eurofenix®

The journal of INSOL Europe
Winter 2019/20

Obtaining Information

Offshore Demystified

Wonderful, Wonderful, Copenhagen! In-depth report

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- Early Warning Europe project
- Clawing back assets in Greece
- The Undertaking: Mystery or reality?
- Modern insolvency research
- Plus, reports from Trier, Moscow, London and more...

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Welcome from the Editors


FRANK HEEMANN


CATARINA SERRA

As the year draws to a close, I usually enjoy taking time for reflection.

Looking back at the past 12 months, it seems safe to say that two topics in numerous variations have been dominating eurofenix and INSOL Europe's various events: the Restructuring and Insolvency Directive and Brexit (see also pp8, 10, 16, 20, 24, 32, 42). Without doubt these two topics will continue to capture our attention also in 2020. Efforts to transpose the Directive into domestic law will intensify and I am sure that our organisation and its members will be at the forefront, rendering competent advice to lawmakers, companies and other stakeholders. Brexit will most certainly happen on 31 January 2020, for whatever good, or bad, it might bring. Despite this, we are unlikely to escape the slogan 'getting Brexit done' in 2020, presumably to be used in the context of difficult negotiations. The outcome will determine the future trade, security and the law-enforcement relationship between the EU and the UK.

Other trade negotiations and trade wars will continue to influence States, institutions and businesses and, as a consequence, also INSOL Europe members. The US president has repeatedly offered the UK a 'massive' trade deal, a deal which will still have to be negotiated. Also, the conflict between the US and China appears far from being solved despite a recent truce. In the context of all this, it will be interesting to follow what kind of impact the ongoing impeachment process against the US president and the campaign for the presidential election in November will bring.

Turning our gaze to INSOL Europe, I am pleased to see how our organisation has adapted to new challenges. One example is the still rather new instrument that will help growing our membership: 26 country coordinators have already been appointed and are steered by the Development Committee (p6). Another example is the newly established 'Insolvency Tech & Digital Assets' wing, that should help members keep abreast of new technologies and the opportunities they offer (pp12, 13). Last, but not least, is the improvement in communication, be it through the brand new website, enhanced social media flows, or transparency and easier access to documentation in Council-related work (p6).

Are there any emerging trends, is there something new to expect in 2020? I dare say 'yes'. I expect climate change, as well as related current and potential future consequences, to evolve into an increasingly important topic in the context of insolvency and restructuring too, since more and more attention will be given to the economic costs and business risks related to climate change. The filing in January 2019 by US giant PG&E for Chapter 11 bankruptcy, allegedly due to financial challenges linked to catastrophic wildfires in California facilitated by climate change, augurs badly in this regard. It would therefore be nice to see contributions for future editions of eurofenix exploring the intersections of climate change and business risk. Emmanuelle Inacio's Technical Insight (p14) already explores an important and related topic, the crossroads of environment and insolvency.

For the time being I leave you, dear reader, to your own reflections and to the reading of this edition of eurofenix. In addition to conference reports, you will find a broad array of interesting contributions around this year's dominant topics, such as the articles on Greek claw back actions (p22), the examination of undertakings under the EIR in Romania and Hungary (p30), the thoughts of this year's winner of the Richard Turton Award (p34), and the continuation of the demystification of offshore jurisdictions (p28). Finally, the Country Reports might offer easier reading (pp 38 et seq), but interesting news for the practitioners.

See you in 2020!

Frank

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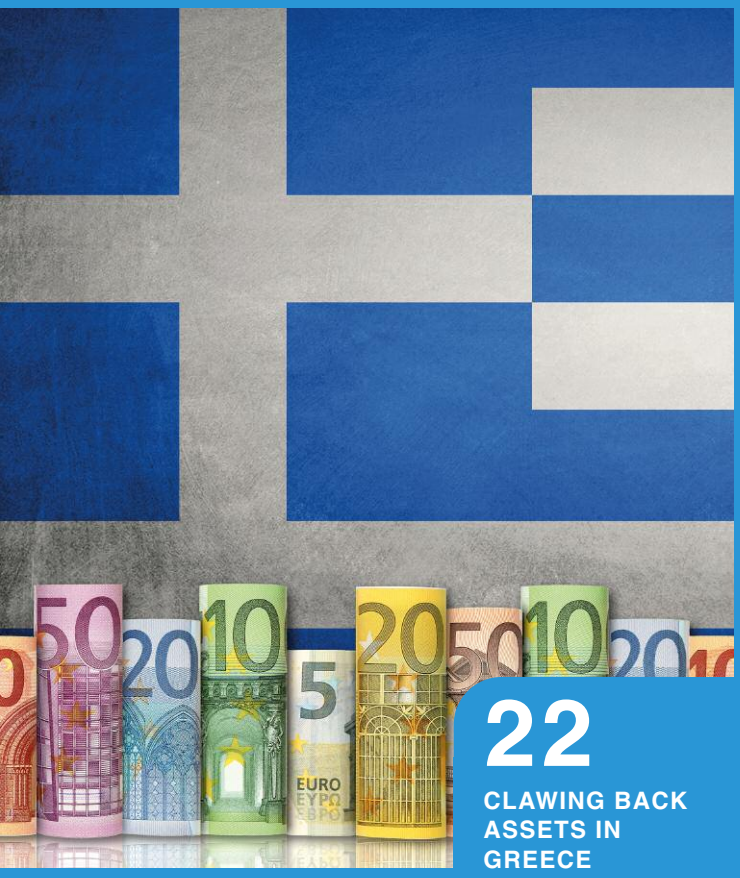
ANNUAL CONGRESS: COPENHAGEN



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Keep the balls rolling!

PIYA MUKHERJEE
INSOL Europe President

Piya Mukherjee looks forward to her year as President of INSOL Europe

> IN 2019, INSOL EUROPE WAS INVOLVED IN ELEVEN JOINT EVENTS WITH KINDRED ASSOCIATIONS; AN INCREASE FROM FOUR JOINT EVENTS IN 2018

This is my first President's Column in Eurofenix. First and foremost, I want to thank our now Immediate Past President, Alastair Beveridge, for succeeding in getting quite a number of balls rolling during his presidency.

This has required a lot of hard work from Alastair and throughout his presidency he has demonstrated a huge commitment to the association and great responsiveness to queries and issues to be handled. My task as President is easy – I just have to keep the balls rolling!

Ball 1: Development Committee

Alastair's predecessor as President, Radu Lotrean, had identified the need for INSOL Europe to be present in all countries in Europe in order to increase its relevance and impact. This was affirmed by the Strategic Task Force 2025. In 2018 the Council resolved to set up the Development Committee which is responsible for identifying Country Coordinators in all countries in Europe. The Country Coordinators shall prepare and execute plans for each country. Co-chairs of the Development Committee were appointed – Alberto Nunez-Lagos, Radu Lotrean and Alice Van Der Schee (Committee Head) – and thanks to their relentless efforts, 26 Country Coordinators have been appointed and further plans are under way.

At the Annual Congress in Copenhagen in September 2019, the Country Coordinators met and exchanged views and made suggestions as to what could be done to increase the presence and awareness of INSOL Europe in their respective countries. A very fruitful discussion indeed and plenty of input as to how we can keep this ball rolling, which I very much look forward to contributing to during my presidency.

Ball 2: Collaboration with kindred associations

In 2019, INSOL Europe was involved in 11 joint events with kindred associations; an increase from four joint events in 2018.

Increased collaboration with kindred associations is one of the key strategy areas identified by the Task Force 2025.

I look forward to yet another year with a range of joint events and extend my gratitude to all involved in setting these events up. As we speak, the joint events listed below are already in the diary.

Ball 3: Rebranding

As you all hopefully have seen, our website was completely re-designed and launched this year. The new modern design of the website made us realise that our INSOL Europe logo looks outdated, so a new project to redesign the logo and the way INSOL Europe presents itself to the outer world has been initiated, with expert guidance from Paul Newson, our Communications Manager.

I look forward to presenting the new logo and new "face" of INSOL Europe at the Annual Congress in Sorrento in October 2020.

Ball 4: Insolvency Tech & Digital Assets

At its Spring 2019 meeting the Council decided to set up a new wing, which initially was titled "Legal Tech & Digital Assets". The new wing is chaired by Frank Heemann (BNT), Laurent le Pajolec (EXCO) and José Carles (Carles Cuesta) who have put great enthusiasm and commitment in getting the new wing up and running.

At the Annual Congress in Copenhagen in September I had the privilege of attending the first meeting of the wing and it was a pleasure to witness the many ideas that surfaced through the discussions.

There was a consensus that the title "legal tech" was too broad, as the intent of the wing will be to focus on legal tech specifically aimed at insolvency and restructuring. The name of the wing has now been changed to "**Insolvency Tech & Digital Assets**" to reflect this.

Undoubtedly, our world has become more tech-driven and

INSOL Europe joint events 2020

Date	Partner	Country
11 June 2020	INSOLAD	Netherlands
25 & 26 June 2020	DAV insolvency Section	Brussels
14 July 2020	R3	United Kingdom

digital assets are here to stay. This will pose new challenges to us, the insolvency and restructuring world. On the other hand, the increasing array of legal tech tools provides opportunities for us to work smarter.

I am confident that the new wing will increase the relevance of INSOL Europe to its members and I will be happy to assist the wing in keeping the ball rolling.

Ball 5: Transparency and rotation

In the course of 2019, a number of policy documents and job descriptions and roles were compiled for the benefit of the Council in order to increase transparency.

Prior to the Council elections next year, along with the usual invitation to all members to stand for the vacant Council positions, we will send the description of the role of the Council as a body and the role of the individual Council members.

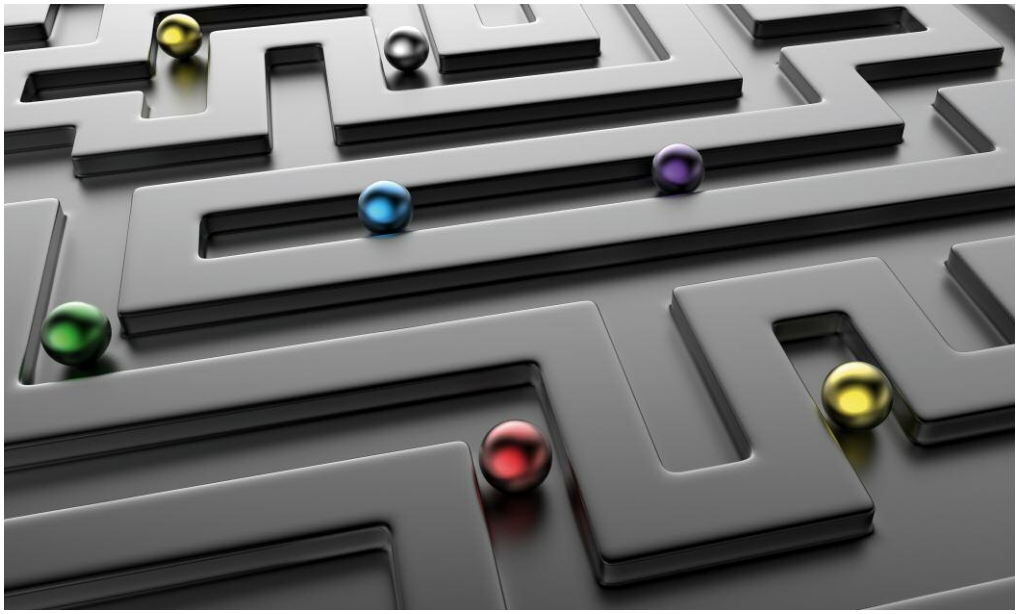
It is important to stress that the roles of all involved in the management of the association will and shall be adapted – subject to the constitution – as we go along, in order to ensure that the association continues to be managed in a timely, efficient and democratic way. Nothing is set in stone.

The role description of the chairs of the INSOL Europe Wings and Forums also introduced a general limit to the position, being a 3-year term, staggered where there are co-chairs to ensure continuity. We believe that this principle of rotation will be beneficial to the very important work of the wings and forums.

This ball will also continue rolling in the next year!

Ball 6: Changes in the organisation

Many of you will have met Emmanuelle Inacio, one of our two Co-Technical Officers, either in person at INSOL Europe's conferences or through her articles in Eurofenix. Through the past years Emma has taken on the role as Secretary to the Technical Committees of INSOL Europe's Annual Congress and EECC Conference as well as the High Level Course. Emma is the backbone of the technical side of these flagship events and has contributed massively to the huge success of these events.



To reflect the change in role, I am pleased to inform you that Emma has kindly accepted the title of INSOL Europe Conference Technical and Training Course Director with effect from 1 January 2020.

Our other Co-Technical Officer, Myriam Mailly, who many of you will have also met at conferences and through her European updates in Eurofenix, has kindly accepted to take over as sole Technical Officer as of 1 January 2020. Myriam will continue to be responsible for the technical content on our website, assist the technical committee of the Academic Forum conferences and liaise with relevant officials of the EU, thus keeping the membership updated on EU matters. Myriam has in a not so distant past worked for the Commission and has gained more insight than most into the various EU bodies.

A ball which also started rolling under Alastair's presidency – and for sure a ball neither he nor any else in the organisation was happy about – was Caroline Taylor's request to reduce her commitments with effect from the Annual Congress in Sorrento in October 2020.

Caroline, our Director of Administration, has been the heart and soul of INSOL Europe for more than 30 years and it is hard to imagine the association without her. However, we respect her wish and the search for Caroline's successor has commenced. We are confident that we will find a candidate who will be able to take over from Caroline and also contribute to the future growth of the association.

When this ball stops rolling at the Annual Congress in Sorrento the association will have a new Director of Administration.

Furthermore, we will have a new Event Strategy Director which will be Caroline's future title and role. We are so fortunate that Caroline has accepted to continue to oversee and assist with the organisation of INSOL Europe's conferences which I personally find quite reassuring. I am not sure everyone realises how much careful planning and "ironing wrinkles" it takes to make an event as the annual conference run smoothly! ■

> **MY TASK AS PRESIDENT IS EASY – I JUST HAVE TO KEEP THE BALLS ROLLING!**

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

Private Equity Awards in France

The 18th edition of the Private Equity Exchange & Awards was held in Paris on 27 November 2019. 120 outstanding speakers from all over the world shared their expertise through interactive round-tables and keynote speeches including INSOL Europe's President, Piya Mukherjee, spoke on a panel about the do's and don'ts in investing in distressed business.

1,200 participants gathered for this major Pan-European summit on private equity and restructuring followed by a high-class evening ceremony rewarding the best performers among LBO Funds, Limited Partners and Management Teams.

Council Elections, Changes and Retirements

Executive Officers

At the close of the Copenhagen Congress in September, Alastair Beveridge (UK) became Immediate Past President and was replaced by Deputy President Piya Mukherjee (Denmark) as the new President. Vice President Marcel Groenewegen (Neths) became the new Deputy President and Frank Tschentscher (Germany) was duly appointed by Council as the new incoming Vice President. Chris Laughton (UK) agreed to remain on as Treasurer for one further year. Furthermore, Caroline Taylor (UK) Director of Administration announced her plans to remain in office for one further year with a view to continuing her assistance on the Secretariat on a part-time basis after that time.

Reserved seats

Following the 2019 Council Election process, the following changes arose:

- **Austria:** Susanne Fruhstorfer preferred not to stand again for a second 3-year term of office and was succeeded by Matthias Prior.
- **Denmark:** This is a new seat as Denmark now has over 30 members (the qualifying number for a reserved seat on Council). Michala Roepstorff was successful in the voting process and began her first 3-year term of office.
- **Ireland:** Barry Cahir retained his seat for a second term of office.
- **Netherlands:** Alice van der Schee (previously in a non-reserved seat) began her second 3-year term of office.
- **Romania:** Simona Milos preferred not to stand for a second 3-year term and was succeeded by Vasile Godinca.
- **Sweden:** As numbers had dropped below 30, the reserved seat on Council was lost
- **Switzerland:** Thomas Bauer retired after his second 3-year term and was succeeded by Sabina Schellenberg who began her first 3-year term of office.

Non-reserved seats

David Rubin completed his second 3-year term of office and Alice van der Schee had moved into the reserved seat for the Netherlands. The successors of those two seats were Evert Verwey (Neths) and Georges-Louis Harang (France). This year two new non-reserved seats for countries not currently represented on Council were made available and duly taken by Jan Lilius (Finland) and Frank Heemann (Lithuania).

Co-opted seats

- Radu Lotrean (in his capacity as EECC co-chair and for his work on the High Level Courses).
- Alberto Nunez Lagos (in his capacity as co-chair of the Turnaround Wing and co-chair of the Development Committee).
- Steffen Koch (in his capacity as co-chair of the Turnaround Wing and the new Board member for INSOL International liaison).
- Tomas Richter (in his capacity as chair of the Academic Forum, succeeding Michael Veder).
- David Rubin (in his capacity as co-chair of the Sponsorship Committee).

Retirements from Council

In view of the above, we say goodbye and thank the following people who now retire from Council: Hans Renman (Sweden), Susanne Fruhstorfer (Austria), Simona Milos (Romania), Thomas Bauer (Switzerland), Michael Veder (Netherlands), Catherine Ottaway (France) and Robert van Galen (Netherlands).

Honorary Members

This year honorary membership was awarded to Michael Veder who had been chair of the Academic Forum since 2016 and also to Steffen Koch in his capacity as past President and co-chair of both the Turnaround Wing and Strategic Task Force 2025. Steffen also became the newly appointed INSOL Europe representative on the Board of INSOL International.

Eminent international Professor joins Academic Forum board

INSOL Europe is pleased to announce that as of 1 January, 2020, the Board of its Academic Forum has been joined by Prof. Francisco Garcimartín.

Prof. Garcimartín is a Chair Professor of Private International Law at Universidad Autónoma de Madrid. He graduated in Law at the Universidad Autónoma de Madrid (1987) and earned his Ph.D. in Law at the aforementioned university (1991). His main fields of expertise are focused on international transactions, cross-border insolvency, international litigation as well as cross-border company law. He also works as a Consultant at Linklaters in Madrid.

He has published in most of the leading law journals on various aspects of private international law and cross-border transactions and he is co-author, with professor Miguel Virgós, of "The European Insolvency Regulation: Law and Practice," The Hague, Kluwer, 2004. He is also the author of the course "Cross-Border Listed Companies", published in the Recueil de cours of The Hague Academy, vol. 328 (2007), pp. 1-171. He has represented the Spanish government as national expert in different international organisations, such as UNIDROIT, UNCITRAL, The Hague Conference or the Council of the European Union.

Prof. Garcimartín replaces Florian Bruder who has handed in his resignation at the end of 2019 after having served on the Board of the Academic Forum for many years, and whose services are gratefully acknowledged by INSOL Europe.

