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The journal of INSOL Europe
Winter 2016/17

35th Annual Congress 2016

Full report from Cascais, Lisbon

Fashion

Restructuring the industry for survival

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- The global impact of product recalls
- How do you value a start-up business?
- Does Estonia need a sandbox?
- Personal guarantees in Lithuania
- Book reviews, country reports and more...

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Joint Chief Editors
Guy Lofalk,
Lofalk Advokatbyrå AB (Stockholm)
Annerose Tashiro,
Schultze & Braun (Achern)

Eurofenix Français:
Sponsored by CNAJMJ – France
Editor/enquiries: Florica Sincu
Email: *floricasincu@insol-europe.org*
Translation: Gabrielle Allemand

Advertising & Sales enquiries:
Edward Taylor, MRP Print
Email: eurofenix@mrp.uk.com
Tel: +44(0)115 955 1000

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Correspondence, including ideas for articles, should be sent to:
Paul Newson, PNDesign
Email: pndesign@icloud.com

Welcome from the Editors

ANNEROSE TASHIRO GUY LOFALK

Once again, here is a rich and interesting issue of our "friends and family's" magazine, to borrow the words of our new president, Steffen Koch.

We have left 2016 behind us and I don't think I exaggerate if I say that it was an eventful, complicated and interesting year. Not all events were desired, but many of them will have consequences for a long time and maybe forever. Among the more tragic are the destructive and cruel deeds of the so-called Islamic state in Syria, Iraq and elsewhere, and its terror strikes, mostly in Europe, but also in Turkey. We also witnessed the British people's wish to exit the European Union, Brexit, and maybe the peak of the refugee crisis and the support from the European people. Together, these events oblige Brussels to find the best ideas for developing Europe in the most cooperative way. What we really need now in the Union is cooperation and patience, together with the wish to find long-term solutions for our challenges. I read somewhere that Europe has never-ever experienced such a long period of peace since the 2nd World War. I think this is the result of the creation of the Union and the open borders.

Outside Europe we watched the presidential election in the US. Some days ago I saw a panel debate from early Autumn 2016, where the members of the panel were asked who they thought was, at the time, the most plausible winner of the presidential election. After some named Clinton, Sanders and others, one woman said: Donald Trump. The audience reacted immediately with a roar of laughter. That time is now past. One of many interesting things in the outcome of the US presidential election is that it showed that it was possible to win an election even when all media are united against the winning candidate. This also placed the focus on the social media and their impact. This leads me to another event during last year, the attempted coup in Turkey on the 15th of July. President Erdogan was prisoner in his plane, circling above Istanbul, when the military were closing the bridges over the Bosphorus and closing down the television and radio in Turkey. President Erdogan then used social media to get people out on the street to fight the military coup. It is interesting to remember that for a long time before, the President had been trying to restrict social media.

I think I can go on for a long time about the events of last year, but I guess you have had plenty of time to debate all those events. Sorry, but I could not refrain from mentioning a few.

Back to our magazine and its content, which fills us all with pride. Our events have been more peaceful and social, without many media implications. First of all, I think of our Annual Congress in Cascais, with a record number of participants. Even if you attended and think you know all about what happened, I urge you to read Myriam Mailly's article on page 14. I did attend but had great pleasure to read about all I did not see during the conference. Talking about conferences, I would certainly suggest you to read about our upcoming Eastern Europe conference in Budapest. Not only is it an excellent choice of venue, but it is also, as usual, a very good opportunity to meet old friends and make new ones and network. When reading this article, I also learned that Budapest was the financial hub of Eastern Europe, which in itself is a very interesting point.

Of course, there are the country updates and book reviews of great interest, as usual. What did catch my eye in particular was the resumé about investing in distressed debt.

Finally, I suggest you visit INSOL Europe's website which gets better and more useful every day. Thank you and congratulations to our website editor!

I wish you pleasant reading and a happy new year!

Guy Lofalk

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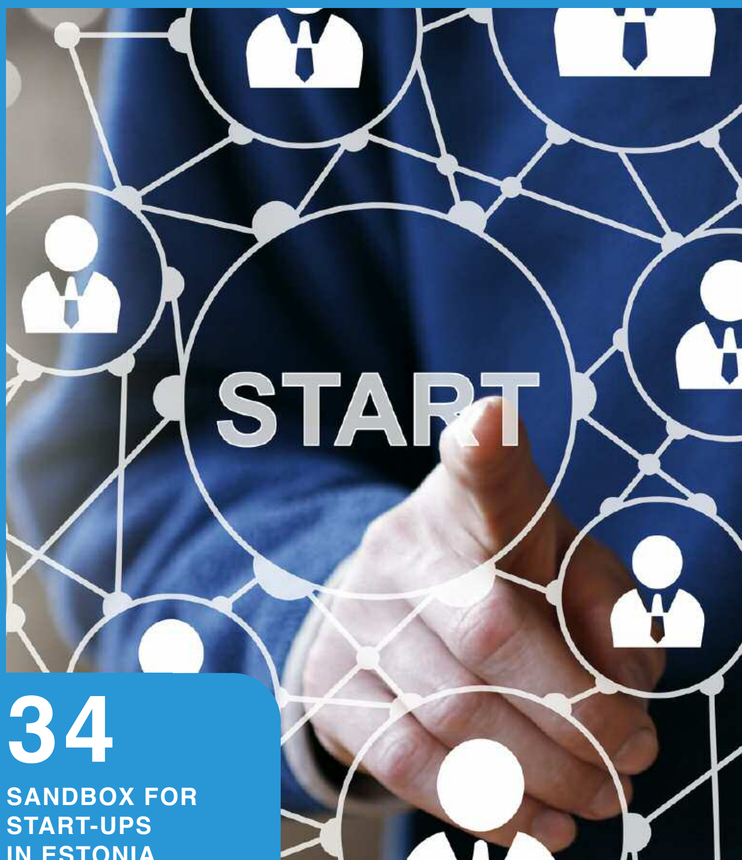

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Welcome, Family and Friends

INSOL Europe's new President, Steffen Koch, launches his plans for the forthcoming year... and beyond

Photo by INDat

STEFFEN KOCH
INSOL Europe President

> **I HAVE CHOSEN A HEADLINE FOR MY PRESIDENCY WHICH I HAVE ALREADY LAUNCHED IN CASCAIS AT THE END OF THE TECHNICAL PROGRAMME: "FAMILY AND FRIENDS"**

When you read this column, already four months of my presidency have elapsed and another eight months are to go.

I thoroughly enjoy serving this wonderful organization and look forward to continuing my efforts to make our INSOL Europe family even more attractive for its members.

"Family and Friends"

For me, INSOL Europe has always been "the place to be" when it comes to European restructuring and networking. There is no other European association that delivers both: excellent knowledge throughout the whole range of different professions acting in the field of restructuring and insolvency and a wonderful familiar and friendly spirit.

With this in mind, I have chosen a headline for my presidency which I have already launched in Cascais at the end of the technical programme: "**Family and Friends**".

This slogan describes in a very simple way what INSOL Europe is for its members: a family of open minded professionals ready and willing to exchange techniques and approaches to help businesses in trouble throughout Europe.

If you, as a member, give some time, enthusiasm and dedication to INSOL Europe, you will receive the same back from the INSOL Europe family. You will take advantage not only business-wise but also very personally by getting to know other members of this wonderful family called INSOL Europe!

Get involved in one of our working groups!

Bearing this in mind, our various working groups are key to the further enhancement of our INSOL Europe family.

Our Academic Forum, Anti-Fraud Forum, Eastern European Countries' Committee, EU Study Group, Insolvency Office Holders Forum, Judicial Wing, Financial Institutions Group, Turnaround Wing and Young Members Group are working constantly throughout the year and offer to every family member, and also to our friends, the unique opportunity to work jointly on new projects and get involved constantly.

Be a member of one of our many wings, forums and groups and participate actively in their continuous work and, even more importantly, in between our Annual Congresses. So, get involved.

You will then experience how rewarding it is to be part of the INSOL Europe Family!

Executive and Council

The Executive and the Council of INSOL Europe are working hard to keep our family in good shape.

I have initiated that Council and Executive not only interact twice a year but every two months via a conference call.

The council, with its 22 members representing many jurisdictions and professions, is the "powerhouse" and the "think-tank" of INSOL Europe together with the Executive. Our discussions on how to develop INSOL Europe in the future are always inspiring and fruitful. By intensifying the collaboration between the Executive and the Council we will be able to speed up the decision-making process in order to make INSOL Europe even better and more valuable for its members – you.

If you have any ideas to share with us, please contact either the Council member representing your country or any other member of the Council. *Please make use of our INSOL Europe Council!*

INSOL International and other friends

I would also like to reach out to our friends: associations, especially INSOL International, and not-yet-members, also being active in the area of restructuring. INSOL Europe is grateful for their support and their involvement.

Together with the president of INSOL International, my dear friend Mark Robinson, I initiated to organize the first joint seminar of INSOL Europe and INSOL International for many years, to be held in fascinating Tel Aviv on 27 June 2017, preceded by a welcome reception and dinner on 26 June. Save the date!

The partnership with our friends from INSOL International offers our family members access to the international restructuring community beyond Europe, especially in the US, Asia and beyond. I am very determined to make this very important relation

Share your views!

between our two organizations even stronger because we and our members are both taking advantage from it.

But I would also like to reach out to other organizations and associations working in the field of cross-border restructuring and insolvency. INSOL Europe respects and acknowledges what they are striving for: finding (cross-border) solutions for businesses in trouble.

Wherever cooperation makes sense I am the first to support it. It is not a question of they *or* we but of they *and* we!

Taskforce 2025

Of course, my main goal is always to make INSOL Europe constantly better in serving its members, so that it continues to grow like it has done successfully over the last decade.

INSOL Europe is "the" pan-European organisation for restructuring and insolvency matters throughout the whole range of professions involved. With this in mind I proposed to the Executive to implement a Taskforce 2025 to examine the whole range of our activities in order to find out if it meets the expectations of our members and where we have space for improvement in the future. The executive unanimously approved this proposal and so the taskforce will be installed this Spring. *This task is very important: it will involve all our members from whom we expect feedback to help to make INSOL Europe even better.*

Brexit and the UK family members

It is still not clear when the negotiations of the UK government with the EU will start, seeking to reach an amicable settlement of the UK leaving the European Union. Without any doubt this surprising vote of the British people has led to a high level of uncertainty both for the EU and the UK.

What is obvious to me is the fact that *our UK members will remain a vital part of the INSOL Europe family*. We need their input in the future as we did in the past, when it was so important to develop the insolvency regimes throughout Europe to the level we have reached today. In this context it is a strong signal to our UK members that with Alastair Beveridge we have chosen a UK Vice-President who will take over the Presidency of INSOL Europe following our 2018 Annual Congress in Athens. As President of INSOL Europe I am determined to preserve as strong and vital links with the UK membership as in the past.

EU and UNCITRAL

INSOL Europe has been also very active within the EU and UNCITRAL (United Nations Commission on International Trade Law). We were involved in several hearings of the EU Commission and regularly sent a delegation, headed by the President, to the UNCITRAL sessions taking place twice a year. We will continue this important task and will do even more.

For next year, we are planning a one-day-seminar in Brussels on the possible impact of Brexit on the EIR (European Insolvency Regulation) and the insolvency/restructuring community.

INSOL Europe is the European voice of the whole range of professions acting in the field of restructuring and insolvency and is duly recognized by the European Union and the United Nations.

INSOL Europe High Level Course on Insolvency Law in Eastern European Jurisdictions

I am proud to report that in 2017 INSOL Europe will establish the first "INSOL Europe High Level Course on Insolvency Law in Eastern European Jurisdictions" starting in February in Bucharest. Three modules (each three days long) between February and November 2017 will offer the participants an efficient training course on modern approaches in insolvency. International experts from INSOL Europe and local experts will combine their knowledge in an interactive and rewarding course for high level lawyers and IPs, judges and state officials of the relevant insolvency agency. We are already planning the next course in a different eastern European country to be held in 2018.

With this High Level Course, INSOL Europe underlines its leadership in the field of education too, as it has already taken leadership in many other areas before, e.g. by publishing the INSOL Europe Turnaround Wing Guidelines this year.

Our INSOL Europe family is in better shape than ever and is looking proudly to a bright future. *So let us make 2017 a very special year, dear family and dear friends!* ■

Steffen Koch taking over the presidency of INSOL Europe at the Annual Congress

"

INSOL EUROPE IS THE EUROPEAN VOICE OF THE WHOLE RANGE OF PROFESSIONS ACTING IN THE FIELD OF RESTRUCTURING AND INSOLVENCY AND IS DULY RECOGNIZED BY THE EUROPEAN UNION AND THE UNITED NATIONS

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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 year, please contact Paul Newson, Publication Manager: paulnewson@insol-europe.org

INSOL Europe now has several LinkedIn groups which you can join and then engage with its members:

- INSOL Europe (main group)
- Eurofenix: The Journal of INSOL Europe
- INSOL Europe Turnaround Wing
- INSOL Europe Financial Institutions Group
- Eastern European Countries' Committee
- INSOL Europe Anti-Fraud Forum

To join one of the groups, visit: **www.linkedin.com** and search for the group by name.

Make a comment!

Share your views!

You will have noticed that we have added QR Codes to every main article to encourage readers to give us their views. The QR codes take you the LinkedIn group for ***eurofenix*** (see above).

Of course, you are welcome to pass on your comments to any member of the Executive Committee, whether by email or in person!

2016 Council Elections

Retirements and changes to the Executive Officers

At the close of the Lisbon Congress (*see full report on page 14*), Alberto Núñez-Lagos (Spain) stepped down as President to become Immediate Past President, Steffen Koch (Germany) became the new President, Radu Lotrean (Romania) became the new Deputy President and Alastair Beveridge (UK) was elected by Council as the incoming Vice President. Jim Luby (Ireland) remained on for a further one year as Treasurer.


Honorary Member Catherine Ottaway (France)

There were also several changes to the structure of Council. Countries with 30 or more members are entitled to a reserved seat on Council and due to other vacancies, nominations from members in Romania, Austria, Ireland, The Netherlands, Sweden and Switzerland were invited to call for candidates from their own country. Following the nomination and election process, Marcel Groenewegen and Thomas Bauer were uncontested and remained on Council for a further three years. Candidates Susanne Fruhstorfer (Austria), Barry Cahir (Ireland) and Simona-Maria Milos (Romania) were uncontested and duly elected to Council. For Sweden, a vote took place amongst the Swedish membership and Hans Renman was duly elected.

Two non-reserved seat vacancies on Council (which may be occupied by any country) also became available as Rocco Mulder (The Netherlands) and David Rubin (United Kingdom) also completed their first three-year term in office. Four nominations were received and following a vote amongst the membership, the two successful candidates were Alice van der Schee (Netherlands) and David Rubin (UK).

Additionally, Carlos Mack (Italy) and Nigel Davies (UK) stepped down as co-opted members of Council and so too did Jim Luby (Ireland) since his appointment as Treasurer. On the recommendation of the Executive Board, Ernst Giese (Czech Rep) and Robert Van Galen (The Netherlands) were co-opted to Council for an initial one year term and previously co-opted members Marc André (France), Chris Laughton (UK), Sabina Schellenberg (Switzerland), Michael Veder (Neths) and Catherine Ottaway (France) were also reappointed for a further one year term.

Finally, Honorary Membership for outstanding meritorious service on behalf of the Association was awarded to Catherine Ottaway (France) and David Rubin (UK).

Eastern European Countries' Committee Conference 2017: 11 & 12 May, Budapest (Hungary)

We are pleased to announce that Budapest will be the host of our 2017 EECC conference from 11-12 of May, where the theme will be "Winding up of (assetless) companies in Central-Eastern Europe – The reality show".

About Budapest

Cited as one of the most beautiful cities in Europe, Budapest's extensive World Heritage Site includes the banks of the Danube, the Buda Castle Quarter, Andrássy Avenue, Heroes' Square and the Millennium Underground Railway, the second-oldest metro line in the world. It has around 80 geothermal springs, the world's largest thermal water cave system, second largest synagogue, and third largest Parliament building. The city attracts about 4.4 million tourists a year, making it the 25th most popular city in the world, and the 6th in Europe.

Financial hub

Budapest is considered a financial hub in Central Europe. Where better could we hold INSOL Europe's annual Eastern European conference to discuss the actual developments in the insolvency landscape?

Changing landscape

More and more insolvency professionals are being confronted with assetless companies. What to do when a company does not seem to have any assets but still has some debts? How to deal the different jurisdictions with such situations? At the conference, representatives of the Hungarian Ministry of Justice and of Economy, High Court will be present. Practical solutions, how to sell assets, and developing the education of Insolvency Practitioners are topics that safeguard the capabilities of the insolvency profession.

The European Commission has finally published a proposal for a directive on 22 November 2016. What will that mean for practitioners and governments across Europe? The landscape will change, that's for sure!

Industry experts

All in all, attending our conference presents a valuable experience and an excellent opportunity to meet industry experts and learn about the latest trends in insolvency.

Networking & Innovation

The conference will be preceded by an optional networking dinner in downtown Buda or Pest, during which the guests can have a taste of both Hungary's culinary traditions and folk music and dance.

The EECC Conference will bring delegates fresh knowledge, widen their network, stimulate their innovative self and expand their vision while providing a relaxing and memorable time in this beautiful city. We are very excited about this event and look forward to welcoming you in Budapest.

Further information and registration will soon be available on our website, www.insol-europe.org

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

INSOL Europe Working Group Updates

Many of our Working Groups and committees took the opportunity to meet at the recent Annual Congress in Lisbon, where they were able to update members on work to date and explain their plans for the future.

Updates from these groups, including the Anti-Fraud Forum, IOH Forum, Judicial Wing and Young Members Group are regularly published on the INSOL Europe website at: **www.insol-europe.org/about-us/about-our-working-groups**

If you would like to get involved in one of the groups, please contact the chair of that group directly for further information.

EIR Case Register Update

After a period of six years, during which Chris Laughton had a leading role in creating and developing the INSOL Europe EIR Case Register and finally negotiated an agreement with Lexis Nexis to host it, he has now handed over the reigns to Reinhard Bork.

Prof. Bork and Mr Laughton will manage the Register as a team for a transition period over the next year, during which Reinhard will do the day-to-day work in cooperation with the Case Register Board, the National Correspondents in collusion with Chris who is happy to assist in a consulting-type capacity and represent the Case Register in Council.

The Case Register can be accessed at: www.insolvencycases.eu

INSOL Europe Young Members Group and Anti-Fraud Forum Joint Conference: A Joint Approach to Combating Fraud

Grant Thornton UK was delighted to host this conference in London on 8 and 9 November. Over 40 delegates from jurisdictions including the UK, Portugal, Ireland, The Netherlands, Belgium, France, Sweden, Switzerland, Germany, Latvia, Romania, Bermuda and the Czech Republic attended, enjoying the opportunity to network over drinks on 8 November, with the technical session on 9 November.

The theme of the programme was fraud, with presentations by experts in their fields, for the most part members of INSOL Europe and the Anti-Fraud Forum or the Young Members Group. This included opening remarks from INSOL Europe President Dr Steffen Koch (hww hermann wienberg wilhelm). Robert Hunter (Edmonds

Marshall McMahon) spoke about witness recollection and the risks of subjectivity. A panel consisting of Georges-Louis Harang (Hoche Societe d'Avocats), Bart Heynickx (Altius), Patrik Kalman (Tragardh Advokatbyra) and Robert Schiebe (Schiebe und Collegen) discussed economic fraud legislation. Edvins Draba (Sorainen) and Eduardo Peixoto Gomes (Abreu Advogados) provided country reports, whilst Vijay Rathour (Grant Thornton UK LLP) spoke about identifying, investigating and preventing fraud by using forensic tools and technologies. Finally, Nick Pike (Pinsent Masons LLP) spoke about funding litigation in insolvent estates. Welcome remarks were provided by Carmel King (Grant Thornton UK LLP) and the Co-Chairs of the Young Members Group Sabina Schellenberg (Froriep) and Slavomir Cauder (Giese & Partner), and the closing remarks of the day were provided by Anti-Fraud Forum Co-Chair David Ingram (Grant Thornton UK LLP).

Lively interactive discussions took place around a number of topics, indicating that this conference was the first of many opportunities for the Anti-Fraud Forum and the Young Members Group to work together to promote their goals and those of INSOL Europe.

Italian Treaty on Insolvency Law

"Crisi d'impresa e procedure concorsuali"

Publisher: OMNIA - Legal treatises
Editors: Oreste Cagnasso and Luciano Panzani
Length: 4832 pages in 3 volumes
Price: €260.00
ISBN: 978-88-598-1335-4
www.shop.wki.it

A new book has been published in Italian with five chapters on comparative law written in English.

This work examines, through a multidisciplinary and cross-sectoral approach, the complete discipline of the bankruptcy law, providing a high-profile comment and extremely practical approach, by considering the existing legislation and the reform projects.

Through their solid scientific background and professional experience, the authors analyze in detail the normative data, while providing an overview of the practical aspects offered by the Court, with guidelines issued by the most significant doctrine. Special attention is paid to inputs from the work of the Rordorf Commission, while conducting a review of the existing system with some of the most significant European and international realities.

With contributions from over 60 authors this book is a cornerstone for all professionals involved in the corporate crisis management process.

Investing in Distressed Debt in Europe: The TMA Handbook for Practitioners

Publisher: Globe Law and Business
Consulting editor: Ignacio Buil Aldana
Publication date: November 2016
Format: Hardback
Length: 327 pages
Price: £155.00
ISBN: 9781911078104

Tom Cox, Damian Malone and Mark Sinjakli of AlixPartners have written the introductory chapter to this volume. They discuss the evolution of the distressed debt market through the emergence of the European high yield bond market in 1997, the dotcom boom, the financial crisis and subsequent attempts by banks to deleverage their balance sheets. There are thoughts on why companies become distressed, distressed investment strategies and the impact of valuation in distressed investment and restructuring discussions.

About the book

The European distressed debt market has grown exponentially during the last few years, experiencing very significant development. Many investors have entered that market with the intention of profiting from the opportunities that this market is offering them. However, navigating the waters of the European distressed debt market has not always been easy, because this market is far from homogeneous and legal fragmentation is the norm.

This co-publication with TMA Europe provides an overview of the European distressed debt market, covering debt trading, non-performing loans, direct lending, restructuring and workouts. It analyses these topics and others from a pan-European point of view, and is intended as a practical guide for anyone seeking a better understanding of the commercial and legal complexities involved in a highly fragmented market where different jurisdictions, legislative

frameworks and market practices apply.

INSOL Europe members are entitled to a 20% discount. Please enter **INSOLDDI** on the check out page to receive your discount at: **www.globelawandbusiness.com/IDD/**

National Conference of Bankruptcy, 3-4 November 2016 "Criminal Interference in Insolvency Proceedings"

Bucharest was the venue on 3-4 November 2016 for the National Conference of Bankruptcy, organized in partnership by the National Institute for Training of Insolvency Practitioners (INPPI) and the National Institute of Magistracy (INM).

The 450 delegates included magistrates, prosecutors, sindic judges and insolvency practitioners. INSOL Europe member Emmanuelle Inacio and Ignacio Tirado (Autonomous University of Madrid) were also present.

The central theme of the event was "**Criminal interference in insolvency proceedings**". This problem is one of the current challenges in Romania in the fight against corruption, which, despite the beneficial effects related to this approach, has a direct negative impact on insolvency procedures, through the possibility of locking procedures, either by suspension or by application of preventive measures like liquidation, ban of the insolvent company or ban on the sale of seized assets.

Interprofessional cooperation and dialogue between the professionals of the criminal and insolvency areas is essential to finding practical solutions to overcome these problems.

Romania has made remarkable progress in the insolvency field, with the new law starting in 2014 which incorporates best practices worldwide and from the EC and UNCITRAL, within a project funded by the World Bank.

Although the legal framework itself is modern and balanced, there are many challenges in implementing the law, to overcome which every effort has been made, a good example being the cooperation between INPPI and INM.

Simona Maria Miloș, President of INPPI and Managing Partner of SCA Stanescu Milos Dumitru & Associations

The European Commission's Directive Proposal for common principles and rules on preventive restructuring frameworks, insolvency and second chance

EMMANUELLE INACIO
INSOL Europe Technical Officer

Emmanuelle Inacio takes a closer look at the new EC directive...

> THE AIM OF THE PROPOSAL IS ABOVE ALL TO ENHANCE THE RESCUE CULTURE IN THE EU BY ESTABLISHING A COMMON EU-WIDE FRAMEWORK

On 22 November 2016, the European Commission presented the long-awaited proposal for a Directive on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU[1].

The European Commission Directive (the Proposal) is part of the Capital Markets Union Action Plan and the Single Market Strategy that announced a legislative initiative on business insolvency, including early restructuring and second chance which aims at removing key barriers to the development of capital markets in the EU by providing legal certainty to cross-border investors and companies operating across the EU.

Indeed, reviews of the implementation of the 2014 Commission's non-binding recommendation on restructuring and second chance[2] showed that, despite reforms in the area of insolvency, rules still diverge and remain inefficient in some countries, which means continuing legal uncertainty, additional costs for investors in assessing their risks, less developed capital markets and persisting barriers to the efficient restructuring of viable companies in the EU, including cross-border groups of companies.

Furthermore, even if the new European Insolvency Regulation of 20 May 2015 (EIR Recast), replacing the EIR of 29 May 2000 and applying to insolvency proceedings which will be opened after 26 June 2017 extends the scope of the EIR to preventive procedures which promote the rescue of an economically viable debtor and give a second chance to entrepreneurs, it is not an instrument harmonising Member States' substantive insolvency laws but a private international law tool. Indeed, the new EIR does not tackle the discrepancies between these procedures.

The aim of the Proposal is above all to enhance the rescue culture in the EU by establishing a common EU-wide framework able to ensure effective restructuring, second chance and efficient procedures both at national and cross-border level.

The Proposal does not harmonise core aspects of insolvency proceedings but gives Member States the flexibility to achieve the objectives by applying the key principles and targeted rules in a way that is suitable to their national contexts. This is particularly important since some Member States already have elements of well-functioning frameworks in place.

The Proposal consists of 47 recitals and 36 Articles and aims to introduce in the Member States the common principles on the use of preventive restructuring frameworks (Title II), rules to provide a second chance for entrepreneurs (Title III) and targeted measures for the Member States to increase the efficiency of restructuring, insolvency and second chance (Title IV and V).

Common principles on the use of preventive restructuring frameworks

The Proposal aims to put in place common, core elements for preventive restructuring frameworks to give debtors in financial difficulty, be they legal or natural persons, effective access to procedures facilitating restructuring plans' early negotiation, adoption by creditors and possible confirmation by a judicial or administrative authority in order to reduce the number of formal insolvency filings in the EU and thereby maximize the value to the involved stakeholders.

For this purpose, the Proposal requires the Member States to:

- ensure that the debtor remains totally or at least partially in control of its assets and affairs;
- limit the circumstances in which a practitioner in the field of restructuring may be appointed;
- allow the debtor to apply for a general or limited stay of individual enforcement actions to support the negotiations of a restructuring plan of up to four months, which can be extended or renewed for up to 12 months by the judicial or administrative authorities, precluding the opening of insolvency proceedings, security enforcement, and any contractual rights of termination or acceleration;
- include minimum mandatory information in restructuring plans submitted for confirmation by a judicial or

administrative authority;
- provide for a restructuring plan to be adopted by the necessary majority of affected creditors voting in classes;
- allow a cross-class cram-down mechanism if the restructuring plan is not supported by all classes of creditors;
- ensure that the restructuring plan is approved by a judicial or administrative authority if the plan affects the interests of dissenting affected parties or provides for new financing to make it binding;
- ensure that when deciding on the approval of a plan, the authority reviews its compliance with the requirements for the adoption of the plan and that the plan is in the best interest of creditors;
- protect new and interim financing by ranking such financing at least senior to the claims of ordinary unsecured creditors and other restructuring related transactions against avoidance; and
- impose specific duties where there is a likelihood of insolvency, to ensure that directors pursue early restructuring when the business is viable.

Rules to provide a second chance for entrepreneurs

The Proposal sets up minimum provisions on discharge of debt for over-indebted entrepreneurs as the basic conditions for ensuring entrepreneurs a second chance in order to boost entrepreneurship and prevent costly forum shopping.

The Member States are required to ensure that honest over-indebted entrepreneurs may be fully discharged from their debts after maximum three years and have the benefit of short disqualification orders without the need to re-apply to a judicial or administrative authority. Where personal and professional debts are intertwined, the Proposal states that the Member States should try to consolidate the separate procedures.

Targeted measures for Member States to increase the efficiency of restructuring, insolvency and second chance

The Proposal also contains provisions to improve the efficiency of the Member States' restructuring and insolvency laws in order to reduce the excessive length and costs of procedures in many Member States, which results in legal uncertainty for creditors and investors and low recovery rates of unpaid debts.

To that purpose, Member States are required to ensure that members of the judiciary and administrative authorities are properly trained and specialised in restructuring, insolvency and second chance matters and that these matters are dealt with in an efficient manner which ensures expeditious treatment of the procedures.

In addition, the Member States are required to ensure that insolvency practitioners receive adequate training, so that their services are provided in an effective, impartial, independent and competent way in relation to the parties. To that end, codes of conduct are encouraged by the Proposal.

Regarding the appointment, removal and resignation of practitioners, a clear, predictable and fair process is required in all Member States. In particular, the criteria concerning the manner in which the judicial or administrative authority selects such a practitioner must be clear and transparent and the Member States must give consideration to the practitioner's experience and expertise. In cross-border situations, the practitioner's ability to communicate and cooperate with foreign insolvency practitioners and authorities and the human and administrative resources must be taken into account. Moreover, the debtors and creditors shall be consulted in the selection of the practitioners.

Lastly, the Proposal requires that their work be subject to appropriate supervision, regulatory structures and an effective regime of sanctions and that their fees be governed by rules which incentivise timely and efficient resolution.

The Proposed Directive adopts many of the recommendations for minimum standards presented by INSOL Europe's Insolvency Office Holders, which were presented to the European Commission, DG Justice in July 2016[3].

Next Steps

To be enacted as a binding European directive, the Proposal will need to be approved by the European Council following hearings before the European Council and the European Parliament. The Proposal will probably undergo some changes in the upcoming EU legislative process.

The Member States will then be required to transpose the directive's provisions into their respective legal systems within two years of its entering into force at the EU level and within three years from such date for its provisions on increasing the efficiency of restructuring, insolvency and second chance.

Against this background, the INSOL Europe Turnaround Wing has launched a new project during the Annual Congress in Cascais, under the co-chair of Alberto Núñez-Lagos, outgoing President of INSOL Europe, on the legal implementation of the preventive restructuring frameworks regulated in Title II of the future Directive.

The first outcomes of the Turnaround Wing's project will be presented during the Annual Congress in Warsaw which will be held on 5-8 October 2017. ■

Footnotes:
1. http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=50043.
2. C(2014) 1500 final, 12 March 2014.
3. www.insol-europe.org/ioh-forum-news

"THE PROPOSED DIRECTIVE ADOPTS MANY OF THE RECOMMENDATIONS FOR MINIMUM STANDARDS PRESENTED TO THE EUROPEAN COMMISSION BY INSOL EUROPE'S INSOLVENCY OFFICE HOLDERS"

Share your views!

Financing and insolvency: Where does it all begin, or end?

Myriam Mailly reports on the INSOL Europe Annual Congress in Cascais (near Lisbon), Portugal

MYRIAM MAILLY
INSOL Europe Co-Technical Officer

The INSOL Europe Annual Congress dedicated to 'Financing and Insolvency – Where does it all begin, or end?' took place on the 23rd and 24th September 2016 at the Cascais Miragem Hotel.

During the course of the Congress various themes, including the Global Credit Risk Management, Shareholders as Creditors, LMA Financing, Distressed Financing, Lender Liability, Estate Financing, Terminating of Credit agreements and Credit Bidding, were discussed from a legal, economical and financial angle.

Celebrating 35 years

On the occasion of the 35th anniversary of the organisation, the President of INSOL Europe (Alberto Núñez-Lagos Burguera, Uría Menéndez) welcomed no less than 427 delegates from 35 countries.

The morning was opened by the Technical Committee co-chairs (Evert Verwey from Clifford Chance and Francisco Patricio from Abreu Advogados) who introduced the first technical session, dedicated to "Global Credit Risk Management", viewed as a helpful toolbox for cross-border insolvency practitioners. The emphasis was put on the need for legal advisors to use their experience in global credit risk management at the very early stages of any cross-border restructuring process. The panel's view was that enabling on-going collaboration between restructuring advisors and banking and derivatives experts could create powerful restructuring teams with different high profiles, for the benefit of clients in terms of costs and quality of advice. While the panel concluded that such a collaboration may still be ambitious at this stage, such an opportunity should not be missed in the near future.

> "THE EMPHASIS WAS PUT ON THE NEED FOR LEGAL ADVISORS TO USE THEIR EXPERIENCE IN GLOBAL CREDIT RISK MANAGEMENT"

Interactive discussions

The second morning session was an interactive discussion between the panellists so as to determine to what extent the financing of companies in distress was seen in each jurisdiction as an opportunity for potential new investors, or just as a way to protect the interests of the existing creditors.

The difficulties relating to the targeting of enterprises which may be subject to distressed financing were evoked as they explained why, in some jurisdictions, the lenders' appetite to provide such financing may be mitigated. The availability (within or outside the plan, and under time pressure) and the protection (only in court-driven proceedings, against claw back actions or liability actions, through new securities) of new funding in UK, Germany and Italy were also discussed, including a view from the banking sector's perspective.

Interactive break-out sessions ('BoS') closing the morning technical session gave a chance to the delegates to share their experience and knowledge about some issues relating to the financing of companies in distress.

The first BoS focused on the liability of directors and/or lenders when financing a company in distress. The second was about the pros and cons of national corporate and/or insolvency provisions enabling the eviction of the equity holders from a distressed company. National overviews were then followed by a discussion of the various means and specific circumstances where the eviction of shareholders may lead to a successful restructuring.

During the third BoS, three panellists from Spain, Germany and the UK discussed the concept of credit bidding (a secured

The magnificent venue for this year's Congress

Keynote speaker José Manuel Durão Barroso, Portugal, opened the afternoon session

A packed opening session attended by 427 delegates from 35 countries

creditor's right to participate in the auction of the collateral and to set-off a claim against the debtor by using the auction price) and the resulting problems. In particular, the technical problems and complications resulting when there is a group of creditors (e.g., of a syndicated loan) who follow a different strategy each *re* a credit bid, and when one or more of the creditors have become creditors on the secondary market before or after the commencement of the proceedings. It turned out in the course of the second round's discussion of the BoS that these issues are becoming more and more common in various jurisdictions.

The panellist of the fourth BoS provided an overview and a comparison on estate financing practices in The Netherlands, Germany and in the UK. There was also a focus on the fact that there may be incentives for distressed companies to forum-shop, the differences between estate financing practices across Europe being taken into account.

Keynote Speaker

The afternoon technical session opened with a speech by the first keynote speaker (José Manuel Durão Barroso, Portugal) who explained his view on the European crisis in its various aspects.

The immediate past President of the European Commission also described the potential impacts of Brexit on the trust in the EU market, including the Eurozone area. However, Mr. Barroso concluded his speech by expressing, after referring to Jean Monnet, his confidence in the fact that the EU will be strong enough to overcome the crisis as long as the national leaders, together, wish to strengthen the EU project.

European updates

The second session was dedicated to the European update. First of all, the wish of the European Commission for a new European insolvency culture was highlighted in the context of the European Commission legislative proposal (published on 22 November 2016) as a follow up of its Recommendation of 12 March 2014.

New financing and the role of shareholders in restructuring was discussed and in particular any mechanism at EU level which would allow the cram-down of a minority of dissenting shareholders in keeping with the EU company instruments. Then the discussion turned on the forthcoming entry into application of the recast Insolvency Regulation and in particular the new measures which would allow groups of companies to benefit in certain circumstances from a system where a unified approach can be taken into consideration.

Hot topics for insolvency office holders in 2016 were then discussed in the light of the results of the poll which took place during the Berlin Annual Congress in 2015. Furthermore, some aspects of insolvency office holders' regulations in several countries were taken as examples, and in particular related to the liability regimes. Before the closure of the session, a poll (whose results have been published on the INSOL Europe website) took place.

The last panel of the day offered a detailed comparative study of the law and practice of workouts and of the termination of credit agreements in the UK, Germany, The Netherlands and Portugal.

Banking collapse

The second day of the Congress began with a presentation by Vitor Bento (Economist and Chairman of Sociedade Interbancaria de Servicos, Portugal).

Supported by relevant figures, the keynote speaker described how the banking system worked before the collapse of Lehman Brothers and the difficulties which remain for some countries to face. He also spoke about consequences of the 'old crisis', the current situation, and any potential future crises.

UNCITRAL Update

Before an update on the work of INSOL International by its

> "MR. BARROSO CONCLUDED HIS SPEECH BY EXPRESSING HIS CONFIDENCE THAT THE EU WILL BE STRONG ENOUGH TO OVERCOME THE CRISIS"

Delegates enjoyed the traditional welcome drinks reception in the autumnal sunshine

Alberto Núñez-Lagos welcomes delegates to the 35th Annual Congress

The many panellists were drawn from a wide range of jurisdictions

> **THE FINAL PANEL OF THE DAY DEALT WITH THE CONSEQUENCES FOR INSOLVENCY OFFICE HOLDERS WHEN 'IT GOES ALL WRONG'**

President, the first panel of the day reported the work undertaken on insolvency within UNCITRAL. First of all, there was a reminder on how UNCITRAL works and how it promotes the uniform interpretation and application of UNCITRAL texts. Then, delegates were made aware of the opportunity for submitting proposals for future work on insolvency at the UNCITRAL Anniversary Congress (July 2017) before a call was made for a functional, integrated and comprehensive approach for secured transaction laws, including their coordination with the insolvency law. Lastly, the role of INSOL Europe within UNCITRAL was reported to the delegates. After the description of the eight Key Principles for facilitating the cross-border insolvency related to groups of companies, a brief overview of the UNCITRAL draft legislation provisions in that area (still an on-going work) was also provided. Before the closure of that panel, the importance of the current and on-going work of the Working Group V on insolvency was reminded.

Post-crisis solutions

Three panels were further held during the last part of the morning. Firstly, the reasons why Ireland got into trouble were explained and in particular, the insufficient supervision of the banks, which led to the disruption of the whole banking system. Then the post-crisis solutions provided by the Irish authorities were described as well the lessons learnt from the Irish crisis experience applied by Cyprus in drafting a new piece of legislation, in regulating licensed insolvency practitioners and in introducing new methodologies for workouts/restructurings to be used by them.

Thereafter, a panel focusing on debt trading first provided a comparative overview of this market in the UK, The Netherlands, Italy and Germany before further discussing the buying and selling process in each of these countries and the lessons learnt from the market practice.

The final panel of the day dealt with the consequences for insolvency office holders when 'it goes all wrong'. Each speaker provided an overview of the law and practice of the appointment, remuneration and liability of insolvency practitioners in his/her jurisdiction. In conclusion, it was agreed that if harmonisation at EU level in this area would be welcome, it should not be forgotten that insolvency practitioners are working in relation with their specific national legal and judicial systems,

A variety of questions were asked and duly answered by the panels

Vitor Bento gave his keynote address on the second day

Finally, the singing waiters joined in our Gala celebrations

which are to be taken into account before any further step towards harmonisation.

New president

The technical sessions ended with the taking up of the presidency of INSOL Europe by Steffen Koch for 2016-2017, in replacement of Alberto Núñez-Lagos Burguera.

The Congress was concluded with its traditional gala dinner on Saturday evening, this time held at the 'Estufa Fria' in Central Lisbon's Edward VII Park.

We hope to meet you all in October 2017 and trust that you will enthusiastically join us in the fascinating and beautiful city of Warsaw where we'll be discussing interesting developments in the world of insolvency and restructuring.

The delegate's perspective

Jean-Luc Hagon is a young Associate at NautaDutilh (Belgium) and here he provides his personal viewpoint of the Congress.

"I am a young Belgian lawyer based in Brussels and I have become very interested in insolvency law since my last year at law school in 2010. I am genuinely passionate about insolvency matters and, in this respect, one has to admit that INSOL Europe's Annual Congress is the place to be!

Attending the Congress has now become a habit for me and after this second participation I hope to come to many other Congresses in the future. As usual with INSOL Europe, I wasn't disappointed this year.

It was an honour to attend this Congress and to hear brilliant practitioners on a wide range of complex cross border topics such as financing companies in distress or squeezing the equity out of a distressed company, to name but a few.

To me, the intervention of the charismatic M. José Manuel Barroso, immediate Past President of the European Commission, was the highlight of this year's Congress. He made an insightful speech about the European Institutions and the European Union with his personal touch of humour.

I really look forward to the next Annual Congress (in Warsaw, Poland) and I hope to see you there!" ■

> "VITOR BENTO DESCRIBED HOW THE BANKING SYSTEM WORKED BEFORE THE COLLAPSE OF LEHMAN BROTHERS AND THE DIFFICULTIES WHICH REMAIN"

More photos from Lisbon can be viewed on our website: www.insol-europe.org/gallery/2016-lisbon-congress

Harmonisation of the European Insolvency Law

ACADEMIC FORUM
INSOL Europe

Myriam Mailly reports on the Academic Forum's Annual Conference in Cascais, which ran alongside the main Annual Congress

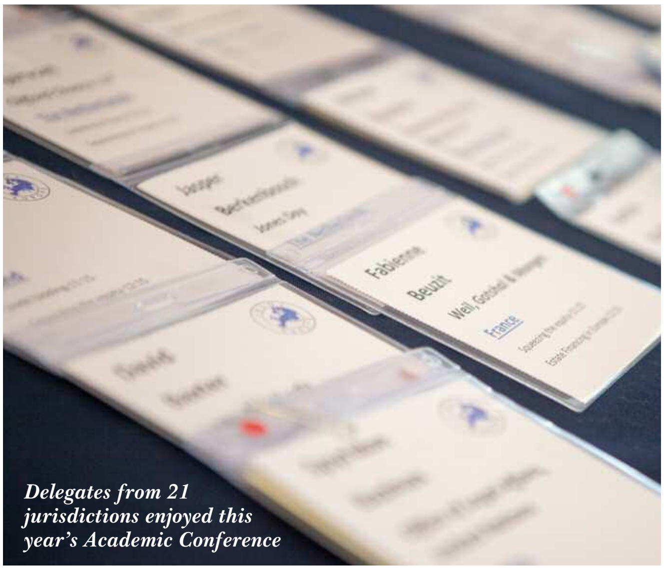
MYRIAM MAILLY
INSOL Europe Co-Technical Officer

"PRESENTATIONS FOCUSED ON POSSIBLE APPROACHES AND OBSTACLES OF SUBSTANTIVE HARMONISATION ON THE OPENING REQUIREMENTS AND DIRECTORS' LIABILITY FOR LATE FILING"

The Academic Forum's Annual Conference took place on 21 and 22 September 2016 at the Cascais Miragem Hotel with over 56 delegates registered representing some 14 jurisdictions.

The conference met the expectations of delegates with challenging and stimulating questions about the feasibility and desirability of harmonisation, convergence or approximation of the insolvency law within Europe on various topics of interest. In particular, the presentations focused on possible approaches and obstacles of substantive harmonisation on the opening requirements and directors' liability for late filing, on avoidance actions as well as on creditors' ranking of claims.

The second part of the conference was dedicated to the current challenges for national preventive restructuring frameworks, in particular regarding new finance and treatment of executory contracts.



Delegates from 21 jurisdictions enjoyed this year's Academic Conference

Substantive harmonisation

The discussions began on the first day with six papers over two sessions devoted exclusively to the substantive harmonisation.

Prof. Dr. Jessica Schmidt chaired the first panel where Gert-Jan Boon (University of Leiden, The Netherlands) provided an overview of the role of stakeholders and the means available to them to carry some weight (for good or bad reasons) in the European legislative process, and in particular in light of the follow-up of the Commission's recommendation of 12 March 2014 on a new approach of business failure and insolvency. Judge Nicoleta Mirela Nastasie (Bucharest and Ilfov Tribunal, Titu Maiorescu University (Romania) & Nottingham Trent University, UK) offered a view of the role of the judiciary for a greater convergence of the European Insolvency Law and proposed optimistic solutions to bring into harmony different judicial systems in Europe. Finally, Dr. Jennifer Gant (Nottingham Trent University, UK) raised the question of social and economic policy through a comparative historical study between the US and the UK insolvency systems.

Joining them on the topic of substantive harmonisation were Professor Antonio Leandro (University of Bari Aldo Moro, Italy) who outlined the harmonisation issues against the background of the European Insolvency Regulation, and in particular the need for legal certainty across the EU with regard to avoidance disputes and Zoltan Fabok (Nottingham Trent University, UK) who compared the 'duty to file' applicable in Germany with the aspects of 'wrongful trading' applicable respectively in Hungary and England. This theme was then picked up by Professor Loes Lennarts (University of Groningen, The Netherlands) who discussed how the directors' liability issues in the vicinity of insolvency from a Dutch perspective, as well as the opportunistic behaviour of shareholders during such period of time.

Creditor ranking in insolvency

The third session, in the afternoon, chaired by Dr. Rolef de Weijs (University of

Delegates took every opportunity to discuss the themes of the conference with colleagues

> "THE SHAKESPEARE MARTINEAU SESSION FOCUSED ON THE INSOLVENCY OFFICE HOLDERS' QUALIFICATION, REGULATION AND REMUNERATION IN THE UK"

Amsterdam, Houthoff Buruma, The Netherlands) focused on possible harmonised approaches and obstacles to harmonisation in the area of the ranking of claims.

This session featured Professor Ignacio Tirado (Universidad Autónoma of Madrid, Spain) who explained the challenges as well as the potential gains of an harmonisation based on the common assumption of international standards in that area while still leaving some space for protection of local interests. Offering a perspective from the banking sector, Dr. Paolo Castagna (UniCreditBank AG, Germany) closed the session asking for more stability and transparency of national insolvency frameworks in the protection of creditors' rights.

The Shakespeare Martineau session was chaired by Professor Michael Veder (Radboud University Nijmegen/Resor, The Netherlands) and focused on the Insolvency Office Holders qualification, regulation and remuneration in the UK. Christina Fitzgerald and Tania Clench (Shakespeare Martineau, UK) explained how to become and practise as licensed insolvency practitioners in the UK in the light of past and forthcoming reforms and highlighted to what extent the question of the IPs' remuneration remains a sensitive one in the UK.

A reception concluded the first day's proceedings, followed by the traditional dinner for academic delegates and their guests and the after-dinner speech was given this year by Professor Stephan Madaus (Martin Luther University Halle-Wittenberg, Germany.

Young Academics' Network in Insolvency Law (YANIL)

The second day opened with the YANIL (Young Academics' Network in Insolvency Law) session chaired by Dr. Jennifer Gant (Nottingham Trent University, UK) regrouping several topics of interest.

First Eugenio Vaccari (City University of London, UK) reached the conclusion that harmonisation of the ranking of creditors may not be imposed but alternatively should be promoted at EU level. Then, Emilie Ghio (University College Cork, Ireland) made a call for more pragmatism in cross-border insolvency law to outreach the traditional debate between universalism and territorialism.

Lastly, Grant Jones (Tilburg University, The Netherlands and City University of London, UK) offered a review of the contract-based UK 'CVA' procedure fitting within the existing insolvency theory, which underlies the need for more efficient data and further empirical evidence in that field.

Challenges for preventive restructuring frameworks

The fifth session opened by Anthon Verweij (University of Leiden, The Netherlands) was dedicated to 'challenges for preventive restructuring frameworks'.

Professor Catarina Serra (University of Minho, Portugal) first argued that the harmonisation of preventive restructuring frameworks is best accomplished through the collection and the statement of general principles that are common to all jurisdictions without any prejudice to the necessary flexibility given by the diversity of legal, economic and political backgrounds.

Professor Bob Wessels (University of Leiden, The Netherlands) shared with the audience the aim of the ELI ('European Law Institute') project on 'Business Rescue in Insolvency Law', namely to design a set of norms and requirements that will enable the further development of

Share your views!

> **SPEAKERS DID MORE THAN JUST OUTLINE A TOPIC OF INTEREST: THEY SOUGHT TO UNDERSTAND, ANALYSE AND RAISE ISSUES ON FUNDAMENTAL INSOLVENCY AND INSOLVENCY-RELATED ISSUES**

coherent and functional rules for business rescue in the EU.

Professor Stephan Madaus (Martin Luther University Halle-Wittenberg, Germany) followed up with recommendations designed to promote the introduction of a harmonised 'workout support' framework across the EU and to strengthen the existing regimes applicable to pre-insolvency as well as to insolvency situations.

Before the end of the session, Dr. Samantha Renssen (Maastricht University, The Netherlands) outlined the on-going reform which should lead to the introduction of the pre-pack and scheme of arrangement proceedings in the Netherlands, mentioning a number of differences between the UK proceedings and the Dutch reform proposals.

Unification

Proceedings concluded in the afternoon with the Shakespeare Martineau Lecture, given this year by Dr. Ignacio Sancho, judge at the Spanish Supreme Court, who argued that calls towards more harmonisation ought to be endorsed, and that some degree of unification would be also a move in the right direction.

In particular, a certain degree or unification would be welcome in the system of priorities or for the avoidance of transactions rules given the proliferation of out-of-court arrangements whose success often depends on the rules applicable within the insolvency framework.

During these two days, speakers did more than just outline a topic of interest: they sought to understand, analyse and raise issues on fundamental insolvency and insolvency-related issues offering subsequent perspectives on, and opportunities, for research to come. *We already look forward to the Academic Forum Annual Conference in Warsaw next year!*

The new delegate perspective

First-time participant to the Academic Forum's Conference, Eugenio Vaccari, PhD candidate at City University of London, gave eurofenix his impressions.

"The INSOL Europe Academic Forum Annual Conference was held on 21 & 22 September near Lisbon, in the stunning location of Hotel Cascais Miragem, facing the magnificent Portugal Atlantic Coast. Unfortunately, there was little time to enjoy the physical backdrop of the location. The six working sessions in which the Forum's Conference was articulated succeeded not only in informing the delegates, but also in investigating some of the most controversial issues that current insolvency faces at the European level.

Several presentations and papers debated the concerns and opportunities associated with the substantive harmonisation of insolvency law. The remarkable conclusive lecture of Spanish Supreme Court Judge, Dr. Ignacio Sancho, provided the participants with a summary of the most divisive aspects of this project, as well as some innovative proposals and considerations on how to address them.

As a first attendee to the INSOL Europe Academic Forum, and as a young researcher, I was honoured to be given the opportunity to present the results of an empirical work that I carried out in the past year. Even more notable was the chance to speak with a stimulating group of experts coming from 14 different jurisdictions.

In my opinion, the range of expertise and the quality of the contributions make this conference a must-go for any scholar specializing in insolvency-related subjects, and I am very much looking forward to attending next year's event on 4 & 5 October in Warsaw." ■

INSOL Europe displayed a wide range of publications to support its members

Directors' liability: What should be the minimum degree of harmonisation in the EU?

Róbert Muzsalyi presents a fictional case study on the impact of COMI shifting on directors' duties

Moving the centre of main interests (hereafter, 'COMI') from one Member State to another may have a significant impact on both the extent and the contents of the directors' duties and liabilities, as well as on the enforcement of these duties.

This situation could result in uncertainty for the creditors and the directors alike. In my view, these difficulties could be resolved by a minimum degree of harmonisation regarding the directors' duties. The issue that I want to focus on refers to what could be the starting point for the common rules.

Case study

The debtor company was in active production and it was assembling electrical goods in Germany. The materials used for the production were imported from East European countries, mainly from Hungary.

The debtor got into a state of impending insolvency, because it was not able to pay its debts as they fell due. After this happened, Mr. Grenbuch, the director of this company, made unlawful payments to his family members out of the assets of the company, totalling €50,000.

The shareholders considered the difficult economic situation of the company and decided to move the COMI to Budapest, because they could rent property and machines at a considerably lower price in Hungary. Moreover, the company would be closer to its suppliers. Thus, they could reduce the transportation cost, as well.

The company, managed by Mr.Grenbuch, started to operate in Hungary. However, it was still unable to pay its bills on time. Consequently, upon the request of a Hungarian creditor, the Budapest Regional Court established the debtor's insolvency, ordered its liquidation and appointed a liquidator.

After the liquidator had examined the debtor's accounts and payments, he brought a claim against Mr. Grenbuch to establish that he had failed to properly represent the interests of the creditors in the span of three years prior to the opening of liquidation proceedings in the wake of any situation carrying potential danger of insolvency, when he had made unlawful payments to his family members in Germany.

Mr. Grenbuch objected to the jurisdiction of the Hungarian court. He argued that he was a German director of a German company, when he had made the questioned payments, that he had been under the German law, and therefore he considered the provisions of the German law should have applied, not the Hungarian ones.


Róbert Muzsalyi (centre) receiving his award at the Annual Congress Gala Dinner, held at the 'Estufa Fria' in Central Lisbon's Edward VII Park

Problems raised by the study case:

a) Which court has jurisdiction for the directors in case of COMI shifting?
b) Which Member State's law will apply?
c) Could the Hungarian court examine the validity of payments made in Germany or only those made when the COMI was in Hungary?

Same unlawful conduct but different decision depending on the applicable law

Hungarian law follows the "wrongful trading" strategy: there is a shift of the director's duties, which prioritises the interests of creditors when the company is in potential danger of insolvency.

The duties of the director who has managed the company during the three years prior to the opening of liquidation proceedings will be examined in court. In Hungary, there is no "duty to file" when the company is insolvent. Moreover, the director cannot file an application for the opening of liquidation proceeding without the

Dr. Róbert Muzsalyi is the winner of the 2016 Richard Turton Award.

Róbert works as a judicial clerk in the Supreme Court of Hungary. He is currently studying for his PhD (research topic 'The Impact of EU Law on Hungarian Procedural Law') at the Doctoral School of Law and Political Sciences at Pázmány Péter Catholic University, Budapest, Hungary.

This is the first time that we have had a winner from Hungary. Previous winners have come from Uganda, Belarus, India, Latvia, Lithuania, Poland, PRC, Romania, Russia and Serbia.

Róbert was invited to the Annual Congress in Lisbon to receive his award.

An abbreviated version of his award winning paper is presented here. The full version and further information about the award can be found on line at www.insol-europe.org/richard-turton-award

"IN HUNGARY, THERE IS NO "DUTY TO FILE" WHEN THE COMPANY IS INSOLVENT... GERMAN LAW FOLLOWS THE "DUTY TO FILE" STRATEGY"

shareholders' decision.

Hungarian law provides for a two-stage procedure. Firstly, under the liquidation procedure, the court can establish the liability of directors. Secondly, subsequent to the delivery of a final judgment establishing the liability of the directors and the final conclusion of liquidation proceedings, any creditor may bring an action to the extent of its claims not yet satisfied. If the directors fail to effect the payment obligation contained in this final decision (and only in such a case), the court could disqualify them for five years.

German law follows the "duty to file" strategy, which means that the director shall apply for the opening of insolvency proceedings without material delay, and at the latest within three weeks after a company becomes illiquid or over-indebted. Under German law, liability for delaying insolvency proceedings results from the culpable violation of the duty to file formal insolvency proceedings. Directors who culpably (intentionally or negligently) fail to file insolvency proceedings commit a delict and will be personally liable for any damage caused. The claim for damages resulting from this liability is barred until insolvency proceedings are closed. At this point, it is possible to take into account any compensation already awarded and to establish whether the claim against the director was settled by the administrator or liquidator.

The disqualification causes are regulated in statutes on the various forms of companies (GmbHG, AktG etc.), which require some form of criminal conduct committed by the director as a precondition to disqualification. In the above case study, Mr.Grenbuch's conduct would constitute "bankruptcy" (*Bankrott*), a crime under §283 of the German Criminal Code.

Cross-border liabilities for the breach of duties

The Court of Justice of the European Union (hereinafter: CJEU) had previously held that the effectiveness Article 3(1) of EIR, must be interpreted as meaning that it confers international jurisdiction on the Member State within the territory of which insolvency proceedings were opened in order to hear and determine actions which derive directly from those proceedings and which are closely connected to them[1].

The CJEU has stated that the actions brought by the liquidator in the insolvency proceedings against the managing director of a company, derive directly from the insolvency proceedings and are closely connected to them[2].

In the recent *Kornhaas* case,[3] the CJEU has pointed out that the law of the main proceedings also determines the applicable law for the director's liability (the extent and also the enforcement of the liability), notwithstanding the fact that the debtor and the director are located in another Member State.

The directors may not have any influence on the COMI shifting, because this may be a shareholders' decision (except in cases where the director is also the majority owner of the company). By the shifting of the debtor's COMI, the related provisions on the director's duties also change. Hence, a different law will be applicable to the enforcement of their liability.

Consequently, the liability of directors could be established under the law of a Member State, which they did not take into account when the questioned conduct was committed.

With the change of the COMI, the directors have to acknowledge that under the new Member State's law, they may have different duties and liabilities than previously. If they do not accept this risk, they could resign obliging the shareholders to appoint a new director.

However, in certain cases, the director is not exempted from the liability with this resignation. Under several Member States' jurisdiction, the courts examine the conduct of those directors who managed the company during the three years prior to the opening of liquidation proceedings. Consequently, the courts would examine the conduct of the resigned directors if they managed the company in the three-year period. Moreover, in my opinion, the duties have to be examined under the new Member State's law (in accordance with the Kornhaas decision) and the directors would be held liable for the breach of these duties.

It would totally contradict the CJEU case law, if the courts which have jurisdiction to open insolvency proceeding, and therefore have jurisdiction for any action against the directors would have to apply the law of another Member State on the directors' liability.

Nor would it suit the above mentioned targets if a court had jurisdiction for the main proceedings but it did not have jurisdiction for any actions against the resigned directors, obliging the liquidator to sue the directors in a different Member State, depending on whether they were managing the company before or after the COMI shifting. I do not think that it would be feasible and effective if the liquidator had to bring a claim under the law of a different country.

The most important points of harmonisation

Insolvency-related duties

In the EU, there are two main types of jurisdiction depending on the insolvency-related duties of the directors. Some Member States use the "duty to file" strategy. Under this approach, directors are obliged to apply for the opening of insolvency proceedings within a certain period if the company reaches certain pre-defined insolvency triggers and typically after this situation they are not allowed to make any payments.

Other Member States use the "wrongful trading" strategy. In these jurisdictions there is a shift of the director's duty of care when the company is in the vicinity of insolvency and there is no duty to file for the of opening insolvency proceedings to the court. In this situation, the directors have to properly represent the interests of creditors rather than the interests of the company or the shareholders.

As I mentioned in the case study, it may cause significant problems if a company changes its COMI from a country following the "duty to file" strategy to a one where "wrongful trading" is the rule, or *vice versa*. These differences lead to legal uncertainty, which makes European harmonisation necessary. My opinion is that the two main strategies do not preclude each other; moreover, they could be complementary to each other at the European level. Thus, the starting point of the harmonisation should not be to have to select one of these strategies or find a new one. The EU ought to provide guidance for the definition of the vicinity of insolvency and the insolvent status of a company and make clear that the directors should take their responsibilities and act prudently in both situations.

Procedure rules

It should be defined that these actions could be brought only before the court which issued the insolvency order; that only the insolvency practitioner can bring any action; and that the actions can only be brought during the liquidation proceedings. These elements are particularly important because of the availability of the necessary evidence and the professional competence of the insolvency judges.

It should be also defined who can bring the action. The insolvency practitioners are best suited to do this, because they have the appropriate competence and information about every transaction made before the opening of the liquidation proceedings and the legal authority to impose the production of evidence.

Disqualification

Establishing the liability of the directors for breach of insolvency-related duties may result in the directors being also sanctioned by disqualification.

The disqualification objectives should be effective not only at the national level, but throughout the EU. Sanctions connected to the breach of insolvency-related duties protect the companies and creditors and they also have a deterrent effect. The lack of the harmonisation of this field undermines the national protection, because according to the rules in force, there is no obstacle for a disqualified director to manage a company in a different Member State. The lack of availability of information about the disqualified persons ensures the free movement of the reckless and dishonest directors who could cause potential business failures in other Member States. For example, a director who was disqualified under Hungarian law cannot manage a company in Hungary for five years, but he could act as a director in Germany or any other Member State.

The rules in force do not ensure the availability of information on the disqualified directors. Under the recast EIR article 24.3 Member States have an opportunity to share and receive this information (more precisely they are not precluded from doing to), but they are not obliged to ensure access to such information.

It is also not clear whether a national disqualification order automatically extends to other Member States, so the EU should provide for the mutual recognition of disqualification orders. ■

> “DISQUALIFICATION OBJECTIVES SHOULD BE EFFECTIVE NOT ONLY AT THE NATIONAL LEVEL, BUT THROUGH-OUT THE EU”

Footnotes

1 Seagon judgment, C-339/07, EU: C: 2009: 83, p.21
2 HvH. judgment, C-295/13, EU: C: 2014: 2410, p.26.
3 C-594/14, EU: C: 2015: 806.

Restructuring in fashion: challenges and a potential way out of the crisis

Victor Seuwen asks what can fashion companies do to be among tomorrow's winners

VICTOR SEUWEN
Partner, EOC Operations+ Consulting GmbH, Germany

For decades, the global fashion, apparel and luxury sector has outperformed other industries with double-digit growth. Nowadays, while global market growth is expected to continue until 2020, the fashion industry is at severe crisis for multiple reasons.

Besides facing the dilemma of balancing sales growth against margin improvements, which are inherent to the fashion industry, companies are now exposed to dramatic changes in the market dynamics. These shifts create significant implications in the way companies create value and establish the margin level. We have identified the major influences which have caused the industry's current crisis and assembled a potential approach in finding a way out.

Why is the fashion industry suffering?

The answer is rather simple: The current crises of the fashion industry stems primarily from increased margin pressure! However, the underlying reasons for it are multi-faceted.

> "THE CURRENT CRISIS OF THE FASHION INDUSTRY STEMS PRIMARILY FROM INCREASED MARGIN PRESSURE"

Margin pressure resulting from retail growth

Although both sales growth and margin improvements, are important strategic factors in value creation, most companies have put retail sales expansion as top priority. Especially those companies listed on the stock market, which need to show an on-going success story to their shareholders, have expanded their operations at above-average pace. However, this massive and partly uncontrolled expansion led to the over-exposure of the brands in sales distribution and did not necessarily bring the expected reward. Most of the companies failed to adapt, their corporate structure and culture towards a market driven business. Moreover, with store-sizes growing larger and a declining square-meter performance at rising fixed costs, retail expansion has also become a significant spoilsport for many companies' margin development.

Margin pressure resulting from competition

The pressure on margin resulting from competition is threefold. Firstly, established companies are competing with some of the world's most rapidly growing fashion companies, among which there are vertical players like Zara and H&M. Their success is based on direct sales to consumers and a maximum of process efficiency in their business model. Secondly, increased competition occurs

from pure online players (e.g. Zalando, About You) entering the market, which added new market dynamics that have heavily affected consumer behaviour, contributing to the industry's overall declining price level. Thirdly, competition also derives from new, financially well-equipped market entrants from non-EU countries, that bring a merchandise over-supply in the market. All these factors affect the industry's price and margin level (e.g. Uniqlo, Under Amour). Changing consumer needs virtually force fashion companies to adapt their operations to 'glocalisation', which leads to further competition. Therefore, the fashion companies are challenged to exploit economies of scale through a viable global standard business model and a well-thought product range, while still responding to local consumers' needs.

Margin pressure resulting from a change in consumer behaviour

Resulting from ongoing digitalization, consumers' expectations towards a brand have significantly changed and so have the requirements that companies have to fulfil to meet those expectations. Instead of just getting the "right" product, at the "right" time, consumers want an entire and seamless shopping experience across devices, sales and communication channels.

To address this, we have divided the challenges that companies face into the six categories: communication, services, price expectations, product expectations, big data and sales channel integration.

1. Communication

With the rise of digital interaction, consumers are better informed than ever. Even taste and purchasing decisions are made online and often linked to social interactions. The easy accessibility and high reach of the internet has made it easy for influencers, such as bloggers or celebrities to reach a huge audience when 'predicting' taste and setting trends. This phenomenon not only affects price, product and service transparency, but also requires companies to establish strong and costly social media communication with their target group. Companies that missed the social media train are facing serious challenges in getting traffic to their sales channels and building their brand. Be it online or offline. Investing in those areas, however, is costly and drives margin pressure on the business model.

2. Service

With 'e-commerce pure players' entering the market and expanding rapidly, consumers have changed expectations towards brands-service portfolios. Thus, most e-commerce platforms attract customers by offering free of charge returns, 24/7 shop hours, various payment methods, a huge variety of stock and daily promotions. It is obvious that traditional retailers can hardly compete with e-commerce offerings and services provided. Furthermore, by having numerous (daily) promotions in place the online price levels off below industry standard, and naturally puts pressure on overall margin.

3. Price expectations

Vertical businesses like Primark, Zara or H&M offer the consumers products at an appropriate fashion level and an affordable price. Through this mass-fashion-market approach, the consumers' perception of the value of fashion has dropped significantly. Consequently, their price readiness is reduced to the same extent. In turn, brands are challenged to justify their price premium by either providing superior quality or emotionalising their brand.

> **COMPANIES THAT MISSED THE SOCIAL MEDIA TRAIN ARE FACING SERIOUS CHALLENGES IN GETTING TRAFFIC TO THEIR SALES CHANNELS**

> **THE IMPLEMENTATION OF E-COMMERCE REQUIRES KNOW-HOW, TECHNICAL INFRASTRUCTURE AND ALIGNED SUPPLY CHAINS**

4. Product expectations

While historically, good quality and/or a cheap price were key to the consumers' purchase decisions, today it has become more important providing products that match consumers' expectations towards a brand's positioning. For example, if brand communication talks consumers into thinking the brand is fashionable and affordable, the consumers' expectations are most probably satisfied if those attributes are equally reflected by the offering, even if the products are not of premium quality. The dilemma is, however, that numerous fashion businesses still claim that '*only the product has to be right to win customers*', whereas the mutual interdependence of brand positioning and product attributes is neglected. Therefore, businesses are recommended to determine strategies that lead to a consistent positioning in both, marketing and the product.

5. Big data

The key in marketing is to understand a company's target group. Not only have target groups shifted from traditional Western markets to the uprising middle class in emerging markets, but the consumers have also become more 'visible'. Digitalisation leads to huge amounts of data about the customer so that investments in business intelligence structures are required. The challenge is to filter relevant data, transform them into meaningful marketing strategies and derive a solid basis for entrepreneurial decisions.

6. Sales-channel integration

Consumers expect a seamless shopping experience. Therefore, the need for omni-channel functionality becomes increasingly vital to fashion businesses. Customer footfall in retail stores is suffering from lacking online fulfilment services, thus making it vital to reconsider the approach of retail within the entire sale- channel mix. Companies are challenged with the decision to consider retail as a means of achieving isolated commercial success or to play a supportive role across all sale-channels to maximize overall profits.

Moreover, most fashion SMEs, especially in Germany, still have a huge share of wholesale operations and lack online operations, making channel integration complex and dependent, as the wholesale partners control their sales-channels. The implementation of e-commerce requires know-how, technical infrastructure and aligned supply chains. Retail also puts margin pressure on wholesale operations, given that the two-staged margin model in wholesale leads to calculative higher (non-competitive) market prices, as compared to the vertical (single-stage) mark-up model of retailing or e-tailing.

The dilemma is that an alignment of wholesale prices to retail level combined with wholesalers' 'fixed' margin expectations would in turn squeeze the brands' wholesale margin, making the wholesale business more and more unprofitable (Gerry Weber, Esprit).

Corporate culture needs to be aligned as well. Companies are recommended to adopt an omni-channel mentality throughout the entire firm and achieve a consumer-centered 'thrust reverser' with their (new) business model.

Given the nature and history of all three sales channels, the challenge is to merge the young, flexible and fast dynamics of e-tailing, with the solid, inflexible and traditional principles of wholesale and retail operations. A challenge, that almost seems as difficult as balancing out "the for conflicting needs in every person, which go hand in hand with fear". For instance, being an individual versus being part of a group, or the need for constancy versus the need for change, according to depth-psychologist Riemann . In a broader sense, success lies in balancing the different needs and perspectives with all the individual contradictions and challenges.

Margin pressure resulting from sourcing

Increasing margin pressure deriving from the demand was historically compensated by 'simply' shifting to low cost sourcing regions. But, eventually, these areas became wealthier and purchase prices are rising. In addition, the consumers' consciousness about sustainable products increases. While 100% sustainability can seldom be achieved, getting there requires a costly permanent realignment of the entire value chain. Moreover, other macro-economic instabilities, such as the struggling Euro and recent events (in Turkey, for instance), will put even more pressure on margins and part of the industry at risk.

Who will be on the winning side? Or, according to the principles of Charles Darwin, which factors determine 'the survival of the fittest'?

There are appropriate solutions at hand to cope with the current and future challenges of the market. What can fashion companies do to be among tomorrow's winners?

The challenge goes far beyond just providing a good product. Nowadays the product itself is no more and no less than seen as an inevitable precondition for industry success, independent of whether it is based on superior quality or on meeting fashion trends. Delivering credible products seems to be most important, contributing to a consistent brand story. Companies need to emotionalize their brand perception in order to distinguish their (comparable) product on the market from other brands and thus to justify price premiums.

Consequently, a clear positioning, an appealing brand image, a consistent social media strategy and a well-integrated omni-channel strategy that is reflected by the corporate culture, are among the weapons for the must-win battles for tomorrow's winners. However, this requires substantial investments in infrastructure, know-how and technology. Unfortunately, many companies don't have a budget for this kind of strategy. The bigger the businesses are, the more resources they usually have available. Thus, the size of a firm is also a condition for success.

However, companies which neglect addressing the various modern issues of the fashion business (such as the need for brand building, sales-channel integration, social media communication, online marketing, big data management, digitalisation and supply chain efficiency) will most likely fail.

As e-commerce businesses are likely to grow, as foreign brands expand regionally and vertical businesses are gaining ground, mostly traditional retailers and SMEs are called to action. However, the crux of the matter is that those which need restructuring most, seldom have the financial means and required capabilities to go through that process. Those companies are strongly recommended to seek professional help.

The potential way out of the crisis

In today's fashion industry, markets and consumer expectations are complex, their development hard to anticipate, let alone calculable. Not responding to these expectations will most likely lead to direct failure.

Finally, as there is no such thing as a uniform solution to the fashion industry's success, a business is likely to succeed only if directly linked to its resources and showing a maximum capability of coping with the full set of industry requirements. This is what we call 'competenciation'.

Business are recommended to concentrate on core competencies and outsource those activities that would exceed their available resources.

Thus, 'competenciation' is based on the principle that a company naturally has to meet all market and consumer requirements in order to provide a viable and holistic market offering, but it still has to decide which demands the business can handle by using its internal capabilities and resources, and which activities should be outsourced.

In this way, the business model can still incorporate all requirements in the alignment of its value chain, while limiting the direct investments to what the company can do best. ■

Footnote:

1. Riemann, F. (2009); Grundformen der Angst: Eine tiefenpsycholgische Studie

> "THERE IS NO SUCH THING AS A UNIFORM SOLUTION TO THE FASHION INDUSTRY'S SUCCESS"

Share your views!

Takata: The unfortunate recall

David Conaway reports on the global effects of a major product recall, and the subsequent innovative application of the Section 363 auction

DAVID H. CONAWAY
Shumaker, Loop & Kendrick LLP (USA)

The tragedy

Takata Corporation is a Japanese-based company that manufactures safety products, primarily airbags and seat belts, as a tier one supplier to the global auto industry. Unfortunately, due to alleged defective airbags produced, Takata has recalled reportedly 122 million airbags globally, with a projected cost of $12 billion.

Takata's airbag recall is tragic because the airbags are allegedly responsible for over 15 deaths and over 150 accidents around the world, according to the December, 2016 reports by the *Wall Street Journal* and the *Bangkok Post*.

The economic loss

The Takata airbag recall has already caused enormous economic consequences to certain of Takata's stakeholders, including customers, lenders, investors and equity holders. The customers are mainly 19 automakers throughout the world including BMW, Ford, Honda and Volkswagen.

Honda is also one of Takata's major investors. An October 7, 2016 *Wall Street Journal* article reported that the recall burden of the automakers was Honda 47%, Toyota 21%, Nissan 11%, and all others 20%.

According to numerous media reports, the airbags recalled globally total 122 million, and the cost of replacement and repair totals approximately $12 billion. Moreover, the U.S.'s National Highway Traffic Safety Administration ("NHTSA") issued a statement that the automakers have "ultimate responsibility" for the costs of replacing the airbags. NHTSA appears to be particularly concerned about the risks of airbag explosions in older Honda vehicles made from 2001 to 2003. The U.S. Government will emerge as a material stakeholder, with Takata currently operating under a five-year, $200 million consent decree with the NHTSA.

In addition to the $12 billion of airbag replacement liabilities, Takata reported it has sustained a cash operating loss of over $500 million since the inception of the recall in 2013. Moreover, Takata is facing civil and criminal fines and penalties from various government agencies, throughout the world. A number of class action lawsuits have been filed seeking redress from Takata for the tragic loss of life, personal injury, and property damage allegedly caused by the defective airbags.

As a result of the economic loss, the automakers will likely emerge as Takata's largest class of unsecured creditors. