INSOL EUROPE
40 YEARS 1981-2021
#86 · Winter 2021/22

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The journal of INSOL Europe

Recognition of proceedings

UK vs EU

Transposition of the EU Directive

France vs Germany

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- Dublin Congress preview
- Joint Project on Recognition
- Real-estate measures post-Covid
- Country reports
- Event news

...and more

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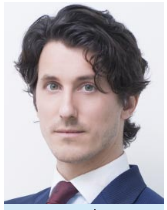
Welcome from the Editors


EDVĪNS DRABA


JOSÉ CARLES

We, as humans, habitually look into the future – especially at a nascent stage of the year, even so – in tumultuous and unpredictable times. It is true that we have also experienced various events that have brought a lot of turmoil in recent years and we want to be prepared for what comes next.

Therefore, it is no surprise that the topics and titles of INSOL Europe conferences revolve around the future recently. The INSOL Europe Autumn Online Conference that took place in October 2021 was entitled "*Back to the Future*" (an outline is on p. 9). In the same vein, the main theme chosen for the next Annual Congress that will occur in an offline setting (fingers crossed) in Dublin in March is "*Back to the Future 2*" and the panellists and speakers will have their chance to come up with their predictions on various topics. In this edition of Eurofenix, members of INSOL Europe's Young Members Group also present their predictions, this time on the future of restructuring and insolvency professions (p. 32-33).

Apart from the ubiquitous pandemics, one of the past events that brought turmoil was Brexit and the changes it introduced into the European legal landscape. This takes us to the next topic examined in this edition – the recognition of judgments and decisions between the UK and EU. In this respect, Kathy Stones provides an update on the joint project between LexisPSL and INSOL Europe (p. 18) on the recognition of foreign decisions in different EU countries, whilst Chris Laughton and Daniel Lewis had a conversation that resulted in down-to-earth practical advice as regards the recognition of decisions in the UK (p. 26). Further, you can even find an outline of the cross-border recognition issues between Cyprus and the UK (p. 34).

We at Eurofenix had our changes last year, too.

Catarina Serra stepped down from her position as a Joint Chief Editor and I would like to thank her for her remarkable contribution to Eurofenix during the past three years. I also wholeheartedly welcome José Carles, who has taken the role of a Joint Chief Editor from this edition onwards.

This Autumn we also mourned the loss of a long-time member of the Executive Editorial Board and a dear member of INSOL Europe family Florica Sincu, who lead a truly remarkable and inspirational career in the restructuring and insolvency field and helped to shape both Eurofenix and INSOL Europe. From this edition, Paul Omar has joined the Executive Board of Eurofenix in her stead and we welcome him, too.

Returning to the topic of the future, this year the Eurofenix team will be doing its best to equip you, our dear readers, with the best knowledge to predict or, perhaps, even influence the future for the better in our common field of restructuring and insolvency.

Nonetheless, we should also keep in mind that obsession with the future oftentimes brings unnecessary stress and can deprive us from living the present day fully. Therefore, I hope that this year we all will be able to remind ourselves to stay present and pay attention to everyday moments and people with whom we share them.

To conclude, I wish our readers a Happy and Successful New Year, where the only unpredictable events will be the lucky and joyful ones.

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Past achievements and future opportunities

FRANK TSCHENTSCHER
INSOL Europe President

Frank Tschentscher recaps the last year and sets out his vision for the future

> *"Adapting to the challenges of the global pandemic, and in response to it, we delivered a myriad of online events which would be the envy of many an international organisation"*

I hope that wherever you are in the world, the holiday season provided a chance for you to connect with your family and friends and re-set for a successful 2022. That is certainly the focus at INSOL Europe as we move into a defining year.

Reflecting on the past

For my first contribution as president, I thought it might be helpful if I reflected, in the first instance, on some of the positive achievements within the past 12 months, acknowledging how we excel in coordinating our technical programmes and projects before sharing my thoughts on what I would like to achieve during my term as your president.

Looking to the immediate past, I began my Presidency firmly stuck at my desk in the close quarters of my own home office, addressing you on-screen as Marcel Groenewegen passed the baton on to me. Back in the heydays of my joining the INSOL Europe Executive, I never could have imagined that shortly after we would be faced with a global pandemic with the magnitude of the current one. However, I do not want to dwell too much on the challenges of the past two years. As professionals within the crisis management and restructuring community, we are accustomed to approaching each new hardship as a challenge and that of COVID-19 is no different. It has been energising and inspiring to work with the Executive and staff at INSOL Europe in rising to this challenge. I am hoping to build on the successes of my predecessor, Marcel Groenewegen and wish to thank him for his energy, commitment and almost super-human efforts during his presidency. Several key projects were started during Marcel's term and I will be working hard to ensure they come to fruition during my term and beyond.

Online opportunities

A key area where we have changed the way we deliver our services is, naturally, our events and training programme. Historically, INSOL Europe has been known for providing the opportunity to bring together peers and colleagues from around the globe, to facilitate the sharing of ideas and building of cross-border relationships.

Our events programme has been an instrumental part of this goal. Adapting to the challenges of the global pandemic, and in response to it, we delivered a myriad of online events which would be the envy of many an international organisation, in each case showcasing a fantastic line up of speakers and industry experts sharing updates on the latest trends in insolvency and business turnaround.

All of our recent educational events received high praise for the interesting range of region-specific topics and selection of relevant and noteworthy speakers but, of course, there is no intention of being complacent in a year that marks the long-awaited return to our in-person annual conference programme with the INSOL Europe Dublin Congress set for 3-6 March 2022. With ancillary meetings before and after the main event, this will be the first opportunity for us to come together once again and leverage the educational and networking benefits that you have come to expect – and to catch-up with existing friends and make new ones!

Getting the news out

Irrespective of the above, I feel we sometimes lose sight of how much we have achieved and what valuable service INSOL Europe is providing to its members and international organisations at large. This is partly because we have had little to no opportunity to meet in person but maybe, I assume, because we are not good enough at updating our members and sharing with them our successes and/or the initiatives we are undertaking, whether jointly with others or standalone.

I suspect, maybe wrongly, that our continued exchange with, and submissions to, the EU Commission and, further, INSOL Europe's participation in the European Commission Group of Experts on Restructuring and Insolvency law went firmly under the radar of most of our members.

The same I suspect applies to our joint research project with the European Bank for Research and Development as well as the joint project with LexisPSL on "How EU Member States recognise insolvency and restructuring proceedings of a third country", addressing for each EU Member State (i) whether the UNCITRAL Model law on Insolvency has been adopted and, if not, whether there are any plans to consider its adoption, (ii) how each country recognises insolvency/restructuring proceedings commenced in a third country (such as the UK post-Brexit, the US, Japan, Australia or Canada), whether through the Lugano Convention, Hague Convention, Rome I or other private international law rules; and (iii) how this approach would apply specifically to the recognition of proceedings commenced in respect of an English law scheme of arrangement or the newly introduced restructuring plan.

Back to the future

This leads me to my vision for the future. Together with Barry Cahir as Deputy President, Giorgio Corno as our new Vice President, the Council and the entire INSOL Europe staff, I am committed to communicating transparently, sharing information and delivering first class content and lectures as well as networking opportunities so you may feel that you are getting the fullest value for your membership.

I promise that INSOL Europe will not rest on its laurels and that we will be more creative about online learning; it is here to stay but importantly in addition to, not instead of, our successful live events which we are all missing so sorely. We will work to identifying legislative change quickly and provide regular and clear legal updates to help you understand how this change affects your business and clients. We will aim to publish new judgments with a mini summary to make it easier to identify relevant judgments and altogether focus on more technical content as well as offer opportunities to publish for our members. Lastly, we will explore new ways to connect with our colleagues around the world and be reminded of why it is so essential that we all pull together to help rebuild the global economy.

Flywheel effect

However, while we are committed to leading the way, we cannot do it without you. I am reminded of a phenomenon described in Jim Collins' book "Good to Great", which is called the "Flywheel Effect". It speaks to the idea that there is no one thing responsible for building an organisation that is an industry leader. No silver bullet or epiphany, no grand program or a single stroke of luck. Not even one dynamic leader(!).

Instead, it is all the things we do together. Like relentlessly pushing a big, heavy flywheel, it is about the momentum that builds from one turn to the next until the breakthroughs begin and achievements compound. This is what leads to an organisation's competitive advantage. So if you wish to help turning the wheel and contribute, step forward and share your ideas. The Executive team and I are committed to listening to your thoughts and ideas.

And there are opportunities aplenty. For instance, our Country Coordinators are liaising with domestic professional bodies and engaging with members on the ground. The objective is to grow our membership numbers and have more countries represented on Council. We know this will take some time as some countries have professional associations and strong links with INSOL Europe already while others are at an earlier stage in the process, meaning that we are not going to rush this. However, we believe this initiative is critically important for the long-term success of our organisation. I encourage you to get involved and contact the relevant Country Coordinator if you would like to help.

In the fast-moving world we live in, communication has become all-encompassing – the methods we use, the frequency of use and the level of interaction which is expected have all changed and INSOL Europe can ill afford to be left behind. We have updated our website, adding functionality, making it look better and, hopefully, driving more usage through and for our members. The site will undergo further improvements to ensure we continue to meet your needs but there are also other communication tools, including social media options, designed to allow you to participate and get involved in the organisation. If you are a serial blogger or are addicted to twitter, please let us know and we will try and get you involved.

Next generation

Our highly engaged Young Members help shape the future of INSOL Europe and ensure that we maintain our position as thought leaders within the restructuring and insolvency community. I invite you to identify young talent in your own firms and encourage them to join the Young Members Group. Not only will it benefit INSOL Europe but also your own firms, allowing younger practitioners entry into the industry, broadening their network into different areas of the world and deepening their understanding of developing jurisdiction.

Lastly, I invite you to come forward with offers for technical publications, whether it is for our monthly newsletter, eurofenix or to be published in the new annual yearbook we are currently planning. If you want to put yourself out there and be recognised as a specialist in your field, do make use of this opportunity and help us create these books, special reports and technical papers.

Closing words

In closing, I hope you find this edition an interesting read and wherever you are reading it, you are staying safe and well. I hope to meet many of you in Dublin, if not before. Registrations for our Annual Congress have been open for a little while now (www.insol-europe.org/events/) and if you have not already done so, I encourage you to register and join us for what shapes up to be a fantastic event. Let us celebrate life, friendship and of course INSOL Europe and make 2022 a year to truly remember!

> *Our highly engaged Young Members help shape the future of INSOL Europe and ensure that we maintain our position as thought leaders within the restructuring and insolvency community*

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*

Tribute to Florica Sincu

With great sadness we report on the passing of our dear friend Florica Sincu from an illness she had been suffering with for the last few years. Many of you may have had the pleasure of meeting Florica at one of our events, but may not be aware of her devotion and commitment to the INSOL Europe family over almost 30 years.

In the 1990's, Florica began working for INSOL Europe under our former name "AEPPC" (*Association Europeenne Des Praticiens Des Procedures Collectives*) originally assisting the late Richard Turton, former Director of AEPPC, with the administration of our French membership and Constitutional matters relating to the association's French registered office.

In 2004, Florica took over the role of Co-ordinator of INSOL Europe's Eastern European Countries' Committee, assisting the co-chairs in delivering conferences to eastern European countries, a role she held for some 14 years, and was an integral part to the success of this wing in extending the boundaries of our membership.

During this period Florica dedicated much time to sourcing articles for Eurofenix, which culminated in her joining the Executive Editorial Board, assisting Project Manager Paul Newson with collating and proof reading articles up until the recent edition published in the Autumn of 2021.

With knowledge from her own legal background and a great eye for detail, Florica again was an integral part of the Editorial Board and will certainly be a hard act to follow.

Throughout all this, Florica assisted at our Annual Congresses, constantly encouraged those with an interest in the insolvency and restructuring discipline to join INSOL Europe, particularly younger individuals with her positivity and vision for the future, suggested speakers for our events or was busy sourcing contributions to one of our newsletters, with her usual warmth, humour and devotion to our unique association which she held so dear to her heart.

An inspiration

Florica was an extremely intelligent, pro-active and inspirational lady with many an interesting story to tell when we all had the opportunity to meet up. Loved by so many of her friends at INSOL Europe, our thoughts and prayers are with her daughter Ioana and husband Alex at this difficult time.

Former Co-Editor of Eurofenix, Frank Heemann, speaks for many when he says: *"Florica was a special person. Among other things, she was without doubt the person that due to her energy, charisma and convincing character was the reason for my becoming increasingly active in INSOL Europe."*

Looking 'Back to the Future'

Myriam Mailly (INSOL Europe Technical Officer) and Paul Omar (INSOL Europe Technical Research Coordinator) look back on the two-part online conference held in October

In the chair as facilitator for the first session on 7 October, Carmel King (Grant and Thornton, UK; Co-Chair, INSOL Europe Anti-Fraud Forum) opened the conference and set the scene by thanking sponsors NetBid. Undertaking his final task as President, Marcel Groenewegen greeted the more than 70 registered participants at the first of two planned webinars.

Barry Cahir (Beauchamps, Ireland) then introduced the keynote speaker: **Miha Žebre** (Legal and Policy Officer, DG Justice and Consumers). In his address, Miha noted the momentum in the wake of the EU Restructuring Directive (Directive) and COVID-19 crisis, seemingly beneficial to initiatives on convergence. Within the Commission, work is progressing on the new initiative, though a decision on its form has not yet been taken. Overall, Miha is impressed with the calibre of the Experts' Group, with many INSOL Europe members naturally involved as the crème de la crème of expertise in Europe.

On other initiatives, the EU has still to formulate an approach to the UNCITRAL framework, since adoption of model laws might be problematic, given EU's status as an observer. A last note on the Directive: 23 of 27 Member States have asked for an extension to the implementation period, a bit disappointing, though explicable through natural caution. Overall, Germany and the Netherlands have been front-runners in the race to adopt, with France a recent runner up. Austria and Greece have also notified new procedures, though Italy's special COVID-19-focused regulation, whose entry into force has been again postponed, may need to be revisited.

For the first panel on '***Regulations, Recognition and Relief in the UK – A Primer for non-UK Insolvency Professionals***' **Chris Laughton** (Mercer & Hole, UK) introduced **Dan Lewis** (Wilberforce Chambers, UK) to cover cross-border recognition. *A summary of their discussion is on pages 26-27.*

The second panel on '***The Real Estate Industry: New Measures passed by States***', helmed by **Giorgio Corno** (Studio Corno Avvocati, Italy; Co-Chair, Dublin Technical Committee), involved **Frances Coulson** (Wedlake Bell, UK), **Stathis Potamitis** (PotamitisVekris, Greece), and **José Carles** (Carles Cuesta, Spain; Co-Chair, Insolvency Tech & Digital Assets Wing). *You can find a full report of their panel on pages 28-30.*

Part Deux: Reprise

The second session on 21 October 2021 was facilitated once more by **Carmel King**. **Frank Tschentscher** (Deloitte, Germany; INSOL Europe President) introduced the keynote speaker, **Austin Hughes** (Chief Economist for KBC), *pictured above*, whose main focus was on issues affecting the Irish and European economies.

In his address, Austin first noted that there was no precedent to the health crisis and the key question was what would happen in the future and for how long? Two elements will need to be taken into account, first, there is no real prospect for a return to a 'normal' situation, as structural changes have impacted organisation of the economy and, second, policy changes will change rules of the game (rate increases etc.). The question of support of the financial sector will be crucial in these circumstances, although likely turbulence is expected and more regulations and taxation will be envisaged by decision makers, which will inevitably lead to more failures.

The first panel of the day focused on views from a notable list of speakers on the topic of ***'Valuation Considerations in the Post-Pandemic Economy'***. **Jason Schiess** (NetBid, Germany) shared with the audience his business valuation insight on the post pandemic economy and surmise that business chains effect will continue, as illustrated by the number of petitions submitted recently by a number of suppliers in Germany.

For Italy, **Patrizia Riva** (Studio Riva, Italy) mentioned that the country adopted a light early warning system in August 2021, where companies are classified using the recovery time index. There are expectations of an increase in the frequency of valuations (with an independent expert), as they become the appropriate response to a growing demand for scrutiny in line with the Italian legislation, which has paid special attention to the need for SMEs to monitor risks and to try to circumvent the impact of the economic crisis.