Prof. Garcimartín joins an internationally diverse Board comprising Tomáš Richter (Chair, The Czech Republic), Line Langkjaer (Secretary, Denmark), Prof. Jessica Schmidt (Germany), Jennifer Gant (UK/USA & Ireland), Luigi Lai (Italy and Poland), Prof. Rolef De Weijs (The Netherlands), and Gert-Jan Boon (The Netherlands).

Eastern European Countries' Committee Conference 2020 21-22 May, Kyiv (Ukraine)

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

Building new laws amidst the Roman ruins

Trier in the Moselle valley, once a capital of the Roman Empire and home to Constantine the Great, saw the holding of a conference, jointly organised by the European Rights Academy (ERA) and the Academic Forum. *Paul Omar & Jenny Gant report.*

The event, at the premises of the ERA, witnessed over 60 people gather to consider the future of preventive restructuring in light of the recent adoption of Directive 2019/1023 and many topical issues besides. With a warm welcome from Tomas Richter (Academic Forum Chair) and Angelika Fuchs (ERA), delegates spent two days in early November (7/8) exploring subjects of contemporary relevance. These included the Directive and its implementation, security rights in the insolvency context, the intersection of insolvency and company law as well as the interaction of the Directive and the Recast European Insolvency Regulation, the last two subjects receiving particular attention in the update of CJEU case-law to which the conference also gave attention. Lastly, the

themes of Brexit and recognition of the UK scheme process also received mention.

By far the single most debated topic was that of the Directive and how it would be implemented by the Member States over the next two years. Focus was placed on different issues, such as class formation, plan content, valuation, cross-class cram-down, the priority rules (absolute and relative), as well as the safe harbour and protection for new and interim finance. The sessions held during the conference generally considered how implementation would play out as Member States came to grips with quite complex themes essential to early restructuring efforts and the avoidance of formal insolvency. Lacunae in the Directive were pointed out and developments to current practice in the field were anticipated. In this light, a round-table held the first day offered particular insight into how five of the Member States might approach the process of transposition, particularly given pioneering domestic developments in the preventive restructuring arena, such as those occurring in Ireland, as well as the more recent moves in Germany, Luxembourg, the Netherlands and Poland.

The quality of the presentations, offered by prominent academics and practitioners drawn from the Academic Forum and more widely, was extremely high and very well-received by attendees drawn from across Europe. These stimulated interventions and resulted in fascinating dialogues between experts. Delegates also enjoyed the hospitality of the ERA at a convivial dinner held at the end of the first day of the event, following a tour of the city and its many architectural wonders. Everyone acknowledged that, as the first event of many likely to occur across the implementation period, the conference in Trier has set a high standard for the debates to come.

INSOL Europe represented in Russia

On 15 November 15, Dmitry Konstantinov, coordinator of INSOL Europe for Russia and Head of Insolvency at Ilyahsev & Partners opened the annual Conference of Insolvency Law organised by Pravo.ru in Moscow.

Dmitry spoke about forum shopping in insolvency cases in Russia and the recent judgements of the Supreme Court of the Russian Federation in the field. Surprisingly, the Russian Supreme Court mentioned the "centre of main interest" as a concept which should be applied by the Russian courts when forum shopping had been recognised. As a non-EU country, Russia did not know COMI before, and the introduction of the concept was not expected.

Pravo.ru organises about 30 legal conferences annually, and the Insolvency Law Conference is one of the most popular of them; this year the conference attracted about 130 attendees. The event aimed to cover the main recent topics of the Russian insolvency law – on Friday, apart forum shopping, topics included subordination of shareholder's loans, accountability of IPs and freezing orders in insolvency cases.

On 21 November The Moscow State University, Faculty of Law, held a panel discussion titled "**Multiplicity of the debtors in the process of insolvency (bankruptcy): theory and practice of law enforcement**". The speakers covered various related issues; the most intense discussion was about liability of the individuals controlling the debtor and the bankruptcy of spouses. *Inter alia*, panelists noted the recent case of a Russian court which imposed a freezing order on the assets belonging to a lawyer who arguably gave a fraudulent piece of advice to the debtor. Another hot topic was the bankruptcy of spouses – Russia expects a bill regulating co-tenancy of spouses in case of bankruptcy of one of them.

This last topic will also be one of the discussion points at the next event being held by The Russian Insolvency Club on 20 December, which will also include panels on "**Expenses of insolvency practitioners spent on lawyers through disputes with the creditors (case Industria v DIA)**"; and "**Inheritance of the debt based on vicarious liability (case Vostoknefteproduct v Shefer)**".

The Insolvency Club Russia is designed to unite insolvency lawyers and insolvency practitioners around the country, as well as develop best insolvency practices. The Club was established in 2018 and is quite popular within the insolvency society. INSOL Europe member Oleg Zaitsev is the Club's Chairman.

Activist stakeholders: Changing dynamics in restructuring in London

Over 60 delegates from the financial and banking services sector met in London on the evening of 2nd December for the third joint INSOL International and INSOL Europe Financiers' Group Panel session and reception. *Paul Newson and Emma Inacio report.*

The meeting was hosted by NatWest at their London offices and opened by Sean Pilcher, Fellow, INSOL International, NatWest. Alastair Beveridge, immediate past-President of INSOL Europe and member of the INSOL Executive Committee welcomed the delegates and introduced the panel.

Chaired by Raquel Agnello QC (Erskine Chambers), the panel of top UK industry experts – Simon Baskerville, Latham & Watkins; David Beckett, SC Lowy; Martin Gudgeon, PJT Partners and Nick Ram, Lloyds Banking Group – started the discussion observing that the credit market has seen an increasing complexity of capital structures and new classes of lenders and investors.

The panel reminded the audience that traditionally, companies were funded by loans from traditional banks. Only large, well-established corporations had access to the public debt markets. Corporate loans were syndicated to a limited number of commercial banks that held the debt until final maturity. The banks would monitor the borrower more intensively and the borrower would have had to negotiate with a limited number of banks in the event of distress.

The rise of loan trading and the number of non-bank institutions in the credit markets made this approach obsolete. Loan trading has made restructuring processes more complex as the number of debt holders has increased and alternative investors can have a more aggressive negotiating stance than traditional banks. Loan trading has the potential to increase lender conflicts during negotiations as the incentives of par lenders are not the same as those of secondary market participants

– a restructuring proposal may be acceptable to a lender that bought into the debt at below par, but unacceptable to a primary lender that provided the original loan at par.

The panel explained that in recent years the UK has seen innovative financing structures, such as the credit default swap (CDS) market, in which new stakeholders have created a changing dynamic in restructuring. CDSs are derivatives that behave like insurance contracts, protecting holders against the risk that a company does not repay its debts. The credit default swap market has created a whole new category of investors that stand to make more money on CDSs if a company defaults than they would if it repaid its debts. Other stakeholders, such as regulators, landlords and pension trustees, are becoming increasingly sophisticated and activist in their approach. The panel discussed the impact of these stakeholders on restructuring in an ever more dynamic and evolving market.

After an hour or so of lively debate the session was brought to a close by Piya Mukherjee, current President of INSOL Europe, with the conclusion that financial restructurings in the UK are inherently complex and more challenging and a request for more people to get involved with the Financiers Group in order to enable this kind of forum to continue. Delegates enjoyed light canapés after the event and spent some time networking before dispersing into the City.

Experts from INSOL Europe and IWIRC meet over breakfast

INSOL Europe and IWIRC (International Women's Insolvency and Restructuring Confederation) held their first joint event on Monday 9 September, *reports Carmel King.*

The event was a breakfast briefing, in which a panel of experts considered whether the UK is still the centre of European restructuring. The panelists were Liz Osborne (Akin Gump LLP, London), Willem van Nielen (Recoup Lawyers, Amsterdam) and Stephane Bonifassi (Bonifassi Avocats, Paris), with Felicity Toube QC (South Square, London) chairing.

It was a lively and engaging session. Liz put forward some strong points on the UK schemes of arrangement, on English law and the Courts system and some considerations around Brexit. Willem provided some context on the new Dutch scheme, a worthy competitor, and Stephane gave his thoughts on the strengths and limitations of the French system. At the conclusion of the debate, the panelists (mostly) agreed that the UK retains its crown for now, the Dutch scheme is an exciting development, and France has some room for development!

Many thanks to RSM for hosting the event, and also to Carmel King (Grant Thornton UK LLP) and Vanessa Rudder (Alvarez & Marsal Europe LLP) for organising it on behalf of INSOL Europe and IWIRC London, respectively. *We look forward to future opportunities for collaboration.*

This new section of *eurofenix* will bring you the most relevant news in the field of insolvency tech and digital assets. To contribute an article to a future edition, please send your proposal to: *insolvencytech@insol-europe.org* or the individual Chairs:
Frank Heemann *frank.heemann@bnt.eu*
José Carles *j.carles@carlescuesta.es*
Laurent Le Pajolec *lpa@exco.pl*

Inaugural meeting of the new IT&DA wing

During the Annual Congress in Copenhagen the newly formed INSOLVENCY TECH & DIGITAL ASSETS wing had the pleasure to conduct their first meeting. The meeting was attended by more than 20 members who showed their enthusiasm to participate in a wing which is answering the needs and expectation of IPs, lawyers and insolvency professionals in the present-day business and legal environment.

The participants debated the following ideas in order to determine the future focus of the wing:

- Anticipating the future insolvency-tech environment
- Sharing knowledge with IPs (Insolvency Holders Forum)
- Finding affordable insolvency-tech tools regarding search of data/investigation of digital assets (relevant to both creditors and IPs)
- Coordinating with the Anti-Fraud Forum
- Advising start-ups in order to help them prevent their risk of insolvency
- Complying with GDPR and "right to be forgotten" issues related to insolvency
- Discussing and explaining cryptocurrency related issues
- Recommending software related to insolvency (not general insolvency-tech, as this would be too broad).

Everyone agreed that the focus of the wing should be on insolvency-tech rather than legal-tech in the broad sense. In this context the group voted on adjusting the name of the wing and a decision was taken to adapt the name to "Insolvency Tech & Digital Assets", now approved by the Executive Council of INSOL Europe.

For more information, please have a look on our page *www.insol-europe.org/insolvency-tech-digital-assets-wing-introduction-and-members* and follow news on INSOL Europe's LinkedIn page: *www.linkedin.com/company/insol-europe/*

Plans for 2020

- Recruitment of new members who could enrich our group
- Updating the database on insolvency-tech associations in order for us to be able to contact the key players on insolvency-tech for future projects (collaborations, invitation as panellists, legislative modification proposals in the field together by INSOL Europe and these key associations at a national/European level, etc.)
- Preparation of panels for the INSOL Europe Annual Congress in Sorrento
- Preparation of articles concerning cases from our members

Next meetings

We will be meeting at the following events in 2020, details to be announced nearer the time:

- 21-22 May: EECC Conference, Kyiv (Ukraine)
- 1-4 October: Annual Congress, Sorrento (Italy)

If you are interested to become a member of our dynamic group, please contact us by email at: ***insolvencytech@insol-europe.org***

Framework conditions for DLT/blockchain technology to be improved in Switzerland

Dr. Lukas Bopp Prof. Dr. Daniel Staehelin of Kellerhals Carrard, Switzerland

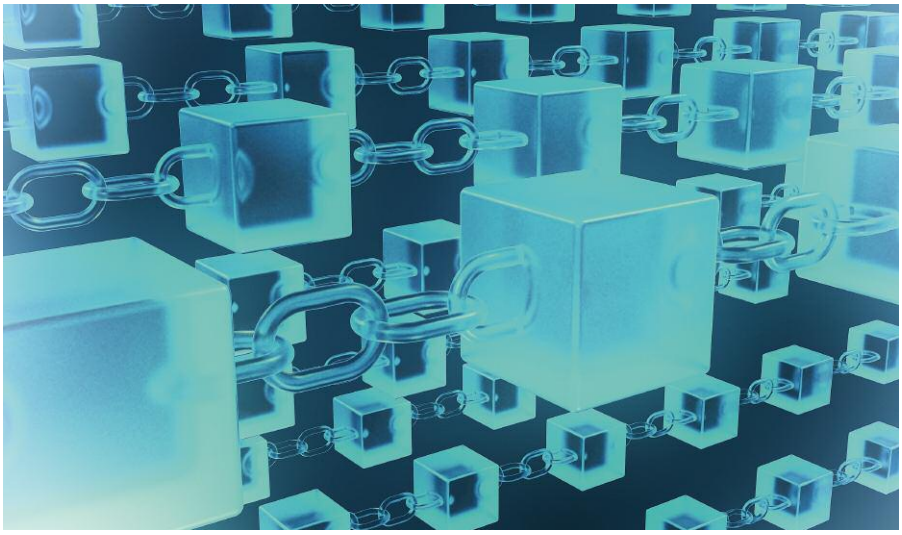
Distributed Ledger Technology (DLT) and Blockchain Technology are among the most promising developments in digitisation today.

Switzerland is therefore one of the first countries in Europe to plan to adapt its legislation to developments in the technology of distributed electronic registers. The aim of the new legislation is to create the legal basis for Switzerland to further develop its position as a leading, innovative and sustainable location for block chain/distributed ledger technology (DLT) companies. The legislation project was launched in December 2018 with a report on the legal framework for block chain and DLT in the financial sector. On November 27, 2019 the Swiss Federal Council just published the project on the adaption of the federal law to developments in the distributed ledger technology.

Legal certainty sought

The proposal is aimed at increasing legal certainty, removing barriers for applications based on distributed ledger technology and reducing the risk of abuse. The proposed new federal legislation, which is designed as a blanket framework, suggests specific amendments to nine federal acts, covering both civil law, financial market law and insolvency law. The Parliament will probably examine the proposal for the first time in early 2020.

In practice, crypto-based assets - which include crypto-based means of payment (or payment tokens) on the one hand, and DLT value rights on the other, are often not held in custody by the beneficial owner, but by a third party (e.g. a so-called wallet-provider as depositary). If such a wallet-provider goes bankrupt, the question arises whether the crypto-based assets he holds in his custody fall into the bankruptcy estate or whether they can be segregated and transferred to the beneficial owners (instead of the general bankruptcy creditors).



Segregation of crypto-based assets

The provisions of the proposed new insolvency law will regulate which prerequisites must be fulfilled so that a crypto-based asset can be sufficiently strongly attributed to a certain person in order to be segregated in a bankruptcy. In accordance with the criterion of exclusive power of disposition in the case of physical property, the concrete form of the right of access to a crypto-based asset will be the decisive elements to decide on segregation: if the access key is known exclusively to the customer, only the customer may dispose of it and initiate a transaction on the block chain, not the wallet-provider. Thus, in such a case, there is no external custody and the corresponding assets are accordingly not included in the bankrupt's estate. The same applies according to the proposed regulation if more than one key is required to dispose of the asset and if the bankrupt's estate does not have sufficient keys to dispose of the crypto-based asset without the participation of other authorised persons. Only if the customer has no access of his own and only the bankrupt has simultaneously all the keys to access the asset directly, does the value fall into the bankrupt's estate.

Access to data guaranteed

In addition to the introduction of a statutory right of segregation for crypto-based assets, a right to access data held in the custody of a bankruptcy estate is foreseen in the new legislation. The current bankruptcy law provides for segregation only for physical property, but not for data, although these may still have a much higher value for the beneficiaries than physical property. In the event of the bankruptcy of a cloud provider, for example, there is considerable legal uncertainty as to whether and how authorised parties can access data stored with the provider (e.g. a customer file, an accounting department or even just photos) in the event of bankruptcy. The new regime creates a legal basis to provide access to such data in the event of bankruptcy.

The planned measures will strengthen the reliability of services in the DLT sector and generally in connection with Internet services. This increases confidence and strengthens the acceptance and dissemination of new technologies.

A closer look at...

When environment meets insolvency

EMMANUELLE INACIO
INSOL Europe Conference Technical and Training Course Director

> **THE QUESTION OF THE LINK BETWEEN ENVIRONMENT AND INSOLVENCY MUST BE RAISED**

Environmental protection and sustainable development are nowadays a global concern to such an extent that the question of the link between environment and insolvency must be raised.

Indeed, a company facing a pre-insolvency or an insolvency procedure may cause damages to the environment or risk causing damages to the environment in two scenarios.

On the one hand, a company having a potentially polluting activity may become insolvent or be in a likelihood of insolvency when following a pollution the company might be destroyed and thus not be able to operate anymore, or when the company has to compensate damages caused by a pollution.

On the other hand, a company having a potentially polluting activity may become insolvent or be in a likelihood of insolvency for economic or financial reasons only and may be obliged to cease its activity or a branch of activity.

But whatever the scenario is, the environmental law will necessarily meet the insolvency law.

Conflicting objectives

The problem is that these two laws do not have the same objectives. Indeed, the environmental law is designed to protect public interests - nature and mankind - whereas the insolvency law is designed to protect private interests - the debtor's and the creditor's interests. And when insolvency proceedings are opened, there are generally no funds available to finance measures to protect the environment. Therefore, it is indispensable that the legislator organises the interplay between the environmental law and the insolvency law[1].

If the European legislator adopted many instruments on environmental issues, such as the EU directive 2004/35/CE of 21 April 2004 "on environmental liability with regard to the prevention and remedying of environmental damage"[2], the question of the insolvent polluter is not covered by the European law.

The existence of a threat or a potential threat to the environment by a company facing a pre-insolvency or an insolvency procedure should result in specific texts.

Environmental assessment

In France, the opening of the safeguard procedure (the company must be solvent, but facing difficulties that cannot be overcome) or of the restructuration procedure (the company is insolvent but the rescue of the company appears to be possible) starts with an observation period of up to six months which can be extended once for another six months, and in exceptional circumstances, can be extended even further for six months.

The court appoints a judicial administrator to represent the

debtor if the company has more than 20 employees and a turnover of more than 3 million euros, but always also appoints a judicial receiver to represent the creditors. During the observation period, the judicial administrator assesses the company's economic and financial situation. If the debtor is in possession, this assessment is not mandatory.

If the debtor carries a business belonging to the classified facilities for environmental protection (which are subject to an administrative authorisation to operate and binding prescriptions for environment protection), the judicial administrator must add to the economic and financial assessment, an environmental one. If the debtor is in possession, this assessment is not mandatory either.

The environmental assessment identifies and describes the business belonging to the classified facilities for environmental protection, the potential or existing pollutions, the emergency security measures and security measures already in place, planned or to be taken to stop or avoid pollutions, and the measures taken to supervise the impact of the business activity on the environment.

Security measures

The judicial administrator must take all the required emergency security measures and security measures to protect the environment from the potential or existing pollutions caused by the company, according to the environmental law, and this can be costly.

Clean-up and remediation plan

The judicial administrator has also to present a restructuring plan in safeguard and restructuring procedures. In case of a continuation plan or a sale plan, a partial clean-up and remediation plan may be imposed in the event of a pollution. The cost and financing of the clean-up or remediation plan must be included in the plan as eventual liability actions considered by the judicial administrator. In case of a sale plan in a safeguard or a restructuring procedure, but also in liquidation procedures, the judicial administrator or the judicial receiver must provide the candidates to the takeover of the company with all the information on the latter.

