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The journal of INSOL Europe
Winter 2018/19

Relativity & Realism in Restructuring

Cross-class cram-down mechanism examined

Also in this edition:

- Athens: Annual Congress Report
- Paradigm Shift in Portugal
- Innovation in Small Jurisdictions
- Legal Frameworks in Kosovo
- Conferences, books *and more*...

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Welcome from the Editors


FRANK HEEMANN


CATARINA SERRA

A year has passed since my first editorial, written for last year's Winter issue. As usual, a lot has changed in the world, at a remarkable pace.

Just to name a couple of the major events with impact on the economy, some of which are still unfolding as we speak, there is, first, "the new French revolution". The *gilets jaunes*, demonstrating against rising fuel taxes and living costs, have succeeded in making the French government back down on the planned fuel tax and to put up future measures, including a boost to the minimum wage. And then there is, of course, "the exit called Brexit". After 18 months of negotiations and an accord just agreed on with the European Union covering Britain's exit by March 2019, the British government postpones the parliament vote on the deal, making Britain's economic future even more uncertain.

In what concerns the Insolvency world, 2018 will be remembered for the sad news of the passing away of Professor Ian F. Fletcher. Ian Fletcher was a gigantic reference in the field of international insolvency law. He will remain with us through his many articles and books and as an inspiring example of lifelong learning for knowledge.

For me, personally, 2018 entailed unexpected challenges. After more than 20 years as an academic, I was appointed justice of the Portuguese Supreme Court. It was not an easy call to make, far from it. I had doubts – I still do – but one thing is for sure: having taken the first steps in the path of what may be called "law in action", I do not regret it for *to change is to enrich*. I am more aware now that it is crucial to look at the objects from multiple sides, to be introduced to different perspectives. This is why it is so important to have publications which provide diversified approaches, which are inclusive rather than exclusive.

The contents of this *Eurofenix* issue closing the year reflect the ongoing changes – *focus on change*, as evidenced by the President's column (*p.6*).

First of all, let us look back at INSOL's Annual Congress, dealing, *inter alia*, with the challenges posed by Brexit and the continuing insolvency law reforms in Europe (*p.14*), and Academic Forum Conference, debating party autonomy and third-party protection in Insolvency Law (*p.18*).

Looking forward, we perceive a paradigm shift in the banking culture (*p.24*) and anticipate the impact of blockchain as a chance for turnaround modernisation (*p.32*). Talking about modernisation, there are innovative examples coming from small jurisdictions (*p.30*), a new (or updated) international insolvency law in Switzerland (*p.26*) and the development of new legal frameworks in Kosovo (*p.34*).

Regarding the topical issue of the Directive on preventive restructuring (forthcoming in 2019), the article on cross-class cram-down is definitely not to be missed. Should the cram-down against dissenting creditors really be permitted only when the absolute priority rule is respected and the plan is in the best interest of creditors? Ignacio Tirado and Riz Mokal express concerns (*p.20*). Also worthy of attention is the EU's project on judicial cooperation in economic recovery (JCOERE) (*p.28*).

Lastly, the regular columns, in particular the Country Reports (*p.38*), currently with news from Latvia, Slovakia, Ukraine, Italy, the Netherlands and Norway, keeping us up-to-date, are a must read for all insolvency professionals.

Let me conclude this editorial with an invitation: dare to take part, throughout the new year, in Eurofenix or in any of other challenging INSOL Europe projects!
Do not fear change! Welcome 2019!

Catarina

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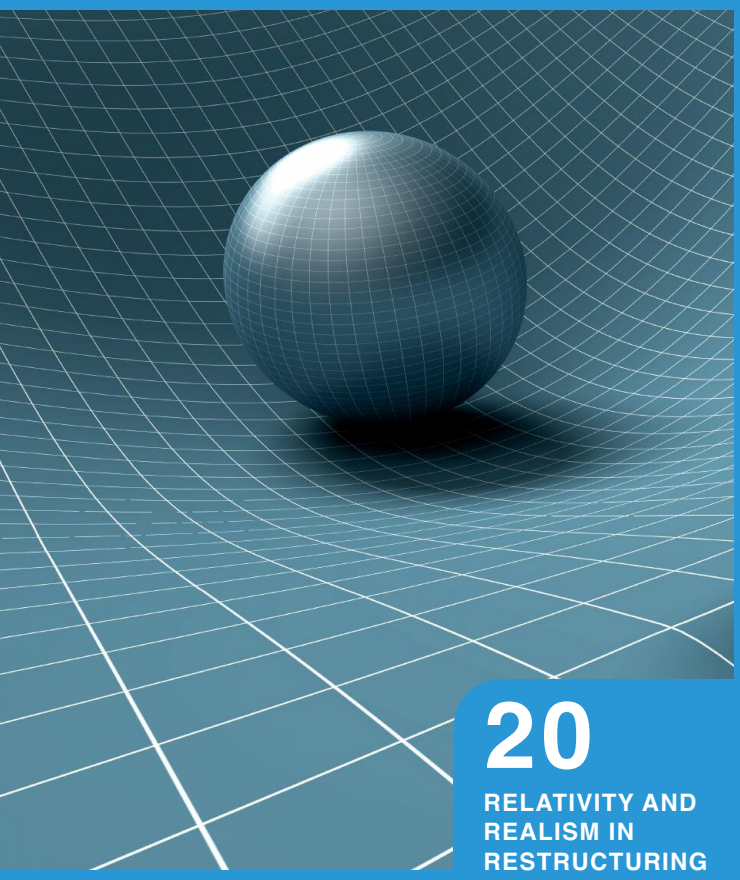

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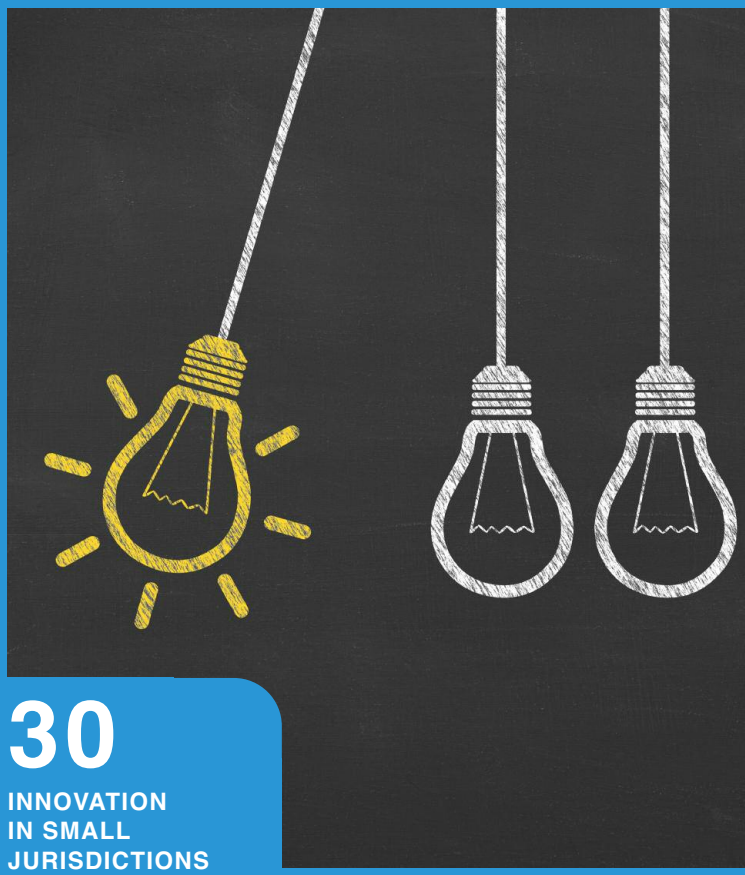

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Focus on change

ALASTAIR BEVERIDGE
INSOL Europe President

Alastair Beveridge updates us on the plans and actions decided upon by the Council at the recent Congress in Athens

> **OUR OBJECTIVE IS TO GROW OUR MEMBERSHIP NUMBERS AND HAVE MORE COUNTRIES REPRESENTED ON COUNCIL THAN THE CURRENT 14**

In my first Eurofenix column I would like to congratulate the editorial team and contributors for their relentless hard work and the continued high quality of the magazine. I also want to thank immediate past-president Radu Lotrean for his energy, commitment and super-human efforts during his presidency – a number of key projects were started during his term and I will be working to ensure they come to fruition during my term and beyond.

One of the benefits of the way the organisation has been set up is to provide an effective 4-year team – first as Vice President, then Deputy, followed by a Presidential year (as part of the Executive team) and then a year as immediate past President (again on the Executive team). You may ask why this is relevant and the reason is simply to allow involvement over quite a long period so that projects which may take significant time to implement and bear fruit can be followed through on. It allows consistency in the decision-making team, a more strategic focus and is one of the reasons why I had a meeting with both our new Vice President, Marcel Groenewegen, and Deputy President, Piya Mukherjee, in November. I want us together to be able to consider and agree on the direction of travel and priorities for the organisation and the next stage of the development of INSOL Europe.

I thought one of the most helpful things I could start by doing for our members would be to provide an update on the discussions your council held while we were attending our recent and hugely successful Congress in Athens. Many, but not all, related to the output of the Taskforce 2025 team. In Radu's last column he provided some of the detail of the proposals and I am pleased to say that Council voted to support all of these changes.

Development Committee

This has recently been set up and Council agreed to split Europe into three areas:

- North & West (to be represented by Alice Van der Schee);
- South (to be represented by Alberto Nunez-Lagos); and
- East (to be represented by Radu Lotrean).

The first project was to agree which countries would fall into which region and detailed in the table shown right is the agreed allocation. The allocation was designed to facilitate co-ordination and assign responsibility to ensure focus and not overload anyone!

This leadership team is now working on identifying country co-ordinators. This will be followed by the development of prioritised bespoke plans for each country – our objective is to grow our membership numbers and have more countries represented on Council than the current 14. We expect this will take some time as some countries have professional associations and strong links with INSOL Europe already and others are at

Development Committee

Country	Allocation
Austria	Alice
Belgium	Alice
Bulgaria	Radu
Channel Islands	Alberto
Croatia	Radu
Cyprus	Radu
Czech Republic	Radu
Denmark	Alice
Estonia	Radu
Finland	Alice
France	Alberto
Germany	Alice
Gibraltar	Alberto
Greece	Radu
Hungary	Radu
Iceland	Alice
Ireland	Alice
Israel	Alberto
Italy	Radu
Latvia	Radu
Liechtenstein	Alice
Lithuania	Radu
Luxembourg	Alice
Norway	Alice
Poland	Radu
Portugal	Alberto
Republic of Kosovo	Radu
Republic of Moldova	Radu
Romania	Radu
Russia	Radu
Serbia	Radu
Slovak Republic	Radu
Slovenia	Radu
Spain	Alberto
Sweden	Alice
Switzerland	Alice
The Netherlands	Alice
Turkey	Alberto
Ukraine	Radu
United Kingdom	Alice

Share your views!

an earlier stage in the process - so we are not going to rush this as we believe it is critically important for the long-term success of our organisation. Updates on progress will follow and I would encourage you to get involved and contact the relevant leadership team member if you would like to help.

Updated objectives

One of the most important areas of change was a re-focus and revision of our objectives – we have updated our website to reflect these but as a reminder I have detailed them in the table above.

As an organisation we will be focusing on these objectives and using our time and resources to develop them for the benefit of our members.

Communication

In the fast moving world we live in, communication has become all-encompassing – the methods we use, the frequency of use and the level of interaction which is expected have all changed and INSOL Europe can ill afford to be left behind. As highlighted in the previous issue we are in the process of updating our website, adding functionality, making it look better and, hopefully, driving more usage through and for our members. We hope to launch the new version in 2019 and once up and running would recommend you take a look at it and I would invite you to provide feedback. The site will be adapted regularly to ensure we continue to meet your needs.

The website is clearly only one of the communication tools we have – we also have various social media options, designed to allow you to participate and get involved in the organisation. I am looking for some volunteers to help in this area so if you are a serial blogger or are addicted to twitter please let me know and we will try and get you into the system and involved.

INSOL Europe's updated objectives

To lead the study, evaluation and development of restructuring and insolvency law, techniques and practice in Europe.

To disseminate technical and topical information on restructuring and insolvency.

To facilitate business development and the exchange of professional experience among its members.

To be acknowledged by European and international bodies as the first port of call for all matters regarding restructuring and insolvency in Europe.

To further the technical training of members and interested individuals.

Communication does however have to be two-way to be effective and I would encourage you to communicate with INSOL Europe in whatever format suits you best. As an organisation we will do at least one member survey each year to gauge your views on relevant topics, in particular our annual conference, and the Executive team and I are committed to listening to your thoughts and ideas.

Other news

I am pleased to report that the second module of the High Level Insolvency course was run in Cyprus at the end of October and we had a great turnout of over 100 delegates – feedback has been good and we are in the process of considering where we will next run the course in 2019. Thanks to Radu Lotrean, Ignacio Tirado and Emmanuelle Inacio who, together with our International Experts, conspired to make this another successful running of the course.

Book recommendation

I love reading books although I am considered a luddite by colleagues as I like paper not Kindle versions. I do however accept the wisdom of the Kindle and the ability to carry a whole library with you wherever you go – I just prefer good old fashioned paper, and if I ever need to start a fire I have handy combustible material!

In each of my columns I will recommend a book or two because I believe there is nothing like sharing something you like with others. This time round I am recommending "*The Square and the Tower*" by Niall Ferguson – it is a book about hierarchies and networks through the ages and how at various times they have influenced the development of the world. One of the messages in the book is how incredibly powerful a well-structured network can be.

I believe this is very relevant for our organisation and how it interacts with its members and hope a few of you end up reading and enjoying this book as much as I did. ■

> ONE OF THE MOST IMPORTANT AREAS OF CHANGE WAS A RE-FOCUS AND REVISION OF OUR OBJECTIVES

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

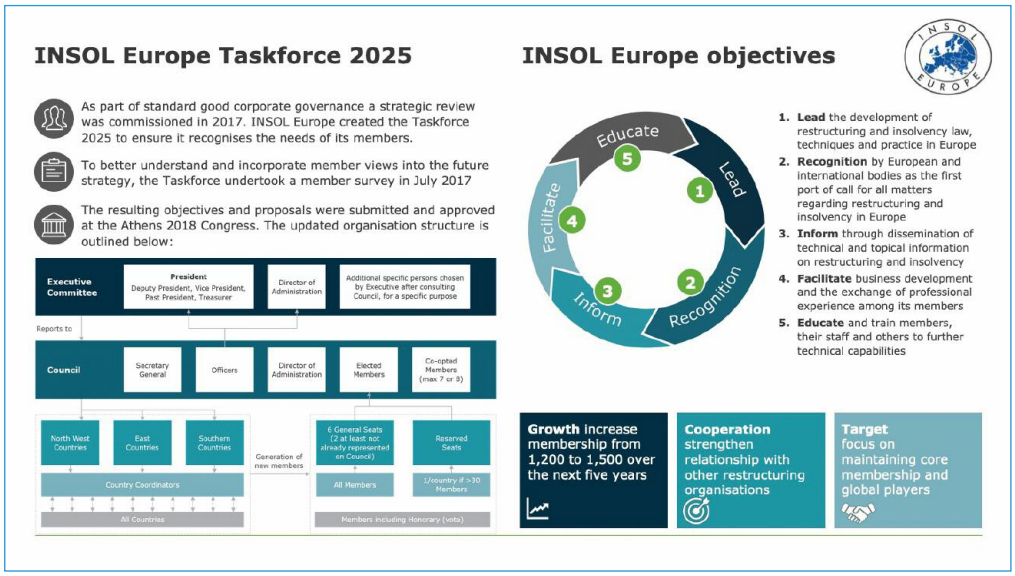
Strategic Taskforce 2025 Report

Last year, the Council of INSOL Europe decided to initiate the formulation of INSOL Europe's strategy for the years to come. To this effect, the Strategic Task Force 2025 was established, which comprises eight members of INSOL Europe, mirroring its extensive professional and geographic diversity, led by Messrs Dr. Steffen Koch and Wolf Waschkuhn.

As for any strategy, the starting point is of key importance. The Strategic Task Force developed a questionnaire to elicit the many opinions of the current membership, your motivation and aspirations and how INSOL Europe should be seen in and seen to interact with the outside world.

The questionnaire was completed in 2017. The results have been analysed in detail and used in the development of the strategy. A summary of the areas of strategic focus is presented on our website.

For further information contact the Co-Chairs of the Strategic Task Force 2025, Dr. Steffen Koch and Wolf Waschkuhn (*contact details on page 46*).



Download the Summary here: www.insol-europe.org/strategic-task-force-2025-member-questionnaire

INSOL Europe & AIJA Joint Conference

The Young Members Group drinks reception at Athens was hugely popular with more than 100 young professionals attending.

The evening was also the opportunity to announce a new event organised for our YMG members: a joint seminar with AIJA, the international association of young lawyers. This seminar will take place from 13-15 June 2019 (save the date!) on the beautiful island of Mallorca. We are happy to announce that the program for this first joint seminar, exclusively organised for and by young insolvency professionals, has now been agreed upon.

Full details about how to attend and take part will be published on our website: *www.insol-europe.org/young-members-group-events*

Council Elections, Changes and Retirements

Executive Officers

At the close of the Athens Congress this month, Radu Lotrean (Romania) stepped down as President to become Immediate Past President, Alastair Beveridge (UK) became the new President, Piya Mukherjee (Denmark) became the new Deputy President and Marcel Groenewegen (Netherlands) was elected by Council as incoming Vice President. Chris Laughton (UK) remains as Treasurer and Caroline Taylor (UK) as Director of Administration.

Council

There were also several changes to the structure of Council. As a reminder, countries with 30 or more members are entitled to a reserved seat on Council and the following situation arose this year:

- A vacancy became available for Spain and France's reserved seats as Vicente Estrade and Marc Senechal retired from Council.
- Frank Tschentscher came to the end of his first three-year term of office holding the reserved seat for Germany and agreed to stand for re-election against other nominations.
- Poland lost their reserved seat on Council as membership numbers fell below 30.

Therefore, nominations from members in Spain, France and Germany were invited for candidates from their own country. Following the nomination and election process, Adrian Thery was duly elected to the reserved seat for Spain for his first 3-year term of office, Jean Baron to the reserved seat for France for his first three-year term of office and Frank Tschentscher to the reserved seat for Germany for his second three-year term of office.

One non-reserved seat vacancy on Council also became available (which may be occupied by any country) as Piya Mukherjee (Denmark) had been appointed as Vice President in the previous year. Two nominations were received and following the election process, the successful candidate was Laurent Le Pajolec (representing Poland).

Each year, Council may co-opt or re co-opt a maximum of 8 members to Council and this year the following members were appointed: Michael Veder (Netherlands), as chair of the Academic Forum, Catherine Ottaway (France), as representative of INSOL International and Constitution specialist, Wolf Waschkuhn (UK), as co-chair of STF2025, Steffen Koch (Germany) as co-chair of the Turnaround Wing and co-chair of STF2025, Evert Verwey (Netherlands), as co-chair of EECC, Robert van Galen (Netherlands), as EU co-chair and Brexit matters, Alberto Nunez-Lagos as co-chair of the Turnaround Wing and our newcomer Georges-Louis Harang (France), as co-chair of the Young Members Group.

