national legislatures, and thereby, predominantly, by highlighting the overarching agreements rather than the differences in the details. However, to achieve this, the restricted focus of CERIL's pilot project would have to be widened considerably. In the next stage, the principle-oriented analysis should therefore be extended beyond preferences to cover the complete set of transactions avoidance rules, and subsequently over the entirety of insolvency law. The efforts to understand the fundamental dimensions of this area of law, and one day to harmonise it, will decidedly benefit from the results of the future research. ■

Footnotes:

1 CERIL is an independent and non-profit organisation made up of practitioners, researchers, and judges working in the areas of restructuring and insolvency; cf. http://www.ceril.eu/

2 In more depth, *Bork*, Principles of Cross-Border Insolvency Law, Cambridge/Antwerp/Portland 2017

3 The complete report can be accessed at http://www.ceril.eu/projects/kopie-avoidance-actions/

> **THE PRINCIPLE OF PROTECTION OF TRUST IS RESTRICTED IN MANY JURISDICTIONS WHEN THE DEFENDANT CONCERNED IS A PERSON WITH A CLOSE RELATIONSHIP TO THE DEBTOR**

Share your views!

Communication and Cooperation: The continuing challenge

Paul Omar and Reinout Vriesendorp report on the new CoCo2 Project and working with CERIL

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Share your views!

The European Guidelines on Communication and Cooperation Guidelines 2007 (CoCo Guidelines)[1] were the outcome of a project led by Professors Bob Wessels (Leiden) and Miguel Virgos (Madrid Autonoma) over the course of two years beginning in 2005.

The project was built on the then Article 31 of the European Insolvency Regulation (EIR) and its injunction to practitioners in main and secondary proceedings to cooperate and communicate with each other. The CoCo Guidelines were designed to flesh out a methodology for the way in which that cooperation and communication should take place and which the parent text had left largely silent.

The draft CoCo Guidelines were the subject of a formal presentation at the Bucharest Conference (Autumn 2006), although they were not formally endorsed by INSOL Europe until the Monaco Conference (Autumn 2007). The brief text, of only 18 articles, provides guidelines for, *inter alia*, the resolution of problems such as direct access by a practitioner to a foreign court, the content of communications, the relevant language to use, the duty of practitioners in main and secondary proceedings to communicate, the coordination of sales and cross-border rescues as well as the issue of costs. It also includes, in an Annexe, a Draft Protocol for potential use in relevant cross-border cases. Though the CoCo Guidelines got off to a slow start, within a few years, its terms, particularly those on cross-border coordination of

rescues and sales, were being considered in cases such as *BenQ Holding, Automold, Pin AG, Landsbanki-Icesave, Kaupthing* and even *Lehman Brothers Holdings* (where the global protocol made express mention of the CoCo Guidelines). Judicial attention to the scope of the CoCo Guidelines even occurred in 2009 in *Stojevic*, where the Austrian court suggested that the duty to cooperate and communicate should also be extended to the courts.

In 2012, two things happened to further propel the issue of court-to-court communication and cooperation into the limelight. The first was the publication of the ALI-III Global Principles for Cooperation in International Insolvency Cases,[2] the product of a study led by Professors Ian Fletcher (UCL) and Bob Wessels. The second was the occasion of the initiation of the EIR revision project, which resulted in a report and draft proposals for reform being presented at the end of that year. Of note, within the extensive changes that were incorporated in the final version adopted in May 2015 and which came into force in mid-2017 were the provisions which created both vertical and horizontal cooperation between practitioners in main and secondary cases involving the same debtor, between the same practitioners and the courts involved as well as between the courts themselves (Articles 41-43). In the group context, the same types of cooperation and communication were to be achieved between those involved in the administration of cases involving debtors belonging to a group of companies (Articles 56-58), while the opening of a group coordination procedure, one of the many novelties in the Recast EIR, would attract a duty under Article 74 for practitioners to cooperate with the coordinator of such a procedure.

