INSOL EUROPE
40 YEARS 1981-2021

#84 · Summer 2021

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The journal of INSOL Europe

The impact of COVID-19 in Europe:

Restructuring and Insolvency Laws

Adopting the EU Directive

Also in this edition:

- Crypto Assets - Digital Gold
- The Judicial Wing at 15
- President Biden's First 100 Days
- The Richard Turton Award celebrated
- Country Reports *...and more*

€30 ISSUE 84

ISSN 1752-5187

Eurofenix General Sponsor

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#84 Summer 2021

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Printed by Pyramid Press

www.pyramidpress.co.uk

Distributed by Meads

www.collationservices.co.uk

NEXT ISSUE PUBLISHED: Oct. 2021

Copy deadlines available on request.

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Welcome from the Editors

EDVĪNS DRABA

CATARINA SERRA

Now, as we are approaching the middle of the Summer season, with the life slowly and gradually returning back to normal, many hard-working individuals – insolvency professionals, certainly, among them, may finally go for a trip abroad on a vacation or enjoy live entertainment in their own countries.*

It seems that the haste and uncertainty that marked the most of the last year has stepped aside, when the governments and legislators were going back-and-forth between easing and increasing restrictions, reacting to (often delusive) reductions in the number of COVID-19 cases, followed by sudden spikes.

Hence, the national legislators may catch their breath and, after the Summer break, continue building their restructuring and insolvency framework – both aimed at addressing the short-term issues posed by the pandemics as a cataclysmic event and long-term issues. As we have evidenced through the COVID-19 crisis, long-term issues are sometimes sacrificed in favour of the short-term ones. This might be a fair and logical sacrifice (p. 20) in the current conditions and it is no wonder that many EU Member States are behind the schedule in transposing the Directive on Restructuring and Insolvency. What is more concerning, as Prof. Bork points out in his article, is that the transposition process has illuminated some systemic problems among the EU Member States in their ability to keep pace with the EU that need to be worked out.

Moreover, the urgency may still be there. With the Member States bogged down in the transposition process of the Directive while simultaneously combatting the pandemic, another set of amendments is already around the corner, as the European Commission is committed to submitting an impressive list of proposals for the harmonisation of insolvency laws by next Summer. Whether this will result in a sound piece of EU legislation and, eventually, efficient national implementations, remains to be seen.

On another note, as one can read from the report on the recent session of UNCITRAL's Working Group V on insolvency (p. 9), a sense of urgency was in the air in that venue, too, as the delegates feared the "potential consequences that the eventual withdrawal of SME protection provided during the COVID-19 pandemic may have" quite soon. The need for an "imminently useable instrument to help SMEs" curb those consequences – recommendations for a simplified insolvency regime – was highlighted. Hopefully, the text will be finalised just in time.

This shows us that, for various reasons, urgency will not leave the restructuring and insolvency field soon, even in the Summer bliss.

By the way, for those interested in the above-mentioned differences between the law suited to address cataclysmic events versus the law suited for more mundane everyday tasks, Prof. Paulus expands insightfully on the topic in this edition. He explores various historical examples and makes a dichotomy of "good-weather insolvency laws" and "bad-weather insolvency laws", where, as he argues, solidarity should be the cornerstone of the latter (p. 17).

Concluding the editorial for the Summer edition, I, myself being one of the previous winners of the Richard Turton Award, would like to wholeheartedly encourage young professionals among our readership to participate in this competition, which may serve as a trampoline to an exciting career in the international insolvency law (pp. 28-31).

* Where the legislation allows so.

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Summertime and the living is easy?

MARCEL GROENEWEGEN
INSOL Europe President

Marcel Groenewegen writes on the prospect of a Summer with less COVID-19 restrictions, back to normal life and a hopeful outlook for the Autumn programme of INSOL Europe in the final part of its 40th anniversary year

> *Now we feel we are on the brink of getting 'back to normal', a phrase which, however, may have a different meaning for many of us*

I am glad and proud to introduce this Summer Edition of Eurofenix to you with many interesting contributions from all over Europe and an overview of INSOL Europe's recent and upcoming activities.

Whilst the COVID-19 pandemic seems now to have lost its feverish pace to a large extent, the impact on the personal and professional life of many of us is still clearly visible.

It is therefore fitting that this Eurofenix edition highlights this impact in various ways, by exploring and explaining new insolvency legislative initiatives throughout Europe. All, of course, against the background of the EU Restructuring Directive.

Now we feel we are on the brink of getting 'back to normal', a phrase which, however, may have a different meaning for many of us. Whilst some of us dream to return full-time to the office and to meet colleagues and friends in 'real time', others have already adapted to the 'new normal' and will also work from home in the future at least part-time.

As regards the restructuring and insolvency profession, the predicted and expected flood of (corporate) bankruptcy proceedings throughout Europe does not yet seem to have reached us. This may well be a result of the continued financial support from governments to business meant to prevent massive bankruptcies and large numbers of lay-offs.

However, as the saying goes, "all good things must come to an end". Given the improving financial climate and as we slowly seem to be climbing out of the

depths of the COVID-19 crisis, we must now expect this support to end rather sooner than later.

New horizon

This new horizon also means that new restructuring tools, which have seen daylight (some of them at *warp speed*) over – roughly speaking – the past year, become increasingly important. The English Restructuring Plan, the Dutch WHOA-scheme and the German StaRuG – each with its own merits and specific characteristics – all are now successfully used for restructuring purposes and will continue to be used as such. Other EU countries (such as Spain) are on the verge of introducing new similar instruments in their own jurisdiction. Whilst both practitioners and courts alike sometimes still struggle with some aspects of the new instruments, a more sophisticated legal practice will no doubt develop in the coming year(s).

You will find contributions on these developments in various countries in this Summer edition and I use the opportunity once again to promote INSOL Europe's tracker[1] to allow you all to keep track on the progress of the implementation in the various jurisdictions. Please use this tool!

In our ever-increasing digital world and profession, digital assets such as *cryptos* have become the new kid on the insolvency block. Members of INSOL Europe's Insolvency Tech & Digital Assets Wing update you on the newest developments and case law on this new type of assets.

Back to the Future

As I write this column, the preparations for INSOL Europe's online Autumn Webinar on 7 and 21 October and the Dublin Annual Congress in March 2022 are in a very advanced stage and the programmes promise to be exciting. The work on the Dubrovnik Annual Congress in October 2022 has also already been set in motion.

Whilst the Autumn conference will be held online, INSOL Europe's Executive is still hopeful that the Dublin Annual Congress will be a live event. Registration for both events is now open, so please do enroll and enjoy Dublin in Spring 2022.

Stay also tuned into all INSOL Europe activities and do regularly visit the INSOL Europe website to stay up to date with our initiatives.

As this Eurofenix issue finds its way towards you, I hope all of you will be able to enjoy some warm Summer weather and relaxation before a no doubt busy Autumn and the 'new normal' – in whatever form and manner - will further descend upon us.

I hope you will find this edition an interesting read and wish you and your beloved ones a wonderful Summer. ■

Footnote:

1 www.insol-europe.org/technical-content/introduction

> *"The English Restructuring Plan, the Dutch WHOA-scheme and the German StaRuG … all are now successfully used for restructuring purposes and will continue to be used as such"*

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*

COFFEE BREAKS 2021

New video from Denmark

The latest video in our **'Coffee Breaks: Connecting Minds 2021'** series from Denmark has now been published, featuring Michala Roepstorff (Attorney-at-Law, Partner, Plesner, Denmark), Henrik Sjørslev (Partner, Head of Finance, Project & Restructuring, DLA Piper, Denmark) and Jeanette Melchior (INSOL Europe Judicial Wing member, Senior Deputy Judge, The Maritime & Commercial Court, Denmark).

'Coffee Breaks: Connecting Minds 2021' videos are brought to you in partnership **with the European Bank for Reconstruction and Development (EBRD)** and its **Legal Transition Programme (LTP)**.

The LTP is the EBRD's initiative to contribute to the improvement of the investment climate in the bank's countries of operations by helping create an investor-friendly, transparent and predictable legal environment. This objective is implemented by the Legal Transition Team, a dedicated team of specialised lawyers working across the 38 economies where the EBRD invests.

Connecting our members with online speed networking

At the last Young Members Group (YMG) speed networking event following our Spring Online Conference in March, we were overwhelmed by the turnout of the session and the feedback we received both during and after the event.

This hour went by in a heartbeat and it was so much fun to see old friends and meet new colleagues. Therefore, we want to re-group again. This time however, with the goal to make even more new friends for the YMG.

With this in mind, the next **YMG-Online Speed Networking event on 2 September** stands under the motto *"expanding the horizon and making new friends"* for us and for INSOL Europe. So when you join this time we would ask you to invite one of your colleagues or friends that is not yet a member of INSOL Europe to join you and us.

For full details and to register your place, visit our website: www.insol-europe.org/events

Please note that as usual, spaces are limited on a first come first served basis, and on this occasion they will be even more limited as members will be bringing along a non-member guest!

With thanks to our Young Members Group sponsor, Schiebe und Collegen (www.schiebe.de).

INSOL Europe's general networking event on 17 June was open to all members. It was sponsored and facilitated by Simeon Gilchrist of Edwin Coe, and included a competition for a bottle of bubbly. This evening was also well attended and judging by the feedback the attendees thoroughly enjoyed it. A short clip of the evening has been published at: *www.insol-europe.org/publications/online-conference-videos*

UNCITRAL Working Group V 58th (Virtual) Session 4-7 May 2021

Simplified Insolvency Regime for MSEs

UNCITRAL's Working Group V on insolvency met for its 58th session from 4-7 May in a virtual space instead of in the bustling metropolis of New York City, much to the regret of the majority of the delegates. *Jenny Gant reports.*

The online meetings were hosted in Vienna where delegates from across the world united morning, noon and night (depending on the time zone) to discuss the remaining questions within the 107 provisions and 389 commentary paragraphs of the draft text on a simplified insolvency regime.

There was a sense of urgency in the proceedings due to the potential consequences that the eventual withdrawal of SME protection provided during the COVID 19 pandemic may have in the near future. The tenor of the discussions and debate highlighted the need for an imminently if not immediately useable instrument to help SMEs deal with the fall out of pandemic related lockdowns. The impact of the pandemic on the efficiency of discussions fed into that concern further, which inspired the convening of several informal sessions hosted on Zoom, during which many of the issues were acknowledged and at least to some extent ironed out before the formal meetings convened.

Despite issues of efficiency due to the virtual format and the challenges of interpretation over poor connections, the Working Group succeeded in finalising the 107 recommendations and most of the commentary, agreeing in the end to submit the recommendations for approval in principle to the Commission, leaving the door open to revisit the recommendations at the next session should that be necessary. This should mean that the instrument will hopefully be available as a resource for SMEs by the time the economic fallout due to withdrawn safety nets proffered during the pandemic come home to roost.

A full report by Dr Jennifer L L Gant titled 'UNCITRAL Working Group V and a Simplified Insolvency Regime for MSEs' is published at: www.insol-europe.org/news/inside-stories

Click here

Yves Merlat RIP

We have the sad duty of informing you on the passing away of our long-time member, Yves Merlat.

Yves was one of the five members who founded INSOL Europe's Judicial Wing during the conference in Bucharest in 2006.

Unlike the other judges in this group, he did not hold a degree in law but an engineering degree.

After graduating from the French Ecole des Mines in 1965 he had a remarkable career as a manager for several large business companies. This career took him to many countries around the world.

His professional responsibilities included managing and understanding people with diverse national and cultural backgrounds.

In 1998, he became a Juge Consulaire (elected honorary commercial judge) of the court in Evry, France, where he mainly presided over insolvency cases and commercial litigation matters.

The Judicial Wing greatly benefitted from Yves' background and commitment.

By sharing his views as a business person with the legally trained minds of this group, he could contribute to broadening the perspectives of many discussions.

Yves was a highly respected member of associations working to further and improve international insolvency law, such as INSOL, the International Insolvency Institute and the International Exchange of Experience on Insolvency Law network.

His memory will remain alive among the members of INSOL Europe.

We extend our condolences to his family and friends.

Eberhard Nietzer, Nicoleta Mirela Nastasie and Michael Quinn, Co-Chairs of the INSOL Europe Judicial Wing

A closer look at...

2020 statistics on business failures

Emmanuelle Inacio compares the insolvency statistics of several major jurisdictions that have been impacted by the COVID-19 pandemic

EMMANUELLE INACIO
INSOL Europe Conference Technical and Training Course Director

> *Business failures seem to mark a "pause" around the world while the global health emergency continues*

The Dun & Bradstreet 2020 Global Bankruptcy Report[1] shows that the number of business failures have decreased in Q1-Q3 2020 of 28[2] of the 36[3] countries monitored despite the impact of the pandemic crisis.

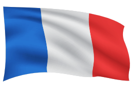
Business failures seem to mark a "pause" around the world while the global health emergency continues. Indeed, businesses are still very dependent on public aid to survive today: emergency loans, debt moratoriums, suspension of the opening of collective proceedings, etc.

United Kingdom

In the UK, business failures fell by 26.8% in Q1-Q3 2020 compared to the same period in 2019 with a 12.9% fall in machinery manufacturing, and a 35.9% reduction in wholesale trade failures. However, the government support measures to prevent companies from going out of business artificially masked the impact of the pandemic on credit risk levels. The report forecasts a rise in the risk of non-payment as the gross operating surplus of the UK, including company profits, fell by 2.9% in 2020.

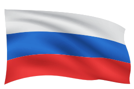
Germany

In Germany, business failures have declined by 13.1% y/y in Q1-Q3 2020, and then continued to drop y/y through November, contributing to a 15.9% fall in failures for the first 11 months of the year. The wholesale, retail and construction sectors are particularly severely affected by the COVID-19 pandemic (each accounting for circa 16% of the total), followed by accommodation and food services. However, the duty to file for insolvency after the company became insolvent as a consequence of the COVID-19 pandemic was suspended in 2020. Moreover, in 2021, new measures allow distressed companies an extended six-week period before filing for insolvency. Nonetheless, payment delays and insolvencies are expected to rise in 2021 given the damage inflicted to cashflows in certain sectors.



France

In France, business failures dropped by 38.1% for 2020 as a whole, with the lowest rate of insolvency proceedings for 30 years. However, the wholesale, retail, construction and accommodation sectors are the most severely affected by the COVID-19 pandemic. The deferral or exemption of certain taxes, employment support, the availability of state-guaranteed loans and the temporary easing of filing requirements in March-August 2020 explain the low rate of business failures. Moreover, the creditors appear to be seeking preventive and confidential debt agreements with distressed companies, rather than filing for liquidation. As the COVID-related economic shock has affected cashflows in many businesses and has already pushed up payment delays (averaged 15.24 days in Q3 2020), the failure rate is expected to accelerate in 2021-22 as the prolonged period of cashflow damage takes its toll.



Russia

In Russia, business failures fell by 12.9% y/y; and 25.6% y/y in

January-July 2020. The government introduced a range of support measures in early 2020 in an effort to help SMEs reduce the negative impact of the COVID-19 pandemic and they have been extended to 2021. However, the government is not able to extend them for much longer as state finances have deteriorated significantly due to the COVID-19 pandemic. Not only revenues have been hit by a reduced tax base as a result of the economic fall, but also by a sharp slide in the oil sector receipts, because of the COVID-19 pandemic-induced drop in global energy demand and prices. As a consequence, in 2020 Russia registered its first fiscal deficit in three years. Thus, credit risks will remain elevated in 2021 and 2022.

United States

In the US, the overall number of commercial insolvencies declined by 11.9% in Q1-Q3 2020, whereas the insolvency applications were largely filed by businesses in the services, retail trade, finance, insurance and real estate sectors. However, within this period, with the exception of February, total Chapter 11 insolvency filings were higher for each month of the COVID-19 pandemic compared to 2019, as businesses reorganised their operations and restructured debt in order to be able to continue operations as solvent companies when commercial activity improves. The government's Paycheck Protection Program (PPP) helped to contain the rate of business failures even if some sectors continued to suffer, such as the small businesses in the mining sector, that demonstrated the highest rate of payment delinquency at 12% compared to other sectors. The second round of PPP funding and other government measures are expected to support economic recovery in 2021 and help to further contain insolvency rates.