If a liquidation procedure is opened without a sale plan because the company ceases all its activities, the judicial receiver acts as the liquidator of the company and must take all the required emergency security measures and security measures.

Impecunious procedures

If the procedure is impecunious, a public body - the Environmental Agency - will finance these measures. However, certain types of businesses belonging to the classified facilities for environmental protection must have financial guarantees covering their insolvency. In this case, the Environmental agency can implement the financial guarantee (e.g. in case of a guarantee on demand) or recover the costs of these measures from the insolvent company. The priority given to such costs are however unclear and depend on the interpretation given by the French Supreme Court.

In a liquidation procedure, the director can be held liable of his/her acts of mismanagement which lead to a shortfall in the company's assets.

Moreover, if a subsidiary is subject to a liquidation procedure, the parent undertaking which has contributed to the shortfall of its subsidiary's assets can be held liable for the environmental liability of its subsidiary.

Environmental liabilities

Regarding the environmental liabilities of the French insolvency practitioners, they can be personally liable in all procedures for a failure in their duty to take the required emergency security measures and security measures in order to prevent or stop the pollution of the business belonging to the classified facilities for environmental protection. The judicial administrator could also be personally liable for failing to provide information to the candidates to the takeover of the company, e.g. when information on the environmental impact of the company is missing, even if this is not required by law.

Soft law

In 2004, the Ministry of Environment and the CNAJMJ (the French organisation of Judicial Administrators and Receivers) published a Guide which clarifies the law when a business belonging to the classified facilities for environmental protection is insolvent. This Guide has been updated in 2012. If this Guide is very useful in practice and provides recommendations which go beyond the law, the courts do not use yet its recommendations to make their decisions.

Conclusion

Protecting the environment when a company is insolvent is extremely costly and prevention appears to be key. The Directive on Restructuring and Insolvency, when implemented, will be very helpful in this context. However, it is indispensable that an effective policy of prevention of environmental damages in companies is adopted and the European Commission encourages this approach[3]. Il is also crucial that clear rules on the obligations of insolvency practitioners (re a pre-insolvent or an insolvent company having a potentially polluting activity) are set, as well as the environmental liabilities of insolvency practitioners and directors, and the priority of environmental claims in insolvency. ■

PROTECTING THE ENVIRONMENT WHEN A COMPANY IS INSOLVENT IS EXTREMELY COSTLY AND PREVENTION APPEARS TO BE KEY

Footnotes:

1 Environmental Claims in Insolvency and the Liability of Insolvency Practitioners, INSOL International Special Report 21 May 2015 available at: https://www.insol.org/library/loadall

2 Directive 2004/35/CE of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32004L0035).

3 https://ec.europa.eu/docsroom/documents/34482?locale=en

A smørgåsbord of Danish delights as the Annual Congress comes to Copenhagen town!

Paul Omar and Myriam Mailly report on the flagship Annual Congress of INSOL Europe

PAUL OMAR
Technical Research Coordinator, INSOL Europe

MYRIAM MAILLY
INSOL Europe Technical Officer

With Chris Laughton (Mercer & Hole UK) as MC kicking off proceedings, Alastair Beveridge (Alix Partners UK; Outgoing President) began by welcoming delegates to a rainy, but beautiful, Copenhagen.

Anticipating the packed day and a half of technical sessions to come, Alastair concluded his welcome with an exhortation to attendees to get involved in the many groups and constituencies within the organisation, many of which had already met on the eve of conference and would continue to meet around INSOL Europe events.

The new information age

The morning's proceedings started with Michala Roepstorff (Plesner Denmark) introducing the keynote speaker as a man of many accomplishments. Professor Vincent Hendricks (Copenhagen University) began with an observation about the profusion of information available every day. But, information, while it may add to knowledge, does not mean an increase in wisdom. "Attention Economics" speaks of a scarcity of attention even in an information-rich world. Push messages are a simple illustration of the desire of the senders to get attention. Markets exist for information products, even for those that are "sub-prime", like fake news, the object being to grab attention and traffic that can be monetised. Influence on social media tends not to be in the hands of the powerful, but in the hands of footballers and singers. The real question, however, is whether we are users of social media or in fact the product being sold (users generating data and information for advertisers).

Anticipating preventive restructuring

In light of that benchmark for the event, the technical agenda was set the challenge of striving hard not just to deliver information, but to do so in a way that added to experience and expertise. Thus, the morning sessions did not spare the delegates. Packed sessions on the Preventive Restructuring Directive ("Directive") and Brexit brought an update on signal events, one firmly past, the other yet to happen (if at all). For devotees of the Directive, the subtle detail of the application of the viability test and the extent and necessity for court supervision featured in presentations by Florian Bruder (DLA Piper Germany), Natalia Stetsenko (IMF), Stephan Madaus (Martin Luther University Halle-Wittenberg) and Bob Rajan (Alvarez and Marshall Europe). The broad consensus was that, of these and many other issues that will face Member States in the implementation period that has recently opened, the articulation of priority rules, cram-down, protection of interim and new finance and safe harbour principles would need close and careful attention.

The Brexit dividend?

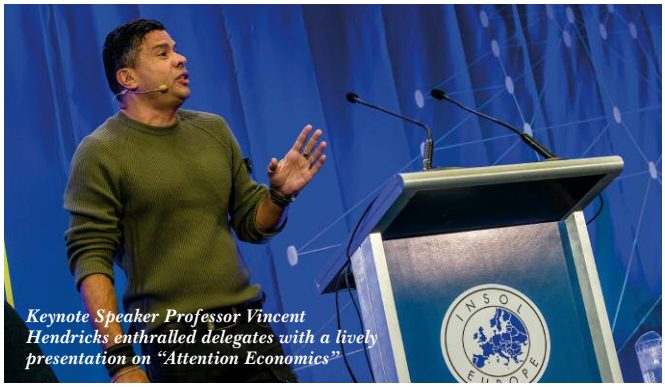
For those weary of Brexit, the panel brought some interest back to current developments by charting the competition between jurisdictions for business. Eduardo Peixoto Gomes (Abreu Advogados Portugal) outlined the Brexit timeline and process thus far and introduced the first of the straw polls for delegates to indicate preferences. On the question of what countries are likely to attract business: Germany, Ireland and the Netherlands came out far ahead of the pack, while as to where the future home for UK lawyers was likely to be, Ireland and the Netherlands were neck and neck favourites of the delegates. Robert Schiebe (Schiebe und Collegen Germany) reported on a recent financial survey suggesting Dublin will become a strong hub, but, for banking generally, Frankfurt, Paris and Amsterdam will still attract some moves.

For Robert, language is still a key factor with many UK solicitors applying for recognition of their qualifications in Ireland. Barry Cahir (Beauchamps Ireland) confirmed the numbers: there were 15,000 lawyers on the Dublin roll till after 2016 when 4,000 English solicitors applied to be enrolled, with 1,000 taking out a practising certificate. However, there is likely to be litigation over whether a practising certificate can be applied for, if the applicant is not practising or resident in that jurisdiction. That said, the numbers applying is a small offset against the economic

Chris Laughton managed proceedings and kept all the sessions on schedule


Delegates were encouraged to introduce themselves to their neighbours


Natalia Stetsenko of the IMF studied the Directive in detail


Keynote Speaker Professor Vincent Hendricks enthralled delegates with a lively presentation on "Attention Economics"


Multiple breakout sessions were well attended by all delegates

and social damage of Brexit likely to impact on Ireland and it is possible that, despite the success of examinership in Ireland, the scheme process might see a resurgence as the Irish structure is identical to that in the UK.

Elisabeth Baltay (Proskauer UK) suggested that non-EU jurisdictions might take up a lot of the overseas business, particular Singapore and the United States. But, UK courts still present attractions: fair, speedy, rule of law certainty, but, on the costs issue, fees may be largely the same. However, extra costs such as travel and needing to instruct local counsel might be dissuasive. One of the key questions was: will the UK insolvency proceedings change? For Georges-Louis Harang (Hoche Avocats France), cooperation through the Recast EIR might make the transition to competition through private international law rules, bilateral agreements and the Model Law. As a result, from current certainty and mutual trust, things might become chaotic with a need for parallel proceedings and a risk that cross-border rescues might be at jeopardy. Ending the session, straw polls of delegates had 63% positive on the future of the UK scheme, while 67% saw the Model Law likely to experience a resurgence.

Break-out sessions: Key sectors in ferment

Four key sectors were at the forefront in the break-out sessions: healthcare, airlines, retail and MSMEs, all adding to the impression of much ferment still happening in the industry. The break-out on MSMEs saw Ignacio Tirado (UNIDROIT) explore how MSMEs have become the issue of the day, particularly in the work of the World Bank (whose principles are due in 2020) and also UNCITRAL (the 2019 Vienna session being devoted to the subject). Monica Marcucci (Bank of Italy) followed this with a focus on financial education and capacity building as key factors in improving MSME resilience to insolvency. Riz Mokal (3/4 South Square Chambers UK) closed the debate with a proposal for a return to a modular approach explored by a group of insolvency specialists in a recent book.

In the retail break-out, introduced by David Conaway (Shumaker US), Catherine Sahlgren outlined the Teknikmagasinet restructuring, a business that began in 1989 and grew to over 130 stores in Finland, Norway and Sweden trading in gadgets and technical wares. The business was underinvested with its working capital depleted. Suppliers were unhappy, but customers none the wiser. The problem was that credit insurance, the lifeblood for suppliers, would dry up with any hint of distress. As a result, the strategic plan was to reduce secured debt, secure private investment, introduce product management and roll out a customer club model. Dan Cohen (Alix Partners Germany) agreed that the credit insurance market was very tight. Generally,

> "ATTENTION ECONOMICS" SPEAKS OF A SCARCITY OF ATTENTION EVEN IN AN INFORMATION-RICH WORLD

A talking heads session provided a complex appraisal of the merits of the absolute and relative priority rules

> **THE FATE OF NON-PERFORMING LOANS AND A STUDY OF THE OW BUNKER COLLAPSE FROM THE DANISH PERSPECTIVE ADDED SPICE TO THE OVERALL MIX**

Catherine reported that key needs to obtain supplies, to borrow and, especially, to liquidate stock might generate adverse publicity, especially as consumers take advantage of bargains. In the UK, Heinz Weber (Gordon Brothers UK) suggested that the current battle between landlords and retailer in the context of CVAs have seen some innovation in plans, but retailers continue to be in some difficulty as landlords are more aggressive in protecting rents. Use of retail space is also a factor with recent development plans focusing on greater diversity by integrating leisure, education and living accommodation within retail environments to try and maximise footfall.

Absolute and relative priorities

Post-lunch, the key themes of the Directive and Brexit appeared again with debates on cram-down and recognition of insolvency-related judgments. In between, the fate of non-performing loans and a study of the OW Bunker collapse from the Danish perspective added spice to the overall mix. A complex appraisal of the merits of the absolute and relative priority rules took place within a talking-heads session featuring Reinhard Dammann (Clifford Chance France), Christoph Paulus (Humboldt University Berlin) and Francisco Garcimartin (Linklaters Spain) with the last's view being that the merits of the relative priority rule could be articulated as "let's be kind to shareholders even if they're out of the money". For Reinhard and Christoph, many connected issues needed to be considered to be able to apply the priority rules and the choice between them was likely to complicate matters and perhaps cause some cross-border competition for restructurings.

How do you solve a problem like NPLs?

The NPL session began with Alberto Nuñez-Lagos (Uriá-Menendez Spain) reporting that of the crises in the US and EU, that in the US has peaked, but the EU has yet to with progress being slow. Anne Fröhling (European Central Bank) reported that there were NPLs valued at EUR 1 trillion at the time of the 2016 ECB survey and census. Though there is a liminal question as to whether NPLs are an EU-wide issue, as touching on systemic integrity, or only a country-based issue for domestic policy-makers, nonetheless the ECB is pushing banks to establish strategies and there is a quantitative expectation with provision targets for NPLs (100% by 7 years if not previously worked out). Steffen Koch suggested a solution would depend on how the Directive was transposed, looking at compensation for creditors whose value decreased as a result of the stay or restructuring. Francisco Patricio (Abreu Advogados Portugal) agreed with the suggestion of more flexibility by having the possibility for lifting stays for certain creditors.

Case study challenges: The OW Bunker restructuring

Lending a Scandinavian flavour to proceedings, Michala Roepstorff (Plesner Denmark) outlined the facts of the OW Bunker Case Study. An underlying UK financial contract faced a challenge in Denmark on its assignment against the background of a swift decline from an IPO in March 2014 to the business collapsing and fraud allegations being brought by November of the same year. There was a venue conflict with the UK-based facility versus a Danish assignor in respect of Danish entities in the group. Patrick Ehret (Schultze & Braun Germany) pointed to case examples of such conflicts, such as the Luxembourg-Germany dispute involving the application Rome I, with the upshot being the inspiration by the New York Assignment of Receivables Convention 2001 for an EU Proposal for conflict resolution by having a single PIL rule. Ulrik Rammeskow Bang-Pedersen (Copenhagen University) suggested that using the law of the assignor is the best solution as it promotes certainty and helps bulk assignments and future pledges of receivables. There is a potential interplay with insolvency law applying to assignor, but the position is compliant with international norms, such as the Model Law and UCC Article 9. Herman Verbeek (ING Netherlands) concluded the session with the view that, though there is a need to define the best connecting factor, party autonomy being be the paramount principle, but any solution, once established, would provide legal certainty.

Action on insolvency-related actions

Concluding the day, the session on recognition of insolvency-related actions featured Rodrigo Rodriguez (Lucerne University) mapping the landscape for "civil and commercial" (the Brussels I space) and contrasting it with the "insolvency-related" and "insolvency decisions" (the last two within the Recast EIR space). Rodrigo suggested the UK position might move to a combination of national law and Model Laws (both the 1997 and the recently passed 2018 text on insolvency-related actions), though schemes, falling between the Lugano Convention 1988 and the Hague Choice of Court 2005 or the Judgments Convention 2019, may prove difficult. Michael Veder (RESOR Netherlands) outlined the flexibility, speed and deal certainty provided by the new Dutch scheme

proposals with the crucial element being recognition elsewhere. The highlight of the proposal is a dual-track approach to permit both private and public options, only the latter falling within the EIR, but both being clearly insolvency processes. Less optimistically, Simeon Gilchrist announced the loss of the "comfort blanket" on Brexit Day. There will be a need to go back to private international law or specific recognition instruments as well as the Model Law. While the paperwork might be easy for the practitioners, the process before the courts is opaque, much experience having gone, added to which is the issue of lack of funding of the system for expertise to be regained.

Focus on day two

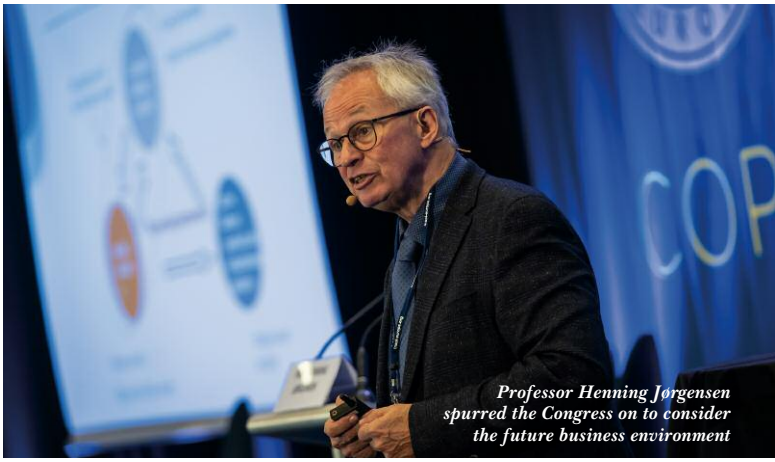
The final day of the conference dawned with a second keynote speaker, Professor Henning Jørgensen (Aalborg University), who spurred the Congress on to consider the future environment within which business would be developing with traditional concerns for employees still uppermost in policy-maker's minds. Sessions on litigation funding, the value and disposal of social media accounts, directors' duties in the context of early warning systems and the prepacking of employees as part of business transfers then provided a great deal of focus for attendees on issues of note in practice.

Money for nothing?

Litigation funding preoccupied a panel drawn from four jurisdictions: Carmel King (Grant Thornton UK), Matthias Hoffmann (Pohlmann Hoffmann Germany), Henrik Rothe (Copenhagen Business School) and Thomas Kohlmeier (Nivalion Switzerland).Various national practices for securing funding served as the intro to a discussion on issues such as protection of financing, referred to in the Directive, understanding financing needs and proper leveraging of businesses as well as the identity of parties willing to lend, the market in recent years having changed in composition and willingness to take risks, factors that restructuring advisors need to take into account. The panel that followed, composed of Piya Mukherjee (Horten Denmark), Anton Molchanov (Arzinger Ukraine) and Frank Heemann (bnt Lithuania), also presented a challenge to practitioners in determining if there is value in social media accounts. Given their undoubted value to the providers who monetise the data, how would businesses in restructuring retain the value of, not just their own public profiles, but of the services they might provide others, GDPR notwithstanding. Information technology issues and their impact on practice sat firmly at the forefront of the deliberations the panel shared with the audience.

Stakeholders at stake: Directors and employees in the firing line

With the theme of prevention in mind, the panel, comprising Rita Gismondi (Gianni Origoni Grippo Cappelli & Partners Italy), Patrizia Riva (Piemonte Orientale University), Nico Tollenaar (RESOR Netherlands) and Morten Møller (Central Denmark Business Hub), explored the role of directors and their duties in the vicinity of insolvency. With reference to various national positions and rules, mention was made of the possibility of stakeholder action, provided information asymmetry was overcome, thus largely leaving room for manoeuvre only to those bodies, such as auditors or tax authorities, with likely access to the necessary data. The succeeding panel also took on the issue of information, particularly in the context of pre-pack regimes in use in a number of different jurisdictions. To this end, Sophie Jacmain (NautaDutilh Belgium), Nicolas Partouche (Dethomas Peltier Juvigny & Associés France), David Rubin (David Rubin and Partners UK), Karol Tatara (Tatara & Partners Poland) and Evert Verwey (Clifford Chance Netherlands) provided views from their respective jurisdictions on the balance between restructurings and employee retention, particularly in light of recent CJEU case-law under the Acquired Rights Directive, sometimes seen as an impediment to rescue. In this context, the lack of information on the part of employees and unsecured creditors leaves the pre-pack process at risk of becoming a debate exclusively between the debtor and the major creditors.



Professor Henning Jørgensen spurred the Congress on to consider the future business environment

Oh, What a Circus, Oh, What a Show!