Responding to the court-to-court element of the Recast EIR, led by Professor Wessels, Leiden University began a project in 2014. Over two years, the study, funded by the European Commission, produced the EU Cross-Border Insolvency Court-to-Court Cooperation Guidelines (JudgeCo Guidelines)[3] and also

provided training for judges in their potential application to cross-border instances. At the time of writing, the JudgeCo Guidelines may be said to represent the state of the art in their application to the duties laid on courts to communicate and cooperate with each other and with practitioners. In that light, the CoCo Guidelines and their content, produced nearly a decade earlier, have not kept up with progress in practice with regards to the experience of cooperation and communication, nor do they reflect current thinking about the purpose and extent of achievable cooperation and communication.

The project proposal

A proposal to review the CoCo Guidelines recently emanated from the Conference of European Restructuring and Insolvency Law (CERIL),[4] an institute set up by a group of European academics, judges and practitioners, including (now Emeritus) Professor Bob Wessels, who chairs the organisation. CERIL comprises some 75 invited representatives of academia, practice and the judiciary. Its intention is to assist in the promotion of insolvency law development and reform at European and domestic levels. In a pioneering cooperation between CERIL and INSOL Europe, a Joint Working Group, to be called the CoCo2 Working Group, will be set up to coordinate work in order to review the Guidelines in light of present practice and understanding of cross-border cooperation and communication in insolvency matters.

The CoCo2 Working Group will be led by Tomáš Richter (Linklaters LLP/Charles University) and Paul Omar (INSOL Europe/De Montfort University), together with a membership composed of representatives of academia, judiciary and practice belonging to both organisations. The working methodology for the CoCo2 Working Group will see the creation of a Core Team, whose role will be to generate proposals for revision of the CoCo Guidelines and carry out consultation and feedback. The Core Team will be advised by a Review Panel, also consisting of practitioners, academics, judges and policy makers drawn from a wide constituency. This will also include input at the comparative level from parties outside Europe, so as to ensure the review of the CoCo Guidelines reflects best practice not just in Europe, but globally. Furthermore, there will also be engagement with stakeholders not otherwise represented on the CoCo2 Working Group.

Project outcomes and reporting

The intention is that, in pursuing the creation of second-generation CoCo Guidelines, the CoCo2 Working Group will take into account recent work, including the JudgeCo Guidelines, on templates for cross-border communication and cooperation. The scope of the CoCo2 Working Group will concentrate on the duty to cooperate and communicate in Articles 41, 43, 56 and 58 of the Recast EIR, which directly address practitioner cooperation in both the single debtor and group contexts.

The judicial cooperation elements (Articles 42 and 57), addressed by the JudgeCo Guidelines, will also be considered, insofar as provisions addressing court cooperation with practitioners will need to be mirrored, as far as practically possible and expedient. Similarly, it is intended that the CoCo2 Working Group will coordinate on matters of common interest with a separate CERIL working party set up to examine Article 74 as part of consideration of the feasibility of a Code of Conduct for such coordinators. Overall, the intention is to achieve synergy between the initiatives in this area with a view to enhancing take up by the international bodies that have previously expressed an interest in soft-law approaches to communication and cooperation, including the European Commission.

At the time of publication, the CoCo2 Working Group will have already begun its work, the intention being to present a working draft of the new generation CoCo Guidelines by the time of the Athens Conference (Autumn 2018). Based on the feedback during the currency of the project by the Review Panel as well as by attendees at the Athens Conference, a final version will be produced in late 2018 which will then be disseminated with view to adoption by INSOL Europe, CERIL and other bodies interested in the field. While the project is ongoing, regular updates in the newsletters and via the websites of the organisations will keep the membership informed of progress.

Summary

Overall, the project is exciting for a number of reasons, not least its utility in bringing up to date the CoCo Guidelines and enhancing the use of such soft-law instruments within practice. It is also the first opportunity for collaboration between INSOL Europe and CERIL and a particularly fitting occasion too to mark the immense contribution Professor Bob Wessels has made in the field of international insolvency law, especially in the area of communication and cooperation, as the co-author of the original CoCo Guidelines and the originator of the JudgeCo Guidelines project. The CoCo2 Working Group hopes to live up to the challenge of following in his footsteps in this revision and updating process. ■