Conclusion

The Dun & Bradstreet 2020 Global Bankruptcy Report states that business failures are expected to increase at the end of 2021, whether from a continuation of the COVID-19 pandemic or a recovery in business exit patterns. However, the report concludes that the most serious risk is that the pressures of the COVID-19 pandemic are such that insolvency procedures are permanently impaired, in a deeper microeconomic change. ■

"The most serious risk is that the pressures of the COVID-19 pandemic are such that insolvency procedures are permanently impaired"

Footnotes:

1 www.dnb.com/content/dam/english/economic-and-industry-insight/global-bankruptcy-report-for-2020.pdf

2 Only in a few jurisdictions business failures increased including Portugal, Bulgaria, Poland, the Czech Republic, Hong Kong, Sweden and Taiwan Region.

3 Austria, Belarus, Bosnia, Bulgaria, Croatia, Czech Republic, Denmark, Finland, France, Germany, Hungary, Italy, The Netherlands, Norway, Poland, Portugal, Romania, Russia, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, United Kingdom, Canada, Colombia, USA, Australia, Hong Kong SAR, India, Japan, Singapore, South Korea.

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:

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Digital Gold: Implications of crypto assets under an insolvency scenario

“*The transactions of crypto assets are on the internet and therefore, considered as global*”

On 15 April, INSOL Europe and INSOL International held their joint Online Seminar 2021. Our co-chair David Orsula moderated the panel “Digital Gold: Treatment of Crypto Assets in Insolvency”, which started with a keynote speech by Professor Ignacio Tirado, Secretary-General at UNIDROIT.

Members of INSOL Europe's Insolvency Tech & Digital Assets Wing, Lee Pascoe and Ilya Kokorin, discussed some of the latest cases at the intersection of insolvency and digital assets, which we summarize in this article.

Are cryptocurrencies property?

The transactions of crypto assets are on the internet and therefore, considered as global. However, the regulation on digital assets is fragmented, which creates uncertainty.

The main debate is **whether to recognize cryptocurrencies as property**. More and more jurisdictions provide such recognition.

- If considered property, the second question would be whose property it is. Is cryptocurrency the property of a crypto-exchange or another crypto-custodian or does it belong to crypto-investors (e.g. customers of a crypto-exchange)?
- If cryptocurrencies are considered as the property of the investors, then their rights against an insolvent exchange may be of proprietary nature (versus a contractual nature).

In this regard, UNIDROIT is aware that international clarity is needed. It has recently established a working group designed to develop a legal instrument containing principles and legislative guidance in the area of private law and digital assets. According to its Secretary-General, Professor Tirado, “*some sort of property right can and should be asserted over cryptocurrencies*”. However, the debate is not clear and there have been cases with different results in different jurisdictions:

- In the **Mt. Gox case** (once the largest bitcoin exchange in Japan), the Tokyo District Court decided that bitcoin was **not considered property under Japanese Law** (as it is not something tangible). Therefore, clients of the insolvent intermediary only had a contractual claim against the intermediary (and not proprietary rights).
- In the **Bitgrail case** (Italy) the Court of Florence decided that cryptocurrencies may be considered property. However, the crypto assets

were considered to be commingled, which gave rise to a relationship of irregular deposit. This led to the disappearance of the proprietary rights of investors, as the cryptocurrencies had become **property of the custodian**.

- In the **Cryptopia case** (New Zealand), the New Zealand High Court ruled that there was property but in the form of a trust. That is to say, crypto assets were not the property of the trustee, they were held on trust by Cryptopia for the account holders (a separate trust for every account holder). Therefore, they were the **property of the account holders**.

Main issues under insolvency

Identification and retrieval:

The first issue that a court-appointed insolvency practitioner will encounter is how **to find out if there are any crypto assets in the estate** of the insolvent debtor.

This information should be requested from the insolvent debtor. Nonetheless, there are other ways to investigate and see: if software associated to crypto assets can be found in the devices used by the insolvent debtor, if bank transfers of the insolvent company mention BTC or any terms related to crypto assets, if there are large files that could imply the download of blockchain, etc. Then the matter is how to obtain private keys and get access to the crypto wallets, holding crypto assets. The insolvency practitioner may use the tools available in their jurisdiction to obtain them (i.e. to subpoena the directors, workers, etc.).

Sometimes, crypto assets need to be retrieved. For example, in the **Dooga Ltd case**, the crypto register from the UK went bankrupt due to a hack in 2018 and the company hired experts to trace the crypto assets by doing blockchain research and trying to link them to people or intermediaries. Fortunately, the experts found out the wallets with the stolen assets in two US cryptocurrency exchanges. After a Chapter 15 recognition in the US, the US Court ordered the turnover of the contents of certain accounts opened with Coinbase Inc and Bittrex Inc.

Preservation:

Once identified, cryptocurrencies should be preserved. Wallets can be accessible by people who have the private key, and as per the advice of the Australian Financial Service Authority, cryptocurrencies should be transferred to a wallet controlled by an insolvency practitioner. In this regard, it is recommendable that insolvency practitioners have an encrypted offline wallet (not connected to the Internet) ready-to-go in case they are appointed.

Not properly securing the crypto assets could lead (as it has indeed happened) to people with a private key accessing the wallet and stealing its content.

There is also a risk of a mistake in the transfer of digital assets between crypto addresses. In the QuadrigaCX case, crypto currencies for a value of 500,000 Canadian dollars were lost for a mistake of this sort (given the volatility in the value, those crypto currencies lost would be worth… over 7 million Canadian dollars at the date of the online seminar!).

Valuation and realisation:

We are all aware of the high market volatility and the constant change in prices of crypto assets. If possible, it would be advisable that the Court sanctions the method for realisation of crypto assets, including its timing and methodology (e.g. over-the-counter trade, sale or exchange via a crypto-exchange, an auction or a public tender).

Distribution:

There would also be issues affecting the distribution (if a distribution *in specie* can be made or if the cryptocurrency needs to be converted into the local (*fiat*) currency prior to the distribution). In the Mt. Gox case, for example, the bankruptcy proceedings have been converted into a civil rehabilitation plan so that distributions could be made *in specie*.

Relevance of foreign judgements

Digital currency exchange insolvencies are large cross-border collapses, with creditors in several jurisdictions. As it is such a new area, insolvency practitioners involved in such insolvencies should look at what has happened in other jurisdictions. In fact, the decision in New Zealand has cited previous rulings from the UK and Singapore.

With this in mind, the Insolvency Tech & Digital Assets Wing is developing a case register of crypto assets and insolvency, which will be accessible through INSOL Europe's webpage. ■

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Past, present and future: The impact of the COVID-19 pandemic on restructuring and insolvency laws in Europe

Prof. Christoph G. Paulus cites examples from the past and the present that can help us prepare for future similar events

PROF. CHRISTOPH G. PAULUS
Professor/Lecturer at Humboldt-Universität zu Berlin, Germany

I am sure that we all find in the previous decades examples for sudden changes of our national insolvency laws due to unforeseen circumstances

The past

We should refrain from believing that Europeans have never before encountered experiences similar to those that we have lived through during the last say 1½ years – the contrary is true. This has – not only but to a high degree – to do with the belligerent history of Europe.

Events such as the 100 years war between France and England, the 30 years war between almost everyone against everyone on German soil, the world wars with their comparatively short duration – they all had disastrous effects on the population and their economic activities. The treatise on the then applicable insolvency law by David Mevius, *Theatri Concursus Creditorum Diaskepsis de Cessione Bonorum*, published in Greifswald in the year 1637 can be fully understood only when keeping in mind that this politician, scholar and diplomat wrote against the background of the 30 years war. Moreover, in the 5th century BC (sic!), the famous Greek physician Hippocrates has written on "epidemics".

But even if we look back to the much more recent history, I am sure that we all find in the previous decades examples for sudden changes of our national insolvency laws due to unforeseen circumstances. As a German I can contribute to this list the two or three events within the last 20 years or so in which summer rains of exceptional intensity for several days in a row caused entire regions alongside rivers (well, even small ones, even creeks) to find themselves literally under water – shops, businesses and factories included.

Each of these events caused the legislator to react on the spot and to primarily suspend the owners or entrepreneurs from the notorious duty to file for insolvency within three weeks after fulfilling an opening reason. Our Greek friends can add to that disaster list, as it were, their experiences some ten years ago in the course of their debt crisis. Insolvency law's application was then suspended for a very fundamental economic reason: there was no market on which an insolvent's estate could be liquidated.

The German and the Greek experience made me write some eight years ago on the need to distinguish between our usual and traditional "good weather insolvency law" and to contrast it to a "bad weather insolvency law" which steps in in situations which are beyond the usual and taken for granted set-up of facts. This is far from being an innovative idea – after all, in

many legislative acts and bankruptcy treaties from the Middle Ages on one finds again and again exceptions from the bad treatment of bankrupts in cases of "flood, fire, and other disasters". In my cited article I further recommended to develop ideas on how to shape bad weather insolvency law – in order not to become caught off guard every time again and again when a black swan enters the scenery.

The present

This brings us directly to the present. Given that it was occasionally announced that we enter an era of epidemics, it was not really an "unknown unknown" event, but still a sort of a black swan (a "known unknown") when last year (2020), in March, the pandemic was globally announced and the lockdowns started one after the other. The longer they took, the clearer it became that insolvency laws, too, had to be adjusted to the new situation – at least temporarily.

Regarding application of that law, Cyprus was probably the most rigid jurisdiction when it suspended the entire operation of her insolvency law for a specified period of time.[1] Italy moved in a similar, but somewhat less dramatic, direction; it suspended the entry into force of its revised insolvency law in order to prevent confusion and irritations about the new law in an anyway turbulent and tumultuous time; the old law, thus, had to be applied further on.

It is on purpose that I mention these two rather extreme examples at the outset. Clearer than all the other national reactions they point to the core of all those alterations: it is about mitigating the harsh consequences of the "everyday" insolvency law or the good-weather insolvency law.

Like in those historical examples given above when a flood, a fire, a war or other acts of God had hit parts of the population or its entirety, the present pandemic intruded into our lives without anyone's fault and without warning. There was no one to blame for it, there was no mismanagement, there was no rough creditor, no careless debtor, no wrong insurance, nothing – it just happened. Under these circumstances it was felt throughout Europe and the entire world that the use of insolvency law in the "normal" way would have been inappropriate. A more or less randomly collected list of legislative examples[2] proves the point:

- The duty to file when and if an opening reason is given was suspended not only in Germany, but also in Belgium, the Czech Republic, Estonia, Lithuania, Luxembourg, Poland, Portugal or Spain.
- Other jurisdictions, such as Finland or Lithuania, limited the creditors' rights to file.
- France, for instance, manipulated its insolvency test in order to provide debtors with a breathing spell.
- In Belgium,[3] creditors were barred from levying a preventive or executory attachment and payment periods were prolonged; this was also done in Bulgaria, Croatia, Cyprus, Finland, Hungary, Italy, Portugal,

> **Like a flood, a fire, a war or other acts of God … the present pandemic intruded into our lives without anyone's fault and without warning**

> The historical examples to which I referred teach us that it would be wise to prepare for upcoming similar events

Romania and Spain.

- The Netherlands put into practice the enactment of their WHOA (wet homologatie onderhands akkoord) as a protective measure for the debtors. This new law which transposes the Directive on Restructuring and Insolvency[4] into Dutch law entered into force around the beginning of the pandemic. The German equivalent[5] owes its incredibly expedited enactment also, to a certain degree, to the pandemic. And it is to be assumed that other Member States have this effect also in mind when transposing the Directive into their domestic law.

To be sure, these examples refer just to insolvency laws and actions closely related to it; they are not, however, by far, the only measures that were taken by national legislators in order to overcome at least the most painful hardships of the pandemic.[6] In Germany, for instance, lease contracts for commercial premises became addressed, as well as vouchers for travel tickets or cultural events to give but a few examples. All these measures have in common – at least to a certain degree – the idea to abstain and/or to get free from the rigid application of the good weather law and to soften its effects.

Before coming back to this latter observation one more word about state intervention and support might be justified. It is perfectly understandable that legislators on a literally global scale have offered deferrals and loans as part of that softening package. However, what is well meant today might turn out as a critical impact tomorrow. For one day the deadline will be arrived on which the sum has to be repaid – additionally to the then daily costs.

What is needed then, accordingly, is a double income (or an accumulation of savings). If that doesn't exist the amount of non-performing loans will increase and threaten banks again.[7] It is probably well known that not only the Directive on Restructuring and Insolvency, but others, as well, serve i.a. the purpose to reduce the amount of these very NPLs. In their aggregation they have the potential to ruin entire banks (Slovenia and Italy have fresh memories to such threats) – and since bank collapses always carry the risk of bringing the respective state into troubles, this is a serious problem.[8]

The future

The historical examples to which I referred *supra* teach us that it would be wise to prepare for upcoming similar events; this is even more true when and if the said prediction should be correct that we enter an era of pandemics. In order not to be hit again by surprise it seems to be a good idea to develop – better now than tomorrow – a sort of catastrophe law which draws from the lessons learned so far and which is, nevertheless, flexible enough to become quickly adapted once the new situation is forming.

Once this conclusion is accepted the task arises to find out what the lessons are that we should learn from the past events. It is here where things get an interesting if not fascinating twist. Since most of the legislative measures have in common to mitigate the sharp edges of not only insolvency law, but also of other areas of law. The bad weather law reacts to a certain degree to the changed circumstances similar to the nascency of equity from the 12th to 17th centuries to the severity of common law. The continental law had a similar evolution some 1500 years earlier when the power of *bona fide* was discovered and unleashed by the Roman jurists.[9] This concept has equivalents nowadays in all civil law codifications one way or the other – in Germany it is sec. 242 of the Civil Law Code.

This parallelism explains why in the Covid 19-legislation often rules as the *clausula rebus sic stantibus* or the compromise – a contract which is best described in German law as one in which both parties step down from their initial 100%-claim – are referred to, either directly or at least implicitly. This is particularly true for the abovementioned examples of insolvency legislation: the debtor's duty to file serves primarily the task to protect the creditors – now, they have to wait, but the debtor, on the other hand, has not more than a deferral. The same is true for the restrictions on creditor filings, for the definition of insolvency, or for the statutory extension of payment deadlines. All these measures have in common – to give the debtor some breathing spell since the pandemic came over mankind like an act of God.

When we now broaden our view and include what else has been done by the states and the European Union, we learn that we have to go a step further for a full understanding of the lesson to be learned from the pandemic. More or less each member state of the European Union has set up an aid program of mostly so far unheard-of amounts. And beyond that, even the Europeans have set up an impressive list of support:

- The European Commission follows a two-partite action plan: the first one aiming at powering resilience and recovery by spending €750 billion in supporting member states to recover, kick-starting the economy and helping private investment, and learning the lessons from the crisis; whereas the second one comes alone with a reinforced long-term budget of €1.1 trillion;
- The European Central Bank has also set up a €750 billion (for the time being) help package which contains, i.a., measures aimed at temporarily increasing the Eurosystem's risk tolerance for facilitating access to credit, and easing the usage of credit claims as collateral. Particularly, the latter step is designed to increase the additional credit claims framework by, i.a., accepting loans with lower credit quality;
- The European Stability Mechanism offers a €240 billion program by providing for the coming 2½ years on favourable lending terms and no macroeconomic conditions attached to the loans,[11] and
- On 18 May 2020, a French-German proposal was presented to set up a €500 billion rescue package, which came as a surprise after the extended discussions about whether or not Eurobonds should be issued as a token of European solidarity.

The last word is decisive: solidarity! Since all those incredible sums are not paid by some third parties but by us Europeans. When we realize this mechanism and when we think about where we have a similar one – even for centuries[11] – we become aware that insurance law is based on a strikingly similar mechanism, based on the solidarity principle. In cases of emergency, it is necessary to stick together and to push aside the usual antagonisms resulting from individual rights.

> **Legislators should prepare for the next disaster: after the pandemic is before the next pandemic**

Conclusion

My conclusion, therefore, is that legislators should prepare for the next disaster: after the pandemic is before the next pandemic. The appropriate guideline for this preparation is to study intensely the solidarity principle of the insurance law and to make it the center pillar for a... catastrophe law. ■

Author's note: This article is based on a presentation made at the 10th European Insolvency and Restructuring Conference on 15 June 2021.