Honorary Members

Honorary Membership for outstanding meritorious service on behalf of the Association was awarded to Heinz Vallender (Germany), chair of the Judicial Wing, who steps down after 13 years of service and also Alberto Nunez-Lagos (Spain), Past President and co-chair of the Turnaround Wing.

Secretariat

Wendy Cooper retired from the Secretariat and was duly thanked for her 11 years of service. Wendy will be missed by all colleagues and members who knew her during her time as INSOL Europe's Membership and Conference Registrations Co-ordinator and we wish her well for the future. Going forward, recently appointed Event Manager, Harriet Taylor, will take charge of Conference Registrations and Hannah Denney will take charge of Membership, to become Sponsorship & Membership Manager.

Anti-Fraud Forum

Carmel King and Bart Heynickx are delighted to announce their appointment as Co-Chairs of the INSOL Europe Anti-Fraud Forum. They are replacing David Ingram and Eitan Erez, who have done some great work in growing and promoting the Forum since it was established at the 2012 Annual Congress.

In 2019 and beyond, Bart and Carmel will be focussed on raising the profile of the Anti-Fraud Forum and developing links with the other INSOL Europe working groups and similar professional organisations. A consultation with members will be circulated in the New Year.

Financiers Group

This is the new name for the Financial Institutions Group which is now chaired by Florian Joseph (Germany) and Francisco Patricio (Spain).

Full details are on our website: www.insol-europe.org/about-us

Private Equity Awards in France: Perspectives from Europe

INSOL Europe was invited to attend the 17th edition of the Private Equity Exchange & Awards in Paris on 21 November 2018, writes Catherine Ottaway.

Our Deputy President Piya Mukherjee spoke on a panel dealing with the restructuring industry, to give her perspectives from Europe.

This year the event was dedicated to '**Entrepreneurship, Venture and Growth Capital**', with the conference including 24 roundtables on topics such as Private Equity best strategies: Leader's secrets; Shopping: Seizing opportunities in a changing world; France: A renewed European pillar; Managing restructuring through skills and teams, Stepping up through digitalisation, and LBO limit: Is the sky the limit… In addition to the conferences, one-to-one meetings were organised for networking before the gala dinner.

ACURIA Conference

Lisbon, 26 October 2018

Lisbon in October, the weather still carrying some of the warmth of late summer, saw the holding of the conference on the ACURIA Project, *writes Paul Omar.*

The event witnessed a consortium of universities from Portugal (Coimbra), Italy (Florence), Poland (Gdansk) and the Netherlands (Maastricht) set out their preliminary findings from empirical research carried out by watching the performance of different courts, concerning corporate restructuring and insolvency. The objective of the research was to identify best practices and blockages in judicial performance in the four jurisdictions identified, and to draw common conclusions where possible.

The colloquium began with a welcome from Helena Mesquita Ribeiro (Assistant Secretary of State for Justice), who together with Catarina Frade (Coimbra), the Project Coordinator, and João Paulo Dias (Executive Director, Centre for Social Studies, Coimbra) underlined the importance of the project in both domestic and international terms, particularly given the legislative changes intervening at both national and European levels in recent years.

The morning was taken up by a presentation from each of the national teams of their research methodology, early findings and results from structured interviews held with stakeholders. Common themes soon emerged, of resourcing and case management problems, judicial training and overseen issues, albeit to different degrees across the countries studied. The pace of legislative change was also referenced as a point of contention with fast-paced reforms requiring periodic capacity-building and stakeholder buy-in.

Three substantive sessions completing the conference agenda addressed themes related to the research study. The first was the keynote speech offered by Paul Omar (Technical Research Coordinator, INSOL Europe), who was presented by Catarina Serra (Justice of the Portuguese Supreme Court, Joint Chief Editor of Eurofenix, INSOL Europe). The speech was themed around the sunset of rescue and how judicial inventiveness was called upon more and more to supplement the gaps in the legislation in order to fulfil the ideal of restructuring.


Catarina Serra with Bob Wessels and Paul Omar

The first afternoon session then picked up the issue of challenges to the judicial system. Led by the chair, Ana Conceição (Leiria Polytechnic Institute), presentations given by Judge Fatima Reis Silva (Lisbon Court of Appeal), Bob Wessels (Emeritus Professor, Leiden), Judge Luciano Panzani (Rome Court of Appeal) and Bartosz Groele (Allerhand Institute) addressed the position, in each of the jurisdictions, about the focus of the study, and provided an account of recent changes, including at European level, which have added to the difficulties of the judicial task.

At the end of the day, under the aegis of Judge Amélia Rebelo (Aveiro Commercial Court), the final session drew out the themes of cross-border and group of companies restructurings, of particular concern to Portugal, the panel being composed of Judge Fernando Tainhas (Lisbon Commercial Court), Paulo Valerio and Rui Castro Lima, both practitioners in the field of insolvency. Conclusions here focused on the need for more training for judges (and practitioners) and the development of best practice guides, drawn from international experience, particularly necessary given the paucity of local experience in major restructurings of these types. The conference was then closed with an address by Narciso Magalhães Rodrigues (High Council of the Judiciary), offering a roundup of the day's themes and their importance.

Further information on the project, including presentations and papers from this event, will be made available via the project website at: *acuria.eu*

Communication and Cooperation: Further Steps

The proposal to review the CoCo Guidelines initiated in Summer 2017 led to the formation of a Working Group later that year to consider the development of a new and updated version of the rules first adopted in 2007.

Under the stewardship of the Co-Chairs – Paul Omar (Technical Research Coordinator, INSOL Europe; De Montfort University) and Tomáš Richter (Of Counsel, Clifford Chance, Prague; Associate Professor, Charles University) – the CoCo2 Working Group has brought together representatives of academia, judiciary and practice belonging to both INSOL Europe and CERIL (Conference of European Restructuring and Insolvency Law, www.ceril.eu). With the assistance of the Review Group, containing a wider number of similarly qualified professionals and reflective of a greater range of jurisdictions across Europe, an initial survey of ideas for areas of focus took place in Spring 2018. The survey was intended to result in the formation of parameters that would inform the drafting process, in particular those following from the Recast EIR which came into force in June 2017. Presentations on some of the outcomes of the survey took place at the Judicial Wing and Main conferences in Athens in October 2018.

The resulting agenda for the redrafting exercise includes, *inter alia*, making the guidelines compliant with the amended terminology used by the Recast EIR, taking account of the issue of the separate standing of debtors-in-possession, the position of groups, whether in co-ordinated or non-co-ordinated situations, the relationships between insolvency office-holders and the group coordinator in case of the former, or situations triggered by the use of "synthetic secondary proceedings" under Article 36 of the Recast EIR. Also forthcoming were proposals to enhance communication requirements in the case of foreign creditors, where the current rules might need further elaboration on the duty of practitioners to communicate outwith their jurisdiction. The possibility of a communications template (minimum information to be supplied) and whether undertakings should take any particular form were also mooted as part of possible changes, as well as issues relating to conflicts of interest and the uses of protocols.

The Working Group anticipates beginning the re-drafting process in early 2019. Aiming for that target, the membership of the Review Group has been widened to ensure a better reflection of practice, while the framework for consultation on the draft will be improved to capture as many views as are feasible. Having said this, the project would benefit from inclusion of further voices from the judiciary: expressions of interest in the work of the Review Group from the insolvency benches across the EU are warmly encouraged, for which please contact the authors.

In summary, it is hoped that the tentative outcomes of the redrafting exercise will be presented to the membership at Copenhagen 2019. *Regular updates on progress will appear in Eurofenix or the monthly newsletters.*

Eastern European Countries' Committee Conference 2019
6-7 June, Ljubljana (Slovenia)

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If you are interested in sponsoring this conference, please contact Hannah Denney: hannahdenney@insol-europe.org

A closer look at...

The General Approach of the Council on the European Commission's Proposal Directive on Preventive Restructuring Frameworks

EMMANUELLE INACIO
INSOL Europe Technical Officer

> IF A CERTAIN DEGREE OF FLEXIBILITY IS NECESSARY TO ENHANCE HARMONISATION, THE EFFECTIVENESS AND CONSISTENCY OF A RESCUE CULTURE IN THE EUROPEAN UNION SHOULD HOWEVER NOT BE SACRIFICED ON THE ALTAR OF FLEXIBILITY

Share your views!

On 11 October 2018, the (Justice and Home Affairs) Council agreed upon its position on the compromise text concerning the European Commission's Directive Proposal on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU of 1 October 2018[1].

Legislative procedure

As a reminder, on 21 August 2018, the Committee on Legal Affairs of the European Parliament adopted Angelika Niebler's Report[2] on the European Commission's Directive Proposal and recommended that the European Parliament's position adopted at first reading under the ordinary legislative procedure should amend the Commission's proposal[3]. The Committee also decided to enter into inter-institutional negotiations ahead of Parliament's first reading. The Report was endorsed by the plenary meeting of the European Parliament and the decision to enter into inter-institutional negotiations was confirmed on 12 September 2018, meaning that the trilogue would start as soon as the Council had adopted its position.

By its general approach, the Council gives the Parliament an idea of its position on the Commission's legislative proposal, in order to help reaching a compromise between the Parliament and the Council. Moreover, informal inter-institutional meetings will be organised by the Council, the Parliament and the Commission to help them reach an agreement on the legislative amendments in early 2019.

Content of the Council's General Approach

The position of the Council keeps all the main elements of the European Commission's Proposal but provides a high degree of flexibility to Member States to adapt the new legislation to their existing frameworks[4]. If a certain degree of flexibility is necessary to enhance harmonisation, the effectiveness and consistency of a rescue culture in the European Union should however not be sacrificed on the altar of flexibility.

Access to preventive restructuring frameworks

The Council notes that there is a wide consensus on the principle laid down by the European Commission's Proposal, according to which Members States shall ensure that effective preventive restructuring frameworks are available for debtors in financial difficulty when there is a likelihood of insolvency. However, a fear lingers that debtors with no prospect of viability will largely apply for these tools, which would cause unnecessary delays in the opening of an insolvency procedure, and would risk decreasing the value of the estate[5].

Thus, the Council proposes to allow the Member States which deem it necessary, to introduce a viability test as a condition for access to preventive restructuring frameworks, provided that this test is carried out without any detriment to the debtor's assets[6]. The absence of detriment does not exclude, however, the possibility to require debtors to prove their viability at their own costs[7].

The compromise text also provides the Member States with the possibility of making this framework available not only upon the debtor's request, but also upon the creditors' request on an optional basis[8]. Moreover, the concept of "likelihood of insolvency" is to be understood as defined by the national law, according to the General Approach.

Appointment of the practitioner in the field of restructuring

Regarding the role of the practitioner in the field of restructuring, the Proposal states that the appointment by a judicial or administrative authority of a practitioner in the field of restructuring shall not be mandatory in every case, but may be required where the debtor is granted a general stay of individual enforcement actions or where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down in order to avoid unnecessary costs and incentivise debtors to apply for the preventive restructuring at an early stage of financial difficulties.

The Council notes that if the Member States agree that the preventive restructuring procedure should be a debtor-in-possession procedure, meaning

that the debtor should be left in - at least partial – control of the assets and the day-to-day operation of the business, some Member States however consider that the presence of a practitioner in the field of restructuring can increase the efficiency of the procedure and can ensure that the interests of all parties are taken into account.

The compromise thus lays down the general principle that the appointment of such a practitioner shall be decided on a case-by-case basis, depending on the circumstances of the case or on the debtor's specific needs, except in certain cases, where the national law may require such a mandatory appointment[9]. According to Recitals 18a, the Member States could decide that the appointment of a practitioner in the field of restructuring is always necessary in certain circumstances, including such as where the debtor benefits from a general stay of individual enforcement actions, where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down or where the restructuring plan includes measures affecting the rights of workers, when the debtor or its management have acted in a fraudulent, criminal or detrimental way in business relations, or when the appointment is made with the sole purpose of assisting in drafting or negotiating the restructuring plan.

Stay of individual enforcement actions

Regarding the question of the maximum duration of the stay, the Proposal requires the Member States to allow the debtor to apply for a general or limited stay of individual enforcement actions, in order to support the negotiations of a restructuring plan limited to 4 months, and that the total duration of the stay of individual enforcement actions, including extensions and renewals, shall not exceed twelve months. The compromise keeps this duration[10,11] in order to reach a compromise between the rights of the debtor and of the creditors.

However, the General Approach introduces a derogation from the twelve-month period, where, according to national law, the restructuring plan is to be submitted within eight months from the start of the initial stay of individual enforcement actions to a judicial or administrative authority for confirmation, Member States have the possibility to provide that the stay is extended until the plan is confirmed[12].

Moreover, the compromise includes the possibility for the Member States to lift the stay of individual enforcement actions where the stay no longer fulfils the objective of supporting the negotiations of a restructuring plan or, where, provided by the national law, it creates unfair prejudice to creditors.

But the compromise also allows Member States to introduce a minimum period during which the stay cannot be lifted, as well as to limit the possibility of requesting the lifting of a stay to where creditors did not get an opportunity to be heard before the stay came into force or before an extension of the period was granted by a judicial or administrative authority. The Member States may provide for a minimum period during which the stay of individual enforcement actions cannot be lifted within the time limit of the initial duration of the stay of individual enforcement actions, up to four months[12].

Cross-class cram-down mechanism

The Proposal includes a cross-class cram-down mechanism to be used if the restructuring plan is not supported by the required majority in each class of affected parties, leading to a dissenting voting class.

The proposal required Member States to make a valuation of the debtor in order to determine which classes of creditors would be "out of the money", and therefore not able to carry the plan by their support in a cross-class cram-down vote and introduced an absolute priority rule according to which a dissenting class of creditors must be satisfied in full if a more junior class could receive any distribution or keep any interest under the plan.

Some Member States considered that these requirements would make the procedure more burdensome and costly and would render the preventive restructuring more restrictive, if not impossible.

The first problem has been addressed in the compromise text by introducing an alternative option by which Member States can avoid the requirement that only classes of creditors "in the money" can carry the plan, namely where a majority of classes of creditors votes in favour of the plan of which at least one class is a secured class of creditors or a class senior to the ordinary unsecured creditors[14].

The second problem has been addressed in the compromise text by providing another alternative option for the Member States, namely to introduce a different benchmark, which is a "relative priority rule", in order to protect dissenting creditor classes when using a cross-class cram-down mechanism. This alternative option requires that dissenting voting classes are treated at least as favourably as any other class of the same rank, if the normal ranking of liquidation priorities under national law were applied, and more favourably than any junior class[15].

To be continued… ■

Footnotes:

1 http://data.consilium.europa.eu/doc/document/ST-12536-2018-INIT/en/pdf
2 http://www.europarl.europa.eu/sides/getDoc.do?type=REPORT&mode=XML&reference=A8-2018-0269&language=EN#title5
3 *Eurofenix*, 2018 Autumn edition
4 https://www.consilium.europa.eu/en/press/press-releases/2018/10/11/directive-on-business-insolvency-council-agrees-its-position/
5 Page 3.
6 Article 4, 1a.
7 Recital 17a.
8 Article 4, 4.
9 Article 5, 2.
10 Article 6, 4.
11 Article 6, 7.
12 Article 6, 7a.
13 Article 6, 8.
14 Article 11, 2b.
15 Article 11, 2a.

MEMBER STATES, HOWEVER, CONSIDER THAT THE PRESENCE OF A PRACTITIONER IN THE FIELD OF RESTRUCTURING CAN INCREASE THE EFFICIENCY OF THE PROCEDURE AND CAN ENSURE THAT THE INTERESTS OF ALL PARTIES ARE TAKEN INTO ACCOUNT

A warm welcome to Athens in October!

Paul Omar and Myriam Mailly report on the 37th Annual Congress in Athens

PAUL OMAR
INSOL Europe
Technical Research Officer

MYRIAM MAILLY
INSOL Europe Co-Technical Officer

Athens, fount of Democracy, Culture and Civilisation, the oldest city in Europe, welcomed delegates to the Annual Conference, accompanied by very warm weather at the end of the tourist season.

Over 400 attended the event, held at the Hilton Hotel, whose rooftop bar boasted unparalleled views of the city skyline and the Aegean beyond. At sunset, the Parthenon was lit up, forming an impressive backdrop to moments of conviviality and networking. Expected on the agenda were the necessary updates on events in the world of insolvency, as well as reminders of contemporary events, the emergence of Greece from austerity, the challenges posed by Brexit and continuing insolvency law reforms throughout Europe. There were some surprises too, with unusual or hitherto unexplored themes, adding to the heady mix of two intensive days of conference.

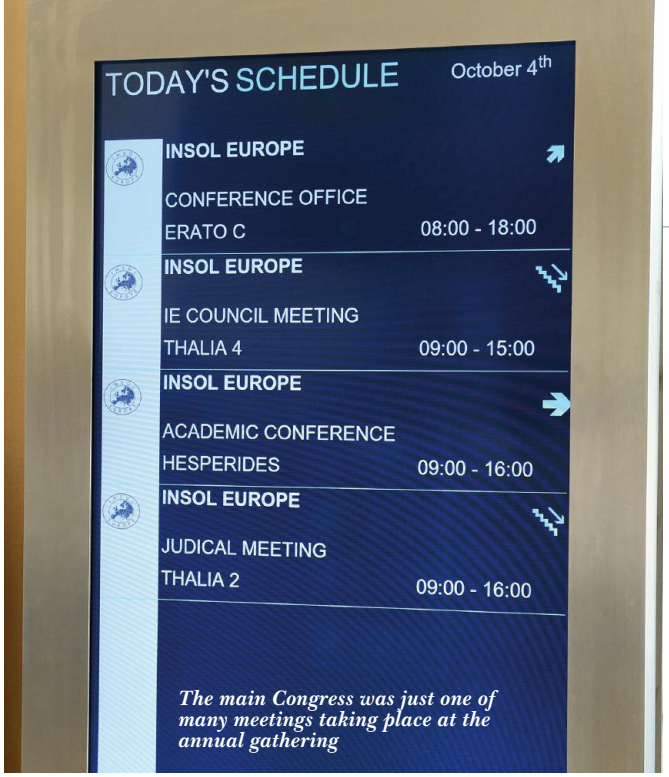
The First Day

Dawn on 5 October heralded the beginning of the first day's events. A fulsome introduction to the day was provided by Radu Lotrean (outgoing President, INSOL Europe) and George Bazinas (Bazinas Law, Greece), ably assisted by Frank Tschentscher (Schultze & Braun, Germany), who also served as compère and stage master throughout the conference. Collectively, they provided the backdrop and introduction to the keynote speaker, Professor Evangelos Venizelos, whose ascent of the *cursus honorum* brought him to the heights of academic and political life in Greece, culminating in his appointment as Deputy Prime Minister in 2011-2012.