Footnotes

1 See: www.insol.org/INSOLfaculty/pdfs/BasicReading/Session%205/European%20Communication%20and%20Cooperation%20Guidelines%20for%20Cross-border%20Insolvency%20.pdf
2 See: www.iiiglobal.org/sites/default/files/alireportmarch_0.pdf
3 See: www.universiteitleiden.nl/en/research/research-projects/law/eu-judgeco-platform
4 See: www.ceril.eu

> **THE PROJECT IS THE FIRST OPPORTUNITY FOR COLLABORATION BETWEEN INSOL EUROPE AND CERIL**

Country Reports

Winter 2017/18

Updates from Italy, Switzerland, Ireland

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> WHILE SOME REGIONS HAVE PROMOTED REFORMS, OTHER MUNICIPALITIES HAVE DEFERRED THE ADOPTION OF MUCH NEEDED MEASURES

Italy:
Local public transport at a crossroad

The development of local public transport in Italy has suffered growing pressure since the outburst of the financial crisis. This country report describes the debate for reform in the country and the current situation. It concludes that urgent intervention is needed.

The vast majority of companies operating in the sector receive funds from both regional and state authorities. However, pressure to reduce budget deficits has imposed significant cuts to these transfers. This has resulted in increased prices, postponement of renovation of the fleet, reduction in the services offered and – to a more limited extent – cuts in the personnel[1].

To cope with these issues, a comprehensive reform of the sector has been in progress since 2014. A first attempt was reversed by judgment no. 251/2016 of the Constitutional Court. Since then, the Ministry of Transport has worked on a new proposal. On 11 April 2017 a draft reform was discussed in the Council of Ministers. It appears unlikely, however, that such a reform will be approved by the Italian Parliament before the next general elections (Spring 2018).

Recently, a new insolvency act has been enacted by means of law no. 155/2017. This reform, however, does not apply to public entities[2]. Additionally, no specific provisions have been included to deal with '*società controllate*' or '*partecipate*', i.e. private law entities fully or primarily controlled or owned by the state or other public bodies.

Meanwhile, the situation in the industry has worsened. While some regions have promoted reforms[3], other municipalities have deferred the adoption of much needed measures in the hope that additional regional or state funds could cover the imbalance of their local public transport companies. Among others, this has been the approach followed by the last administrations in Rome.

The situation of the municipal transport company, ATAC S.p.A. ('ATAC'), reached the no-return point this summer. The Council in Rome therefore submitted a petition for a '*concordato preventivo in continuità*' (i.e. a formal rescue procedure under the supervision of the local court), approved on 27 September 2017. The court appointed three independent experts with the task of drafting a rescue plan capable of making the service operate again, promoting new investments in the bus and underground fleet, and reducing/renegotiating the €1.3 billion debt.

The situation of ATAC is by no means unique. Other entities, such as ANM in Naples, are facing liquidation[4]. The proposed reform of local public transport may facilitate the rationalisation of services and the reduction of purchase costs in the future. However, it can do little to turn around distressed entities. It is high time the government considers the adoption of statutory measures or guidelines to promote general rescue goals in this sector of the industry.

Footnotes:

1 As evidenced by the 'Annual Report to Parliament' published by the National Observatory on the Policies of the Local Public Transport. Available (in Italian) at: <http://www.infoparlamento.it/wp-content/uploads/2017/07/Regioni-Osservatorio-politiche-del-trasporto-19-luglio-2017-Riunione-tecnica-24-luglio-2017.pdf> [Accessed: 3 November 2017].

2 Art. 2(1)(e) of law no. 155/2017.

3 See the actions adopted by Tuscany since the approval of regional law no. 65/2010.

4 P Frattasi, 'ANM, buco di 3 milioni al mese. «Società verso la liquidazione»' (25 September 2017) Il Mattino <https://www.ilmattino.it/napoli/cronaca/anm_buco_di_3_milioni_al_mese_societa_verso_la_liquidazione-3261327.html> [Accessed: 3 November 2017].

Italy:
Update on Bankruptcy Law Reform

At the end of a lengthy process ending with the report drawn by the Rodorf Commission in December 2015 and with the draft law presented by the Government to the Chamber of Deputies in March 2016, the enabling law reforming the legal framework for enterprises in distress and insolvency proceedings was approved by Parliament in October 2017; afterwards, on 30 October 2017, the law No. 155 of 19 October 2017 named "Delegation to the Government to reform the corporate crisis and insolvency" was published in the Italian Official Gazette.