Footnotes:

1 Similar decisions were made in Bulgaria, India, Cyprus, Romania and Spain.

2 All taken from www.insol-europe.org/technical-content/covid19.

3 Similarly in Scotland.

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.

5 On the StaRUG cf. Paulus, The New German Preventive Restructuring Framework, Rivista Orizzonti del Diritto Commerciale 2021, p. 9 ff.: www.rivistaodc.eu/Article/Archive/index_html?ida=171&idn=25&idi=-1&idu=-1.

6 On those further measures cf. https://insol.azureedge.net/cmsstorage/insol/media/documents_files/covidguide/30%20april%20updates/2-covid-map-17-may.pdf.

7 Cf. just ECB's Guidance to banks on non-performing loans, available at www.bankingsupervision.europa.eu/ecb/pub/pdf/guidance_on_npl.en.pdf.

8 On this, cf. *Paulus*, Europe in the Corona-Crisis, Norton Journal of Bankruptcy Law and Practice 2020, p. 545 ff.

9 On this cf. *Kunkel*, Fides als schöpferisches Element im römischen Schuldrecht, Festschrift für Paul Koschaker, vol. II, 1939, p. 5 ff.

10 Cf. press release from May 15, 2020.

11 Modern insurance law is usually said to have originated in Venice, cf. *Nehlsen-Stryk*, Die venezianische Seeversicherung im 15. Jahrhundert, 1986. To be sure, risk minimising efforts can be traced back deep into antiquity.

Adopting the Directive: Member States "in particular difficulties"

Prof. Reinhard Bork provides a timely update on the position of Member States in the adoption of the EU Directive on Restructuring and Insolvency

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According to Art. 34(1) of the Directive (EU) 2019/1023 on Restructuring and Insolvency, and subject to some minor exceptions, Member States:

> "shall adopt and publish, by 17 July 2021, the laws, regulations and administrative provisions necessary to comply with this Directive".

However, Art. 34(2) of the Directive states that,

> "*by way of derogation from paragraph 1, Member States that encounter particular difficulties in implementing this Directive shall be able to benefit from an extension of a maximum of one year of the implementation period provided for in paragraph 1. Member States shall notify to the Commission the need to make use of this option to extend the implementation period by 17 January 2021.*"

Rumour has it that most Member States have made use of this option but an official list of those States is not available and the European Commission keeps it to itself. At any rate, some information is available[1] and it is interesting to cast a glance to the reasons for playing the extension card.

Subject to further developments after the completion of this article (mid-May) and with the caveat that reliable information is difficult to obtain, the picture can best be drawn by pooling Member States in four groups.

Member States who have already implemented the Directive

The first group is made up of a few states which have already implemented the Directive. To this group belong Greece (law No. 4738/2020) and Germany (*Gesetz zur Fortentwicklung des Sanierungs- und Insolvenzrechts*, including the *Gesetz über den Stabilisierungs- und Restrukturierungsrahmen für Unternehmen - StaRUG* as its centrepiece).

Although no longer a Member State of the EU, the United Kingdom can also join the ranks of this group, since it passed its Corporate Insolvency and Governance Act 2020 (CIGA 2020) on 26 June 2020 which meets most, albeit not all[2], demands of the Directive.

Member States in which the implementation is on its way

The second group consists of Member States in which the implementation is on its way and which are expected to pass a respective bill before 17 July 2021.

This concerns Austria (*Restrukturierungsordnung*), France (Act N°2019-486 of 22 May 2019 ['*Loi Pacte*'], Art. 196[3]), Luxembourg (Bill No. 6539), and Romania (Bill amending the Romanian Insolvency Act No. 85/2014), possibly also Lithuania (Bill Nr. XiVP-362[4]).

In these countries, draft laws have been presented to parliaments and the public and it is currently very likely that they will be passed in time – or have already been passed when readers take note of this article.

Member States which require an extension option

The third group is the largest one. It is composed of at least 17 states which have notified the European Commission that they will make use of the extension option as provided for in Art. 34(2) of the Directive. To my knowledge, members of this group are Belgium, Bulgaria, Croatia, Cyprus, The Czech Republic, Denmark, Estonia, Finland, Ireland, Italy, Latvia, The Netherlands, Poland, Portugal, Slovakia, Spain, and Sweden.

However, this is not a homogenous group. Among them are States which have most of the instruments provided for by the Directive already in their law (e.g. Italy, Ireland, Poland, Portugal, The Netherlands), either already before the Directive required so or in reaction to the Directive.

A good example are The Netherlands which, on 26 May 2020, have amended their insolvency law through the *Wet homologatie onderhands akkoord* (WHOA) which covers most but seemingly not all of the means regulated in the Directive.

Others are on their way but not far enough to finishing the legislative work before the expiry of the deadline. Finally, there are also Member States which are still at the first setout.

> ***Rumour has it that most Member States have made use of the extension option but an official list of those States is not available***

Member States about which there is no information

The fourth group is constituted of Member States for which there is no information at all (Hungary, Malta, Slovenia).

Particular difficulties

Looking at the reasons for the delay – or the "*particular difficulties*", as Art. 34(2) of the Directive puts it – various circumstances play a role. It does not come as a surprise that the most frequently mentioned cause is the crisis provoked by the COVID-19 pandemic. It made legislative work more cumbersome. On a personal level, many ministerial employees were bound to work from home or even contracted an infection, and everything took longer, in particular coordination between teams and ministries involved and public consultations. On a more substantial level, all workforce available was occupied with *ad hoc* legislation reacting to the entirely new challenges and needs caused by the pandemic. This was a particular problem in smaller countries and made it necessary to focus on the more urgent COVID-19-related legislation and leave other things unprocessed.

In some states, the Directive was used as an opportunity for (e.g. in Estonia), or implemented in the context of (Italy), a fundamental insolvency law reform. This cannot be done in two years. Not only that the drafting of a new insolvency act takes more time than the implementation of a Directive in an already existing insolvency law. Insolvency professionals – such as judges, insolvency practitioners, lawyers – also need sufficient time to get acquainted with the new law. In general, it is reported from various countries that their governments have opted for a thorough rather than a rapid transformation process and have accepted that the deadline will be exceeded. This is understandable, given that the Directive requires decisions on some 70 options.

However, there are other, more general and fundamental causes. In many Member States, one can hear complaints that the Ministry of Justice or even the government itself are not sufficiently staffed and that the existing personnel does not have sufficient expertise in harmonisation techniques and in the transposition of Directives, let alone in insolvency law. This sometimes leads to a rather low priority being given to the implementation of the Directive and in some states (e.g. Latvia, Slovakia) to the utilisation of the EU structural reform support program as provided by the Directorate-General for Structural Reform Support (DG REFORM). There are other commitments that make heavy demands on scarce resources, e.g. Finland's presidency of the EU Council (as the duties of the presidency occupy all the resources for six months entirely) or natural calamities (such as earthquakes, e.g. Croatia). Another obstacle to the timely implementation of the Directive are elections (e.g. Croatia, Spain). They often lead not only to a change at the top of the ministry but also to a replacement of the responsible personnel, with the result that the new persons in charge do not have the necessary expertise and experience in the field of insolvency law. Further, elections can lead to new coalitions or even to a minority government, making new compromises both necessary and difficult to reach where the implementation of the Directive is not only technical but concerns politically controversial issues (such as the treatment of tax claims etc.).[5]

In summary, it turns out that most Member States of the EU have failed to implement the Directive in time and have notified the European Commission that they need another year as provided for in Art. 34(2) of the Directive. When accounting for whether this is a

good thing or a bad thing, whether the reasons put forward are sufficient and Member States are indeed "in particular difficulties", there is no simple answer. However, the following can be said.

Minor relevance

In light of the challenges and burdens caused by the pandemic, one could argue that the implementation of a Directive on restructuring and insolvency seems of minor relevance. With more than one million dead in Europe, there are probably more important things than the implementation of a Directive.

One should consider that, in the light of more than one million businesses facing insolvency, the pandemic has led many States to enact special laws to avert the threat of insolvency for businesses that had to close for longer periods because of the pandemic, or at any rate have suffered significant losses. One

> *It does not come as a surprise that the most frequently mentioned reason for delay is the crisis provoked by the COVID-19 pandemic*

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could ask whether the energy invested in these COVID-19-related laws would not be better used in the implementation of a Directive which aims at enabling the timely rescue and restructuring of enterprises on the verge of insolvency and could also be used for fighting COVID-19-related insolvencies.

However, this question must be answered in the negative. Near-term legislation reacting to the pandemic could be content with suspending or amending certain rules of current insolvency law (e.g. regarding the director's liability, statutory duties to file for insolvency, definition of substantive insolvency, etc.). This can be done on short notice, whereas the implementation of a complete framework for pre-insolvency restructuring needs thorough deliberations and sufficient time for shaping a convincing and coherent law. Against this background, a delay of the implementation seems like a rather small sacrifice.

Structural problems

The fundamental structural problems that are revealed and exemplified by the transposition issue discussed here must be of greater concern. It follows from the above, that many Member States have inherent difficulties to keep pace with the European Union.

The combination of a multitude of legal acts, the complexity of regulations, and short implementation deadlines seems to overwhelm many national governments. They sometimes lack the necessary manpower and material resources, the demandable expertise, and occasionally the required sense of the importance of the task at hand. Seen from this angle, one could argue that a Regulation seems to be preferable to a Directive, because the former applies directly and requires, unlike the latter, no transforming act from the part of national legislators.

However, it seems not advisable to impose a Regulation on the Member States where it concerns a topic that is particularly marked by national cultures and customs. This holds true for issues of procedural law in particular, including the law of restructuring and insolvency proceedings.

To be clear, the harmonisation of restructuring and insolvency laws is worth striving for, but it should be pursued cautiously, thoroughly prepared, and with sound judgement. This is neither compatible with short deadlines for the development of European legal acts, nor with short implementation deadlines for national legislators.

Looking ahead

Looking ahead, we can see another example of astonishing haste. On 11 November 2020, the European Commission – based on the new Capital Markets Union Action Plan of 24 September 2020[6] – published the initiative "*Enhancing the convergence of insolvency laws*".[7] It has therefore reactivated the Group of experts on restructuring and insolvency law (E03362) and intends to submit a proposal for the harmonisation of insolvency laws by the end of June 2022. The "non-exhaustive list" of relevant features includes:

- prerequisites for when insolvency proceedings should be commenced (including a definition of insolvency and provisions on who is entitled to file for insolvency),
- conditions for determining avoidance actions and effects of claw-back rights,
- directors' duties related to handling imminent/actual insolvency proceedings,
- position of secured creditors in insolvency, taking into account specific needs for the protection of other creditors (e.g. employees, suppliers),
- court capacity when it comes to expertise and necessary training of judges; and
- asset tracing, which would be relevant, in particular in the context of avoidance actions.

For anyone familiar with the field, this is an impressive catalogue and it is probably safe to say that this list cannot be solidly worked through in one year or at least might be perceived as being rather ambitious. It is difficult to understand why the European Commission is exerting such massive time pressure on such an important and complex issue.

For the avoidance of doubt, harmonisation in this field of law deserves support! However, we all know, haste makes waste… ■

Footnotes:

1 I am particularly grateful to the members of the working group on harmonisation of transactions avoidance laws in the EU (chaired by *Michael Veder* and myself) and to the national reporters of INSOL Europe's EIR Case Register (administered by *Kristin van Zwieten* and myself) who provided me with information regarding their national laws.

2 For example, it follows from sec. A6(1) Insolvency Act 1986 that the appointment of a monitor is mandatory if the debtor company strives for a moratorium. This is in contrast to Art. 5(3)(a) of the Directive which requires the judicial or administrative authority responsible for the moratorium to decide on a case-by-case basis that such a practitioner is necessary to safeguard the interests of the parties. Further, the Directive applies also to natural persons who are entrepreneurs (Art. 1(2)(h) of the Directive) whereas English law restricts the application of the moratorium rules to companies (sec. A1(1) Insolvency Act 1986).

3 This Act authorises the French government to implement the Directive through an *Ordinance*. The government is still aiming at doing so before the deadline expires.

4 Cf. *Heemann/Juškys*, Eurofenix Spring 2021 p. 38.

5 Similar effects can be registered for The Netherlands, where the government has resigned and is only administering the most important matters as a caretaker government.

6 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - A Capital Markets Union for people and businesses-new action plan, Brussels, 24.9.2020, COM/2020/590 final, p. 13.

7 European Commission, Inception Impact Assessment Initiative "*Enhancing the convergence of insolvency laws*", available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/12592-Enhancing-the-convergence-of-insolvency-laws-(last accessed 04 May 2021), at B.

View from the UK: An end in sight?

As the UK begins to open up after the ending of the third lockdown, Duncan Swift, Chair of the Policy Group at insolvency and restructuring trade body R3, looks at the key trends and policy decisions affecting the profession

Rescue
Recovery
Renewal

DUNCAN SWIFT
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Since my last Eurofenix column, the UK has passed through two stages of lockdown restrictions, consumer spending has increased, and the economy has started to recover more strongly than was initially predicted.

As a result, individuals and businesses have cause to be optimistic, but the experience of the past 12 months means this is tempered by the prospect of further restrictions if COVID-19 cases rise once more.

At a challenging stage

Looking at insolvency case numbers, it's clear the Government's support measures are continuing to prevent corporate insolvency numbers increasing as a result of the economic effects of the pandemic.

March and April numbers at 997 and 925 were respectively 20% and 23% down on the prior year. April's number was particularly surprising as April 2020 was itself 16% down on April 2019.

The Government has a challenge on its hands in terms of managing the withdrawal of its support, and the approach it takes will determine if business failures spike or if insolvency numbers simply return to around pre-pandemic levels in the near future.

A window for planning and action

On 19 May, the House of Lords debated the Government's Statutory extension of the temporary measures introduced by the Corporate Insolvency and Governance Act 2020.

The Insolvency Minister, Lord Callanan, highlighted the need for Government to "continue to support businesses by giving them every chance to survive, fully reopen and get through this period of uncertainty" amid ongoing social distancing restrictions.

While the Government's efforts to support businesses are very welcome, and we were delighted R3 was mentioned in the debate by both Lord Callanan and Lord Leigh, we hope this extension will encourage company directors to plan ahead and explore their options in order to determine how they will manage when it ends.

Of course, a key element of any business' survival is the support of their creditors, so it was positive Lord Leigh also raised the point that HMRC's support for viable restructuring proposals will be critical – especially in light of HMRC's new status as a secondary preferential creditor, which will give it a right of veto in most Company Voluntary Arrangements.

New powers for the Insolvency Service?

At the time of writing, a new Bill has been laid in Parliament which would grant the Insolvency Service (IS) powers to investigate directors of dissolved companies.

The Ratings (Coronavirus) and Directors Disqualification (Dissolved Companies) Bill contains measures that would close a legal loophole around the misuse of the dissolution process and would also give the Insolvency Service a means of tackling directors of companies who have taken advantage of the raft of Government COVID funding schemes only to have subsequently been dissolved so as to avoid having to pay these funds back.

The Bill is something we welcome. The proposal to bring the behaviour of directors of dissolved companies under the Secretary of State's investigatory powers was first proposed in 2018, and we supported it then, so we're pleased legislation has been tabled that could bring it into effect.

However, one key question is whether the Insolvency Service will have the resources available to conduct these investigations alongside those they already carry out into directors of insolvent companies.

Annually the IS secures about 1,200 adverse proceedings against directors from 20,000 corporate insolvencies, whereas over 500,000 companies are struck-off by Companies House, usually for not filing accounts, which flags errant director behaviour.

We have suggested it would be better if Companies House invoked compulsory liquidation, the latter yielding earlier IS investigation of the affected company's affairs through its Official Receiver unit, and urge the Government to consider how it can work with the insolvency and restructuring profession to support its investigations into the conduct of directors of dissolved companies.