Following the close and handover to Piya Mukherjee (Incoming President), delegates enjoyed an afternoon of leisure in the city before the gala dinner. Located in the tent-like structure of Wallman's Circus Building, delegates were greeted by a jazz band on arrival. The event certainly raised the roof and incidentally set a new standard for gala dinner entertainment. With trapeze artists, songsters, jugglers and acts galore filling the performing space, the background lightshow and musical score added to the richness of the experience. Applause for the technical expertise and skill of the performers was well-deserved. With echoes of the music and performance lingering in the night, delegates departed with thoughts of Sorrento next year. ■

> **THE EVENT CERTAINLY RAISED THE ROOF AND INCIDENTALLY SET A NEW STANDARD FOR GALA DINNER ENTERTAINMENT**

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

All event photography by Matthew James, www.photographyby matthewjames.com

Wonderful, Wonderful Copenhagen: Insolvency at the cutting edge

Line Herman Langkjaer, Jenny Gant and Paul Omar report on the 15th Academic Forum Conference in Copenhagen

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DR. JENNIFER GANT
YANIL Chair (2015-2019);
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UC Cork School of Law, Ireland

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INSOL Europe
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The annual conference of the Academic Forum in its 15th anniversary year took place on 23-24 September in Denmark. The charms of Copenhagen were only mildly attenuated by the autumn chills and grey skies over the city. Professor Michael Veder (Chair, Academic Forum; Radboud Nijmegen) opened proceedings by inviting attendees to join in a moment of silence to honour the passing of Gabriel Moss QC earlier this year.

Warmly welcoming delegates numbering over 70 from nearly 20 jurisdictions across Europe and the globe, Michael Veder noted the significant anniversaries of both the Academic Forum and the Younger Academics' Network in Insolvency ("YANIL").

With Anthon Verweij (Secretary, Academic Forum) in the chair, proceedings began with a suite of presentations on the Preventive Restructuring Directive ("Directive"). Lydia Tsioli (Kings College London) opened with an exposition of the nature of the entry test and the knock-on effect on how viability might be defined being explored in her doctoral project. Following this, Professor Ray Warner (St John's New York) and Michael Veder considered how the Dutch plan procedures, conceived prior to the Directive, might be a suitable vehicle for realising its purpose and how the procedures might fare if an American court were asked to enforce any resulting restructuring plans. Concluding the panel, Aurelio Gurrea-Martinez (Singapore Management University) discussed the impact of the shift in emphasis to pre-insolvency, as seen recently in Singapore and the EU, on classic reorganisation mechanisms.

The Academics presented their own perspective on hot topics of the day

Continuing the focus on topical issues in insolvency law, the second session, presided over by Professor Jessica Schmidt (Bayreuth), covered the themes of director's liability and the role of the debtor-in-possession ("DIP"). Based on a comparative study of British, Dutch and German regulation on director's liability, Michelle van Haren (Radboud University) explained how existing regulation in those Member States corresponds to the content and purpose of the Directive. Particular attention was paid to Article 19 on the duties of directors faced with a likelihood of insolvency and how the Directive might have an impact on future judgments on director's liability. Following this, Gert-Jan Boon (Leiden) posed some cogent questions on the purpose and role of the debtor-in-possession ("DIP") in EU Law, looking at both the EIR and the Directive. Attention was drawn to the failed attempt by the EU legislator to align the roles of the DIP and the insolvency practitioner in the EIR, but the argument was also put that the Directive provides more normative guidelines for the role and aims of DIPs.

The day's proceedings ended with the annual lecture sponsored by Edwin Coe, renamed this year the Gabriel Moss Memorial Lecture. It was given by Professor Ignacio Tirado (General Secretary of UNIDROIT), who sparked off a debate on the protection of creditors' rights within the framework of the Directive. Attention was drawn to the vagueness of the final version of the Directive, making it possible for Member States to choose between different standards, and, particularly, to the highly topical choice between the absolute and relative priority rules ("APR" and "RPR"), described by Professor Tirado as a choice between the: "hard to get, easy to implement" way, or the "easier to get/hard to implement" way. He underlined that "The APR is a tenet, an

Surbhi Kapur and Animesh Khandelwal explored the importance of resolution of financial distress

underlying principle, which does not exist in the system beyond a very confined realm". In conclusion, it was mentioned that the difference between the two different standards in reality was not that great. In the end, judges will have the last word!

The Second Day

The second day again dawned grey, but spirits were high. The first session, devoted to presentations from members of the YANIL group, featured papers focusing on the conference theme of preventive restructuring. Chaired by Jen Gant (Post-Doctoral Researcher, JCOERE Project, UC Cork), the day was opened by Ilya Kokorin (Leiden) discussing intra-group financial support in insolvency with the aim of finding the balance between group interests and the protection of creditors' rights. Then, Minke Reijneveld (Radboud University) outlined the impact and effects of obligations under the GDPR on insolvency practitioners in the handling of personal data.

The second session of the day, curated by Professor Rolef de Weijs (Amsterdam; Houthoff Buruma), was on the theme of affecting and protecting creditors. Giulia Ballerini (Bocconi) offered a perspective on how the cross-class cram-down in the Directive requires the application of a fairness standard. The argument was made that a model utilising the APR as a default protection rule, but with the possibility of clearly justified alterations subject to court supervision, was desirable. This was followed by a joint paper by Judge Flavius-Iancu Motu (Cluj Court) and Andreea Deli-Diaconescu (National Institute for Insolvency Practitioner Training, Romania) on new and interim financing under the Directive and the utility of trade credit.

The post-lunch session facilitated by Luigi Lai (National Information Processing Institute, Poland) opened with Professor Reinout Vriesendorp and Gert-Jan Boon (Leiden) exploring the role of mediation within the international insolvency law framework. Reference was made to arguments at European level surrounding the proposals for minimum standards for mediators and a common definition for the role. Professor Reinout Vriesendorp outlined the scope of the research project beginning with a census of international instruments and moving to the development of a questionnaire bringing challenges for the collection of reliable data from the countries being surveyed.

Continuing the theme of actors in insolvency, Surbhi Kapur and Animesh Khandelwal (Insolvency and Bankruptcy Board of India) explored how the importance of resolution of financial distress has stimulated reference to insolvency practitioner regulation in the Directive. Translating regulatory issues to the Indian context, especially given the relatively recent introduction of the radically new Insolvency and Bankruptcy Code 2016, the presentation highlighted the development over the past few years of regulation governing practitioner conduct, as well as appointment and remuneration. The session concluded with views on the judicial role in restructuring and insolvency matters revealed by the JCOERE Project coordinated by Professor Irene Lynch Fannon and Jen Gant (UC Cork), reporting on a survey of procedures in Member States, either extant or being developed in light of the Directive, and noting issues of concern to policy makers and commentators that also arose in the Directive.

Concluding the day's substantive proceedings, the Edwin Coe Practitioners' Forum, chaired by Florian Bruder (DLA Piper Munich), opened with Vincent van Hoof (Radboud Nijmegen) outlining the scope of the stay in the Directive and its effect on debtors and their contracting partners. Anticipating the transposition of the Directive, a survey of the position in some Member States revealed how contractual frameworks might have difficulty adapting the text in the face of differing approaches to security. Responding to the outline, Simeon Gilchrist (Edwin Coe LLP) and Tomáš Richter (Charles University; Clifford Chance Prague) pointed out issues of concern in how the Directive approached the stay framework. A controversial suggestion was that the Directive constituted a backdoor harmonisation of insolvency law with many of the provisions it sets out, including the definition of and framework for the stay.

Drawing proceedings to a close, Professor Veder gave his farewell speech, his time in the Chair having come to an end. Thanking participants, speakers and panel chairs alike, Professor Veder added his appreciation for the continued support of Edwin Coe through their sponsorship. Mention was also made of changes in personnel for both YANIL, the new Chair being Gert-Jan Boon, and within the Academic Forum, with a new Chair and Secretary in the persons of Tomáš Richter and Line Herman Langkjaer. With an envoi from Tomáš Richter, delegates departed Copenhagen with the prospects of continuing discussion in Sorrento next year. ■

"As a Ph.D. student and a young academic, being involved as a speaker in the Academic Forum Annual Conference was of immense value for me.

Measuring myself with academics and practitioners with much more experience than I have, pushed me to go beyond my limits and to work harder, so that I could feel a bit "closer" to their level of knowledge and expertise. Despite only being at the beginning of my academic career, the seniors carefully listened to my ideas, valued my opinions and related to me as a peer. This was a very rewarding feeling and I was extremely grateful for the insights and suggestions they provided. Challenges such as the ones I faced during the conference have made me grow more confident in my capabilities and opportunities to achieve my academic goals."

Giulia Ballerini, PhD Candidate, Bocconi University, Italy

More photos can be viewed at www.insol-europe.org/gallery/copenhagen-photos-academic

Clawing back assets in Greek insolvency proceedings

Yiannis G. Sakkas and Yiannis G. Bazinas examine the provisions in the Greek Insolvency Code for the avoidance of asset depletion

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Asset depletion is predominantly driven by the debtors' tendency to place significant parts of the insolvency estate beyond the reach of creditors.

Especially in strained economic times, to which Greece is no stranger, asset-stripping at a diminished or no value, as well as the preferential treatment of creditors, are frequent in cases of debtors nearing insolvency. In these conditions, the avoidance provisions of the Greek Insolvency Code[1] (the "IC") have an important role in the efficient operation of insolvency proceedings. By express stipulation in the Code, the insolvency is terminated if there are no more assets to finance its operations[2]. Therefore, it is crucial for the revocation framework in place to be effective in clawing back assets to the estate, to ensure both the continuation of proceedings and the collective satisfaction of creditors. Even more so, under domestic rules, impeachable dispositions may even lead to the *de facto* avoidance of an ill-intended debtor's insolvency.

The setting aside of antecedent transactions is regulated in articles 41-51 IC. As a main requirement, avoidance depends on the fact of insolvency. This means that the commencement of insolvency proceedings is a necessary prerequisite to overturn asset depletion. However, the Court will not declare the insolvency if the assets of the estate do not suffice to cover the expenses of the procedure. Past empirical evidence has shown that 80-85% of the domestic insolvency proceedings could not be concluded because of insufficient assets to cover costs[3]. Thus, the IC purports to avoid the overcrowding of the courts with cases that could not proceed much further. At the same time though, depriving the estate of valuable assets could in fact prevent the very opening of insolvency proceedings because the court can reject the insolvency petition for insufficient assets. However, the debtor's details are entered into the Insolvency Register as a red-flag warning for any interested party. Although this is by no means equal to insolvency, the debtor does not escape all repercussions. The debtor risks an imprisonment sentence of at least two years, as well as a pecuniary fine, if during the suspect period[4] he or she strips the insolvency estate of its assets or enters precarious transactions, etc[5].

Of course, Greek law offers ways to curb fraudulent acts outside the context of insolvency by means of an *actio pauliana*. In fact, both insolvency revocation and the *actio pauliana* share a common background and trace their roots to Roman law. Nevertheless, the *actio pauliana* cannot substitute the IC provisions for setting aside transactions. The statutory rules for fraudulent acts are not drafted to deal with the complexities of commercial default[6], which is often extensive and intricate[7]. More importantly, in avoidance proceedings under the IC, the court assumes exclusive jurisdiction over the undoing of all transactions and the claw back rights of creditors. Otherwise, revocation proceedings for the same debtor could in all likelihood be scattered around different venues, given that competence would have lain with the court which would have jurisdiction *ratione loci* and *ratione materiae* under the applicable provisions of the Code of Civil Procedure[8].

At the same time, the application of article 41 IC ensures that the undoing of transactions will, in theory at least, also benefit from the expedited nature of all insolvency trials[9]. This translates to a hearing within twenty (20) days as of the filing of the legal action for the revocation with the insolvency court and a ruling within fifteen (15) days after the trial[10]. Unfortunately, in many of the country's overloaded courts this is merely wishful thinking and realistic times exceed the timeline stipulated in the Code.

Who can challenge the transactions?

Avoidance under Greek law is an action *ad personam* brought by the insolvency practitioner[11] against the transferee. This falls in line with one of the main pillars of the IC, which provides that as of the declaration of insolvency,

the power to administer the insolvency estate is vested with the insolvency practitioner. Domestic legislation follows the German example, whereby transactions are not *ipso facto* null and void but must be voided by a judgment of the insolvency court.

The suspect period

The applicable challenge period spans between the time the debtor stopped paying its obligations as they fall due[12] ("*cessation of payments*") and the time that the bankruptcy is declared. Cessation of payments plays a pivotal role in various aspects of the proceedings so the court will mark the exact date in its insolvency judgement. However, to avoid uncertainty in transactions by express stipulation in the IC, the suspect period may not exceed a maximum of two years[13]. Nevertheless, the twilight period can be extended to five years for all transactions where the court is convinced that the debtor purported to harm the creditors (or to benefit others) and that the counterparty to that transaction had knowledge of such intent[14].

Test applied: Void, avoidable and excluded transactions

Similar to other national laws, the Greek IC provides for the revocation of impeachable dispositions on the condition that such acts took place within the aforesaid "*suspect period*" and were detrimental to the creditors.

The code makes a distinction between transactions *per se* void (or avoidable "*ex lege*") and those subject to discretionary avoidance. For example, transactions at an undervalue, gratuitous or preferential[15] are included in the list of article 42 with void transactions and are *ipso facto* considered detrimental acts, which must be overturned. This does not mean that *ex lege* void transactions are set aside automatically. However, the insolvency practitioner must request the revocation of such acts and the Court is obliged to grant such request.

On the other hand, avoidable transactions of article 43 are broader in scope and cover any transaction carried out by the debtor within the suspect period, but the Court can only revoke them on the application of the insolvency practitioner, if satisfied that the counterparty was aware that the debtor had ceased payments at the time of the transaction and that the act in question was detrimental to creditors.

The avoidance action has a time bar of one year from the day the insolvency practitioner obtained knowledge of the act and in any case, after the lapse of two years from the declaration of insolvency. Theory suggests (mostly drawn from German jurisprudence) that this time limit only applies when exercising the right to set aside a transaction, but it does not bar the right of the insolvency practitioner to refuse performance of an obligation emanating from a revocable act[16]. Although there is no express provision in the IC to this effect, the Greek Civil Code offers ample support in article 273, which expressly states that objections are not time barred[17].

Finally, the insolvency code

> **THE COMMENCEMENT OF INSOLVENCY PROCEEDINGS IS A NECESSARY PREREQUISITE TO OVERTURN ASSET DEPLETION**

> **THE CODE DOES NOT OFFER GUIDANCE AS TO WHAT CONSTITUTES THE "ORDINARY COURSE OF BUSINESS" AND THE DECISION IS MADE ON AN *AD HOC* BASIS**

sets out to exclude certain transactions from the scope of avoidance provisions. For example, Article 45 provides that transactions within the ordinary course of business or where the debtor received fair consideration in cash are not overturned[18]. This intends to put up a safety net around current transactions, which could otherwise fall under one of the categories in articles 42-44. The Code does not offer guidance as to what constitutes the "*ordinary course of business*" and the decision is made on an *ad hoc* basis, depending on the type of business and operations of the debtor. However, acts necessary for the day-to-day activities (buying and selling of merchandise, payment of salaries and taxes etc.,) would typically fall within the scope of article 45[19].

Furthermore, transactions under a reorganisation plan are protected from revocation in the event that the plan does not succeed and the debtor is subsequently wound up[20].

In addition, article 45 (2) also states that acts expressly excluded from avoidance by specific legislation cannot be overturned. This becomes particularly relevant as regards the fate of security awarded during the grey period. As previously mentioned, the law stipulates that security granted during the challenge period pursuant to a previously unsecured debt is *ex lege* void[21]. However, by way of two legislative decrees dating back to 1923 and 1959, security *in rem* and liens in favour of credit institutions cannot be set aside[22]. In practice, mortgages and liens granted to credit institutions during the twilight period for past obligations cannot be overturned by the insolvency court. Understandably, this is an option that credit institutions are keen to exercise. Finally, financial collateral arrangements are also immune from avoidance, by virtue of legislation implementing the Financial Collateral Directive.[23]

Conclusion

Avoidance provisions survived the numerous recent reforms of the IC without significance alterations. This resilience to change is attributed to the fact that the relevant provisions are well tailored to meet a variety of circumstances and that they form a part of the legal heritage, endowed with a plethora of case law that is crucial in the sufficient operation of the law.

Improvement is of course not excluded, but the avoidance framework predominantly suffers from the overall overloaded Greek court system. Any advances in that direction will also benefit from the efficient operation of the existing avoidance framework and the rules of the insolvency proceedings. ■

Enhancing entrepreneurship and the growth of SMEs across Europe

Piya Mukherjee, Rita Gismondi, Ángel Alonso and Bart De Moor report on the meetings of the Early Warning Europe project throughout the year

> THE EARLY WARNING MECHANISM RELIES ON THE COLLABORATION OF BUSINESS CONSULTANT TEAMS AND VOLUNTEER GROUPS

Early Warning Europe[1] is a project to enhance entrepreneurship and growth of SMEs across Europe. They work on policies related to insolvency, developing and testing innovative methods and helping companies in difficulty by setting up early warning mechanisms.

The Early Warning mechanism relies on the collaboration of business consultant teams and volunteer groups which advise companies going through difficult economic issues and help them to seek options in order to survive economic difficulties. Thus, several experienced early warning consultants and business people support and advise companies in order to set an organised plan for their financial situation. INSOL Europe was represented by various members throughout the year at the Expert Network Meetings which have been summarised here.

Setting up the Early Warning Manual in Turin

The Expert Network meeting of Early Warning Europe was held in Turin, Italy, on 25 January 2019, attended by Rita Gismondi. The meeting was mainly focused on the Early Warning Manual (with specific reference to setting up an early warning mechanism), as well as on the relevant success factors and the lessons learned during the mechanism's implementation in the target countries (i.e., Greece, Italy, Poland and Spain).

In these countries, early warning mechanisms have been tested in order to provide advisory and support services to companies in distress. The results and lessons learned in this first wave will be used to support the preparation and implementation of early warning mechanisms in second- and third-wave countries.

The discussion was also focused on the impact of the Preventive Restructuring Directive on Restructuring and Insolvency (the "**Directive**") on preventive restructuring frameworks, which is closely linked to early warning mechanisms and will no doubt be a valuable opportunity to increase

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the setting up of such remedies, as well as to harmonise the domestic legislations. For the purposes of Early Warning Europe, it would be very interesting to monitor the implementation of the Directive in the different Member States and record any practical consequences which may arise.

Mapping best practices in Brussels

Three meetings took place in Brussels on 5 March 2019, 4 April 2019 and 6 June 2019.

The first meeting, attended by Bart De Moor, focused on the mapping of best practices, existing initiatives and measures on early warning by introducing institutions which take care of early restructuring for entrepreneurs across Europe.