The reform was necessary and in some respects marks a sharp discontinuity with the previous regulations, a fact that clearly emerges in the enabling law, although the room left to the Government for implementation does not allow a detailed forecast of the new provisions, in terms of both the corporate governance of distressed enterprises and the relevant proceedings.

According to this law, the Government shall adopt, within twelve months from the date of its entry into force, one or more legislative decrees for the organic reform of the Bankruptcy Law referred to in Royal Decree No. 267 of 16 March 1942.

The new law is of a paramount importance for its consequences on corporate governance and in particular concerning the new duties and liabilities of the management and control bodies in a situation of financial distress. Here there is the need of a more detailed regulation to be implemented by the Government and the leading principle of the reform is to protect the value of distressed companies.

In this respect, the Legislator, enshrining the principles that the Government must follow in issuing the legislative decrees, has preferred the achievement of a regulatory system aimed at saving the companies rather than their liquidation.

One of the most important changes is the introduction of a non-judicial and confidential "alert and crisis composition procedure", aimed at stimulating the early disclosure of the crisis and directing a rapid analysis of the causes of the economic and financial situation of the company and facilitate the negotiations between debtor and creditors.

The procedure may be voluntarily activated by the debtor and, in case of non-cooperation of the debtor, there will be a public declaration of crisis; the "alert and crisis composition procedure", is a set of procedures aimed at preventing the development of a full-blown situation of financial difficulty in enterprises and promptly implementing suitable reorganisation measures, since it is unanimously believed that in order to ensure the success of the restructuring processes for debt-ridden enterprises, they must be launched before the enterprise actually becomes insolvent, i.e. unable to meet its debts as they fall due.

In addition, "liquidation proceedings" will be introduced to replace the current bankruptcy procedure. In this new perspective, the bankruptcy receiver plays a key role and sees a strengthening of his powers. There will also be a reduction in the duration and costs of the insolvency proceedings, by empowering the management bodies and restricting deductible costs.

In the general framework of crisis resolution instruments, one should also take into account the principle according to which, with the new regulatory framework, priority will be given to proposals to overcome the crisis, considering the liquidation as an "*extrema rati*".

Access to certified rescue plans and debt restructuring agreements will also be encouraged and facilitated.

In fact, the threshold of 60% of the credits, provided for by article 182-bis of the existing Bankruptcy Law, will be deleted as long as the agreement will be able to satisfy fully and promptly the creditors who have not attended the negotiations.

Last but not least, it is also important to mention further changes, which will have, as an objective, the introduction of some innovations aimed at reducing the exploitation of the composition with creditors' function while the rules regarding the over-indebtedness crises will be subject to modification too. ■

> THE NEW LAW IS OF A PARAMOUNT IMPORTANCE FOR ITS CONSEQUENCES ON CORPORATE GOVERNANCE

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Switzerland:
Current projects and new laws

In Switzerland, there are currently two new insolvency-related legislation projects in the pipeline. One project intends to amend the current international insolvency law of Switzerland and to facilitate the recognition of foreign insolvency proceedings. The other aims to incentivise the implementation of reorganisation measures in companies at an early stage in order to avoid insolvency.

Already enacted at the beginning of 2017 is a new legislation that provides an international jurisdiction for the freezing of assets belonging to an inheritance estate.

Revision of the Swiss International Insolvency Law

On 7 September 2017, a hearing in relation to an intended revision of the Swiss international insolvency law took place before the Swiss Parliament's upper chamber's legal commission. Participants included – in addition to two other experts – INSOL Europe members Vincent Jeanneret, Karl Wüthrich and Daniel Staehelin. Based on the experts' comments the commission agreed to accept the proposal in general and move ahead with the legislation project.

Key points of the revision, as has already been reported earlier in Eurofenix by Rodrigo Rodriguez of the Federal Office of Justice, are the omission of the ominous reciprocity as a condition for recognition and the extension of the indirect jurisdiction from the statutory seat to the Centre of Main Interest (COMI). In addition, assets located in Switzerland can be turned over to the foreign insolvency administrator without opening ancillary proceedings in Switzerland, in cases were neither privileged creditors domiciled in Switzerland, nor creditors with a pledge located in Switzerland exist. At last, foreign judgements on voidance claims will be recognised in Switzerland provided the respondent was not domiciled in Switzerland.