The profession's support in this, as in all areas of insolvency policy, will be crucial – as we continue to emerge from the pandemic and into an uncertain economic future. ■

> *It's clear the Government's support measures are continuing to prevent corporate insolvency numbers increasing*

The Judicial Wing at 15: A thriving international "bench"

Luisa Gomes and Eberhard Nietzer recount the Judicial Wing's key milestones and achievements

LUISA GOMES
Judge at the Commerce Court in Sintra, Portugal

EBERHARD NIETZER
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The fledgling stage

The successful launch of INSOL Europe's Academic Wing in 2004 lead to the Council's decision in 2005 to have another wing, a "Judicial Wing" (JW). Michael Thierhoff, INSOL Europe's President from 2006 to 2007, was asked to start it. Together with Heinz Vallender, and an initial group of judges, the JW was established in 2006.

Marc Udink, INSOL Europe's Secretary General at that time, and Michael Thierhoff invited five judges from France, Germany, Spain, and Romania to a meeting during the Annual Congress in Bucharest in 2006: Yves Merlat (France), Ignacio Sancho (Spain), Heinz Vallender (Germany) and two Romanian judges who did not attend any subsequent meetings after 2006.

The judges were invited to actively get involved in a project called "European Communication and Cooperation Guidelines for Cross-Border Insolvency (CoCo Guidelines)" under the auspices of INSOL Europe. They accepted the invitation. Judge Vallender took the lead as the JW's first chair.

In 2007, some more judges were invited to meet during the Annual Congress in Monaco to discuss the draft of the CoCo Guidelines published in 2006. The judges attending this meeting decided that the Judicial Wing was a project worthwhile to be continued.

Adolescence

By 2008, the Judicial Wing had matured from a mere initiative to a constituent working group of INSOL Europe.

> *By 2008, the Judicial Wing had matured from a mere initiative to a constituent working group of INSOL Europe*

The agenda of the judicial meeting in Barcelona during the 2008 Annual Congress of INSOL Europe was determined by the judges themselves and it was the first meeting of which an official record was kept (the minutes). The minutes mention a comment by the chairman that this meeting might be the beginning of a tradition: 14 judges had attended. They discussed basic problems arising from the European Insolvency Regulation No. 1346/2000 (EIR 2000) such as the meaning of "opening of proceedings" and the determination of whether a case is to be treated as a main or secondary proceeding.

The next meeting in Stockholm in 2009 took the Judicial Wing another step ahead in its development and visibility for others by having an official written program and by being reported on in the Eurofenix Spring 2010 issue. The discussion of practically relevant issues with the application of EIR 2000 was based on a hypothetical case prepared by three judges for the purposes of the meeting in Stockholm. The judges lamented that the absence of a European Insolvency Register made it very difficult to ascertain whether proceedings against a particular debtor had been opened in other jurisdictions.

Adulthood

In 2011, the Judicial Wing got carried across the threshold from adolescence to adulthood.

During the Annual Congress in Venice, the Judicial Wing could enhance its public visibility by presenting its first collection of papers on "*Regulations and Measures of Protection in National Legislations within the*

European Union" in a volume of INSOL Europe's Technical Series.[1]

During their meeting in Brussels on 11 October 2012, INSOL Europe's Secretary General asked the JW for a specific contribution to the discussion regarding the amendment of EIR 2000.

In harmony, the JW's cellists, Edward Bailey (UK) and Eberhard Nietzer (Germany), prepared a proposal for an amendment of Article 31 of EIR 2000 which was adopted by the JW and sent to INSOL Europe for submission to the European Commission.[2]

Additionally, the JW presented its second publication on "*The remuneration of the insolvency representative*."

When the judges met again in Paris on 26 September 2013 at the Annual Congress, they discussed a topic that has gained new relevance under the EU Directive on preventive restructuring frameworks (the Directive): "*The role of the judge in restructuring of companies within insolvency.*"

The JW's work in 2007 (CoCo Guidelines) and 2012 (Art. 31) lead to an invitation by Prof. Bob Wessels (University of Leiden) for the JW to contribute their expertise to his new project "*EU Cross-border Insolvency Court-to-court Cooperation Principles*."

2014 took INSOL Europe and the JW to Istanbul for the Annual Congress. On 9 October, the judges discussed another judicial role in insolvency proceedings: "*The role in the nomination, supervision, and removal of the insolvency representative*." The discussion showed that this role is very influential in most Member States. An on-topic publication by the JW can be found in the Technical Series.

The meeting of 1 October 2015 in Berlin was focused on issues of the EU Regulation 2015/848 on insolvency proceedings (recast). Another point of discussion was the discharge of residual debt. This discussion led to the conclusion that the topic should be more thoroughly treated during the next Congress in 2016. This meeting was held in sunny Cascais, Portugal.

Five new members could be welcomed into a JW which had not only assembled as a cohesive working group but in the spirit of a reunion of good old friends. Afterwards, the choir of opinions on the "*Discharge of Natural Persons and Release from Debt in Individual Member States in the EU*" was orchestrated under "Maestro" Vallender's "battuta". The lyrics of the choir presentations can be found in the Technical Series volume published under the same title.

Warsaw hosted the next meeting of the JW on 5 October 2017, which was chaired by Judge Caroline Costello. All agenda items were again focused on individual aspects of the recast version of the EIR. Many highly valuable presentations were made all over the day with enough time to also catch up on news from the year before.

In the following year, INSOL Europe headed South, to Greece, and the JW gathered in the city of Athena, goddess of wisdom. The ideal place for the emotional parting of the JW's chair, Judge Vallender, who set sail to new sights and projects, passing the chair to Judge Caroline Costello. In his farewell speech, Judge Vallender summarised the history of the Judicial Wing, highlighting how much it has grown in membership and complexity.

The technical program of the meeting included, i.a., presentations on the motives of forum shopping and the role of the judiciary in negotiations to develop a protocol for cross-border insolvency proceedings.

One year later, in 2019, Copenhagen welcomed the most recent in-person meeting of the Judicial Wing. It was chaired by Judge Eberhard Nietzer as Judge Costello was appointed to the Irish Court of Appeal and could no longer offer enough of her time and expertise to the Judicial Wing. The experience of this brief "chairlessness" made the JW agree on having more than one chair. The meeting voted for a panel of three co-chairs from Member States with different legal traditions: Judge Eberhard Nietzer (Germany), Judge Nicoleta Năstasie (Romania) and Judge Michael Quinn (Ireland). They made it possible for the JW to continue flourishing.

The main subject of discussion during the meeting was the Directive, with the Chairman of the Danish Bankruptcy Council, Professor Ulrik Bang-Peterson, explaining the steps taken in Denmark to implement the Directive.

Outlook

The increase in membership from six judges in 2007 to 41 in 2021, and in activities, such as the JW's first mid-year meeting in 2021, is testimony to the growing attractiveness and vivacity of this group.

The COVID-19 pandemic did not demotivate the JW at all. On the contrary, the JW has adopted a mission statement and protocol as a basis for its future work.

The focus of the JW's activities will be on the promotion of best practice in matters concerning (i) the conduct in courts of law of restructuring and insolvency proceedings, and (ii) cross-border cooperation between courts in insolvency and restructuring matters.

The future

Looking to the future development of the Wing, young members of the judiciary from all Member States are encouraged to become its active members. ■

Footnotes:

1 A list of the Judicial Wing's publications can be found at www.insol-europe.org/judicial-wing-publications

2 The blackletter text of the proposal can be found at https://insolvencycourts.org/JWPUB/Article-31-Amendment.pdf

> *The increase in membership from six judges in 2007 to 41 in 2021 ... is testimony to the growing attractiveness and vivacity of this group*

INSOL Europe & INSOL International join forces online

Paul Omar and Myriam Mailly report on the online webinar recently held in two sessions

MYRIAM MAILLY
INSOL Europe Technical Officer

PAUL OMAR
INSOL Europe Technical Research Coordinator

On a bright April morning with 100+ participants attending, the INSOL International and INSOL Europe joint webinar began with Matthew Newman (Ogier) facilitating.

Following thanks to the sponsors Ogier and HFW, Marcel Groenewegen (President, INSOL Europe) introduced Professor Ignacio Tirado (Secretary-General, UNIDROIT) who gave the keynote address on the application of principles of insolvency law to digital assets. Speaking of the latest UNIDROIT initiative, Professor Tirado outlined its importance, especially given the need to develop legislative guidance and international best practices in relation to digital assets, covering, *inter alia*, insolvency, security rights and the applicable law to transactions involving these assets. Challenges remain in how property rights are structured and asserted in these new types of assets, particularly where held via intermediaries.

Digital Assets and Insolvency

Continuing the theme, the first panel, moderated by Dávid Oršula (bnt attorneys), began with an introduction to the work of the INSOL Europe Insolvency Technology and Digital Assets Wing. Then, Lee Pascoe (Barrister, Melbourne) and Ilya Kokorin (Leiden University) looked at issues of recovery of crypto-assets in insolvency proceedings, particularly because of the global risk of crypto-exchanges insolvencies. Following some illustrations of sample transactions, the speakers engaged with the thorny issue of the recognition of crypto-currencies as property. The impact on the assertion of rights for the collective process in insolvency, particularly in relation to identification, preservation, valuation, recovery and distribution, was covered, together with practical tips for detecting and securing crypto-assets.

> “The speakers engaged with the thorny issue of the recognition of crypto-currencies as property”

International rescue

Opening the afternoon session, Eric Levenstein (Werksman Attorneys) began by posing questions to the keynote speaker Kathutshelo “K2” Mapasa (CEO, Basil Read Construction), whose construction company has been in business rescue proceedings since 2018. Reflecting on the pre-World Cup 2010 growth, in which the company grew ten-fold, difficulties subsequently came with tighter profit margins and growing trading losses being financed by indebtedness.

On challenges for directors, the speaker suggested that little could prepare a director for formal processes and stakeholders changing their perception of the debtor’s viability. A follow up addressed risks for ongoing contracts, necessitating further financing needs, but with suppliers being reluctant to extend credit. On affording business rescue, a general lack of DIP-financing is one of the biggest difficulties facing companies in distress, while dealing with stakeholders is also an acutely sensitive part of the process. With hindsight, would anything change? Probably, with greater anticipation, access to cash reserves and a funding agreement anticipating rescue.

Turning the corner on the Covid-19 crisis: What happens next?

Helmed by Mahesh Uttamchandani (IFC World Bank), the panel, including Lynn P. Harrison III (Dentons), Sonya van der Graaff (Avonhurst) and Torsten Braner (Taylor Wessing), explored the mixed economic outcomes for businesses in the crisis. Exposing existing vulnerabilities in some areas, the pandemic has also shown that strong recovery is possible in the durable goods production. Support by governments and access to financing has helped sustain businesses, with positive impact on liquidity.

The World Bank/INSOL International Tracker shows the reform measures in various jurisdictions, with legislative measures targeting sustainability, as Sonya van der Graaff illustrated by outlining the new UK restructuring processes.

Against the global background of low numbers of proceedings, Lynn Harrison suggested that the rise in high-value Chapter 11 proceedings derives from the continued attractiveness of access to the US courts and strong trust in enforcement measures.

Comparing the pandemic to previous crises, Torsten Braner explained that the more prudent financial management and reduced exposure to currency instability in Eastern Europe will have a positive impact on economic survival. Overall, for him, the pandemic has offered an opportunity to rethink business models and the workings of insolvency. ■

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COVID-19
Coping with the crisis across Europe

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Towards a New World
INSOL Europe events go online
Divergences and convergences of 'COVID-19' recovery plans

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Pushing suppliers into the insolvency abyss?
The COVID-19 pandemic: A nucleus for significant reform

#83 · Spring 2021
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Then & Now: 40 Years of INSOL Europe
The EU Directive in Germany: A new star in the firmament

Public claims, pandemics and preventive restructuring

ACADEMIC FORUM
INSOL Europe

MYRIAM MAILLY
INSOL Europe Technical Officer

PAUL OMAR
INSOL Europe Technical Research Coordinator

The Academic Forum Spring Webinar, attracting around 40 delegates, recently took place on 20 May 2021.

Kindly sponsored by Edwin Coe LLP (London), the event featured a presentation by Professor Nuria Bermejo (Universidad Autonomà Madrid). Introduced by Marcel Groenewegen (INSOL Europe President) and Professor Tomáš Richter (Academic Forum Chair), Professor Bermejo outlined some key themes around the topic of "*Public Creditors in Preventive Restructuring Frameworks: Considerations in the light of the Pandemic Crisis*".

For Professor Bermejo, public claims, pandemics and preventive restructuring are not easy issues with ready solutions. The key point is whether preventive restructurings could/should be dominated by public creditors, given their unwillingness to participate as "economic owners" of the firm, leading to liquidations if plans are not adopted? To start with, there is no homogeneous treatment in insolvencies for public debt, though often given preferential treatment and exclusion or exemption from the effect of stays. Payment priority in many systems is accorded to protect public resources from the risk of being "externalised", though arguments can be made against this, especially as risks could be spread across the population and over time. Nonetheless, public creditors may hold huge amounts of claims against many debtors and cannot diversify in order to spread those risks. The UK Cork Report was the earliest to mention this dichotomy and impact on public debt preference, as was also a contemporary issue in Spain.

> *To start with, there is no homogeneous treatment in insolvencies for public debt*

The pandemic has seen Governments take on roles as lenders of last resort, despite the risk of systemic crisis and uncertainty as to the evolution of the economic situation going forward or the chances of recovery of the businesses affected. Valuations of businesses in financial distress are also problematic, especially as many have claims against other similarly affected businesses. No liquidity is available from conventional lenders, thus the state activity in this area to improve working capital and access to funds is vital. However, what will be the impact going forward if the State is involved in insolvencies as a creditor? Will this help or hinder recovery? Will public creditor behaviour lead to restructuring successes or will be just consigning debtors to liquidation? A big impact here will be on employment prospects, a key policy incorporated in the EU Directive on Restructuring and Insolvency (the Directive).

The Directive approach offers no direct answer at first sight. In this light, some Member States have signalled their policy, e.g., the Portuguese unilateral statement considering the Directive has sufficient flexibility to exclude some categories of claims and that exclusion is justified, albeit the statement has no legal status, so there is no impact on other Member States or on the EU policy. In the Directive, public claims have protection under plan adoption provisions (voting thresholds and no imposition of plan on some privileged creditors, thus limiting the effects on these creditors). Thus, inclusion of public claims, even with these protections, is still possible.

Professor Bermejo suggests there may be good reasons for bringing public claims within preventive restructuring proceedings, as they have not been expressly excluded by the EU legislator (unlike some special provisions: e.g., employees, tort and maintenance) and the stay does have an impact on claims, so it would be disproportionate to exclude public claims from being able to challenge stays. Moreover, as Directive Recital 52 states, no "cancellation" in full or in part can happen if claims are privileged and Member States are free to limit the effects of the plan: e.g., allowing delays, but not cancellations/haircuts. Overall, this militates in favour of bringing public claims within restructuring processes.

However, a key question is how public creditors ought to participate and be involved in the restructuring process? Though there are no formal restrictions in the Directive, some concerns exist in respect of the difficulty in *ex-ante* assessments of viability and plans (as public creditors lack the skills of financial creditors). This can be exacerbated by the risk of ex-post review by public creditors with any "excessive sacrifice" resulting in sanctions for civil servants "approving" plans. Thus, public creditors are likely to remain passive, despite the possibility of large amounts being involved, with the risk that important thresholds may not be reached if they "opt out" of decision-making. Furthermore, debtors are sensitive to sharing information with public creditors if there is a risk of sanction for misbehaviour. Lastly, a risk of discrimination can arise if public creditors participate, but do so on the basis of policy influences, i.e., the Government decides "who lives and who dies".

Some proposals could be advanced, including the creation of a market for public distressed debt and/or the establishment of a public fund to take over claims and participate on the same basis as other creditors. Any issue with state aid compatibility could be determined using the "private creditor test" based on prevailing market conditions (*Frucona* C73/11), i.e., the significance of any economic advantage must be considered, as well as whether a comparable facility would have been obtained from a private creditor. In conclusion, the Directive does not exclude public claims. Public creditor privilege does not avoid inclusion within a plan, but may result in differences in application, although new strategies are required for their "rational involvement" in restructurings. Above all, there is a need to do this quickly, as significant public claims are likely to feature going forward.