The next meeting, attended by Marine Callebaut (associate lawyer, colleague of Bart De Moor at Strelia) aimed at discussing the Directive on business insolvency from the perspective of small and medium-sized enterprises, in particular as regards Article 3 and early warning tools.

The representative of the European Commission and the Romanian Presidency informed the audience of the reference to early warning in the Directive and how it should be interpreted. According to them, the Directive is considered as an achievement by the panel for SME.

Participants also discussed the steps to take at national level and how some Member States will implement early warning to support entrepreneurs in financial trouble waters.

The third meeting focused on the obstacles entrepreneurs can experience along the way and sharing good practices on breaking through the stigma associated with failure and embracing the lessons learned from it.

Extending support in Barcelona

Ángel Alonso attended the Expert Network Meeting in Barcelona on 5 September 2019 where two European regional projects aimed to help SMEs companies in financial and economic difficulty were jointly explained: the DanubeChance 2.0 and the '*Programa Renace (REBORN)*'.

Ms Edina Kálmán explained how the DanubeChance 2.0 project provides assistance to second-chance entrepreneurs in the Danube region. This programme is intended to help:

(i) failed entrepreneurs to re-start;
(ii) underperforming entrepreneurs to improve;
(iii) prevent new entrepreneurs from failing.

In this respect, the programme carries out a wide array of actions including workshops and mentoring for the entrepreneurs and other activities proposed by business support organisations, educational institutions and policymakers.

Ms Almudena Sánchez, representing CEEIM (Centro Europeo de Empresas e Innovación de Murcia), presented the "Reborn Project", the Spanish regional action plan in re-entrepreneurship developed in Murcia, in partnership with other European areas. The project is within the scope of the Interreg Europe Project's framework and among its goals, one is to promote the exchange of experiences and good practices in financing second opportunities, as well as the promotion of a positive image of restarters. Ms. Sánchez pointed out that the programme has advised until now SMEs with total liabilities of EUR 27 million euros. A successful restructuring resolution with creditors has been reached in 89% of the situations analysed by the programme.

Professor Mr. Jan Adriaanse of Leiden University brought up several insolvency issues related to human behaviour during his conference entitled 'Studies on early warning, turnaround and second chance entrepreneurship'. In particular, Prof. Adriaanse explained how and when entrepreneurs react to warning signals, why these signals are often ignored and the consequences of personal circumstances influencing the process.

Some interesting findings in Prof. Adriaanse's work are that:

(i) the bankruptcy experience can be similar to losing a loved one;
(ii) stigma due to insolvency may not come from social network but institutions;
(iii) grief caused to entrepreneurs in bankruptcy may imply an extremely stressful situation that may stop them from taking a second chance.

Looking back, moving forward in Brussels

Piya Mukherjee, President of INSOL Europe, attended the final conference in Early Warning Europe, held in Brussels on 14 November 2019. This conference, under the heading 'Looking back, moving forward', marked the conclusion of the three-year project financed by EU (COSME) with the objective of rolling out Early Warning mechanisms in other Member States.

Simona Constantin, Member of the Cabinet of Commissioner Vera Jourova, DG Justice, Consumers and Gender Equality, described the Directive on Preventive Restructuring as a positive achievement and that it would help to save businesses.

As of 1 January 2020, Croatia will take over the Presidency of the Council of the European Union. Petra Jurina, JHA Counsellor, Permanent Representative of the Republic of Croatia to the EU, shared that initially Croatia had been against Art. 3 (Early Warning Mechanisms) of the Directive, considering early warning to be a question of corporate governance. However, Croatia has at present embraced the Early Warning concept which is now in the process of being rolled out in Croatia, as part of the second wave of the Early Warning Europe program.

Morten Møller, Coordinator of Early Warning Europe summed up the findings and

> IT WAS A VERY INTERESTING DAY, MARKING THE CONCLUSION OF THE EWE PROJECT BUT ALSO HERALDING THAT THE WORK WILL CONTINUE

results of the project:

- 3,400 businesses assisted since 2016 across Europe;
- 55% of the businesses assisted are saved;
- 25% go bankrupt;
- 20% close down as solvent or reduce operations to less that 13,000 EUR per year (ie one employee);
- early warning mechanisms are being rolled out in 10 Member States

Going forward, at the permanent network of Early Warning Europe, partners will:

- continue lobbying;
- continue mentoring;
- provide policy recommendations to EASME (The Executive Agency for Small and Medium-sized Enterprises) and DG Grow;
- participate in an ERASMUS project from 2020 to 2022, integrating knowledge of crisis management into advice to start-ups;
- have talks with OECD and the Word Bank concerning expanding the Early Warning mechanisms beyond Europe.

A panel of early warning consultants, mentors and entrepreneurs shared their experiences with the audience. A panel discussion followed on the future of Early Warning services in the context of the Directive on preventive restructuring:

- Birgit Weidel, Head of Unit, DG Grow, explained that it is DG Grow's policy to create a SME-friendly environment and reduce the stigma connected with business failure. The Directive is an important tool in this work.
- Mislav Marcius, Head of Unit, Ministry of Economy, Entrepreneurship and Crafts of Croatia, noted that stakeholders in a business, especially banks, have data that enable them to predict failure. However, Croatia would focus on promoting knowledge of the assistance that is available, rather than imposing alert obligations on third parties.
- Advisor Mia-Maria Kontkanen, Federation of Finnish Enterprises, shared that Finland's tasks in rolling out Early Warning mechanisms primarily involve bringing all the existing players offering advice together in a comprehensive organisation.
- Salvador Marin, President, European Federation of Accountants and Auditors for SMEs, reminded the audience that the members had in-depth understanding of the businesses of SMEs and therefore would be very well qualified to advise on restructurings.
- Piya Mukherjee summarised from the view of an insolvency practitioner, that in order to achieve results, the assistance offered to businesses has to be impartial, free of cost, confidential and consist in relevant specialist expertise. The Early Warning Europe mechanisms tick all boxes.
- Finally, Ondrej Vondracek, Legislative Officer, DG Just, advised that DG Just would organize transposition seminars in January 2020 in order to explain to the Member States how to transpose Art. 3, as many Member States do not have any experience in Early Warning mechanisms.

In the afternoon, four different workshops were set up in which EWE consultants, mentors and business owners could share their experiences regarding to raising awareness, creating and maintaining a network of mentor-volunteers, cooperation models and identification and initial contact to businesses in distress.

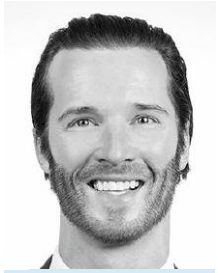
In all, it was a very interesting day, marking the conclusion of the EWE project but also heralding that the work will continue. ■

Footnote:

1 https://www.earlywarningeurope.eu

Demystifying offshore: Obtaining information

In their second article "demystifying offshore", the authors examine some of the more common mechanisms for obtaining information in the four Crown Dependencies and Overseas Territories (CDOTs)



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In our last article, building upon presentations by the Anti-Fraud Forum, the authors discussed steps European-based insolvency officeholders could take in order to obtain recognition and assistance from the British Virgin Islands, Cayman Islands, Guernsey or Jersey (which, for convenience, we called the four Crown Dependencies and Overseas Territories (CDOTs).

In this article, we build upon that foundation by examining some of the more common mechanisms for obtaining information in the CDOTs.

Information held in the CDOTs

Some essential information is publicly available in the CDOTs. All maintain registers of incorporated companies, a search of which will reveal basic information such as company name, number, date of incorporation, type of company, the status of the company[1] and address of its registered office. Such a search will reveal the company's Memorandum and Articles in most CDOTs[2] and, in Cayman, a search can be run to show a company's current directors. Similarly, court searches can be carried out, which will reveal any writs (i.e. forms commencing claims) or judgments to which a company has been a party.

In all CDOTs there is a requirement to maintain and file beneficial ownership information, which can be accessed by criminal and tax authorities in certain circumstances. Whilst the trend appears to be towards public accessibility, this information is not yet available publicly.

More information is held at the companies' registered offices. This includes registers of members and directors. The nature and extent of such records varies between jurisdictions and by type of entity, thus a good starting point is often to seek advice as to what records are likely to be held at the registered office and elsewhere.

Norwich Pharmacal applications

Broadly speaking, a Norwich Pharmacal application for disclosure can be made against a non-party to litigation, provided that (i) they are mixed up or involved in a wrong that has occurred; (ii) they are at least likely to be able to provide the information sought; and (iii) the order is necessary to enable an action to be brought against the wrongdoer.

Norwich Pharmacal orders are frequently sought against registered agents or other service providers, who may hold ownership information, details of the movement of funds or KYC information[3]. Registered agents, in particular, will normally be found to be "mixed up" in the affairs of their principal company, so as to make them a potential target for this type of order.

The disclosure normally involves the production of documents. The information sought may be wide-ranging and may include the identity of wrongdoers, existence of wrongdoing and/or location of assets. In the BVI and the Cayman Islands Norwich Pharmacal relief has been successfully sought in aid of enforcement of an overseas judgment where there is reasonable suspicion that a respondent is mixed up in the willful evasion of another's judgment debt[4].

Bankers' Trust applications

Where there is a *prima facie* case of fraud and the relevant information is required to trace, preserve or recover assets which may otherwise be dissipated before the conclusion of a legal claim against a defendant, then a Bankers Trust order may be sought against a non-party (usually a bank)[5].

In the right circumstances, this can be a powerful tool in the CDOTs. However, because the order overrides normal confidentiality obligations, it is only available in relatively narrow circumstances. There must be good grounds for believing that the assets are the applicant's assets, they were acquired by fraud or wrongdoing and that delay might result in the dissipation of the funds before the substantive action goes to trial. On the other hand, unlike for Norwich Pharmacal relief, there is no requirement for the respondent to be mixed up in wrongdoing.

Injunctions

Our next article will deal, in detail, with freezing injunctions that may be available to support proceedings overseas. For the purposes of this article, it is worth noting that such injunctions are often coupled with ancillary

disclosure orders, e.g. orders requiring a defendant to deliver up a sworn statement of its assets; disclose documents in support of that statement (e.g. bank records) and/or provide other information to enable the injunction to be effective.

A different form of injunction, namely an Anton Piller order (sometimes known as a search and seizure order) can be made to allow an applicant to enter a respondent's premises, search for, inspect and seize documents and other property.

Such orders are relatively rare and will only be made in exceptional cases. Requirements include for the applicant to show an extremely strong *prima facie* case that the actual or potential damage would be a very serious matter for the applicant; that there is clear evidence that the respondent possesses incriminating evidence and that there is a real risk that such evidence will be destroyed before an on-notice application could be made and enforced. As litigation relating to data breaches, cyber fraud and cryptocurrencies increases, so may the use of such orders.

Liquidators' powers to obtain information

Our last article discussed recognition and assistance for overseas insolvency officeholders. Such orders can include requiring the production of information and documents to the overseas officeholder.

Another common route to recovering information in the CDOTs is to look at proceedings seeking to wind-up entities located there, and to see if the winding up is just and equitable, on grounds of insolvency, or only for public policy reasons[6].

Once appointed, liquidators have extensive statutory and common law powers to obtain information and pursue their own investigations into wrongdoing. Although their efforts are made for the collective benefit of all company stakeholders (not merely the party who originally sought their appointment), liquidation is still one of the most common and effective methods of enabling information to be gathered and actions to be taken where wrongdoing has occurred and money has gone missing through an offshore entity.

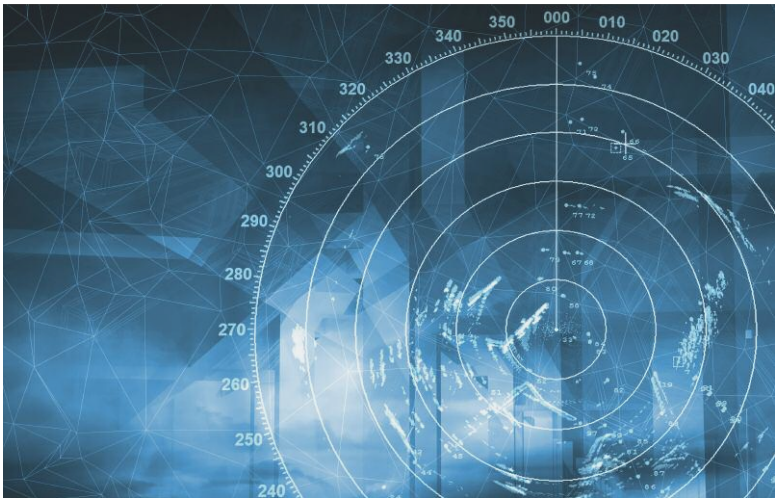
The details and extent of these powers vary from jurisdiction to jurisdiction, but commonly involve being able to recover documents and information that belong to the company in question, compel directors to provide statements of the company's affairs immediately prior to liquidation, and/or compel current and former directors (and, in some jurisdictions, other service providers) to provide documents relevant to the company and/or to be examined by the liquidators about matters relevant to the company.

Letters of request

In addition to the powers to provide recognition and assistance to foreign insolvency officeholders discussed in our last article, in each of the CDOTs the courts also have the power to grant relief pursuant to a letter of request from a foreign court in furtherance of civil proceedings, typically with a view to taking or obtaining evidence in support of those foreign proceedings[7].

The requirements for such a letter of request are in line with the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters and the English Evidence (Proceedings in Other Jurisdictions) Act 1975. Essentially, they are that foreign proceedings must be contemplated or on foot and the evidence sought must be strictly limited to that necessary for those proceedings.

Letters of request are not often used in the CDOTs. However, in the right cases, they may be a potential route to obtaining a wide variety of evidence including documents or property, to examining witnesses, or even to taking samples of blood or conducting a medical examination.



Conclusion

As set out above, there are various methods of obtaining information in the CDOTs and European-based professionals should not be deterred from seeking appropriate relief within these jurisdictions.

In most cases, the relevant inquiry will start with considering what information is likely to be located in the relevant CDOT that may assist an investigation or potential litigation. Once that information is in mind, it will be easier to consider who is likely to hold it and, from there, the best potential route(s) to obtain it.

The courts in these jurisdictions, supported by well-qualified legal and accounting professionals, are responsive to global developments and well-versed in cross border insolvencies and litigation. Accordingly, if you think that there may be information held offshore that could assist you in your efforts, it is likely to be worth speaking to a professional in that jurisdiction about potential ways to obtain it. ■

Footnotes:

1 e.g. whether active, struck off, or in liquidation.
2 but not in Cayman.
3 based on the equivalent English jurisdiction first established in *Norwich Pharmacal Co. v Customs and Excise Commissioners* [1974] AC 133.
4 *UVW v XYZ* BVIHC (COM) 108 of 2016; ArcelorMittal USA LLC v Essar Global Fund Limited & Anor (Unreported, 29 March 2019).
5 Following the English case of *Bankers Trust v Shapira* [1980] 1 WLR 1274
6 Winding-up is a considerable topic in its own right, which we do not attempt to cover in this article.
7 e.g., the court in Cayman can grant letters of request from overseas courts, pursuant to the Evidence (Proceedings in Foreign Jurisdictions) (Cayman Islands) Order 1978, which extends certain sections of the similar UK statute to the Cayman Islands.

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EUROPEAN-BASED PROFESSIONALS SHOULD NOT BE DETERRED FROM SEEKING APPROPRIATE RELIEF WITHIN THESE JURISDICTIONS

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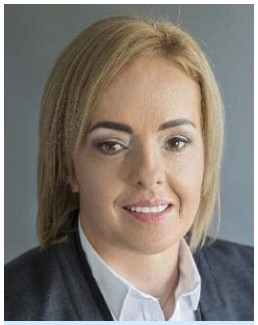
The Undertaking: Mystery or reality?

Andrea Csőke, Nicoleta Mirela Nastasie and Róbert Muzsalyi ask how does the undertaking, provided by the 2015/848/EU Regulation, work in Romania and in Hungary?

ANDREA CSŐKE
Judge at the Supreme Court of Hungary



NICOLETA MIRELA NASTASIE
Judge at the Bucharest Tribunal, Romania

RÓBERT MUZSALYI
Judicial Clerk at the Supreme Court of Hungary

The differences between Member States in relation to substantive and procedural rules are commonly a source of difficulties in cross-border proceedings.

Among others the Regulation 2015/848 of the European Parliament and the Council on insolvency proceedings (hereinafter: EIR-R) provides some new legal instruments to limit the possibility of secondary insolvency proceedings. The undertaking (Art. 36) is one of the new features which has not been known before in Continental legal systems.

We consider that the application of the undertaking in different insolvency regimes involves some difficulties. To demonstrate this assumption, we will compare the Romanian and the Hungarian legislation in this field and show the differences and the similarities.

Preparing the undertaking when the main insolvency proceedings are opened in Romania

Romanian law does not regulate the situation of an undertaking following the meaning and the effects provided by EIR-R.

In the reorganisation proceedings, the judicial administrator may propose an undertaking as part of the reorganisation plan, a tool for an efficient administration of the main insolvency proceedings, in direct relation to the complexity of the restructuring process. During the implementation of the

reorganisation plan the undertaking is possible if one takes into consideration its purpose and effects on the debtor's estate. The approval of the reorganisation plan is the creditors' right, but the plan has to obtain judicial confirmation.

In the winding-up procedure the insolvency practitioner is entitled to propose an undertaking. The courts have limited power in relation to the management and the estate of the debtor. The general assembly of the creditors has the right to approve the insolvency practitioner's proposal for the undertaking.

When the main proceedings are opened in another Member State

Romanian creditors should be informed about the opening of main insolvency proceedings in another Member State, about the practitioner's intention to provide an undertaking, the contents of the undertaking and the arguments supporting it, including the effects on creditors' rights and the local debtor's estate.

Creditors vote on a reorganisation plan in five categories. The reorganisation plan must be approved by the absolute majority in each category in relation to the value of claims, not the number of creditors.

Even though there is no provision in the national law, the Romanian syndic judge may consider an application on the legal basis of Article 36 (5) EIR-R admissible, take note and verify the legal requirements of the undertaking for its approval, but this is just a presumption, in the absence of relevant jurisprudence. The Romanian insolvency law has kept the traditional view that in applying the procedure, the main

role lies with the courts, thus certifying the essentially judicial nature of collective proceedings.

A formal confirmation of the Romanian court decision to approve the undertaking does not seem necessary, but there exists the possibility for a Romanian judge to consider it his duty to examine *ex officio* some formal requirements, such as the approval by a qualified majority of local creditors, the publication and notification of the undertaking and the real possibility for the unknown creditors to find out about the undertaking.

Preparing the undertaking when the main proceedings are opened in Hungary

The Hungarian Insolvency Act (*Act XLIX of 1991 on Insolvency Proceedings*, hereinafter: "HIA") was amended in connection with the entry into force of the EIR-R. Special provisions were added in relation to the applicability of the undertaking in the winding up proceedings (in Hungary there is no possibility to propose an undertaking in the reorganisation proceedings).