Professor Venizelos' allocution, based on his extensive experience, addressed the recent history of Greece through its economic and social travails and its challenging relationship with the international institutions, as part of the country's efforts to redress the imbalance in its economy. While not minimising the work yet to be done, Professor Venizelos permitted himself some cautious optimism that, despite the immediate and likely difficult period ahead, Greece would eventually be able to restore its economy and social structures. In sum, the lessons of the past and continuing present would serve as reminders for a better future for the country.

Continuing the theme of matters Hellenic, the first session was devoted to the "Holy Grail" of domestic insolvency law. Here, with George Bazinas at the helm, Giorgio Cherubini (EXP, Italy), Agustín Bou (Jausas, Spain) and David Ereira (Paul Hastings, UK) spanned the development of the legislative framework from past to present. Their contributions showed why rapid legislative change has failed to bring the desired panacea and why unaddressed issues in the frameworks surrounding insolvency (including constitutional, corporate and fiscal matters) prevent effective access to restructuring in the country. The conclusion signalled that economic factors played a great

Keynote speaker Professor Evangelos Venizelos opened the conference to a packed hall on the first day



The main Congress was just one of many meetings taking place at the annual gathering

Delegates enjoying the fresh air prior to the welcome dinner

part in the access to insolvency procedures, requiring particular attention in the context of continuing stresses on the Greek economy.

The focus on the present also brought two sessions before the morning coffee break, devoted to Brexit and the Draft Directive. In the first, a conversation between Simeon Gilchrist (Edwin Coe, UK) and Andrew Shore (UK Insolvency Service) brought tantalising glimpses of the world behind the press headlines, in which preparations have been put into place to respond to the final political settlement of Brexit. Depending on the outcome, the desire expressed by many for certainty would be likely met, though the precise vehicle for cross-border regulation of proceedings cannot be predicted with certainty and would need, in any event, to respond to continuing challenges in the post-Brexit continuum.

The second session mapped out the future of the Draft Directive, parts of which are already subject to agreement, with the remainder likely to be agreed soon. The result will be, in the view of the panellists, Reinhard Dammann (Clifford Chance, France), Christoph Paulus (Humboldt University, Germany) and Francisco Garcímartin (Madrid Autonomá, Spain), a considerable improvement in the tools available for restructuring, including across boundaries. Uncertainty, though, as in the case of Brexit, was also present, the final shape of the text still being open to some change, while its eventual implementation by Member States is likely to produce some diversity in its effect and impact across Europe.

With breakout sessions devoted to topics of current concern, such as NPLs, distressed asset sales, the role of offshores in asset concealment and bankruptcy-proofing, as well as the challenges facing the automotive industry, the morning's session drew to a close, in time for a well-deserved pause for lunch before the afternoon session began. First up was a contribution from the Judicial Wing on approaches to communication and cooperation. A distinguished panel, Judges Vallender (Germany), Costello (Ireland), Panzani (Italy) and Szczepanik (Poland), offered their insights into new challenges formed by the paradigm in the Recast EIR, including the new 'group coordinator' role, and how to incentivise courts to communicate.

Reporting at the end of this session was Paul Omar (INSOL Europe) on progress with the CoCo2 Project and, of particular relevance to the role of judges, the inception of work on the JCOERE project, led by Irene Lynch Fannon (UCC, Ireland), looking to research and report on impediments at the court level facing cross-border restructurings. The session that followed updated delegates on the further case-law and practice in relation to the Recast EIR. Giorgio Corno (Studio Corno, Italy), Nicolas Theys (Dentons, France), John Briggs (3/4 South Square, UK) and Judge Caterina Macchi (Milan Civil Court, Italy) canvassed the latest developments and suggested future trends.

Closing the day, an extended presentation on spyware and the tools for investigation and detection formed the backdrop for a discussion of the boundaries between the permissible and impermissible. With the ever-growing need for adequate detection of fraud and concealment of assets, the role of investigations in the everyday work of the insolvency practitioner was the subject of some scrutiny. The application in hypothetical scenarios of tools developed especially for this purpose was underpinned by a series of short films illustrating their use, after which David Ingram (Grant Thornton, UK) and Claude Montgomery (Dentons, USA) debated some of the legal issues surrounding the use of detecting tools and the collection of evidence. An envoi by Radu Lotrean set the scene for the next day's activities.

> **BREAKOUT SESSIONS WERE DEVOTED TO TOPICS OF CURRENT CONCERN, SUCH AS NPLS, DISTRESSED ASSET SALES AND THE ROLE OF OFFSHORES IN ASSET CONCEALMENT**

> THE OBJECTIVES OF ANY BANKRUPTCY LAW ARE TO RESCUE VIABLE COMPANIES, WHILE SAVING COSTS AND MAXIMISING THE (EXPECTED) RETURN TO CREDITORS AT THE SAME TIME

The Second Day

The second day opened with a speech by Dimitrios Vervessos (President, Athens Bar Association). After several years in the spotlight, subsequent to the Greek financial crisis, the speaker highlighted the improvements made in Greece the last few years: amendments to the Greek insolvency code, the introduction of a consumer insolvency law, out-of-court mechanisms and mechanisms dealing with non-performing loans. The emphasis was made that a highly qualified and experienced body of Greek professionals is important to go along with the movement of modernisation and digitalisation of the insolvency practice in Greece. In the long term, these changes would contribute to boosting the economy, create jobs and attract foreign investment.

The keynote speech was followed by a panel moderated by Bart de Moor (Strella Law, Belgium) and dedicated to the relationship between Law & Economics. Jocelyn Martel (ESSEC, France) first reminded the audience of the objectives of any bankruptcy law: to rescue viable companies, while saving costs and maximising the (expected) return to creditors at the same time. Michael Thierhoff (Andersen T&L, Germany) suggested the objective could be achieved by a practical look at international best practices and benchmarking rather than at harmonisation, which decreases competition within the EU. George Georgakopoulos (Piraeus Bank, Greece) informed the audience that, though more than 16.5% of the productive capacity (assets) of the non-financial sector of the Greek economy was trapped in non-viable business schemes, representing a huge cost for society as a whole (and not just the affected parties), the much-anticipated Draft Directive could help in this regard.

Before the coffee break, Adam Harris (President, INSOL International) gave a summary of organisational activities at the international level, developed by

Athens Bar Assoc. President Dimitrios Vervessos opened the second day

Drawing attention to the link between law and economics

Piya Mukherjee's panel focused on new technology such as Blockchain and Bitcoin

numerous individual and institutional members. The panels which then took place after the break focused on technology, the first homing in on legal tech and how modern technology could affect insolvency work. Kicking things off, Aidas Kavaliauskas (CID, Germany) reminded the audience of the different levels of advanced technology potentially available for use. Concrete examples were then presented by Bart Heynickx (ALTIUS, Belgium) illustrating specific tools in place in Belgium for preventive monitoring of companies, instituting various alert systems and setting up the new online central solvency register whose function has been extended since 1 May 2018. Moderating the panel, Frank Heemann (BNT, Lithuania) outlined the algorithm-based insolvency practitioner selection systems which exist in Hungary, Lithuania, Slovakia and Portugal and, in particular, the differences between the national selection systems. Concluding matters, the panel posited a selection of challenges and questions remaining to be solved on the use of such technology.

Technological matters then moved on to digital assets.

Share your views!

The Young Members Group reception is always a favourite amongst delegates

Incoming President Alastair Beveridge is formally welcomed by Radu Lotrean

The Gala Dinner entertainment set hearts alight with a dazzling performance

Moderated by Piya Mukherjee (Horten Law, Denmark) the next panel suggested how a debtor's digital assets, for example bitcoins, could be taken into account by insolvency professionals. Jay Doyle (Swansea University, UK) explained the potential of blockchain systems, while Ilya Kokorin (Buzko Legal, Russia) offered an insight into Initial Coin Offerings ("ICOs"/investment tokens). The panellists then talked more generally about cryptocurrencies offering a chance for the audience to become more familiar with these new tools (including issues of pseudonymity, security concerns, traceability and uncovering fraudulent transactions). Tom Braegelmann (BBL, Germany) then proposed solutions on the evaluation and sale of cryptocurrencies in both private and insolvency law, reporting on how property rights over cryptocurrencies have been recognised by the courts, recent examples being provided by cases in the Netherlands and Russia.

Before the finale of the day, announcements regarding the INSOL Europe Strategic Taskforce 2025 were made by Steffen Koch (HWW, Germany) and Wolf Waschkuhn (One Square Advisors, UK), outlining the headlines of INSOL Europe's strategy for growth and development for the next few years.

The conference was then closed by Radu Lotrean, who passed the torch to Alastair Beveridge (Alix Partners, UK), the incoming President of INSOL Europe.

Delegates then enjoyed a free afternoon before the Gala Dinner and its musical and theatrical homage to Greece past and present. Thus passed two very convivial days in Athens. Until the white rose blooms again… ■

"As a first time delegate, I was delighted to attend the INSOL Europe Annual Congress in Athens.

As I discovered, besides being a first time delegate, I was also the only delegate from Appleby and from the Isle of Man! As a first-timer I was thrilled to realise that not only were the speakers engaging and informative, but also that the delegates were so welcoming.

It was great to meet and converse with, as well as learn from like-minded insolvency professionals from across Europe and beyond. I came away with a greater understanding of the similarities and differences between the insolvency frameworks of many jurisdictions, with new ideas as to how we may tackle the challenges we each face, and some great contacts. I look forward to seeing everyone at next year's Congress in Copenhagen, catching up with the friends I have made and making new ones.

I would like to extend my congratulations to INSOL Europe for hosting such an excellent event.

Claire Corkish, Counsel at Appleby (Isle of Man) LLC

PANELS FOCUSED ON TECHNOLOGY, THE FIRST HOMING IN ON LEGAL TECH AND HOW MODERN TECHNOLOGY COULD AFFECT INSOLVENCY WORK

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

Academic endeavour reaches new heights

Alexandra Kastrinou and Paul Omar report on the 14th Academic Forum Conference in Athens

ALEXANDRA KASTRINOU
Principal lecturer,
Nottingham Law School

PAUL OMAR
INSOL Europe
Technical Research Officer

Academic Forum Chair Michael Veder opening the conference

The Academic Forum conference arrived to a warm welcome and sunny skies in the city of Athena, its eponymous protector and also the goddess of wisdom, whose attribute was invoked for attendees at the event.

Under her aegis, the conference assembled to debate this year's theme: "**Party Autonomy and Third-Party Protection in Insolvency Law**", with a selection of papers exploring the links between the dominant theme of insolvency law and related areas of contract law, property law and corporate law. Delegates were met by a fulsome welcome from the Academic Forum Chair, Michael Veder (Radboud Nijmegen) who noted the upcoming anniversaries of the Academic Forum (15 years) and Younger Academics' Network in Insolvency Law (10 years), underlining the continued importance of academic research to the work of the organisation.

Chairing the first session, Anthon Verweij (Secretary, IEAF) introduced the first set of presentations with an overall focus on *ipso facto* clauses in contract law and their relationship to insolvency processes. Natalie Mrockova (Oxford) outlined her experience of empirical research in China in relation to contractual opt-outs from court-driven insolvency and its relevance to similar situations in Europe. Eugenio Vaccari (City University London) followed this with an examination of the relationship between essential supply contracts, *ipso facto* and termination clauses in England and Wales, illustrating the policy objectives behind the special treatment of these clauses in that jurisdiction. Closing the session, David Brown (Adelaide) gave an account of the law reform experience in Australia, where the many exceptions in the law arguably serve to undermine the effective prohibition of *ipso facto* clauses.

In the second session of the afternoon, the debate turned to the position and role of secured creditors. With Jessica Schmidt (Bayreuth) in the chair, guiding proceedings, the first presentation saw Melissa Vanmeenen and Inge Van de Plas (Antwerp) tackle the effectiveness of retention of title agreements, particularly looking at whether a balance between the title-holder's rights and the position of other creditors was achievable. In a unique three-hander, Ben Schuijling, Vincent van Hoof and Tom Hutten (Radboud Nijmegen) took turns dissecting the topic of accelerated extrajudicial collateral enforcement of NPLs. Ending the session, Judge Flavius-Iancu Motu (Specialized Court of Cluj) discussed the impact of the second chance approach on secured creditors' rights through a detailed examination of proposed provisions governing stays, cram-down, plan adoption and creditor protection.

Closing proceedings for the day, the Edwin Coe Lecture took place, given this year by Professor Frank Verstijlen (Groningen). Employing an analogy drawn from the world of film, the speaker offered, albeit with some humour, a particularly trenchant criticism of the safe harbour and immunity provisions of the Draft Directive of 2016. In offering an analysis of the shape of these

Share your views!

provisions, measured against the realities of restructuring practice, Professor Verstijlen classified responses, as the title of Sergio Leone's film starring Clint Eastwood would have it, into "*The Good, the Bad and the Ugly*". The conference then adjourned for networking and more discussions over drinks and dinner, rounding off an excellent first day.

The next morning saw delegates back early for a session dedicated to the work of the Younger Academics' Network in Insolvency Law. With Line Langkjaer (Aarhus) at the helm, the first speaker, Frederik De Leo (Leuven), addressed the influences on insolvency procedures to be drawn from the development of corporate governance principles in their application, often with a refocusing on the position of creditor. The lessons of legal transplants, in the case of Cyprus in particular, in the presentation by Sofia Ellina (Lancaster), showed the options faced by creditors in jurisdictions with the law still in the process of development. Offering a view from just such a jurisdiction, Olga Stakheyeva-Bogovyk (Kiev) rounded off the session with a look at the future of financial restructurings in light of the COMI debate. The theme of restructuring was picked up in the session following the coffee break, where Wai Yee Wan (SMU) gave an account of schemes of arrangement in Singapore and recent changes leading to the absorption of rules from the United States, while Tereza Vodičková (Lawyer, Czech Republic) suggested limits to the absolute priority rule in use in many jurisdictions.

The final session of the conference, labelled the Edwin Coe Practitioners' Forum, was devoted to transaction avoidance. Chaired by Florian Bruder (DLA Piper, Munich), a paper from Reinhard Bork (Oxford) showcased arguments for and against the harmonisation of rules with a meticulous analysis of the parameters which should inform the process of evaluating the need for convergence of rules and ultimately the formation of a potential text. In response to a series of questions posed by the chair, Simeon Gilchrist (Edwin Coe, London) and Hans Renman (Hamilton, Sweden) Bork emitted generally positive views on the desirability of harmonisation, though its scope remains to be determined, given the diversity of current legal frameworks.

Closing the conference, Michael Veder stated that the thought-provoking presentations with ensuing interaction from the audience helped ensure a lively debate and make the event a success. Bidding farewell to the delegates, Michael exhorted delegates to plan for the next conference in Copenhagen in 2019. ■

Lively debate was a feature of the conference

> **THE THOUGHT-PROVOKING PRESENTATIONS WITH ENSUING INTERACTION FROM THE AUDIENCE HELPED ENSURE A LIVELY DEBATE AND MAKE THE EVENT A SUCCESS**

"I am really grateful for the opportunity that was given to me to be a presenter at the INSOL Europe Academic Forum Annual Conference in Athens.

The conference gathered many academic and professional experts in the field of insolvency from all over the world, which took this conference to a higher level, since mechanisms and ideas from various jurisdictions were recommended.

All the presented papers were of high quality and what was interesting about this conference was that it was very interactive, since fascinating debates took place after the presentation of each paper. I would strongly recommend to anyone who is involved in the area of insolvency to attend conferences held by INSOL Europe."

Sofia Ellina, Lancaster University (UK)

More photos can be viewed at www.insol-europe.org/gallery/2018-athens-academics

Many younger academics were present including Vincent van Hoof, Sofia Ellina, Frederik De Leo, Tom Hutten

Has Newton had his day? Relativity and realism in European restructuring

Riz Mokal and Ignacio Tirado applaud the imminent introduction of a cross-class cram-down mechanism, support the Council's proposal of a relative priority rule, and suggest a better interpretation of the creditors' best interest test

IGNACIO TIRADO
Professor at the Universidad Autónoma of Madrid, currently serving at UNIDROIT

RIZ MOKAL
Barrister at South Square, London, Visiting Professor at the University of Florence, Honorary Professor at University College London

Share your views!

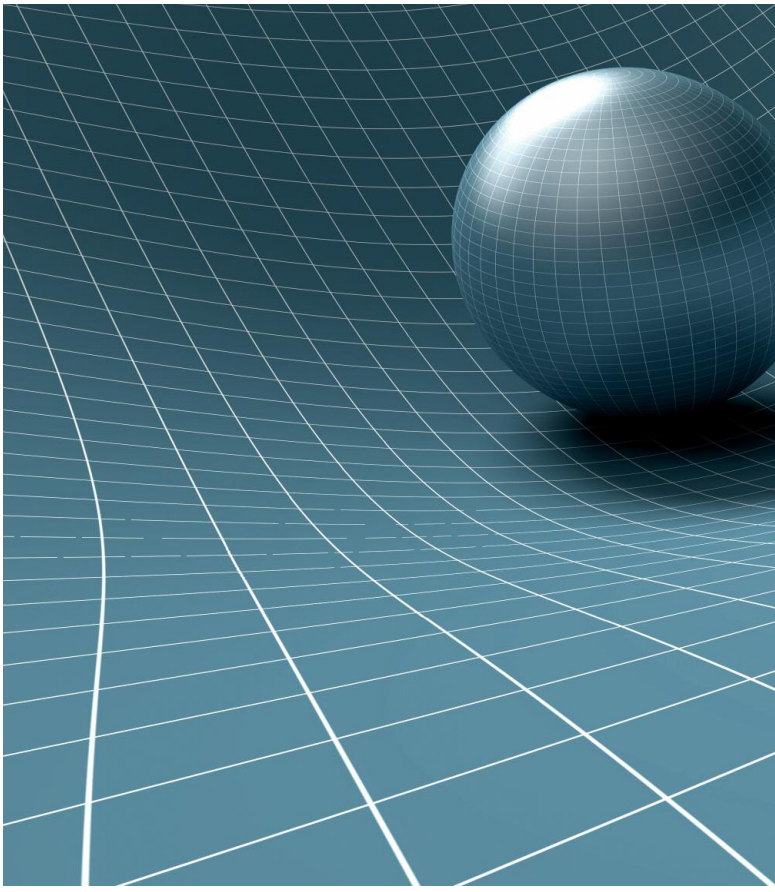
Isaac Newton had good reason for believing space to be absolute, and absolute space to be essential to the operation of the laws of motion. In a famous example, he noted that water in a rapidly spinning bucket is at rest relative to the bucket, yet has a concave surface.

This, he thought, evidences the water's being in motion in relation to absolute space. Similarly, according to his first law, in the absence of an applied force, a body stays at rest or, as the case may be, continues in a straight line, in either case again in relation to absolute space. And so on. The notion of absolute space, then, was indispensable to Newton's monumental contribution to human knowledge. And yet the same concept eventually came to be recognised as a hurdle to scientific progress. The problem — as explained variously by Berkeley, Leibniz, and Mach, the last of whom denounced "*the monstrous conceptions of absolute space and absolute time*" — is that absolute space is inaccessible to the senses, impervious to meaningful analysis, and useless in practice.[1] The displacement of Newtonian absolutism by Einsteinian relativity marks a milestone in the advance of civilisation.