Following a vigorous Q&A session, the event closed with Professor Richter inviting submissions of interest for future webinars. ■

Professor Bermejo's slides and the video replay are available from our website at: www.insol-europe.org/academic-forum-events.

With thanks to the Academic Forum Sponsor for their continued support:

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INSOL Europe in Romania

After a year in this new normal, working primarily from home, with different degrees of social distancing and various restrictions, one may become fatigued by online meetings and conferences.

And there might have even been instances of thinking this meeting should have been an email or a call. We certainly miss the interaction and live networking, or to put it simply, we miss meeting other human beings. While for online meetings, the professional dislike seems pretty standardised, it's hard to beat the convenience of an online conference.

This online event is living proof that after the new normal, we are heading into a new future. The '*International Conference on Business Law Experiences, Evolutions and Perspectives in Business Law in the Post-pandemic Era*' took place on 13-15 May 2021. INSOL Europe organised the event with the Romanian Institute of Commercial Law and the Faculties of Law of Babeș-Bolyai University, Romanian-American University, Nicolae Titulescu University and Titu Maiorescu University. The conference had no less than 9118 participants, over three days, with 1780 attending INSOL Europe's panel. A live event for 1000 participants would be difficult to pull off and require six months of organising at least; I can't imagine the effort necessary for 9,000 participants!

Implementing the Directive

From the participant's side, at a push of a button, you were transported right there, for example, to INSOL Europe's panel on '*Implementing the Directive 2019/1023*', listening to renowned experts from Germany, UK, Czech Republic and Romania. We were very fortunate to have, during the panel, Prof. Christoph G. Paulus, Prof. Paul J. Omar and Prof. Tomáš Richter, together with the moderator, Prof. univ. Dr. Gheorghe Piperea. The esteemed professors had at their disposal a translated version of the amendments; thus, they were able to make direct recommendations on the implementation project. The importance of early warning, the clawback provisions and the necessity for further detailing the stay were a few of the amendments discussed.

Until 2008-2010, in Romania, insolvency was considered bankruptcy, with only a small number of judicial reorganisations in 2008, about 1% of insolvency procedures. Compared to 2008, in 2018, there were five times more reorganisations procedures, i.e. about 6% of the total number of insolvencies. You should note that about 80% of companies that go into insolvency are assetless, which would indicate an accurate percentage of about 24% of reorganisation procedures of the total number of insolvencies in which the debtor has assets. Concerning pre-insolvency proceedings, although present in legislation for more than ten years, it has been found that they are rarely accessed: the *ad hoc mandate* is scarce in practice and the data regarding the preventive composition indicate a relatively higher interest for *concordats* – a little over 80 procedures, with a success rate of 8.75%. This is an indication of structural deficiencies in the regulation of this restructuring instrument and mirrors the mindset of entrepreneurs.

Even though the Directive was adopted before the COVID-19 pandemic hit the world, given its efficient solutions for the affected companies, it is a welcoming addition to the Romanian legislation on restructuring and insolvency. Keeping our economy alive in these difficult times will be one of our main goals in the years to come, and transposing the Directive into national legislation is indeed is a step in the right direction. ■

NICULINA ȘOMLEA
Co-coordinator of the Eastern European Countries' Committee (EECC)

The conference had no less than 9118 participants over three days, with 1780 attending INSOL Europe's panel

The Richard Turton Award: How it all began

Neil Cooper, INSOL Europe's President in 1997-1998 and judge on the awards panel, provides some background and context to the Richard Turton Award

NEIL COOPER
INSOL Europe Life President, Honorary Professor, Nottingham Trent University

> **When Richard Turton died in 2004, there was a widespread feeling that his contribution should be marked**

Although this article is about the award and not the person after whom it was named, it's important to put its origin into context.

The late 1970s and the 1980s saw enormous developments in the insolvency laws of the United Kingdom and many other European nations. For the first time there was a recognition that there were substantial advantages in being able to collaborate with professionals from other nations. This was a response to the growing cross border trading and investment stimulated by technology and entities such as the European Union. It was a matter of good fortune that brought like-minded professionals together to develop this collaboration.

Richard Turton was a leader among such people: he had been instrumental in the development of the Insolvency Practitioners Association (IPA) in the United Kingdom, which grew out of the Insolvency Practitioners Discussion group, IPs who were Chartered Accountants, Certified Accountants, or simply unqualified insolvency specialists. When the IPA celebrated its 21st birthday with a conference in Massachusetts, Richard was involved in its organisation. The success of that conference led to the formation of INSOL international which is another story entirely.

When the UK Insolvency Act 1986 introduced licencing of IPs, it was necessary to bring together the resources of the various licencing bodies and the Society of Practitioners of Insolvency, now R3, was formed. By now you can probably guess that Richard was one of those involved in bringing those resources together.

The Award's first winner Lavinia-Olivia Iancu with Marc Udink

While this was going on Europe was developing economically and practitioners from other European countries looked enviously at the IPA. The outcome, which again is the subject of yet another story, was the formation of the AEPPC *(Association Européenne des Praticiens des Procédures Collectives)*. That title became archaic and for better or worse the name was changed to INSOL Europe. Richard had been involved with this organisation from its foundation and on his retirement from practice, he became the full-time general secretary of INSOL Europe.

Such cross-involvement with the different bodies was not of course limited to Richard but there was no individual who had left their imprint on all four organisations to such an extent and, when Richard died in 2004, there was a widespread feeling that his contribution should be marked. The choice of the Turton award was not difficult although there were formalities to observe in each of the four organisations that came together to establish the award. The first presentation of the award was not until 2005 when this now long-standing procedure came to a climax with the award to Lavinia-Olivia Iancu of Romania.

The judging panel comprises representatives of the four organisations, and it is particularly appropriate that the award takes place each year at the INSOL Europe Annual Congress (recent disruptions excepting) as that organisation above all benefitted from Richard's focus for so many years. The criteria for the award are widely published but in addition, the judges look for ideas that are new, unpublished elsewhere by the candidate, and of wide interest to the insolvency community.

In the words of the winners

The Richard Turton Award is all about the winners and the opportunities it provides, so here a few past winners comment on their inspiration for entering and how it has affected their careers.

Lavinia-Olivia Iancu

The first winner of the Award in 2005 with the article "The Liability Regime in the Insolvency Procedure from Romania"

"After graduating a Master's degree in Business Law in 2004, the following year I enrolled in a Master's degree in Enterprise Auditing, Assessment and Reorganization. The year 2005 was also the one in which I passed the exam to become an insolvency practitioner in Romania.

Romania, at that time, was not a member of the European Union and in the field of insolvency, that I wanted to access both theoretically and practically, there was very little information.

Participating in the Richard Turton Award contest came naturally in the context presented, and today I perceive it as "the door I shyly knocked on", without knowing that on the other side of the door was the European and international insolvency elite.

Winning the Richard Turton Award gave me access to a community of insolvency specialists in general and to the Academic Forum of INSOL Europe in particular. The members of the Academic Forum – university professors – helped me enormously by providing information, materials and books, all extremely necessary for my research during my Master's degree and doctorate. I still remember how I received by post many specialised books – I was shocked at the prices they had, and they were offered to me for free, just to help my career development. This group is also "guilty" for my obtaining in 2013 the postgraduate Diploma in

INSOL EUROPE 40 YEARS 1981-2021

RICHARD TURTON AWARD PAST WINNERS AND THEIR PAPERS

2020 Carla Cervantes Villacorta (Spain)
"Necessary reforms: Adaptation of insolvency regimes in Latin America due to the crisis"

2019 Odwa Ngxingo (South Africa)
"Attitudes towards investing capital in restructuring and turnaround situations, and the multiplier effects deriving therefrom"

2018 Yutong Zhang (China)
"Blockchain: A Chance for Turnaround Procedure Modernization"

2017 Bingdao Wang (China)
"Belt and Road: Is it an Opportunity for a Regional Insolvency Solution?"

2016 Róbert Muzsalyi (Hungary)
"Directors' liability: what should be the minimum harmonisation in the EU?"

2015 Waiswa Abudu-Salam (Uganda)
"Insolvency Proceedings: A double Edged Debt Collection Tool"

2014 Anant Khandelwal (India)
"The Phenomenon of Corporate Debt Restructuring in India: How Far Can It Go To Prevent Insolvency?"

2013 Danuta Brzezinska (Poland)
"Actio Pauliana of the bankruptcy receiver within or outside the bankruptcy proceedings?"

2012 Edvins Draba (Latvia)
"Modernizing Insolvency Law in Latvia: Successes and Failures"

2011 Ieva Baranauskaite (Lithuania)
"The Growing phenomenon of Fraudulent Bankruptcy"

2010 Maurycy Organa (Poland)
"Abuse of insolvency proceedings in Poland by a creditor to exert pressure on the debtor. Remedies for the entity declared bankrupt as a result of a malicious motion"

2009 Yana Hankovic (Belarus)
"The Legal Position of an Assignee in Assignor's Insolvency"

2008 Tang Liangyuian (China)
"New Issues in Chinese Enterprise Bankruptcy Law"

2007 Yanna Bakulina (Russia)
"Protection of Employees' Rights in Insolvency

2006 Jelena Marjanovic (Serbia)
"Bankruptcy of Socially Owned Enterprises in Republic of Serbia"

2005 Lavinia-Olivia Iancu (Romania)
"The Liability Regime in the Insolvency Procedure from Romania"

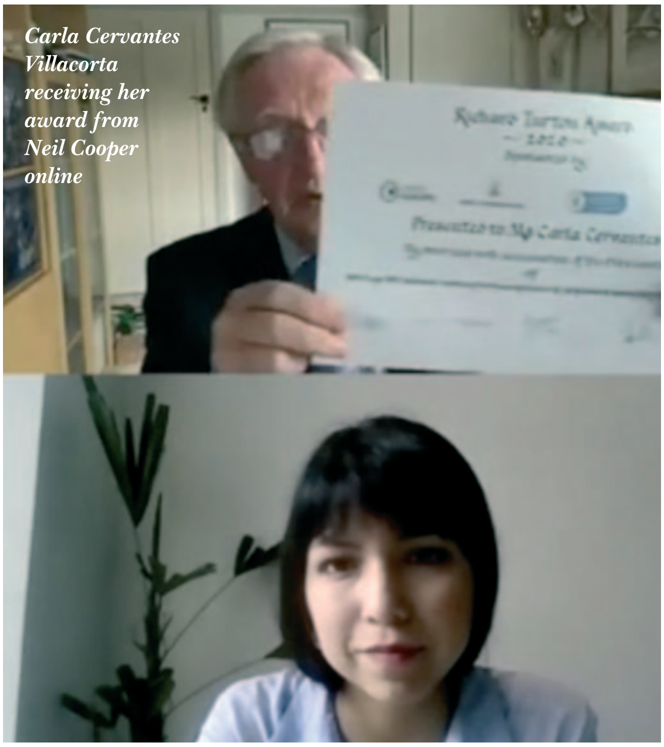
> *Winning the Richard Turton Award gave me access to a community of insolvency specialists in general and to the Academic Forum of INSOL Europe in particular*
>
> ***Lavinia-Olivia Iancu***

International Insolvency Law at the Faculty of Law, Nottingham Trent University.

This positive and supportive attitude towards young people from the members of the Academic Forum of INSOL Europe, which still exists today, forced me to research, study and continue my personal development.

I also saw the beauty of the university career in these people. Today I am a university lecturer myself, taking over the mission to encourage and motivate students to overcome their limits.

The Richard Turton Award was for me, in 2005, and continues to be today, a launching pad for young people in the field of insolvency. I definitely urge my colleagues, who are at the beginning of the road, to capitalise any chance offered by INSOL Europe, because people of indisputable value are waiting for them, with open arms, to guide their steps in the world of insolvency."



Carla Cervantes Villacorta receiving her award from Neil Cooper online

Carla Cervantes Villacorta

Winner in 2020 with the article "Necessary reforms: Adaptation of insolvency regimes in Latin America due to the crisis"

"Ever since I was a student, the study of insolvency law has been a key part of my life, so the Richard Turton Award was a great aspiration of mine. In the context of systemic crisis caused by COVID-19, the Richard Turton Award represented a unique opportunity to raise awareness of the problems of insolvency legislation in Latin America and how this context had forced governments to modernise the procedures and look for alternatives to the urgent refinancing needs of companies according to current requirements.

Winning the award has allowed me to consolidate as part of the new generations of lawyers who spread this branch of law. I am also the first Latin American woman to win this prestigious award and I have received recognition from my academic community and my workplace.

The award is an amazing opportunity and within reach of anyone interested in this area of law. Don't miss the opportunity to write and be part of such a long-standing award. Being one of the winners still feels surreal."

Ieva Strunkiene receiving her award from Neil Cooper in Venice

Ieva Strunkiene

Winner in 2011 with the article "The growing phenomenon of Fraudulent Bankruptcy"

"By chance I read in Eurofenix that the Richard Turton Award winner would be presented at the INSOL Europe Congress in Venice. This inspired me and the saying "I found myself in the right place at the right time" describes my decision to enter.

The congratulations I received gave me more self-confidence and encouraged me to study insolvency. From winning, these two personal qualities have accompanied me in my career. This Award was a start for my career in insolvency. It also allowed me to meet the Life

President Neil Cooper who encouraged me to continue my PhD studies in insolvency law and to start my individual practice. This has allowed me to participate in projects with the European Commission and work with the World Bank.

I would advise future entrants to take the initiative, to take responsibility and worry less about what will happen tomorrow. When the opportunity arises, please use it and act. The world is waiting for you. If I could, you can do it as well!"

Róbert Muzsalyi

Winner in 2016 with the article "Directors' liability: what should be the minimum harmonisation in the EU?"

"Five years ago, when I applied for the Richard Turton Award, I was working as a judicial clerk and PhD researcher in Budapest. My colleague, Andrea Csőke, a judge of the Hungarian Supreme Court, brought this award to my attention. I had an interesting topic that had not yet been researched in an international comparison, so I thought this might be a good, convincing topic to catch the jury's attention.

This award meant a lot to me. I was the first person in Hungary who won this award. My name has become known in the Hungarian judicial and academic community, and my paper also brought international recognition through Eurofenix: it was cited – among others – in the USA, Russia, Germany, Belgium and read all over the world. I have since become a senior lecturer at the Károli Gáspár University and now I am applying for a judge position. I think this award has had an impact on my judicial and academic career, as well.

During the award ceremony in Lisbon, I collected approximately fifty business cards, made a lot of connections. During the conference, I listened to lectures and had personal conversations with prominent experts whom I had known only through their publications previously.

Through Judicial Wing, we will continue to keep in touch with judges, and I look forward to continuing to participate in joint projects with foreign insolvency practitioners. INSOL Europe is more than a community. I feel that with this award I have gained a ticket to be part of this large and international family.

My advice to future applicants is that when thinking about the choice of topic, they should think big and without boundaries. If you have a good idea and it's exciting enough, you can easily win the jury's approval, no matter where in the world you are applying from. This prize could be a big jump in your career, so it is definitely worth applying and getting involved in INSOL Europe's work."

Róbert Muzsalyi receiving his award in Lisbon

Yutong Zhang

Winner in 2018 with the article "Blockchain: A Chance for Turnaround Procedure Modernization"

"I had been working on the research of debt restructuring and bankruptcy for eight years at that time. In 2017, I had a chance to do some research on some cutting-edge technologies such blockchain, AI, and clouding. I realised that there might be a chance for the aggregation between technology and law. At the same time, one of my colleagues, Xiahong Chen, posted the notice of the Richard Turton Award on the internet.

So I finished my paper and presented it to my PHD mentor, Prof. Shuguang Li, who is the director of Corporation Restructuring and Bankruptcy Research Center at China University of Political Science and Law, and is also the chairman of INSOL China. He thought my work was worthy and encouraged me to enter the award.

The news that I had won the Award spread rapidly in China. Lots of experts soon invited me to share the research with them.