Statements of undertaking issued to creditors established in other Member States shall be considered valid only if approved in advance by the Hungarian court. In a request submitted to the court, the practitioner shall demonstrate what assets are situated in the Member State of the undertaking, supported by financial statements and documents, their value, plans for the sale of such assets, and the objectives of the undertaking for creditors, as well as the disadvantages that the lack of undertaking is likely to cause. A list of claims of known foreign creditors in the other Member State, indicating the rules set out in the HIA for the payment of such claims and how they should be classified in the priority order provided by HIA, should also be provided.

If the creditors in the other Member State affected do not approve the undertaking which was approved by the court in advance, the insolvency practitioner shall inform them urgently about the possibility of joining the main insolvency proceedings in Hungary, with the payment of a registration fee, with the provision that the time limit for the submission of notices for claims shall commence on the day of the voting on the statement of undertaking.

The court shall inform the creditors and address them a written statement about the undertaking, but it is not binding for the court. In such a situation – when the main proceedings are opened in Hungary – any insolvency court is entitled to approve a proposal for undertaking, there is no court with exclusive jurisdiction.

In the event of any unlawful action or negligence – including failure to fulfill the undertakings – the foreign creditors may file an objection within 15 days. This is a legal remedy by which creditors can ask the court to compel the insolvency practitioner to fulfill the undertaking.

When the main proceedings are opened in another Member State

The Fővárosi Törvényszék (Budapest-Capital Regional Court) shall have exclusive competence for opening, determining territorial insolvency proceedings and controlling the undertaking proceedings.

The communication of an undertaking by a foreign insolvency practitioner to Hungarian local creditors shall contain a statement declaring that the undertaking is following the validity requirements according to the national law of the Member State of the main proceedings. The foreign insolvency practitioner shall provide, for the Hungarian's creditors complete information, elements about the local assets affected by the undertaking, including their value and plans for their sale, in Hungarian. The foreign insolvency practitioner shall inform Hungarian local creditors about the voting process for the approval of the undertaking. The voting shall be conducted in the presence of a public notary.

Creditors are grouped in two categories: secured and unsecured. Creditors can vote according to their accepted claims. If the plan is approved by a majority of votes in both categories, the undertaking is approved.

Conclusions

It is obvious from the above that although we are close neighbours and there are companies with a seat in one country and an establishment in the other, our insolvency rules are totally different.

The Hungarian legislator tried to keep up with the new European rules of the EIR-R, the Romanian one did not wake up yet, while courts must deal with challenges generated by the undertaking. In Hungary, the HIA gives a big task and responsibility to the judge, while the Romanian rules are based on the creditors' activity, giving them the possibility to deal in accordance with their interests. From the creditors' point of view, inconsequent or insufficient rules are much better than no procedural rules. But the lack of rules leads to legal uncertainty in cross-border situations.

The goal of our work is to show how serious the problems related to an undertaking as alternative to secondary proceedings may become. This reality requires flexibility and a positive attitude from all parties involved - debtors, creditors and national authorities with competence in the field - in order to produce positive effects and develop the undertaking as an efficient mechanism for international cooperation. ■

“THE GOAL OF OUR WORK IS TO SHOW HOW SERIOUS THE PROBLEMS RELATED TO AN UNDERTAKING AS ALTERNATIVE TO SECONDARY PROCEEDINGS MAY BECOME”

Modern insolvency research: The bridge to the future

Jen Gant & Paul Omar report on the annual meeting of the Younger Academics' Network in Insolvency Law, Copenhagen

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Moody weather in the land of Scandi-noir dramas greeted the members of the Younger Academics' Network in Insolvency Law ("YANIL") meeting at the premises of DLA Piper in Copenhagen on a damp Tuesday morning.

After a fulsome welcome to those present by Henrik Sjørslev (Insolvency and Restructuring Partner, DLA Piper), Jen Gant (YANIL Chair; Post-Doctoral Researcher, JCOERE Project, UC Cork School of Law) opened proceedings marking the 10th anniversary of YANIL. After an introduction of the board and a brief history of the body since its founding in 2009 by Bob Wessels (Emeritus Professor, Leiden), Dr Gant welcomed the group of twenty or so attending the first PhD conference organised by YANIL, the intention being that this would constitute the first of many such doctoral conferences and networking opportunities. The first panel of the morning, chaired by Dr David Ehmke, focused on the topic of the moment: the adoption this year of the Preventive Restructuring Directive on Restructuring and Insolvency (the "**Directive**"). Sits Schreurs (PhD Candidate, Utrecht) posed the question of how the plan elements in the newly adopted Directive will have an impact on Article 36 of the European Insolvency Regulation ("**EIR**") which provides for the possibility of an undertaking to respect local priorities. In analysing the Dutch regime in particular, the suggestion was made that there is a need for some targeted reforms to ensure that the transposition of the directive does not conflict with existing local options. Following this, George Wabl (PhD Candidate, Vienna; Attorney, Binder Grosswang) suggested steps that directors should take when faced with the imminence of insolvency. Through an empirical study carried out across Austria, the views and behaviour of directors were examined, especially surrounding the duty to file. The survey establishes that directors tend, if anything, to be concerned about insolvency prospects, but may be more negligent than criminal in their manoeuvres prior to declaring the fact.

Closing the session, Aoife Finnerty (PhD Candidate, Limerick) appreciated how the Irish examinership would fare on the advent of the directive. Despite the pre-eminence arguably enjoyed by Ireland having been the first to introduce preventive restructuring through a calque of the Chapter 11 model, the directive would bring some innovations, particularly as far as the stay, cram-down and priority provisions were concerned.

After the break, the second morning session presided by Dr Emilie Ghio (Birmingham City University) featured presentations on private international matters connected to insolvency. Walter Nijnens (PhD Candidate, Fulda) floated the thought of where preventive restructuring should fit in the binomial framework constituted by the EIR and the

Members of YANIL assemble in Copenhagen

Brussels IA Regulation. Exploring the prospect through am examination of Dutch law processes, an important element identified was the entry criterion for various processes, the definition of which can obscure the already delicate methodology for defining the scope of both texts. Following this, Oriana Casasola (PhD Candidate, Leeds) set out some ground rules for a proposed harmonisation of transaction avoidance provisions. The need for a doctrinal basis to appreciating what claims are firmly inside insolvency and what lies outside was expressed, for a proper understanding of how to integrate transaction avoidance, a key aspect of insolvency case-management, into the existing framework. Concluding proceedings before lunch, Chiara Lunetti (PhD Candidate, Milan/Sorbonne) continued the theme of harmonised rules by suggesting what could be the formula for jurisdiction in the case of annex actions, another issue where the need for a proper definition of what might be included is necessary.

Afternoon perspective

A pleasant *buffet à la Scandinave* preceded the afternoon session, which offered different regional perspectives on insolvency issues. Under the aegis of Dr Eugenio Vaccari (Lecturer, Essex), the first came from Jadesola Faseluka (PhD Candidate, Leeds), who provided a view on the utility of UK Corporate Voluntary Arrangements (CVAs) as a way of rescuing businesses under stress. Outlining recent developments in the retail and other sectors, the proposal was made that the setting of business rates, among others, might be a factor in the success of businesses exiting CVAs. Explaining the features of the UK insurance market, Geleite Xu (PhD Candidate, Essex) suggested new approaches to crisis management and market exit mechanisms for the industry. The lack of a special resolution mechanism, as it existed for financial institutions, placed the spotlight on the need for change in the current inadequate framework, including the coordination of creditor decision-making and the introduction of new rescue procedures.

Reforms

Continuing the theme of reforms, Dennis Cardinaels (PhD Candidate, Leeds) produced a strong argument for the differentiation of unsecured creditors. Through a comparison of governance in insolvency and corporate governance norms, an exploration of the role of key actors creates the need to distinguish between the groups of unsecured creditors. The factor to be used would be whether creditors had the type of control normally associated with those in the position of shareholders or connected parties. The session ended with a final presentation by Frederik de Leo (PhD Candidate, KU Leuven), who provided a view on the thorny question of employee protection in the pre-pack procedures. Examining the position of the Belgian and Dutch legislations and using case-law examples drawn more widely, the suggestion was made that balancing the goals of employee retention and value-maximisation were not, as often thought, incompatible objectives. Reconciling the two, however, would require much more openness to innovation by legislators and the courts.

Research methodology

The final session of the day put the spotlight on the issue of research methodology and the appropriateness of a methodological approach to the insolvency research. Chaired by Dr Paul Omar (Technical Research Coordinator, INSOL Europe), three post-doctoral academics presented papers on the utility of variants of research methodology to their projects. Pushing the insights into the choice of methodological approach, Jen Gant explained how the JCOERE Project was exploring judicial cooperation in the context of the transition to the Directive. Issues of terminology, language, legal culture and the perceptions of the contributors all featured as challenges in the process of developing a questionnaire and analysis of the responses. Dr Samantha Renssen (Assistant Professor, Maastricht) outlined the value of empirical research and statistical analysis in examining the prevalence of fraud and the value of resulting damage/harm in "*turbo liquidations*". Issues such as the formulation of a simple, but precise, research question and the lack of accessible information do, however, constitute obstacles to the project, but the ability to consider the development of an analytical tool to predict outcomes can be a beneficial aspect to the project.

Winding up the debate, Dr Lézelle Jacobs (Senior Lecturer, Wolverhampton) considered how methodology informed the research project and how the choice of methodology was predicated on the expected scope (and perhaps also anticipated outcomes) of the project. Empirical, doctrinal, black-letter research, law in context, socio-legal research etc. were all options that could be explored variously for their appropriateness for particular projects, but flexibility in the way methodology (or multiple methodologies where useful) was used should always be considered.

The three presentations stimulated a lively and spirited question and answer session before a brief farewell from Gert-Jan Boon (Researcher, Leiden) rounded off proceedings for the day. Gert-Jan, who takes over as YANIL Chair, looked forward to future occasions as a showcase for the quality of research being carried out by YANIL members. ■

GERT-JAN BOON, WHO TAKES OVER AS YANIL CHAIR, LOOKED FORWARD TO FUTURE OCCASIONS AS A SHOWCASE FOR THE QUALITY OF RESEARCH BEING CARRIED OUT BY YANIL MEMBERS

Attitudes towards investing capital in restructuring and turnaround situations, and the multiplier effects deriving therefrom

ODWA NGXINGO
Winner of the 2019
Richard Turton Award

The 2019 INSOL Europe Annual Congress, convened in Copenhagen, explored practical considerations and intricacies encountered in special situations under the theme (un)necessary restructuring, which spoke to the "(un)fortunate" reality that some businesses may not be worth saving in cases where survival will have net negative ripple effects on industries and the economies in the long run.

It is exciting to observe the development of, and to work in, an environment that advocates for renewed focus, investment, education and positioning of resources towards opportunities in distressed, restructuring and turnaround situations. I am convinced that effective collaboration among insolvency, business recovery, restructuring practitioners, and capital dedicated for distress and special situations can afford a better chance for successful rehabilitation of businesses, preservation of value, recovery of profitability, and the revitalisation of credit markets among others.

The negative ripple effects that poor performance and distress have on economies are undeniable, though in some instances distress and failure become catalysts for dramatic change, making way for innovation and growth; the words of Joseph Schumpeter, the "gale of creative destruction" describe the "process of industrial mutation that incessantly revolutionises the economic structure from within, incessantly destroying the old one, incessantly creating a new one".

In many ways the preservation of even a single business, can curb and reverse a downward spiral of negative ripple effects, and instead yield significant social returns over and above the potential economic returns. For instance, saving jobs that could have otherwise been lost helps limit or prevent the worsening of dire social consequences as a result of:

- Numerous families losing a source of income; possibly the only income stream in some instances;
- Increase in inequality, debt levels, poverty, tensions within families and communities, crime, homelessness, and erosion of confidence and self-esteem; and
- Negatively impacting the government tax base and therefore the government's ability to fund socio-economic beneficial initiatives.

Distress and failure of businesses, especially those that provide vital products and services, often compromise the state of an economy, contribute to the depletion of efficiencies in financial and commercial markets, and make it hard for big and small enterprises whose ecosystem relies heavily on the distressed company.

While capital investment into special situations is critical, the flow of capital into these situations, especially in emerging markets, has partly been muted by scepticism. Some aspects of the scepticism are well warranted, as some funders have previously been burnt and will be wary of what may appear to be "messy" situations. In the words of Mark Twain "history doesn't repeat itself, but it often rhymes"; in the case of funding distressed businesses, past experiences, especially painful ones, leave a lasting impression, resulting in sticky emotional biases.

Emotional biases inform the nature of attitudes that providers of capital may have towards difficult situations. Among emotional biases prevalent amid capital providers (funders) in distressed situations are the following:

- *Regret-aversion bias* – where people try to avoid the pain of regret associated with bad decisions.
- *Status quo bias* – where people are generally more comfortable keeping things the same than changed and thus do not necessarily look for opportunities where change is beneficial, leading to failure to explore other opportunities.
- *Loss-aversion bias* – supported by several studies suggesting that, psychologically, losses are significantly more powerful than gains.

The presence of these biases and limited exposure to different asset classes and / or investment strategies cause providers of capital to operate within parameters that (i) they may be familiar with, and (ii) mirror those parameters which are followed by those around them. As a result, herding and group thinking trumps exploring new opportunities which could potentially yield higher social and economic returns. Perceptions

> **EMOTIONAL BIASES INFORM THE NATURE OF ATTITUDES THAT PROVIDERS OF CAPITAL MAY HAVE TOWARDS DIFFICULT SITUATIONS**

and thinking around special and distressed situations investing must evolve as an enabler to efficient distressed markets.

Special and turnaround situations present opportunities for impactful and developmental investing potential, as well as investment diversification by virtue of the countercyclical nature of distressed investing. It is worth acknowledging that in some instances the resistance and avoidance of distressed investment opportunities could simply be a factor of limited pools of capital in certain jurisdictions with tight restrictions and little-to-no wiggle room as dictated by investment mandates, where the opportunity cost of any expenditure and investment needs to be carefully considered within tighter limits, so that, as a result, what may take a longer time to understand and attain sign off may be avoided by default.

It will take a lot more work, time and deep investment into emerging markets such as those in the African continent, to enable a shift in perceptions towards distress and turnaround situations, to enable more capital flow and investment into distressed economies and businesses, as well as enable a catch up with the rest of the world's most developed markets.

Organisations, such as the International Finance Corporation ("IFC") and others, are taking a global view in the way they design and invest in solutions that seek to have a world-wide impact and support the development of viable and sustainable distressed markets even across emerging and underserved markets. The IFC, through its Distressed Asset Recovery Program ("DARP") seeks to promote close collaboration in advancing the development of more efficient financial and distressed asset markets with the following envisaged benefits[1] of well-functioning and vibrant distressed assets market in mind:

- **For investors**, a distressed assets market provides access to potentially attractive returns and diversification.
- **For banks**, maintaining a high level of non-performing loans ("NPLs") ties up an institution's capital in non-performing assets, putting pressure on long-term profitability and making it harder to absorb future losses and strengthen capital buffers. In addition, large NPL portfolios force banks to retain higher levels of capital, reducing their ability to provide new credit, and particularly rescue credit, which in turn can hinder economic growth as potentially good investments are postponed or abandoned.
- **From a policy standpoint**, a developed distressed assets market provides for an efficient and effective process for cleaning up banks' balance sheets, as it allows for the disposal of NPLs to private investors who bring greater efficiency, expertise, and financing to the workout process. A large volume of NPLs can undermine the reliance on the banking system and erode economic growth.

Collaboration at an international level has become of critical importance, as businesses increasingly develop cross-border networks with exposure across multiple countries simultaneously increasing the risk exposure of banks and other creditors or funders and capital providers. Best practice and learnings shared globally to inform policy and market advancement among local bodies such as the South African Restructuring and Insolvency Practitioners Association ("SARIPA:) and international organisations such as INSOL International will help accelerate the design and implementation of best practices across the African markets.

In the words of Dr Eric Levenstein, "effective corporate rescue procedures promote economic and social stability by preserving the value of assets represented by an insolvent or borderline solvent company (where survival of the company, or its business, as a going concern is likely more profitable than a break-up sale of the company upon liquidation), and by preserving the jobs of employees". Readily available capital and a well-equipped and competent body of insolvency, business recovery and restructuring practitioners precede effective and sustainable change in the restoration of efficiencies and businesses to a place where governance, liquidity and financial controls, operations and human capital, among others are optimised and therefore may grow economies and maximise investor returns. ■

Footnotes:

1 BOX 1.1: Benefits of a Distressed Assets Market, International Finance Corporation - DARP - Creating Distressed Assets Markets, Lessons learned since the Global Financial Crisis and Opportunities for Investors in Emerging Markets Today - Second printing of updated edition, October 2019.

As part of the award, Odwa was invited to attend the INSOL Europe Congress in Copenhagen, Denmark, where he was presented with his award by Marc Udink, Honorary Chairman of INSOL Europe.

Odwa says: *"I had the privilege of being awarded the 2019 Richard Turton Award. The award confirmation email came as pleasant and exciting news, though I was not necessarily surprised.*

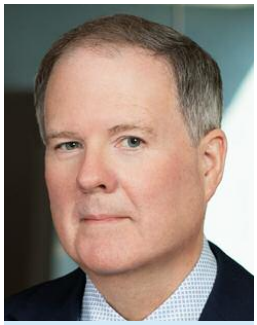
Being in Copenhagen and attending the INSOL Europe 2019 Congress broadened my perspective and inspired greater flexibility in my thinking and approach towards restructuring, turnaround, and business recovery situations, and life in general.

The opportunity has also allowed me to establish great friendships and a network of professionals from various parts of Europe, which is nothing short of incredible. I look forward to participating further at various levels and forums in INSOL International and INSOL Europe."

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

Chapter 15 News: Delaware District Court rejects lawsuit against foreign representatives

David H. Conaway advises any administrators or liquidators outside the US to read on before they become concerned about liability for serving as foreign representatives in Chapter 15 cases



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In a Chapter 15 procedure in Delaware, a disgruntled "creditor" sued the Chapter 15 UK-based "foreign representatives" in their individual capacities. The case is McKillen v. Wallace (In re IBRC), No. 18-1797, 2019 U.S. Dist. LEXIS 166153 (D. Del. Sept. 27, 2019). Before administrators or liquidators outside the US become concerned about liability for serving as foreign representatives in Chapter 15 cases, read on.