We do not claim quite the same status for the European Council's proposal to substitute or at least supplement the absolute priority rule ('**APR**') in restructuring law with one based on relative priority ('**RPR**'). Yet the comparison is irresistible, not least because it flatters insolvency law and those who practice, study, and teach it.

Cross-class cram-down in the Preventive Restructuring Directive

The Council's proposal concerns the forthcoming Directive on Preventive Restructuring Frameworks, which has just completed. The Directive looks



set to create an extensive toolbox with which Member States may equip entrepreneurs and enterprises seeking to respond to distress, without invoking formal insolvency proceedings. Much has already been written about various aspects of the Directive. We focus here on the primary conditions that must be met before a restructuring plan may be made effective against a claimant class, amongst whose members it has not attracted requisite support, i.e. on the preconditions for a 'cram-down' against a dissenting class.

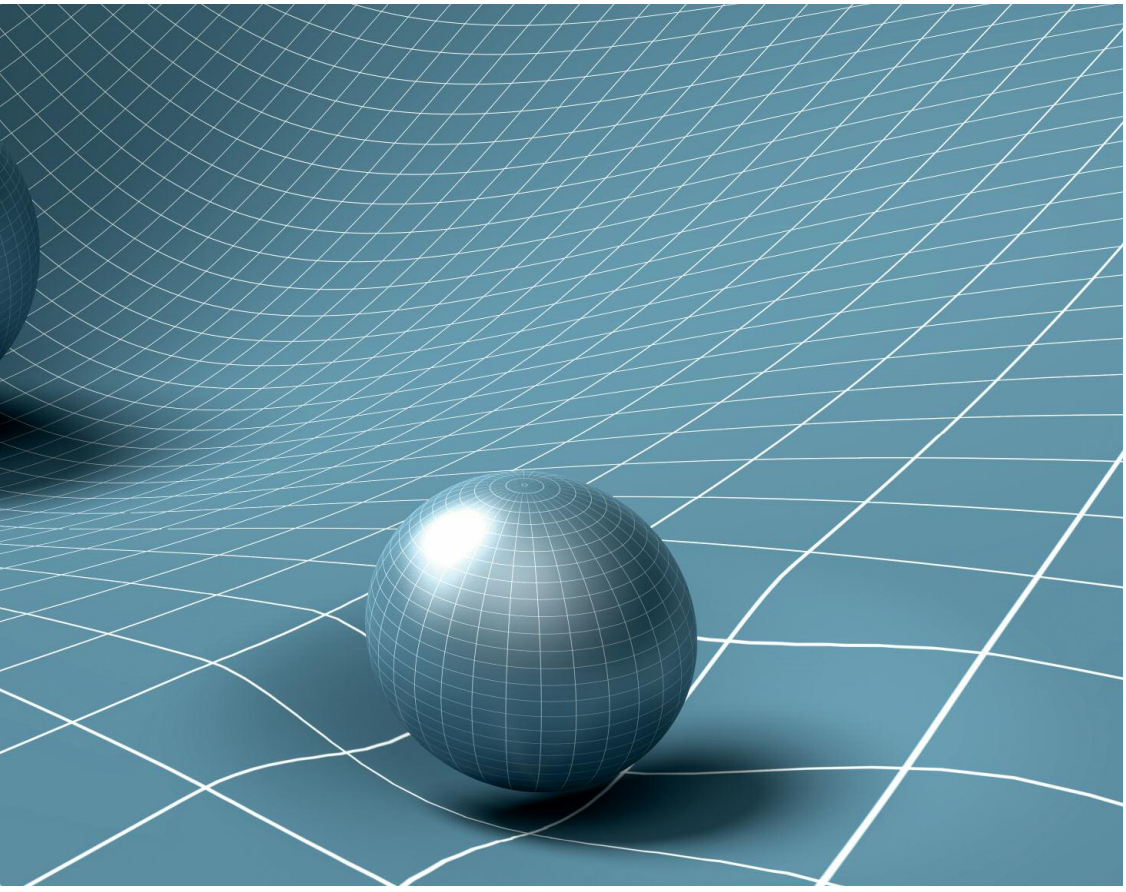
Drawing on practice under Chapter 11 of the US Bankruptcy Code, the Commission had proposed that a cross-class cram-down be permitted only if (among other things) the APR was respected and the plan was in the best interest of creditors, understood in a particular way. The APR requires that no claimant class ranking below the dissenting one should receive or retain anything under the plan unless each member of the dissenting class has been paid the full face value of his outstanding claim. The best interest of creditors test sets the floor in relation to each dissenting creditor by requiring that no such creditor be left worse off under the plan than they would be in the debtor's liquidation. We will call this the 'returns in liquidation' test ('**RIL**'), and will contrast it with the 'returns in realistic alternative' test ('**REAL**').

The very introduction of a cross-class cram-down mechanism would constitute a huge advance in European restructuring law and practice, for which the Commission is to be commended. The availability of cram-down would potentially facilitate value- and employment-preserving restructurings of distressed but viable debtors which, under the current dispensation, are subject to unnecessary liquidations. And the RIL and APR have historically provided the conceptual foundations for the cram-down mechanism. Experience in the US and elsewhere has taught, however, that neither is quite suited to the task.

Getting 'REAL' about creditors' best interests

The problem with RIL is that it opens the door to plans under which some of the value that ought to go to the members of the dissenting class would be expropriated for others. As noted, RIL guarantees that dissentients would get at least as much under the plan as in liquidation. This is not good enough, however, where liquidation is not at all likely, regardless of whether the plan is approved or not. Consider a debtor who is balance-sheet insolvent but fully able to pay the debts as they fall due, from the revenues generated by its operations, i.e. it is cashflow solvent because of a 'going concern surplus'. If liquidated, however, it would not be able to

> **CONSIDER A DEBTOR WHO IS BALANCE-SHEET INSOLVENT BUT FULLY ABLE TO PAY THE DEBTS AS THEY FALL DUE, FROM THE REVENUES GENERATED BY HIS OPERATIONS**



> **A DISSENTING CREDITOR DOES NOT WANT THE PLAN TO BE APPROVED AND SO HE CANNOT COMPLAIN AS LONG AS HE IS PAID AT LEAST AS MUCH AS HE WOULD BE IN THAT SCENARIO**

meet some of the repayment obligations because of value destruction through counterparty termination of contracts, erosion or refusal of trade credit, supplier discounts, customer confidence and associated willingness to pay for guarantees, departure of key employees, higher rates on financial credit and so on. The plan proposes to maintain the debtor as a going concern, then, but promises the dissenting class only their liquidation returns, which are significantly lower. Here, RIL clearly does not protect dissenting creditors' (best) interests.[2]

The Council proposes that the best interest test may be met if each dissenting creditor received at least as much as he would either in liquidation or in "*the next best alternative scenario, if the restructuring plan was not confirmed*". The latter terminology is open to misunderstanding in suggesting comparisons with the position of the dissentients in a hypothetical scenario that, by stipulation, is worse than (i.e. is next best to) the plan. This is perverse, as the example above illustrates, since the dissentients would want their plan returns to be compared with a scenario in which they claimed they would be *better* off.

We suggest that REAL provides a more sympathetic reading of the Council's proposal:[3] the dissentients' plan returns ought to be compared — not with a hypothetical worse scenario—but with the scenario realistically likely to materialise if the plan was not approved. This may, but need not, be liquidation on either a going concern or a piecemeal basis. By definition, a dissenting creditor does not want the plan to be approved, and so he cannot complain as long as he is paid at least as much as it would be, precisely in that scenario. REAL has a proud lineage in restructuring practice[4] and enjoys scholarly support.[5]

Relativity displaces absolutism

Where the RIL requires too little, the APR demands too much. There are four overlapping problems with it.

First, it subjects approval of the plan to a requirement that may be utterly unrealistic on the facts. The debtor's estate may, on any credible assessment, lack sufficient value to pay the dissentients anywhere near 100 cents on the euro. In such cases, which are unlikely to be rare, the APR does not serve any defensible purpose.

Second, the rule incentivises dissent on the expectation of a free ride. Members of a class who expect there to be sufficient support elsewhere for the plan have an incentive to vote against it in the hope of receiving full payment, effectively by free-riding on the sacrifice of those who agree to give up part of their claim by voting for the plan.

Third, however, this incentive to hold out risks backfiring. Creditors in multiple classes may have more or less symmetrical incentives to hold out, with the result that some plans that might have been approved in the absence of this strategic behaviour would end up being rejected.

Fourth and finally, the absolute priority rule makes it very difficult to award value, under the plan, to equity. This is particularly problematic in relation to small and medium enterprises in which separation of ownership and control is not feasible because of the size, nature, or location of the debtor's business, and/or because the business is only viable if it were to retain its pre-distress goodwill, which in turn could only be retained if some of the pre-distress management continued to stay in place under the plan.

The Council proposes that Member States may supplement or substitute the APR with an RPR that provides that the dissentient class be treated at least as favourably as any other class of the same rank and more favourably than any junior class.

The RPR, which is likely to address many of the APR's problems, again enjoys scholarly support.[6] The version of the RPR recommended by the Council appears to derive from the recommendations resulting from a Commission-funded project on

restructuring best practices, led by the authors of this article together with Profs. Lorenzo Stanghelini and Christoph Paulus.[7] We understand that this RPR commended itself to members of the Council as a result of workshops to present this project's results, conducted at the Bank of Italy in Rome and at the Centre of European Policy Studies in Brussels.[8]

Let no one mock any more the notion that publicly funded academic hard work may enrich policy discourse and legislative process.

Conclusion

The APR, like absolute space, was once crucial to progress, yet must now be acknowledged as a possible barrier to it. Restructuring law is ready for a dose of relativity. Time is also ripe to reinterpret the best interests test by breaking its hitherto invariant focus on the debtor's liquidation, and by aligning it with the creditors' returns, in the realistic alternative scenario to the plan.

The Council's proposals may yet herald restructuring law's Einsteinian revolution. ■

We are grateful to Judge (retd) Charles Case, Lorenzo Stanghellini, and Wolfgang Zenker for lengthy, brilliant, instructive, inspiring conversations on the topic. Unless explicitly attributed to another, the views expressed here are ours alone.

Footnotes:

1 Arden Zylbersztajn, 'Newton's absolute space, Mach's principle and the possible reality of fictitious forces' (1994) 15 *European Journal of Physics* 1 provides an interesting and accessible account.

2 This point is explicated by Michael Crystal QC and Riz Mokal in 'The valuation of distressed companies: A conceptual framework' (2005) 3 *International Corporate Rescue* 63-68 and 123-131.

3 In any event, the statement of the best interest test as proposed by the Council could benefit from a reformulation along the lines suggested in the text here.

4 See e.g. the judgment of the Court of Appeal of England and Wales in *In re English, Scottish, and Australian Chartered Bank* [1893] 3 Ch 385, 406 and 413-414 (Lindley LJ) and 415 (Lopes LJ). On a related point, see *Re British Aviation Insurance Co Ltd* [2005] EWHC 1621 (Ch), [88]; one of the present authors, then a pupil barrister, assisted counsel for the opposing creditors.

5 Lorenzo Stanghellini, Riz Mokal, Christoph Paulus, and Ignacio Tirado (eds), Best Practices in European Restructuring (Walters Kluwer, 2018) (European Commission Grant JUST/2014/JCOO/AG/CIVI/7627), 37-38 and Policy Recommendation 2.6.

6 See e.g. Baird and Rasmussen, 'Chapter 11 at Twilight' (2003-4) 56 *Stanford Law Review* 673, 691-693; Douglas G. Baird, 'Priority Matters: Absolute Priority, Relative Priority and the Costs of Bankruptcy', 165 (2016) *University of Pennsylvania Law Review* 785, 791; Wessels, Madaus, and Boon, *Rescue of Business in Insolvency Law* (Instrument of the European Law Institute, 2017), pp. 335-6, paragraph 686; and Madaus, 'Leaving the Shadows of US Bankruptcy Law: A Proposal to Divide the Realms of Insolvency and Restructuring Law' (2018) 19 *European Business Organisation Law Review* 615, particularly Section 5.2.

7 See Stanghellini *et al*, *supra*, at pp. 45-47, including Policy Recommendation 2.16. For full access to the results of the project, see www.codire.eu.

8 A complete recording of the latter proceedings is accessible at the Centre's YouTube channel here: https://youtu.be/z5ArsT3-Y1w.

> **THE APR, LIKE ABSOLUTE SPACE, WAS ONCE CRUCIAL TO PROGRESS, YET MUST NOW BE ACKNOWLEDGED AS A POSSIBLE BARRIER TO IT**

A paradigm shift in Portuguese bank culture

Francisco da Cunha Matos writes on the necessary changes in the paradigm of bank culture in order to restore the trust between clients and bank institutions

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A field of extremely high importance in a bank's governance is the problem related to culture and integrity, and its being taken into account in an effective way in the entire organisation. This can be difficult to achieve since the notion is not inbuilt in the organisation and the leaders do not give it much attention.

Values such as: knowledge, qualification, courage, control and risk management, common strategy control, control of star performers, the group itself and the corporations that belong to it, as well as the equitable remuneration, cannot be imposed from the outside if they are not already accepted by the individuals that manage and supervise the Bank, and consequently spread by them throughout the entire organisation.

The culture of integrity and commitment must start from top to bottom and it shall settle in six pillars that must work as the basis of a good governance system:

(i) To know the **business**;
(ii) To know the **structure**;
(iii) To know the **merchandise**;
(iv) To know the **employees**;
(v) To know the **clients**; and
(vi) To know the **rules**.

Regarding the existence, in the banking industry, of complex or opaque corporation structures, the Basel Committee for Bank Supervision clarified that the Administration Board and the people with management duties must know and understand the operational structure of a bank that functions by appealing to special vehicles or similar structures, or which, in some jurisdictions that establish an obstacle to the transparency do not follow the international banking standards. In such cases the Administration Board and the people with management duties must understand the purpose, the structure and the particular risks involved in the operations and must also find out how to mitigate the identified risks ("*understand-your-structure*").

Regarding the bank industry's perception, the Basel Committee for Bank Supervision considers that the corporate governance is "*the way a bank's business and activities are administrated or managed*" by the corresponding entities with management and supervision duties. It is also the way in which they align corporate behavior and the activities with the general expectation that banks must operate in a prudent, safe and meticulous way, combined with integrity and compliance with the applicable legislation and regulations.

Large, complex and opaque structures demand a much harder effort in order to maintain and implement the integrity culture, because difficulties can arise easily, reopening the question of how to treat the so-called structures which are described as "*too big to fail, too big to manage*".

In order to achieve a change of behavior it will probably be necessary to start applying effective and efficient sanctions, a subject that the European Commission arises expressly in its *Green Paper COM (2010)284 final)*. Considering, however, that any reinforcement of the civil or criminal liability regarding the corporation's managers must be carefully analyzed.

Most of the organisations express concerns regarding adopting measures and ethical principles, besides legislation and other regulations. Nevertheless, some corporations apply a set of rules concerning the goals they want to implement, in order to create a sense of trust in the general public, and for such a purpose they decide to describe the amounts and the strategy they want to achieve in the long and short term in their annual reports and on their websites. However, this declaration of will

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and intent to eliminate the loss of confidence incurred in the meanwhile is not enough by itself. Indeed, the demonstration of the effective defense and implementation of the principles and values emerging from the official documents is an urgency.

The intervention of the Bank of Portugal in the governance of banks in crisis, practicing powers of destitution, replacement of directors and disposition of assets and liabilities, alienated the shareholders from the decision procedures.

On the way to achieving the announced need of promotion of an amended culture paradigm, we consider that the creation of corporate-banking mechanisms to stimulate the intervention of the stockholders in the management of credit institutes in crisis is thoroughly pertinent.

Therefore, the need to trigger the intervention of stockholders in a responsible manner in corporate governance is an absolute requirement. Simultaneously, there is the necessity of a proper representation of the external interests of that governance.

The question of the participation of stockholders and the consideration of long-term and external interests is mainly a feature of the internal and organisational corporate status. In fact, we do not foresee how to convince the stockholders to participate in the company's life and contemplate long-term interests, except for by introduction of benefits for their participation, through a proper internal organisation and the procedures' streamlining, in the interest of an easier, more attractive, less expensive and, consequently, more interesting intervention, improving the company's internal performance.

In the Portuguese Law, the bank-company stockholder's special condition, linked to the existence of special duties, is perfectly expressed. Article 199 of the Legal Framework of Credit Institutions and Financial Companies, although not imposing a general duty, implies a special duty of general participation in the company's life. Fulfilling it, at least on the financial support plan, is not coercive, because there is no clarified derogation from the principle of contribution's limitations incorporated in the Company Act. And the duty will not bind all the stockholders equally, but only the ones whose participation has a relevant dimension for the company's management.

The distribution of specific contours of power between executive and non-executive bodies must be reasonable, with a clarified identification of an enlarged scope of matters which have to be reported. As a matter of fact, the enforcement of the powers of a non-executive body that comes directly from the stockholders can be decisive for the introduction of powers in the scope of high management and strategic supervision – a possibly superior dimension than the company's usual business. This will be seen in the variety of the bodies' powers, like that of the general and supervision council, or of the non-executive director's board, as explained above.

In this regard, it is desired that, concerning the issue of the relatively undetermined high management, the companies that adopt the dualistic model (the idea may be used, mutatis mutandis, in other models) should include in their legal status rules that provide for fundamental strategic decisions, including singular operations, besides a system of authorisation or approval by the general and supervision council of all decisions – always having in mind a participation in the decision and not an overlap. ■

> **LARGE, COMPLEX AND OPAQUE STRUCTURES DEMAND A MUCH HARDER EFFORT IN ORDER TO MAINTAIN AND IMPLEMENT THE INTEGRITY CULTURE**

Switzerland's new (or updated...) international insolvency law

Rodrigo Rodriguez and Marjolaine Jakob report on the revised Swiss recognition act

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Switzerland's international insolvency law – the relevant provisions being contained in Art. 166-175 of the Swiss International Private Law Act ('SPILA') of 1989 – is governed by the principle of passive territoriality – or must we say "was"?

Lacking formal recognition by the competent Swiss court, foreign insolvency proceedings have no effects on Swiss territory. Foreign insolvency administrators *may neither collect assets* located in Switzerland *nor take any legal actions* to this aim on Swiss territory prior to such recognition (according to some views they may even risk criminal sanctions for such actions).

International developments towards a universalisation of cross-border insolvencies (EU Insolvency Regulation, UNCITRAL Model Law on cross-border insolvency) have led to increased criticism of Switzerland's adherence to its highly territorial (and thus costly and burdensome) approach. Efforts to reform the provisions on international insolvency law were initiated years ago. The outcome of these efforts is a recast of Switzerland's international insolvency law provisions ('**revSPILA**') adopted by the Swiss parliament in March 2018 that will have entered into force on 1 January 2019.