To future entrants my advice would be to dig deep into your area and find the true facts." ■

> **My name has become known in the Hungarian judicial and academic community, and my paper also brought international recognition through Eurofenix**
>
> *Róbert Muzsalyi*

Yutong Zhang receiving his award in Athens

Further information about the winners and links to their papers can be found at:

www.insol-europe.org/richard-turton-award

www.insol.org/Education/Richard-Turton-Award

Asset recovery in fraud: A Spanish example

Héctor Sbert provides an example of the use of insolvency proceedings as an asset recovery tool in a Spanish case featuring FORUM FILATELICO

HÉCTOR SBERT
Partner - Dispute Resolution & Asset Recovery, Lawants, Spain

In May 2006, the Spanish "Audiencia Nacional" (National Court) started criminal fraud proceedings against the directors of FORUM FILATELICO, S.A., a company established in 1979, offering stamp collections as a profitable investment for consumers.

The criminal case for fraud was built in view of the company's inability to fulfil its contractual obligations to repurchase from its clients the stamp collections the company had previously sold them. In the frame of such criminal proceedings, the company's premises were raided and the directors replaced by judicial trustees.

Almost simultaneously, a group of clients started mandatory insolvency proceedings against the company, on the grounds of its inability to buy back their stamps. Thus, in June 2006, Madrid Commercial Court nº 7 started insolvency proceedings against FORUM FILATELICO and appointed its own insolvency trustees.

In view of such a development, the "Audiencia Nacional" immediately revoked its appointment of the (criminal) judicial trustees, thus giving the insolvency trustees green light to exclusively deal with the assets, liabilities and day-to-day management of the bankrupt company, which immediately was put into liquidation.

In this way, the insolvency trustees were entrusted to use the proceeds of the company's liquidation to compensate the victims of this massive fraud, which affected more than 260,000 customers and added up to a value of more than 3 billion euros.

For several years now, the insolvency trustees have so far been able to return approximately 25% of their failed investments to those affected. This is not an insignificant percentage, considering the high level of debt and the massive negative net worth of the company, despite it possessing valuable assets, like real estate (in Spain and abroad) and art collections. The most recent payment to victims was made in March 2020.

In this article, we will try to evoke the most interesting milestones of this complex insolvency procedure. Though this text will focus on the case of FORUM FILATELICO, it is also interesting to note that there is another company in the same sector, called AFINSA, which was simultaneously involved in a similar fraud and whose insolvency proceedings have also allowed the victims to recover a substantial part of their money. Recovery efforts continue to this day.[1]

FORUM FILATELICO's "business model"

The company's "business model" consisted of buying stamps from wholesalers and reselling them in lots to retail customers. To this end, the company entered into three different contracts simultaneously with each customer: a contract for the sale of philatelic lots, a contract for the deposit of the stamps purchased and a commitment to repurchase the stamps. At the expiration of the term established in each contract, the company had to buy back the stamps, at a price that included a premium or revaluation of the price initially paid by the customer. However, it was soon established by the insolvency court that the company bought and sold the stamps to its customers on the basis of unilaterally drawn up price lists, which bore no relation to the actual market value of the stamps. In fact, the company could not prove that it sold stamps to persons other than its customers at the prices indicated in its catalogues.

A "good ol'" Ponzi scheme

In view of the above, the Spanish insolvency court considered this model a classic Ponzi scheme, since it needed new customers who, with their contributions for the purchase of stamps, could enable the company to pay the agreed revaluations to its old customers.

Although the company pretended the profit came from the revaluation of the stamps, this was not the case. On the one hand, because there was no evidence that the stamps were sold outside the circuit created by the company itself; on the other hand, because the stamps were later valued as being worth much less than what the company claimed, and therefore could not constitute a guarantee of success for the company's business model.

> *"Although the company pretended the profit came from the revaluation of the stamps, this was not the case"*

FORUM FILATELICO had a large commercial network throughout Spain knowing that only by attracting new customers could it maintain its business model. Indeed, the company's income came almost entirely from customer contributions, and it is only with these contributions that it was able to meet the obligations assumed in the philatelic sales contracts.

Therefore, the insolvent company must have been aware of the risk associated with its activity and the possibility that, in the short or medium term, the volume of business would decrease to such an extent that it would be impossible to meet its commitments, which would lead to insolvency.

Misleading accounting

On the other hand, the company's accounts did not reflect this risk. The company never made any provision for the repurchase commitments entered into with its customers, at prices that were overvalued by more than 12 times the usual price in the most solvent market catalogues. The company should thus have recorded in its balance sheet the amounts it had undertaken to repay by accruing the difference between those amounts and the cash received on a time basis, up to the date on which the customer was supposed to use its repurchase rights. These amounts should have been recorded to the income statement of each year. This shows that, at least two years before the bankruptcy was declared, the company should have declared a negative net worth, resulting in its obligation, at that point in time, to either proceed to a capital increase or apply for voluntary insolvency.

Suspicious transactions

In addition, the purchases of stamps were mostly made from companies whose sole customer was FORUM FILATELICO, had no employees, in some cases had been dissolved just after the judicial intervention of FORUM FILATELICO and, in short, did not appear to have any real commercial activity. In the opinion of the insolvency trustees and the Spanish Public Prosecutor's Office, all these suppliers that appeared in

FORUM FILATELICO's accounts as such and to whom enormous sums were paid were not wholesalers, but mere intermediary companies which allowed overpricing and intermediation margins to be charged without any commercial or mercantile justification.

The massive task of liquidating the company's assets and compensating the defrauded customers

Against this backdrop, the relative success that has enabled FORUM FILATELICO's customers to recover a respectable percentage of their investments has been due to the commendable work of the insolvency trustees. They found themselves with assets worth more than one billion euros, although insufficient to cover the company's total debts (mainly consisting, as mentioned above, of claims from defrauded customers).

Nevertheless, the company had assets of undoubted value: a large real estate portfolio, art collections, philatelic lots and a great number of securities consisting of shares in other both public and private companies, investment funds and financial derivatives.[2]

Most of the real estate, works of art and stamp collections were sold at auctions held at various houses, including Sotheby's of London. In other cases, given the value of the works of art in question, the Spanish State exercised its right of first refusal.

In short, the results obtained speak well of the professionalism of the insolvency trustees, as well as of the ability of the Spanish insolvency procedure to deal effectively with complex liquidation operations, generating the necessary income to compensate, to the greatest extent possible, the victims of a fraud as massive as it was unprecedented. ■

Footnotes:

1 Interestingly, though, the insolvency trustees of AFINSA declared in March 2021 they have not managed to contact 28,320 former customers and have thus deposited 10.6 million euros with the court. If these amounts are not claimed within the next five years, they will be handed over to the Spanish Treasury.

2 Ironically, the company's debtors also included the Spanish Tax Agency itself, which religiously paid its dues to the insolvency estate.

"The company had assets of undoubted value: a large real estate portfolio, art collections, philatelic lots and a great number of securities"

Slovakia: Bankruptcy or reorganisation following mergers

Martin Provazník takes a retrospective look at mergers in Slovakia where the legal successors ended up in bankruptcy or reorganisation between 2012 and 2019

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Slovakia saw a huge increase in the number of merged companies between 2012 and 2017. Thousands of companies were merged into fewer than 200 successor companies, which subsequently ended up in bankruptcy.

Abuse of the merger process

A merger is a procedure that is quite common in M&A transactions and is often the desired way to dissolve companies. However, when a merger is carried out in order to avoid liquidation, bankruptcy or reorganisation, the insolvent company is often merged with a successor company and liabilities of the insolvent company are transferred to the legal successor. Thus, the creditors' claims cannot be satisfied in the liquidation, bankruptcy or reorganisation of the dissolved company and the liabilities of the dissolved company remain with the legal successor.

Moreover, the merger is often planned so that the legal successor is also insolvent or becomes insolvent by the merger itself. As a consequence, the legal successor files for bankruptcy after the merger. In the subsequent insolvency proceedings of the legal successor the insolvency administrator has difficulty obtaining information about the dissolved company. If the bankrupt successor company is the legal successor of a large number of dissolved companies (10 or more), it is almost impossible for the insolvency administrator to get the essential information about the dissolved companies.

In addition, under this merger "model", the sole shareholder of the successor company is often a person who has no funds and/or is difficult to find, often a foreign national from an Asian or African country, making it extremely difficult to communicate and hold them accountable.

Creditors thus have nothing to satisfy the claim, leaving them with only one option: to ask the police for help.

In the context of criminal proceedings, the investigation focuses on whether the debtor has reduced its assets with the intention of harming the creditor or whether there has been an attempt to prevent the winding-up of the business.

Emergence of the merger problem in 2012

The sharp rise in these "special purpose" mergers occurred due to a legislative change in 2012. Previously, when someone needed to get rid of a company, they transferred its shares to a penniless and often uncontactable person. The abandonment of this "model" and the focus on company mergers indirectly resulted from an amendment to the Slovak Commercial Code. As of 1 October 2012, the law changed and the registration of a majority shareholder now also requires the consent of the tax authority. This consent applies to both the transferor and the transferee, with a few exceptions (e.g. foreign entities). The amendment spurred a massive increase in corporate mergers aimed at getting rid of company debts. The law allowing this type of merger remained in force until 2017. During this time period (especially 2014 and 2015), there was a significant increase in company mergers in Slovakia. The Slovak Ministry of Justice was aware of this development and initiated a change of laws in 2017.

> *Mergers were often prepared with the intent that the legal successor would file for bankruptcy (reorganisation) after the merger*

Correcting the problems with abuse of merger process in 2017

Effective as of 8 November 2017, the amendment to the Commercial Code incorporated new conditions for mergers to reflect the frequent occurrence of mergers deliberately aimed at preventing debt recovery or getting rid of insolvent companies and avoiding bankruptcy proceedings.

From this date, companies should not merge if doing so would create a situation where the value of the legal successor's liabilities would exceed that of its assets. An addition, an auditor's certification is required. Furthermore, none of the merged companies can be in liquidation, bankruptcy, reorganisation or dissolution proceedings. If such a merger were to take place, all members of the bodies that carried out the merger could be held liable.

This new law also introduced the obligation to inform the tax authority of the merger in advance.

Today, it is possible to merge with a company that has financial difficulties but is not bankrupt. However, the legal successor must have enough assets to cover the debts of both companies.

Evolution of merged companies by merger period from 2011 to 2019

During the period from 1 January 2011 to 12 December 2019, a total of 3,309 companies were merged into 158 successor companies, which were later subject to bankruptcy or reorganisation.

The trend of company mergers started to increase in the last months of 2013 and peaked in 2015. Chart 1 shows the number of merged companies in each month in the period from 2011 to 2019.

After a peak in mid-2015, the number of merged companies started to gradually decline until mid-2016, only to turn around and peak again in late summer 2017. It is likely that this increase in 2017 may have been caused by state efforts to change the merger law. After a significant number of mergers in January 2018, corporate mergers were essentially completely muted by mid-2018, with no mergers taking place in 2019.

The merger trend was only halted in 2017 by the aforementioned change of law. Although this change of law came into force on 8 November 2017, 170 more companies were merged in 2017 and 2018, either due to the probable antedating of merger agreements and subsequent registration after the effective date of the law, or due to late registration.

Chart 2 gives a general overview of the monthly trend of mergers in which the legal successor's bankruptcy or reorganisation request was filed.

According to the chart, in 2018, bankruptcy or reorganisation requests were filed for the 30 companies with the largest number of merged companies in the period from 2012 to 2019 (1,097 legal predecessors). On average, 37 companies merged into a single successor that was subject to a bankruptcy or reorganisation request. In 2018, the number is significantly affected by the bankruptcy of Eurotransfer, spol. s r.o., a legal successor of 42 predecessors, which in turn were legal successors of 698 other companies.

Conclusions

It can be concluded that there has been a trend in Slovakia to get rid of indebted companies. Prior to 1 October 2012, it was mainly a share transfer, where the initial shareholder transferred its shares to a new shareholder. If this new shareholder was uncontactable and the company was insolvent, the debt recovery process became much more difficult. This was prevented by prohibiting share transfers without the consent of the tax authority in 2012.

However, as the merger of a non-asset-bearing company with a successor company was not subject to the tax authority's consent, and the original shareholder could transfer its share via merger, the number of "abused" mergers started to increase. Such mergers were often prepared with the intent that the legal successor would file for bankruptcy (reorganisation) after the merger.

In this time period, instead of more than 3,000 indebted companies, only less than 200 successor companies have been included in the bankruptcy statistics (3,383 companies merged into 178 successors, all of which filed for bankruptcy or reorganisation between 1 January 2011 and 31 December 2019). This created a negative impact in the following areas:

- Creditors' rights violation (insolvency regulation).
- Tax avoidance (tax statistics and payment).
- Misreporting on the number of bankruptcies (insolvency statistics).

The massive increase in the "abuse" of the merger regulation between 2012 and 2016 resulted in a change of law in 2017.

We believe that advisers helping entrepreneurs to dispose of companies with financial difficulties realised the shortcomings of the 2012 law change and started to offer special purpose merger services. The main wave of abused mergers occurred between 2012 and 2018, peaking in 2014 and 2015. However, a significant number of mergers continued even after the amendment came in force on 8 November 2017, with another 170 companies merged in 2017 and 2018. It is probable that the registration of mergers in 2018 where the legal successor ended in bankruptcy or reorganisation occurred not only for administrative reasons, e.g. delayed registration, but also due to the antedating of merger agreements. ■

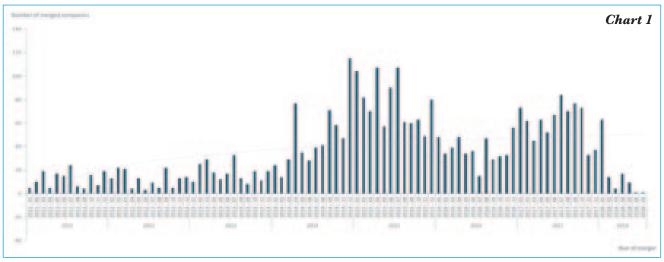

Chart 1

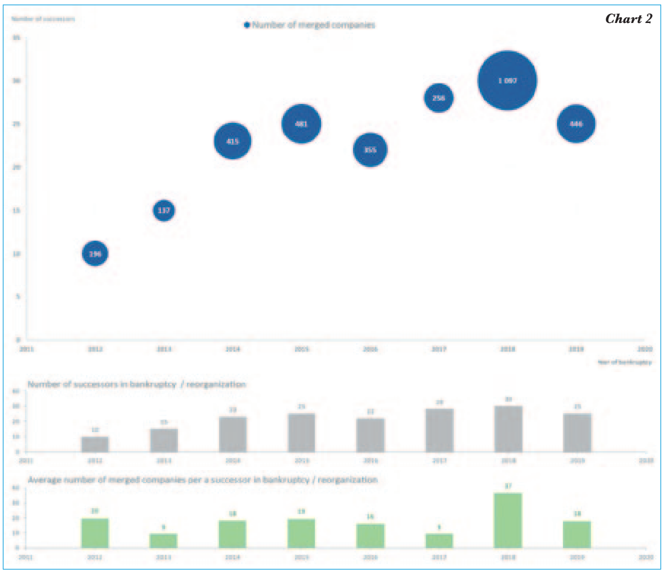

Chart 2

> "Instead of more than 3,000 indebted companies, only less than 200 successor companies have been included in the bankruptcy statistics"

Crisis & Opportunity: Biden's first 100 days and beyond

Ryan Walker reports on the new US President's impact in the first few months of his administration

RYAN WALKER
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The significance and symbolism of the "first 100 days" of a new president's administration dates back to the time of the 32nd President, Franklin D. Roosevelt, when he coined the term during a July 1933 radio address.

Since then, it has been used as a milestone in every successive new presidential administration to mark early success. It is, then, not lost on those who follow politics that the 46th President, Joseph R. Biden, held a March 2nd meeting with presidential historians to discuss the triumphs of his predecessors like Lyndon Johnson, Abraham Lincoln, and, of course, FDR — after whom Biden is said to be modelling his presidency.

Like FDR, President Biden has proposed — and to some extent passed — an aggressive and progressive policy agenda. Furthermore, although not facing a world war like FDR, Biden is combating numerous crises such as the COVID-19 pandemic, a broken global supply chain, rising energy prices, a flood of immigrants at the U.S. Southern border, racial justice, and a volatile economic recovery, just to name a few.