The saga ultimately arises from the Great Recession, specifically the meltdown and nationalisation of Anglo Irish Bank PLC ("Anglo") in 2008-2009. In response, pursuant to the Credit Institutions (Stabilisation) Act 2010, Ireland created the Ireland Bank Resolution Corporation Limited ("IBRC") as the successor of Anglo. In 2013, pursuant to a Special Liquidation Order of the Irish government, Kieran Wallace and Eamonn Richardson were appointed as Special Liquidators for IBRC ("Special Liquidators"). Their charge was to maximise the IBRC estate for the benefit of its stakeholders. As part of their charge, the Special Liquidators filed a Chapter 15 petition for the recognition of the IBRC liquidation proceedings pending in Ireland as foreign main proceedings, and also appointed themselves as the "foreign representatives" under the Bankruptcy Code in the Chapter 15 proceedings, in order to insure an orderly and uniform administration of IBRC's assets and liabilities. Their Chapter 15 petition for recognition indicated assistance in the US was necessary to bind IBRC's US creditors in the U.S. and to protect US assets from claims or actions.

> THERE WAS SIGNIFICANT CONTROVERSY, LITIGATION, AND CRIMINAL CONVICTIONS REGARDING THE LEGALITY OF ANGLO'S TAKE OUT OF THE TOXIC SHAREHOLDER

Rewind the clock back to 2008-2009. Certain individuals and their companies (Paddy McKillen, Anthony Leonard and Clarendon Properties Limited, the "Anglo Borrowers") were substantial customers of Anglo, with outstanding borrowings in 2008 of about 2 billion euros, related primarily to real estate interests in California and Massachusetts.

Allegedly, Anglo desired to rid itself of a toxic shareholder who owned 29% of Anglo. To this end, Anglo approached its largest borrowers to borrow additional funds from Anglo in order to collectively take out the toxic shareholder. The Anglo Borrowers were part of the group, and borrowed an additional 45 million euros from Anglo. The plan was to accumulate the proceeds of the borrower loans to purchase the 29%, and later sell it for a gain to repay the loans and a profit to boot. When Ireland nationalised Anglo, the stock value plummeted to zero.

In the aftermath, there was significant controversy, litigation, criminal convictions and adverse publicity regarding the legality of Anglo's take out of the toxic shareholder using additional loans from borrowers. The Anglo Borrowers assert that they suffered significant economic, reputational and personal harm as a result of these transactions. In the liquidation proceedings of IBRC in Ireland, the Special Liquidators initiated collection actions against the Anglo Borrowers in order to maximise the IBRC estate, including with respect to the additional 45 million euro loans.

In 2018, Anglo Borrowers filed adversary proceedings in the

IBRC Chapter 15 case against the Special Liquidators as foreign representatives, but in their individual capacities. The asserted claims included breach of fiduciary duty, breach of duty of case, fraud and negligence. The Anglo Borrowers did NOT file a complaint against IBRC, presumably due to the automatic stay (and its penalties for violation), arising from the Chapter 15 petition for recognition. The Anglo Borrowers also filed a cautionary Motion for Relief from Stay "for cause" in the Chapter 15 case, arguing they did not need relief from stay because the adversary proceedings were not against the Chapter 15 debtor, IBRC. Apparently, the Anglo Borrowers also did not assert any of their claims of the Chapter 15 adversary proceedings in defense or counterclaim to any of the proceedings in Ireland.

The Delaware Bankruptcy Court had to decide whether it should grant relief from stay to the Anglo Borrowers and allow the adversary proceedings against the individual foreign representatives to proceed.

For the following reasons, the Bankruptcy Court and the affirming Federal District Court ruled against the Anglo Borrowers and in favour of the foreign representatives:

1. The Barton Doctrine

Though it did not decide this issue, the District Court noted that the application of the Barton Doctrine in a Chapter 15 case was a matter of first impression.

The Barton Doctrine arises from an 1881 US Supreme Court decision barring suits against court-appointed fiduciaries in any venue except in the appointing court, and only with prior court permission. US Circuit Courts of Appeal including the 3rd Circuit (which includes Delaware) have extended the Barton Doctrine to bankruptcy trustees.

The District Court also noted that under the Barton Doctrine, the Special Liquidators were appointed as the Chapter 15 foreign representatives in the Irish liquidation proceedings, not in the Chapter 15 proceedings. The Chapter 15 court merely recognised that appointment. If applicable, the Barton Doctrine would require any action against the foreign representatives to occur in the Irish liquidation proceedings, with prior permission. The Court noted that:

> *Bankruptcy Code Section 101(24) defines foreign representative as ". . . a person or body . . . authorized in foreign proceedings to administer . . . the assets or affairs or to act as a representative of such foreign proceedings . . .." Moreover, Section 1515(a) of the Bankruptcy Code provides that "a foreign representative applies to the court for recognition of foreign proceedings in which the foreign representative has been appointed . . .."*

Whether the Barton Doctrine applies to foreign representatives in a Chapter 15 case remains an open question, though it seems clear where the Delaware courts are leaning.

2. Extension of the automatic stay to non-debtors

The automatic stay of Section 362 of the Bankruptcy Code is applicable upon the recognition of foreign main proceedings. The automatic stay normally applies only to protect debtors, but in limited circumstances can be extended to protect non-debtors as well. Here, the courts expanded automatic stay to cover the foreign representatives as non-debtors, as they have a significant identity of interest with the Chapter 15 debtor, IBRC. Thus, the Anglo Borrowers were required to obtain relief from stay before their adversary proceedings may continue.

3. Relief from stay denied

The Anglo Borrowers sought relief from stay "for cause." The District Court acknowledged that "for cause" is a somewhat amorphous legal standard, but certainly requires a prima facie showing based on an evidentiary record, that the balance of hardships from not obtaining relief is significantly in favour of the Anglo Borrowers. Here, the adversary complaint was not verified and the Anglo Borrowers submitted no evidence to establish "for cause." Accordingly, the Bankruptcy and District Courts denied the motion for relief from stay, effectively terminating the adversary proceedings.

Takeaways

It is no surprise that the Bankruptcy Court and the affirming Federal District Court extended the automatic stay and denied relief from stay, under these circumstances.

The attack on the foreign representatives seems misplaced, particularly when the Anglo Borrowers were Irish nationals, borrowing money from an Irish bank and under loan agreements entered into in and governed by the laws of Ireland. Perhaps they wanted to avoid appearing in Irish courts due to prior adverse publicity in Ireland, but presumably their defenses and claims could be asserted in the Irish collection action or the Irish Liquidation Proceedings of IBRC.

The interesting automatic stay takeaway is that while extension of the automatic stay to non-debtors generally has limited application in the US, Chapter 15 may be a circumstance where extension is more frequently appropriate.

The other takeaway of interest is the potential application of the Barton Doctrine, which was not decided in this case. When another opportunity arises to address the Barton Doctrine in the Chapter 15 context, my money is on that courts will pick up on the dicta of the District Court opinion and rule the Barton Doctrine does apply. It is logical and serves the purposes of Chapter 15 comity among countries and the orderly and uniform administration of assets and claims in cross-border insolvency cases. ■

"THE ATTACK ON THE FOREIGN REPRESENTATIVES SEEMS MISPLACED, PARTICULARLY WHEN THE ANGLO BORROWERS WERE IRISH NATIONALS"

Poland: Dynamics, participants, statistics and the future

Dr Patryk Filipiak examines Polish out-of-court arrangement approval proceedings

DR PATRYK FILIPIAK
Senior Partner and attorney-at-law at FILIPIAKBABICZ Legal

The Polish Restructuring Law of 2015 allows for the conclusion of an arrangement with creditors in out-of-court proceedings ("arrangement-approval proceedings").

It is one of four proceedings under the Law. Creditors' votes are collected by the debtor under the supervision of an arrangement supervisor. Having obtained the majority of two thirds of the value of claims, the arrangement is approved by the court[1].

Dynamics and timing

Proceedings are divided chronologically into *out-of-court* and *court* phase. It begins with the agreement between a debtor and a restructuring advisor on the supervision of the proceedings. Such advisor will act as the arrangement supervisor. The amount of claims covered by the arrangement (principal amount plus interest) and the voting power of creditors are determined on the arrangement day set by the parties. The subsequent claims do not fall under the arrangement.

The supervisor prepares a restructuring plan which sets forth, *inter alia*, restructuring measures and financial projections. Then, the debtor sends voting cards to his creditors along with the arrangement proposals. Creditors vote in writing, thus, the general meeting of creditors is not convened. Creditors can address the supervisor to obtain information necessary to make an economically rational decision.

As the creditors are unable to object to the amount of their claims, the proceedings may not be continued if the value of disputed claims exceeds 15% of the total value of claims. The arrangement is concluded when: half of the number of votes and two thirds of the value of all claims covered by the arrangement are reached.

The debtor then files a petition to the court for approval of the arrangement. The court shall issue a decision within two weeks and thereafter the debtor enjoys protection against enforcement . All creditors can appeal to the regional court. When the decision becomes final and binding, the proceedings end and the arrangement is executed. If the debtor fails to execute the arrangement, it will be revoked by the court and the claims will return to their original amount.

The out-of-court stage may last for a maximum of three months from the arrangement day. The court usually approves the arrangement within two-four weeks and then a possible appeal procedure will last another two-three months. The whole procedure lasts about five-six months if the court's approval is appealed and three-four months if it is not appealed.

> **THESE PROCEEDINGS ARE INTENDED FOR DEBTORS IN AN EARLY PHASE OF THE FINANCIAL CRISIS (IMMINENT INSOLVENCY)**

For whom are the arrangement approval proceedings?

These proceedings are intended for debtors in an early phase of the financial crisis (imminent insolvency). Then, debtors generally pay their creditors on time. The situation of a small number of creditors with whom the debtor has a direct relationship still based on trust and partnership is optimal in such a case. These proceedings will function perfectly in order to conclude a selective arrangement (art. 180) with a selected group of creditors. These could be, for example, financial institutions or a small group of suppliers.

Main actors in the proceedings

Debtor: The procedure is available for entrepreneurs, including individuals and companies that are insolvent or

threatened with insolvency. In accordance with article 11 of the Bankruptcy Law[2], the insolvent shall be considered a person who is no longer able to pay their liabilities when they fall due (cash-flow test) or an organisation whose all liabilities exceed the value of assets and such a situation has continued for more than two years (over-indebtedness test).

Creditors: The arrangement covers claims arising prior to the arrangement day. The creditors *in rem* do not participate in the proceedings without their consent, unless a partial arrangement with the use of the cram- down mechanism is implemented. Creditors have one vote with a weight corresponding to the principal amount and interest of their claims.

Arrangement supervisor: It is an individual or a company that has a licence of a restructuring advisor. The arrangement supervisor ensures that the proceedings are conducted legally, provides all information to the creditors and accepts their reservations. He or she assists with the preparation of arrangement proposals and in carrying out the vote-collection. The supervisor assesses whether the arrangement can be executed and submits a comprehensive report to the court.

The remuneration of the supervisor results from a contract with a debtor and is not limited by law. The supervisor is an entity strictly controlled by the Minister of Justice and the local restructuring court.

Restructuring court: The function of the court is limited to a decision on the arrangement approval that will be issued if the arrangement is lawful and does not grossly harm creditors who vote against.

Statistics

Within the period from 1 January 2016, i.e. from the date of entry into force of the Restructuring Law, a total of 1,262 restructuring proceedings were opened, out of which 335 ended with the concluded and approved arrangement, 380 were discontinued without the conclusion of the arrangement and 547 proceedings are still pending.[3] Out of this number, there were only 27 petitions submitted for approval of the out-of-court arrangement. In three cases, the court dismissed the petition, and for the remaining 24 – the court's decision was positive.

We do not have any information about the number of executed arrangements. We can only assume that this number will be higher than in other proceedings. It derives from a better economic situation of a debtor using this instrument.

Comparing a number of arrangements concluded in these proceedings with a number of arrangements concluded in *twin accelerated arrangement proceedings*, we can see a great potential for an increase in the number of out-of-court proceedings.

Pros and cons of the proceedings and the need for change

The *arrangement approval proceedings* is quick, efficient and practically independent of court decisions which require time and sometimes may not take into account the economic conditions. The debtor may independently choose the supervisor with whom the relationship requires trust. The legal framework also ensures the confidentiality of the procedure, although in practice, information about financial problems gets to the market. Moreover, in the course of these proceedings a selective arrangement may be concluded with certain creditors.

Despite these advantages, presented statistics show that arrangement approval proceedings are used very rarely. As far as I am concerned, the main reason is a lack of enforcement prohibition at the pre-litigation stage, as well as a lack of ban on terminating contracts of key importance for a debtor.

In practice, the only successful out-of-court proceedings are those in which the group of creditors is very small or in which a partial arrangement is concluded. In such cases, the protection of a debtor results from stand-still agreements. Fortunately, Poland's internal plans to amend the Law are in line with the obligation imposed by the EU Directive on preventive restructuring framework[4].

Measures provided for in articles 6 and 7, such as automatic stay of individual enforcement actions and a prohibition on terminating executory business agreements, will make these proceedings more attractive, provided that the Polish legislator does not make such measures dependent on the discretionary decision of the court. The stay should be applied automatically at the request of a debtor. Work on the implementation of the Directive will begin later this year within the working groups of the Ministry of Justice. ■

> **THE ONLY SUCCESSFUL OUT-OF-COURT PROCEEDINGS ARE THOSE IN WHICH THE GROUP OF CREDITORS IS VERY SMALL OR IN WHICH A PARTIAL ARRANGEMENT IS CONCLUDED**

Footnotes:

1 The arrangement approval proceedings shall be conducted pursuant to articles 210 - 226 of the Act of 15 May 2015 - Restructuring Law Journal of Laws of 2019, item 243, available at: http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20190000243. The Act entered into force on 1 January 2016.

2 Journal of Laws of 2019, item 498, available at: http://prawo.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20030600535. The Act entered into force on 1 October 2003.

3 See: Zimmerman Filipiak Restrukturyzacja - Report on the Restructuring Proceedings for the Q2 2019: http://zimmermanfilipiak.pl/aktualnosci/prezentacje/raport-restrukturyzacje-w-polsce.-q2-2019.html (available in pdf version).

4 Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency), Official Journal of the EU of 26 June 2019, L 172/18.

Country Reports

Winter 2019/20

Short country reports from Lithuania and Czech Republic

FRANK HEEMANN
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Lithuania:

Change in organisation of the profession of insolvency practitioners: Chamber of Insolvency Administrators established

As reported in the previous issue of *Eurofenix*,[1] a more contemporary insolvency law[2] finally came into force in Lithuania on 1 January 2020. One of the major changes is the introduction of a self-governing body for insolvency practitioners.

Although the Insolvency Law came into effect only at the beginning of 2020, implementation work had already started earlier. On 13 September 2019 the inaugural meeting of the Chamber of Insolvency Administrators[3] ("Chamber") took place, during which the Chamber was established, the governing bodies of the Chamber and the representatives of other institutions operating ancillary to the Chamber (members of the Court of Honour and the Audit Commission) were elected and the Statutes of the Chamber, the Code of Ethics for insolvency administrators and the Rules of the Court of Honour were approved. The Chamber was registered in the Lithuanian Register of Legal Entities at the end of October 2019. Establishing the Chamber means the creation of a self-governing body for insolvency and restructuring administrators, two separate professions under the insolvency laws in effect until the end of 2018.With the new Insolvency Law, insolvency and restructuring administrators are united into one profession, called II Insolvency Administrator.[4]

Unlike other state-regulated professions – such as attorneys, notaries, bailiffs, judges, and auditors – insolvency and restructuring administrators had previously not been together in a professional self-governing association, but rather organised in various private organisations which, without self-governing rights, could not ensure proper representation of the profession. Mandatory membership in the Chamber aims at ensuring a higher level of competence for insolvency administrators and appropriate professional development as well as more efficient administration of insolvency proceedings.

The Insolvency Law delegates to the Chamber some of the functions of the public supervisory authority, The Authority of Audit, Accounting, Property Valuation and Insolvency Management under the Ministry of Finance of the Republic of Lithuania[5] which at the State level supervises the activities of insolvency administrators. The Chamber will organise and conduct qualifying exams for insolvency administrators, supervise training and certification, monitor adherence to ethical principles, ensure handling of complaints about the ethics of administrators and represent administrators in drafting and amending new legislation. The Chamber will also perform a self-monitoring role, i.e. the Presidium of the Chamber will be able to impose penalties on insolvency administrators. The most severe will be the removal of a member of the Chamber which, in view of the compulsory membership of the Chamber, means an interdiction to work as an insolvency administrator.

Establishing self-government of insolvency administrators is expected not only to ensure proper representation and protection of the interests of all insolvency administrators, but also to improve the quality of insolvency procedures and prevent administrators from abusing their rights and delaying insolvency proceedings.

For INSOL Europe and its members this is a positive development, since the Chamber can be addressed as a single port of call for matters relating to IPs in Lithuania and for future cooperation. ■

Footnotes:

1 Please see previous report on the law by Frank Heemann and Aušra Zabulionytė, *The new corporate insolvency law*, in Eurofenix No. 77 (Autumn 2019).
2 Law on the Insolvency of Legal Entities ("Insolvency Law"); *Lietuvos Respublikos juridinių asmenų nemokumo įstatymas, No. XIII-2221*
3 *Nemokumo administratorių rūmai.*
4 *Nemokumo administratorius.*
5 *Audito, apskaitos, turto vertinimo ir nemokumo valdymo tarnyba prie Lietuvos Respublikos finansų ministerijos.* Website: http://www.bankrotodep.lt/

Czech Republic:
Ground-breaking Czech Supreme Court decision on balance-sheet insolvency

The definition of insolvency is a key element of the insolvency law. It opens the gate for tools that enable creditors to safeguard their rights vis-à-vis their debtors. On 19 August 2019, the Czech Supreme Court published a ground-breaking decision which addresses a crucial aspect of balance-sheet insolvency. Many other issues, however, still remain unresolved.

Definition of insolvency

As in other jurisdictions, the Czech Insolvency Act anticipates two forms of insolvency: cash-flow insolvency (illiquidity test) and balance-sheet insolvency (over-indebtedness).

Cash-flow insolvency, in short, occurs when a debtor has multiple creditors with *past due* claims for more than 30 days which the debtor is unable to satisfy with his (liquid) assets. On the other hand, an over-indebted debtor also has multiple creditors, but concurrently the sum of his liabilities exceeds the value of all of his assets. An important factor taken into consideration is the debtor's potential future development and whether the debtor may reasonably be expected to continue managing his assets or conducting business.

Whereas the former test is overwhelmingly used, the latter form of insolvency has been successfully availed of only exceptionally, the main reason presumably being the information asymmetry between creditors and debtors regarding the existence of all assets and payables and uncertainty about the valuation of the debtor's assets.

Supreme Court decision

It has been unclear whether the definition of balance-sheet insolvency requires the existence of two creditors with past due claims. As it follows from the text above, unlike the definition of cash-flow insolvency, the provision on over-indebtedness does not contemplate two creditors with matured receivables; it simply requires the plurality of creditors without specifying further conditions regarding the maturity of their claims.