To get straight to the point: the revised law is less of a revolution than an evolution of the existing provisions, "loosening" rather than abandoning the territorial approach, with Swiss courts and authorities still retaining a considerable amount of decision and control powers. This article gives a short overview over the most important aspects of the revised regime.

The requirements for recognition of a foreign insolvency decree

Swiss law not only requires formal recognition of the foreign insolvency order by the competent Swiss court, but also subjects such recognition to strict conditions. The revSPILA retains the fundamental recognition requirement, but loosens its conditions. Firstly, by abolishing the controversial proof of reciprocity. Secondly, by extending the indirect competence to the debtor's centre of main interest (COMI), which is now considered – together with the place of incorporation, formerly the sole criterion – a proper ground for indirect competence. Other recognition requirements have remained unaltered. To sum up, under the revSPILA's provisions, recognition is granted if:

- the foreign insolvency order is *enforceable* in the state in which it was rendered;
- there is no ground to deny recognition for reasons of violation of the Swiss *ordre public* and
- the foreign insolvency order was rendered in the state of the debtor's domicile (under Swiss law only the *registered office*), or in the state of the *debtor's centre of main interests* under the condition that the debtor was not domiciled in Switzerland at the moment of opening of the foreign insolvency proceedings.

It is worth noting that the latter condition still excludes a recognition in Switzerland of a foreign proceeding opened in respect of *any company formally incorporated in Switzerland* (even if its COMI is located in that foreign country).

Effects of recognition of a foreign insolvency order and waiver of ancillary proceedings

The recognition of the foreign insolvency order still entails the mandatory opening of ancillary insolvency proceedings in Switzerland. Those ancillary proceedings encompass all assets of the foreign debtor located in Switzerland, but only serve the satisfaction of certain preferential claims (unlike the ancillary proceedings under the EuInsReg). These preferential claims are those secured by a pledge, privileged claims of creditors domiciled in Switzerland (such as, among others, employees) and – as introduced with the recast – claims related to a branch of the foreign debtor registered in the Swiss commercial register (if any).

Under the revSPILA – and following the example of the regime introduced a few years ago in the Swiss Federal Banking Act for cross-border banking insolvencies – the conduct of ancillary proceedings is no longer mandatory in all cases. Upon a request of the foreign insolvency administrator with the competent court, the court may *waive the conduct of ancillary proceedings*, provided that *no preferential* claims were lodged. However, in the event that creditors with domicile in Switzerland have lodged *non-preferential claims*, the court may order a waiver of the ancillary

proceedings only if these claims are "adequately considered" in the foreign bankruptcy proceedings.

The waiver of the ancillary insolvency proceedings provides the foreign insolvency administrator with the authority granted by the *lex fori concursus generalis*. The foreign insolvency administrator may in particular transfer assets abroad and litigate before Swiss courts, but the given authority does not include acts of sovereignty, the use of means of coercion or the power to adjudicate on disputes (see also art. 21 of the EuInsReg, from which the new provision draws some inspiration).

Where ancillary proceedings are not waived – be it because no request for waiver is filed or such request is rejected – the proceedings are not altered by the recast: After satisfaction of the creditors of preferential claims a remaining surplus shall be made available to the foreign insolvency administrator or to the creditors in bankruptcy entitled thereto. However, such surplus will only be made available after a (further) recognition decision concerning the foreign schedule of claims. The Swiss court will thereby examine whether non-preferential claims of Swiss-domiciled creditors were "adequately considered" (i.e. not unduly discriminated against) in the foreign schedule of claims. As seen, where ancillary proceedings (which are generally conducted by a public office) take place, foreign insolvency administrators will continue to have very limited powers to act on Swiss territory.

Cross-border cooperation

So far, Swiss law has lacked a rule on the admissibility of cooperation of Swiss authorities with foreign authorities. Although cooperation did take place nevertheless in some cases, there remained a severe legal uncertainty. The revSPILA now provides for an explicit rule allowing Swiss authorities to cooperate with foreign authorities in the event that the Swiss and foreign proceedings have an intrinsic connection. This will ultimately also allow for so-called "insolvency protocols" to be applied in Switzerland.

Possibility to recognise foreign avoidance actions and other similar decisions

As a consequence of Switzerland's strictly territorial approach on the effect of foreign insolvency proceedings, up until the enactment of the new law foreign judgments on avoidance claims could not be recognised and enforced in Switzerland. Such claims had to be filed in Switzerland within the ancillary insolvency proceedings and could only be based on Swiss law, i.e. art. 285 et seqq. of the Debt Enforcement and Bankruptcy Act. These provisions provide – in comparison to many foreign laws – a rather restrictive basis for avoidance claims.

The revised provisions now allow for the recognition of foreign judgments on avoidance claims and other acts detrimental to creditors. Such recognition essentially requires a close connection to a bankruptcy order that has been recognised in Switzerland. However, an important limitation has been introduced: The foreign avoidance judgment will *not* be recognised if the defendant was domiciled in Switzerland at the time the claim was filed. This limitation – introduced to protect Swiss defendants from "forum shopping" by claimants abroad – will significantly limit the practical relevance of the new provisions on recognition of avoidance actions and similar decisions.

Improved coordination of branch insolvency proceedings with ancillary insolvency proceedings

The former SPILA allowed for parallel insolvency proceedings, on the one hand proceedings over the Swiss branch of a foreign debtor and on the other hand parallel ancillary insolvency proceedings following the recognition of the foreign insolvency of the main debtor. This former regime led to legal inconsistencies and delimitation problems, since these concurrent insolvency proceedings encompassed different insolvency estates.

Against this background, the revSPILA provides for an integration of the branch of insolvency proceedings into the ancillary insolvency proceedings (similar to the proceedings under the EuInsReg). A consequence of this unification is the inclusion of a third category of preferential claims into the new "unified" ancillary proceedings, namely those of (secured and unsecured) creditors of the Swiss branch. All these claims will have to be satisfied in such ancillary proceedings before any surplus is transferred to the foreign main proceedings.

So sum up: still a challenging path to simplicity

The new Swiss provisions on recognition of foreign insolvencies draw some inspiration from the EuInsReg and the UNCITRAL Model Laws (including its newest Model Law on insolvency related judgements). However, the revised articles 166-175 revSPILA remain an autonomous and unique system. Its relative generosity in terms of recognition requirements (having now dropped reciprocity and embraced COMI) is tainted with a comparatively high degree of involvement and control of the proceedings of and by Swiss public authorities.

In particular, the new "simplified" proceedings (i.e. waiving ancillary proceedings) may be interesting for administrators and thus highly relevant in practice. These proceedings come, however, with additional requirements and – if granted – with additional responsibilities for the foreign insolvency administrator who will have to act "in accordance with Swiss law" on Swiss territory. Consequently, even under the "simplified" conditions of the revSPILA, our recommendation remains: do not try this without local counsel! ■

> **LACKING FORMAL RECOGNITION BY THE COMPETENT SWISS COURT, FOREIGN INSOLVENCY PROCEEDINGS HAVE NO EFFECTS ON THE SWISS TERRITORY**

Share your views!

Judicial Co-operation in economic recovery (JCOERE)

Irene Lynch Fannon and Jennifer L. L. Gant provide an update on INSOL Europe's involvement in the new EU-funded project

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Share your views!

Dramatic changes to insolvency law throughout the EU in the last couple of decades have refocused on rehabilitation and rescue instead of liquidation.[1]

Rescue frameworks have often introduced conflicts with traditional insolvency law principles such as equality of treatment of creditors, transparency and predictability.[2] This has become even more complicated due to the requirement for judicial cooperation in cross-border insolvency cases.[3]

Judicial co-operation has been the subject of several projects since the passage of the European Insolvency Regulation (EIR) in 2000. After the EU recommendation on *A New Approach to Business Failure*[4] in 2014, the introduction of the Recast EIR in 2015, and the pending introduction of a preventive restructuring Directive,[5] the topic has again found the spotlight.

New project

An exciting new project has recently been launched: Judicial Co-Operation supporting Economic Recovery in Europe (**JCOERE**)[6] in order to identify obstacles to judicial co-operation in the context of the implementation of the proposed preventive restructuring directive. This project is funded by the European Union's Justice Programme (2014-2020)[7] and is based at University College Cork, IRELAND, which is particularly appropriate given the Irish experience with restructuring

provided under the Examinership process which is modelled on Chapter 11 US Bankruptcy Code.[8]

JCOERE will focus on the strengthened co-operation obligations imposed on the judiciary in the Recast Regulation but will confine its enquiry to preventive restructuring processes. In addition to exploring challenges that procedural rules might present to co-operation, this project will focus on specific substantive problems that will likely become more acute in the restructuring context, such as the commencement of secondary proceedings to protect a creditor's interests in the face of the 'cram-down' provisions as envisaged by the Directive. The question of whether it is reasonable for a court in the second state to decline jurisdiction becomes more immediate in such circumstances. Radical restructuring processes may make co-operation more difficult which may, in turn, inhibit restructuring in the EU.

The obstacles envisaged are illustrated in *SIAC Ltd.*, in which an Irish company embarked on an Irish Examinership procedure where a particular creditor, the Polish Roads Authority (PRA), was not brought into the restructuring at all. This creditor was effectively treated as an 'out of the money creditor' due to outstanding litigation occurring between the debtor company and

the creditor in Poland. The creditor lodged an objection at the last minute in the Irish court and although the court heard this argument the creditor did not prevail. If the PRA had commenced insolvency proceedings in Poland, how would the obligations have played out under the Recast EIR?

With the introduction of more sweeping restructuring procedures throughout the EU under the proposed Directive, situations like SIAC are likely to become more common. The JCOERE project therefore addresses the implementation of co-operation obligations imposed on EU domestic courts by the Recast EIR in anticipation of the introduction of new preventive restructuring procedures.

The project team

The JCOERE Project will operate under the leadership of Professor Irene Lynch Fannon based at the School of Law, University College Cork, Ireland. The project will be run in partnership with INSOL Europe, The Universitá degli Studi Firenze, and the University of Titu Maoirescu in Bucharest. The project team includes judges, practitioners, and scholars specialised in cross-border insolvency law. Many team members also have previous involvement in previous projects focussed on judicial co-operation in cross-border insolvency.[10]

Specific issues to be addressed

The project will address specific issues identified from existing research. The first relates to the nature of the obstacles which may arise due to the complex rescue regime envisaged by the Directive. In a departure from previous projects, rather than identifying specific rules, the issues will be identified thematically, such as those that alter existing insolvency principles or give wide discretion to courts.

The project will also identify procedural rules that present obstacles to effective co-operation, such as constitutional requirements for public hearings for the administration of justice, which would interfere with the informal communication expectation present in the Recast EIR.[11]

A third issue relates to the fact that the Recast EIR positively asserts the importance of 'best practices for co-operation in cross-border insolvency cases' as a solution to the difficulties of efficient judicial co-operation. The project will explore the level of general awareness amongst the European judiciary of the best practice principles and guidelines.

Fourthly, the full and effective implementation of communication and co-operation provisions in cross-border insolvency law requires more than a mere knowledge of the letter of the law. For example, it has been observed that other levels of experience and skills are necessary to really complement communication and co-operation in practice.

Planned activities and outcomes

A number of funded activities will take place during the project period of two years starting in September 2018. A literature review and a consultation exercise will be undertaken. They will describe the legal frameworks in key Member States and in the proposed Directive, identifying doctrinal and procedural rules relevant to judicial co-operation obligations described in the Recast EIR. Key Member States include Ireland, Romania, Italy and the UK (for comparative purposes), with additional states such as Germany, the Netherlands, and Spain to be added where interesting issues are presented.

Judicial utilisation and awareness of best practice guidelines on co-operation adopted by European and international organisations described in the Recast EIR will be benchmarked. This will take place through the Judicial Wing of INSOL Europe, which will give it a broad geographical scope, while consultation with the Turnaround Wing will add a key practical dimension to the project.

There will also be ongoing dissemination of knowledge and information on co-operation through enhanced judicial and practitioner networks aiming to improve judicial co-operation in relation to business recovery in the EU.

Expected results include the better exchange of information on business rescue frameworks and best practise guidelines and increased support and capacity for real co-operation for judiciary and national authorities.

These outcomes will be achieved by a comparative analytical report on restructuring rules, a benchmarking report on current best practice guidelines, and a website with curated data. It is intended that this project will result in an easily accessible ongoing resource providing guidance for judges who engage in cross-border insolvency cases. ■

THE PROJECT WILL BE RUN IN PARTNERSHIP WITH INSOL EUROPE, THE UNIVERSITÁ DEGLI STUDI FIRENZE, AND THE UNIVERSITY OF TITU MAOIRESCU IN BUCHAREST

Footnotes:

1 Christoph Paulus *et al.*, "Insolvency Law as a Main Pillar of Market Economy - A Critical Assessment of the Greek Insolvency Law" (2015) 24 *International Insolvency Review* 1; Jan Adriaanse, "The Uneasy Case for Bankruptcy Legislation and Business Rescue", in Michael Veder and Paul Omar (eds), *Teaching and Research in International Insolvency Law: Challenges and Opportunities* (INSOL Europe 2015). ; Vanessa Finch: The Recasting of Insolvency Law (2005) 68 Modern Law Review 713.

2 H Eidenmuller, "A New Framework for Business Restructuring in Europe: The EU Commission's Proposals for a Reform of the EIR and Beyond" (2013) ECGI *Working Paper Series in Law, Working Paper no. 199/2013*.

3 Articles 42, 46, 57 and Recital 48 of the European Insolvency Regulation (Recast) (EIR Recast).

4 Commission Recommendation Com (2014) 1500 final.

5 COM (2016) 723 final 2016/0359 (COD) 22.11.2016.

6 EU Commission Grant JUST-JCOO-AG-2017 800807.

7 JCOERE Project 800807 DG JUST-JCOO-AG-2017

8 Irene Lynch Fannon and Gerard Murphy, Corporate Insolvency and Rescue (Bloomsbury Professional 2012), Chapters 1, 12, 13 and 14.

9 Re SIAC Construction Limited and Ors and the Companies (Amendment) Act 1990 (as amended) [2014] IESC 25; Irene Lynch Fannon, "*Examinership: Approval of Schemes—Re SIAC Construction Ltd and in the Matter of the Companies (Amendment) Act 1990 (as amended)*" Commercial Law Practitioner, January 2015.

10 For example, the Leiden JudgeCo Project (2013-2015) which developed best practice guidelines for co-operation between judges and between practitioners in cross-border insolvencies. In addition, see the CODIRE Project website at: <www.codire.eu>.

11 Anna Bandina, "Judicial Cross-Border Co-operation on Insolvency Matters Today and Tomorrow: Roundtable Report" in Omar and Veder (eds) (n 1) 64.

Insolvency practice in small jurisdictions: An example of innovation in Jersey

Paul Omar highlights Jersey as an example of a small jurisdiction that punches above its weight

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Small jurisdictions often suffer from deficiencies in appropriate laws, qualified professionals, supportive courts and policy-making infrastructure. The volume of economic activity is also a factor dictating the development of laws and legal infrastructure.

Jersey, though a small jurisdiction in size, punches above its weight when these factors are considered. It is an off-shore financial jurisdiction acting as a conduit for large-scale investment. It has well-qualified legal and accounting professionals and a very supportive judiciary, responsive to global developments, while respecting the mixed legal heritage of the island. The policy-makers are also active and keep an eye out on international measures of interest, particularly those that can support Jersey's ambition as a leading jurisdiction concerning financial services.

The present law of insolvency, though, does present some difficulties. There are three old procedures, two of which are rooted in the Middle Ages and derive from French law. *Cession de biens* is a foreclosure process enabling debtors to conduct a transfer of their goods to creditors. In return, the debtor gains a discharge (provided the debtor has acted diligently). There are then two exit processes for assets disposals: *dégrèvement* for real property, which contains a foreclosure element, and *réalisation* for moveables. Where the creditor has had to act to obtain judgment and enforcement, the involuntary cession (*adjudication de renonciation*), attracts the same exit procedures, but without the comfort of a discharge at the end.[1] *Remise de biens*, is a process by which a surrender of assets into the hands of the court occurs, resulting in asset disposal and a distribution of the proceeds to the secured and unsecured creditors. In fact, the prospect of a pay-out for unsecured creditors, however minimal, is a pre-requisite for the success of the application, and also leads to a discharge. However, the debtor is unable to dictate how the property is disposed of by the *jurats* appointed by the court.

The third procedure is *désastre*, created in the 18th century on the island, in order to marshal concurrent claims against the same debtors. *Désastre* was originally limited to moveables, but has been extended to immoveables by the passing of the Bankruptcy (*Désastre*) (Jersey) Law 1990 (*Désastre* Law). This law has also brought the procedure into the modern age, though it is not a codification by any means. Recourse to jurisprudence is necessary to fill in the *lacunae*. This is also the position in the case of the two older procedures, governed by the *Loi (1832) sur les décrets* and the *Loi (1839) sur les remises*.

More recently, the Companies (Jersey) Law 1991 (Companies Law), a text derived from the Companies Act 1985 (United Kingdom), was introduced. As a result, the Jersey Companies Law has both the scheme of arrangement and of winding up. However, there are differences between company law, as practised in Jersey, and elsewhere. For example, some procedural steps within winding up refer back to the *Désastre* Law and there is no right for a creditor to initiate the process. There is also a hierarchy of choice between the older procedures, as well as between the bankruptcy and company law procedures. Article 4 of the *Désastre* Law prohibits the opening of a procedure where a *cession* or *remise* is afoot, while Articles 154A and 185B of the Companies Law require winding up to cede ground to a *désastre* order.

> **JERSEY IS AN OFF-SHORE FINANCIAL JURISDICTION ACTING AS A CONDUIT FOR LARGE-SCALE INVESTMENT**

Innovation

In Jersey, however, what has distinguished the practice of insolvency law has been the innovation lying at the heart of developments. For example, the courts created, long before consideration of such insolvencies elsewhere, the "social *désastre*" procedure to enable the discharge of debtors with minimal estates.[2] This procedure was of such utility that it has only lately been supplemented by the Debt Remission Order under the Debt Remission (Individuals) (Jersey) Law 2016 for qualifying debts under £20,000. The homestead exemption in Article 12 of the *Désastre* Law has also been carefully crafted by the courts to postpone realisation of the creditor's interest in the property under certain conditions, thus safeguarding its use by vulnerable spouses and dependents.

