INSOL EUROPE

#87 · Spring 2022

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The journal of INSOL Europe

Return to live events!

Back to the Future²

Conference reports from Dublin

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- **Cross-border Schemes and Plans**
- **Towards greater harmonization**
- **Limits to common aw recognition**
- **Landmark changes in Jersey**
- **Country reports**
- **Event news**

...and more

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paulnewson@insol-europe.org

Welcome from the Editors


EDVĪNS DRABA


JOSÉ CARLES

Spring. The time of the year in which nature itself seems to come to life again. And this year, more special than ever for INSOL Europe, as it has brought many of our members together in person for the first time since Copenhagen in 2019.

We made it work through the pandemic and stayed united despite not meeting in person. Nonetheless, at INSOL Europe we are not only an association of professionals. We have already built strong ties of friendship during the past 40 years. And we had the luck to see this friendship blossom once again this Spring in the Annual Congress in Dublin.

Not everything is a reason for joy, though. Our minds were – and still are – at all times with our Ukrainian neighbours. INSOL Europe has condemned Russia's unprecedented military aggression against the State and people of Ukraine. INSOL Europe President's words of support to Ukraine during the Annual Congress, which are echoed in his article 'Courage, resistance and resilience in the face of adversity' (p. 6) and in INSOL Europe Statement on Russia's invasion of Ukraine (p. 11), united the voices of all our members. As poet Pablo Neruda once wrote: '*They may cut all the flowers, but they won't be able to stop Spring*'. Nonetheless, I wish we find the way to avoid any more flowers being cut and I am proud to learn that INSOL Europe is working on further help to Ukraine and its people.

This edition also analyses the global implications of the Russian invasion of Ukraine on global supply chains (p. 14) as well as certain implications of COVID-19: measures adapted as a consequence of the pandemic that are desirable to become permanent (p. 12) and its impact international insolvency policy-making (p. 28)

Our Spring 2022 edition includes articles on the latest most relevant conferences and workshops: the Joint Fraud Conference (p. 9), YANIL (p. 10), all the panels from Dublin's Annual Congress *Back to the future 2* (p. 18), its Academic Conference (p. 24) and the Richard Turton Award (p. 13). In this regard, congratulations to Abbas Abbasov from Azerbaijan, who received this award during Dublin's Annual Congress! You will also find in this number a detailed report on the panel on the compared analysis of cross-border schemes and plans in Ireland, the UK, The Netherlands and Germany (p. 26).

This issue also covers recent developments from UNCITRAL's Working Group V (p. 10), our joint project with LexisPSL on the Recognition of Foreign Decisions in Different EU Countries (p. 12) or the harmonization of insolvency and restructuring substantive laws at a European level (p. 30). Furthermore, it offers details about what is going on in Jersey and its winding-up regime (p. 36), the relevant Arca Investments Case on COMI in the Czech Republic (p. 38), the restructuring of public hospitals in Poland (p. 39) or the impact of the transposition of the EU Directive in new and interim financing in Portugal (p. 40).

For you to be duly updated from a tech perspective, our IT&DA column (p. 16) brings you the latest news from cryptocurrency exchange insolvencies from Turkey (Thodex) and Poland (BitMarket and CoinRoom).

And as we have been lately travelling to the future, we also suggest you travel to the past with us by reading the review on Professor Wessel's 'Rembrandt's Money: The Legal and Financial Life of an Artist-Entrepreneur in 17th century Holland'!

José

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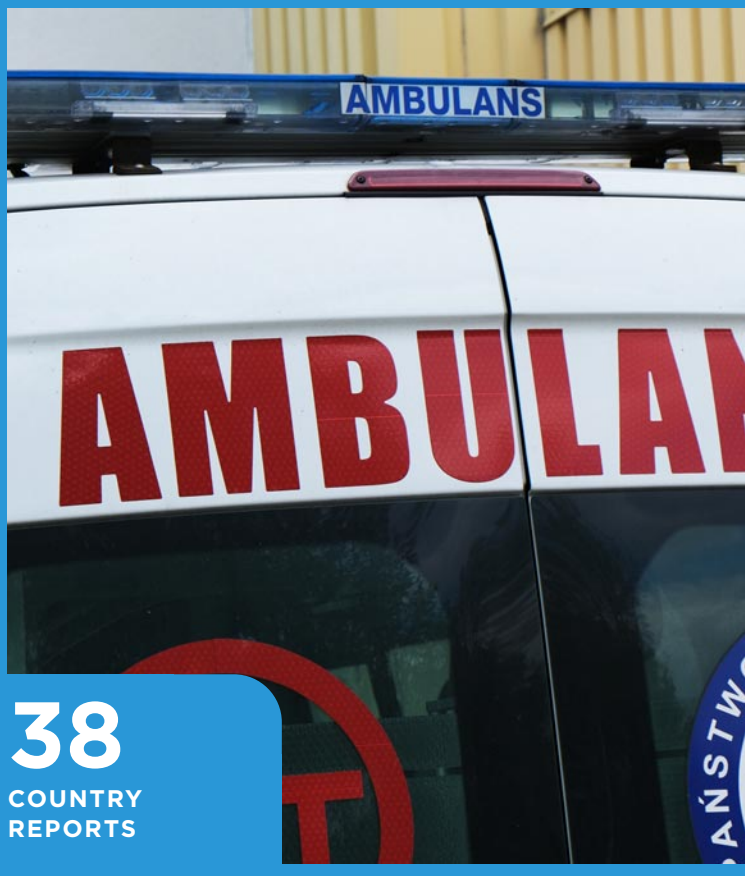

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COUNTRY REPORTS

Courage, resistance and resilience in the face of adversity

Frank Tschentscher reflects on the war in Ukraine, its likely impact on the global economy and on INSOL Europe's recent Annual Congress

FRANK TSCHENTSCHER
INSOL Europe President

> *We have issues to address, a war and pandemic to navigate, people to take care of, but we are doing it together*

It is difficult to concentrate on work these days. Russia's aggression in Ukraine has severely undermined the concept of sovereignty and has led to escalating human rights violations. What we are witnessing in Ukraine is not just war but shocking, horrifying crimes of war.

Until recently, the once quiet town of Bucha was in the hands of Russian Federation troops. From here, the invading army hoped to advance on the Ukrainian capital of Kyiv. However, meeting with fierce resistance and experiencing heavy losses, the progress of the invading army was stopped. The Russian army was forced back and subsequently withdrew altogether from the area, leaving behind death and destruction.

The pictures that now emerge from Bucha following its occupation by Russian forces are horrifying impressions from a city filled with destruction and civilian death. They record and bear witness to the massacre perpetrated on the city's inhabitants. In the face of such mind-numbing cruelty, anyone would be forgiven for falling into despair.

However, the many messages I receive from members, friends or business contacts in Ukraine do not betray hopelessness or defeat but an impressive display of resolve. While their stories are recording the atrocity of war, they are also – and maybe predominantly – a powerful testament to courage, to love of place, to a need for belonging. They do not give up but continue to resist, to push and fight back courageously.

Acts of kindness

When bad things happen far away, it is all too common to distance ourselves from them. Not this time, though! We have issues to address, a war and pandemic to navigate, people to take care of, but we are doing it together. I am inspired by acts of everyday kindness, people of all walks of life stand together, united in their condemnation of the war, volunteering in their communities to help those in need.

Many of you have opened your homes to refugees from Ukraine and their families, providing food, transportation, toys, comfort and still reaching out regularly to ask what more you can do. Others are coordinating the provision of financial and other critical support, such as housing and work permits for evacuees, helping Ukrainian contacts and their families understand the requirements to get to bordering countries safely.

Members and/or their firms have donated generously to the UN Refugee Agency (UNHCR), the International Committee of the Red Cross (ICRC) or set up their own foundations to support humanitarian needs related to Ukraine. There are too many acts of selflessness and heroism to name them all here; we truly shine our brightest when we take care of each other!

Right from the outset, INSOL Europe has been very vocal in its condemnation in the strongest possible terms of Russia's unprecedented military aggression against the State and people of Ukraine. We have called on Russia's president to immediately cease the hostilities, withdraw Russia's armed forces from Ukraine and fully respect its territorial integrity, sovereignty and independence. We have also expressed our unconditional support to the brave people of Ukraine, especially those who are in the invaded zones in which the Russian military aggression is currently taking place.

Coordinated support

However, while this is undoubtedly the right thing to do, it does not feel good enough. Further to the many selfless acts of individual members, which are deserving of the highest praise, the Executive is therefore looking into how we may provide coordinated support and much needed help at the level of INSOL Europe, too.

We are currently exploring different suggestions and options as to whether we can set up our own foundation or, alternatively, partner up with an existing one in response to the humanitarian crisis that is unfolding before our eyes. We are still in the early stages of our investigation and it may take a while yet before we are in a position to report real progress, let alone implement our ideas but I wanted to share this information with you regardless and irrespective of the pressure of expectation it may create.

So, watch this space for further news on this topic!

Global economy

Turning then to how the Russian invasion is likely to impact the world economy, the entire global economy will feel the effects the sanctions and the return of what is best described as the return of the Cold War. Impacts will flow through three main channels, namely: (i) higher prices for commodities like food and energy will push up inflation further, in turn eroding the value of incomes and weighing on demand; (ii) neighbouring economies in particular will grapple with disrupted trade, supply chains, and remittances as well as an historic surge in refugee flows; and (iii) reduced business confidence and higher investor uncertainty will weigh on asset prices, tightening financial conditions and potentially spurring capital outflows from emerging markets.

Russia and Ukraine are major commodities producers, and disruptions have caused global energy prices to soar, especially for oil and natural gas, the former recording the highest price per barrel in ten years. The estrangement of Russia from the global energy markets has all but turbo-charged that process, with natural gas flows to Europe under threat. Food costs have jumped, too. Wheat, for which Ukraine and Russia make up 30% of global exports, has recently reached a record.

The outlook for the world's economy is rapidly worsening. The forecasted average rate of growth of the world economy is now expected to be 2.6% this year after two years of crisis with COVID-19, dramatically down from 5.5% last year and again down from the projections that were made in the last quarter of 2021.

Dealing with the consequences

Helping our corporate clients adjust to this new reality will be a huge challenge. As restructuring professionals, we will be called upon to deal with the consequences of the current crisis. Those consequences are and will be draconian. They will cross borders. I believe that the way we as restructuring professionals react to this latest crisis, how we aid our clients in dealing with the plethora of issues they are faced with in these uncertain times, will have a profound effect not only on individual businesses and their respective workforces, but on the economy at large.

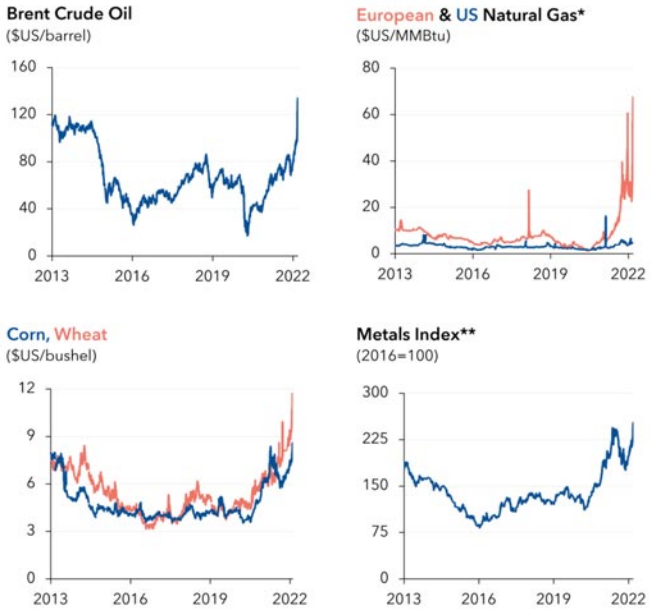
Fortunately, efficient debt and other restructuring tools are at our disposal, as was very apparent again from the panel presentations and discussions during our Annual Congress in Dublin. With all the above going on, it is almost ridiculous to reflect on it here, but continue we must, no matter the heartbreak!

Over 29 months, roughly 885 days – that is how long we have been in hibernation. It felt incredibly good to meet again in person following the COVID-imposed shelving of our live events. To catch up with good friends, sorely missed during the dark days of the pandemic, to shake hands, COVID be damned! – was simply fabulous. We reignited and reunited showing the best of who we are and all we can be. A thousand thanks again to all who participated in this defining event!

There is, of course, no resting on our laurels. On the contrary, the plans for our upcoming Annual Congress in Dubrovnik are far advanced. The Technical Committee has been working tirelessly and delivered a programme that is simply astounding. I know you will not be disappointed when we meet again in Dubrovnik in October of this year. Until then, stay safe, be well. And be prepared for handshakes (maybe even a hug) from old friends. ■

Growing pressures

Prices for energy, grains, and metals soared since the invasion of Ukraine, signaling that inflation rates are poised to accelerate.



Source: Bloomberg, USDA, Datastream, and IMF staff calculations.
Note: *European & US natural gas prices use the Dutch TTF and Henry Hub as proxies, respectively. **Base Metals Price Index includes aluminum, cobalt, copper, iron ore, lead, molybdenum, nickel, tin, uranium, and zinc.

IMF

> *As restructuring professionals, we will be called upon to deal with the consequences of the current crisis*

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*

Decision phase for the new EU Initiative: Format, content and progress

The INSOL Europe EU Study Group chaired by Barry Cahir (Beauchamps, Ireland) summarise the latest findings of the European Commission Experts' Group

The final scheduled meeting of the EC Experts' Group on Restructuring and Insolvency took place online on 28 January 2022. In the lead up to the last two meetings that preceded this event, taking place towards the end of 2021, two key documents were released giving an insight into a possible format for a draft text and some indication as to its content and likely progress.

The first was the Commission Work Programme 2022,[1] adopted on 19 October 2021, which contained over 40 policy initiatives for 2022, focusing on green, digital and post-pandemic resilience issues. It also mentioned the need for fully developed European capital markets to aid recovery from the pandemic, thus requiring massive investment beyond that deliverable by public money and traditional bank lending. In that light, action in respect of insolvency is seen as a priority in order to enhance convergence, remove discrepancies, increase efficiency and facilitate cross-border investment. As such, the deepening of the Capital Markets Union (CMU) will feature a harmonisation initiative for 2022 Q3, slightly later than originally anticipated in Q2, the reason being to avoid a legislative logjam and create more of an opportunity to further finetune the proposals.

The second document was a new Communication on the second CMU Action Plan, first announced on 24 September 2020, on 25 November 2021.[2] The action plan builds on the ambition to integrate national markets into a real and effective single market to facilitate cross-border investment. Action 11 in the document sets out the insolvency initiative as one of its key features, the reasoning being to help make the outcome of cross-border investment more predictable. In providing an update on progress on the Action Plan, the Communication refers to various legislative texts to be formulated for delivery soon as part of the proposed initiative.

Neither document refers expressly to a precise form for the insolvency initiative, which has been the subject of some debate throughout the deliberations of the Experts' Group. Given the wide-ranging nature of the topics discussed, ranging from substantive to procedural law as well as capacity building issues, various vehicles, ranging from a Recommendation form to a formal Directive text, have already been suggested. In some cases, preferences have been expressed for a particular text form as being more appropriate for certain proposals. The option has also been canvassed for the separation of topics into different texts, if more than one is proposed.

At the 28 January 2022, a number of topics were on the agenda in the shape of sufficiently advanced recommendations and model frameworks for possible harmonisation. In the way the agenda was presented, it seems as if the discussion points anticipate a possible shortlist for the contents of a draft text or texts. The Commission has indicated that it will now prepare a first draft by March for consideration in the first stage of the decision-making process, after which a final version of the text will be agreed before it then embarks on the legislative process. To comfort its eventual decisions, two qualitative surveys have been commissioned that are currently in progress. These have also addressed many of the same issues that appeared on the final agenda.

It will not be an easy ride. Throughout, the Experts' Group has been conscious of the likely objections, whether to convergence or harmonisation or indeed in relation to each of the topics under discussion. If the text progresses, it will owe much to the calibre of the contributions to the discussions, drafting and deliberations. Many of these came from INSOL Europe members with undoubted expertise and experience derived from practice and academia. Nonetheless, this initiative to harmonise insolvency law is ambitious, albeit much goodwill and good faith may prove necessary to see it through to a successful conclusion. ■

Footnotes:

1 See: <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_5246>.

2 See: <https://ec.europa.eu/commission/presscorner/detail/en/ip_21_6251>.

Keeping ahead of the fraudsters

Paul Newson, CEO of INSOL Europe, reports from the Joint Fraud Conference held on 30 March 2022 at The Royal College of Physicians, London

After a long break from live events it was a great pleasure to host the joint fraud conference at the Royal College of Physicians in London for what turned out to be a triumphant event, attended by over 150 delegates with a professional interest in counter-fraud measures, particularly relating to prevention.