> *Like FDR, President Biden has proposed — and to some extent passed — an aggressive and progressive policy agenda*

Early success

Yet, despite these evolving crises, the Biden Administration has had some early success by proposing — and Congress passing — the "American Rescue Plan" to abate the economic damages caused by the pandemic emergency response. This $1.9 trillion legislation focused on expanding the nationwide vaccination program and aiding families most in need by providing those that qualify with a $1,400 direct payment from the government, extending unemployment benefits, allocating $130 billion to reopening schools, and $160 billion for the supplies and workforce necessary to stop the spread of the virus.

In addition to this substantial legislative effort, President Biden has signed 42 executive orders (EO) — the most since FDR's 99 EOs during his first 100 days. However, even with successes like administering over 200 million vaccine doses in the U.S., the clear focus from the White House was undoing as many of the policies from the previous Trump Administration as possible.

Through April 23rd, according to the American Presidency Project, Biden has undone 62 of 219 orders signed by President Trump—more than twice as many orders in his first 100 days as the last three presidents combined. Many of these actions relate to the bureaucratic machinations of government, but several are significant from a policy and political perspective.

Rejoining the Paris Climate Accord delivered on a key campaign promise from Biden and completely reversed Trump's position that it "handicaps the United States economy in order to win praise from the very foreign capitals and global activists that have long sought to gain wealth at our country's expense."

The Biden White House even went a step further in cementing the importance climate will play in its policymaking by convening, for the first time since its inception during the George W. Bush Administration, the Major Economies Forum on Energy and Climate. Additionally, the Biden-Harris team stopped the U.S. exit from the World Health Organisation (WHO) and further construction of "the wall" along the U.S.-Mexico border.

Diplomatically, President Biden has maintained the same hard-lined posture as the Trump Administration on matters involving China while focusing much of his efforts during the first 100 days on Iran, Afghanistan, and Russia. We can expect the approach to China to change from rhetorical combat to a multi-lateral approach involving the European Union and other major U.S. trading partners.

National security

Like Trump, Biden has committed to ending the generational conflict in Afghanistan, but delayed the Trump imposed deadline of May 1st for the withdrawal of all U.S. troops to September 11th — setting the stage for additional political theatre as the world prepares to honor those lost during the 20th anniversary of the attacks on New York City, Washington, DC, and United Flight 93 in Shanksville, Pennsylvania.

Further complicating matters in the Middle East, as it has with other U.S. presidents, Iran continues to pose a national security threat as well as a diplomatic conundrum. Specifically, for President Biden, reentering the Iran Nuclear Deal was a centrepiece of his campaign foreign policy promises, but has yet to produce tangible results largely because Iran has boosted its uranium enrichment and through its various "third parties" continues to antagonise and stoke the flames of conflict in areas such as Yemen, Israel, and Iraq.

Conversely, President Biden has had direct bilateral communication with Russian President Putin and even discussed the idea of a summit between the two nations hosted by a third-party country similar to those meetings held between then President Trump and North Korean dictator Kim Jong-un.

Notably, the President will embark on his first foreign trip in mid-June. Travelling to the G7 summit in Cornwall, England and to a NATO summit in Brussels, Belgium, Biden will attempt to reverse another of the Trump Administration's signature actions — tariffs. To date, both sides have made concessions by agreeing to suspend tariff increases in an effort to reset the relationship. However, the key point of contention — steel and aluminum tariffs — could be a hill too high to climb for either side. Since the U.S. has imposed tariffs on EU metals as "national security threat" — citing Section 232 of the Trade Expansion Act of 1962 — steel prices have skyrocketed and relations between the EU and U.S. have deteriorated into an "eye-for-an-eye" posture.

Yet, even with Biden's goodwill tour of the continent, it will be difficult to roll these back as the steel industry and trade unions have already begun lobbying the White House to keep them in place while the prospect of a large infrastructure bill looms on the horizon.

New legislation

The first 100 days of the Biden Administration have been full of activity, but activity does not equate to productivity, unfortunately. Given that the President's party controls both chambers of Congress, President Biden was only able to muster 11 pieces of legislation passed and signed into law — second fewest of Administrations dating back to FDR.

The House of Representatives maintains an eight-seat majority (with five vacancies) and the Senate stands at an even 50-50 split with Vice President Kamala Harris serving as the tie-breaking vote as needed. Therefore, the key to President Biden's purported ambition to remake America in the same vein as President Franklin Roosevelt may lie with West Virginia Senator Joe Manchin (D-WV) and his opinion on forthcoming pre-eminent legislation such as:

- the $2 trillion infrastructure proposal known as the "American Jobs Plan" and its companion the $1.8 trillion "American Families Plan", which aims to increase federal funding in education, child care and paid family leave by reversing the 2017 tax cuts;
- returning the top marginal rate to 39.6% from the current 37%;
- increasing capital gains taxes on households making more than $1 million;
- readjusting estate taxation;
- ending the practice of carried interest; and
- stepping up Internal Revenue Service (IRS) enforcement.

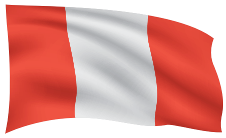
In addition to the aforementioned legislation, other matters, like climate — and how the U.S. will reach net zero emissions by 2050 — demand attention prior to COP26 in Glasgow this November. The progressive wing of the Democratic Party will demand action on immigration and police reform prior to the 2022 midterm elections.

Furthermore, breaking through the U.S. vaccination rate plateau by convincing those that are hesitant that it is indeed safe and effective while staving off inflation, finding a way to solve the growing labor shortage plaguing what would otherwise be a more robust economic recovery, securing our critical infrastructure from cyber threats, and making sure all Americans have an affordable, reliable, and abundant source of energy are just a few of the many important issues facing this Administration in just the near term and primarily on the domestic front. ■

"The first 100 days of the Biden Administration have been full of activity, but activity does not equate to productivity, unfortunately"

In this section of *eurofenix* we bring you short updates from our members including insolvency measures in response to the COVID-19 crisis in their jurisdictions. To contribute to a future edition, please contact: *paulnewson@insol-europe.org*

Austria: New act on implementing the Directive



DAVID SEIDL
Graf & Pitkowitz Rechtsanwälte GMBH Graz, Austria

The Austrian Ministry of Justice has submitted its draft for the Implementation Act of the Directive on Restructuring and Insolvency to the Parliament (Restrukturierungsordnung – "ReO") on 22 February 2021. The reactions of the professional public are mixed.

The draft foresees a (so-far locally unknown) judicial preventive restructuring procedure to help companies overcome a probable insolvency via a pre-packed restructuring plan.

This restructuring plan will have to provide restructuring measures (essentially fresh capital and/or a haircut) and a categorisation of creditors in certain classes that will be (or will not be) affected by the restructuring plan. The draft suggests five classes of creditors (secured, unsecured, bonds, SMEs and creditors of subordinate claims). Stay of execution and an automatic stay of essential contracts is accessible.

While the debtor remains in possession, if the court approves a stay of execution, a cross-class cram-down is required, or if the self-administration of the debtor leads to disadvantages for the creditors, the court has to appoint a restructuring office holder who shall supervise and support the management for the preparation and implementation of the plan. The office holder will prepare a report to the court and the affected creditors with a detailed and qualified opinion on the proposed restructuring plan.

The affected creditors will vote on the restructuring plan. In each class, a 75% majority of the amounts of debts and a 50% majority of the headcount of the creditors will be necessary. If the plan is not accepted by all classes but by the majority, the court may rule a cram-down. If the conditions for the confirmation of the restructuring plan are fulfilled, the class of the refusing creditors are treated equally with the classes with the same ranking respectively better than subordinated classes and no class of creditors would receive more than its full claimed amount.

Public or confidential procedures shall be possible. The public procedure will be called "European Restructuring Procedure" and will fall within the scope of the Regulation (EU) 2015/848 on insolvency proceedings. All basic information, such as the company's name, the competent court, the appointed office holder, the schedule of hearings and the cornerstones of the restructuring plan, as well as the votes and the court's decisions will be made public on a website, administrated by the Ministry of Justice. The hearings will be accessible to creditors only. This procedure is to be completed within two, maximum three months.

> *The Austrian lawgiver might miss this unique chance for true innovations in court-approved procedures*

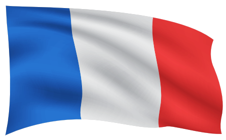
A so-called simplified restructuring plan will also be available, which shall affect only the financial creditors. This procedure is designed as fully pre-packed and requires the consent of the majority of at least 75% of the creditor claims in each class.

After the draft's publication on the website of the Austrian Parliament on 22 February 2021, an impressive number of 50 observations and opinions by numerous institutions and professionals were filed.

In these observations and opinions, one of the main concerns appears to be a rather low level of distinction from the already available reorganisation procedure, as well as the absence of more innovative restructuring tools such as debt-to-equity-swaps or semi-mandatory capital increases. This lack of more opportunities might render the Restructuring Act rather uninteresting for debtors, who might tend to utilise the tried-and-tested reorganisation plan, with a minimum quota of 20% (which requires a double positive vote of more than 50% of the creditors and of the total amount of the claims).

We share these concerns. It appears that the Austrian lawmaker might miss this unique chance for true innovations in court-approved procedures, by approving a mere minimum-implementation of the Directive. ■

France: National courts should facilitate enforcement of foreign judgements



JEAN-LUC VALLENS
Honorary judge, Professor emeritus, University of Strasbourg

According to a recent judgement of the French Cour de cassation[1], a foreign judgement setting a financial penalty for mismanagement against a manager should be recognised and enforced in France whatever the judgement looks like.

A German Court had judged a manager to bear personal liability after insolvency proceedings had been opened against his company. He was charged an amount of more than 2 million euros, upon a request filed by the German Insolvenzverwalter (liquidator). In the meantime, this manager had transferred his home in the South of France, maybe in order to avoid lawsuits of German creditors…

The clerk of the French Court issued a certificate giving enforcement to this judgement.

Upon an appeal filed by the manager, the French Court of appeal reversed the decision of the lower-level court, by considering that the judgement did not contain any formal conviction. Such an analysis was then rejected by the Cour de cassation: a domestic court may neither distort nor review foreign judgements, according to the EU law[2]. The certificate delivered by the clerk pursuant to article 54 of Council Regulation (EC) 44/2001 certified the enforceability of this judgement.

This judgement of the Cour de cassation also reminds national courts that recognition and enforcement of judgements in relation with insolvency proceedings opened in other EU Member States are regulated by the Regulation Brussels I, except if public policy is invoked[3]. It differs from rules applicable to opening judgements, whose recognition and enforcement are granted *ipso jure*. Other judgements have to be enforced as judgements passed in civil and commercial cases.

The Council Regulation (EC) 44/2001 of 22 December 2000, and the more recent Regulation (EU) n° 1215/2012 provide a vague definition of what such a judgement could be: any judgement, whatever its name[4], given by a court or tribunal of a Member State. No specific requirements are needed for a foreign judgement to be recognised: therefore, any decision issued by a foreign court must be recognised and enforced. The formal appearance of a judgement is not relevant for its recognition, because domestic rules are not fully harmonised, especially with respect to procedural matters, thus foreign judgements cannot be expected to be similar to domestic ones.

An old judgement of the Cour de cassation can be mentioned in that respect for it had indicated that any decision issued by a foreign court may get *exequatur* if it affects the rights or liabilities of a person[5].

Moreover, neither the Legislative guide on insolvency law nor the cross-border insolvency model law adopted by UNCITRAL suggest any definition of the formal appearance of the national or foreign judgements: such definitions were deemed unnecessary, because they primarily depend on domestic legislators.

If such aspects of procedural matters in civil and commercial cases are not harmonised, domestic courts only have to check the name of parties, the sum to be paid or the relief to be granted and the right to enforcement. In this case the certificate delivered by the foreign clerk confirmed in a sufficient manner the obligation of the former manager to pay.

The Cour de cassation therefore focusses on a flexible approach of the notion of enforceable foreign judgements, based on the general principle of mutual trust due to foreign European courts, irrespective of the formal appearance of such judgements.

Obviously, the foreign court should also be a real public body established by the law and acting according to the rules set out by the European Court of Human Rights and in an independent way: the courts of EU Member States are deemed to meet with such principles. This presumption is necessary for a proper functioning of the internal market. Such an approach should apply to all kind of judgements in relation with foreign insolvency proceedings, ordered toward a debtor, a shareholder, a third debtor, a mother company or a manager, or issued in any judicial case on a challenged claim, on a disqualification or on a discharge. ■

Footnotes:

1 Cass First civil chamber 3 March 2021, n° 19-20.393

2 In this case, article 32 of Council Regulation (EC) n° 44/2001 of 22 December 2000 on jurisdiction, recognition and enforcement of judgements in civil and commercial matters

3 Articles 25 and 26 of Council Regulation (EC) n° 1346/2000 of 29 May 2000 on insolvency proceedings, repealed by articles 32 and 33 of Regulation (UE) n° 2015/848 of 20 May 2015 on insolvency proceedings

4 Article 32 of Council Regulation (EC) n° 44/2001 of 22 December 2000; also, article 2 of Regulation (UE) n° 1215/2012 of 12 December 2012 on jurisdiction, recognition and enforcement of judgements in civil and commercial matters

5 Cass 1ère civ 17 Oct 2000, n° 98-19.913

> *The Cour de cassation focusses on a flexible approach of the notion of enforceable foreign judgements*

The new Greek Insolvency Code: 'Something old, something new, something borrowed, something blue'

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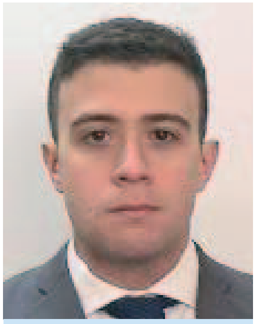
Scientific Advisor, Bazinas Law Firm, Athens, Greece



YIANNIS G. BAZINAS
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> *Hopefully, the new code will not leave insolvency actors feeling blue, especially considering that its long-term goal is to strengthen financial stability*

The Greek insolvency code[1] (IC) has once again been amended, keeping to the tradition of the past decade that requires domestic insolvency legislation to be revisited at frequent intervals.

Despite that the amendment is very extensive, the new law has retained a number of the stipulations found in the previous (old) IC[2]. New provisions and proceedings have been included to ensure that the IC is at par with other modern insolvency laws in Europe and elsewhere. In fact, the new IC borrowed terms and wording from Directive (EU) 2019/1023 and embraces its recommendations. Hopefully, the new code will not leave insolvency actors feeling blue, especially considering that its long-term goal is to strengthen financial stability, with the new law envisaged as a vital tool in tackling existing NPLs and preventing the build-up of more[3].

The new IC was initially scheduled to come into force on 1 January 2021 but was then pushed back to March 2021 (for rehabilitation, liquidation proceedings etc.) and June 2021 (for early warning, OCWs and small insolvencies). Various provisions of the old legislation, some of which could be traced back to the Napoleonic Code de Commerce of the year 1807, were maintained in the new code. This was not the case for intra-insolvency reorganisation proceedings that were available under the (old) IC and have now been abolished altogether. Reorganisation under the previous provisions was one of the possible outcomes of the unitary insolvency procedure, commencing with (or after) the declaration of the debtor's insolvency. However, the new law shifts (even more) the weight to pre-insolvency proceedings for the rescue of debtors.

A sharp departure from erstwhile legislation is that now, for the first time in Greece, insolvency proceedings are also available to non-merchant debtors. The new legal framework also marks a transition to the digital era for domestic insolvency proceedings with the use of electronic means of communication for the filing of claims, submission of restructuring or repayment plans, voting and notifications to creditors, lodging of challenges and appeals etc., following the example of Article 28 of Directive (EU) 2019/1023.

In fact, the new IC follows the lead of the EU Directive on preventive restructurings, as reflected in the provisions adopted on early warning tools with alert mechanisms now added to the IC, the out-of-court debt restructuring scheme for pecuniary obligations to financial institutions, the State and Social Security Institutions, pre-insolvency rehabilitation proceedings (also existing under the previous law), debt discharge for debtors which are natural entities in three (3) years after the declaration of insolvency etc. However, domestic scholars have taken the view that the harmonisation of the IC with Directive 2019/1023 was not particularly necessary, with criticism also suggesting that borrowing terms and expressions found in the Directive required more attention to detail when transposed to national law, that the IC approach to regulate some matters by reference to ministerial decisions (to be issued at a subsequent time) is not doing any favours for the certainty of the law and that the use of definitions as a legislative technique, is an unsuitable and unfamiliar practice in the domestic legal order[4].