Closing the session, **Michael Weaver** (Duff & Phelps, London) shared his view that uncertainties remained as to how the situation will move in the post pandemic economy, particularly given how closely this crisis has followed previous events, including the 17-18 financial crisis as well as 'Brexit'. Regarding the question of valuation, Michael observed that share prices are dropping, though in the meantime the 'restructuring market' has begun again to reach a good working level (from a restructuring firm perspective).

The second panel chaired by **Robert Peldan** (Borenius, Finland; Co-Chair, INSOL Europe Young Members Group) then focused on what might be the future of the professions in the field, with **Stéphanie Oneyser** (Walder Wyss, Switzerland), **Incoronata Cruciano** (Schiebe und Collegen, Germany), and **Georges-Louis Harang** (Hoche Avocats, France; Co-Chair, INSOL Europe EECC). *You can read a full account of their panel on pages 32-33.*

Overall, both sessions of the online event were warmly received by participants with the general themes of the webinar perhaps capable of being summarised as "cooperation, innovation and agility". Special mention was made of a continuation of these themes when live sessions resume in Dublin in March 2022.

Further in-depth reports on both sessions are published at: www.insol-europe.org/events/past_events under the Back to the Future banner.

With thanks to our Conference Sponsor:

A wake-up call for sleepy companies?

Niculina Somlea, Co-Chair of the EECC reports on the group's recent online conference which focused on zombie companies and a view of the airline industry

The pandemic has been ongoing for two years now and the world seems used to a new, uncomfortable mundane. Some companies, in particular, seem to be in a sleep-like state, slowly shutting down. Trying to better understand emerging trends, the latest EECC Conference on 25 November, titled "A wake-up call for sleepy companies?" looked at the zombie company phenomenon.

Prior to this, INSOL Europe's newly anointed President, **Frank Tschentscher** (Deloitte, Germany) together with **Evert Verwey** (Clifford Chance, Netherlands) gave the welcome address, while **Catherine Bridge Zoller** (Legal Transition Team, EBRD) gave the keynote address, detailing the final EBRD Assessment Results. A unique project, supported by INSOL Europe, the report soon to emerge will dive deep into the restructuring regimes of more than 40 jurisdictions uncovering examples of best practice as well as insolvency principles that require strengthening.

Returning to zombie companies, numbers have increased dramatically since the last financial crisis, affecting about a fifth of US companies and a sixth of enterprises in Germany. While it is easy to blame COVID-19, data from Germany, Bulgaria, Czech Republic, and Poland, presented by the moderator for the first panel, **Roman-Knut Seger** (BDO Restructuring GmbH, Germany), and the speakers: **Stela Ivanova** (bnt Neupert Ivanova & Kolegi, Bulgaria), **Ernst Giese** (Giese & Partner, Czech Republic) and **Michal Barlowski** (Wardyński & Partners, Poland), points to low or zero interest rates, state aid, inflation, growing cost of raw materials, and, in general, structural weaknesses of national economies, as causes for zombification. As much human capital is bonded in these nonperforming companies, thus unavailable for the job market and more innovative enterprises, these zombies will infect other viable companies in the distribution chain.

Implementing the Directive on Restructuring and Insolvency gives us a fighting chance, as the German StaRUG, in force at 1 January 2021 shows. This law is aimed at avoiding a higher number of insolvencies in the slipstream of the pandemic by offering tools that help individual negotiation with creditors for a haircut and with the help of the court, if needed. Implementing a simplified regime designed to quickly restructure viable zombies or move them into liquidation is another way to go. So too, reviewing current legislation to avoid misuse of COVID-19-related funds, while keeping close oversight of the banking sector.

The first panel was followed by a view of the airline industry, which has certainly taken a hit, the pandemic further exposing systemic flaws. The panel, moderated by **Omar Salah** (Norton Rose Fulbright LLP, Netherlands), presented data for global airline failures 2014-2020, using the Condor insolvency, presented by **Marlies Raschke** (Noerr Partnerschaftsgesellschaft mbB, Germany), and the Carpatair case, presented by **Ramona Faraianu** (RTZ, Romania), as examples. In each case, COVID-19 was not the cause of failure, but certainly affected their operations. Condor, a subsidiary, part of the Thomas Cook Group, had provided cross-group guarantees that were called in prior to the group's meltdown. Key elements in Condor's restructuring were that, for the first time, the German authorities permitted (an insolvent airline) to keep their flying permit and they received a loan of €380 million backed by a state guarantee. By contrast, Carpatair's insolvency was rooted in a commercial conflict with Timisoara airport, their hub, over unfair competition and significant taxes owed to the airport for each passenger.

Last but not least, the event welcomed **Georges-Louis Harang** (Hoche Avocats, France, New Co-chair, EECC), who presented the closing remarks, focusing on the EECC's plan for the next year.

With thanks to our Conference Sponsor:

BDO RESTRUCTURING

StaRUG: A model for Europe?

Myriam Mailly (INSOL Europe Technical Officer) and Paul Omar (INSOL Europe Technical Research Coordinator) report on the recent online lecture by Professor Christoph Thole

The INSOL Europe Academic Forum 2021 Winter Lecture on the subject of 'StaRUG: The New German Restructuring Law' took place online on 1 December 2021. Sponsored by Edwin Coe LLP and facilitated by Tomáš Richter (JŠK, Prague; Chair, INSOL Europe Academic Forum), the lecture was given by Professor Christoph Thole (University of Cologne).

According to Professor Thole, the new legislation entered into force on 1 January 2021 with the introduction of pre-insolvency proceedings based on the likelihood of insolvency with a restructuring plan outcome allowing for a cram-down of minority creditors. The pre-insolvency process is a completely new tool insofar as cram-down is now available. The legislation takes a toolbox approach allowing for different instruments (plan confirmation, early examination, stay of enforcement and execution, in-court voting procedure etc.), albeit absent the possibility for contract/lease termination.

Change has also been made to the organisation of courts dealing with restructuring with the introduction of 24 specialised restructuring courts. The scope of the new legislation addresses itself to debtors as sole legal entities as well as within group structures. The German legislator has also introduced a jurisdiction requirement based on the German interpretation of COMI while facilitating cross-border (European) recognition of judgments.

One question remains as to whether the traditional tests of insolvency (over-indebtedness/balance sheet insolvency) remain applicable, thus requiring that notice of intention to file for court protection be filed within six weeks. Nonetheless, overall, the procedure offers flexibility in terms of voting (a quick process via electronic means) with the possibility at the end to involve courts as required. As for professional involvement, courts will appoint practitioners (on a mandatory or voluntary basis where there is the possibility of proposing a particular appointment) and will also oversee remuneration so as to keep the costs of proceedings down.

On the moratorium ('stabilisation order'), the new law offers a stay of execution and/or enforcement of rights over movables with the debtor granted the right of use (but not of sale except with creditor consent). A further obligation added stipulates there is no duty to advance fresh money without security. However, in respect of safe harbour provisions, there is no fresh money privilege and no super-priority, albeit the plan and its effects can be protected, in particular from transaction avoidance claims. Nonetheless, there is no certainty on how far this protection can go in practice. Indeed, there is no clear view yet on the number of cases, as they are confidential (although the estimate is that approximately 15 cases have been commenced since January 2021, though precise data will not be 'available' till July 2022).

In summary, the new legislation has certainly had a real impact on the conduct of out-of-court negotiations with creditors. The main features of the new legislation combine to create a system seemingly more favourable to the debtor.

With thanks to our Conference Sponsor:

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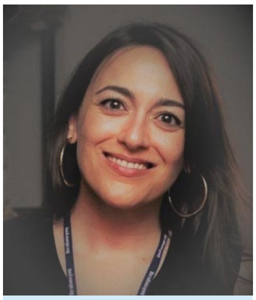
ACADEMIC FORUM
INSOL Europe

Call for Papers - Annual Conference Dublin 2022

We are excited to announce that the call for papers for the March 2022 conference in Dublin attracted 27 paper proposals from 15 jurisdictions. As expected, the papers mostly focus on preventive restructurings, both at the national level and in the cross-border and general policy context, but submissions also cover a number of other interesting topics in our field of research.

The results of the selection process, which informs the technical programme for the conference, can be found on our website: www.insol-europe.org/academic-forum-events

Annual Congress 2022: Are you ready for time travel in Dublin?



EMMANUELLE INACIO
INSOL Europe
Chief Technical Officer

Emmanuelle Inacio takes a closer look at the themes informing the technical content of our next Annual Congress in Dublin 2022

> *We are a herd species: we delight in the company of other people, and we delight in shared experiences*

The main theme of our 2022 Congress will be "Back to the Future 2". After our INSOL Europe Autumn Online Conference of 7 & 21 October 2021 titled "Back to the Future", our INSOL Europe Annual Congress in Dublin will continue to explore "in real life" this time travel on 4 & 5 March 2022 under the driving forces of the 2022 Technical Committee Co-Chairs Barry Cahir (Beauchamps, Ireland) and Giorgio Corno (Studio Corno Avvocati, Italy).

Since the start of the COVID-19 pandemic, technology has made it possible for a lot of our work to be done remotely. Zoom started off as a video-conferencing platform and has evolved into a part of everyday life for us. But now that the States are pushing for earlier boosters that are effective against variants, there is hope that the vaccination programme will be progressing well in Europe, so that most of us will be back to offices soon, travel again smoothly and will meet in Dublin... Indeed, we are a herd species: we delight in the company of other people, and we delight in shared experiences.

The idea that the pandemic will change everything about our future is only partly true. Indeed, what will our world look like post-pandemic? To reference the title of a classic 1980s science-fiction film, it will take us back to the future! However, emerging from the pandemic can also lead to build back a better future...

Harmonisation of a rescue culture in the EU

Indeed, the EU Member States were required to implement the Directive (EU) 2019/1023 on Restructuring and Insolvency – which was adopted on 20 June 2019 – by 17 July 2021 in their national legislation at the latest, with an extension up to 17 July 2022 if they encounter particular difficulties in transposing it. The Directive contains several key measures, the most important being that debtors will have access to a preventive restructuring framework that enables them to restructure, with a view to preventing insolvency and ensuring their viability, thereby protecting jobs and business activity.

However, the pandemic disrupted the transposition race. Indeed, very few Member States have already transposed the EU Directive to use it as a tool to prevent insolvency related to the pandemic and most of them have already notified the European Commission that they will make use of the extension option.

The national choices will necessarily impact the harmonisation of a rescue culture in the EU, the Annex A of the European Insolvency Regulation and hence, the use of preventive restructuring in cross- border restructuring. Our 2022 Dublin Congress will be the opportunity to discuss and assess the practical consequences of the national choices made.

Where the debtor is close to insolvency, the European legislator deems that directors should take steps to minimise losses and to avoid insolvency, but it is also important to protect the legitimate interests of creditors from management decisions that may have an impact on the constitution of the debtor's estate, in particular where those decisions could have the effect of further diminishing the value of the estate available for restructuring efforts or for distribution to creditors. The impact of the EU Directive on Restructuring and Insolvency on director's behaviour in the likelihood of insolvency will thus also be explored.

Our congress will also analyse the impact of the EU Directive on Restructuring and Insolvency on over-indebted or insolvent entrepreneurs and consumers and the opportunities for a fresh start as well as the role of the EU in pushing towards convergence in this area.

Cross-border schemes and plans: how they work in different jurisdictions

Although the UK has exited the EU before the implementation deadline of the EU Directive on Restructuring and Insolvency, the UK undoubtedly remains in the race with the reforms on its restructuring and insolvency regime in line with the EU Directive and the need to maintain the attractiveness of its cross-border restructuring in the post-Brexit era. Our 2022 Congress will *inter alia* explore the different schemes and restructuring plans in the UK, the Netherlands, Germany and Ireland and question their recognition and enforcement.

Restructuring cases in the Aviation space

The pandemic has devastated the airline sector but has not stopped it. If the traffic won't return to 2019 levels before some time, the Irish examinership already showed that it can, in certain circumstances, be used to restructure airline groups provided that one or more group companies is registered in and has its centre of main interests in Ireland. Recent restructuring cases using the examinership, which in the current format complies with many requirements under the Directive, will *inter alia* be explored during our 2022 Dublin Congress.

Harmonisation of insolvency laws in the EU

While the majority of EU Member States still have to implement the EU Directive on Restructuring and Insolvency, the European Commission published the initiative "enhancing the convergence of insolvency laws" on 11 November 2021 and intends to submit a legislative proposal containing minimum standards for a harmonised restructuring and insolvency law in the EU. To this end, the Group of experts on restructuring and insolvency law (E03362) will assist the Commission in the preparation of the legislative proposal whose issues will be discussed in depth!

Data protection and insolvency

We should warn our delegates that some horror is coming their way... Indeed, a "Little Shop of Horrors" will be presented since insolvency practitioners cannot escape the European General Data Protection Regulation which is applicable to them as of 25 May 2018, creating new duties and responsibilities...

Roads? Where we're going, we don't need (Silk) Roads!

As our future is also digital, the insolvency practice will be necessary challenged with the question of protecting and recovering digital assets. The INSOL Europe Insolvency Tech & Digital Assets Group and the INSOL Europe Anti-Fraud Forum will join their forces and welcome two experts to present an update on crypto assets and fraud – what the insolvency practitioner needs to know!

The Courtroom of the future – which way forward?

Our INSOL Europe Judicial Wing will take us to the Courtroom of the future and explore the unprecedented changes brought by technology to judges, lawyers and court users since the pandemic.

More hot topics!

The 2022 Dublin Congress will also examine the myriad of issues of cross-border and court cases in real estate industry as well as new financing trends for businesses in distress.

Dublin awaits you!

Dublin has been ranked among the friendliest cities in Europe and the world. What better setting to host our 2022 Congress than Dublin after two years without meeting one another in person? So, expect a very warm welcome upon your arrival! We look forward to welcoming old and new friends in person in Dublin on 4 & 5 March 2022 for what will be the second part of a truly memorable time travel!

Book your place! ■

BACK TO THE FUTURE²

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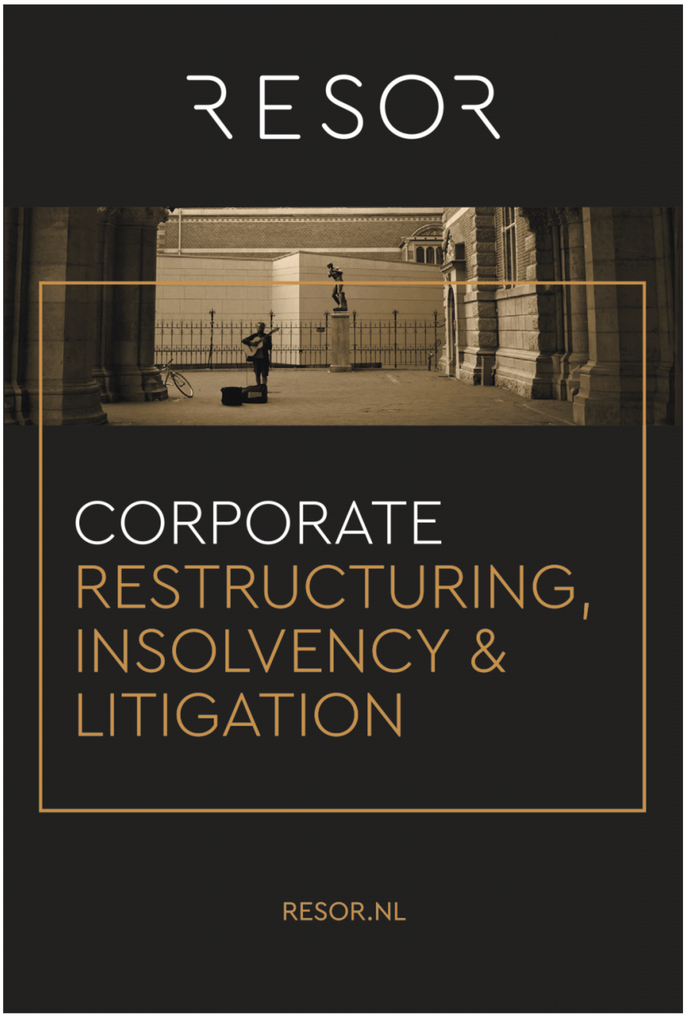
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This new section of eurofenix will bring you the most relevant news in the field of insolvency tech and digital assets. To contribute an article to a future edition, please send your proposal to: *insolvencytech@insol-europe.org* or the individual Chairs:
Dávid Oršula *david.orsula@bnt.eu*
José Carles *j.carles@carlescuesta.es*
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Looking back to 2021 and looking forward to the future… in 2022


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We are aware that many of us, as experts in restructuring and insolvency, believe that in 2021 there was still no practical crossroads between insolvency itself and crypto assets.