Reorganisation of companies before insolvency

This new law on pre-insolvency reorganisation will formally be contained in the company section of the Swiss Code of Obligation and will complement the 2014 already enacted amended provisions on reorganisation in the Swiss Bankruptcy Code. The new provisions will create new and more precise duties for board members of Swiss companies to ensure that necessary measures to avoid insolvency are initiated as early as possible and that the focus of board members on liquidity and capital cover of a company is sharpened.

The new law provides that if there are reasonable grounds to suspect that the company may be unable to pay its debts when they become due within the next six months, the board is required to draw up a liquidity plan and to adjudicate the economical state of the company.

The liquidity plan must identify the current liquidity and the expected income and expenses. If the liquidity plan indicates that the company might become unable to pay its debts when they become due the board must implement additional measures to ensure the company's ability to meet its financial obligations or to file for the opening of a debt moratorium in accordance with the provisions of the Bankruptcy Code. Although the monitoring of the finances and the cash flow of a company on a constant basis already belonged, under the current law, to the core obligations of the board of a company, there was no such explicit course of actions to be undertaken.

Besides impending illiquidity, loss of capital will remain a triggering factor for reorganisations measures. Under the current law, the threshold for initiating such measures is the indication in the last annual balance sheet that one-half of the share capital and the legal reserve

are no longer covered by sufficient assets. Under the new law, this threshold will be raised to two-thirds and the measures to be undertaken by the board are more clearly addressed. The board has to implement measures to remove the capital loss and asses the economic situation of the company. If the company does not have a statutory auditor, the balance sheet must be audited before presenting in to the general assembly.

These new provisions should more adequately commit the board of directors to closely monitor the development of the financial situation of a company and initiate in good time the necessary steps to either avoid insolvency or, at least, to initiate the proceedings at a point in time where there is still a chance for recovery.

New law on international jurisdiction for the freezing of assets belonging to an inherited estate

One of the most controversial topics in international debt enforcement law is the international jurisdiction for the freezing of assets with joint

> **THE NEW PROVISIONS WILL CREATE NEW AND MORE PRECISE DUTIES FOR BOARD MEMBERS OF SWISS COMPANIES**

ownership. When the last Shah of Persia died in an Egyptian military hospital in 1980, a creditor of one of his heirs tried to freeze the late Shah's villa in St. Moritz (Switzerland). The Federal Supreme Court of Switzerland justifiably refused this in a last-instance ruling, since not the villa, but only the quota of the yet undivided inheritance constituted a sizable asset of the respective heir. In domestic cases such a quota is considered to be located at the descendant's last domicile. Nonetheless, the Federal Supreme Court of Switzerland later decided in several questionable decisions that Switzerland has no jurisdiction for the freezing of assets against foreign heirs despite the descendant's last domicile being in Switzerland. Now, the Swiss legislator has become active and enacted on 1 January 2017 a new law according to which assets belonging to an undivided inheritance may be frozen in Switzerland if the descendant's last domicile is located in Switzerland but it is not relevant whether the other assets of the descendent are actually located in Switzerland. ■

Ireland:
Court of Appeal clarification of issue of discretion in examinership applications

The Court of Appeal has allowed an appeal by the Edward Holdings group of companies against a decision of O'Connor J in the High Court refusing to appoint an examiner to four of the seven group companies in respect of which an examiner was sought to be appointed.[1] The group, which is controlled by Gerry Barrett, owns, amongst other assets, the Meyrick and G hotels in Galway.

The Court of Appeal rejected all of the findings which underpinned the decision of the High Court to refuse to appoint the examiner, including non-disclosure and abuse of process findings. The central issue for consideration by the Court of Appeal was the argument by the secured creditor that a settlement agreement between the group and the secured creditor in January 2017 was inconsistent with the concept of the group of companies seeking to have an examiner appointed to the relevant companies and that this should cause the court to exercise its discretion to refuse the application to appoint the examiner.