In the corporate insolvency field, other advances have been made, many ingeniously impressive. For example, Jersey has extended its scheme practice to envelop entities near the

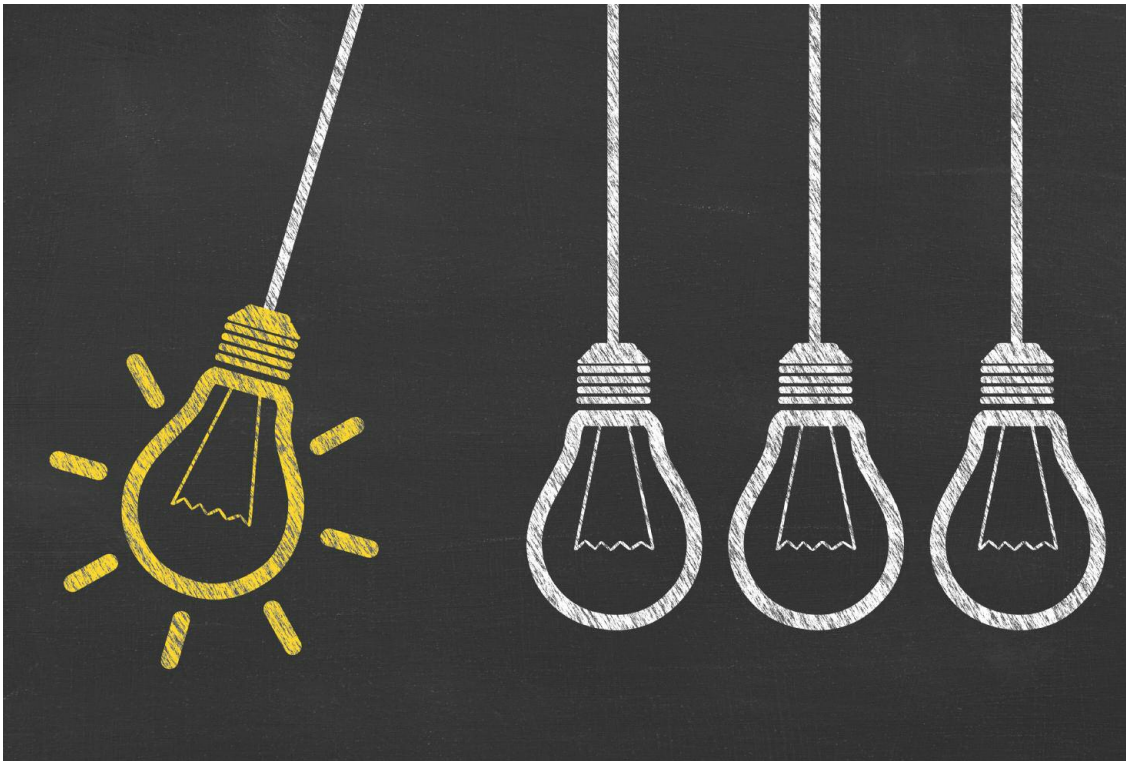
insolvency threshold.[3] The case-law has also seen authority for a scheme, in conjunction with the continuance procedure in Part 18C of the Companies Law allowing a Canadian company to domicile itself in Jersey, so as to avoid the territorial bar limiting the application of the statute to Jersey companies.[4] The jurisprudence has also developed to embrace new techniques for ascertaining the will of classes, including in special purpose vehicles with multiple beneficiaries.[5] As such, scheme practice is seen as a strong adjunct to restructuring initiatives for island entities used as investment vehicles for projects elsewhere, assisted by the courts' ability to use the local cooperation provision in cross-border cases.[6]

In winding up, even without a creditor right to initiate procedures, the case-law has taken into account their interest. The courts have evolved jurisprudence focusing on the just and equitable winding up provision in Article 155 of the Companies Law.[7] Under this provision, cases have developed a workout style process, avoiding the cessation of activity in winding up and enabling the sale of the business as a going concern.[8] The workout model has also been used successfully in the case of entities carrying out regulated business, an area of some concern for the financial sector.[9] Taking the model further has been its more recent use to facilitate a Jersey equivalent of the pre-pack procedure.[10]

Elephant in the room

The "elephant in the room" is of course the fact that these manoeuvres might not be necessary if Jersey had a dedicated rescue-type procedure. There is already a "passporting" process, by which a Letter of Request sent to the High Court in London, properly motivated and comforted by Counsel's opinion on the suitability of invoking the procedure, will lead to UK administration being made available for Jersey entities under the authority of section 426 of the Insolvency Act 1986 (United Kingdom). This procedure has been so often used that it represents a well-trodden path for Jersey Advocates and courts,[11] although a more recent application for a Letter of Request was turned down, where the court was concerned about proper supervision being available to monitor the office-holder's activities on the island, preferring instead the opening of local proceedings placing the Viscount in charge.[12] While the option for rescue in the UK exists, there does not seem to be any urgency for any home-grown initiative to take its place or any transplanting of the administration procedure, as has occurred in Guernsey in the Companies (Guernsey) Law 2008. However, for financial institutions, a special provision has been made recently by means of the Bank (Recovery and Resolution) (Jersey) Law 2017 to introduce recovery and resolution procedures as options.

Overall, the experience in Jersey illustrates that, even without a wide tool-kit of procedures to use, practitioners and the courts appear more than able to repurpose existing procedures and laws in order to achieve successful outcomes. Although a consideration of reforms may still prove necessary, such an innovation can have a palliative effect. In the last analysis, change may only come if policy-makers are sufficiently convinced that reforms will prove useful.[13] ■



> THESE MANOEUVRES MIGHT NOT BE NECESSARY IF JERSEY HAD A DEDICATED RESCUE-TYPE PROCEDURE

Footnotes:

1 *Birbeck v Midland Bank Ltd* (1981) JJ 121.
2 *Re Russell* (5 May 1994) (unreported).
3 *Re Drax Holdings Ltd; Re Inpower Ltd* [2004] 1 BCLC 10 (a UK-Jersey scheme).
4 *Re APIC Petroleum Corporation and APIC (Petroleum) Jersey Limited* [2012] JRC 228; [2013] JRC 034.
5 *Re Investkredit Funding Ltd* [2012] JRC 121.
6 Article 49, Bankruptcy Law.
7 *Re Belgravia* [2008] JRC 161; *Bisson v Bish* 2008 JLR Note 46.
8 *Re Poundworld (Jersey) Limited* 2009 JLR Note 12.
9 *Re Centurion Management Services* [2009] JRC 227.
10 *Re Collections Group* [2013] JRC 039.
11 A recent example is *Siena SARL v Glengall Bridge Holdings Limited and Others* [2015] JRC 260.
12 *Re Orb arl (or Representation of Harbour Fund II LLP)* [2016] JRC 171.
13 The author is aware of reforms currently being mooted, proposing a petition right for creditors in winding up, removing recourse to *dégrèvement*, as well as possibly introducing a new restructuring procedure.

Blockchain: A chance for turnaround procedure modernisation

YUTONG ZHANG

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You can read the full version of Yutong's award-winning paper on our website: www.insol-europe.org/richard-turton-award

Share your views!

Blockchain brings value reconstruction to assets, including assets digitalisation, standardisation, registering, and precise pricing.

In the "traditional" insolvency practice, there are always three pain points:

- asset tracking and confirmation of its ownership;
- service and asset operation[1]; and
- asset pricing and evaluation.

There is a solid connection between all participants of a turnaround procedure. They can all be registered to a blockchain system. This secured, transparent, and efficient connection is credited for the following reasons: the asset digitalisation and standardisation are the fundamental base; decentralised registering is part of theoretical methods, and precise pricing is a key solution. In short, the blockchain system could open the door for the modernisation of turnaround procedures.

The nature of the blockchain system

From a technological perspective, the distributed ledger, consensus algorithm, and multiple nodes are the substantial parts of understanding a blockchain system. In its essence, a blockchain system can be described as a shared and synchronised digital database.

The information system

Like the Internet, the Blockchain system is an electronic network with information streaming. There are several kinds of information on the blockchain: participant information, asset information and transaction information.

Incentive mechanism

A blockchain system has a special incentive mechanism driven by a consensus algorithm and a distributed ledger. The mechanism leads to crypto-economics or token-economics. Associated with the distributed ledger, participants fulfill production, distribution and consumption of goods and services in an encrypted, even tokenised environment.[2] In a word, it is a reward system, participants could get a reward based on their activities and performance in the system.

Trust mechanism

A blockchain system is an algorithm-driven, secured, liable environment which provides a solution for data privacy and information security. The trust mechanism comes out for two reasons. The technological one relies on the consensus algorithm, and encryption algorithms. The structural one would be the 'smart contract', which means that all the contracts made by participants are shown as various computer programmes. All smart contracts can run automatically once conditions are achieved. With the mechanism, digital assets become acceptable.

How turnaround and blockchain can work together

Different business models have their own logics. For a blockchain system, all the logics lead to two results – to increase benefits or to reduce costs. Technologies like blockchain are always options for business like turnaround if match points can be found.

Turnaround modernisation

Turnaround modernisation is brought about not only by the application of cutting edge technologies, but also by the revolution of the concept: turnaround goes from being business-logic-driven to data-driven. The precise targeting and precise pricing are the future of the turnaround business.

Modernisation solutions for the three pain points

Data is vital in the next generation. It could be applied to turnaround digitalisation at least on three aspects for business efficiency: asset tracking and confirmation of its belongingness; service and asset operation; asset pricing and evaluation.

Junction points between business and technology

Concerning asset tracking and confirmation of its belongingness, all the information about the assets and participants can be shown through the blocks. Concerning the service and asset operation, service providers are no longer auxiliaries. As for asset pricing and evaluation, the blockchain system can generate a relatively precise calculation.

Turnaround consortium blockchain

Consortium blockchain is the best choice for the turnaround business concerning the business cost and secrets. Different channels could be added to the consortium

blockchain in which information is shared only within permissioned nodes.[3]

Brief introduction and basic model

On the turnaround consortium blockchain system, creditors, debtors, trustees or administrators, lawyers, accountants, and asset operation experts can work as a joint market power. In order to build a blockchain system all kinds of data could be registered for the purpose of rending the assets reliable and the data secured.

For trade match-making, the debtors and investors/creditors, the debtors and intermediaries, the investors/creditors and intermediaries can strike bargains with each other on the system. For data analysis, tech providers could help to analyze data in many ways, including quantitative analysis, neuro-computing, and others in order to obtain precise results.

Participants and their roles

One of the advantages of the turnaround consortium blockchain is that different participants could be allocated different authorisations, accordingly. Some institutions could play more than one role in the system.

Turnaround process on the system

When everyone is registered in the system, the turnaround process seems more complex and efficient than traditional ones. From the point of view of debts, the most important thing is to know how to deal with them, being associated with other participants in the system.

Economic issues

Economic value

From the point of view of organisations, a blockchain system is more like a catallaxy (political economy). The higher the percentage of potential cost saving that might be achieved, the more there is a possibility that a blockchain system could be deployed.

Cybersecurity

Through a blockchain system it is easier to maintain cybersecurity. Hacker attacks could be detected easily if they hacked into the system; the risks from insiders could be eliminated effectively, such as when they try to conceal some information or overwrite data.

Technology standard

Usually, there would be at least three parts of the standards:

(1) the process for data collection, aggregation, analysis, transaction, and storage;
(2) the technological procedure for authorities to monitor the turnaround process;
(3) the API used to connect with other capital markets.

Legal concerns

Legal nature and law application

Unlike in a joint venture, an incorporated business organisation or partnership,[4] there are not only bilateral activities, but also some multilateral ones. All the transactions and evaluation activities are subjects to contract laws, tort laws, insolvency laws.

Conflict of laws in a cross-board situation

There is always a conflict of laws in a cross-board situation[5]. If the participants come from different countries, the situation might be subject to multi-jurisdictions.

Data

On a distributed ledger, data can be stored in a variety of forms and types. At this stage, blocks have limited storage capacity to keep vast number of data, for instance, movies or digital arts. Data is usually encrypted or hashed before it is added to a blockchain. Throughout the process, data is chronologically ordered in a manner that makes it difficult to tamper with information without altering subsequent blocks[6].

Insolvency Law

In the block system, tech providers develop and maintain the network and also provide data analysis services to other participants. Will they possess the system? To what extent will tech providers get benefits from of their work and services? There are two approaches for that. The first one is called the 'bitcoin-way' and the other is called the 'ripple-way'.

Regulation

Authorities and regulators are important parts of the system. Apart from the fact that the participants might to have to report their activities to them, (e.g. accountants shall report their activities to some regulators for annual audits), the system could offer more sophisticated methods for regulators to get an insight into the network activity.

Closing remarks

The blockchain system could transform the model of traditional turnaround process in order to be more efficient. Not only intermediaries are empowered to play a richer role, but also the authorities could achieve a comprehensive regulation goal. The turnaround procedure is an ideal scenario which can directly deploy the system.

However, when applying the turnaround consortium blockchain system we should pay attention to the issues of concern, including data, economic value, regulation and so on. ■

Footnotes:

1 Asset operation means real estate management, debt collection and other actions which can increase assets' value.
2 Marc Pilkington, Bitcoin through the Lenses of Complexity Theory: Some Non-Orthodox Implications for Economic Theorizing, Handbook of the Geographies of Money and Finance, Pollard, J. & Martin, R. (eds.), Edward Elgar, 2017.
3 See introduction about HyperLedger Fabric, see https://www.hyperledger.org.
4 Dirk A. Zetzsche, Ross P. Buckley, Douglas W. Arner, The Distributed Liability of Distributed Ledgers: Legal Risks of Blockchain, EBI Working Paper Series(2017 – no. 14).
5 Lord Collins, Et. Al., Morris Dicey AND Collins On The Conflict Of Laws (2016); Adrian Briggs, Private International Law In English Courts (2014).
6 Michèle Finck, Blockchains and Data Protection in the EU, Max Planck Institute for Innovation and Competition Research Paper No. 18-01

> **A BLOCKCHAIN SYSTEM IS AN ALGORITHM-DRIVEN, SECURED, LIABLE ENVIRONMENT WHICH PROVIDES A SOLUTION FOR DATA PRIVACY AND INFORMATION SECURITY**

The development of insolvency law in Kosovo

Drini Grazhdani reports on the development of new legal frameworks following the collapse of the country's banking system at the end of the war in 1999

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FOLLOWING THE END OF THE KOSOVO WAR IN 1999, THE COUNTRY'S GOVERNING STRUCTURES HAD COLLAPSED

Following the end of the Kosovo war in 1999, the country's governing structures including its banking system had collapsed. The rush to establish legal frameworks and governing mechanisms caused gaps in various areas.

One of those areas was insolvency proceedings. Four years after the war ended, in 2003, the provisional Self-Government of Kosovo adopted the UNMIK[2] Regulation No. 2003/7 on Liquidation and Reorganisation of Legal Persons in Bankruptcy. In 2016, this Regulation was replaced by the Law on Bankruptcy,[3] which was adopted by the Kosovo Parliament.

This law has been harmonised with EU Regulation 2015/848 on insolvency proceedings (recast)[5]. The new Law on Bankruptcy includes many features left out by the previous regulation. The adoption of this law was positively evaluated, as a result of which Kosovo improved its position in the World Bank Doing Business Report,[6] jumping from 163rd to 43rd place.[7]

In addition, in March 2018, the Parliament of Kosovo adopted the new Law on Business Organisations,[8] which regulates bankruptcy and insolvency proceedings for limited liability companies, joint stock companies, the enforcement of creditor claims on a limited liability company subject to voluntary dissolution, as well as protection of creditors upon a cross-border merger.

Yet, the enforcement of the new laws remains questionable, leaving interested parties confronting unwritten practices in the context of different insolvency procedures.

Main features of the Kosovo Law on Bankruptcy

General principles of the Law on Bankruptcy

The new Law on Bankruptcy addressed the weakness of the UNMIK regulation, which did not outline different principles applicable to bankruptcy or insolvency. The Law on Bankruptcy states that, in liquidation proceedings, the courts shall maximise the overall return to all creditors[9] and shall consider the bankruptcy proceedings as urgent proceedings.[10] Moreover, the court shall ensure the avoidance of any kind of suspension or interruption of bankruptcy proceedings. Furthermore, creditors shall have equal priority to shares in accordance with the *pari passu* principle[11] and, upon the completion of liquidation proceedings, the debtor:

> *"Shall not be the owner of its assets at the conclusion of the liquidation proceeding and shall be removed as active business from the registry of businesses with the designation 'liquidated'"*[12]

> *"Shall be noted in every new registration of a business by the debtor and close family members for five (5) years from the day of conclusion of the bankruptcy proceedings and the fact that the individual debtor has become bankrupt shall be noted in the Credit Registry of the Central Bank of the Republic of Kosovo."*[13]

The identity of debtors

The UNMIK Regulation No. 2003/7 on liquidation and reorganisation of legal persons in bankruptcy did not recognise natural persons as debtors. Natural persons had no legal responsibilities and were free to establish new businesses, even where if they may have been involved in previous bankruptcy proceedings of legal entities. Nonetheless, in Article 4, the new Law on Bankruptcy states that:

> *"2.4. The individual debtor shall not be the owner of its business assets administered in the bankruptcy proceedings at the conclusion of the liquidation proceedings. The fact that the individual debtor has become bankrupt shall be noted in the business registry in every new registration of a business by the debtor and close family members for five (5) years from the day of conclusion of the bankruptcy proceeding and the fact that the individual debtor has become bankrupt shall be noted in the Credit Registry of the Central Bank of the Republic of Kosovo."*

Jurisdiction

The new Law on Bankruptcy places the cases of insolvency/bankruptcy under the jurisdiction of the Basic Court in Prishtina, Division of Commercial Matters, a change from the UNMIK Regulation, which called for bankruptcy cases to be heard by the District Economic Court within the geographic area in which the debtor's principal place of business was located. With the new law, parties have the right to appeal against the decision made by the Basic Court of Prishtina by

applying to the Division of Commercial Matters of the Court of Appeals.

Cross-border bankruptcy/ insolvency

The new Law on Bankruptcy covers all aspects of cross-border insolvency/bankruptcy proceedings in its Chapter IX. This was completely missing in the UNMIK regulation it replaced.

Possession of the estate

Under the previous regulation on liquidation and reorganisation of legal persons in bankruptcy, an administrator was automatically appointed by the court.[14] In the new Law on Bankruptcy, the debtor can now choose between an administrator to be in possession of the estate or be removed from the estate by the court.

Expedited proceedings for Small and Medium Enterprises (SMEs) and pre-agreed plans

The new Law on Bankruptcy has included a chapter covering Small and Medium Enterprises (SMEs). According to Article 11, SMEs are defined as business organisations which have an annual turnover of up to €1 million or up to 25 employees.

According to Article 12, proceedings involving an SME debtor shall be treated as reorganisation cases, with the SME required to file a reorganisation plan within 30 days from the day of bankruptcy proceedings being opened. Under Chapter II, Article 13, the Law on Bankruptcy also provides for the appointment of a "Monitor" to assist in formulating a reorganisation plan.

The Monitor, after his/her appointment, shall consult with the debtor regarding the debtor's business, its prospects and whether a plan that creditors could accept can be formulated.

Implementation

Although the legal framework governing bankruptcy in Kosovo has evolved significantly since 1999 to reflect international best principles and modern developments, the courts are lagging behind in developing practices in relation to insolvency and bankruptcy proceedings largely because of the business community's distrust of bankruptcy proceedings.

The first insolvency cases in Kosovo were filed in 2010. Since then, there have been a total of 29 cases filed, out of which 4 cases where filed after the adoption of the new law. Although this number is very low, this provides an opportunity for the courts to start building the trust of creditors and debtors to consider court proceedings as a suitable remedy in times of financial difficulties. This will also provide courts with opportunities to develop practices to enhance legal security for parties entering bankruptcy.