However, in the panel on "*Digital Gold: Treatment of Crypto Assets in Insolvency*" held within the joint Online Seminar 2021 with INSOL International, we stated how crypto and insolvency had already crossed their paths. Several times. We addressed some cases of crypto exchanges around the globe (Mt. Gox in Japan, Bitgrail in Italy or Cryptopia in New Zealand), in which the treatment of crypto assets as property or not had implications on the treatment of creditors' claims against insolvent intermediaries.

Moreover, we shared some tips on the key issues a Court-appointed insolvency receiver may find on an insolvency file with crypto assets, such as how to identify and retrieve crypto assets, how to preserve their value, how to evaluate and realize them and, finally, how to distribute them. If you missed that panel, we invite you to read our short report published in Eurofenix issue number 84 (*Summer, 2021*)!

Indeed, we cannot deny that the relevance of digital assets is growing. As an example, we all heard last February about Tesla's $1.5 billion investment in Bitcoin or how the car-manufacturer still held $1.26 billion at the end of Q3 2021 despite the sale of a relevant stake in Bitcoin in April 2021. Could you imagine what would happen if a company with that amount of assets in Bitcoin needs to undergo a restructuring process or becomes insolvent?

Digital assets are, therefore, a reality we will have to deal with in both present and future cases. And given its nature and novelty, decisions from one jurisdiction are being considered and cited by courts in other jurisdictions. This is the reason why the main project from our Wing in 2021 was to gather some of the most important decisions that involved digital assets in a case register, already accessible through INSOL Europe's webpage.

We especially thank Emmanuelle Inacio, Lee Pascoe and Ilya Kokorin for their important level of involvement in the project during this year, as well as all the country representatives that have contributed to this case register so far. Some of these decisions, such as the ones in Coinroom or Thodex, will be reported in future issues of *Eurofenix*. And of course, get in touch with our Wing if there is any new decision in your country!

With a view to 2022, we are all looking forward to meeting again in person in Dublin. From our Wing, in close collaboration with the Anti-Fraud Forum, we are working on a panel titled "*Roads? Where we're going, we don't need (Silk) Roads! Cryptoassets and fraud – what the insolvency practitioner needs to know*". Top notch speakers (Danielle Haston, Chainanalysis UK; Aidan Larkin, Asset Reality UK and Ireland), experts in the field of assets recovery, will share their insights into crypto and fraud, with emphasis on how insolvency practitioners can seize and realise digital assets under insolvency scenarios. We are sure that all the tips that are provided during the panel will be extremely useful to the INSOL Europe community.

Finally, as the world is becoming increasingly digital, our Wing will work, in 2022, on a series of short videos to share content, in an easy manner, on digital assets and precedents from the best experts across all the European jurisdictions. *Stay tuned!*

Crypto currencies and insolvency in Portugal: What does the future hold?

JOAQUIM SHEARMAN DE MACEDO
Partner and co-head of the Dispute Resolution practice, PLMJ

DIOGO FRANCO COELHO
Associate in the Dispute Resolution practice, PLMJ

Portuguese scholars and courts have not yet dealt with the impact of crypto currencies and crypto assets in insolvencies and in pre-insolvency proceedings. There are certain issues that are likely to arise in insolvency cases that are bound to raise doubts among insolvency practitioners, of which these are examples:

Is the breach of a duty to transfer crypto currencies relevant for the purposes of applying for or assessing the insolvency of the debtor?

Under the Portuguese Insolvency Code, any debtor that is unable to fulfil its obligations as they fall due is considered to be in an insolvency situation (cash flow test). The same applies when the debts of the insolvent considerably outweigh its assets (balance sheet test).

There is no limitation on the breach of monetary or payment obligations. As such, it seems that the lack of recognition of crypto currencies as money or equivalent under Portuguese law will not prevent a breach of an obligation to transfer crypto assets from being considered when determining whether the debtor is insolvent under the cash flow test criterion.

However, at least at first glance, it is more difficult to conceive of an insolvency application filed by a creditor arguing that the debtor is insolvent under the balance sheet test following the increase or decrease in the market price of the cryptocurrencies the debtor holds. This is because there is a lack of supervision of the crypto assets market and therefore room exists for ample discussion regarding the asset value of the cryptocurrency.

Are cryptocurrencies part of the insolvent estate of a debtor? Theoretical and practical challenges

All assets belonging to the debtor form part of the insolvency estate, unless those assets are not subject to attachment (*impenhoráveis*). Assets that are not subject to attachment represent a closed and restricted list of personal assets that are indispensable to ensure the debtor can live a decent life. This is naturally not the case of crypto currencies. Therefore, we believe the broad definition of assets belonging to the debtor would include crypto assets and crypto currencies.

In line with what is happening in other jurisdictions, the main issue, of a practical nature, relates to the taking over of crypto assets by the insolvency administrator following the opening of the insolvency proceedings against the debtor. First, the insolvency administrator would have to know that the debtor owns crypto currencies and, second, he or she would need access to the digital wallet where the crypto assets are stored and to the corresponding private key.

Pursuant to Portuguese law, the debtor is incentivised to cooperate with the insolvency administrator. The debtor is under an obligation to provide all information relevant to the proceedings and give any cooperation required. A breach of these duties may lead to the insolvency being classified as culpable, which may entail severe consequences. Portuguese law would also allow for the issue of orders by the judge assigned to the insolvency case in support of the takeover of assets requested by the insolvency administrator. In particular, the judge could order third parties to provide information for the purpose of determining the existence of assets belonging to the debtor (Article 55, no. 6 of the Portuguese Insolvency Code).

Is the insolvency administrator bound to liquidate the crypto currency, through its conversion into legal tender?

In regular insolvency proceedings, the insolvency administrator is required to liquidate all the debtor's assets and use the proceeds to pay the creditors according to their ranking.
As such, we believe the insolvency administrator is required to convert crypto currencies into legal tender, with all the disadvantages that this procedure may entail. These disadvantages include the inexperience of the insolvency administrator in trading crypto currencies, the timing of the conversion, etc.

Are transactions involving crypto currencies subject to claw-back actions under the portuguese insolvency code?

Pursuant to Articles 120 and following of the Portuguese Insolvency Code, provided that certain assumptions are met, the insolvency administrator is entitled to claw back detrimental acts carried out by the debtor up to two years before the filing of insolvency proceedings.

On the face of this, a transaction including crypto assets would be subject to claw-back as far as the legal requirements are met. Needless to say, the tracing of crypto currencies and the possible conflict of laws triggered may provide additional challenges to the success of such an action.

Final comment

Apart from the theoretical issues raised by the crypto currencies in an insolvency scenario, the main challenges that insolvency practitioners will face are those relating to the skills and tools made available to the insolvency administrators to deal with the insolvency proceedings of a debtor who owns crypto currencies. Tracing and accessing the crypto assets will be burdensome and costly, and the possibility that these assets are unavailable to creditors, in our view, is great. ■

> "The insolvency administrator is required to convert crypto currencies into legal tender, with all the disadvantages that this procedure may entail"

How EU Member States recognise insolvency and restructuring proceedings of a third country

Kathy Stones provides an update on the joint project between LexisPSL and INSOL Europe

KATHY STONES
Lexis PSL Restructuring and Insolvency

Following the aftermath of Brexit, I began thinking about how the world looked for English insolvency practitioners (IPs) without the comfort of our well-loved European Insolvency Regulation (recast) 848/2015 (the EIR Recast).

Gone were the days when IPs could confidently expect any insolvency proceedings listed in Annex A of the EIR Recast and with their COMI in England to be recognised across all EU Member States automatically, without question. Instead, we were faced by a confusing patchwork of different local regimes, now that England was effectively treated as a third country. England was effectively in a similar position to the US, Australia, Japan or Canada, when seeking to have its insolvency proceedings recognised in EU Member States.

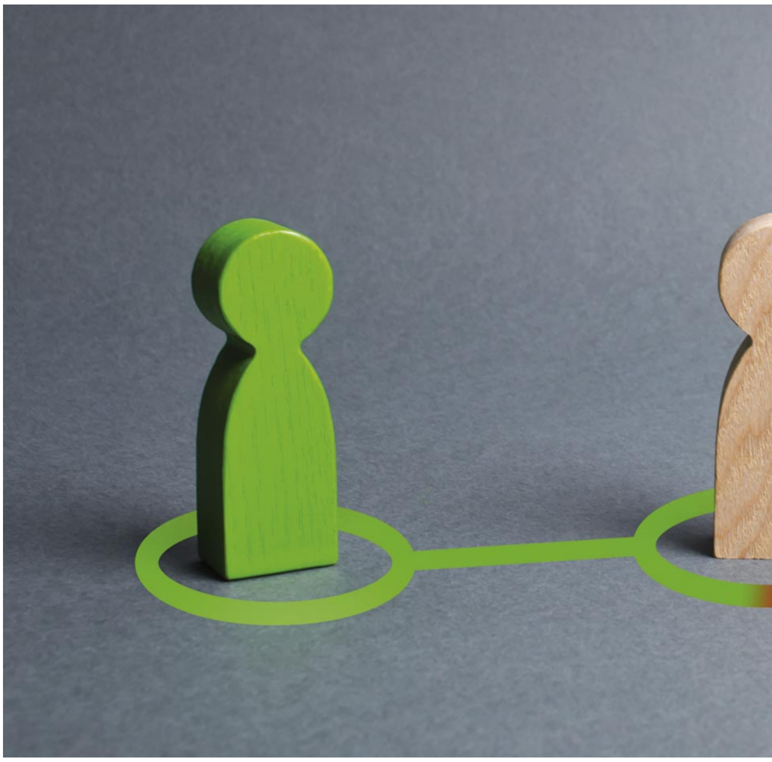
This was the driver for the Joint Project between LexisPSL and INSOL Europe to map out local processes in each Member State. I have been fortunate to work with Chris Laughton (Mercer & Hole), Myriam Mailly (INSOL Europe Technical Officer), Neeta Chenani (LexisPSL), INSOL Europe's Country Coordinators[1] in each Member State and other local experts to complete this valuable research.

Gone were the days when IPs could confidently expect any insolvency proceedings listed in Annex A of the EIR Recast and with their COMI in England to be recognised across all EU Member States automatically

Research areas

The starting point for our work was to ask whether each Member State had adopted (or was considering adopting) the UNCITRAL Model Law on cross border insolvency. Although not as comprehensive as the EIR Recast, it does provide some assistance for recognition following an application to the local court. However, its use is significantly hampered as, besides the UK, only a handful of Member States have enacted it (Greece, Poland, Romania, Slovenia) and none of the others questioned thought future adoption was likely.

At the start of the joint project in February 2021, the question whether the UK could join the Lugano Convention 2007 in its own right was still very much open, so we asked Country Coordinators whether that would apply and assist recognition. However, despite initial support from the other convention countries, such as Norway, Iceland and Switzerland, the EU firmly rejected this avenue. Fortunately,



we had also asked the question what other provisions (e.g. the Hague Convention, Rome I or other private international law rules (PIL)) would assist recognition of insolvency/restructuring proceedings commenced in a third country.

Our final question was to apply these principles to specific facts and we asked whether the Country Coordinators thought that the English (i) scheme of arrangement or (ii) restructuring plan would be recognised in their country.

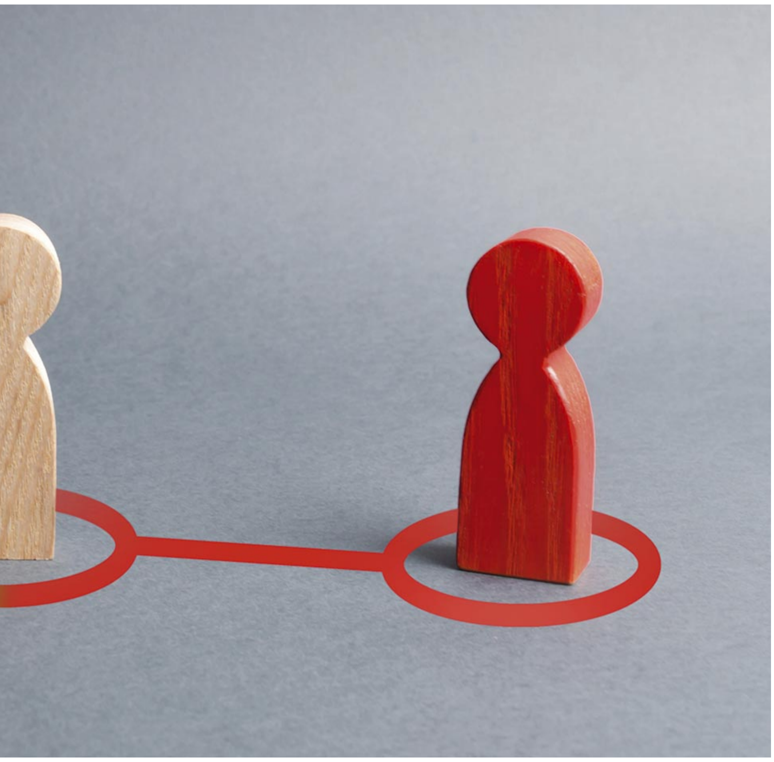
Key themes

As the results came back, some key themes started to emerge.

Some countries had a form of the *exéquatur* procedure, which required the applicant to apply to court (e.g. France, Lithuania and Spain). Although the exact requirements vary from country to country, general bars to recognition under *exéquatur* or PIL include: being contrary to public policy, the foreign decision being obtained by fraud (e.g. abuse of legal rules or fraudulent forum shopping) or absence of a sufficient connection between the application and the court seized.

Other countries have provisions within their own PIL for companies in third countries, which look at where the company's centre of main interests (COMI) is, even though the EIR Recast does not apply (e.g. Germany, Spain, Austria, Portugal).

On the specific question of whether an English scheme of arrangement or restructuring plan would be recognised, most countries had not yet tested this in caselaw, so pointed back to their general principles on recognition. Roughly 40% of the Country Coordinators thought that their Member States would probably grant recognition, though many said the position was unclear, with some drawing a distinction, following *gategroup Guarantee Limited* [2021] EWHC 304 (Ch), between the restructuring plan (which may be more readily classed by Member States under their PIL as an insolvency procedure) and the scheme of arrangement. Obviously, each case depends on its own facts and local advice should always be sought before commencing proceedings.



Research table, articles and next steps

We have produced a table summarising the results from all EU Member States with links through to the more in-depth articles from the Country Coordinators, which is available on LexisPSL[2] and the INSOL Europe website.[3]

I will be joining Chris Laughton, who is chairing a panel of speakers from the UK, the Netherlands, Germany and Ireland at the INSOL Europe 2022 Dublin Congress, to discuss '*Cross-border schemes and plans: how they work in different jurisdictions*' and also some of the joint project's findings on recognition. ■

> *"I will be joining a panel of speakers at the INSOL Europe 2022 Dublin Congress to discuss 'Cross-border schemes and plans: how they work in different jurisdictions'"*

Footnotes:

1 See: www.insol-europe.org/country-coordinators

2 See: www.lexisnexis.com/uk/lexispsl/restructuringandinsolvency/document/393783/624B-GCH3-GXFD-808W-00000-00/INSOL_Europe_Lexis_PSL_Joint_Project_on__How_EU_Member_States_recognise_insolvency_and_restructuring_proceedings_of_a_third_country___consolidated_table

3 See: www.insol-europe.org/technical-content/recognition-in-third-states

The transposition of the EU Directive: A great Franco-German convergence

Reinhard Dammann compares the French and German transpositions of the EU Directive on Restructuring and Insolvency

REINHARD DAMMANN
Founding Partner at DAMMANN, France

In the Aachen treaty dated 22 January 2019, France and Germany agreed to deepen the integration of their economies and to harmonize their business laws, including their respective insolvency proceedings. The transposition of the EU Directive on Restructuring and Insolvency was a first opportunity to implement this programme.