However, a provision on dismissal of an insolvency petition in another part of the Insolvency Act states that in case of a creditor's insolvency petition, the insolvency court shall dismiss the petition if it is not ascertained that another creditor has a matured claim.

In the case considered by the Supreme Court, the debtor had several matured claims. In order to avoid insolvency proceedings, it allegedly deliberately agreed upon the prolongation of its claims with some of its creditors, while repaying all the remaining creditors with the exception of the claim of the insolvency petitioner. On the basis of the above-mentioned rule, the High Court in Prague as an appellate court ruled that both forms of insolvency (illiquidity and over-indebtedness) require establishing the existence of at least two creditors with *past due* claims. Consequently, the court dismissed the insolvency petition with the reasoning that the insolvency petitioner failed to establish the existence of another creditor with a matured claim.

Upon an extraordinary appeal, the Supreme Court rightly reversed the High Court of Prague decision and ruled that in order to establish balance-sheet insolvency, it suffices that the petitioner has one past due claim so that all other claims do not necessarily have to be mature. The Supreme Court, in effect, concluded that the provision on dismissal of an insolvency petition related solely to cash-flow insolvency and not to balance-sheet insolvency.

Other issues unresolved

Although one can praise the Supreme Court decision at hand, several issues are still unresolved. One major question relates to the valuation of businesses and its determination. To my best knowledge there is not a single decision which thoroughly addresses over-indebtedness in detail. In the light of a potential slowdown in the economy, this does not bring any certainty to the respective playing field. ■

> **THERE IS NOT A SINGLE DECISION WHICH THOROUGHLY ADDRESSES OVER-INDEBTEDNESS IN DETAIL**

PETR SPRINZ
Partner, Havel & Partners s.r.o.
Prague, Czech Republic

Technical Update

Winter 2019/20

Myriam Mailly, Technical Officer of INSOL Europe, reports on the technical content made available throughout 2019 and other updates on the INSOL Europe website

MYRIAM MAILLY
INSOL Europe Technical Officer

THE FINAL TEXT OF THE RESTRUCTURING & INSOLVENCY DIRECTIVE AS PUBLISHED IN THE OFFICIAL JOURNAL OF THE EU IS NOW AVAILABLE FROM THE INSOL EUROPE WEBSITE

Updated insolvency laws

Updated Insolvency Laws have been published in 2019 for Switzerland. We are grateful to Prof. Dr. Rodrigo Rodriguez, Rechtsanwalt Wissenschaftlicher Berater (Eidgenössisches Justiz- und Polizeidepartement EJPD, Bundesamt für Justiz BJ, Direktionsbereich Privatrecht) for sharing this information.

Twelve countries remain covered so far: Belgium, Bulgaria, Finland, France, Germany, Greece, Lithuania, Luxembourg, Spain, Sweden, Switzerland and The Netherlands.

National insolvency statistics

New or updated national insolvency statistics are regularly published on the INSOL Europe website. Currently, national insolvency statistics are available for Austria, Belgium, Croatia, Cyprus, Denmark, England & Wales, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Portugal, Romania, Scotland & Northern Ireland, Spain, Sweden and Switzerland.

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, Spain, Sweden and Switzerland), please do not hesitate to send me the information.

National insolvency statistics by outcomes

In 2019, local experts have worked on this theme under the aegis of the INSOL Europe EU Relations Working Group now chaired by Barry Cahir and assisted by Paul J. Omar (INSOL Europe Technical Research Coordinator) and myself.

Relevant information on national insolvency statistics by outcomes is thus now available for the following countries: Bulgaria, Cyprus, Czech Republic, Denmark, England & Wales, Estonia, Finland, France, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

Please contact me at mailly.myriam@orange.fr if you want to contribute within the EU Relations Group.

EIR Case Register

Recent cases delivered in 2019 from the CJEU and national first instance and appeal courts of the EU Member States applying the EIR or the EIR Recast are available on the INSOL Europe Case Register which is accessible from the Lexis Library.

Please note that the access to the INSOL Europe EIR Case Register from the Lexis Library has recently changed: rather than being available under 'International cases', users can now find the content by logging-in as usual and by clicking on the top tab 'Sources' on the far right. The next step is to find 'INSOL Europe: European Insolvency Regulation Case Register' and to click the 'browse' button on the right hand side.

Please be also reminded that if you have forgotten your User ID and Password you will need to contact Lexis via their dedicated mailbox for INSOL Europe users: (INSOL-Users@lexisnexis.co.uk) to get a reminder.

If you need any assistance, please send an email to technical@insol-europe.org

The European Insolvency Regulation 2015/848

In 2019, a new set of information has been made available to help the insolvency actors to find relevant information on the national laws applicable to cross-border insolvencies when applying the EIR Recast.

You will find on this dedicated webpage *the list of the official texts* (and amended Annexes following the Regulation (EU) 2018/946 of 4 July 2018 - date of effect: 26/07/2018), 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.

Indeed, a table focusing on the *outcomes of national insolvency proceedings applicable under the scope of the EIR Recast* is now available for Bulgaria, Cyprus, Czech Republic, Denmark, England & Wales, Estonia, Finland, France, Greece, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.

Moreover, the links to the *(official) national texts adopted in domestic legislation to deal with the (concrete) application of the EIR Recast* are available for the following countries: Czech Republic, England & Wales, Finland, France, Hungary, Ireland, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Spain and The Netherlands.

I am grateful to the experts within the INSOL Europe EU Relations Working Group for sharing the information.

The European Directive on Restructuring and Insolvency (2019)

The EU adopted on 20 June 2019 the Directive (EU) 2019/1023 of the European Parliament and of the Council on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (hereafter the 'Directive').

With that text (OJEU L 172 of 26.06.2019, p. 18-55), the European Union aimed at disseminating in all EU Member States modern and streamlined rules that should facilitate restructuring, give entrepreneurs a second chance and improve the efficiency of restructuring, insolvency and debt discharge procedures. In other words, that Directive would allow viable business in distress to be rescued and honest but bankrupt individuals to be given a second chance, among other provisions.

The final text of the Restructuring & Insolvency Directive as published in the official journal of the EU is now available from the INSOL Europe website.

According to its Article 34, Member States are required to adopt and publish the laws, regulations and administrative provisions necessary to comply with the Directive (subject to several exceptions detailed into the same Article) by 17 July 2021. As several EU Member States are already in the process of adopting such provisions in order to implement the Directive into domestic legislations, any document of interest can be sent to mailly.myriam@orange.fr

Last but not least, *relevant information on the state of play in domestic legislations before the adoption of the Directive* is still available 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.

Special thanks go to the experts of the EU Relations Working Group for sharing this information with the INSOL Europe members. If you want to contribute as well for non-covered countries, please do not hesitate to send me any relevant links, articles etc...

Brexit publications

Two articles relating to Brexit are still available on the INSOL Europe website, namely '*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 U.S. since 2005 and is available on the Global INSOLvency website. This link is now also accessible from the introduction page of the Technical Content section.

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 2019 technical series publication arising from the Annual INSOL Europe Academic Forum Conference in Copenhagen will be available online soon!

INSOL Europe events

The presentation slides and the final programme of the INSOL Europe Academic Forum Conference (25&26 September 2019, Copenhagen, Denmark) and of the INSOL Europe Annual Congress (26-29 September 2019, Copenhagen, Denmark) are available as well as the materials/videos of the EECC Conference 2019 (6&7 June 2019, Ljubljana, Slovenia). The photographs of these events have also been published. Do not hesitate to have a look! ■

Useful Links

Email:
technical@insol-europe.org

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

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

www.insol-europe.org/technical-content/outcomes-of-national-insolvency-proceedings-within-the-scope-of-the-eir-recast

www.insol-europe.org/technical-content/state-of-play-of-national-insolvency-data-by-outcomes-currently-available

www.insol-europe.org/national-texts-dealing-with-the-eir-2015

EU Directive on Restructuring and Insolvency (2019)
www.insol-europe.org/technical-content/eu-draft-directive

www.insol-europe.org/technical-content/eu-directive-on-restructuring-and-insolvency

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

Books

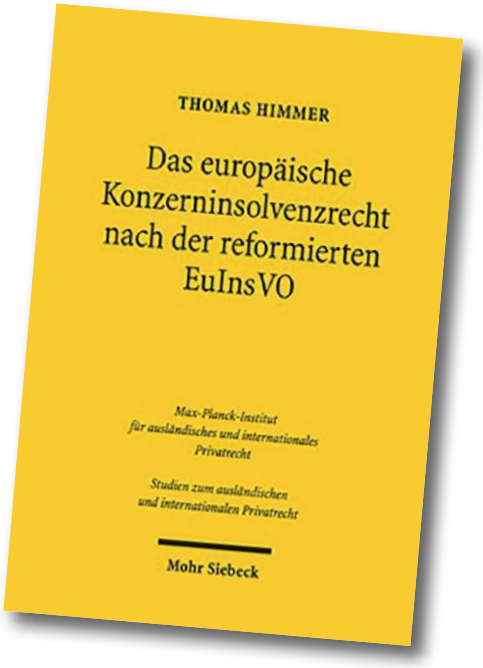
Here we regularly review or preview books which we think are relevant and interesting to our readers.

If you would like to suggest a book for a future edition, please contact Paul Newson on: paulnewson@insol-europe.org

Das europäische Konzerninsolvenzrecht nach der reformierten EuInsVO

(The European Group Insolvency Law after the reformed EuInsVO)

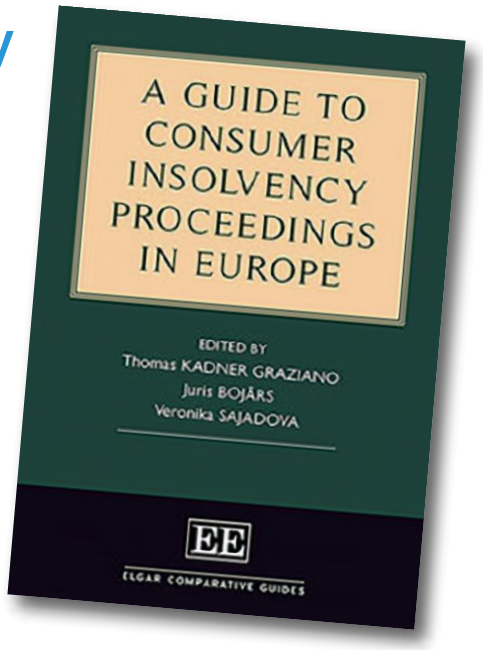
Thomas Himmer, Mohr Siebeck, 1st edition, 2019. XXIV + 484 pages. ISBN 978-3-16-157587-7, €84



Group insolvencies have become a particular challenge for international insolvency law. Finally, the European legislator played its card and devised Arts. 56-77 EIR 2015, i.e. not less than twenty-two articles, in order to tackle this intricate problem. The coordination model implemented with its two-tier superstructure is innovative. However, in the first prominent case of a cross-border group insolvency after the EIR 2015 had become effective, namely *Air Berlin* and *NIKI*, the new rules have *not* been applied. One can only speculate about the reasons why this has been so. That time is of the essence in the early stages of an insolvency might be one explanation. More generally, innovations might simply take their time to conquer minds and to encourage pioneers to employ them. To this avail innovations need interpreters. The better innovations are explained and the better they are analysed, the more successful they might become. Hence, academics have the task to delve into new rules like Arts. 56-77 EIR 2015. The work under review does this in the most impressive fashion. It provides the most in-depth analysis conceivable now and stands miles above contemporary parallel works. It invests heavily – and this investment pays rich dividends immediately. The work under review – a Bayreuth *Dissertation* of 2018, supervised by *Jessica Schmidt* – painfully follows the detailed European rules into their tiniest details (and into their darkest spots). The number of pages alone (484) would be indication enough that the minutiae do not escape attention. And better, quality meets quantity here. The only desire not fulfilled would have been to employ more economic analysis. If one is not afraid of the German language, this is the first address to consult whenever a European cross-border group insolvency raises questions and, in its wake, questions concerning Arts. 56-77 EIR 2015 emerge.

Prof. Dr. Peter Mankowski
Chair for Private Law, Private International Law and International Procedural Law, Director of the Seminar for Private International Law and International Procedural Law, University of Hamburg, Germany

A Guide to Consumer Insolvency Proceedings in Europe



Thomas Kadner Graziano, Juris Bojārs and Veronika Sajadova (eds); Edward Elgar, 1st edition, 2019,1162 pages, ISBN 978-1-78897-564-3, £250

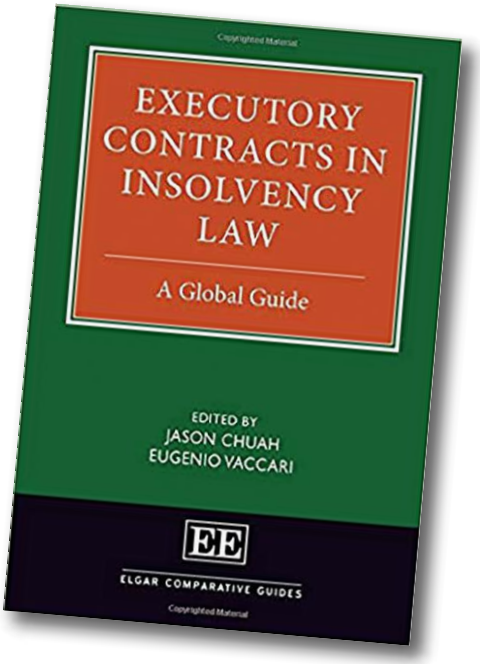
The cross-border impact of corporate cases is well-known, but there has also been a steady trickle of cases featuring consumers and entrepreneurs facing the spectre of insolvency. Practice today requires some appreciation of the potential implications of consumer procedures in offering client advice. This text, constituting one of the most comprehensive surveys of consumer law in the past decade, offers insights into the law and practice in 30 European jurisdictions and is prefaced by two chapters introducing the topics of consumer over-indebtedness and debt relief as well as how comparative law has been used in this project to understand the position in the countries surveyed.

The various country chapters, written collectively by 50 or so experts drawn from academia, practice and the judiciary, offer a wealth of information following a set pattern that looks at issues including, inter alia, access to proceedings, payment plans, discharge regimes, the place of courts and practitioners within the processes and the fine detail of what happens to the debtor and his/her assets as procedures unfold. Costs and creditor supervision of the process are also outlined. Where available, statistics are also provided and the chapters conclude with an assessment of reform initiatives and the strengths and weaknesses of the jurisdictional frameworks.

Overall, this is a work of considerable achievement and, though some of the finer points of tariffs and thresholds will probably change, it will likely remain a strong point of reference for those interested in the development of consumer insolvency law.

Paul J. Omar
Technical Research Coordinator

Executory Contracts in Insolvency Law: A Global Guide



Jason Chuah and Eugenio Vaccari (eds); Edward Elgar, 1st edition, 2019, 736 pages, ISBN 978-1-78811-551-3, £195

Executory Contracts in Insolvency Law: A Global Guide, edited by Professor Jason Chuah of City University in London and Dr Eugenio Vaccari of the University of Essex compiles a thematic and comparative critique of the treatment of executory contracts during insolvency procedures in 34 jurisdictions from all over the world. This book brings together 46 authors in collaboration to discuss firstly the insolvency procedures available in their jurisdictions, followed by how executory contracts are dealt with in each procedure. Each chapter also gives some insight into the debate around reform in this area.

Executory contracts are a complex problem for insolvency law procedures as a financial crisis does not necessarily bring contracts to an end, creating a difficult legal quandary on how to resolve overhanging contractual obligations that a company may not be able to afford to resolve under the originally agreed terms. The project undertaken by Chuah and Vaccari aims to interrogate the approaches of a range of developed and developing countries, identifying (at p.2) "key supporters, the stakeholders, and the pull-push factors driving the agenda for reform."

Chuah and Vaccari have put together a timely and well organised tome that not only gives the reader an understanding of a very technical area of insolvency law in the treatment of executory contracts, but also offers an up to date review of insolvency law procedures in a plethora of jurisdictions. The presentation also divides the contributions into legal families (civil, common law, and hybrid) which is particularly valuable to the comparative academic lawyer.

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2020

21-22 May	INSOL Europe Eastern European Countries' Committee Conference *Kyiv, Ukraine*
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*

2022

5 & 6 October	INSOL Europe Academic Forum Conference *Dubrovnik, Croatia*
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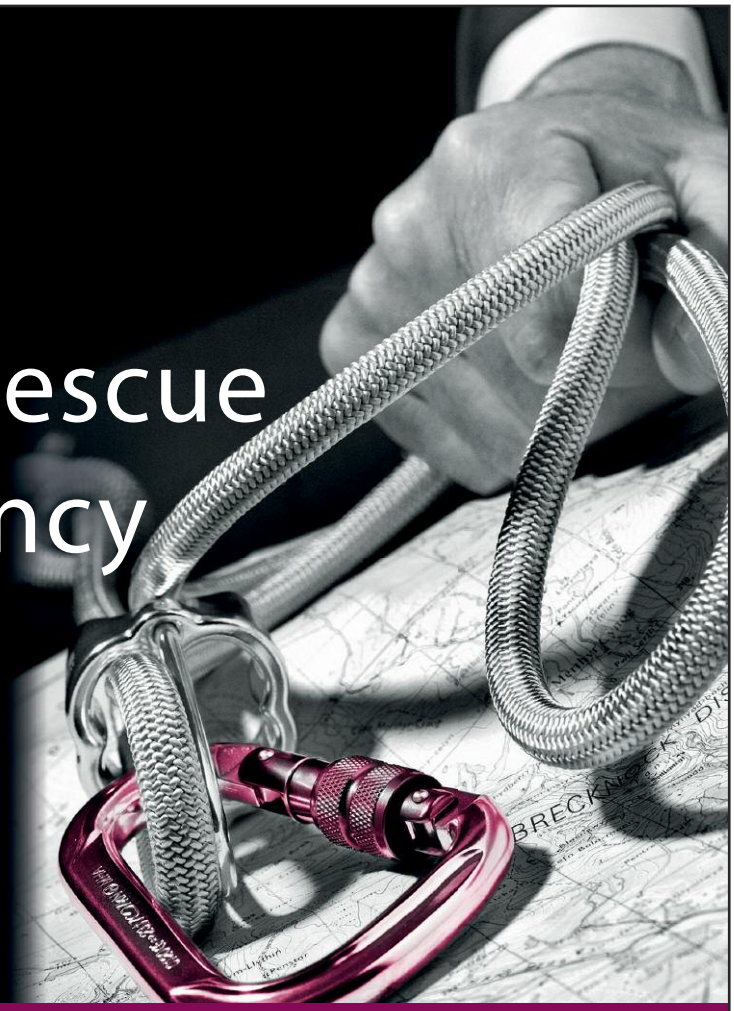

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