Led by the Fraud Advisory Panel along with INSOL Europe and R3, the team have been planning this event since the successful debut in 2021, held on-line because of the COVID-19 restrictions in place at the time. This year, whilst a virtual option was offered for those that could not attend in person, the vast majority of delegates chose to join their colleagues for a whole day of highly interesting presentations, not to mention the many networking opportunities throughout the day.

Under the title '**Keeping one step ahead**' the conference brought together world-class speakers including regulators, insolvency experts, counter fraud specialists and renowned academics, who delivered unique insights into hot topics related to tackling global economic crime including company fraud, corporate culture and behaviour, understanding deception, chasing assets, and how to put victims first and make fraudsters pay.

Putting victims first

After a welcome and introduction for **Sir David Green CB QC**, Chair of the Fraud Advisory Panel, **Dame Vera Baird DBE QC**, Victims' Commissioner for England and Wales, presented her findings on the types of fraud which were most common, and who they were mostly targeted at. Contrary to the commonly held belief that the elderly (over 80) were the biggest target group, the statistics showed that the largest group of victims was the middle-aged sector, who were most likely to be the victim of credit account fraud. One of the reasons for this was the amount of data that this sector regularly generated and gave away inadvertently through their laptops, smart phones and other devices.

Harnessing technology to fight fraud

Picking up on the facts presented in the first session, **Hemen Shah** & **Spencer John**, Associate Partners, Forensic Data Analytics, Financial Crime & Forensics at Ernst & Young (main sponsors of the event) presented a fascinating talk on the data science behind fraud protection, detection and response. A chilling fact was that the speakers' exact opposites in the hacking world were doing the same thing, but with the intention of advising fraudsters how to use the mass of data available to create fraudulent campaigns. Simple measures such as using a Faraday sleeve for your mobile phone (to cut out unwanted data emissions), RFID wallets to prevent your banks cards being read unwillingly and shredding all personal data, whether at home or at the office, were advocated as the first major steps to preventing this kind of fraud.

Breakout sessions

Rounding up the mornings sessions, four breakouts were offered, featuring the topics: '*Distorted reality: The (ab)use of language by fraudsters*' (chaired by **Alan Bryce**, Campaign Manager, Fraud Advisory Panel with **Dr Elisabeth Carter**, Criminologist & Forensic Linguist, Kingston University), '*Protecting the rights of the accused*' (chaired by **Bart Heynickx**, Counsel, ALTIUS with **Barry Stancombe**, Barrister, 33 Chancery Lane and **Willem van Nielen**, Founder, Recoup advocaten), '*Chasing Ghosts: Taking pre-emptive action to prevent company fraud*' (chaired by **Frances Coulson**, Partner, Wedlake Bell LLP with **Dr Alan Kabki**, Senior Researcher & Lecturer, Safety & Security Studies, Saxion University of Applied Sciences and **Daniel Lewis**, Barrister, Wilberforce Chambers), and '*Chasing assets: recovering funds in crypto frauds*' (chaired by **Carmel King**, Director, Grant Thornton UK LLP with **Dani Haston**, Head of Global Asset Management, Chainalysis and **Michael Gubbins**, Chief Bureau Officer, Criminal Assets Bureau). Michael Gubbins was unable to attend on the day but joined the panel live on-screen from his office in Ireland.

Businesses behaving badly

After the lunch and networking session in the exhibitor room, **Dame Margaret Hodge MP**, Chair, APPG on Anti-Corruption and Responsible Tax spoke on her work to encourage big businesses to make sure they are doing their part to prevent fraud and pay their fair share of tax – and not to hide behind such terms as 'avoidance' rather than 'evasion', making the point that both can be considered 'unlawful' and therefore 'illegal'.

The UK Post Office scandal

The main panel of the afternoon featured an engrossing presentation on the lessons to be learnt from the long-running case, in which 555 sub-post-masters (the managers of the Post Office branches) were accused of defrauding the Post Office by amounts ranging from a few hundred pounds to over £50k or more, often with terrible personal consequences to the victims. A flaw in the computer systems they were all obliged to use let them to be falsely accused of theft, false accounting and fraud. The chair of the session, **The Right Honourable Sir Anthony Hooper**, Associate Member, Matrix Chambers, led the audience with the panel (**James Hartley**, National Head of Dispute Resolution, Freeths LLP solicitors, **Kay Linnell**, Partner, Kay Linnell & Co Chartered Accountants and **Ron Warmington**, Director, Second Sight Investigations Ltd) who had all worked on the case, through the background, evidence and eventual outcome of the case. Funded by venture capitalists, the case was eventually won in a 'David versus Goliath' style, though so far the government has not actually made any payments to the victims.

Final farewell

To cap off the day, a drinks reception was held straight after the last technical session where delegates could reflect on what they had learnt from the expert presentations and reinforce their new connections made throughout the day.

With thanks to the main conference sponsor: EY, technical session breakout sponsors: Grant Thornton, Wedlake Bell, XXIV Chambers and South Square, and exhibitor partners: Howden and Pantera Property.

YANIL Workshop, Dublin 2022

Jennifer L. L. Gant (Lecturer, University of Derby) reports on the workshop for the Younger Academics' Network in Insolvency Law held before the start of our Academic Conference in Dublin

Two long years after our inaugural workshop in Copenhagen, YANIL was finally able to draw together younger insolvency academics from all over Europe for a fruitful and fascinating research event in Dublin, just prior to the INSOL Europe Academic Forum.

Although we sadly missed one presenter, who could not attend due to the conflict in Ukraine, nine other presenters attended to present research ranging from PhD work, post-doc interests to a range of other projects. Also in attendance were several more senior academics who kindly gave their time to provide feedback and encouragement to the next generation of insolvency academics.

The first panel on preventive restructuring frameworks and new procedures included presentations on the criteria for classifying claims within the cross-class cram-down and the impact of legal rights and economic interests; the Polish simplified restructuring directive; and the novel 'negotiated workout' in Italy. Presentations on the second panel covered the approach of the EMA on delayed disclosure of inside information during financial distress; defending the public interest in corporate insolvency; and arbitration and transaction avoidance claims in cross-border insolvency cases, all of which fell under the umbrella of balancing insolvency and outside interests.

Finally, a panel on special interest insolvencies covered employee participation in restructuring proceedings by means of workers buy-outs; a new approach to commercial farmers' insolvency; and the Italian experience of restructuring companies during the COVID 19 pandemic.

The presentations were highly professional and well delivered with the content innovative and cutting edge. These younger academics truly represent the trajectory of insolvency scholarship for the future, which should give all of us in insolvency academia great hope for that future. The next YANIL Workshop will take place prior to the INSOL Europe Academic Forum taking place in Dubrovnik in October, so please watch out for a call for submissions in the near future!

New projects on the horizon at UNCITRAL

Report by Jennifer L.L. Gant in her role as INSOL Europe Working Group V Observer

In the week of 13 December 2021, UNCITRAL's Working Group V on Insolvency Law met via UNCITRAL's Interprefy platform, given the continued threat and restrictions of the COVID 19 pandemic (no schnitzel or strudel for the virtual attendees once again!).

Quite quickly, the opening day of the session saw the ground-breaking and timely *UNCITRAL Legislative Recommendations on Insolvency of Micro- and Small Enterprises* finalised. This is a particularly important development in the current economic climate when MSMEs are facing financial difficulties worldwide.

On the second day, a potential practice or legislative guide on asset-tracing and recovery in insolvency proceedings was discussed. This project is particularly important, as an effective system of asset-tracing and recovery in insolvency would help to maximise the value of an insolvent estate, while emphasising the protection of creditors. Although there are a number of challenges that will need to be overcome, such as how to deal with the era of digital trading, the project was viewed, if nothing else, as an educational and information sharing opportunity for which a toolbox could be developed that could aid jurisdictions currently without strong mechanisms in this area.

The third topic discussed in the week pertained to applicable law in insolvency proceedings. It was noted that this topic was obviously important, but also quite complex. A particular observation was that harmonising applicable law in insolvency proceedings and reinforcing the application of the lex fori concursus would enhance legal certainty and predictability, prevent abusive forum shopping and reduce complexities and costs of insolvency proceedings. This idea is, of course, not unfamiliar to those well-versed in European cross-border insolvency discourse and it is perhaps not surprising that the European Insolvency Regulation (Recast) was brought up on a number of occasions as an exemplar of how this has been accomplished elsewhere, though the appropriateness of any significant borrowing was also met with some caution and even trepidation.

The 59th Meeting of the UNCITRAL Working Group V was productive, if disappointing only due to its virtual nature. The next session should be interesting with many difficult cross-border matters to discuss. There are also a new set of recommendations for MSMEs to look forward to, which will be timely for small businesses struggling under the economic impact of the COVID19 pandemic.

Judicial Cooperation in an Integrated Europe

Irene Lynch Fannon (UCC) and Jennifer L L Gant (Derby) report on the conclusion of the JCOERE Project

In 2018, Professor Irene Lynch Fannon of the School of Law at University College Cork (UCC) in Ireland made an application to the European Commission DG Justice for funding on the EU's Justice Programme (2014-2020).

Substantial funding was awarded to conduct a project on Judicial Cooperation in the EU Supporting Economic Recovery in Europe (JCOERE – Project no 800807). Partnered with the Università degli Studi di Firenze in Italy, the Universitea Titu Maiorescu in Romania and INSOL Europe, the project was led by a small but extremely motivated and innovative team at UCC, which completed five work packages, producing 2 substantial reports for the EU Commission and conducting numerous dissemination events and activities.

The project utilised both doctrinal and empirical methods to determine substantive differences between the approaches in European jurisdictions to restructuring, preventive or otherwise and in light of the Preventive Restructuring Directive, as well as the procedural, legal, and cultural differences that could present obstacles to cooperation by stymying the facilitation of mutual trust between courts and judges.

Despite the impact of COVID 19 and the inability to travel to work together in person, the team at UCC and abroad completed its deliverables by the end of 2021 to a very high standard and much acclaim during various dissemination events toward the end of the project. Although the findings in relation to the judicial cooperation aspect were more or less that it rarely happens in practice, the project uncovered a number of factors that impact on the EU integration project more broadly, which are useful perspectives for both policy and legislative efforts for the future.

Following the completion of the project, the team at UCC resolved to write a monograph that would provide a narrative of the project, its context and findings. In addition to the project aims, the monograph examines an issue that became clear to the team during the project research: the EU integration project and what the harmonisation approach in the Directive and the reticence toward cooperation say about its relative progress and even preference.

The monograph is written with the issue of European integration in mind, with content and analysis additional to the two JCOERE reports, which should be of great interest to academics, practitioner and policy makers alike. Publication by Elgar of *Corporate Recovery in an Integrated Europe* is expected in mid-2022.

INSOL Europe Statement on Russia's invasion of Ukraine

In the early morning of 24 February 2022, Russia's president Vladimir Putin declared war on Ukraine. Russian armed forces were deployed into Ukraine to seize control of the territory of a sovereign democratic State and remove its democratically elected leaders.

We condemn in the strongest possible terms this unprecedented military aggression against the State and people of Ukraine. This unprovoked attack and deployment of Russia's armed forces into Ukraine's territory is a crime under international law. There is no excuse or justification for this criminal action.

We call on Russia's president to immediately cease the hostilities, withdraw Russia's armed forces from Ukraine and fully respect Ukraine's territorial integrity, sovereignty and independence.

We wish to express, in these terrible moments, our unconditional support to all our Ukrainian members, their families and their friends, praying with all our might that the barbarism and disaster that an armed conflict always generates cease immediately, thus avoiding more bloodshed and suffering. We extend our prayers and support to the brave people of Ukraine, especially those who are in the invaded zones in which the Russian military aggression is currently taking place.

INSOL Europe stands firmly by Ukraine and its people as they face this unparalleled crisis.

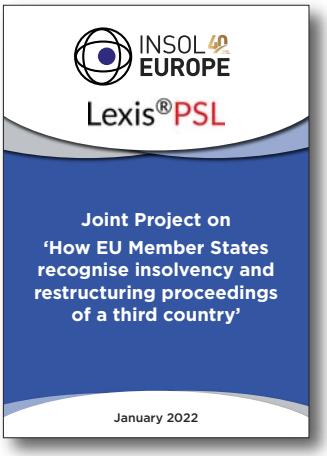
New publications from INSOL Europe

The Executive of INSOL Europe is delighted to announce two new collaborative publications

Joint Project between LexisPSL and INSOL Europe on the Recognition of Foreign Decisions in Different EU Countries

Apart from the European Insolvency Regulation applicable only between EU Member States, a few international instruments deal with the recognition issue relating to insolvency (and insolvency-related) judgments. Those international instruments, namely the UNCITRAL Model Laws 1997 and 2018 (for those Member States which have enacted them), the Hague Convention or EU Rome I Regulation, may also be complemented by other specific private international rules. For third countries and the UK (as a consequence of Brexit), a great uncertainty remains therefore in terms of providing the necessary authority for the recognition of such judgments. In that light, the Joint Project between LexisPSL and INSOL Europe on the recognition of foreign decisions in the 27 EU countries has been designed to address those situations and provide readers with a description of each national recognition process applicable to those judgments.

As added value, the proposal has been made by LexisPSL (UK) to make the exercise more concrete than simply being a mere description of national provisions within the scope of this project. That is why the project contains the national provisions which would apply with regard to the recognition of proceedings commenced in the UK in respect of an



English Part 26 scheme of arrangement or Part 26A restructuring plan. Alternatively, the reasons why recognition would be excluded will be adverted to. Indeed, this project includes restructuring proceedings and/or judgments commencing insolvency proceedings, even though international texts may exclude them from their scope of application.

This document was prepared by a team drawn from INSOL Europe Country coordinators with the assistance of INSOL Europe members or other local experts (where necessary) to complete this valuable research project. Readers will not only find individuals answers by the contributors from the 27 EU countries, but also a table summarising their findings, which is reproduced in Appendix I of the publication. We hope that the publication will achieve its aim, namely to ensure that proper consideration should be given to providing information for all professionals interested in questions arising under the Private International Law of Insolvency.

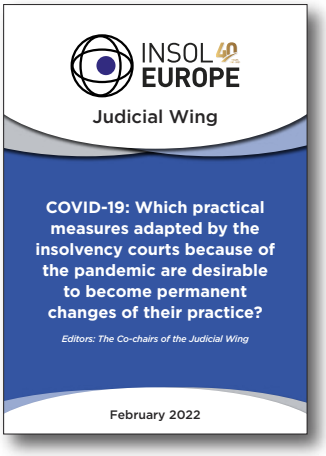
COVID-19: Which practical measures adapted by the insolvency courts because of the pandemic are desirable to become permanent changes of their practice?

The Co-chairs of the Judicial Wing, Nicoleta Mirela Nastasie, Michael Quinn and Eberhard Nietzer have launched the sixth volume in the series of publications by INSOL Europe's Judicial Wing.

The articles in this volume describe how and to what extent the use of technology could help judges in different European countries to cope with the adverse impact of COVID-19 on their procedural work.

Authored by members of the Judicial Wing, the information in the text shows a broad range of different approaches to deal with conditions under the pandemic: from not having specific legislation and measures at all to quite liberal legislation permitting remote hearings and extensive use of audio-visual technology by some courts.

The articles also show that the approaches taken in dealing with the pandemic largely depend on available financial resources and on legal traditions. Therefore, a comparison of those approaches does not necessarily help in finding the best solution for a particular jurisdiction. However, the articles can help the reader to cherry-pick ideas from the individual measures described in the articles and to assemble them in a manner befitting the



situation in the reader's home jurisdiction.

We encourage you to read all articles in order to benefit from the entirety of the useful information to be found there. Even though the use of audio-visual technology in civil and insolvency proceedings has not increased by the degree that might have been expected, the tenor of the articles is in favour of making remote hearings possible on a permanent basis. This tenor makes us confident that the number of technology-prone judges will grow steadily and result in an increased and diligent use of the available technical equipment in civil and insolvency proceedings.

We thank all the members of the Judicial Wing who have contributed articles to this collection for their great efforts in bringing this project to fruition. Our thanks are also extended to Michael Quinn's former judicial assistant Lorna Reid for her support in all administrative matters and to INSOL Europe for its technical assistance.

If you would like a copy of either publication, please email paulnewson@insol-europe.org

Richard Turton Award 2021 & 2022

News of the 2021 competition awarded in Dublin, and the 2022 competition to be awarded in Dubrovnik

Richard Turton had a unique role in the formation and management of INSOL Europe, INSOL International, the Insolvency Practitioners Association and R3, the Association of Business Recovery Professionals in the UK. In recognition of his achievements these four organisations jointly created an award in memory of Richard.

The Richard Turton Award provides an educational opportunity for a qualifying participant to attend the INSOL Europe Congress with all expenses paid.