In the Court of Appeal, Finlay Geoghegan J and Hogan J, in separate judgments, with which Peart J agreed, both concluded that the existence of the settlement agreement was not a sufficient basis upon which to exercise their discretion to refuse the application. Hogan J explained the position as follows.

"*The fact … that an application for examinership would be inconsistent with the performance of the obligations imposed on a company under the terms of a settlement agreement cannot in itself – and I stress these words – be a dispositive consideration for a court determining whether to appoint an examiner … precisely because the entire examinership system is premised on the assumption that pre-existing commercial contracts (of whatever kind) will be overridden, varied, negated and dishonoured in the wider public interest of rescuing an otherwise potentially viable company*".

This constitutes a useful clarification of this issue particularly in light of a recent decision of the High Court which suggested otherwise (*Re JJ Red Holdings Ltd*), with which Hogan J expressly disagreed. ■

Footnote

1 Examinership is the Irish legal mechanism for the rescue or reconstruction of an ailing but potentially viable company.

> **THE COURT OF APPEAL REJECTED ALL OF THE FINDINGS WHICH UNDERPINNED THE DECISION OF THE HIGH COURT**

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Applying the Regulation (EU) 2015/848 on insolvency proceedings (Part 3)

Myriam Mailly writes about the tools available to insolvency practitioners (hereafter, 'IPs') who will need to conclude cross-border insolvency agreements or protocols under the scope of the EIR 2015 (recast).

MYRIAM MAILLY
INSOL Europe Co-Technical Officer

The Recast Insolvency Regulation aims at fostering a proper cooperation between IPs taking into account best practices as set out in the Guidelines adopted by European and International organisations such as UNCITRAL.

In particular, Recital 49 of the EIR 2015 (recast) states that IPs "*should be able to enter into agreements and protocols for the purpose of facilitating cross-border cooperation of multiple insolvency proceedings in different Member States concerning the same debtor or members of the same group of companies, where this is compatible with the rules applicable to each of the proceedings. (…) Simple generic agreements may emphasise the need for close cooperation between the parties, without addressing specific issues, while more detailed, specific agreements may establish a framework of principles to govern multiple insolvency proceedings (…)*".

It is also important for IPs to consider the need to conclude insolvency protocols in light of the fact that, pursuant to the applicable national law, such protocols "*may be approved by the courts involved, where the national law so requires*."

In order to help IPs in that regard, guidelines have been published by a number of organisations dealing with cross-border insolvency matters. Apart from the tools necessary for the application of the EIR 2015 *per se* such as the publication of standard forms in order to inform known foreign creditors and to object with regard to group coordination proceedings or the publication of updated information on national proceedings listed into Annex A of the European Insolvency Regulation (see *Part 1*), other

> **IPs SHOULD BE AWARE THAT INSOL EUROPE'S INSOLVENCY REGULATION CASE REGISTER COULD ALSO BE HELPFUL FOR THEIR DAY-TO-DAY PRACTICE**

texts have to be put on the scene where there is a need to conclude cross-border insolvency protocols.

For example, the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009) provides relevant information on practical aspects of cross-border cooperation and communication between IPs. In particular, Part III of the Practice Guide deals with cross-border insolvency agreements and provides relevant information on when and how to use them. This third part was built on practical experience and the Annex I of the Practice Guide contains an interesting list of case summaries to illustrate how different issues had been addressed in practice, such as claims resolution including employees' claims (*Sendo*) or intra-group transactions (*Calpine Corporation*), coordinated asset sales (*AgriBioTech Canada, Inc.* or *Alphastar Television Network, Inc.*), coordinated restructuring plans (*Smurfit-Stone Container Corporation*) or determination of IPs' fees (*360Networks Inc.*), and so on… Furthermore, IPs should be aware that the University of Leiden has made public a part of the International Insolvency Institute's ('III') protocols database.

At last but not least, IPs should be aware that INSOL Europe's Insolvency Regulation Case Register could also be helpful for their day-to-day practice as the first decisions delivered by national courts under the EIR 2015 (recast) are now available on the Lexis Nexis dedicated platform. ■

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

For updates on new technical content recently published on the INSOL Europe website, visit: **www.insol-europe.org/technical-content/introduction** or contact Myriam Mailly by email: **technical@insol-europe.org**

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