The small number of court proceedings to date has also been influenced by the heavy reliance of creditors on taking security interests in movable and immovable personal property, as well as in personal, bank, and corporate guarantees, mainly due to the efficient enforcement system in Kosovo and developed practice and legislation in these areas. In addition, the lack of reliable financial reporting and the underdeveloped corporate governance structures in Kosovo further affect recourse to insolvency/bankruptcy as an alternative to the usual pattern of asset-security enforcement.

The most recent legislation: The Law on Business Organisations

As mentioned earlier, in March 2018, the Parliament of Kosovo adopted a new Law on Business Organisations,[15] which, *inter alia*, regulates bankruptcy and insolvency proceedings in provisions including: Chapter IX on the Dissolution of a Limited Liability Company and Decision to Initiate the Bankruptcy Procedure; Chapter XIII on the Voluntary Dissolution of a Joint Stock Company and Decision to Initiate Bankruptcy Procedure; Article 117 on the Enforcement of Creditor Claims on a Limited Liability Company Subject to Voluntary Dissolution; and Article 236 on the Protection of Creditors upon a Cross-Border Merger. Since this is a very recent law, it remains to be seen if it will have any effect in increasing the number of insolvency cases filed in courts.

Conclusion

Kosovo, as the newest country in Europe, has made great progress in adopting new laws that allow for proper insolvency/bankruptcy proceedings. Nonetheless, the major issue remains the enforcement of such laws. The capacity of the courts to deal with insolvency cases needs to be improved and the trust of the companies in the courts needs to be increased. ■

Footnotes:

1 Disclaimer: The author's views expressed in this publication do not necessarily reflect the views of the United States Agency for International Development or the United States Government.
2 UNMIK stands for the United Nations Mission in Kosovo, which was established by UN Resolution 1244 and on which was conferred legislative powers.
3 UNMIK Regulation No. 2003/7 on liquidation and reorganisation of legal personal in bankruptcy, available at: www.unmikonline.org/regulations/2003/RE2003_07.pdf
4 Law on Bankruptcy (05/L-083), available at: www.kuvendikosoves.org/common/docs/ligjet/05-L-083%20a.pdf
5 Ibid., Art. 1.
6 See World Bank, Doing Business 2018, Economy Profile of Kosovo, 4, available at: www.doingbusiness.org/~/media/WBG/DoingBusiness/Documents/Profiles/Country/KSV.pdf
7 See World Bank, Doing Business 2017, 15, available at: https://openknowledge.worldbank.org/bitstream/handle/10986/25562/109903-WP-DB17-PUBLIC-Kosovo.pdf?sequence=1&isAllowed=y
8 See Official Gazette of the Republic of Kosovo, available at: https://gzk.rks-gov.net/ActDetail.aspx?ActID=2585
9 Law on Bankruptcy (05/L-083), above note 4, Article 4.
10 Idem.
11 Idem.
12 Idem.
13 Idem.
14 See UNMIK Regulation No. 2003/7, above note 3, Article 17.1.
15 See Official Gazette of the Republic of Kosovo, available at: https://gzk.rks-gov.net/ActDetail.aspx?ActID=2585

> **THE COURTS ARE LAGGING BEHIND LARGELY BECAUSE OF THE BUSINESS COMMUNITY'S DISTRUST OF BANKRUPTCY PROCEEDINGS**

The long arm of the law: Avoidance actions without borders

David Conaway writes on the long reach of the US Bankruptcy Code

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A June 2018 Bankruptcy Court decision in the Southern District of New York (SDNY) held that foreign companies with no presence in the US were subject to default judgements.

Foreign-based companies doing business in the US, and foreign affiliates of US companies, are routinely counter-parties to a variety of commercial contracts in the US. Given the vicissitudes of financial and economic conditions, it is inevitable that such companies will occasionally encounter the insolvency of their counter-party. The insolvency could be pursuant to a Chapter 11 filing in the US. Increasingly, insolvencies are pursuant to foreign insolvency proceedings. Foreign insolvency proceedings may precipitate the filing of a Chapter 15 (of the US Bankruptcy Code), which is an ancillary procedure able to assist the foreign insolvency estate regarding U.S. assets, claims and related issues.

Unfortunately, Chapter 11 cases often result in the pursuit of preference claims against parties who received payments from the debtor-counterparties under such contracts prior to the Chapter 11 filing. Also, Chapter 11 estates may seek to recover payments as "fraudulent conveyances". In Chapter 15 cases, the foreign insolvency estate may not pursue avoidance actions under the US Bankruptcy Code. However, US courts have ruled that the foreign insolvency estates may recover on avoidance actions based on the laws of the foreign jurisdiction, and based on state law avoidance statutes, such as the Uniform Fraudulent Transfer Act, as adopted by US States.

> FOREIGN AFFILIATES OF US COMPANIES ARE ROUTINELY COUNTER-PARTIES TO A VARIETY OF COMMERCIAL CONTRACTS IN THE US

In the Chapter 11 case of *Advance Watch Company, Ltd.*, the Bankruptcy Court for the SDNY ruled that default judgements on preference claims against Hong Kong based companies were valid and enforceable. In *Advance Watch*, the Advance Watch trustee filed adversary proceedings in the SDNY to recover payments made to the defendants. In each of the lawsuits, the Bankruptcy Court determined that the Hong Kong companies had been properly served with process under Rule 4(f) of the Federal Rules of Civil Procedure regarding service on foreign defendants. Rule 4(f) requires compliance with The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (1965) (the "Hague Service Convention"). The Hague Service Convention in turn requires that service complies with the laws of Hong Kong.

The Hong Kong companies ignored the complaints. In response, the trustee filed motions for default judgements against the foreign companies. The Advance Watch Court noted that The Hague Service Convention is NOT applicable to the service of pleadings, other than the summons and complaint. Rather, FRCP 5(b)(2)(c) requires only that the motions for default be mailed

to the defendants' last known addresses. The trustee need only submit an affidavit to that effect with no requirement of proof of actual service.

As a consequence of the Court's ruling, the Hong Kong companies are now subject to the US judgements against them. Though it is not ideal to have a US judgement outstanding, it is unclear of the actual impact of the judgements against the foreign defendants. Certainly, the trustee could enforce the judgements against assets located in the US, including the attachment of funds owed to the companies by US affiliates or by third parties. Identifying assets to attach could be difficult and expensive, if the foreign entity does not maintain operations in the US.

Exporting a US judgement abroad can be nearly impossible, since the US is not a party to any bilateral or multilateral treaty among countries regarding the reciprocal enforcement of judgements. Many foreign countries perceive U.S. money judgements as excessive and generally bristle at the extraterritorial exercise of jurisdiction by US courts. However, some countries will enforce US judgements based on such countries' internal laws and international comity. In this case, the trustee would be required to initiate a lawsuit in Hong Kong seeking enforcement of the U.S. judgement. It is unlikely that a Hong Kong court would recognise a US judgement against a Hong Kong company. Moreover, it is unlikely that the trustee could initiate avoidance actions based on the US Bankruptcy Code against the companies in Hong Kong courts. Accordingly, it is possible that a foreign company and its assets outside the US are practically insulated from a US Bankruptcy Court judgement for a preference recovery.

Nevertheless, the *Advance Watch* decision illustrates the long-arm of the US Bankruptcy Code, particularly the preference recovery claims. If a foreign-based entity has or will have material assets or operations in the US, it may be advisable to defend the preference claims, particularly since such claims are usually subject to substantial defenses.

In 2017, the US's largest trading partner was the European Union at $717 billion.[1] Also in 2017, EU countries represented approximately 43% of the foreign direct investment in the US. Accordingly, EU companies are likely to face recovery claims arising from insolvency cases in the US. For example, in the cases of Madoff Investment Securities and its largest feeder fund, Fairfield Sentry, hundreds of lawsuits were filed against investors for recovery of payments, many of which were EU-based companies and banks. Understanding the "long arm of the law" will be essential to minimising risk and avoiding loss in such lawsuits. ■

Footnote:
1 2017 US Census Bureau.

UNDERSTANDING THE "LONG ARM OF THE LAW" WILL BE ESSENTIAL TO MINIMISING RISK AND AVOIDING LOSS

Country Reports

Winter 2018/19

Updates from The Netherlands, Ukraine, Norway, Latvia, Italy

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> THE MBPA PROVIDES FOR A NUMBER OF CHANGES THAT RELATE TO INCREASED DIGITALISATION AND TRANSPARENCY OF THE BANKRUPTCY PROCESS

The Netherlands: Modernisation of the bankruptcy procedure

On 1 January 2019 the Modernisation of Bankruptcy Procedure Act (MBPA) entered into force in the Netherlands. The MBPA brings Dutch bankruptcy law into the 21st century by modernising a number of aspects of the bankruptcy procedure (faillissement).

In particular, the MBPA aims to achieve the following three goals:

i) increased digitalisation and transparency;
ii) increasing the speed of the procedure; and
iii) providing for a more made-to-measure procedure and more specialisation and expertise.

It is expected that the entry into force of the MBPA will lead to a number of important changes in the day-to-day activities for both bankruptcy trustees and creditors in the handling of a bankruptcy in the Netherlands.

First, the MBPA provides for a number of changes that relate to increased digitalisation and transparency of the bankruptcy process. This specifically concerns the abolishment of the requirement that notifications in bankruptcies must be in written form and that all meetings must be in physical form. Rather, with the introduction of the MBPA all notifications and meetings may take a digital form. This enables, for example, that hearings be held by conference call, that voting on a reorganisation plan be done through a website and that creditors only receive information from the bankruptcy trustee by email. In addition, the MBPA provides for the possibility for orders of the supervisory judge to be made public through the Central Insolvency Register, although it is not yet clear exactly which categories of orders will be published.

A second category of measures aims to increase the speed of the procedure. The most relevant change under this category regards the introduction of a deadline for the filing of claims with the bankruptcy trustee. This date is related to the date of the claims' admission meeting (i.e. the deadline is 14 days prior to the meeting), after which date claims can no longer be filed with the bankruptcy trustee for acknowledgment. There is no hardship clause, so creditors will have to make sure that they file their claim in a timely manner. This also applies to secured creditors who might possibly be undersecured. Another novelty is the introduction of the possibility for the bankruptcy trustee to - until the deadline - admit claims on his own accord. However, it is expected that this possibility will be not be used very often in practice.

Thirdly, the MBPA provides for the possibility to tailor a bankruptcy to the specific circumstances of the individual case and promotes further specialisation and the development of expertise. This category of changes does not only provide for more flexibility in the number of claims' admission meetings that are held (none, one or multiple as opposed to one), but, in particular, also for new rules concerning the creditors' committees. Such committees are especially prevalent in larger bankruptcies, whereby the previous maximum of three members was often felt to be a constraint. The MBPA provides that from now on a creditors' committee can consist of as many members as desirable, as long as the number of members is uneven and represents the most important groups of creditors. Specialisation and the development of expertise are further promoted by allowing that a supervisory judge can appoint an expert - at the costs of the estate - to support the judge in cases that require particular expertise, and that the court can appoint multiple supervisory judges and use the institution of a newly-founded governmental advisory committee on insolvency law.

The MBPA is applicable to bankruptcies opened in the Netherlands on or after 1 January 2019.

Ukraine:
Country's first ever Insolvency Code

On 18 October 2018 a Ukrainian parliament – Verkhovna Rada – adopted the very first Ukrainian Insolvency Code. The adopted Code underwent more than 1 300 amendments of which approximately 40% were rejected. Having an extremely high support from international lenders, such as IMF and WB, the country obtained a brand-new law for dealing with distressed debt, applicable both to natural and legal persons.

First of all, the Code sets much more flexible conditions for both debtors and creditors in legal person insolvency. These are:

- Cancelling a debt threshold for initiation of an insolvency case for legal persons. For private entrepreneurs this will be an unpaid debt of minimum USD 1 500; however, for legal persons, the court may open insolvency proceedings irrespectively of the debt amount at stake. It is expected that case law of the renovated Ukrainian Supreme Court will determine whether a cash flow test or a balance sheet insolvency will be the main criteria for the vast majority of cases.
- Allowing to initiate insolvency proceedings without prior collection through courts and\or enforcement services. This is surely a positive development for creditors, as they are no longer required to spend significant amounts (€12,000 for the State Court fee in the first instance) for litigating the debt before switching a debtor to the insolvency case.
- Fixing the principal length of each stage (e.g. assets management, restructuring or liquidation) to prevent the cases from being deliberately delayed.
- Returning key rights to secured creditors. For almost five years the latter (most of which are Ukrainian banks) were mere spectators to insolvency procedures, having no voting right in either creditors' GM or the creditors' committee. This apparently deprived them of the possibility to have any influence over an IP candidature, as well as over stage changing or the pre-fire sale process. The Code reinstates secured creditors in all the basic rights available to non-secured ones.
- Allowing e-sales of all and any debtor's assets under transparent valuation and bidding process and court supervision over substantial assets sale. For a decade, fire-selling of assets was used in many Ukrainian insolvency cases, legitimising closed auctions with non-transparent bidding and discounting terms. New developments will allow to sell the debtors' assets via e-trading services exclusively, with little-to-none limitations for participation in bidding. Moreover, should any securities be fire-sold or be subject to an inadequate discount, a security creditor is to be allowed to take the security into his possession.

One of the main innovations of the Code is introduction of the natural person insolvency. Earlier, such an approach was only available for private entrepreneurs and for their commercial debs only. Nowadays any natural person with either commercial or consumer debts in distress may apply for a commercial court protection, requesting either:

- debt management (i.e. write off some debts and scheduling instalment for the remaining under a creditor- and court-approved repayment plan); or
- regular debt collection when most of the debtor's property is sold and the amounts received are to be distributed between the creditors.

To sum up, the Code aims to provide a reliable protection of the creditors' interests by reducing not only the duration of the procedures and the excessive formalities, but also the costs of these procedures. The Code is expected to be officially published within 1 month. After official publication, it will enter into force within at most 6 months, setting special transition periods for new fire-sale terms and the distressed loans secured by mortgaged housing.

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> **ONE OF THE MAIN INNOVATIONS OF THE CODE IS THE INTRODUCTION OF NATURAL PERSON INSOLVENCY**

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Norway
Developments in Norwegian International Insolvency Law

As a non-EU member, Norway has never been a part of the European Insolvency Regulation (EIR), and the international elements of Norwegian Insolvency law have arguably been ready for revision for decades.

After Brexit it is highly likely that the EIR will no longer apply to Britain, and Britain will be in a similar situation as EIR outsiders like Norway and Denmark. The question of mutual recognition of bankruptcies between EIR-countries and "outsiders" therefore seems to be a hotter topic after Brexit.

Norwegian Insolvency legislation has, until recently, had only a domestic focus with the only international elements being the incorporation of the Nordic Convention on Bankruptcy from 1933 (!). With The Nordic Convention bankruptcies are fully recognised between the Nordic countries, and the Convention has been an important tool for insolvency practitioners in the Nordic countries since its implementation.

With the exception of our neighbouring countries, Norway has not formally acknowledged foreign insolvency proceedings. On the other hand, Norwegian law does not territorially limit Norwegian insolvency proceedings to Norway. In principle, Norwegian insolvency proceedings assume universal application and are only limited by the possible non-acceptance in other States.

This inconsistency, together with an increasingly international Norwegian industry, seemingly moved the Norwegian Ministry of Justice to initiate work on a new Norwegian International Insolvency legislation in 2009. The new legislation was passed by Parliament in 2016, and is reflected in a new fourth chapter in the Norwegian Bankruptcy law, concerning the recognition of foreign insolvency proceedings in Norway. The law amendment has not entered into force due to technical issues at the Norwegian Company Registry, and the Norwegian Ministry of Justice has recently announced that an exact date for its implementation is not yet determined.

The law amendment entails that Norwegian legal venue rules will be in agreement with the EIR and UNCITRAL model law, for example by introducing the Centre of Main Interest (COMI) as forum clause, and by allowing for secondary insolvency proceedings in Norway.

The main feature of the law amendment is that foreign insolvency proceedings - assuming that they fulfill certain criteria - are immediately and automatically recognised in Norway. The foreign liquidator can notify publicly the main insolvency proceedings in Norway through the Norwegian Company Registry. By a public notification, the liquidator obtains legal protection, can seize assets in Norway directly and can challenge transactions based on the (Norwegian) rules for recovery in Bankruptcy.

However, not all foreign insolvency proceedings will be recognised. The law amendment lays down a condition of reciprocity as its sets out that "*the insolvency proceedings are commended in a State which in accordance with its national law recognises corresponding bankruptcy proceedings commenced in Norway*". Several countries (amongst others Britain) have rules for recognition that do not pose such a requirement.

The preparatory works indicates that insolvency proceedings opened in States having incorporated the UNCITRAL Model Law will most likely be recognised in Norway when this new Insolvency regime enters into force. It will definitely be interesting to see how this condition will be interpreted by Norwegian courts in the future.

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Latvia:
Amendments to Insolvency Law

A set of amendments to the Latvian Insolvency Law and the Civil Procedure Law was adopted on 31 May 2018. The amendments partially entered into force in July, another part will enter into force in 2019 and some of the amendments still require adoption of secondary legislation. The scope of the amendments is rather broad and this review focusses on several of the issues covered by them.

Change of the name of the supervisory institution
The name of the governmental institution in charge of supervising insolvency and restructuring proceedings has been changed and the Insolvency Administration has now become the Insolvency Control Service. From the legislator's perspective, the new name delivers a message regarding the role and functions of the institution better than the previous one.

Random appointment of administrators
Until now, administrators have been appointed in insolvency proceedings pursuant to a roster. Despite several targeted measures implemented over the last couple of years, the current system of appointment was assessed as still being vulnerable to interference. Therefore, the amendments aim to introduce random automated appointment of administrators.

Introduction of the electronic insolvency registration system
The amendments introduce an online platform called electronic insolvency registration system, which is aimed to become an unprecedented comprehensive platform having the functions of storing information on insolvency administrators and restructuring supervisors, insolvency and restructuring proceedings, submission of creditor's claims, exchange of information among different players (e.g. an administrator and a debtor's representative) etc.

Resolution of disputes related to creditors' claims

Special procedural rules have been introduced for resolving disputes concerning creditors' claims. Previously, if an administrator rejected a creditor's claim, the creditor had to challenge the administrator's decision in the court charged with adjudicating the insolvency proceedings of the debtor. However, the insolvency proceedings are not designed for the resolution of substantive disputes (e.g. as regards the existence or the amount of a creditor's claim), and the only vehicle for the resolution of such disputes under the Latvian Civil Procedure Law is the so-called claim proceedings (proceedings by way of an action). Hence, if the court established that there was a substantive dispute, it merely ordered the creditor to bring a claim into court having jurisdiction over the said dispute, which may or may not have be the same court that hears the insolvency proceedings. It often resulted in a lengthy litigation running alongside insolvency proceedings, procedurally independent and disconnected from them.