Despite the high aspirations (and expectations) of the amended IC, early signs indicate that the new law will not have managed to build strong immunity to the (frequent) amendment syndrome it has developed. ■

Footnotes:

1 Law 4738/2020 State Gazette (SG) A' 207/27.10.2020.

2 Law 3588/2007, SG A' 153/10.7.2007

3 G. B. Bazinas, Y. G. Sakkas, Y. G. Bazinas, Greece, Special Alert to Chapter 23A, Collier International Business, Insolvency Guide, Matthew Bender/Lexis-Nexis 2020.

4 Psychomanis S., Insolvency Law, Sakkoulas, 2021, p., 5.

Poland: New developments in restructuring law

A new restructuring tool has recently been introduced into Polish restructuring law, namely simplified restructuring proceedings.

Although simplified restructuring proceedings were meant to serve only during the Covid-19 epidemic having been adopted as part of the Polish legal system through the so-called "*Anti-Crisis Shield [4.0]*", they can be applied to any financial troubles or potential insolvency, not only the ones due to the Covid-19-related financial difficulties.

Simplified restructuring proceedings rapidly became popular and are most frequently used because of their features:

(i) Opening of the proceedings is done by the debtor (entrepreneur) himself – by publishing an announcement in the Court and Commercial Gazette (*Monitor Sądowy Gospodarczy*);
(ii) During the proceedings, the law provides for a stay of enforcement;
(iii) There is a ban on termination of agreements essential for the debtor's enterprise;
(iv) There is a possibility to cover the secured creditors with the arrangement, under certain conditions;
(v) The Creditors' Meeting may be carried out by means of remote direct communication;
(vi) The court is involved only at the final stage of the proceedings, to approve (or not) the arrangement.

As research shows[1], after the first quarter of 2021, simplified restructuring proceedings were opened in more than 750 cases (three months from their introduction), and constituted around 80% of all restructuring proceedings.

What is even more important, in more than 166 cases the arrangement was concluded in about 60% of such cases. Previously, the percentage of concluded arrangements in similar proceedings was around 28%. This increase especially shows that both debtors and creditors see the bright side of the simplified restructuring proceedings, thanks to the possibility to reach an agreement.

However, when the restructuring case finally moves to the court, there are some slowdowns and the debtor may have to wait up to nine months for the court decision on the approval of the arrangement. Nevertheless, only in two cases so far the courts have refused to approve the concluded arrangement. Additionally, only in 16 cases the courts have cancelled the effects of making the announcement, which basically meant that the proceedings were harming for the creditors. A cancellation implies that the enforcement proceedings may be conducted and the termination notice may be given so that even after the cancellation the arrangement can still be concluded and presented (again) to the court to approve.

All the above-mentioned facts clearly show that in the current situation in Poland, the out-of-court restructuring proceedings are the easiest, the fastest and the most predictable ones.

Simplified restructuring proceedings may be initiated only until the end of November 2021 (after recent changes), and moreover, an amendment to introduce these proceedings permanently has already been statutory law in Poland and is to enter into force in December 2021.

Our observations on the way in which simplified restructuring proceedings work have led us to a conclusion that some improvements in the course of the proceedings could be made.

Namely, the amendment to the Restructuring Law in Poland provides that:

(i) The announcement on the opening of the proceedings to approve the arrangement will be made by the arrangement supervisor, not by the debtor;
(ii) The announcement may be made only after the debtor has submitted the list of receivables and the list of disputed receivables;
(iii) The arrangement supervisor will list the agreements essential for the functioning of the debtor's enterprise so as to prevent its termination;
(iv) The court's decision on the cancellation of the effects of making the announcement may be appealed;
(v) The case files will be kept by the arrangement supervisor.

Additionally, there will be no time limit for the proceedings to be opened, which means that this new legal provision will be permanent in the Polish restructuring framework.

Summing up, the data and statistics show that simplified restructuring proceedings are a very popular restructuring tool in Poland. The legislative decision to make it a new permanent possibility seems to be a very good one especially in light of the ongoing discussions on how to implement the EU Restructuring Directive 2019/1023 into the Polish legal system. ■

Footnote:

1 See: Reports on Simplified Restructuring published on INSOL Europe's website: www.insol-europe.org/technical-content/national-insolvency-statistics-poland [access: 10/05/2021].

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"In the current situation in Poland, the out-of-court restructuring proceedings are the easiest, the fastest and the most predictable"

Publications of interest on EU prevention, restructuring and insolvency matters

Myriam Mailly writes about the latest information made available to INSOL Europe members on the INSOL Europe website

MYRIAM MAILLY
INSOL Europe Technical Officer

EU public consultation on 'Insolvency laws: increasing convergence of national laws to encourage cross-border investment'

In my previous technical column, INSOL Europe members were informed that the European Commission had published a Survey in order to consult all stakeholders with an interest in insolvency law on the new EU initiative to be adopted for the second quarter of 2022 and aiming at improving convergence between national frameworks for corporate insolvencies.

As a consequence, we are pleased to let you know that INSOL Europe has participated to that public consultation as a Non-Governmental Organisation and that the contribution to that survey (which tackled important issues that were not addressed in the Directive on Restructuring and Insolvency (n°2019/1023), including the liability and duties of directors of companies in the vicinity of insolvency; the status and duties of insolvency practitioners; the ranking of claims; avoidance actions; identification and preservation of assets belonging to the insolvency estate or core procedural notions) is now available at www.insol-europe.org/eu-study-group-news

EU Proposal for a Regulation replacing Annexes A and B to the EU Insolvency Regulation

For your information, the EU Commission has launched a public consultation on a Proposal for a Regulation replacing Annexes A and B to the EU Insolvency Regulation.

Amendments follow notifications to the European Commission from **The Netherlands** (November 2020), **Italy, Lithuania, Cyprus and Poland** (December 2020) in relation to the recent changes of their domestic insolvency law.

This proposal is open for feedback for a minimum period of 8 weeks (17 May 2021 - 12 July 2021 (midnight Brussels time) during which time INSOL Europe members can share their views on this EU legislative Act.

More information is available at: https://ec.europa.eu/info/law/better-regulation/have-your-say/initiatives/13026-Regulation-replacing-Annexes-A-and-B-to-the-EU-Insolvency-Regulation_en

Tracker on the Implementation of the EU Restructuring and Insolvency Directive

As a reminder, a tracker on the implementation of the EU restructuring and insolvency Directive is available on the INSOL Europe website at: www.insol-europe.org/tracker-eu-directive-on-restructuring-and-insolvency

Since the last technical column, updates were published for **Slovakia, Italy, Portugal and The Netherlands**. The tracker is still being updated and will be until July 2022 which is the ultimate deadline for Member States having used the extension option provided for by Article 34(2) of the Directive.

In the meantime, relevant information regarding the Directive on Restructuring and Insolvency of 20 June 2019 remains available from: www.insol-europe.org/technical-content/eu-directive-on-restructuring-and-insolvency

> *A tracker on the implementation of the EU Restructuring and Insolvency Directive is available on the INSOL Europe website*

Lexis®PSL

INSOL Europe/ LexisPSL Joint Project on 'How EU Member States recognise insolvency and restructuring proceedings of a third country'

As a reminder, LexisPSL R&I's has sought the collaboration of INSOL Europe in which the INSOL Europe's country coordinators have provided answers to key questions on recognition by EU Member States of insolvency or restructuring proceedings commenced in a third country, such as the UK (post Brexit).

A consolidated table including the replies from INSOL Europe and the articles accredited to INSOL Europe for **Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, The Netherlands, Poland, Portugal, Romania, Slovakia, Spain and Sweden** are available on the INSOL Europe website at: www.insol-europe.org/technical-content/recognition-in-third-states

Best Practices Guidelines for Judicial Cooperation in EU Cross-Border Insolvency Proceedings

These guidelines aim at providing some substantial and procedural guidance to those professionals under the duty to communicate and coordinate insolvency proceedings in the context of the EU Regulation 2015/848 of 20 May 2015. In particular, these guidelines promote non-binding best practices in terms of cooperation and coordination between courts themselves and between courts and insolvency practitioners appointed in main and/or secondary insolvency proceedings, including in case of corporate groups.

These guidelines remain also the objectives and the main provisions of the European Insolvency Regulation Recast all taking into account other recently formulated standards in this area, including the INSOL Europe European Communication and Cooperation Guidelines for Cross-Border Insolvency (2007), the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009), the UNCITRAL Model Law on Enterprise Group Insolvency with Guide to Enactment, Chapter 2 (2019), and other International Principles or Guidelines including those adopted by the International Insolvency Institute and the American Law Institute.

These guidelines were prepared by the Ecole Nationale de la Magistrature (ENM, France), in partnership with the Institut de Formation Judiciaire-Institut voor Gerechtelijke Opleiding (Belgium), the Consejo General del Poder Judicial-Escuela Judicial (CGPJ-EJ, Spain) and the Krajowa Szkoła Sądownictwa i Prokuratury (KSSIP, Poland) as part of the 'EU cross-border insolvency proceedings: judicial inter-professional cooperation for an effective application of the recast EU insolvency Regulation' Project (2019-2021).

This publication is also closely related to the professional training prepared by these training institutions and held in February and December 2020, with a view to facilitate the work of judges and practitioners dealing with such issues. The training was developed, in addition to the above actors, with the support of the French Conseil National des Administrateurs judiciaires et Mandataires judiciaires and was funded by the Justice Programme of the European Union (2014-2020).

These guidelines are available in English, French, Polish and Spanish at www.insol-europe.org/eu-study-group-links

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

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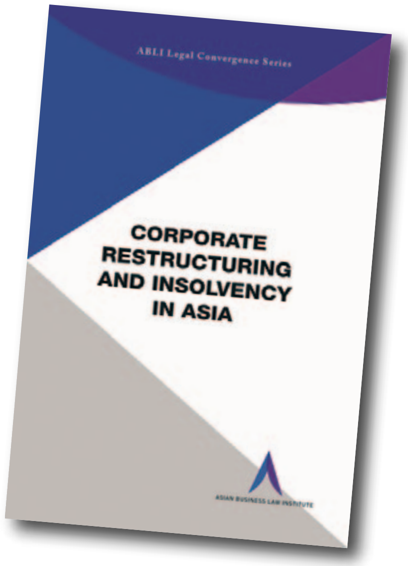
Corporate Restructuring and Insolvency in Asia 2020



Asian Business Law Institute, (2020, ABLI, Singapore) 804 pp., SGD 495, ISBN 978-981-14-4963-5 (print), 978-981-14-5158-4 (e-book)

This text arises from a joint project between ABLI and III, first conceived of in 2016 and motivated by the interest for the topics of restructuring and insolvency from international institutions working with economies at differing stages of development, particularly in Asia.

The ultimate goal of the project is to produce a set of principles covering court-based and out-of-court restructuring and cognate processes. Towards that end, a survey was initiated into the laws prevailing in the ASEAN* group of nations and six other countries with which Free Trade Agreements have been entered into by the group. Nonetheless, the landscape of development in these countries, ranging from the emerging and developing to the developed, could constitute a challenge to the formulation of a set of principles.

In order to carry out the survey, a questionnaire was developed, containing over 200 questions dealing with a variety of topics, both procedural and substantive, as well as looking at the role played by key stakeholders, including debtors, creditors, office-holders and the courts. Contemporary concerns, such as the use of rescue financing, ranking and priorities and the availability of cross-border frameworks assisting in coordination and cooperation, are also reflected in the comprehensive survey alongside more traditional issues, such as the position of employees and creditors. The exercise, involving the accumulation of a vast amount of up-to-date and relevant data, saw the participation of over 100 insolvency specialists drawn from the ranks of practice, academia and the judiciary.

Overall, the text merits great interest, as one of the more recent surveys into the law and practice of restructuring and insolvency in the ASEAN region that will help inform all those engaged in practice and research in a part of the world that has seen much movement lately in terms of reforms.

Paul Omar, INSOL Europe Technical Research Coordinator

** Association of Southeast Asian Nations*

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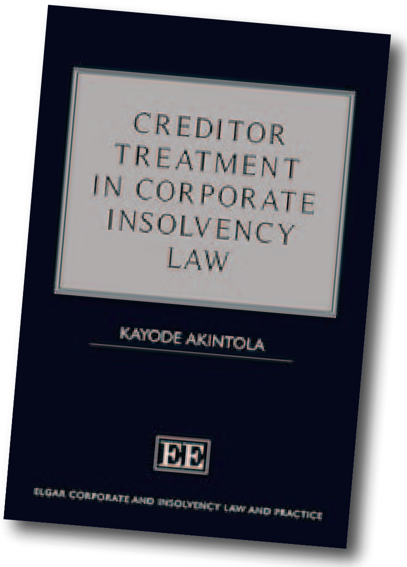
INSOL Europe offers a range of publications in our Technical Series, arising from events organised by the INSOL Europe Academic Forum and the Judicial Wing. The publications contain papers delivered by speakers and panellists, as well as ancillary texts (draft laws and rules) debated at the conferences. The texts contain accounts of recent research in the insolvency field that are useful for both academics and practitioners. Members of INSOL Europe are entitled to one complimentary copy of all of the publications (€20 non-members).

A full list of publications is available to order on our website at: www.insol-europe.org/publications/technical-series-publications

Creditor Treatment in Corporate Insolvency Law

Kayode Akintola (1st edition) (2020, Edward Elgar, Cheltenham) 256 pp., £125, ISBN 978-1-78897-138-6



It is often said and rarely disputed that credit is essential to economic growth. Creditors, however, are risk-adverse and want to understand what they face should one of their debtors file for insolvency.

The monograph looks into the treatment of creditors under English law. The monograph exemplarily outlines the difficulties faced by office holders in their task of dealing with complex financial transactions and securing a fair treatment for the different classes of creditors. It also discusses the divide between the (legitimate?) expectations of holders of proprietary interests on the company's assets and their treatment. Building on the findings of this analysis, Dr. Akintola suggests ways for improving the system by means of regulatory reforms. In Dr. Akintola's view, these reforms should focus on redistributive rules as well as on the laws governing securitisation and the treatment of creditors in insolvency.

The book is structured in three parts. The first part explains the company's reliance on debt finance to collect capital pre- and post-insolvency, despite the existence of alternative sources of funding, such as equity finance, sales of receivables and retained earnings or profits. The second part focuses on the treatment of secured and unsecured creditors in formal insolvency proceedings. The last part is dedicated to the treatment of creditors in special insolvency proceedings, with a detailed look to bank insolvencies.

The book is geared primarily towards practitioners and the judiciary, with detailed guidelines on how to address the ingenuity of these players towards the promotion of the goals advocated by the legislator in the Insolvency Act 1986 and following reforms. Nevertheless, this monograph is more than appropriate for research purposes in the areas of corporate insolvency and corporate finance.

Dr Eugenio Vaccari, Lecturer, Department of Law and Criminology, Royal Holloway and Bedford Colleges, University of London

Corporate Reorganization Law and Forces of Change

Sarah Paterson (1st edition) (2020, OUP, Oxford) 380 pp., £80, ISBN 978-0-19-886036-5

This engaging and interdisciplinary study by Sarah Paterson offers an examination of how creditors in the UK and US have mobilised and adapted the law in a variety of ways to achieve restructurings. It provides fascinating examples of how restructuring law in action can differ from the law in the books. The focus is on the restructuring of complex, highly leveraged companies, in the context of a shift from a hold-to-maturity, working capital debt market to a traded, leveraged market. There is a good discussion of how in the UK restructurings in this context are the subject of inter-creditor agreements, which exclude weaker, poorly adjusting creditors, and there are reflections on why this system presently works well.

Given this role for inter-creditor agreements the book calls into question the relevance, in this context, of common theoretical debates around restructuring law. The book cleverly uses discussion of the early history of reorganization and the changing roles of different personnel in the analysis of how the system in each country developed. There are sharp insights into the differences between the two systems and what works well in each, as well as discussion of what might need to change in the future. Readers will gain understanding of two complex systems in a well-written text that should be of interest even to non-specialist readers.

Professor Rebecca Parry, Nottingham Law School, UK

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