What is the comparative result? At first sight, both countries took quite different approaches. France transposed the directive, *de minimis*, by way of an *Ordonnance* dated 15 September 2021, amending existing accelerated safeguard proceedings and introducing classes of creditors into safeguard and *redressement judiciaire* proceedings. By contrast, the German *StaRUG* created, as of 1 January 2021, a brand new standalone and very detailed restructuring procedure, containing no less than 102 paragraphs, in accordance with very thorough German style legislation. But in reality, there is a great deal of convergence of both systems.

> "With StaRUG, the German legislator has created brand-new mediation and preventive restructuring proceedings"

Different starting points

French law was known for an efficient and successful two stage model. A restructuring agreement was negotiated in the framework of a transparent pre-insolvency conciliation procedure. To overcome the holdout position of dissenting minority creditors, financial accelerated safeguard, functioning as a prepack, was available. However, the French system was also known for its debtor-friendly approach, lacking classes of creditors, cross-class cram-down and efficient creditor protection through the best interest of creditors' test.

Germany was starting from a blank sheet. There was no pre-insolvency restructuring procedure, but only efficient debt restructuring in the framework of the *Planverfahren* within regular insolvency proceedings (*InsO*).

With *StaRUG*, the German legislator has created brand-new mediation and preventive restructuring proceedings (*Sanierungsmoderation*, *StaRUG*-restructuring procedure). The new framework is conceived as a toolbox-system. The *StaRUG*-restructuring procedure takes over most of the ingredients of the successful *Planverfahren*, subject to three important changes: a greater flexibility to select affected parties; a ¾ majority rule of the amount of restructuring claims in each class (with no headcount majority) and the possibility to treat classes of equal ranking differently in case of cross-class cram-downs.

The French approach sticks to its successful two-stage system, but introduces classes of affected parties, replacing the old creditors' committees. In big restructuring cases (consolidated threshold of 250 employees and 20 million turnover or 40 million turnover), French law also enhances the protection of the rights of creditors through the introduction of the best interest of creditors' test and absolute priority rules and abrogating the possibility for the court to impose a debt scheduling plan for a duration of up to ten years.

The new German mediation: A transposition of the French *conciliation* model

In the new German mediation procedure, the debtor may ask the insolvency court to appoint a mediator to assist the debtor in its debt restructuring discussions with its major creditors. Like *conciliation*, the mediation procedure is strictly confidential in order to protect the credit provided by suppliers.
The procedure is designed for small and medium-size businesses. In case of conversion of the *Sanierungsmoderation* into a *StaRUG*-restructuring procedure, pursuant to § 100, *StaRUG*, the mediator becomes the practitioner in the field of restructuring. The restructuring agreement is fully consensual and will be sanctioned by the insolvency court.

But there are some rather small differences. While French *conciliation* is available to debtors in cessation of payments for less than 45 days, the German mediation is unavailable for debtors that are cashflow insolvent or overindebted. Contrary to French law, German mediation is silent on the possibility for the debtor to propose a mediator to the court. Such a choice in favour of the debtor, who remains in possession, would appear logical. The duration is slightly different: French *conciliation* is limited to four months, with a possible one-month extension, whereas the German mediation lasts three months and can be extended once, upon request of the mediator, but only with the consent of the debtor and the creditors involved.

New financing benefits in both countries from the safe harbour principle in case of the opening of subsequent insolvency proceedings. But in French law, new-money creditors enjoy a privileged ranking and cannot be affected by the restructuring plan.

This being said, German practitioners could use mediation, like in France, to confidentially prepare a prepack debt restructuring plan to be sanctioned by the court within the public *StaRUG*-restructuring procedure.

The consent of the shareholders to open preventive proceedings

In Germany, it is debatable as to whether shareholders need to consent to the opening of *StaRUG*-restructuring procedure. Such a requirement would appear contrary to the objective of the law to provide for a possible cross-class cram-down of equity holders. In this respect, it is interesting to note that, in French law, which traditionally highly protects shareholders' rights, the management of the debtor may request the opening of accelerated safeguard proceedings without the consent of the equity holders.

The identical scope of preventive restructuring proceedings

In essence, preventive restructuring proceedings are semi-collective. Who is going to choose the affected parties? What are the applicable criteria? Both legislators have opted for a very flexible "*à la carte*" approach. Pursuant to § 8, *StaRUG*, the selection of affected parties must be made on objective criteria. As an example, it is possible to limit the scope of the proceedings to financial creditors. It is also possible to carve out small creditors and (strategic) suppliers. French law provides that the draft plan must set forth the underlying reasoning for the selection of affected parties. Thus, it is possible in both jurisdictions, like in the UK scheme of arrangement, to limit the circle of affected parties to main stakeholders.

The creation of creditor classes and the absolute priority rule

The French legislator transposed *verbatim* Article 9 of the directive when introducing classes of affected parties. In this respect, the German transposition, inspired by the *Planverfahren*, provides for possibility to create additional sub-classes for creditors having the same ranking. This approach constitutes an interesting model for French practitioners.

Quite surprisingly, in the case of the cross-class cram-down, the European directive opted, as matter of principle, in favour of the relative priority rule, leaving the option to the Member States to choose instead the absolute priority rule. Following the US example, the German *Planverfahren* uses the rigid US version of the absolute priority rule. Thus, it is not possible to freely allocate the surplus created by the restructuring plan. Classes of creditors having the same ranking must receive equal treatment.

When transposing the absolute priority rule, Germany introduced a double derogation in § 27 and § 28, *StaRUG*. First, it may be necessary to provide for some flexibility in favour of lower ranking classes, where such derogation is necessary to achieve the aims of the restructuring plan. Second, *a fortiori*, it is also possible to make limited derogations to the rule of equal treatment of classes with the same ranking. For example, it may be advisable to provide for a better treatment for unsecured (but strategic) suppliers by comparison to unsecured financial creditors. In the same vein, a plan may provide for a better treatment of a class of creditors that agrees to provide new money financing by comparison to creditors having the same ranking that refuse to participate. When adopting this second derogation, the German legislator has followed the French restructuring practice.

The German legislator provided for the possibility to address the issue of inter-group personal guarantees. French law is silent on this topic and the German approach is worth being considered in practice.

The French approach sticks to its successful two-stage system, but introduces classes of affected parties, replacing the old creditors' committees

International recognition

Mediation and *conciliation* proceedings are confidential proceedings and thus are not comprised within the scope of the (recast) European Insolvency Regulation[1]. French accelerated safeguard proceedings are already listed in Annex A, whereas inclusion of its German counterpart is awaiting the revision of the EIR. Consequently, the international automatic recognition of the opening of proceedings as well as of the restructuring plan that is binding upon opposing minority creditors is guaranteed. ■

Footnotes:

1 See: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R0848

The new Greek Insolvency Law: A turning point

Yiannis Bazinas and Yiannis Sakkas write on the recent transposition of the EU Directive on Restructuring and Insolvency in Greece applicable since March 2021

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> *The GIL now includes provisions on pre-insolvency rehabilitation and liquidation [plus] provisions relating to electronic early warning tools*

Over the past decade, one of the standard features of the Greek legal scene has been the constant amendment of the country's Insolvency Code (IC).

Introduced in 2007, the genesis of Greece's first comprehensive insolvency legislation came at an inopportune time, as the country soon spiralled into a lengthy economic crisis that resulted in numerous business failures. As the situation deteriorated, the problem of rising debt grew to systemic proportions, as NPLs on Greek banks' balance sheets reached unsustainable levels.

In this environment, the IC fell prey to various reform initiatives, whose purpose was to enable banks to resolve the pressing problem of private debt as quickly and efficiently as possible. At the same time, the effectiveness of the IC was undermined by the introduction of various quasi-restructuring procedures, which conflicted with (rather than complemented) the traditional insolvency processes. When the dust finally settled, the situation appeared radically different than when the IC was introduced; its original coherence and structure was somewhat compromised, whereas a patchwork of parallel procedures undermined its status.

In the face of this unstable setting, the introduction of the EU Directive on Restructuring and Insolvency (Directive) provided an opportunity to deliver a coup de grâce to the much-maligned IC. As a result, the IC was amended one last time, only this time by overhauling it and replacing it with a completely new piece of legislation, the new Greek Insolvency Law (**GIL**),[1] under the aspirational title of "*Debt Settlement and Facilitation of a Second Chance*".

One of the main driving forces behind the introduction of the GIL was to consolidate in a single piece of legislation all insolvency and restructuring related proceedings and provisions that had been introduced over the years by special legislation (surprisingly, the GIL renounces the title "Code"). This was considered necessary in order to reduce the excessive fragmentation and the multiplicity of laws that characterized the field creditor-debtor relations.

The GIL thus now includes, not only provisions on pre-insolvency rehabilitation and liquidation, but also provisions relating to electronic early warning tools, which provide for three levels of insolvency risk (low, medium, high), the out-of-court workout (OCW) mechanism as well as provisions regulating the profession of insolvency practitioners. While the benefits of consolidation should not be understated, it must be pointed out that, as a result, the GIL has become significantly more convoluted than the previous IC.

In addition to structural consolidation, nonetheless, the new GIL includes a number of important substantive reforms to the Greek insolvency regime. One of the most striking changes is the extension of eligibility for insolvency liquidation to natural persons. This marks a sharp break from the previous framework, which, tracing its roots to the Napoleonic *Code de Commerce*, relied on a strict conceptual distinction between merchants and non-merchants as regards their eligibility for insolvency. Previously, Greek insolvency law had dismissed the idea of granting insolvency capacity to non-merchant debtors and financial default of natural entities was dealt within consumer bankruptcy proceedings,[2] introduced in the Greek legal order in 2010 during the economic crisis that dictated the need for the adoption of a new institution.[3]

Another important reform is the abolition of insolvency reorganization proceedings. Under the IC, reorganization was one of the possible outcomes of the unitary insolvency procedure, commencing with (or after) the declaration of the debtor's insolvency. Reorganisation proceedings barely survived the IC amendments in 2016-2017, which did not abolish only the reorganization provided in Chapter 7 of the IC, despite its very limited appeal.

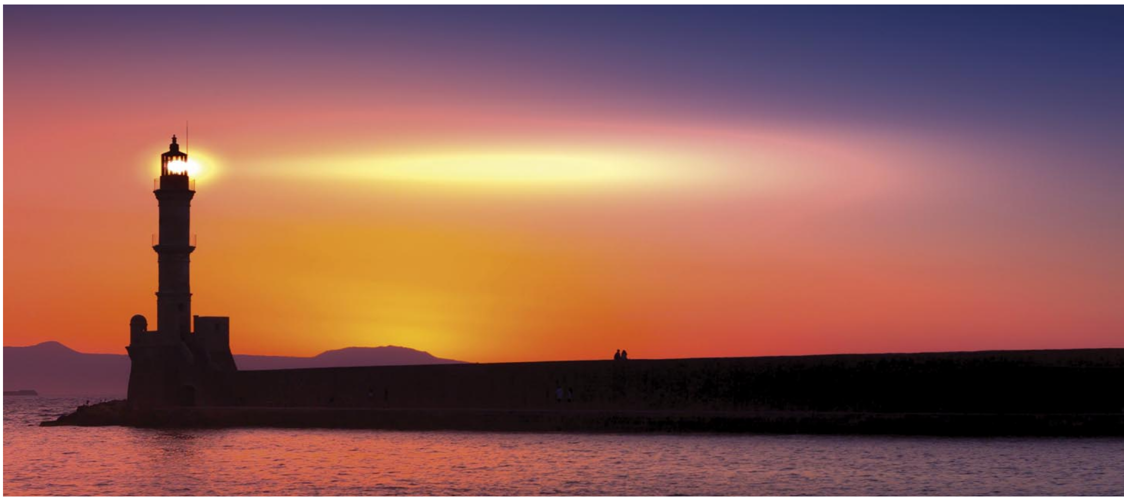
Since formal reorganization is not an option anymore, the main weight of corporate restructurings will have to be borne by the pre-insolvency rehabilitation procedure. Rehabilitation, which is structured as a pre-packaged procedure, had traditionally been the instrument of choice for debtors wishing to restructure their financial obligations. Taking into account existing practice, the GIL elevates rehabilitation as the sole fully-fledged restructuring mechanism.[4]

This latter aspect ties into another important factor underpinning the introduction of the GIL, namely the transposition of the Directive. Although a number of commentators had argued that the harmonisation of the Greek insolvency framework with the Directive was not particularly necessary, since most of its provisions were already effectively transposed in Greek law, the GIL took the opportunity to formally incorporate a number of the Directive's elements.

For instance, the GIL introduces early warning mechanisms (Articles 1-5) as provided under Article 2 of the Directive. Early warning tools are adopted for the first time in the domestic legal order and reflect the objectives of the Directive. Specifically, the above mechanism purports to provide debtors with clear and transparent early warning tools, which could identify circumstances that could lead to insolvency and highlight the need for immediate action.[5] Available tools include both a warning mechanism as well as consulting services provided by the Borrowers' Services Centres, professional bodies[6] etc. Debtors can access information on available early warning tools as well as procedures and measures for debt restructuring and discharge electronically through the website of the Special Secretary for Private Debt Management.[7]

In addition, many of the Directive's provisions on preventive restructuring plans are now reflected in the pre-insolvency rehabilitation procedure. In particular, the GIL introduces a cross-class cramdown option that allows for the confirmation of a rehabilitation plan, even if a class of creditors has voted against it, provided that the plan conforms to the relative priority rule, under which the dissenting class is treated at least as favourably as any other class of the same rank and more favourably than any junior class (Article 54 para 2).

In addition to bolstering restructuring tools in the Greek framework, the GIL also marks the 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., as also provided in the Directive. As a result, although the introduction of the GIL was not really motivated by the need to transpose the Directive, it has presented an opportunity to further align the Greek insolvency framework with the European paradigm.

Some time will pass until a clear view of the application of the GIL by the courts can emerge. The new IC was initially scheduled to come into force on 1 January 2021, but the date was then postponed till March 2021 (for rehabilitation, liquidation proceedings etc.) and June 2021 (for early warning, OCWs and small insolvencies). As a result, the new regime has begun to apply to insolvency cases only recently and courts are only beginning to come to terms with the new provisions.

Still, a preliminary observation can be expressed in that the GIL marks a turning point for Greek insolvency law. The GIL has not really been the catalyst of change, but rather represents the formal recognition of a fundamental conceptual shift that has been occurring for the better part of the last decade and has witnessed the Greek legal framework move away from its pre-existing principles and defining characteristics since the 19th century. Under the new GIL, Greek insolvency law, heavily influenced by European and international paradigms, takes a fundamentally different orientation and adopts many novel concepts and provisions. The real question is whether this developed, yet complicated new regime, will be able to meet the expectations of debtors and creditors. Though past experience may not provide much ground for optimism, the implementation of the new GIL represents one of the most important challenges that the Greek legal framework is currently facing. ■

"Early warning tools are adopted for the first time in the domestic legal order and reflect the objectives of the Directive"

Footnotes:

1 Law 4738/2020 State Gazette A 207/27.10.2020.

2 Law 3869/2010, State Gazette A 130/03.08.2010.

3 Following the adoption of the GIL, there is no longer an option to file new applications for consumer bankruptcy proceedings under Law 3869/2010. Proceedings pending at the time of the GIL's entry into force continue according to its provisions.

4 The OCW mechanism is more limited in its scope and effect.

5 Article 1(1) GIL. "*In domestic law there was no similar mechanism, with the exception of some rules for businesses requiring for example to prepare balance sheets or corporate governance rules or actions by the general assembly in cases where the company's capital is reduced etc.*,": E. Perakis, Insolvency Law (Nomiki Bibliothiki, 2021), 18.