Now such disputes will be heard by the same court and in an expedited manner. Namely, the case must be examined in a written procedure within 30 days from the submission of explanations to the claim by other involved parties, while the court ruling may only be appealed once, provided that the specific preconditions for the initiation of appellate proceedings are established by the court of appeal.

In addition, the creditor whose claim has been rejected by the administrator on the grounds of a dispute will be entitled to bring the claim into court for the resolution of a dispute right away, without the need to separately challenge the administrator's decision *per se*.

Italy:
New Code of Company Crisis and Insolvency is close to being approved

On 8 November 8 2018, the Council of Ministers approved the Legislative Decree implementing the Law 155/2017. It consists of 390 articles, divided into four parts:

Part I: Crisis and insolvency Code
Part II: Changes to the Civil Code
Part III: Guarantees for buyers of buildings to be built
Part IV: Final and temporary provisions

The purpose of the Legislative Decree is to reform the insolvency system by providing a systematic and organic framework, thus overcoming the discontinuous and fragmented approaches that had characterised the reforms of the provisions which took place in the last 15 years.

Key points of the reform:

- ✓ The replacement of the term 'bankruptcy' with the expression "judicial liquidation" in accordance with the terminology in other European countries, in order to avoid the social discredit that historically accompanies the term "bankrupt";
- ✓ The priority of dealing with proposals that lead to the overcoming of the crisis by ensuring business continuity;
- ✓ The uniformity and simplification of the legislation of the various special proceedings previously existing on insolvency matters;
- ✓ The reduction of the duration and costs of insolvency proceedings;
- ✓ The establishment, at the Ministry of Justice, of a register of individuals delegated to perform, on behalf of the Court, the functions of management or control in the insolvency proceedings, with an indication of the requisites of professionality and independence necessary for being registered.

Furthermore, the Legislative Decree makes changes to the provisions on alert procedures and assisted settlement of the crisis, i.e. out-of-court procedures aimed at anticipating the appearance of the crisis, thus allowing a fast analysis of its causes. In fact, differently from the previous provisions, the Legislative Decree foresees the possibility for the company concerned to challenge the symptomatic imbalance indices of the "crisis" and significantly modifies the thresholds beyond which the reporting charges are charged to the qualified public creditors.

In addition, the Legislative Decree broadens the obligation of the Public Prosecutor to file an appeal for the opening of the judicial liquidation, providing it in all cases in which the public prosecutor becomes aware of a state of insolvency, differently from the previous provisions, which provided for it only in specific cases. Some changes are also made to the provisions on the composition with creditors, where the independent professional has to certify the truthfulness of the company data declared by the applicant and the feasibility of the proposed plan. This becomes a condition for admission to the composition with the creditors in order to decide upon the business' continuity and the maintenance or re-hiring of a number of employees equal to at least 30% of those employed at the time of filing the plan, for the next two years.

The final wording will depend on any possible amendments made by the Commissions of the competent Ministries where the Legislative Decree is currently analysed. The next step is the approval from the Council of Ministers which, most probably, will happen no later than 13 January 2019. The reform will start with the entry into force of the new Code of the Company Crisis and Insolvency that will represent a real revolution for the Italian bankruptcy law, where some provisions will be effective after 30 days from the publication in the Official Gazette, while the most relevant part will be effective only in 2020. ■

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New content and resources published on the INSOL Europe website

Myriam Mailly, Co-Technical Officer of INSOL Europe, reports on the technical content made available in 2018 and other updates on the INSOL Europe website.

MYRIAM MAILLY
INSOL Europe Co-Technical Officer

> A DEDICATED WEBPAGE HAS BEEN CREATED TO HELP INSOLVENCY ACTORS TO DEAL WITH THE PRACTICAL APPLICATION OF THE (RECAST) INSOLVENCY REGULATION 2015/848

Updated insolvency laws

We are grateful to **Catherine Ottaway** from Hoche Avocats (Paris, France) who kindly send us an update on the adaptation of French law to the Regulation on insolvency proceedings. The article focuses in particular on the Order which was adopted in order to facilitate the implementation of the mechanisms created by the Regulation and to enable courts and practitioners to act quickly in often complex insolvency cases, where economic and social issues require exemplary responsiveness.

State Reports

Reports are available for Austria, Belgium, Belarus, Bulgaria, Cayman Islands, Croatia, Cyprus, Czech Republic, Denmark, Estonia, EU, Finland, France, Germany, Greece, Hungary, India, Ireland, Israel, Italy, Jersey, Latvia, Lithuania, Luxembourg, Macedonia, The Netherlands, Poland, Portugal, Puerto Rico, Romania, Russia, Serbia, Slovakia, South Africa, Spain, Sweden, Switzerland, Turkey, Uganda, UK, Ukraine and USA.

Lastly, the 2018 CEE insolvency survey has been published for Belarus, Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland and Slovakia. We are grateful to **Frank Heemann**, Eurofenix joint chief editor and Rechtsanwalt, Partner at bnt Heemann Klauberg Krauklis APB (Vilnius, Lithuania) for sharing this information with the INSOL Europe members.

National insolvency statistics

Updated national insolvency statistics for 2018 were published for England & Wales, France, Italy, Latvia, Northern Ireland, Scotland and Spain.

Our special thanks go to **Simeon Gilchrist** (Edwin Coe, UK), **Giorgio Corno** (Studio Corno – Avvocati, Italy & UK), **Alberto Nunez-Lagos** and **Esther González Pérez** (Uria Menendez, Spain) for sharing the information with the INSOL Europe members.

If you are interested in contributing for any uncovered EU Member States (Bulgaria, Czech Republic, Estonia, Malta, The Netherlands, Poland, Romania, Slovakia and Slovenia) or beyond, or to update the information already published (Austria, Belgium, Croatia, Cyprus, Denmark, Finland, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Portugal, Sweden and Switzerland), please do not hesitate to send them.

EIR Case Register

More than 650 abstracts are now uploaded onto the Lexis Nexis INSOL Europe European Insolvency Regulation Case Register platform, including new abstracts applying the Recast Regulation on Insolvency 2015/848. The Register is definitely a useful tool for any insolvency professionals' day-to-day business as it enables them to be aware of the recent developments in relation to the application of the EIR (recast) by national jurisdictions.

European Insolvency Regulation

A dedicated webpage, which is regularly updated, has been created to help insolvency actors to deal with the practical application of the (recast) Insolvency Regulation 2015/848.

You will find on this webpage the list of the official texts (and amended Annexes), the links relating to the standard forms referred to in Article 88 of the EIR Recast and established by the implementing Regulation (EU) of 12 June 2017, as well as information on domestic legislations/registers and in particular the state of play of national insolvency proceedings applicable to EU cross-border insolvencies.

Lastly, the new consolidated version of the EIR Recast of 26 July 2018 reflecting the changes introduced by the Regulation (EU) 2018/946 of 4 July 2018 replacing Annexes A and B to Regulation (EU) 2015/848 on insolvency proceedings has been published (date of effect: 26/07/2018) as well as a table focusing on the outcomes of

national insolvency proceedings applicable under the scope of the EIR Recast for Bulgaria, Cyprus, Czech Republic, Denmark, England & Wales, Estonia, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

Our special thanks go to the experts of the **EU Relations Working Group** for sharing this information with the INSOL Europe members.

EU Draft Directive on Preventive Restructuring Frameworks, Insolvency and Discharge Procedures

The official texts on the *Proposal for a Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures* and amending Directive 2012/30/EU (COM/2016/0723 final) as well as the latest documents arising from the EU legislative adoption process are now available on our website.

In addition, the final report of a project funded by the European Union and entitled '*Contractualised Distress Resolution in the Shadow of the Law – Effective judicial review and oversight of insolvency and pre-insolvency proceedings*' (September 2018), the *European Law Institute's (ELI) Instrument on Rescue of Business in Insolvency Law* (September 2017), and the report, commissioned by the European Commission DG Justice, entitled '*Study on a new approach to business failure and insolvency – Comparative legal analysis of the Member States*' relevant provisions and practices' (University of Leeds - January 2016) have been published on the same webpage.

Last but not least, relevant information has also been published for Bulgaria, Cyprus, Czech Republic, Denmark, England & Wales, Estonia, Finland, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia and Spain as well as additional commentaries from Bulgaria, Estonia, Luxembourg and Slovakia.

Brexit publications

Two articles relating to Brexit have been published: '*Post-Brexit Cooperation and Coordination of EU-UK Insolvencies*' written by **Paul J. Omar** (Gray's Inn, Barrister, INSOL Europe Technical Research Coordinator) and '*UK-European cross-border insolvency after Brexit*' written by **Robert van Galen, Barry Cahir, Alberto Nunez-Lagos** and **Frank Tschentscher** as members of the Brexit Committee of INSOL Europe.

USBC Chapter 15 Database

The USBC Chap.15 database of US cross-border cases is a joint project of the American Bankruptcy Institute and INSOL International. It is a database of all Chapter 15 cases filed in the US since 2005 which is available from the Global INSOLvency website. This link is now also accessible from the introduction page of the Technical Content section.

We are grateful to **Dr. Annerose Tashiro** (Schultze & Braun, Germany) for sharing this information with us.

INSOL Europe Academic Forum publications

The INSOL Europe Academic Forum's newsletters as well as updated information advertising academic events are regularly published on the website.

In addition, the 2018 technical series publication arising from the Annual INSOL Europe Academic Forum Conference in Warsaw has been published and members can order a copy from the website if you have not already received one.

INSOL Europe events

The presentation slides and the final programme of the INSOL Europe Eastern European Countries' Committee Conference (31 May & 1 June 2018, Riga, Latvia) and of the INSOL Europe Annual Congress (4-7 October 2018, Athens, Greece) are available as well as the materials of the INSOL Europe Academic Forum Annual Congress (3 & 4 October, Athens, Greece). The photographs of these three events have also been published.

Do not hesitate to have a look!

INSOL Europe 2018 Co-labelled events reports

Full reports on the INSOL International Helsinki Joint One Day Seminar (13th June 2018, Finland) and the 7th European Insolvency & Restructuring Congress (28 & 29 June 2018, Brussels) are available to INSOL Europe members in the news section of the INSOL Europe website. ■

Useful Links

Email:
technical@insol-europe.org

LinkedIn: www.linkedin.com

Twitter: @INSOLEurope

Updated Insolvency Laws
www.insol-europe.org/technical-content/updated-insolvency-laws-france

State Reports
www.insol-europe.org/technical-content/state-reports

National Insolvency Statistics
www.insol-europe.org/technical-content/national-insolvency-statistics

EIR Case Register
http://tinyurl.com/y7tf2zc4

European Insolvency Regulation
www.insol-europe.org/technical-content/useful-links-to-be-aware-of-before-applying-the-recast-insolvency-regulation-2015848

EU Draft Directive
www.insol-europe.org/technical-content/eu-draft-directive

Brexit Publications
www.insol-europe.org/technical-content/brexit-publications

USBC Chapter 15 Database
www.insol-europe.org/technical-content/introduction

Academic Forum Publications
www.insol-europe.org/academic-forum-documents

www.insol-europe.org/academic-forum-news

INSOL Europe Events
www.insol-europe.org/events

www.insol-europe.org/gallery

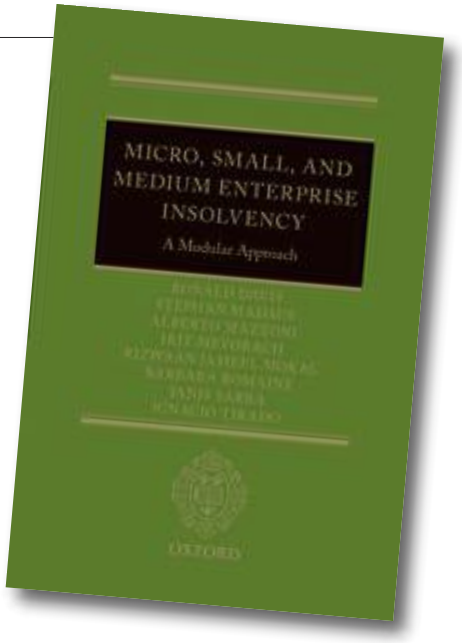
INSOL Europe 2018 Co-Labelled Events Reports
www.insol-europe.org/news/from_insol

Books

Got a new book to review or preview?

Let us know and we will consider it for a future edition. Contact Paul Newson for more details on: paulnewson@insol-europe.co.uk

Micro, Small, and Medium Enterprise Insolvency



Various Authors (1st edn) 2018, OUP, Oxford), 256pp, £75, ISBN 9780198799931

The preponderance of MSMEs (Micro, Small and Medium Enterprises) in all economies, not just those developing or emerging, is well-known. The loss of value and entrepreneurship from MSME failure is also a well-known phenomenon. Yet, many insolvency systems find it difficult to grasp the particular needs of MSMEs, as even particularly useful tools promoting rescue within insolvency law are only with some difficulty and cost adaptable to MSMEs. Into the regulatory and legislative void steps this new text, bringing together a stellar cast, drawn from academia and the judiciary in six jurisdictions.

The eight authors (Davis, Madaus, Mazzoni, Mevorach, Mokal, Romaine, Sarra and Tirado) are very well-known and have taken part in many panels and enquiries into the condition of MSMEs, including within the UNCITRAL Working Group V and the World Bank's Insolvency and Debtor/Creditor Regimes Taskforce. Their collective experience in academia/judiciary and legal reform (both domestic and international) puts them in the ideal place to comment and provide what they describe as a "modular framework" to permit legislators to adapt existing or adopt new approaches to MSME insolvency, while also permitting access by stakeholders to changes addressing MSME financial difficulties and insolvency.

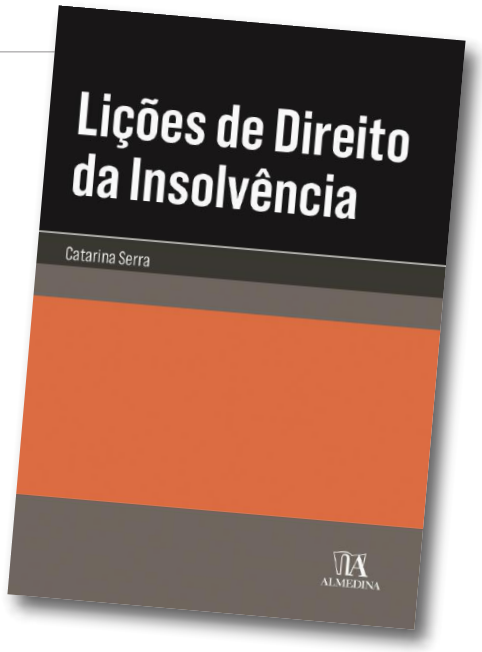
In its essence, the "modular approach" relies on the overarching principle of fairness and provides for dedicated procedures enabling access to rescue or liquidation by debtors or creditors. Examples of its application to particular types of economy are provided with a guide to implementation, as well as an indication of a basic toolkit for policymakers and law reformers.

In summary, this is a novel text distilling the experience of a group who by their experience and knowledge is very well-placed to comment and to assist in the promotion of MSME-focused insolvency processes.

Paul J. Omar
Technical Research Coordinator

Lições de Direito da Insolvência

(Lessons on Portuguese Insolvency Law)



Catarina Serra (1st edn)
2018, Almedina, Coimbra, 736pp,
€40, ISBN 9789724074450

In April 2018, Eurofenix Joint Chief Editor, Catarina Serra, highly reputed Professor of the Faculty of Law of the University of Minho, recently appointed Judge of the Portuguese Supreme Court of Justice, and a long-standing member of the Academic Forum of INSOL Europe, published her Lessons on the Portuguese Insolvency Law ("*Lições de Direito da Insolvência*"). This Portuguese language book consists of a considerably extensive analysis of the Portuguese Insolvency Law which provides the reader with an in-depth approach to both company liquidation (within insolvency proceedings) and restructuring Portuguese tools. In addition, Catarina Serra's *Lessons* address the regimes applicable to natural persons under the Portuguese Insolvency Law and also cross-border insolvency.

Specifically, the book is focused on the description and detailed analysis of:

(i) the Portuguese legal framework applicable to insolvency proceedings ("*Processo de Insolvência*");

(ii) the restructuring tools available for companies in Portugal, namely the Special Revitalisation Proceedings ("*Processo Especial de Revitalização*) and the Regime of Out-of-court Corporate Restructuring ("*Regime Extrajudicial de Recuperação de Empresas*");

(iii) the legal framework applicable to natural persons, including the recently created Special Proceedings Aimed at a Payment Agreement ("*Processo Especial para Acordo de Pagamento*"); and

(iv) cross-border insolvency.

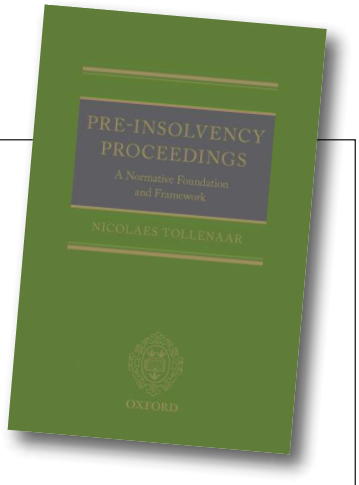
What makes Catarina Serra's *Lessons* greatly valuable for any practitioner or scholar is that it is clearly a novel work on the Portuguese Insolvency Law, written by an author with an especially wide and varied background. In fact, besides being the first lessons on the Portuguese insolvency law to address the topic in such a broad and integrated perspective, the book is organised in a way that allows any reader, more or less knowledgeable of the Portuguese Insolvency Law, to easily find an answer or, at least, the author's opinion on any fundamental issue related to the Portuguese Insolvency Law.

The publication provides to its readers a particularly extensive list of Portuguese and foreign bibliography and also a comprehensive analysis of case law, which contributes to the usefulness of the book to any practitioner or scholar.

To conclude, it is fair to say that Catarina Serra's "*Lessons on Portuguese Insolvency Law*" is an essential book for anyone, practitioner or scholar, interested in studying the field of the Portuguese Insolvency Law.

Nuno Gundar da Cruz,
Senior Associate, Morais Leitão, Galvão Teles, Soares da Silva and Associates, Lisbon

Book preview: Pre-Insolvency Proceedings



Nicolaes Tollenaar, February 2019, 320pp,
£75, ISBN 9780198799924

To be published by OUP in early 2019, this text by INSOL Europe member Nicolaes Tollenaar will deal with the Draft Directive on Preventive Restructurings, which by then is anticipated will be adopted. A review will follow in Eurofenix.

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2019

6 & 7 June	EECC Conference *Ljubljana, Slovenia*
13–15 June	AIJA-INSOL Europe Joint Conference *Mallorca, Spain*
25 & 26 September	INSOL Europe Academic Forum Conference *Copenhagen, Denmark*
26–29 September	INSOL Europe Annual Congress *Copenhagen, Denmark*

2020

30 Sept. & 1 Oct.	INSOL Europe Academic Forum Conference *Sorrento, Italy*
1–4 October	INSOL Europe Annual Congress *Sorrento, Italy*

2021

6 & 7 October	INSOL Europe Academic Forum Conference *Dublin, Ireland*
7-10 October	INSOL Europe Annual Congress *Dublin, Ireland*

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