The Award Panel is pleased to announce that the 2021 winner is Abbas Abbasov from Azerbaijan. Abbas is currently a PhD student at the Martin-Luther-Universität Halle-Wittenberg, in Germany, researching cross-border insolvency and restructuring law. He will be writing a *paper on "Protection of dissenting creditors' interests: Direct application of the "substantive fairness" test while considering the recognition of foreign restructuring plans"*, which will be published in summary in Eurofenix and in full on our website. As part of the award, Mr Abbasov attended our Congress in Dublin in March 2022 where he received his award from INSOL Europe President Frank Tschentscher.

Abbas Abbasov (centre) receiving his award in Dublin from INSOL Europe President Frank Tschentscher

Details of the 2022 award are shown below and will be published on our website at: *www.insol-europe.org/richard-turton-award*

THE RICHARD TURTON AWARD

The Richard Turton Award is an annual award funded by INSOL Europe, INSOL International, the Insolvency Practitioners Association and R3, the Association of Business Recovery Professionals, jointly created in recognition of Richard Turton's unique role in the formation of all four organisations.

This award will be given to the best paper proposal and will be presented at the INSOL Europe Congress in Dubrovnik, Croatia, 6-9 October 2022.

We invite applications from any person who:

- is a national of a developing or emerging market country;
- works in or studies in the field of insolvency and restructuring law and practice*;
- is under 35 years of age.

Applications are in the form of a 200-word personal statement and brief synopsis of the proposed paper, along with the applicant's CV.

For more information and to apply:
www.insol.org/Focus-Groups/Academic-Group/Richard-Turton-Award

Application deadline: **30 June 2022**

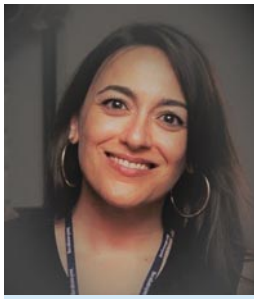
*Students satisfying the nationality requirement, but studying in another country, are also eligible to apply.

INSOL INTERNATIONAL · INSOL EUROPE · Insolvency Practitioners Association · Association of Business Recovery Professionals R3 Rescue Recovery Renewal

A closer look at:

Implications of the Russian invasion of Ukraine on global supply chains

Emmanuelle Inacio takes a closer look at the Dun & Bradstreet special report



EMMANUELLE INACIO
INSOL Europe
Chief Technical Officer

> ***Russia and Ukraine are among the largest commodity-exporting nations in the world, controlling crucial natural gas, oil, metals, and agri-commodities on a global scale***

The Russian invasion of Ukraine is a significant humanitarian crisis that has far-reaching global implications and supply chain disruptions, as reported in the Dun & Bradstreet special report of March 2022 on the implications for the global economy and businesses of the Russia-Ukraine crisis.[1]

Businesses around the globe continue to be confronted with inflation caused by the pandemic as well as commodity price increases provoked by disruptions to the supply chain. The Russian invasion in Ukraine is testing again the supply chain.

The Dun & Bradstreet special report states that the new consequences arising from the Russia-Ukraine crisis could leave the world facing extended reductions to energy supply, severe sanctions that will likely impact food security, as well as rare metal supplies needed to sustain production of key technologies.

Indeed, Russia and Ukraine are among the largest commodity-exporting nations in the world, controlling crucial natural gas, oil, metals, and agri-commodities on a global scale, and also serve as vital lifelines for the European economy. All of this, coupled with a significant humanitarian crisis makes the unrest even more complicated.

Commodity dependence

The Dun & Bradstreet special report explores the commodity dependence of European nations on Russia and Ukraine, and the effects of supply chain disruption. The special report also explores potential scenarios such as the impact beyond the Ukrainian border to other parts of the world, the severity of sanctions on Russia, and the likely counter-sanctions by Russia.

Around 374,000 businesses worldwide rely on Russian suppliers and 241,000 businesses rely on Ukrainian suppliers, according to the Dun & Bradstreet special report.

In particular, the Dun & Bradstreet special report shows that European gas storage levels are critically low at 33% of capacity. And because of current EU sanctions on Russia, Germany has placed a hold on the Nord Stream 2 gas pipeline impacting 30 billion metric cubes of gas that were expected to enter the continent in 2022. Dun & Bradstreet data indicates that these issues, along with other

geopolitical tensions and supply shortages will underpin high gas prices in the short-term. This is just one sector that will feel the strain of sanctions on global supply chains. This crisis has the potential to widely exacerbate Europe's energy crisis.

Ripple effects

The full business impact of the Russia-Ukraine crisis will continue to unfold in the coming days.

Indeed, there are 14,745 Tier 1, and 7.6 million Tier 2 supplier relationships with Russian entities globally. 25 countries have a high dependency on Russia and Ukraine for a variety of commodities. Seven major Russian financial institutions and 13 Russian firms have been impacted by sanctions. As a result, the total corporate family members of these businesses include more than 16,748 entities spread across at least 21 countries.

The ripple effect of US, UK, and EU sanctions on Russian companies further cripples an already weakened global supply chain.

A likely disruption of trade routes, rising freight costs, inaccessibility of critical raw materials, and wide disruption to businesses threaten to derail global economies while adding to inflationary pressures. In addition, potential rate hikes may further exacerbate rising manufacturing and production costs – leading to higher price tags for end-user goods and services.

Financial sanctions are impacting thousands of entities — shedding light on the need to understand Beneficial Ownership and Corporate Family Tree data.

With the sanctions and diminished access to commodities at hand and supply chain disruption to consider, the Dun & Bradstreet special report states that business leaders would do well to pursue a better understanding — leading to better management — of their supply chains.

In the near-term, companies can rely on their alternative suppliers to fill resource gaps in their supply chain.

Additionally, the Dun & Bradstreet special report identifies best practices for business leaders to create an agile supply chain to help weather current and future disruptions:

- Develop a risk-based assessment process to identify specific risks that could impact the productivity of the supply chain.
- Conduct an assessment that maps out all suppliers.
- Continuously monitor the supply chain.
- Identify alternative suppliers for urgently needed goods in higher-risk regions.
- Invest in data and analytics.

The conflict in Ukraine reinforces indeed the need to have in place more resilient supply chains. ■

Footnote:

1 https://www.dnb.com/da-dk/bliv-klog-paa-data/nyheder/global-business-impacts-russia-ukraine-crisis/

The conflict in Ukraine reinforces indeed the need to have in place more resilient supply chains

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*
Laurent Le Pajolec *lpa@exco.pl*

Cryptocurrency Exchange Developments

This month we look at two cases regarding cryptocurrency exchange developments – The Thodex case in Turkey, plus BitMarket and Coinroom in Poland

BURAK BAYDAR
Partner, Moroglu Arseven, Turkey

CEYLAN NECIPOGLU
Senior Associate, Moroglu Arseven, Turkey

Turkey: Thodex

On 18 April 2021, the Cryptocurrency exchange platform Thodex went offline, shaking Turkey with its first large-scale cryptocurrency fraudulent case and causing the loss of around USD 2 billion worth of crypto-coin belonging to cryptocurrency investors.

Cryptocurrencies are still unregulated in Turkey. Consequently, cryptocurrency exchange platforms are not subject to any incorporation conditions, such as financial strength and minimum capital requirements, and they are not subject to any supervision by regulatory authorities, such as the Banking Regulation and Supervision Agency or the Capital Markets Authority. Their activities are also unregulated and no state warranty applies to cryptocurrency investors.

The cryptocurrency exchange platforms can be considered as intermediary platforms that facilitate the trading of cryptocurrencies and gain commission from each transaction under Law No. 6563 on Regulation of Electronic Commerce. Although intermediary service providers have several information duties arising from this Law, they are also unregulated and not subject to the supervision of regulatory authorities, such as the BRSA and the CMA.

In the Thodex case, no peer-to-peer transfer was being made on the platform, but all the coins or their value were kept solely by the platform, which made it possible for the CEO to control and transfer all the coins and the fiat money. The Prosecution Office is running the investigation on the ground of aggravated fraud and establishing a criminal organization. As per Article 157 of the Turkish Criminal Code (TCC), fraud is defined as deceiving another with fraudulent behaviour and securing gain. As per Article 158 of the TCC, fraud by "using electronic data processing systems, a bank or lending institution as an instrument" is considered aggravated fraud requiring aggravated sanction. Establishing a criminal organization is also criminalized under Article 220 of the TCC.

As Thodex managers collected money and crypto coins by fraudulent acts from cryptocurrency investors using an electronic system and gained benefit from these fraudulent acts, aggravated fraud can be assessed in this case. Also, as an organization consisting of at least three people was established to commit a crime, establishing a criminal organization is present in the case. The CEO, managers, and employees acting with intent to commit the crime of aggravated fraud, establishing a criminal organization, and gaining a benefit from the crime can be prosecuted and are liable for the crime.

After the Thodex scandal, some amendments were made to the relevant legislation on 1 May 2021, according to which crypto-asset service providers are included within the scope of the anti-money laundering obligations. In this regard, all crypto exchange platforms are also obliged to comply with know-your-customer and notification obligations in which Turkish customers are included or transacted with. A separate guide is expected to be published by the Financial Crimes Investigation Board (MASAK) on how to implement this obligation for companies that are not based in Turkey.

MASAK has a long arm which would have extraterritorial reach. Nevertheless, the rules and regulations in respect of the powers of MASAK and consequences of any violation of the provisions of law vis-à-vis its powers, as well as the laws in relation to the laundering of proceeds of crime, are all regulated under criminal

laws. The territorial scope of the TCC is determined in such a way that it applies to any crimes which are partly or fully committed in Turkey. Accordingly, so long as any results of a crime occur in Turkey, it would be considered that the crime is committed in Turkey, which would lead to the jurisdiction of Turkish public prosecutors and judiciary. It would indeed be arguable whether or not MASAK would be able to enforce its powers outside Turkey. Let alone, if the requirements under the respective regulations are violated, criminal sanctions would be triggered and MASAK and Turkish prosecutors would have the authority and jurisdiction in Turkey. Besides, even if MASAK or the Turkish prosecutors have no extraterritorial reach, the authority they hold may suffice to halt the operations of any non-complying crypto asset trader by way of eliminating internet access to the relevant platform and even blocking the transfer of funds by Turkish banks to its accounts.

At this stage, there is no indication or precedent as to how MASAK will approach these new powers, specifically as concerns crypto asset traders located abroad, which makes our assessments very conservative.

Poland: BitMarket and Coinroom

The Polish Act on Counteracting Money Laundering and Terrorist Financing, which recently entered into force,[1] defines virtual currency as a digital representation of value which (i) is convertible in economic transactions into legal tender and accepted as a medium of exchange; (ii) may be stored or transferred by electronic means or the subject of electronic trading; and (iii) is not:

1) legal tender issued by the National Bank of Poland, foreign central banks, or other public authorities;
2) an international unit of account established by an international organisation and accepted by individual countries belonging to, or cooperating with, that organisation;
3) electronic money;
4) a financial instrument; or
5) a bill of exchange or cheque.

Regarding the insolvency law aspects of cryptocurrencies, it is important to recall the increasing number of cryptocurrency exchanges which have gone bankrupt. Such entities may go bankrupt for a number of reasons, including the loss of funds or liquidity, hacking, their owners engaging in "exit scams", poor regulation or lax governance and management. The number of reasons is as numerous as the ever-growing number of cryptocurrency exchanges which collapse. Focusing on the Polish market, there have been two major exchange collapses: BitMarket and Coinroom.

BitMarket, one of the oldest Polish cryptocurrency exchanges and established in 2014, unexpectedly ceased all activities on 8 July 2019.

More than two thousand investors lost the immense funds deposited on the exchange and it remains uncertain whether any of them will be compensated at all. Although the public prosecutor's investigation into this case is still ongoing, one of BitMarket's co-owners has been charged with acting to the detriment of clients in the amount of at least BTC 23,000 (or approx. PLN 100 million), for which he faces up to 10 years' imprisonment. According to Polish cryptocurrency expert Professor Krzysztof Piech: "*A principle which the whole cryptocurrency community has promoted for years comes to mind: do not keep your money on exchanges, but only enough funds to make the current transaction. This is because they are the weakest link in the whole digital currency system.*"[2]

The other important example is the bankruptcy of Coinroom, which, on 2 April 2019, terminated the contracts of all users overnight, giving them **1 day** in which to withdraw their funds. Notwithstanding the short notice, many customers reported problems with recovering their deposited funds and it remains difficult to determine how many of them were successful in their withdrawals. Coinroom eventually informed its users that it had begun liquidating the company. On 5 August 2019, it filed a bankruptcy petition, which includes the option for the liquidation of its estate and covers all of its creditors, i.e., including those customers who have yet to receive their funds held on the exchange. For such customers (i.e., those who have yet to receive their funds), it is significant that the company's list of creditors includes all Coinroom users who are owed funds by the exchange. While this, of course, does not mean that all of the funds are guaranteed to be recovered, it is an important step in the process.

Unfortunately, many of the exchange's participants have still not been reimbursed their funds and are faced with the prospect of long civil and criminal proceedings that will likely drag on for many years.

In connection with the numerous collapses of cryptocurrency exchanges and a desire to protect small investors, on 12 January 2021, the Polish Financial Supervision Authority (the "KNF") issued a KNF Warning on the risks associated with the acquisition and trade of cryptocurrencies (including virtual currencies and cryptocurrencies). In its publication, the KNF notes that entities active in the cryptocurrency market or otherwise engaged in crypto-related activities, which are not subject to a legal duty to comply with certain regulatory requirements, often do not provide mechanisms to safeguard investors' interests.[3]

It should be emphasised that one should not be afraid of investing in the cryptocurrency market, but rather that one should be extremely cautious when making such investment, only depositing the funds necessary for a given transaction on one's wallet, since there are few mechanisms available in the Polish legal order, as it currently exists, which can protect against the loss of all or some of the secured funds. ■

Footnotes:

1 Act of 1 March 2018 on counteracting money laundering and terrorist financing, Journal of Laws of 2018, item 723, as amended.

2 See <https://biznes.radiozet.pl/News/BitMarket.-Upadla-polska-gielda-kryptowalut.-Klienci-mogli-stracic-60-mln-zl>

3 See <https://www.knf.gov.pl/knf/pl/komponenty/img/Ostrzezenie_UKNF_o_ryzykach_zwiazanych_z_nabywaniem_oraz_z_obrotem_kryptoaktywami_72241.pdf>

PIOTR GRABARCZYK
Counsel at WKB Lawyers (Poland)

MARCIN LORENC
Lawyer at WKB Lawyers (Poland)

> ***Cryptocurrency exchanges…may go bankrupt for a number of reasons, including the loss of funds or liquidity, hacking, their owners engaging in "exit scams", poor regulation or lax governance and management***

Back to the future 2: The Dublin experience

Paul Omar and Myriam Mailly report from our return to live events in Dublin for the Annual Congress which attracted over 360 delegates over the four-day event

PAUL OMAR
INSOL Europe Technical Research Coordinator

MYRIAM MAILLY
INSOL Europe Technical Officer

With introductions by facilitator David Rubin (Begbies Traynor UK) and opening notes of welcome from Frank Tschentscher (President, INSOL Europe; Deloitte DE), Marcel Groenewegen (Immediate Past President, INSOL Europe; CMS NL), Barry Cahir (Deputy President, INSOL Europe; Beauchamps IE) and Giorgio Corno (Co-Chair, Dublin Organising Committee; Studio Corno Avvocati IT), proceedings began with the introduction of Austin Hughes (Chief Economist, KBC Bank IE), the keynote speaker.

> *Profound and unpredictable substantive forces have led to the dramatically changing economic climate*

Keynote: How to make sense of change?

Profound and unpredictable substantive forces have led to the dramatically changing economic climate recently seen with great impact on the business health. How to make sense of the economic, health and political changes in the last few years? Perhaps there will be no more predictable economic cycles, although things are unlikely to be apocalyptic. Underlying economic structures are more robust than expected; impressive turnaround is starting to happen; quick adaptations and moves are being seen. The rebound seems uneven. In particular, consumer spending is down, though a return back to the 1970s boom-bust cycle is not envisaged. Significant drivers for the future? More insolvencies undoubtedly, as pandemic support is withdrawn. More creative destruction will also happen, with added pressures from climate change and political unpredictability.

Cross-border schemes and plans

Connecting to the Autumn discussion at "Back to the Future 1". Chris Laughton (Mercer & Hole UK) introduced the speakers: Michael Murphy (McCann Fitzgerald IE), offering an appreciation of Irish examinership; Kathy Stones (LexisNexis UK), talking of the recent introduction of UK Part 26A, Marcel Groenewegen (CMS NL), recounting the introduction of the WHOA, and Riz Janjuah (White & Case DE), explaining the impact of the StaruG. A comparable table was produced and populated with answers to key issues through a question and answer session involving the panel. An overall assessment suggests that there is strong Directive-alignment in EU states, the advantage being a strong recognition and enforcement

framework. The audience poll, having heard the hard sell, agreed on an order: 1. NL; 2. IE; 3. UK; and 4. DE, for desirability as restructuring jurisdictions.

Restructuring cases in the aviation space

Barry Cahir (Beauchamps IE) introduced the session, mentioning the UA-RU conflict impacting current changes. For Siobhán Connolly (GECAS IE), the pandemic has been the greatest challenge in recent times. There were more modest numbers of cases before then, but during the pandemic, most airline lessors maintained 3 portfolios: repossessions, restructurings, safe assets. At the outset, practice saw 90% short term deferrals with standardised documentation, but this soon moved to restructurings, including US Chapter 11 for many Latin American airlines. For Riz Mokal (3/4 South Square UK), though US Chapter 11 might be regionally specific, Covid-19 might also have been an excellent occasion for many airlines to restructure and US courts have been quite willing to take jurisdiction.

The EU Directive, Article 19

Michał Barłowski (Wardyński & Partners PL) introduced speakers Reinhout Vriesendorp (Leiden University NL); Irene Lynch Fannon (UCC IE) and Reinhard Dammann (Dammann Avocat FR) for a comparison of the Directive Article 19 structure on directors' liability in insolvency to domestic provisions. Though some countries have indicated that transposition is not necessary because of existing rules, the question is whether Article 19 will change behaviour in practice? In IE, there is a low rate of disqualifications generally, as clawback actions are more useful. In NL, there are suggestions that, where outcomes are not readily predictable, steps to avoid insolvency could include exploring restructuring. In this light, could Article 19 be translated into a positive obligation to explore, even undertake, restructuring? The view in IE is no, while, in PL, there is a risk that filings might just happen to get directors "off the hook".

Race to the EIR Annex A (featuring the Young Members' Group)

Catrien Roseman (NautaDutilh NL) introduced views from Georges-Louis Harang (Hoche Avocats FR); Yannis Sakkas (Bazinas Law Firm GR) and Elina Pesonen (Castren & Snellman Attorneys FI). Key issues broached included the link between the Directive and EIR, also key connections with Annex A listing: the need for a public, collective procedure, based on "insolvency" laws. Recent amendments have begun listing new processes. Are the Member States in fact "racing" to list? Are current Annex A restructuring processes potentially compatible with the Directive? Or *vice-versa*? This is being thrashed out in the transposition process, but a common feature among between Member States is the fact that IOH appointments are mostly made, though courts in FI have discretion. Overall, are the PRD/EIR Annex A proceedings (actual/anticipated) the best tools available? Panel views are mostly optimistic.

Consumer debt discharge

Stathis Potamitis (PotamitisVerkris GR) introduced panellists Gauthier Vandenbossche (Ghent University BE); Stephan Madaus (Halle University DE) and Alexander Rokas (Bank of Greece) responding to question of how the PRD exhortation for a discharge for consumers can be taken forward. In light of the changes intervening in national systems, can the distinction between entrepreneurs and consumers continue to be maintained in all systems and how generous should discharge be, particularly given the "Second Chance" approach across EU Member States? The view is that different risk-taking requires differentiation. Despite a willingness to promote second chance/discharge, moral hazard fears are still alive. As for harmonisation or the emergence of common standards, some panel members think it possible, while others see a role for the court to take into account any differences, e.g. good faith standards that might be different for businesses.

Real-estate industry

Picking up from the Autumn conference panel, Giorgio Corno (Studio Corno Avvocati IT) introduced a discussion on the renegotiation or disclaimers of leases with John Briggs (3/4 South Square UK); Kelley Smith (Law Library IE) and Michael Thierhoff (Andersen DE). Use of powers to disclaim "onerous property" is common in the UK and IE, though, in the latter, disclaimer is also possible though in examinership, not just in liquidation. Landlords in this

> ***Despite a willingness to promote second chance/discharge, moral hazard fears are still alive***

> *As economic growth has led to impact on the environment, new technology might lead to unanticipated impacts*

position will tend to want to negotiate if they face repudiation and reduced returns in procedures. Where no lease amendment is possible, this adds leverage to renegotiations, though often mitigated in practice by landlords taking bonds. What about EIR Article 11? Assuming a hypothetical case, there might need to be secondary proceedings, if a local rule requires intervention or where public policy does not allow parties to accept a change of position that is contrary to domestic practice.

More harmonisation of insolvency law at the EU level?

Robert Hänel (Anchor DE) introduced the topic inviting the taking of a "Big Picture" approach by focusing on the CMU Pillars, under which measures include improving both domestic and cross-border insolvency. In that light, Miha Žebre (DG Justice and Consumers) outlined the preliminaries to the legislative process, stating that the aim is for a draft to emerge by 2022 Q3. In his view, the two drivers for the initiative are the current inefficiency of proceedings and/or systems and the fragmentation of insolvency (stemming mainly from embeddedness of insolvency frameworks in national systems, which can be rigid and resistant to change). Available data and assessments by the EBRD and World Bank clearly show that states with well-functioning proceedings have higher recovery rates. Within the discussions this far, some topics have appeared popular, such as transactions avoidance, MSEs and pre-packs, which have a high chance of being considered for inclusion.

Day Two

David Rubin and Frank Tschentscher opened with tributes to the late Nigel Davies and much missed Florica Sincu, both long-standing members of the INSOL Europe family.

Second Keynote: The benefits and risks of AI

Barry Cahir introduced Paul Gallagher SC (Attorney-General IE). Against the background of attention to the East, the aspects of modern life that still merit attention are artificial intelligence (AI) and crypto-currency, holding both promise and potential for damage. Countries are still coping with the pandemic fallout and are thus not seeing the threats of tomorrow. Regulation also sees the benefits of new technology, but not the risks. AI, biotech and new technology are all emerging and developing without great scrutiny. As economic growth has led to impact on the environment, new technology might lead to unanticipated impacts. Access to knowledge through access to data risks human intervention being circumvented, while re-engineering humanity through processing data becomes possible. For crypto-currency, the issue is how will regulatory authorities cope with change. Proper controls at present do not exist. Risks are less dangerous than AI, but there is still no real appreciation of potential threats including subverting monetary policy, economic regulation and financial networks.

IOHs and GDPR (The Little Shop of Horrors)

Daniel Fritz (Dentons DE) introduced Hanneke de Coninck (Forent NL) and Jan Pohle (DLA DE). Issues canvassed in the panel included the interaction between contracts and GDPR; unfair competition law; whether and how the insolvency estate can obtain information from authorities; the process for sharing information with creditors and/or potential buyers (with opt-in requirements and the potential for customers). The view is that GDPR exemptions will need to read very closely to ensure compliance and also how far information can be processed. Moreover, the GDPR also has an impact on negotiations, bid structures and price valuations,

which can be helped with a "Data Room Procedure" (helping to protect data, but also permit value estimation). Overall, expertise in this highly complex area is required.

Cryptoassets and fraud (Insolvency Tech and Digital Assets Wing/Anti-Fraud Forum)

As Co-Chairs of the bodies collaborating in this session, José Carles (Carles Cuesta ES) and Carmel King (Grant Thornton UK) introduced Dani Haston (Chainalysis UK) and Aidan Larkin (Asset Reality UK/IE). A note was made of the recent phenomenal rise in crypto-currency: USD 15.8 trillion: 567% and NFTs: USD 44.2 billion. There is a strong insolvency connection: (i) structure: platforms, traders etc; (ii) crypto-assets in cases. Looking for assets is quite simply a hunt for clues. The investigative process can be complex, given lack of visibility of crypto-assets, as compared to normal assets. Main issues include how assets are recovered, how value is estimated and/or preserved, how such assets are distributed. As for blockchain analysis, the collection of information on fraud cases is enabled, including information regarding owners' identities.

The Courtroom of the Future (Judicial Wing)

Judge Michael Quinn (High Court IE) introduced Judge Jeanette Melchior (Maritime and Commercial Court DK) and Judge Caterina Macchi (Milan Civil Court IT) to recount experience within the pandemic, including its impact on court hearings, remote attendance, document submission, technical provision/support and the updating of e-filing rules to make digital submissions mandatory. Procedural rule changes were, nonetheless, difficult to apply when staffing levels dropped due to social distancing and illness. Verifying identities of participants when hearings moved between online/offline modes and enforcing health rules were also felt problematic. Further issues remain, including equality of arms (e.g. familiarity with technology; digital poverty/access), but cost reductions have also been achieved, particularly with hybrid approaches.

New financing trends for businesses in distress

Led by Alina Zechiu (CITR CY), panellists included Alessandra Biotti (Chiomenti IT), Francesco Ussenti (Prelios Innovation IT) and Damiano Pascucci (Prelios Innovation IT). Discussion focused on MSE-related issues and the fact that insolvency frameworks play a crucial role in their life cycle, but are less well suited to the type of entity. There is a focus on SPV use to channel financing and funds repayments in investment strategies as well as the use of securitisations by isolating assets to help in managing bankruptcy risk. Overall, good people, skills and structures are essential to manage such assets in restructurings to properly advise on legal risks. Remaining concerns include governance over transactions, particularly when rescheduling required, but high levels of UTPs (Unlikely to Pay) could be a bonus to distressed debt investors, who are highly diversified and not risk-averse.

Closing Words

Frank Tschentscher closed the conference with thanks to the teams, facilitator, speakers and sponsors and looked forward to reconvening in Dubrovnik in October. ■

> *The investigative process can be complex, given lack of visibility of crypto-assets, as compared to normal assets*

Further photos and presentation slides are available at: www.insol-europe.org/events/

Academic Conference:

The emerging new landscape of European restructuring and insolvency

Paul Omar and Myriam Mailly report from the Academic Forum Conference in Dublin

PAUL OMAR
INSOL Europe Technical Research Coordinator

MYRIAM MAILLY
INSOL Europe Technical Officer

> *The event was attended by 64 delegates from nearly 20 different jurisdictions*

The INSOL Europe Academic Forum Conference took place on 2-3 March 2022 at the Clayton Burlington Hotel in Dublin. Sponsored by Edwin Coe LLP and facilitated by Tomáš Richter (JŠK, Prague; Chair, IEAF), the event was attended by 64 delegates from nearly 20 different jurisdictions.

With a reminder of the need for solidarity, a minute's silence took place at the beginning of the first day's proceedings for the victims of conflict in Ukraine.

Topics in corporate preventive restructuring

Chaired by Jennifer Gant (Derby), panel speakers focused on the implementation of Directive 2019/1023 ("PRD") in French, Czech and Spanish laws. For France, Sarah Pople (Fidal Brittany) outlined reforms giving more weight to secured/priority creditors, while also forcing the hand of minority/recalcitrant creditors through a redesign of the Accelerated Safeguard Procedure. For the Czech Republic, Tomáš Richter suggested that transposition would result in a hybrid of German restructuring practice and post-2019 US Chapter 11 reforms by allowing courts to cram down a restructuring plan on a dissenting unsecured class of debt, though overall the reforms are a creative solution compared with hitherto. For Spain, José Carlos González Vázquez (Madrid Complutense) then analysed the reforms which aimed to solve the problem of shareholder holdouts and protect creditors capitalising their lending from adverse legal effects (incl. subordination and de facto directors' liability).

Fresh start and other topics related to individual debtors

Chaired by Tomáš Richter, Gauthier Vandenbossche (Ghent) explored how the EU Directive's requirement for honest insolvent entrepreneurs to have access to a "second chance" could be fulfilled by member states applying the same principles on discharge to all natural persons, regardless of their entrepreneurial status. In the context of transposition of the Directive in Portugal, the situation of personal debtors was investigated in a joint presentation by Ana Filipa Conceição, Catarina Frade and Fernanda Jesus (Coimbra), who concluded that the transposition did not grant a true fresh start, thus resulting in a missed opportunity for a new personal insolvency paradigm. Finally, Jennifer Gant (Derby) gave a presentation on how the post-pandemic period could offer the opportunity to explore the use of Fineman's vulnerability theory to respond to calls for fairness in insolvency and restructuring. This might require a new theoretical paradigm to consider the choices of stakeholders affected by corporate decisions.

Closing proceedings on the first day, Irene Lynch Fannon (UCC) delivered the "Gabriel Moss Memorial Lecture" by focusing on cross-border recognition of corporate restructuring arrangements with a special reference to Irish practice. Cooperation and coordination issues, beginning with the case of *Eurofood* and the Parmalat Group, were discussed, with a coda suggesting a review of common law tools predicated on jurisdiction. The Gabriel Moss Memorial Lecture was then followed by the Welcome Reception and the Academic Dinner.

Design issues in restructuring and insolvency law

Opening the second day in a panel chaired by Luigi Lai (NIPI Warsaw), Jonatan Schytzer (Uppsala) analysed the treatment of environmental claims in bankruptcy and how principle-based changes could be implemented to reduce the risk when polluters cannot pay. Ioannis Bazinas (UCL) then suggested a difference in approach to "insolvency" and "restructuring" as concepts, inviting a fundamental distinction that has important cross-border implications, where a distinction between recognition of proceedings and recognition of plans might be useful. In a joint presentation, David Ehmke (GT Restructuring Berlin) and Eugenio Vaccari (Royal Holloway) focused on the harmonisation narrative of the EU and analysed alternative approaches, notably top-down regulation and bottom-up competition supporting the convergence of insolvency and restructuring laws across the Member States.

Cross-border and EU law topics

Chaired by Francisco Garcimartín (Madrid Autonomá), panel speaker Stephan Madaus (Halle-Wittenberg) asked how cross-border effects of restructuring plans could be secured, exploring whether a further legislative initiative was necessary and how best to approach a new cross-border framework for restructuring plan proceedings. Following this, Walter Nijnens (Fulda) analysed the interaction of state aid with insolvency, particularly in how the recovery of unlawful state aid could result in businesses facing financial difficulties, for which preventive restructuring or formal proceedings could be suggested at appropriate stages of the recovery process. Finally, Rodrigo Rodriguez (Bern) outlined how COMI-shifting techniques aimed at securing a restructuring in the UK could impact on cross-border recognition of scheme plans and outcomes.

More topics in corporate restructurings and insolvencies

After lunch, the panel chaired by Gert-Jan Boon (Leiden) saw Dennis Cardinaels (Cadanz Brussels) highlighted the analogy between corporate solvency and insolvency governance. Attention post the 2008 financial crisis has (only) focused on corporate governance and related issues. Nonetheless, similar conflicts between unsecured creditors and directors/office-holders and between majority and minority unsecured creditors invite consideration of governance needs within insolvency. The second joint presentation by Flavius Motu (Judge, Cluj Specialised Court) and Andreea Deli-Diaconescu (Romanian National Institute for IP Training) noted the impact of Directive protections for interim and new financing, risking providers gaining leverage and speculating on the debtor's vulnerability. Thus, member states should harmonise avoidance rules in subsequent insolvency proceedings to avoid forum shopping for safe-harbour jurisdictions. Closing proceedings, Theodora Kostoula (EUI Florence) proposed an answer to the topical question of how and when to determine asset value in insolvency proceedings where the value is not easily established through an exploration of the world of crypto-assets to outline the main challenges in the context of EU insolvencies.

Edwin Coe Practitioners' Forum

Chaired by Tomáš Richter, a joint presentation by Reinhard Bork (Hamburg/Oxford) and Michael Veder (Radboud Nijmegen) of the results of an intensive research project dealing with the harmonisation of transactions avoidance rules in the EU has given rise to a Model Law comprising nine sections recommended for implementation into the national insolvency laws of EU Member States. This was then commented upon via a lively discussion overseen by Francisco Garcimartín and Christina Fitzgerald (Edwin Coe).

In winding up the event, Tomáš Richter thanked the speakers and participants and looked forward to a return next October in Dubrovnik. ■

> *The Edwin Coe Practitioners Forum presented the results of an intensive research project dealing with the harmonisation of transactions avoidance rules in the EU*

Presentation slides are available at: www.insol-europe.org/academic-forum-events

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Cross-border Schemes and Plans: How they work in different jurisdictions

Kathy Stones summarises the findings from the panel at the Dublin Congress, comparing and contrasting the restructuring regimes in Ireland, UK, Netherlands and Germany

KATHY STONES
Lexis PSL Restructuring and Insolvency

> ***Many European countries have been prompted to revamp their restructuring laws following the introduction of the EU Directive***

Many European countries have been prompted to revamp their restructuring laws following the introduction of the EU Directive on Restructuring and Insolvency (Directive 2019/1023). At INSOL Europe's 40th annual conference in Dublin on 4 March 2022, a panel compared and contrasted the restructuring regimes in the following countries: Ireland, UK, Netherlands and Germany.

Three long-established procedures (examinership and schemes in Ireland and schemes in the UK) were compared with three newer procedures, Restructuring Plans in the UK, WHOA in the Netherlands and StaRUG in Germany. The focus was the schemes' or plans' efficacy in cross-border restructuring.

A summary of the findings appears below and in the table.

Ireland

For Ireland, **Michael Murphy** (McCann FitzGerald LLP) stated that examinership is a well-established restructuring process in Ireland that has gained significant international attention. It was introduced 30 years ago and was largely modelled on the US Chapter 11 process. It is user-friendly and its concepts are very familiar to advisors in an international context. Similarly, the Irish statutory scheme of arrangement provisions have been on the statute books for over 60 years, largely mirroring UK provisions.

Some final words:

- Ireland remains a firm member of the EU. Examinership is listed in Annex A of the Recast European Insolvency Regulation (Regulation 2015/848), facilitating recognition of the process throughout the EU. Schemes of arrangement can be also recognised in the EU using the Recast Judgments Regulation. Both processes have also been recognised in the US using the Chapter 15 procedure; and
- Ireland has a proven track record in international restructuring, with a responsive and experienced judiciary and a fast track appeal court. Irish decisions have also been relied upon in an international context.

UK

In the UK, **Kathy Stones** (LexisPSL R&I) noted that schemes of arrangement have been used for many years and are available without proving insolvency, as they arise under the Companies Act 2006, rather than the Insolvency Act 1986. Indeed, statistically, around 50% of all scheme cases currently going through the courts are solvent schemes. Part 26A restructuring plans are a new tool available since June 2020 sharing many of the same features as schemes, with the addition of cross-class cram-down where certain conditions are met. Insolvency does not need to be proved, rather that the company 'has encountered or is likely to encounter financial difficulties', the case of Hurricane Energy showing the need for a "burning platform".

Some final words:

- the UK has some fantastic, pragmatic, specialist judges to hear plan/scheme cases and a great track record;
- the low sufficient connection test is appealing for foreign companies; and
- if the finance documents contain English law governing clauses, then UK schemes/plans may be the only option, unless the *Gibbs* rule can be circumvented.

The Netherlands

As from 1 January 2021, **Marcel Groenewegen (**CMS) outlined the availability of the Dutch 'scheme', already widely known as 'WHOA', as a new restructuring tool. Combining certain elements of the US Chapter 11 and the English Scheme with typical Dutch law innovations, the WHOA has had a successful start and continues to grow in popularity. Currently, approximately 150 WHOA proceedings, mainly for small and medium size enterprises in financial distress, have been launched and approximately 90 court decisions have been published.

Some final words:

- with the WHOA, the Netherlands has become a very attractive jurisdiction for cross border restructurings, especially given the low entry test for companies with no COMI in the Netherlands;
- the WHOA is very much a "debtor in possession"

process and court involvement can be very limited;
- cross-class cram-down and the option to obtain a general moratorium for a maximum period of eight months allow for a flexible restructuring tool, which can be used in private (non-public) proceedings as well; and
- the relatively low costs and the availability of well trained and specialised courts (which rule in the highest instance with no option for lengthy and costly appeal proceedings) provide for a speedy and cost efficient restructuring instrument with a high level of deal certainty.

Germany

As presented by **Riaz Janjuah** (White & Case LLP), on 1 January 2021, the StaRUG introduced the new Preventive Restructuring Framework that fills a gap in German restructuring law. In particular, the new Preventive Restructuring Framework allows for an implementation of a restructuring plan by way of outvoting dissenting creditors and including the possibility of a cross-class cram-down.

Some final words:

- with the Preventive Restructuring Framework, the StaRUG has added a swift and flexible instrument to the toolbox that allows, in particular, for an implementation of a restructuring plan by way of outvoting dissenting creditors and including the possibility of a cross-class cram-down;
- there have been twenty-two cases reported so far with four confirmed restructuring plans. In one case, the process has been implemented in just seventy-five days from initiation to confirmation; and
- the Preventive Restructuring Framework has proven as a flexible tool that can deal, for example, with disputes among shareholders, the restructuring of bonds, dissenting lenders in syndicated loans or assist with the restructuring of an individual group entity during the reorganisation of the group in an in-court process.

Concluding remarks

For the Chair, **Chris Laughton** (Mercer & Hole), there is a striking similarity between many of these regimes and, where time and circumstances permit, the particular facts of the cross-border case in question may well dictate which restructuring regime is chosen. Each regime claims flexibility and skilled practitioners and none stands out with all-round advantages for cross-border restructuring. Often these plans and schemes will support each other and run in parallel. As ever in cross-border restructuring the key to success is communication and cooperation between professionals, as exemplified by the panel members.

Further research

LexisPSL R&I is excited to be partnering with INSOL Europe to produce a research paper in 2022 analysing how various Member States have implemented Directive 2019/1023.

INSOL Europe's national reporters will be asked to analyse their country's regimes through a series of questions mapped to the requirements of the Directive text. The findings will be published on the organisations' websites. We will add reports as countries continue to implement new restructuring plan/scheme procedures before the long-stop date of 17 July 2022 (for Member States which have requested an extension) for implementation of the EU Directive. ■

A full report from the panel is published on our '**Past Events**' section of our website under the Dublin section at: *www.insol-europe.org/events/past_events*

> ***INSOL Europe's national reporters will be asked to analyse their country's regimes through a series of questions mapped to the requirements of the Directive***

Summary of the findings:

	Ireland		UK		Netherlands		Germany
	Examinership	Scheme	Restructuring Plan	Scheme	WHOA		StaRUG
					Private	Public	Plan
Insolvent (or likely)	Y	N	Y	N	Y	Y	Y (imminent)
Moratorium/stay	Y	N	N	N	N(Y)	N(Y)	Y
Voting (Number, Value)	50% N&V	50%N 75%V	75%V	50%N 75%V	66%V	66%V	75%V
Cross-class cram down	Y	N	Y	N	Y	Y	Y
IP appointed	Y	N	N	N	N(Y)	N(Y)	Y/N
Jurisdiction test	COMI (EU), SC	SC	SC	SC	SC	COMI	COMI
EU recognition	Y	Y	Local Law	Local Law	Local Law	Y	Private: Local Law Public: Y (22.7.22)
Challenge/solution	100/150 days	Limited moratorium	Moratorium	Moratorium			Directors' duties shift Contracts termination
Final word	Ready recognition; proven 30+ years track record		Sufficient connection; judges			Groups	Swift & flexible

The impact of the COVID-19 pandemic on international insolvency policy-making

Catherine Bridge Zoller reports on the key findings of the EBRD's recent project with INSOL Europe

CATHERINE BRIDGE ZOLLER
Senior Counsel, EBRD

> *During the course of our association with INSOL Europe, we have revised our core insolvency standards and completed a successful comparative research project on business insolvency*

The COVID-19 pandemic and ensuing economic crisis have been an important spur to the policy work at the European Bank for Reconstruction and Development (EBRD) in the area of corporate insolvency.

They have been an opportunity to strengthen EBRD cooperation with other international financial institutions from the European Commission and the IMF, to the World Bank and UNCITRAL and to develop closer partnerships and networks with private sector associations, particularly INSOL Europe and its members. These contacts have been instrumental for EBRD's research and international standard setting. During the course of our association with INSOL Europe, we have revised our core insolvency standards and completed a successful comparative research project on business insolvency.

For readers who may not be that familiar with the world of IFIs, the EBRD is a multilateral development bank headquartered in London and established in 1991, following the collapse of the former Soviet Union. Our mission is to develop open and sustainable market economies in countries committed to, and applying, democratic principles. We operate across a number of sub-regions: Central Asia, Central Europe and Baltic States, Cyprus and Greece, Eastern Europe and the Caucasus, South Eastern Europe, parts of North Africa (known as the 'Southern and Eastern Mediterranean' or SEMED) and Turkey. Since the war in Ukraine, we have closed our offices in Russia and Belarus, although we stopped new investments in 2014 and 2020 respectively.

In addition to being a bank and a key investor in many markets, the EBRD is actively involved in policy-making. EBRD economists are influential in the policy sphere, but lawyers also play an important role through the Bank's Legal Transition Programme. The programme's objective is to improve the legal and investment environment in the economies where the EBRD invests. We regularly work on projects for commercial legislative reform, including a number of EU projects to transpose the Preventive Restructuring Directive. We also carry out capacity building and training of judges and insolvency practitioners in countries familiar to INSOL Europe, such as Croatia and Cyprus, as well as more remote and exotic locations like Armenia. Recently our insolvency project list has expanded to include projects with an IT and statistical reporting component, as well as initiatives to provide SMEs and entrepreneurs with financial and business guidance.

The COVID-19 crisis has been unique in its global effects. It affected, often profoundly, developed and emerging markets. At the EBRD, we quickly realised that we needed to set some priorities for our technical assistance projects and policy engagement that could support the Covid-19 emergency financial assistance packages provided by the EBRD, the European Union, the European Investment Bank, the International Monetary Fund (IMF) and the World Bank Group and many national authorities. In May 2020, I published the "EBRD Covid-19 Response: Financial Restructuring and Insolvency Discussion Paper" to invite comments and opinions from stakeholders on what we needed to prioritise.

By 2020, our insolvency standards by which we benchmark our projects against best international practices: the 'EBRD Core Principles of an Effective Insolvency System'[1] and the 'EBRD Insolvency Office Holder Principles'[2] were out of date. They did not reflect any of the latest trends on corporate insolvency, especially those favouring corporate rescue. This theme of a second chance was particularly important given the pandemic. Moreover, we had not yet updated our Insolvency Office Holder Principles to include any of the findings from our comprehensive 2014 assessment on the profession in 27 countries.[3]

One important initiative, therefore, was to revise these existing standards. We did this in consultation with a number of other IFIs and INSOL Europe. This resulted in 2020 in new EBRD Core Principles for an Effective Insolvency System in English (and translated into Russian) that aim to provide legislators and national authorities in the EBRD's economies of operations with high-level guidance on key objectives and international best practices in business insolvency. The principles now reflect the latest developments and trends in insolvency laws, particularly the increasing focus on the importance of statutory restructuring tools, consensual out-of-court restructuring

solutions and early 'pre-insolvency' action to support business continuity. They are supported by the recast principles on insolvency office holders, which articulate the core elements that should be considered by policymakers for the development of the insolvency office holder profession and advancement of the integrity, fairness and efficiency of the insolvency law system.

In May 2020, in response to the COVID-19 pandemic, we launched another important initiative with support from INSOL Europe: the EBRD Business Reorganisation Assessment on insolvency systems. We anticipated a wave of insolvency law reform and we were keen to understand which economies the EBRD should prioritise for technical assistance supporting corporate rescue and turnaround. Published in January 2022, our Assessment report is available at www.ebrd-restructuring.com and reflects over 18 months of intensive work. It includes:

- comparative research on the EBRD regions and benchmarking against England and Wales, France, Germany and the USA;
- jurisdictional bankruptcy and insolvency profiles covering business reorganisation procedures for all 38 emerging markets where the EBRD invests; and
- stakeholder perception maps on key issues affecting reorganisation.

Possibly, without the COVID-19 crisis, we would never have attempted anything on this scale. But the lack of business travel and working from home was an opportunity to try to understand in detail the relative strength, effectiveness and flexibility of corporate reorganisation and rescue tools across EBRD regions.

Among all 38 economies assessed by the EBRD, Greece comes first, followed closely by Poland, Lithuania and Romania. In fifth place is Kosovo, propelled forward by the overall quality of its insolvency legislation. Also among the top ten performers are Moldova (in 8th place) and Albania (in 10th place). At the lower end of the spectrum are many of Central Asian and Southern and Eastern Mediterranean (SEMED) countries, such as Egypt, Lebanon, Morocco, Tunisia and West Bank and Gaza.

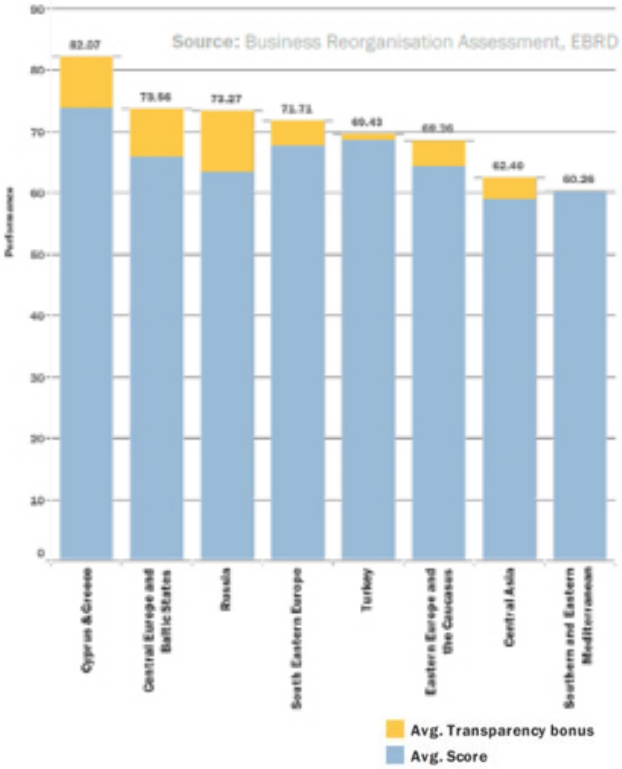
With a study of this breadth, there are many interesting findings. Transparency of insolvency data quickly became a central theme of our assessment. We discovered that 11 of the economies where the EBRD invests do not disclose publicly any data on insolvency. In other words, there is no transparency at all for the market and for investors. Furthermore, in these economies, there is no recognisable central authority or regulator. We integrated this into our methodology and ranking through a data transparency bonus of up to 10 points awarded to economies that publish comprehensive and accessible data on insolvency.

Regional differences can be clearly seen in the chart from the main assessment report. This illustrates the average performance (in descending order) of each of the EBRD sub-regions on an aggregate basis with respect to the assessment questionnaire and the data transparency bonus. It evidences a significant 22-point gap between Greece and Cyprus and the SEMED region.

Another important finding from the assessment is the apparent lack of popularity of business reorganisation procedures in many economies where the EBRD invests according to questionnaire respondents. Many respondents also believe that private workouts are not widespread. One reason for this may be the lingering negative stigma that affects all aspects of insolvency and bankruptcy, notwithstanding whether the goal of a given procedure is reorganisation of the debtor business.

With support from INSOL Europe members and the generous time contributed *pro bono* by our law firm partners, we hope to be able to maintain the economy profiles published at the www.ebrd-restructuring.com website. These legislative overviews can thus continue to be a useful and practical source of information for investors and policymakers in emerging markets. Our vision is also to improve data collection and transparency among national authorities. By further articulating what type of data regulators should collect and publish, we aim to establish a stronger link between insolvency data and policy-making in economies where EBRD is active. ■

Figure 6.34 Overall business reorganisation assessment score including the Data Transparency Factor across EBRD subregions



Another important finding from the assessment is the apparent lack of popularity of business reorganisation procedures in many economies where the EBRD invest

Footnotes:

1 Available at: <https://www.ebrd.com/legal-reform/ebrd-insolvency-core-principles.pdf>.

2 Available at: <https://www.ebrd.com/legal-reform/insolvency/ioh_principles.pdf>.

3 See: <https://ebrd-restructuring.com/ioh-assessment>.

Towards a greater level of harmonization at European level

Giorgio Corno and Andreas Stein summarise their presentation at the conference in Alba (Italy) on 21 November 2021 organised by the Associazione Albese Studi di Diritto Commerciale*

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The transposition of Directive (EU) 2019/1023 by EU Member States and transposition control by the Commission

The European Commission is supervising the implementation of Directive (EU) 2019/1023 by Member States. As at 20 November 2021, only three Member States have officially notified a complete transposition within their jurisdiction. The remaining 24 Member States have taken advantage of the possibility to extend the deadline for implementation of 17 July 2021 by a year in accordance with Article 34(2) of the 2019 Directive in case of particular difficulties, generally invoking the Covid-19 pandemic as a reason for such difficulties. However, even a number of the latter Member States have already implemented at least certain aspects of the 2019 Directive, for instance in relation to early warning mechanisms (as in Germany and Italy). Nonetheless, delay in the implementation of the 2019 Directive is not expected to have a significant impact on the harmonization process.

The Commission is responsible for making sure that all EU Member States properly transpose and apply EU law. In its role as '*guardian of the treaties*', the Commission has enforcement powers wherever an EU Member State does not incorporate, whether fully or at all, a directive into its national law by the set deadline or has not applied EU law correctly in its transposing legislation. To the extent appropriate, the Commission takes advantage of the various committees and expert groups already in place, as well as the valuable support of European agencies, to foster implementation and assess how legislation is implemented in practice. In many cases – and this will also include the 2019 Directive – the Commission also contracts out an evaluation of the transposing legislation in all Member States to serve as a basis for its own assessment.

The Commission may open an infringement procedure for 'non-communication' (where no transposition of a directive, or of parts of it, has been notified at all) as well as in the case of an incorrect transposition of a directive, in accordance with Article 258 ff. of the TFEU.

The possible impact of the 2019 Directive on Regulation (EU) 2015/848 and recent amendments to Annexes A and B

The 2019 Directive requires Member States to put in place preventive (pre-insolvency) restructuring procedures which comply with certain minimum principles of effectiveness. It is without prejudice to Regulation (EU) 2015/848 ("EIR (Recast)") whose scope also extends to proceedings which provide for restructuring of a debtor at a stage where there is only a likelihood of insolvency and to proceedings which leave the debtor fully or partially in control of its assets and affairs.[1]

The 2019 Directive does not change the approach taken in the EIR (Recast) of allowing Member States to maintain or introduce pre-insolvency restructuring procedures which do not fulfil the conditions for notification under Annex A to the Regulation, for example because they do not meet the publicity requirements. However, although the 2019 Directive does not require that procedures within its scope fulfil all the conditions for notification under that Annex, it aims to facilitate the cross-border recognition of those procedures and the recognition and enforceability of judgments under the EIR (Recast)[2] and therefore encourages Member States to transpose their obligations by means of national procedures which also qualify for Annex A to the EIR (Recast).

That said, currently legislative proceedings are underway to amend Annexes A and B to the EIR (Recast) for a number of Member States in view of recent changes to their domestic insolvency law introducing new types of insolvency proceedings or insolvency practitioners, partially also introducing preventive restructuring procedures following Directive 2019/1023 which meet the requirements of the EIR (Recast).

After an assessment of the compliance of the changes notified by certain Member States (the Netherlands, Italy, Lithuania, Cyprus, Poland, Germany, Hungary and Austria) with the requirements for being included in Annexes A and B of the EIR (Recast), the European Commission adopted a proposal for a Regulation on 11 May 2021

aimed at amending the annexes accordingly. Regulation (EU) 2021/2260 was thus adopted by the co-legislators on 15 December 2021 and was published in the Official Journal on 20 December 2021. It became effective from the twentieth day following its publication in the Official Journal, therefore on 9 January 2022.

As soon as other Member States implement the 2019 Directive within their domestic laws, further notifications are expected to be requested and, therefore, further amendments of Annex A and B are certain to follow.[3]

Furthermore, by 2027, the entire EIR (Recast) on cross-border insolvency will be subject to review on the basis of a Commission report on its application.[4] A study on the issue of abusive forum shopping, which was due on 27 June 2020,[5] is currently in progress.

Towards further harmonization of substantive insolvency law within the EU

A further initiative aimed at harmonizing insolvency law is currently under preparation in the context of the efforts to complete the so-called capital markets union (CMU).[6] The legislative and non-legislative measures of the 2020 CMU Action Plan[7] included one specifically dedicated to making the outcomes of insolvency proceedings more predictable through a legislative or non-legislative initiative for minimum harmonization or increased convergence in targeted areas of non-bank insolvency law.[8]

Following a public consultation on insolvency laws, on 25 November 2021 the Commission announced[9] that it will propose an initiative by the third quarter of 2022 that will seek to harmonize targeted aspects of the corporate insolvency framework and procedures. Subject to an impact assessment, the Commission will propose a directive whose exact scope will be subject to further discussions with Member States and the European Parliament. This directive proposal could be complemented by a Commission Recommendation.

An independent Group of Experts has been assisting the Commission in the preparation of a potential legislative proposal containing minimum standards for a harmonized insolvency law in the EU. The Group is helping the Commission to consider, *inter alia*, the following issues: the scope of the new instrument, in view of the objective of facilitating the free movement of capital in the internal market; common definitions; common principles and rules in the area of formal insolvency procedures (e.g. filing of claims, conditions for accessing the procedures, avoidance actions, ranking of claims, special rules for micro and small enterprises); duties of directors in the vicinity of insolvency; other measures aiming at enhancing the efficiency of insolvency proceedings and reducing their costs and length, including in relation to the training and qualification of judges and insolvency practitioners. The results of the work of the Group will feed into the process of the Commission selecting the issues considered appropriate for harmonization and setting out proposed rules for common standards. ■

Footnotes:

* This article is based on a speech at the Conference in Alba (Italy) on 21 November 2021 organised by the Associazione Albese Studi di Diritto Commerciale, as well as on the official documents available on the EU Commission web site. This article expresses the views of the authors and, with regard to Mr Stein, does not reflect the official position of the EU Commission. An extended version of the article has been published in www.dirittodellacrisi.it

1 Recital 10, EIR (Recast).

2 Recital 13, 2019 Directive.

3 Because of the heavy legislative process the Commission attempts to bundle as many notifications as possible.

4 Article 90(1), EIR (Recast). A similar review clause can also be found in Article 33, 2019 Directive.

5 Ibid., Article 90(4).

6 See: https://ec.europa.eu/info/business-economy-euro/growth-and-investment/capital-markets-union_en

7 COM(2020) 590 final.

8 Action 11, 2020 CMU Action Plan.

9 COM(2021) 720 final.

> ***The entire EIR (Recast) on cross-border insolvency will be subject to review on the basis of a Commission report on its application***

Limits to common law recognition of a foreign bankruptcy

Frances Coulson, Robert Paterson and Stephen Baister examine the recent judgment in Kireeva & Anor v Bedzhamov, delivered by Snowden J

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Last year, in Kireeva & Anor v Bedzhamov,[1] Snowden J, as he then was, dealt with two applications.

The first was an application by Lyubov Andreevna Kireeva, the Russian trustee in bankruptcy (*arbitrazh manager*) of Georgy Bedzhamov, for recognition at common law of her appointment with a view to enabling her to take control of Mr Bedzhamov's property and assets in the UK; the second was an application in existing proceedings between Vneshprombank LLC and Mr Bedzhamov, by which the trustee, a non-party, sought an order under Civil Procedure Rule (CPR) 40.9 setting aside part of an order made in March 2021 varying the terms of a worldwide freezing order originally made in 2019. The variation had the effect of permitting Mr Bedzhamov to sell a Belgrave Square property and use the proceeds of sale to pay accrued and anticipated living expenses, legal fees in connection with the defence of the UK proceedings due to come on for trial in January 2022 and other disbursements.

Facts and judgment

Mr Bedzhamov is a Russian citizen domiciled in England and Wales, where he has been living since 2017. He was the subject of criminal and civil proceedings in Russia in connection with his alleged involvement in a fraud perpetrated against the bank. He is also the first defendant in UK proceedings in which the bank seeks relief arising from the alleged fraud. The bank is itself bankrupt.

The order of which recognition was sought was a bankruptcy order made on 2 July 2018 by the Russian Arbitrazh Court on proceedings brought by a judgment creditor, VTB24. The Russian trustee's contention was that its effect vested Mr Bedzhamov's assets worldwide in her. According to her, Mr Bedzhamov had failed to cooperate with her in identifying them: she described him in her evidence as a "delinquent bankrupt". The Belgrave Square property was one of his assets caught by the freezing order. It was believed to have considerable development value, so understandably the trustee was anxious to secure it for the bankruptcy.

Snowden J held that the Russian bankruptcy order should be recognised "at least to the extent that the English court should acknowledge its existence and the status of the Trustee." However, he also held that there was no basis at common law for the court to declare that Mr Bedzhamov's property had vested in the trustee or to make an order for it to be transferred to her or sold for her benefit. After an exhaustive examination of authority going back to the 19th century, including more recent cases such as *Cambridge Gas v Navigator Holdings*[2] and *Rubin v Eurofinance SA*,[3] he concluded that no such order had been made in any of the properly argued early cases in point and, following Rule 217 of *Dicey, Morris & Collins* on the Conflict of Laws, held:

> *"an assignment of a bankrupt's property to the representative of his creditors, under the bankruptcy law of any foreign country, other than Scotland or Northern Ireland, is not, and does not operate as, an assignment of any immovables of the bankrupt situate in England."*

In doing so, he reminded himself of the warning Lord Collins had given in *Singularis Holdings v PricewaterhouseCoopers*[4] of the limits to judicial power to develop the common law in this area. "I would also decline any invitation to extend the common law in the instant case," he said.

The Court of Appeal (Newey, Arnold and Stuart-Smith LJJ) has taken a different view,[5] but one largely based on Snowden J's approach to Mr Bedzhamov's evidence. Snowden J had noted that, unless a foreign judgment which was final and conclusive on the merits could be impeached on one of a number of well-established grounds, it could not be re-examined on its merits when recognition was sought in England (*Dicey*, Rule 48). Mr Bedzhamov had relied on a number of grounds as bars to recognition: fraud, natural justice and public policy; but the judge had decided, after detailed examination of the law on each followed by its application to the facts, that none of the bars to recognition had been made out evidentially:

> *"I do not accept that Mr Bedzhamov's evidence is sufficiently strong to demonstrate that any of the bars to common law recognition apply. I also do not accept that the question of recognition should be*

adjourned to await the outcome of the trial in the UK [p]roceedings at which…these issues would be ventilated in evidence."

The Court of Appeal disagreed, saying that Mr Bedzhamov's evidence in support of his allegations of fraud should not have been rejected without its having been tested in cross-examination. As Newey LJ put it:

"[I]t seems to me, with respect, that the Judge was wrong to hold the VTB 24 Judgment to be well-founded. It was not possible to arrive at that conclusion in the face of Mr Bedzhamov's witness statement when he had not been cross-examined on it, nor to dismiss the possibility of VTB 24 bearing responsibility for any fraud. Further, it not being suggested that the Judge's decision to recognise the Russian bankruptcy can be sustained on any other basis, that decision must, in my view, be set aside. That is not to say, however, that the recognition application falls to be dismissed. The correct course is, I think, to remit the matter to the High Court so that directions can be given for a hearing at which Mr Bedzhamov's evidence can be tested in cross-examination."

The Court of Appeal did, however, uphold the principle that there is no power at common law to grant assistance to a foreign trustee in bankruptcy in relation to immovable property located in the UK. The court's finding meant that it could not make an order vesting real property in a Russian bankrupt's trustee in bankruptcy, order the property to be transferred to the trustee, or in some other way confer possession and control of the property on the trustee. Newey LJ said:

"The immovables rule means not just that immovable property in this jurisdiction does not vest automatically in a foreign office-holder, but that (as Story said in the passage from 'Commentaries on the Conflict of Laws' quoted by Ritchie J in MacDonald v Georgian Bay Lumber Co) 'immoveable property is exclusively subject to the laws of the Government within whose territory it is situate'. Far, therefore, from a foreign bankruptcy giving the office-holder 'complete dominion' over an immovable, it will not be recognised as having conferred any interest in or right to such property on the office-holder and, absent statutory intervention, the office-holder will not be entitled to an order vesting it in him. Were it otherwise, there would have been no need for Astbury J to make a receivership order in Re Kooperman and books such as Dicey, Morris & Collins on the Conflict of Laws, Totty Moss & Segal: Insolvency and Fletcher, 'The Law of Insolvency' would all be mistaken in thinking the appointment of a receiver appropriate."

And:

"Of course, as Lord Sumption explained in Singularis, 'the principle of modified universalism is part of the common law', and the common law is susceptible to development in the light of that principle. As, however, Lord Sumption also said, the principle is 'subject to local law and local public policy', and Rubin shows that changes in the law relating to international insolvency can potentially be a matter for the legislature, not the judiciary. Mr Robins argued that the creation of a common law exception to the immovables rule would properly be a matter for Parliament and that the relief available to a foreign office-holder at common law must be recognised as limited by the immovables rule. I agree. A development of the common law which allowed a foreign office-holder to obtain either title to English immovable property or its sale would involve depriving the owner of what under English law is his property. It seems to me that it is for Parliament, not the Courts, to determine whether and, if so, under what conditions that should be permissible."

Conclusion

One should avoid the temptation to think of the Court of Appeal's judgment as a setback for international recognition. In spite of the weight of learning in the Court of Appeal's judgment, which examines routes of recognition in detail, comparatively and by reference to conflict of laws principles, one should be careful of attaching too much significance to the outcome of the appeal. We must see what happens when the case is re-heard at first instance, and after directions have been given for a hearing in which the evidence can be fully tested. In the end, it was primarily the evidential issue that prevailed on a conventional proposition. In English proceedings, the written evidence of a witness is not generally speaking to be disbelieved in the absence of cross-examination, unless it is so obviously at odds with objectively provable facts or documents that it can be rejected without being tested orally.[6] The final result of the Russian trustee's applications will only become clearer after that re-hearing. ■

Footnotes:

1 [2021] EWHC 2281 (Ch).
2 [2006] UKPC 26.
3 [2012] UKSC 46.
4 [2014] UKPC 36; [2016] UKPC 33.
5 [2022] EWCA Civ 35.
6 As to the former point, see, for example, *Long v Farrer & Co* [2004] EWHC 1774 (Ch); as to the latter, *Portsmouth v Alldays Franchising Ltd* [2005] EWHC 1006 (Ch).

> ***In spite of the weight of learning in the Court of Appeal's judgment, … one should be careful of attaching too much significance to the outcome of the appeal***

Compromise: The new bad word?

Ryan P. Walker discusses the policy implications for a divided government after the 2022 midterm elections

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> ***The 2022 midterm elections are expected to usher in a new period of divided government and… compromise!***

On a summer evening in 1790, a trio of American icons—Thomas Jefferson, Alexander Hamilton and James Madison—met for dinner in New York City to break a deadlock in Congress.

The decision to be made was whether or not the Federal Government would assume the debts states incurred to finance the Revolutionary War and also where the capital of the federal government would reside. The outcome of this meeting, known as the "Compromise of 1790", was a pivotal moment in US history. An agreement was reached between the three, whereby Jefferson and Madison agreed with Hamilton's proposal to create a system of public finance by assuming the debts of the states and Hamilton agreed to support Jefferson and Madison's proposal locating the nation's capital along the bank of the Potomac River between Maryland and Virginia in what is now Washington, DC.

Could this type of compromise occur in the present-day political environment? Media outlets profiteering from prolonged political division would have you believe it is not possible, but if Shakespeare's character Antonio in *The Tempest* was right when he said "what is past is prologue" the political process is truly less of a zero-sum game and more of a journey in incrementalism.

While the current legislative and executive branches of the Federal Government are controlled by the Democratic Party, one-party rule is historically short-lived and the forthcoming midterm elections of 2022 are likely to maintain that trend. While conventional thought would lead to a belief that one-party dominance would yield a litany of public policy successes, the 117th Congress has produced very few noteworthy policy victories for the majority party. For instance, outside of COVID-19-related response legislation, the single most prolific piece of legislation signed into law has been the Infrastructure Investment and Jobs Act (IIJA). Furthermore, the leadership of the Democratic Party has struggled and, to date, has failed to get all of its members to support passage of the proposal by President Biden known as the Build Back Better Act (BBB). This has left the annual government funding (appropriations) process and reauthorization of the National Defense Authorization Act (NDAA) as the lone legislative vehicles on which to attach other policy initiatives. However, this period of unproductivity may soon run its course as the 2022 midterm elections are expected to usher in a new period of divided government and…compromise!

If history is to repeat itself, we can expect House Democrats—who currently hold a 9-seat majority (with two Republican vacancies)—to lose their majority, as the incumbent President's party has lost an average of 26 seats in midterm elections since World War II. Similarly, the incumbent President's party loses an average of four Senate seats in a midterm election cycle. In the current environment, a loss of four Senate seats would amount to a tectonic shift in political fortunes, but the electoral map does not favour Republicans as they currently have to defend 20 of the 34 seats up for re-election. Yet, in an environment where COVID-19 persists; President Biden's approval rating hovering in the high 30 to low 40 percent range; inflation surging to over seven percent; and a war raging in Ukraine, anything can realistically happen in the coming months.[1] The prevailing assumption is the House will flip to Republican control and the Senate remain in Democratic hands—and that scenario has significant impact on public policy outcomes.

It may seem counterintuitive, but, during periods of divided government, Congress has actually been more productive. According to analysis by the Pew Research Center spanning over 30 years (1989-2020), four of the five most productive sessions of Congress took place while there was divided government.[2] Much of this success can be explained by applying the theory of incrementalism or by what famed political scientist Charles Lindblom referred to as the "science of muddling through" to those four sessions of Congress. Rather than attempting to push through broader and, quite often, more ideological, legislative packages that occur more frequently during one-party rule scenarios, Republicans and Democrats are forced to work together through the give-and-take procedural process. Recent times have shown us these types of negotiated outcomes produce more durable results. For instance, the Reagan tax cuts of 1981 and 1986 and Welfare Reform during the Clinton Administration are just a few of the immediate

examples of public policy which have stood the test of time—because they were negotiated during times of divided government, forcing policy-makers to compromise for the good of the country.

Although many believe compromise to be a quaint concept of the past and the two major political parties in the US have only entrenched themselves further into hyper-partisan bickering, President Biden's record as a member of the Senate from Delaware and as Vice-President of the United States indicates a predisposition to compromise. Furthermore, it is unknown if he will actually run for re-election in 2024 and will most certainly be looking to build a legacy. A Republican-led House of Representatives and a Democratic-controlled Senate will undoubtedly need to find ways to work together—and with the White House—to address the near endless list of public policy conundrums. Ongoing issues of deficits and debts, matters of national security, climate change, the US-China relationship, the current conflict in the Ukraine as well as NATO spending will all require bicameral and bipartisan agreements.

The Founding Fathers of the United States intentionally created a system of government, where it would be difficult to move policy proposals forward to protect its citizens from government overreach and the passions of factions. While many engaged in modern-day political discourse pan the structure and procedures of our Republic as archaic, Jefferson, Madison and Hamilton knew what they were doing. Their mission was to avoid the trappings of a monarchy and instead force compromise.

It is alleged that Benjamin Franklin was asked by a bystander upon exiting the Constitutional Convention in 1787 what kind of government they had just given the people, to which his response was "*A Republic, if you can keep it*". To keep it requires compromise, not an abdication of conviction—and that evidence can be found in passionate debates throughout history, both in the United States and around the globe. The world awaits new leaders who will author the next great compromise to carry America, and the global community, into the future. ■

Footnotes:

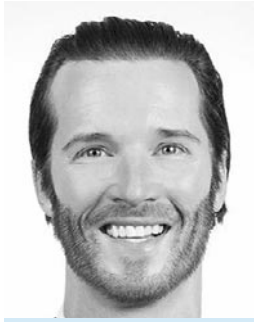
1 See: <https://abcnews.go.com/Politics/economic-concerns-hurt-bidens-approval-democrats-peril-ahead/story?id=83128327>.

2 See: <https://www.pewresearch.org/fact-tank/2021/02/03/single-party-control-in-washington-is-common-at-the-beginning-of-a-new-presidency-but-tends-not-to-last-long/>.

Many believe compromise to be a quaint concept of the past and the two major political parties in the US have only entrenched themselves further into hyper-partisan bickering

Landmark changes to Jersey's creditor's winding up regime come into effect

Stephen Alexander and Chazha Hick report on Jersey's recently expanded insolvency regime



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> ***The new mechanisms and tools...will serve to afford creditors with high levels of protections and flexibility***

Jersey has recently expanded its insolvency regime by introducing amendments to the Companies (Jersey) Law 1991, with the key change being that creditors of an insolvent Jersey company may now apply to the court to initiate a creditor's winding up (a procedure which, previously, only the debtor company could commence voluntarily).

Other important changes brought about include the granting of power to the Court to appoint a provisional liquidator and the creation of a new Register of Approved Liquidators. The Companies (*Amendment No.8*)[1] (Jersey) Regulations 2022 (Amendment No.8), which governs these changes, came into force on 1 March 2022. The new mechanisms and tools it has introduced will serve to afford creditors with high levels of protections and flexibility, maintaining the robustness of Jersey's insolvency regime and, in turn, the jurisdiction's position as an attractive location for international business.

When a creditor may apply for a creditor's winding up

Prior to the introduction of the new developments, a creditor's winding up could only be commenced by special resolution of the shareholders at a general meeting of the debtor company. A creditor may now apply to the court for an order to commence a creditors' winding up. There are certain requirements which must be met for a creditor to be able to do so, namely that the creditor has a claim against the debtor company for not less than a prescribed minimum liquidated sum of JEP 3,000 and the company is unable to pay its debts. A company will be deemed unable to pay its debts, if a demand has been served by the creditor requiring payment in respect of a sum exceeding the prescribed minimum and the company has, for 21 days after service of the demand, failed to pay the sum or otherwise disputed the debt to the reasonable satisfaction of the creditor. In addition, the creditor must either have evidence of the company's insolvency or it must have the consent of the company to make the winding up application. The application made under the new provisions must be by Representation (a local procedural step) accompanied by an affidavit. Further details of the procedure for the new creditor-led winding up mechanism are set out in the Royal Court Practice Direction 22/01 and include the requirement for creditor to place notice of the application in the Jersey Gazette.[2]

Effect of a creditor's winding up

The effects of a voluntary creditors' winding up commenced by special resolution of the shareholders at a general meeting of the debtor company also apply to the new creditor's winding up instigated by creditors by court order. For instance, from commencement of the winding up process, the company must cease to carry on its business, except in so far as it may be deemed beneficial and required for its winding up. Furthermore, no action can be taken or proceeded with against the company, except by leave of the court – and subject to such terms as the court may impose. In order for the status of the companies' members to be changed after commencement of the winding up or a transfer of the company's shares to occur, such activity must have been sanctioned by the liquidator prior to being initiated, otherwise it will be voided. The court has a wide discretion in considering an application for an order commencing a creditors' winding up. It may make an order that the creditors' winding up commences in respect of the company from the date of the application or such other date as the court deems fit.

Appointment of a provisional liquidator

The amendments provide that the court may, at any time after an application for a creditors' winding up instigated by a creditor, appoint a provisional liquidator. The introduction of this new change brings Jersey into line with a number of other jurisdictions, both onshore and offshore, which already have this protective tool in place. The intention of this aspect of Amendment No.8 is to make use of a provisional liquidator in circumstances where, in the interim period between an application being brought and the order being made effecting the winding up, there may be an immediate risk of dissipation of company assets or loss or destruction and, as such, it may be

necessary to take urgent steps to preserve the debtor company's assets, books and records. The role of a provisional liquidator is therefore a critical way in which Jersey's insolvency regime bolsters the protection afforded to creditors.

The court can appoint a person nominated by the applicant creditor or selected by the court as the liquidator and it has the discretion to request the applicant to furnish such further information as the court requires, as well as to order other parties be convened to the application. The court may also dismiss the application and may also make such further orders as it thinks fit. The steps that must be taken following the appointment of a liquidator under the new provisions include that the liquidator must, within 7 days of their appointment, call a meeting of creditors to take place 21 days after the date of the order (or the next working day). Notice of the meeting must be published in the Jersey Gazette not less than 10 days before the day for which the meeting has been called. At that meeting, the creditors are furnished with such information which is in the possession of the liquidator concerning the company's affairs as they may reasonably require.

Where a liquidator has been appointed by the court, a creditor may, within 7 days of the creditor's meeting, apply to the court for an order appointing some other person as the liquidator. Amendment No.8 also includes a provision that where, as a result of an application made by a creditor, an order for a creditors' winding up is made and the company was not insolvent at the date that the application was made, the debtor company will have a right of action against the applicant to recover damages for any loss sustained as a consequence of the order (unless the applicant had made the application while acting reasonably and in good faith). Such an action must be brought within 12 months from the date of the application for the creditor's winding up.

At any time during the course of the creditors' winding up which has been ordered by the court, a company may apply to the court for an order terminating the creditors' winding up. A prerequisite for making a successful application is that the court is satisfied that the property of the company is at the time of the application sufficient to pay in full claims filed with the liquidator or those which the liquidator has been advised will be filed within the prescribed time. The appointment or removal of a liquidator may be made on request by the company, a director of the company, a creditor, the Viscount (the executive officer of the Courts of Jersey), the Jersey Financial Services Commission, the Minister for External Relations and Financial Services or any other person. The expansion of the creditor's winding up regime also includes the establishment of a Register of Approved Liquidators, which will be published online by the Viscount. The Viscount will also exercise certain supervisory powers in the context of the new creditor's winding up, including, for example, the ability to investigate a liquidator where there are circumstances which justify an investigation.

Impact

The amendments will serve to ensure that Jersey continues to enjoy its reputation as a leader among the offshore international finance industry by putting into place greater flexibility and protection for creditors. Ultimately, this reassures creditors that a range of options and protective remedies will be available to them in Jersey for the purposes of debt recovery. The amendments demonstrate a continuing intention on the part of the legislature to adapt and improve the existing framework. Specific developments, including the production of a publicly accessible register for liquidators and supervisory functions over liquidators on the part of the Viscount, will also have the effect of increasing confidence and transparency in the insolvency process. ■

Footnotes:

1 Available at: <https://www.jerseylaw.je/laws/enacted/Pages/RO-013-2022.aspx>.

2 Available at: <https://www.jerseylaw.je/courts/Pages/RC-22-01.aspx>.

> *The amendments will serve to ensure that Jersey continues to enjoy its reputation as a leader among the offshore international finance industry*

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*

Significant ruling on the COMI definition in the Czech Republic: The Arca Investments Case

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Arca Investments a.s. (the "Debtor") is a Slovak holding company for the Arca Group, whose activity takes place mainly in the Czech Republic and Slovakia. In January 2021, the Debtor filed for insolvency at the Prague Municipal Court, due to its inability to meet its liabilities to at least 1889 creditors amounting to more than CZK 18.6 billion.

The Debtor and several of its creditors sought to open main insolvency proceedings in the Czech Republic under Article 3 of the European Insolvency Regulation (Recast). However, the Municipal Court in Prague considered that, as a Slovak entity, the Debtor's COMI was located in Slovakia and, therefore, the Czech courts only had jurisdiction to open territorial insolvency proceedings.

After multiple appeals, the Prague High Court has reversed the decision of the Prague Municipal Court and has opened main insolvency proceedings in the Czech Republic. Based on the factual circumstances, the Prague High Court agreed with the contention that the Debtor's COMI was in the Czech Republic, effectively rebutting the legal presumption that the COMI of a legal person is situated in the Member State of its registered office.

More importantly, the Debtor argued that the majority of its creditors was from the Czech Republic and most of them were of the view that the COMI was in the Czech Republic. Since most of the creditors were retail investors, the Debtor was able to collect the necessary data through questionnaires via established communication channels. Moreover, the Debtor's largest creditors also supported this view.

Moreover, the High Court in Prague deemed that, *inter alia*, the following proven facts played a substantial role in determining the Debtor's COMI:

- a significant part of the Debtor's operational management was carried out through a Czech company;
- the management of the Debtor was situated in the Czech Republic, where it made essential decisions;
- the only member of the Debtor's board of directors lived in the Czech Republic, where both ordinary business decisions and strategic decisions were made;
- only support functions were carried out at the Debtor's registered office in Slovakia;
- the place of performance under most of the promissory notes issued by the Debtor was in the Czech Republic; and
- the Debtor's legal advisors, financial capital, tangible assets and IT systems were all located in the Czech Republic.

The Prague High Court also stated that the Prague Municipal Court should not have accepted uncritically the minority view expressed by a few dissenting creditors who argued that the location of the Debtor's registered office was in Slovakia. The Prague High Court argued that, compared to the extensive presence of the Debtor in the Czech Republic, the location of its registered office in Slovakia could not amount, without more, to the COMI being in Slovakia.

For all of the above-mentioned reasons, the Prague High Court concluded that the Czech Republic was clearly ascertainable by third parties (mainly creditors) as the place where the COMI was situated and, therefore, the legal presumption that the COMI was located in Slovakia could be rebutted. ■

Restructuring of public hospitals – A new law to rescue the sector from debt

DR PATRYK FILIPIAK
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At the end of 2021, Poland had 574 public hospitals for c. 38 million inhabitants. The sector has been experiencing financial difficulties for years: its total debt is €3.6 billion of which €0.35 billion are liabilities due and payable.

Currently, hospitals cannot benefit from bankruptcy proceedings, while restructuring proceedings are not tailored to their needs. Creditors are therefore assured of getting their money back, which means that the mechanism for debt growth has no natural limits. In fact, since 2010, the overall debt has increased by 60%!

Another problem is the lack of coordinated management of hospitals. Most of them are owned by local governments at as many as three levels (cities, districts or provinces), while others belong to universities, ministries, etc. Public units often compete in the same area for patients, which is not beneficial for the public financing of health services. Very limited resources end up not being completely used and end up wasted. Competition for medical staff also significantly increases salary costs. The health system is therefore overloaded and has been further affected by the COVID-19 pandemic.

In this situation, the government has proposed a reform that will, on the one hand, implement financial restructuring procedures and, on the other, provide opportunities for re-profiling, consolidating, streamlining and unifying management procedures. Four categories of entities (A-D) have been introduced. In two of these categories, corrective and developmental actions will be mandated. A newly-established *Agencja Rozwoju Szpitali* (ARS) (Agency for Hospital Development) will be able to appoint a new hospital director, put into place professional crisis management and carry out necessary actions.

These actions will include, in particular, the withdrawal of medical services that are unnecessary in a particular area. Currently, in many smaller centres, there are multi-specialist hospitals, which do not serve sufficient numbers of patients to be cost-effective or operate at the highest levels of safety. As such, consolidation is therefore necessary, whilst however maintaining access to services for local communities. Other actions will include improving internal management procedures, including human resources and multi-entity purchasing systems, as well as the rescission of unprofitable contracts.

As part of the reforms, a hospital will also be able to propose an arrangement with its creditors to restructure its debt. During the deliberations of the Ministry of Health's working group in which the author participated, this was seen as a particularly difficult proposal. This is because hospitals will continue to be unable to go bankrupt, so creditors will not have the natural benchmark of potential satisfaction levels in bankruptcy. It was therefore agreed that, in the event of lack of consent to an arrangement by some creditor groups, the objecting creditors would receive a one-off payment of an amount corresponding to satisfaction under hypothetical bankruptcy proceedings, i.e. under the bankruptcy preference rules. This repayment is guaranteed by the ARS, but will be certainly lower than repayments under an arrangement.

The ARS will also set up a system to supervise recovery and development processes, under which hospitals will receive financial, targeted and expert support. Raising management qualifications of the managerial staff is stated as being of key importance for the reform – as, too often, the personnel still draw mainly on medical experience.

In brief, the Hospital Modernisation and Efficiency Improvement Law is expected to be adopted in Q3/Q4 of 2022. It is currently open for public consultation. ■

> ***Hospitals cannot benefit from bankruptcy proceedings, while restructuring proceedings are not tailored to their needs***

Portugal welcomes fresh money

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Given the pandemic context in which we all have been living for almost two years now and that has seriously affected companies worldwide, mechanisms to help companies cope with the economic crisis, such as preventive restructuring procedures as well as effective and swift insolvency proceedings have gained renewed importance.

Therefore, the confirmation of the long awaited transposition of the Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 by Portugal has been received with great enthusiasm. To that end, the Portuguese Parliament approved the Law 9/2022 of 11 January 2022, which introduced several legislative novelties and established measures to support and accelerate corporate preventive restructuring processes and payment agreements, and, consequently, amending the Insolvency and Corporate Recovery Code, the Commercial Companies Code and related legislation.

One of the most interesting changes in the text is related to financing incentives with positive and direct impact in the investors' sphere within recovery processes. In short, companies in Portugal that are in a proven difficult economic situation or in a situation of imminent insolvency, but still susceptible to recovery, may resort to an alternative to the typical insolvency process: the Special Revitalization Process (PER).

This alternative process aims, essentially, to implement negotiations between the company and its creditors, approve a recovery plan and promote the revitalization of the company, and thus allow for the continuity of activity.

The success of a recovery plan often depends on obtaining financial backing for a company subject to the PER. In order to promote and encourage such bankrolling, the new legislation applies to creditors who, in the course of the recovery proceeding of a given company (new financing) or in the execution of a recovery plan (interim financing), finance its activity by providing it with capital for its revitalization. These creditors will have a claim against the insolvent estate up to an amount corresponding to 25% of the company's non-subordinated liabilities at the date of the declaration of insolvency, provided this is declared within two years as from the date of the final and unappealable decision approving the recovery plan.

Furthermore, lending made available to companies over that percentage will benefit from a general preferential ranking before the general preferential ranking granted to employees (one of the top ranked creditors). Similar treatment applies to debts arising from financing made available to the company by creditors, shareholders or any other entities specially related to the company subject to the recovery plan.

The aforementioned law also establishes that the financing acts referred to are protected against any challenges, executions or declarations of nullity. Moreover, the providers of new financing or interim financing cannot incur civil, administrative or criminal liability on the grounds that such financing is detrimental to the creditors as a whole, except in cases expressly provided for by law.

These legislative innovations are, therefore, an excellent opportunity for companies in difficult economic situations or facing imminent insolvency to attract external financing and investment to help them overcome the adverse conditions they face.

In the same vein, the newly introduced amendments are also positive from the point of view of creditors and possible financiers, as they will be able to promote the faster recovery of their debtors or financed companies by having protection through the rights now granted to them. This brings certainty to and provides the economic interest for new funding and business in general which have been completely forgotten so far!

Due to the aforementioned extra layers of protection for the company's financial backers, it is expected that, once the new law comes into force (11 April 2022), financing companies in difficulty will become more attractive to third parties, as well as to shareholders. This will consequently provide higher chances of success for PERs and necessarily improve the turnaround statistics for companies that will now have other sources of funding.

Such expected results would confirm the effectiveness of the legislation described above and the consequent success of this type of proceeding, both from the point of view of the recovered company and its creditors. ■

View from the UK:
More detail and discussion needed...?

Duncan Swift looks at the UK Government's proposals for a new approach to insolvency regulation.

The Government's proposals to change the insolvency profession's regulatory framework are the largest and most significant overhaul of insolvency regulation since the introduction of the Insolvency Act 1986.

This had been planned for some time, with the Government committing in 2015 to carrying out a review by mid-2022. However, beyond an initial call for evidence in 2019, the delivery of this review was delayed by the pandemic and the need to introduce emergency insolvency legislation.

That changed before Christmas, when the Government announced a consultation on a suite of new policies that, if implemented, would be a total overhaul of our current regulatory framework.

At the heart of these is the proposal for a single "independent" government regulator that would have the power to authorise, regulate and discipline individual IPs and firms providing insolvency services, as well as setting regulatory, technical, professional, ethical and educational standards.

This – alongside the other proposed reforms, which include firm regulation, proposals for compensation and other measures – would replace the current system of Recognised Professional Bodies (RPBs), which have carried out insolvency regulation since the introduction of the Insolvency Act 1986.

A need for deeper scrutiny

The Government's proposals could be an opportunity for a constructive discussion on how regulation could be even more effective. Change in the regulatory framework has been mooted for some time and many in the profession are keen to engage in a discussion around what the future of regulation might look like.

However, these proposals are lacking some crucial details. These details need to be provided and discussed – especially if this is going to be an evolution of our current approach.

Given that the UK's existing regulatory framework is internationally recognised as being effective and is a key pillar of our globally-ranked insolvency framework, any system that replaces it needs to build on it, and evolve in areas that have been identified as needing review.

Two critical issues

The key issues with the Government's proposals lie in the plan to effectively house the single regulator within the Insolvency Service and the lack of corresponding regulation of the Government's Official Receiver that undertakes insolvency work. Both raise major conflict of interest issues which should be addressed before the proposals move forward.

In their current form, under the new framework, the Government would set insolvency legislation, regulate insolvency practitioners and their firms and then effectively compete with those same insolvency practitioners for work through the Government's Official Receiver, which is not presently nor as proposed subject to the same regulation.

The Government needs to clarify how it will ensure there is a level playing field for the public and private sector parts of the insolvency profession if these proposals are to form the basis of our new regulatory framework – and provide more detail on how the single regulator would be genuinely independent.

A long, detailed process

Although the consultation on the Government's proposals closes on 24 March, it will be some years before any changes are introduced.

Once the deadline passes, the Government will need time to review submissions received before it publishes its response to the consultation. And as the creation of this regulator will require primary legislation, the timing of the introduction of any changes will be dependent on the parliamentary calendar and the Government's other legislative priorities.

A potential upside to this is that the Government has time to engage with the profession and work with it to develop a new system of regulation. It is critical that the conversation continues after the consultation, so that we can ensure we have a regulatory framework that works for the profession – and all the stakeholders it supports. ■

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

> ***The Government needs to clarify how it will ensure there is a level playing field for the public and private sector parts of the insolvency profession***

Technical Update:

The latest publications of interest on prevention, restructuring and insolvency matters (Q3 2021-Q1 2022)

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***

Final publication of the outcomes of the INSOL Europe/ Lexis®PSL Joint Project on 'How EU Member States recognise insolvency and restructuring proceedings of a third country'

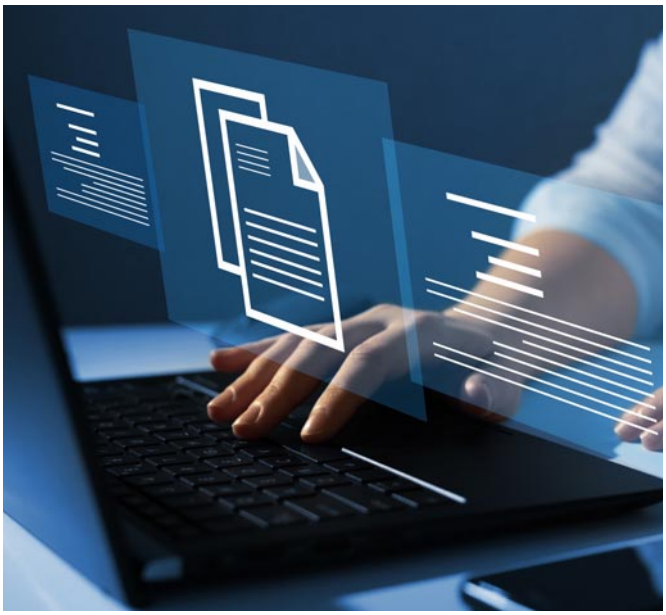
The announcement was published on 19 January 2022 and the document (PDF) has been made available at: *www.insol-europe.org/technical-content/introduction*

We are grateful to all INSOL Europe Country Coordinators, national experts from the EU Study Group and external contributors for their highly valuable input which has made this publication possible for the benefit of all INSOL Europe members.

For more information, please see the excellent article by Kathy Stones from LexisPSL (UK) in the previous edition of Eurofenix (2021-2022 Winter edition, pp.18-19).

Updates on the Tracker on the Implementation of the EU Restructuring and Insolvency Directive

The tracker on the implementation of the EU Restructuring and Insolvency Directive has been regularly updated on the INSOL Europe website. Since my last technical column, updates have been published for *France, Spain, Germany, The Netherlands and Portugal*.



Please note that the links for the legislation implementing the EU Directive on Restructuring and Insolvency in *Austria, France, Germany, Greece and Portugal* (as communicated to the EU COM) have been published at: *www.insol-europe.org/tracker-eu-directive-on-restructuring-and-insolvency*.

As the deadline of July 2022 is fast approaching, please keep a regular eye on it!

INSOL Europe Worldwide Digital Assets Case Register

The new Worldwide Digital Assets Case Register provides a summary of cases and judgements concerning digital assets with an inventory table produced with thanks to the contributions of INSOL Members as well as members of the Insolvency Tech & Digital Assets Wing.

As at 21 February 2022, the table contains relevant information regarding cases from *UK, Turkey, Poland, Estonia and the US*.

Should you know of a case which might be of interest, please fill in the template available at: *www.insol-europe.org/worldwide-digital-assets-case-register* and send it to one of the Co-chairs of the Insolvency Tech & Digital Assets Wing (José Carles (Spain), Dávid Oršula (Slovakia), Laurent Le Pajolec (Poland)) by email to: *insolvencytech@insol-europe.org*.

National Insolvency Statistics

The latest insolvency statistics for *France* (Year 2021), *Switzerland* (2014-2020), the *Netherlands* (Year 2021), *Italy* (Q3 2021) as well as for *England & Wales, Northern Ireland and Scotland* (Q3 & Q4 2021 including the link to the monthly insolvency statistics in response to the COVID-19 situation) are available from the dedicated technical section of our website at: *www.insol-europe.org/technical-content/national-insolvency-statistics*

I am also pleased to inform INSOL Europe members that a Report on the first year of functioning of simplified restructuring proceedings in Poland (as at February 2022) is available in English at: *www.insol-europe.org/technical-content/national-insolvency-statistics-poland*

I am grateful to Karol Tatara and Mateusz Kaliński from TATARA & Partners for sharing this information.

Interactive EBRD Business Reorganisation Report

As per the previous cooperation of INSOL Europe with the EBRD (Summer 2021), we are delighted to inform the INSOL Europe members that the interactive EBRD Business Reorganisation Report on insolvency and bankruptcy systems has been made available.

It includes a main report and individual economy profiles (as well annexes) for all 38 economies where the EBRD invests, including many countries where INSOL Europe has members.

More information is available at: *www.insol-europe.org/eu-study-group-links*

EU legislation updates

Two texts of reference that might be of interest to INSOL Europe members have been published in the Official Journal of the European Union, namely:

(1) The Directive (EU) 2021/2167 of 24 November 2021 on Credit Servicers and Credit Purchasers relating to 'Non-Performing Loans' (NPLs) (entry into force on 28 December 2021, OJ L 438, 8.12.2021, p. 1-37).

(2) Regulation (EU) 2021/2260 of the European Parliament and of the Council of 15 December 2021 amending Regulation (EU) 2015/848 on insolvency proceedings to replace its Annexes A and B (entry into force on 9th January 2022, OJ L 455 of 20.12.2021, p. 4-14).

Relevant links are available at: *www.insol-europe.org/eu-study-group-links*. ■

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

Other Useful Links

Coffee Breaks Series 2021
>www.insol-europe.org/publications/web-series

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

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

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

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

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

> LinkedIn
www.linkedin.com/company/insol-europe/

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

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

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

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

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

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

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

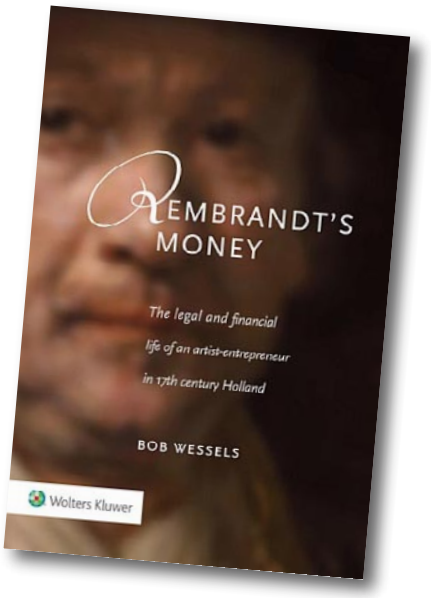
> www.insol-europe.org/academic-forum-news

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

If you would like to suggest a book for a future edition, please contact our book editor **Paul Omar** (khaemwaset@yahoo.co.uk)

Rembrandt's Money: The Legal and Financial Life of an Artist-Entrepreneur in 17th century Holland

Bob Wessels (1st edition) (2021, Wolters Kluwer, Deventer) xxxiv + 458 pp., EUR 65, ISBN 978-90-131-6489-3



Rembrandt the artist needs no introduction. The Rijksmuseum in Amsterdam has his finest work on display. Rembrandt the entrepreneur, who dealt in the commodity of his artistic talents and who sought commissions to earn his keep, is less well-known, though reference is oft-made to his becoming bankrupt due to a taste for the genteel pleasures of 17th century Dutch society. Much of what has been written, however, is urban myth, the reality of his financial affairs being difficult to resolve at a few centuries' distance, particularly with the seemingly fragmentary preservation of sources. Into this void steps a work by the renowned Bob Wessels, Emeritus Professor at the Leiden Law School.

Though written from the perspective of an academic lawyer fundamentally interested in the panoply of insolvency, the wider legal and social history the work contains is impressive. As it charts its course through the major events and significant relationships of Rembrandt's life, themes emerge that require an insight into constitutional and political structures, marriage, property and succession laws of the various provinces of the Netherlands, the operations of the courts and particular procedures of relevance to Rembrandt's precarious finances as well as histories of the various *dramatis personae*. These are collected in "windows" at the end of a text that, although by the author's own admission does not pretend to be an exhaustive biography, is extraordinary in its detail.

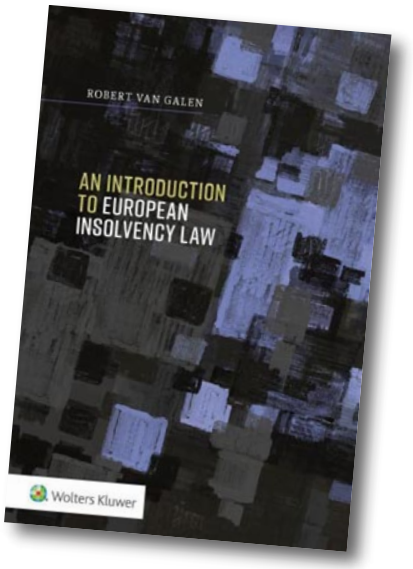
Accompanied by a full bibliography with reference to works from a variety of disciplines, of which good use is made in the supporting arguments for and footnotes to the text, this work is unique. Though it could be criticised by legal historians in that more sources are available that could have been included, what is here is not by any means the product of an amateur interest. This is a serious work that crowns Professor Wessel's long career, adding considerably to his reputation as a scholar. It incidentally offers more rigorously evidenced insights into the life of the artist, his financial dealings and transactions. It can be recommended none too highly as a *tour de force* worthy of the statures of the author and the artist.

Paul Omar, Technical Research Coordinator, INSOL Europe

> ***This is a serious work that crowns Professor Wessel's long career, adding considerably to his reputation as a scholar***

An Introduction to European Insolvency Law

Robert van Galen (1st edition) (2021, Wolters Kluwer, Deventer) viii + 220 pp., EUR 70, ISBN 978-90-131-6458-9



The architecture of European (Union) insolvency law has been decades in the making, containing within it facets of private international law, procedural law and rules on applicable law, employment law and the law relating to the insolvency of financial institutions and insurance undertakings. The piecemeal approach to construction of this topic area has largely resulted from debates about the relative competence of the EU authorities and member states, but has more recently and notably expanded to encompass the introduction of rules designed to have an impact on the substantive insolvency law of member states.

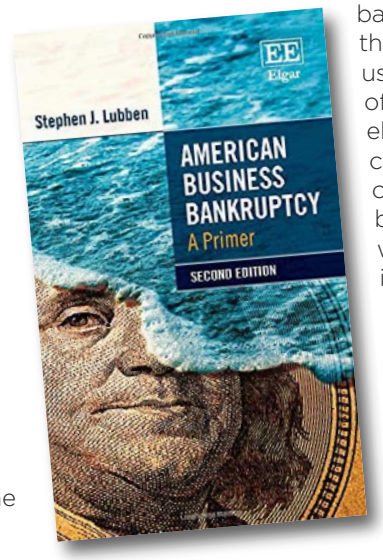
This text presents itself a *vade mecum* to European insolvency law and, chiefly, the main texts of this architecture in four discrete areas: the Recast European Insolvency Regulation 2015, the Directive on Restructuring and Insolvency 2019, TUPE rules as well as wage guarantees and pension plans. In each of these areas, the texts are outlined, their workings dissected and practical examples provided. These are then supported by the jurisprudence cited with references being made to further reading and sources. Overall, though the work is a short one (120 pages plus the referenced texts set out in the form of annexes), nonetheless the discussion approaches a level of detail and analysis that provides more than just an introduction.

While modestly disclaiming any intention of the work forming a "comprehensive treatise", the deep treatment of the materials, reliant on the author's extensive expertise (including as a member of the European Commission's Expert Group on Restructuring and Insolvency) and interest in the subject, is clearly visible in the many salient observations and comments about the texts covered and their workings. In sum, this is a useful text for those at all levels of engagement from novice to specialist.

Paul Omar, Technical Research Coordinator, INSOL Europe

American Business Bankruptcy: A Primer

Stephen Lubben (2nd edition) (2021, Edward Elgar Publishing, Cheltenham) 204 pp., GBP 63, ISBN 978-1-80037-919-0



Insolvency and restructuring law tends to be a complex area of study. The American system is well-known globally as an effective framework for corporate restructuring, having been emulated the world over, including in the EU's own Preventive Restructuring Directive 2019/1023. The author's second edition of his primer on *American Business Bankruptcy* provides a concise and accessible description of the key chapters of the US Bankruptcy Code.

Divided into five distinct parts, Lubben begins with a short historical discussion of the provenance and scope of American bankruptcy law. He then provides a useful description of the key elements that are common to all corporate bankruptcies while focusing on important characteristics of the American system. The last three parts provide a concise explanation of the three main procedures: liquidation under Chapter 7; restructuring under Chapter 11 and the many options that it provides such as the pre-pack and s363 sales; as well as the mechanism for recognising foreign bankruptcy cases under Chapter 15.

This book would be quite useful to students of insolvency law and indeed anyone who wishes to develop a working knowledge of the key aspects of the American insolvency framework. It is direct and clear, while also providing enough depth and discussion that it would also be useful from a comparative perspective. It is a very practical synthesis which, in the second edition, integrates the recent Small Business Reorganisation Act.

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2022

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6-9 October	INSOL Europe Annual Congress *Dubrovnik, Croatia*

2023

May	INSOL Europe EECC Conference *Vilnius, Lithuania (TBC)*
11 & 12 October	INSOL Europe Academic Forum Conference *Amsterdam, The Netherlands*
12-15 October	INSOL Europe Annual Congress *Amsterdam, The Netherlands*

2024

2 & 3 October	INSOL Europe Academic Forum Conference – *Sorrento, Italy*
3-6 October	INSOL Europe Annual Congress *Sorrento, Italy*

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