6 Such as, for example, Chambers of Business or other professional associations; see Article 1(2), GIL.

7 See Article 1(3), GIL; www.keyd.gov.gr/

8 The GIL applies to proceedings commencing after its entry into force: Article 263(1), GIL. However, Article 263(2), GIL states that a pending insolvency procedure, following a decision of the creditors' meeting, may be altered to an insolvency procedure under the GIL at the same stage the pending procedure has reached.

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Regulations, recognition and relief in the UK: A primer for non-UK insolvency professionals

Chris Laughton and Daniel Lewis discuss an overview of the rules and procedure and give practical guidance for the recognition and enforcement of foreign insolvency judgments in England and Wales

CHRIS LAUGHTON
Chartered accountant and insolvency practitioner, Mercer & Hole, UK

DANIEL LEWIS
Barrister, Wilberforce Chambers, UK

Chris: Let's start by setting the legal framework. Dan, now that the UK has left the EU and the transition period has ended, what is the principal legal basis in the UK for the recognition of, and the provision of assistance in, foreign insolvency proceedings?

Dan: *The Cross-Border Insolvency Regulations ("CBIR"), a UK statutory instrument (SI 2006/1030), became a more significant tool for insolvency practitioners on 31 December 2020, when the transition period ended after the UK had left the EU. Other EU insolvency office-holders now need to use the CBIR (or the Northern Ireland equivalent) to deal with assets in the UK. They are no longer able to use the provisions of the European Insolvency Regulation ("EIR"), unless main proceedings were already open when the transition period ended.*

Before we look in more detail at what the law now provides, what about practicalities? Chris, what does the change from the EIR to the CBIR mean in practice for an EU insolvency practitioner whose insolvent estate has assets – including claims or potential claims – in the UK?

Chris: Equally important as the law, communication and cooperation are fundamental to the successful execution of any cross-border restructuring or insolvency. They are the lubrication allowing the mechanism of the legal framework to function. Without communication and cooperation that mechanism will seize up. In the world of restructuring and insolvency we are each used to our own local laws, rules and systems. The challenge comes when we try to make them work with someone else's.

In practice, communication and cooperation are likely to be the best way to achieve your objectives in a jurisdiction other than your own where the law, practice and customs are not familiar to you. Different laws, language and culture will all contribute to your challenges.

Communication and cooperation are particularly relevant when using the CBIR because of the court's power to entrust the administration or realisation of all or part of the debtor's assets located in Great Britain to the foreign representative or another person designated by the court.

The best cross-border approach is to put yourself in the shoes of your counterparty and think what they might want. Explain yourself clearly, check you've been understood and check that you understand. As ever when dealing with people, focus less on what you want to say and more on achieving the response you're seeking from the other person. Recognise that they, hopefully, will be adopting the same approach. Remember that cultural issues may well require time to navigate and that your counterparty's level of authority may be very different from yours. Be aware that by working together across borders you are likely to achieve hugely more – and more quickly – than going it alone.

Dan, you spend much of your time in Court, appearing before insolvency and other High Court judges. How likely do you think it is that an English judge would want an English IP to be entrusted with the assets on a CBIR application?

Dan: *The starting point is that under the CBIR it is English law, not the law of the foreign representative's jurisdiction or some supranational law, that will apply to the assets in England and Wales. The court can 'entrust' (and this word is important) the administration or realisation to either the foreign representative or another person designated by the court. In practice the other person will be a UK insolvency practitioner.*

In choosing between the two, the courts will generally decide to appoint the foreign representative where the case is straightforward, such as where the purpose of the appointment is to sell a piece of real estate.

The courts will favour entrusting the administration or realisation of assets to a UK insolvency practitioner where the purpose of the appointment is more wide-ranging and it is intended that the person appointed will use *all the powers available under the Insolvency Act. This is likely where there is a contentious insolvency, where assets are difficult to realise, where a business is continuing to operate or where it is intended that the role of the appointee will be investigatory.*

Chris: So how does an EU office-holder engage with the CBIR? Is recognition of foreign insolvency proceedings automatic?

Dan: *Unlike the EIR, the CBIR do not provide automatic recognition of foreign insolvency proceedings. They do, however, allow recognition through a straightforward court application. The legislation is mature, its provisions are understood, the procedures are well-established and the approach of the UK courts is predictable.*

The court will require evidence of the opening of the foreign proceeding and of the appointment of the foreign representative. Foreign documents submitted as evidence do not need to be notarised or legalised, but they must be accompanied by a translation into English. If the necessary evidence is before the court, recognition is likely to be granted.

Chris, do you think that's clear enough and enticing enough for EU office-holders to come to you and me whenever they need to make use of the CBIR?

Chris: It's fair to say that you and I are always happy to help our friends from INSOL Europe, Dan, and would be keen to do so, although there are other lawyers and insolvency practitioners in the UK who could advise and assist! But I think there's a more practical point.

The key thing is to talk to us early. It's back to communication and cooperation. If you, as a foreign IP, tell me what you want to achieve, I can tell you how to go about achieving it using UK insolvency law. Remember that the detail of how we achieve that goal may be a little different from how you would do so in your own jurisdiction. This is a team game.

So, Dan, our foreign representative has applied for recognition in the UK. What's next?

Dan: *The application is likely to be heard quickly – within days – but the court can at the time the application is filed:*

- *order a stay of creditor execution over the debtor's assets;*
- *provisionally appoint the foreign representative, or another person designated by the court (typically a UK insolvency practitioner) to protect the assets. This means that there will be someone in office to take actions to protect assets before recognition is formally granted; and/or*
- *give the foreign representative the use of any of the powers available under the Insolvency Act to preserve assets.*

In practice, what is often most important at this stage is an application for a freezing order, and which could be either limited to the UK or worldwide. This may be a particularly useful power in cases where the non-UK proceeding is taking place in a jurisdiction with no provision to grant the necessary injunction. As soon as recognition is granted however, the need for a freezing injunction may fall away as the legal effect of recognition in main proceedings will be to stop any dealing with the assets of the debtor.

Chris, we've talked already about the role of the UK insolvency practitioner here, but is this a straightforward exercise for you?

Chris: Well, we need to start from the foreign representative's strategy. What are they trying to achieve? How have we agreed they should go about it? What specific powers should be sought from the court?

Assuming the court grants the powers we agreed should be sought, then yes, it should be straightforward as a UK IP to use them as the court and the foreign representative intended.

Again, you can see why communication and cooperation is so important.

But Dan, what if the estate is not straightforward? How does UK law help in gathering information?

Dan: *The CBIR give the foreign representative the power to make anti-avoidance applications under UK insolvency law, to set aside transactions entered into pre-insolvency to the detriment of creditors, even though the insolvency proceeding is not in the UK.*

Chris: OK Dan, so would it be fair to say that although the CBIR do not allow foreign law to apply in the UK and they don't provide for automatic recognition, they do provide for recognition on a quick and simple application?

Dan: *Yes, and they allow a foreign representative, usually through a UK IP, to exercise the powers that would have been available if the debtor has been subject to UK insolvency proceedings in the first place.* ■

> "Under the CBIR it is English law, not the law of the foreign representative's jurisdiction or some supranational law, that will apply to the assets in England and Wales"

A comparison of real estate-focused measures in the Covid-19 pandemic

Views from Spain, Italy, Greece, England and Wales on new measures in the real-estate industry

> The economic crisis resulting from the pandemic has caused many families to fall into unprecedentedly vulnerable situations

The Covid-19 pandemic has led to a reduction in the activity and turnover of businesses across Europe. Moreover, the economic crisis resulting from the pandemic has caused many families to fall into unprecedentedly vulnerable situations.

This has led to many states adopting measures aiming to protect businesses, vulnerable individuals and families. This article, which follows a panel on "*Real estate industry: New measures passed by the states*" on 7 October 2021 at the INSOL Europe Autumn 2021 online conference, analyses the main measures adopted in Spain, Italy, Greece and the UK.

Spain

Spanish real estate measures, passed[1] in order to help certain tenants (self-employed or SMEs whose activity was compulsorily suspended as a consequence of the state of alarm of whose turnover decreased by at least 75%),[2] distinguished between "qualified" landlords (companies, public entities or "large property owners")[3] and those who are not. In the case of "qualified" landlords of commercial property and with regard to the rents until the end of the state of alarm plus a maximum of four extra months, (i) a 50% reduction in the rent payments or (ii) an interest and penalty-free rent moratorium for the rents (of up to two years or until the termination date) was automatically applied if requested by the tenant (at the choice of the landlord).

Lessees of commercial property were entitled to request a temporary and extraordinary deferment of rent payments to the rest of non-large property holders. The parties to the lease contract were free to use the lessee's security deposit to pay the rent (which needed to be refunded within a year). Certain tax incentives were given to landlords, if reductions in rent were granted. These measures did not apply to landlords under insolvency proceedings or in a state of current or imminent insolvency. Measures regarding residential leases of vulnerable tenants included:

(i) a suspension of eviction procedures;
(ii) a moratorium on payment;
(iii) state-bank guarantee lines or
(iv) direct aids.

Notwithstanding the legal measures passed, Spanish courts are also applying the implicit *rebus sic stantibus* clause (extraordinary and unforeseeable alteration of the circumstances existing at the time of the contract) to rule on the suspension or reduction of rent payments. For instance, this has applied to the rentals of shops located at Madrid-Barajas airport, given the sharp drop in air passenger traffic due to the pandemic.[4]

Italy

Due to the pandemic, many disputes have arisen between landlords and tenants as to who should bear the burden of the mandatory closures of business premises imposed by law to prevent the spread of infection. Although the Supreme Court has not ruled on this issue yet, some courts have observed that, due to Covid-19, there was no total impossibility to perform the obligation under the lease agreement, but only a partial one. Therefore, the tenant may be entitled, pursuant to Article 1464 of the Civil Code, to a reduction of the rent which ceases at the time when the respondent's performance can be fully restored.[5]

Given this situation, very recently, Law-Decree no. 118 of 24 August 2021, converted into Law no. 147 of 21 October 2021, establishes that the entrepreneur who faces a state of financial or economic imbalance that makes its crisis or insolvency likely, may request the appointment of an expert to facilitate negotiations with creditors and any other interested parties; to allow for an amicable solution to overcome the state of economic or financial imbalance, including through the sale of the company or parts of it.

The expert may invite the parties to redetermine, in good faith, the content of the contracts if execution has become excessively onerous due to the pandemic. This provision applies to contracts with continuous or periodic performance or deferred performance; but not to services that are the subject of employment contracts. If a first attempt at conciliation with the expert fails, the parties shall apply to the court, to fairly redetermine the terms of the contract for the period strictly necessary as an indispensable measure to guarantee the continuity of business and ensure the balance of services, also establishing the payment of an indemnity. The judge will decide applying the criterion of fairness, which translates, for the judge, into an instrument of control modifying or supplementing the negotiation statute to guarantee a fair balance between opposing interests.

England and Wales

In common with most countries, England and Wales introduced reliefs for tenants during the pandemic.[6] Restrictions on recovery of possession or arrears have now largely tapered off,[7] but have left a significant court backlog, meaning that courts are prioritising evictions of residential tenants, for example for anti-social behaviour. For residential property, notice periods were extended (depending on tenancy type) until 1 October 2021, when they reverted to pre-pandemic periods and there was a separate stay on possession claims which expired on 20 September 2021 as well as a stay on enforcement by eviction till 21 May 2021 (i.e. effectively for orders made for pre-pandemic reasons). Bailiffs must now give 14 days' notice of any eviction and should not evict anyone with Covid-19. Also for home-owners, mortgage payments could be deferred by up to 6 months to July 2021 and, even now, the lender must take the borrower's circumstances into account in agreeing repayments of arrears.

For commercial property from 25 April 2020, there was a limit on the use of Commercial Rent Arrears Recovery ("CRAR"). There can be no forfeiture of lease for non-payment of rent from 26 March 2021 to 25 March 2022, though it was possible for other default (repairs, etc). If proceedings were already on foot, the court still cannot order possession until 25 March 2022. Rent includes service charges and insurance rent. Mortgage holidays were not available for commercial property, although there was significant other government and bank support for business.

Retail, leisure and hospitality businesses were also able to benefit from 100% business rates relief until 30 June 2021, followed by 66% business rates relief for the period from 1 July 2021 to 31 March 2022, capped at £2 million per business for properties that were required to be closed on 5 January 2021 or £105,000 per business for other eligible properties Restrictions also remain on petitioning to liquidate a Company for business rent arrears.

The future remains somewhat uncertain. The Government has proposed an "arbitration scheme" from March 2022 for Covid-19 arrears in commercial cases. It has published a response to its earlier call for evidence, titled "Supporting Businesses with Commercial Rent Debts: Policy Statement".[8] As recently as 9 November 2021, the Business Secretary announced the new measures, comprising a new Code of Practice,[9] effective immediately, and draft legislation,[10] intended to come into force on 25 March 2022. The Code is voluntary and seeks to provide guidance and best practice on engagement between landlords and tenants largely around trying to encourage them

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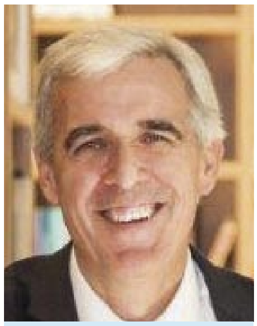

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to reach agreement. It applies to commercial tenancies forced to close by legislation following the pandemic. Annex A to the New Code sets out the Business types affected and the relevant periods as well as geographical variations.

The legislation proposes relief for “protected rent debts” but also restrictions on tenants in entering to insolvency processes, once the arbitration process is initiated. It also restricts landlord’s remedies, including retrospectively on current debt claims and bankruptcy proceedings. Either party can seek to invoke the process within 6 months of the Act coming into force, but must notify the other and try to engage and agree matters first. Arbitration will not be available, if the tenant has entered a CVA or Restructuring Plan. However, if arbitration is entered into, the Arbitrator will weigh the effects on the businesses of both the landlord and the tenant of any relief. During the period in which reference to arbitration may be made, the landlord is restricted from recovery or winding up action.

> *The Greek Parliament passed a new insolvency law during the peak of the pandemic, [which] introduced a primary residence preservation mechanism*

Greece

The onslaught of the COVID-19 pandemic has prompted Greece to adopt a set of measures to provide relief from its impact. In connection with judicially supervised enforcement, including the conduct of forced sales, it is worth noting that most court proceedings were suspended, expressly including auctions and other enforcement actions, between November 2020 and April 2021.

Additional measures related to residential and commercial leases. Legislation required compulsory rental reduction for several categories of persons, including tenants, which are affected businesses for their business establishments, employees of affected businesses for the tenancy of their primary residence, and employees in merchant marine and post-secondary students.

Redress was provided to landlords that were subject to the obligation to provide rental reductions in the form of tax relief. Moreover, fiscal relief was provided to all landlords who voluntarily provided rental reductions of more than 30%. In fact, apart from the suspension of proceedings and the rental reductions discussed above, the remaining measures generally adopted in response to the pandemic were fiscal. As noted above in connection with the suspension of court proceedings, all these measures were of limited duration for the peak of the epidemic.

By coincidence, the Greek Parliament passed a new insolvency law during the peak of the pandemic[11] and it is important to note that the new law, among many other reforms, introduced a primary residence preservation mechanism. The mechanism involves a private entity (**SLBO**) selected by the state pursuant to a public tender to buy the primary residence of an applicant who is characterized as vulnerable (as defined by law) and is either declared bankrupt or their primary residence is being auctioned off by the secured creditor. The SLBO acquires the residence at a market-based price without imposing any delays in the proceedings, thereby also providing them with a reasonable recovery and liquidity.

The SLBO then leases the residence to the debtor at a rate calculated based on the then average mortgage interest rate plus a margin determined through the public tender process. Vulnerable debtors also enjoy a rental subsidy payable by the State to the SLBO (defraying part of the rental liability). The tender process to commission the SLBO has commenced and is expected to complete in first semester of 2022.

Final remarks

We can conclude that some of the measures that address the real estate-related problems derived from the pandemic have been replicated in all of the countries, while other measures are specific to each of the countries (such as the SLBO in Greece). However, all of the States have reacted proactively to try to minimise the financial and social problems derived from the non-payment of rents, for both businesses and families, in these complicated times. ■

Footnotes:

1 Measures included in the Royal Decree-law 15/2020 of 21 April on additional urgent measures to support the economy and employment and the Royal Decree-Law 35/2020, of December 22, 2020, on urgent measures to support the tourism and hotel industries and trade and in relation to tax matters.

2 Tenants must certify they comply with those requirements through a “responsible declaration” and would be liable for the damage caused in case this information proves to not correspond to reality.

3 Grandes tenedores were defined as those owners of more than 10 urban properties (excluding parking space or storage rooms) or a property of more than 1,500 constructed sqm.

4 Ruling (Auto) of Madrid’s First Instance Court nr. 39 of 23 March 2021 (ECLI:ES:JPI:2021:25A).

5 Trib. Roma 29 maggio 2020, available at: www.ilcaso.it/giurisprudenza/archivio/23762.pdf.

6 Coronavirus Act 2020 26 March 2020.

7 Practice Direction (PD) 51Z and CPR 55.29, and PD 55C.

8 See: www.gov.uk/government/publications/resolving-commercial-rent-arrears-accumulated-due-to-covid-19/supporting-businesses-with-commercial-rent-debts-policy-statement.

9 See: www.gov.uk/government/publications/commercial-rents-code-of-practice-november-2021.

10 See: https://bills.parliament.uk/bills/3064.

11 Law 4738/2020, voted October 2020, came fully into effect 1 January 2021.

The future of restructuring and insolvency professions

Members of the Young Members Group from Finland, Germany, France and Switzerland discuss the future of their profession

> *France has now passed from a doctrine of "whatever the cost" to a so-called policy of "tailor-made assistance"*

On 21 October, INSOL Europe held its 2021 Online Seminar. Robert Peldan (Co-Chair, Young Members Group), moderated the Young Members Group panel on the "Future of Restructuring and Insolvency Professions" with group members represented by Incoronata Cruciano, Stéphanie Oneyser and Georges-Louis Harang sharing their views.

This article is a summary of the discussion between the panellists.

What have been the latest trends and new tools in the toolbox that you have come across during the past 18 months?

In **Germany**, the latest 18 months were influenced and shaped by the economic impact of the pandemic and the government measures that followed, like changes in the law and a financial assistance programme. Regarding the financial measures, they included, for example, special loan and interim aid programmes, deferred tax payments and short-time work allowance.

As to the legislative changes, Germany acted very quickly and introduced a temporary suspension of the obligation to file for insolvency as of 1 March 2020 for all companies where the insolvency event was caused by the pandemic, which is presumed to be the case if the company was not insolvent at the end of December 2019. Since 1 May 2021, the obligation to file is once again in effect. Another important legal measure was the possibility to reduce the rent for business premises. Due to this extensive government aid, the expected "wave of corporate insolvencies" has been avoided, even in heavily affected sectors. And furthermore, we even have a decline in corporate insolvencies of 25.8% in May 2021 compared to May 2020. The recognizable willingness of the new government to take further support measures will not fundamentally change this trend until 2022.

In **France**, trends have been felt regarding political measures implemented and regarding figures related to insolvency proceedings. The French government has indeed tried to remedy to the pandemic's effects on economy by guaranteeing all loans granted to companies in distress (up to 90% of the sums borrowed for some of companies fulfilling the criteria). These loans have been allocated to a large part of companies in situation of a strain on their cash flow. It was named the so-called policy of "whatever the cost". Regarding the figures, France has seen a decline of around 40% of insolvency proceedings since the beginning of the COVID-19 crisis.

To reinforce the possibility to restructure, the French Government has also adopted exceptional measures, notably in the out-of-court phase (e.g. interruption/prohibition of judicial actions for the payment of further sums or to terminate contracts; interruption/ prohibition of any enforcement proceedings implemented by creditors; the possibility of asking the President of the Commercial Court to postpone or spread-out payments due to creditors for a period of up to two years). Even if the French government has reaffirmed its support by allocating public aid, France has now passed from a doctrine of "whatever the cost" to a so-called policy of "tailor-made assistance". Some of the previous measures are extended in the crisis exit plan. Therefore, there should be probably no wave of bankruptcies in the nearest future.

The recent transposition of the Directive on Restructuring and Insolvency maintains part of the measures adopted to face the COVID-19 crisis. The debtor is now able to ask the judge to postpone or spread-out payments due to creditors for a period of up to 2 years. Thanks to this transposition, we can also say that safeguard proceedings have been modified to fulfil the Directive's requirements in terms of the creation of classes of creditors, the "cross-class cram-down" and other new concepts, such as the notion of the "best-interest-of-creditors test". Coming with these new tools and these new concepts in French law, we can foresee new areas of expertise for insolvency practitioners.

As for **Switzerland**, the prepack deals have been confirmed as being an efficient tool for restructuring companies of a certain size. Despite the COVID-19 situation, Swiss law has not developed any new restructuring tools from a long-term perspective (i.e. long-lasting measures) so far. In other words: either the company in financial distress is able to use the existing tools (composition proceedings, subordination of claims, recapitalisation, etc.) to overcome the financial distress or it will go bankrupt eventually. Instead, the Swiss government preferred to intervene in a directed manner at the pre-insolvency stage. For instance, in 2020, the Swiss government guaranteed loans granted by the banks to companies meeting certain criteria. In this context, a new provision was introduced, according to which such loans are not considered as debts on the balance sheet, meaning that companies cannot be deemed to be overindebted solely based on these loans. The future will tell us whether this system has truly helped sustainable companies that were affected by the COVID-19 situation or whether it helped financially unstable companies to temporarily circumvent the rules on filing for bankruptcy.

In **Finland**, everybody was waiting for an avalanche of bankruptcies and restructurings to hit during Spring 2021, but now it has been proven that the predictions have been completely false. Actually, the amount of bankruptcy applications filed with the courts has been the lowest in 30 years. When focusing on the trends, it is fair to say that the latest trend has been an increased number of out-of-court workouts and prepacked bankruptcies. We have especially seen several prepacks during the past year; this is a fairly new change of perception in our market, which is very welcome since this is an effective way to salvage going concerns in a bankruptcy situation. Furthermore, we have been witnessing more distress M&A cases, in which insolvency lawyers work side-by-side with banking and finance lawyers. Apart from prepacks, distressed financing is the new kid on the block. We have come across several cases in which funds making investments in distressed companies have had a major role in recovering a debtor company that has been undergoing in-court restructuring proceedings.

What are your predictions for the future of restructuring work in 2022 or 2023?

In **Germany**, the noticeable trend is away from the classic insolvency filing and towards a culture of restructuring at an early stage. Since the beginning of the year, this trend has been supported by the German legislator, who, as required by the Directive on Restructuring and Insolvency, incorporated a preventive restructuring framework for businesses, the "StaRUG", which came into force on 1 January 2021. For the first time, the financial restructuring of imminently illiquid, but restructurable companies, is possible with the involvement of creditors, even against the will of individual creditors. Indeed, StaRUG is rather a tool for larger companies, because of the high costs for advisory and consulting support. As a new tool, it will take some time to make it useful in practice. And we also have to wait and see to which extend the companies will accept it.

In **France**, it would be of good benefit to have the continuation of the trends arisen during the pandemic period, especially regarding the use of out of court proceedings. In that case, the slow, but real development of new mentalities to anticipate financial problems can be anticipated with, maybe, an increase of anticipated reflexes from managers which are likely to be foreseen in the future. Managers might start the restructuring process of their business earlier than in the past, giving them more possibilities to find compromise with creditors and to settle a restructuring plan or a prepack deal either in a confidential environment (with *conciliation*) or not (with safeguard proceedings).

The recent transposition of the Directive into the French legal system might have this impact. The idea is to force the debtor to take measures at an early stage. The toolbox is full of various technical solutions if you start the process of restructuring your business as early as possible. They have to be selected on a case-to-case basis. As such, we can predict much more work within the context of out-of-court proceedings for lawyers, IPs and experts.

As for **Switzerland**, the latest trends observed should continue their progress. Nevertheless, bankruptcy proceedings or the threat of such proceedings should remain very important in the Swiss law landscape. The COVID-19 situation has added an additional level of complexity. Therefore, a careful analysis of the situation, the causes of financial distress and the options that are open will remain an important tool in restructuring work. In this sense, on the one hand, directors should become even more aware of their duties and act upon them when the company is in financial distress. On the other hand, we might accept more liability cases against directors, in particular if they failed to monitor the financial situation of the company and to take the appropriate measures to detect and to avoid over-indebtedness.

After looking into the crystal ball in **Finland**, we clearly see that out-of-court restructurings and cross-border work will become more common in the upcoming years. In particular, cross-border claw-back claims or collecting monies, which have been unlawfully disbursed to creditors or shareholders, are going to be the new normal. Avoiding in-court restructurings is going to be continued as a general trend in the future, since the financiers are very reluctant to commence official proceedings. This is mainly because the results, especially from bankruptcy proceedings, have been appalling, the banking regulation sets high demands on the equity ratio when holding non-performing debts on the banks' balance sheet, and, lastly, the banks are very conscious of their reputation and they are not willing to risk their public relations by filing bankruptcy applications against non-performing debtors. ■

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Turning back the Clock: Post-Brexit cross-border recognition in Cyprus & UK

Chris Iacovides and Andri Antoniou outline some of the new cross-border recognition issues between the two jurisdictions of Cyprus and the UK

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> *The process for recognising UK insolvencies in Cyprus, in the absence of the EIR Recast, is largely untested*

The loss of the relatively streamlined and automatic recognition regimes which applied between the UK and EU member states by virtue of the EU Regulation on Insolvency Proceedings 2015 (848/2015) (EIR Recast), has been described as a "great tragedy".[1]

What was a clear and smooth route to recognition between Member States, facilitating more efficient and swift cross border insolvency proceedings with obvious benefits to creditors and other stakeholders, no longer applies for UK office holders who will need to seek recognition in EU member states and *vice versa*, leaving office holders to navigate through a fragmented and less predictable landscape of common law, domestic legislation and international treaties to identify the most appropriate route.

For insolvency proceedings which commenced prior to 31 December 2020, the position was clarified by the Withdrawal Agreement (2019/C 384 I/01); the EIR Recast continues to apply to those cases. The pathway, however, to recognition for insolvency proceedings commenced post 31 December 2020 will undoubtedly be more complex and the increase of cross border structures involving Cyprus means it is necessary to identify the legislative framework which will be applicable for recognition to be achieved.

Recognition of UK insolvency proceedings in Cyprus

(i) Statute

The process for recognising UK insolvencies in Cyprus, in the absence of the EIR Recast, is largely untested. There are a limited number of reported cases where the Foreign Judgments (Reciprocal Enforcement) Law 1935, Chapter 10 ("Cap 10") has been relied upon as the basis for the recognition of receivers in other common law jurisdictions.[2] Section 3 of Cap 10 provides that any judgment (by virtue of the amendments introduced by Law 130 (1)/2000 the definition of a judgement was extended to include judgements or orders regardless of whether a monetary sum is awarded) of a Superior Court will be recognized by the Cypriot court.

Section 3(1)(b) goes on to provide that particular courts of a foreign country will be deemed superior Courts of that country for the purposes of Cap 10, while section 9(1) provides that Cap 10 applies to, *inter alia*, judgments obtained in courts of the United Kingdom. Recognition will be forthcoming provided the judgment is considered final between the parties. Section 3(3) Cap 10 provides that a judgment is deemed to be final, irrespective of whether an appeal is pending or the judgment is subject to an appeal.

(ii) Common Law

Common law may be another route to recognition; in the first instance case of *Eitan Erez v Dr Borris Bannai* (Appl no. 1535/2011),[3] although the court refused to recognise the foreign insolvency proceedings because the respondents were not Cypriot residents and the applicant failed to sufficiently prove that they held assets within the jurisdiction, nonetheless the Cypriot court was willing to follow common law principles as a route to recognition.

As guidance as to the necessary requirements to be met for the recognition of foreign insolvency proceedings, the Cypriot court may use the UK Supreme Court decision of 24 October 2012 in *Rubin v Eurofinance*,[4] pursuant to which, upon enforcing foreign insolvency orders at common law, it is necessary to meet the test set out in Rule 3 of Dicey & Morris,[5] namely that the judgment debtor:

(i) was present in the foreign jurisdiction at the time proceedings were commenced;
(ii) that he claimed or counterclaimed in the foreign proceedings;
(iii) that he had submitted to the foreign proceedings by voluntarily appearing; or
(iv) had agreed to submit to the jurisdiction of the foreign court.

(iii) Model Law 1997

Another route to the recognition of, inter alia, UK insolvency proceedings, could be achieved if Cyprus were to decide to adopt, via domestic legislation, the UNCITRAL Model Law on Cross Border Insolvency ("Model Law"). Although this would not be a replacement *per se* of the EIR Recast, in the sense that the recognition would not be automatic, it would at the very least create a procedure to be followed for recognition through court and the scope of that recognition would be defined in the domestic legislation through which the Model Law would be adopted. Nevertheless, adoption of the Model Law is not currently under consideration in Cyprus and, in any event, any court route to recognition will mean unavoidable and possibly protracted delays with further risks of loss and asset dissipation to creditors and other stakeholders.

Recognition of Cypriot insolvency proceedings in the UK

(i) Model Law 1997

The UK already has domestic legislation in place through which it can continue to recognise Cypriot (or other member state) insolvencies; the UK implemented the UNCITRAL Model Law on Cross Border Insolvency ("Model Law") via the Cross Border Insolvency Regulations 2006 (SI 2006/1030) ("CBIR") pursuant to which a foreign representative appointed in foreign insolvency proceedings may make an application to a court in Great Britain for recognition of those proceedings. The impact of the recognition is, *inter alia*, that the foreign representative will have standing to make an application to the English Court under the claw back provisions under the Insolvency Act 1986. Also, for foreign main proceedings only (commenced where the debtor has its centre of main interests) recognition results in an automatic stay on certain enforcement actions against the debtor, equivalent to the stay which applies in English liquidation proceedings.

(ii) Section 426, Insolvency Act 1986

Furthermore, section 426 of the Insolvency Act 1986 enables the UK courts to assist in relation to insolvencies commenced in the courts of "a relevant country or territory", upon request, and the scope of the assistance which may be provided via this route can be much wider than that in the CBIR. Unfortunately, however section 426 does not apply to Cyprus, as it is not a relevant country for these purposes. It remains to be seen whether, in light of Brexit, section 426 will be extended to apply to Cyprus or even all EU Member States.

> *It remains to be seen whether, in light of Brexit, section 426 will be extended to apply to Cyprus or even all EU Member States*

Summary

Thus, whilst there are routes available for recognition the position is not anywhere near as clear and predictable as it was under the EIR Recast; the procedures will now be more costly and time consuming and automatic recognition between Cyprus and the UK, at least for now, is a thing of the past. Furthermore, where a UK debtor has a nexus to several EU Member States, this analysis will need to be repeated for each one separately with clear adverse implications for stakeholders. For practitioners who need to act expeditiously to protect and safeguard assets, even a few months' delay in their recognition may mean it is too late.

Footnotes:

1 Susan Block-Lieb, "The UK and the EU Cross Border Insolvency Recognition: from Empire to Europe to "Going it alone"" (2017) 40(5) *Fordham International Law Journal* 1373.

2 Application no 449/19 of the D.C. of Nicosia, judgment dated 13/7/2020; Application no 7/15 of the D.C of Limassol , judgment dated 18/7/2017.

3 A. G. Erotocritou LLC, "Cross Border Recognition of Insolvency Proceedings" (13/05/2009).

4 [2010] EWCA Civ 895.

5 Lawrence Collins and Jonathan Harris (eds), *Dicey, Morris & Collins on the Conflict of Laws* (15th edn) (Sweet & Maxwell, 2018).

Over the hills and far away

David H. Conaway reports on the world-wide reach of the US Chapter 11 'Automatic Stay'

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In our global economy, it is common for companies to be doing business and have assets located in multiple countries. When such companies become insolvent, protecting assets globally can be complicated.

From the debtor company's perspective, it seeks to prevent creditors from seizing assets or pursuing collection actions against the debtor, wherever the assets or creditor may be located. Naturally, the creditor's perspective is the opposite: creditors seek to recover payment for goods or services that were provided to the debtor. When the debtors, creditors, and assets are located in multiple jurisdictions, knowing the applicable laws that apply is essential, albeit not simple.

On 19 October 2021, the U.S. Bankruptcy Court for the Southern District of New York (SDNY) addressed this scenario. In *Kumtor Gold Co. CJSC, and Kumtor Operating Co. CJSC* (collectively, "Kumtor"), the mining company Kumtor, located in the Kyrgyz Republic, filed for Chapter 11 protection in the SDNY on 31 May 2021. Kumtor, a wholly owned subsidiary of Centerra Gold, Inc., operated Kumtor's Gold Mines, pursuant to contracts with a state-owned entity, Kyrgyzaltyn JSC (JSC), which purchased the gold from Kumtor. JSC then refines the gold and sells it outside Kyrgyzstan. JSC is Centerra's largest shareholder owning a 26% interest.

Before Kumtor's Chapter 11 filing, as part of a politically motivated business nationalization program, Kyrgyzstan enacted a "Temporary Management Law" which allowed the Kyrgyz President to seize the Kumtor gold mines and related bank accounts to "secure" payment of alleged environmental claims of $3 billion, and $350 million in alleged tax claims. In response, Kumtor filed for Chapter 11 in the SDNY, which triggered application of Chapter 11's "automatic stay" under section 362 of the US Bankruptcy Code. Moreover, Kumtor filed a motion for a "362 Order" to make clear the automatic stay applied to all parties including foreign creditors, specifically in this case foreign governments. Kyrgyzstan filed an objection to the 362 motion based in part on the doctrine of sovereign immunity, which Kyrgyzstan asserted should exclude Kyrgyzstan from the automatic stay. Kyrgyzstan also filed a motion to dismiss the Chapter 11 case, also on grounds of sovereign immunity and lack of corporate authority to file Chapter 11 in the first instance.

Next, Kyrgyzstan filed a lawsuit against Kumtor in a Kyrgyz court seeking a declaration that Kumtor's Chapter 11 filing was invalid, because the board resolutions authorizing the Chapter 11 were likewise invalid under Kyrgyz law. Kumtor in turn filed a motion to enforce the section 362 stay and for sanctions against Kyrgyzstan for violating the stay, along with a motion for a temporary restraining order (TRO) to prohibit Kyrgyzstan from violating the "362 Order".

The SDNY granted Kumtor's stay motion finding that Kyrgyzstan violated the Section 362 automatic stay and the SDNY held Kyrgyzstan in contempt of court for violating the automatic stay and awarded sanctions to Kumtor for its actual costs and attorneys' fees. However, the SDNY did not enjoin the legal actions in Kyrgyzstan, due to lack of service of process on Kyrgyzstan. Kyrgyzstan appealed the SDNY's ruling finding a violation of the automatic stay and awarding sanctions, specifically a direct appeal to the U.S. 2nd Circuit Court of Appeals, bypassing the U.S. District Court. This appeal was denied by the District Court. Remaining pending are Kyrgyzstan's motion to dismiss the Chapter 11 case for lack of corporate authority to file Chapter 11, and a renewed motion by Kumtor for contempt and sanctions against Kyrgyzstan relating to the litigation in Kyrgyzstan. These issues have not yet been resolved.

> "The Kumtor case raises many interesting legal issues in a politically charged environment"

In essence, the fight is about whether Kumtor's property was wrongfully expropriated by Kyrgyzstan, based on specious environmental and tax claims, asserted by Kyrgyzstan to parlay its claims into a controlling ownership interest in the Kumtor Gold Mines. The Kumtor case raises many interesting legal issues in a politically charged environment. A key issue is the world-wide reach of the automatic stay of Chapter 11. Kumtor asserts that section 362(a)(3) of the Bankruptcy Code stays:

> *"any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate…"*

Section 541(a) of the Bankruptcy Code defines the scope of property of the estate to include property "wherever located and by whomever held". This seems pretty clear. However, the Kumtor rulings so far compromise that clarity and allow for a creditor to practically evade the Section 362 automatic stay, as such rulings did not also enjoin the legal actions in Kyrgyzstan. Even if the SDNY enjoined the Kyrgyzstan legal proceedings to effectively nationalize the Kumtor Gold Mines without compensation, would Kyrgyz courts enforce the SDNY order? There is no bilateral treaty between the U.S. and Kyrgyzstan regarding recognition and enforcement of foreign judgments. Absent a treaty, it is highly unlikely a Kyrgyz court would rule in Kumtor's favour, where the operating assets are located.

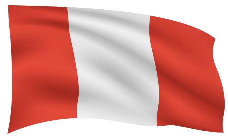
The UNCITRAL Model Law on Cross-Border Insolvency, designed to facilitate a successful "main" insolvency proceeding in one nation (here, the Kumtor U.S. Chapter 11 proceeding), with assistance from courts in other jurisdictions, could be helpful in this context. Particularly, the Chapter 11 representative could initiate an ancillary proceeding in another jurisdiction to obtain access to the local courts to provide assistance consistent with the goals of the "main" insolvency proceeding. While the U.S. and 52 other countries have adopted the UNCITRAL Model Law, Kyrgyzstan has not. Thus, it is highly unlikely the SDNY will be able to impact the ongoing legal proceedings in Kyrgyzstan. Even if these issues are presented to the U.S. 2nd Circuit Court of Appeals, the same limitation will exist.

The Kumtor case is a cautionary tale for companies seeking to utilize U.S. Chapter 11 as a "main" insolvency proceeding, where the assets are not in the U.S. Clearly, Kumtor is struggling to fight the alleged nationalization without compensation of the Kumtor Gold Mines. For creditors in foreign jurisdictions, Kumtor is a playbook for continued collection actions against Chapter 11 debtors regarding legal actions and against assets outside the U.S., particularly where both parties have not adopted the UNCITRAL Model Law. While this case involved the U.S. and Kyrgyzstan, the same issues would exist if any European country were involved, since few EU countries have adopted the UNCITRAL Model Law. ■

> *While the U.S. and 52 other countries have adopted the UNCITRAL Model Law, Kyrgyzstan has not*

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*

The implementation of the Directive in Austria - New opportunities for companies?



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Austria implemented the Directive on Restructuring and Insolvency (the Directive) on time on 17 July 2021.

The Directive's requirements were implemented in the Restructuring Regulation (*Restrukturierungsordnung*). Though not the first time Austria has introduced a preventive procedure, the "company reorganisation procedure" introduced in 1998 in the Company Reorganisation Act (*Unternehmensreorganisationsgesetz*) has rarely been used (c. 5 times). This is due to various disadvantages, such as the lack of enforcement, insolvency protection and the requirement that the company must not be insolvent. Moreover, entrepreneurs have tended to file too late for insolvency, rendering this procedure an insufficient incentive.

The new Restructuring Regulation now provides for a stay of enforcement on application by the debtor under certain conditions. The "likelihood of insolvency" in the sense of Article 4 of the Directive is defined as a threat to the company's existence, in particular if illiquidity is imminent or if certain key figures are not met (equity ratio <8%, notional debt repayment period >15 years). Restructuring procedures are not open to already illiquid companies, though significant over-indebtedness need not be detrimental, provided the proposed restructuring plan eliminates this.

The debtor retains self-administration powers. However, if necessary in the interest of the creditors or if the approval of interim/new financing is required, a restructuring trustee will be appointed to assist the debtor. In practice, it is assumed that insolvency courts will always appoint a restructuring trustee.

New to the Austrian insolvency culture is the creation of creditor classes and the possibility of a **cross-class cram-down**. The following creditor classes are in the legislation: secured creditors, unsecured creditors, bondholders, creditors in need of special protection (i.e. with claims of less than €10,000) and subordinated creditors. Voting within classes will require a majority of headcount and 75% majority of capital.

If approval of the restructuring cannot be obtained in all classes, a rejecting class may be outvoted, provided that the majority of the classes, including the secured creditors, have approved the restructuring and that rejecting classes of creditors are treated equally to other classes of the same rank and better than lower ranked classes. Nonetheless, rejecting creditors can apply for an examination of whether the criterion of "**best interest of creditors**" has been met, i.e. whether they have been placed by the restructuring plan in the same position as in the best possible scenario of insolvency proceedings.

On the occasion of the implementation of the Directive, Austria has taken the opportunity to create a **type of pre-pack** in the form of the **simplified restructuring procedure**. In this procedure, only financial creditors can be affected, although a broad interpretation is suggested, to include tax and social security granting payment deferrals due to the Covid-19 pandemic. As a pre-condition, the agreement of the affected creditors with declarations of consent of at least 75% in amount of the claims must be submitted to court together with an expert opinion stating the restructuring plan is compatible with the best interest of creditors. If all requirements are met, the court can confirm the restructuring plan without any publicity. The disadvantage of this simplified restructuring procedure is that, in the absence of publicity, recognition under the European Insolvency Regulation seems unlikely.

> "Whether the new preventive restructuring procedure will be accepted in practice remains to be seen"

Outlook

Whether the new preventive restructuring procedure will be accepted in practice remains to be seen. It can be assumed that it will only be used by large companies due to the complexity, necessary preparation and associated costs. The possibility of cross-class cram-downs can help to ensure that rejecting creditors cannot block meaningful restructuring measures. ■

Spanish insolvency law reform: Fit for purpose?

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Earlier this year, the Spanish Council of Ministers published a draft insolvency law reform bill, intended to implement the Directive on Restructuring and Insolvency.

A statutory public consultation was opened in the summer, enabling the author to make comments, keeping in mind the track record of the 22/2003 Insolvency Law, enacted almost twenty years ago, and substantially amended by the 30/2011 Law and other texts, most of which have not met the intended targets. This failure is evidenced by the fact that the Law has been amended more than twenty-five times (other than COVID-19 related measures), often following pressure by interest groups.

These comments take into account the insolvency office-holder (**IOH**) principles established by the European Bank for Reconstruction and Development (**EBRD**) revised in March 2021. The 30/2011 Act also provided for the necessity to regulate the tasks and duties of insolvency administrators. However, requests by professional associations in Spain for the enactment of provisions to create a professional and specialized body of insolvency administrators, so as to increase the efficiency of the procedures, have been unsuccessful.

Firstly, the EBRD principles define the IOH as any professional involved in reorganisation or liquidation processes. The concept of reorganisation is construed in the broadest sense, including early action, pre-pack solutions and insolvency proceedings. In defining liquidation, the EBRD provides for intervention oriented towards liquidation of assets and payment of debts. Clearly, there are no differences between the EBRD's definition of restructuring experts and the role of insolvency administrators.

The EBRD has also listed twelve principles for an effective regulatory and professional framework. The third of these requires independence and impartiality to balance the interests of stakeholders. This and the 9th principle also refer to remuneration paid out of the insolvent company's assets. Of note is that where remuneration originates from other sources or the IOH is appointed by an interest group, there is a risk to independence, as the appointing party often tries to influence the professional, regardless of the general interests of the procedure, even by promoting actions complicating and lengthening proceedings.

These are commonplace situations nowadays and will be enhanced by the proposed draft. The expected economic and financial consequences, both from the general restructuring procedure and the special microenterprise procedure, are a reduction of financing under preferential commercial conditions. Increasingly, suppliers will request advance payment or payment upon delivery. The likely consequence will be that creditor remedies available in cases of non-payment will be reduced, because the draft text renders it impossible to start recovery procedures before a court or enforce court judgements or resolutions.

Further remarks may also be made, the first dealing with the classification stage (*sección de calificación*). Conduct of this stage lies with the insolvency administrators; it is always a source of conflict and often extends the duration of proceedings. This stage should be subject to the public prosecutor's competence, who would assess, relying on insolvency administrators' reports, their conclusions to prevent matters becoming "bargaining chips". There is awareness that biased interpretations of accounting irregularities or the quantification of the aggravation of the insolvency may unnecessary complicate the procedure.

Secondly, dealing with the intervention of the Tax Agency, the Social Security and Companies' Registries in the early detection of insolvency, the first two are usually creditors. As creditors are the ones to decide, before doing business, whether a potential counterparty is in a difficult financial situation, it would be useful to grant private individuals access to information gathered by administrative bodies on unpaid or outstanding debts, payment deferrals and annual accounts. The 6th additional provision of the draft, which imposes free, unpaid work, deserves a separate comment, particularly as to whether it complies with the Spanish Constitution.

In the author's view, as it stands, the draft law will not meet, once again, the intended targets, mainly because steering economic life via legal provisions is difficult. ■

> *The EBRD principles define the IOH as any professional involved in reorganisation or liquidation processes*

Slovakia: Adaptation of the EU Directive on Preventive Restructuring Frameworks

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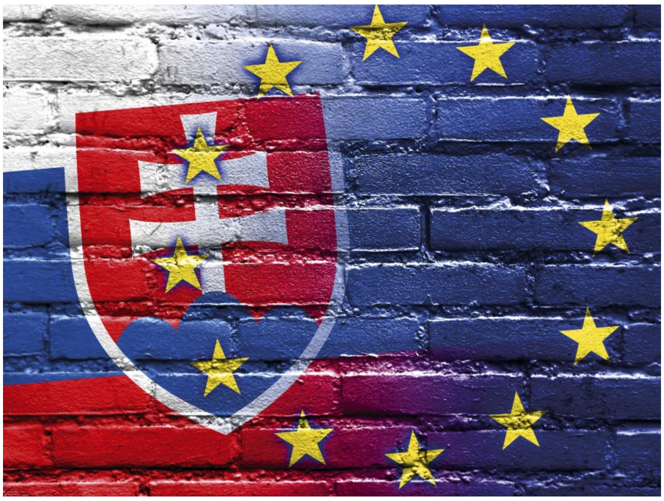
The current Slovak insolvency framework only allows restructuring under strict conditions. A new law on impending insolvency, based on the EU Directive 2019/1023 ("Directive") is currently being prepared.

The aim of the new law is simple: to prevent business bankruptcies and avoid job losses. However, the peculiarities of the existing Slovak insolvency framework suggest a broader use of the new law. So, what will happen after 17 June 2022, when the new law comes into force?

The Ministry of Justice draft gives a debtor in a state of impending insolvency the option to file for either a public or private preventive restructuring. Private preventive restructuring is a private agreement with one or more bank creditors to restructure the debtor. However, if the debtor wishes to involve one or more non-bank creditors, it must choose the public preventive restructuring process, which is monitored by a court-appointed insolvency trustee. A debtor seeking public preventive restructuring can ask the court for a moratorium to enable it to seek an agreement with its creditors. This will result in claims collection being suspended for three months, with an optional three-month extension.

Since the debtor cannot be insolvent at the beginning of the preventive restructuring process, the new law treats the impending insolvency solution as a private agreement between the debtor and the creditors. As such, though there is no other limitation on who the advisor can be, except that it requires sufficient experience, a debtor should choose an advisor the creditors will trust. The role of the advisor is to review the debtor's financial situation and prepare a restructuring plan. This is crucial, since it is uniquely the advisor who analyses the debtor's situation and prepares a draft of the debtor's restructuring plan. As such, the new law also makes the advisor responsible toward the creditors.



> *A non-insolvent debtor can initiate the preventive restructuring process, then become insolvent once the process has begun and still complete the process under the new law*

The anticipated practical application of the new law

Currently, a Slovak insolvent debtor has only two options: to declare bankruptcy or seek restructuring. When choosing the latter, the debtor must satisfy at least 50% of the creditors' registered claims. This leads to a very low number of restructuring processes in Slovakia; official statistics show just 16 approved restructurings between January 2021 and October 2021.

The new law does not require this target to be achieved, but only allows a restructuring if the debtor is not yet insolvent. However, a non-insolvent debtor can initiate the preventive restructuring process, then become insolvent once the process has begun and still complete the process under the new law. Furthermore, the preventive restructuring process under the new law on impending insolvency seems simpler and quicker than the cumbersome restructuring process under previous legislation.

These facts suggest that a debtor seeking to restructure by offering creditors a debt haircut, rather than opening a bankruptcy, will wish to explore the options offered by the new legislation. Creditors hoping to gain a percentage of receivables, rather than the usual low amounts paid in bankruptcy, will also look to the same solutions. In fact, some creditors will prefer the restructuring process under the new law, given that the prospect of a low return may still be better than bankruptcy.

A personal view

The author has had the pleasure of taking part in the formal meetings between the Slovak Ministry of Justice and stakeholders discussing the creation of the new law. These meetings have shown that the new law has captured the attention of all major stakeholders and, for that reason, should see a great deal of use in the future. ■

View from the UK: A potential missed opportunity?

As the Rating (Coronavirus) and Directors Disqualification (Dissolved Companies) Bill 2021 begins the final stages of its legislative journey, Duncan Swift looks at areas where the legislation could be improved

The Government's plan to enable the Insolvency Service to investigate directors of dissolved companies, through new powers granted through the Bill, is well-intentioned.

The change will help deter the use of dissolutions by directors to avoid scrutiny and liabilities, solving a longstanding issue highlighted by many of our members and many in the profession. However, it appears that this legislation is likely to only be used by the Government to recoup money in cases of significant Bounce Back Loan fraud and does not deal with the scale of the problem (it is estimated up to half of the typical 50,000 pre-pandemic dissolutions per year are insolvent).

While understandable, this limited application could undermine the Bill and the opportunity it has created to properly close this loophole to deter fraudulent behaviour. There is also the question of how the Insolvency Service will be funded as its new powers and responsibilities will significantly increase its workload.

Funds for additional investigations

For this Bill to deliver on its aims, the expansion of the Insolvency Service's investigatory powers must be accompanied by additional resources. If it is not, there is a real risk that investigations into directors of dissolved companies will come at the expense of investigations into directors of insolvent companies. This cannot be allowed to happen – especially given that, in light of challenging wider economic conditions, the Insolvency Service is likely to be called upon to investigate an increasing number of insolvent companies on top of its current caseload. It needs expanded resources to match these expanded powers if its other areas of investigation are not to suffer.

Too limited a focus

While no-one would take issue with recovering fraudulently claimed taxpayers' money, making this the focus of the Bill means other creditors who have been victims of director misconduct will most likely miss out on redress or compensation. In part, this is because the legislation aims to address the behaviour of *directors* of dissolved companies, rather than looking more closely at the dissolution process and the dissolved entity itself. Companies House automatic strike-off routines account for 95% of dissolutions. Quarantining companies for Insolvency Service screening pre-dissolution will deter directors from the outset.

Restoring dissolved companies to the Companies Register to be placed into an insolvency procedure and then investigated by the insolvency profession could enable directors to be held accountable, assets to be identified and then realised for their creditors' benefit. But the overarching issue is the fact that this legislation appears to have been designed to tackle issues relating to Bounce Back Loan fraud, rather than the wider abuse of the dissolution process.

A more rounded approach would see the Government make it easier and less costly for creditors and the insolvency profession to restore a company to the Companies Register. Although this would be a late amendment to the Bill, it would benefit the profession, its efforts to tackle director misconduct, the Insolvency Service, and the victims of those who use the dissolution process to avoid investigations into their behaviour.

Improvement at the final hurdle?

As this article was being written, the Bill was going through the Committee Stage in the House of Lords. Two Peers, Lord Fox and Lord Leigh of Hurley, have used this stage to query what measures will be used to recover funds from culpable directors, and suggested that the dissolved companies in question should be restored to the Companies Register to allow them then to be entered into an insolvency process.

Hopefully, the Government has a response to both of these points – as well as our concerns about the existing flaws in the dissolution process and Insolvency Service resources. If it can turn these responses into something that enables this legislation to benefit all those affected in these cases before it completes its journey to the Statute Book, this Bill could make a real difference to the Government and the profession's efforts to tackle director misconduct – and to those who suffer as a result of it. ■

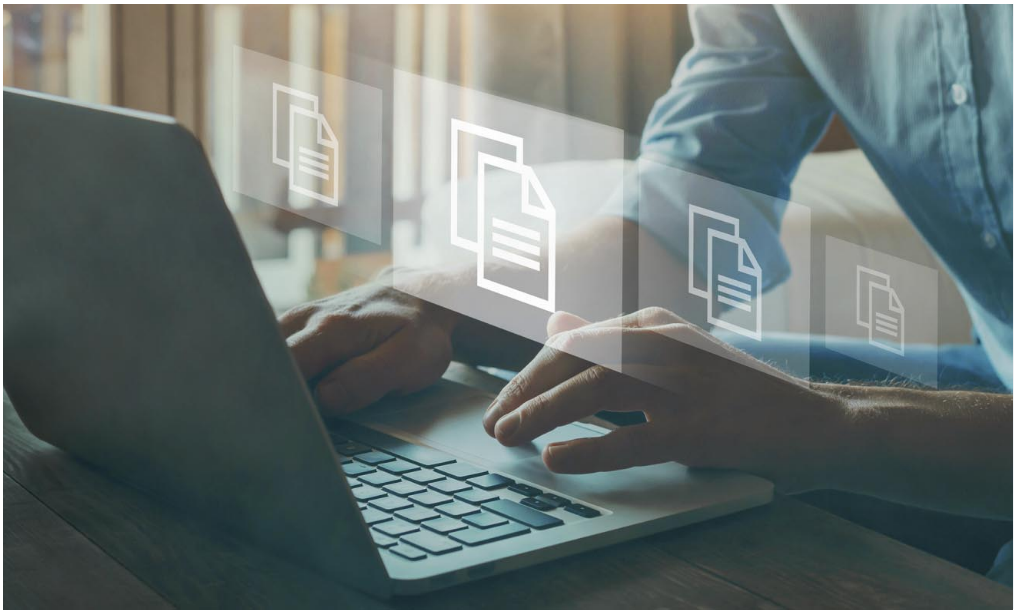
DUNCAN SWIFT
Immediate Past President of insolvency and restructuring trade body R3, London

it appears that this legislation is likely to only be used by the Government to recoup money in cases of significant Bounce Back Loan fraud

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



> *If you want to contribute, please do not hesitate to send me the relevant materials at: technical@insol-europe.org*

Updated insolvency laws

The new **Greek Insolvency Law** (Law 4738/2020, as amended by Law 4818/2021) (with full English translation) has now been published on our website. Please note that the Greek Insolvency Code, as amended by Law 4472/2017 (with full English translation) is still available, as it still applies to pending proceedings – as well as the Law 4354/2015 on Non-Performing Loans, as amended by Laws 4389/2016 and 4393/2016 (with full English translation).

See: www.insol-europe.org/technical-content/updated-insolvency-laws-greece

Following the Polish/English bilingual version of the amended pre-pack in **Poland**, INSOL Europe members now have access to a translation of the Polish simplified restructuring law provisions in English at: *www.insol-europe.org/technical-content/updated-insolvency-laws-poland*

Updated Insolvency Laws have also been published for **Lithuania** as from 15 July 2021, changes to the insolvency and some other laws came into effect in relation to the EU Directive on Restructuring and Insolvency. Law no XIII-2221 on insolvency law for legal entity as at 15 July 2021 (in Lithuanian only) is available at: *www.insol-europe.org/technical-content/updated-insolvency-laws-lithuania*

Please note that the updating process of the information contained in the Updated Insolvency Laws section is in progress, as national legislation will have been amended by both the specific measures taken in the COVID-19 context and soon by the forthcoming national texts implementing the EU Directive on Restructuring and Insolvency. If you want to contribute, please do not hesitate to send me the relevant materials at: *technical@insol-europe.org*

Tracker on the implementation of the EU Directive on Restructuring and Insolvency

As a reminder, a tracker on the implementation of the Directive on Restructuring and Insolvency in EU Member States is available on the INSOL Europe website. Since my last technical column, updates were published for **Poland** and **Spain** and the links for the legislation implementing the EU Directive on Restructuring and Insolvency in **Greece**, **Austria**, **France** and **Germany** have been published at: *www.insol-europe.org/tracker-eu-directive-on-restructuring-and-insolvency*

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 remains available at: *www.insol-europe.org/technical-content/eu-directive-on-restructuring-and-insolvency*

Lexis®PSL

INSOL Europe's European Insolvency Regulation Case Register

As at 31 December 2021, **803** abstracts are published in total including 44 abstracts applying the Recast Regulation on Insolvency 2015/848: 1 from Austria; 1 from England & Wales; 3 from Estonia, 1 from France, 1 from Gibraltar; 5 from Germany; 1 from Italy; 22 from Lithuania; 4 from Portugal, 4 from The Netherlands and 1 from Scotland.

All abstracts are published at the Lexis-Nexis INSOL Europe's European Insolvency Regulation Case Register platform at: *www.lexisnexis.com/uk/legal/api/version1/sf?shr=t&csi=414885&sfi=GB02STIntCseCmn*

The new EU-wide interconnection of national insolvency registers (IRI 2.0)

Information of interest has been published on the EU Study Group Links webpage (*www.insol-europe.org/eu-study-group-links*) including a new version of the Insolvency Registers Interconnection search interface. The EU-wide interconnection of national insolvency registers (IRI 2.0) has been developed in accordance with Article 25 of the Recast European Insolvency Regulation. It allows searches for insolvent debtors, whether natural or legal persons, within the EU Member States' registers that have completed the implementation according to the aforementioned regulation.

The new system has been integrated into the e-Justice Portal and replaces the previous version based on voluntary participation under the Insolvency Registers Interconnection search (IRI 1.0). ■

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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EIR Case Register
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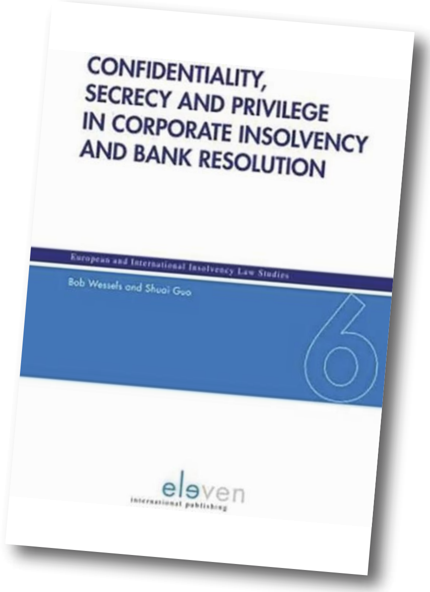
Confidentiality, Secrecy and Privilege in Corporate Insolvency and Bank Resolution



Shuai Guo and Bob Wessels (1st edition) (2020, Eleven International Publishing, The Hague) 200 pp., EUR 75, ISBN 978-94-6236-167-6/978-90-5931-794-9 (ebk)

In *Confidentiality, Secrecy and Privilege in Corporate Insolvency and Bank Resolution,* Emeritus Professor Bob Wessels (Leiden) and Assistant Professor Shuai Guo (China University of Political Science and Law) have made a tremendous job in giving shape to a topic that had never been taken into account before as an autonomous field of research. The perspective adopted by the authors is not only that of several national legal orders (at least forty, considering the European Union as one single jurisdiction) but also an international and multinational one, as interesting issues related to the conflict of laws realm and to the conclusion and implementation of cross-border insolvency protocols are dealt with in the book.

After a first introductory chapter, the second chapter deals with definition issues. The authors' effort to provide definitions of the concepts of "confidentiality", "secrecy" and "privilege" is much appreciated as, even if it seems that "they can be interpreted interchangeably", "nuances exist among" them. The next eight chapters analyse how issues of confidentiality, secrecy and privilege come into play in relation to the different actors involved in corporate insolvencies or in bank resolutions, i.e.: debtors; insolvency practitioners; courts and insolvency authorities; creditors; other stakeholders (namely: bidders and acquirers in a sale of business process and clients); banks looked at both as professional service providers and as debtors; resolution authorities and other agencies.

The choice of approaching the topic of the book from the perspectives of the different interested actors is a brilliant one, as it shows how really different problems may arise in the different situations. The analysis is rich in truly interesting normative and case law references, that demonstrate how the topic of the book, far from being the object of a purely academic exercise, plays a major role in practice too. The last chapter contains a summary of the book, underlying a "principal conflict that can be seen in different chapters, namely disclosure versus confidentiality" and conclusions in the sense of favouring both further research on the topic (even if the book in itself is truly more than complete) and joint initiatives by institutional actors to clarify (at least some) "aspects of confidentiality, secrecy and privilege matters for both domestic and international insolvency cases".

Giulia Vallar, Lawyer, DLA Piper, Milan, Italy

> ***The analysis is rich in truly interesting normative and case law references***

Corporate Debt Restructuring in Emerging Markets

Richard Marney and Timothy Stubbs (1st edition) (2021, Palgrave Macmillan, Cham CH) xxiv + 422 pp., EUR 44, ISBN 978-3-030-81305-5

This text, written by a financial risk analyst (Marney) and a partner at Denton's (Stubbs), is the fruit of experience teaching a course on corporate debt restructuring, where the stories, rather than the detail of data, information and analyses, focusing on parties, their personalities and their perspectives proved to be highly attractive to the students. In this light, the authors have set out to offer "navigational aids" to professionals involved in restructurings acting for a variety of stakeholders. Through the case-studies and accounts of lessons learned, the authors have attempted to blend narratives with practical transactional data, technical analyses and figures to offer those involved in cross-border, multi-party workouts, particularly in emerging markets, a roadmap to charting a course through complex situations.

One of the attractive features of this text is not just its blended approach, but the very colloquial and approachable language in which the lessons are couched. Inspired by a number of aphorisms and sayings, many of the sections connect the reality of actual practice with the often rarefied world of abstract transactions to render these more transparent to the reader. At the centre of the narrative is the interplay of personalities and the process, which reflects this real-world path the authors tread and in which outcomes may well depend on a variety of factors, both transactions- and personalities-based.

In five parts, the authors take the reader on a complex and enlightening journey. Part I outlines the "Restructuring Tale", while Part II (in 7 chapters) outlines the purpose of the text before embarking on a description of the main phases of a restructuring, to each of which are then devoted the remaining chapters of this part. Part III describes the phenomenon of exogenous events (outside the will of the parties), a very apt reflection of pandemic times. Part IV (in 2 chapters) contains a reference toolkit covering macro-economics and credit analysis as well as a guide to legal issues encountered in restructurings. Part V then concludes.

Overall, this is a text that is very pragmatic and contains much useful and practical information, while also remaining very approachable, reflecting the best didactic practice. It can certainly be recommended, not just for its content, but as a good and entertaining read.

Paul Omar, Technical Research Coordinator, INSOL Europe

New Bank Insolvency for China and Europe, Volume 3: Comparative Analysis

Matthias Haentjens, Shuai Guo and Bob Wessels (1st edition) (2021, Eleven International Publishing, The Hague) xiii + 206 pp., EUR 44, ISBN 978-94-6236-216-1

This is the third, and concluding, book in a series that was inaugurated in 2017, arising out of the work of the authors at the Hazelhoff Centre for Financial Law at the University of Leiden. The authors, who are eminent in financial and insolvency law, have endeavoured in this final part to provide the comparative analysis tying together the information published in the previous two works on China and the European Union respectively.

The book is an elegantly concise text in just over 200 pages, divided into 11 chapters. After a brief introduction of the scope of the work and the role of international benchmarking, the work segues into a recap of the findings of the previous two works (suitably updated). It then proceeds through an outline of the institutional framework governing banking supervision and types of insolvency proceedings, before entering the detail of the process: In 6 chapters at the heart of this opus, the authors cover issues around the management of failing banks, the concept of bail-in, contracts and termination rights, judicial review of the process, depositor protection and deposit guarantee schemes as well as cross-border issues. Rounding this off is a postscript of a possible future for bank insolvency law in both China and Europe.

Overall, there is much to consider in this work, coming as it does at a time when China and the European Union are economic competitors on the world stage. The text is filled with astute observations on both legal and financial frameworks, while also considering the practical context for bank operations in these jurisdictions. As a whole, the series, to which this work forms an elegant finale, can be recommended to all those practicing or interested in developments in the field.

Paul Omar, Technical Research Coordinator, INSOL Europe

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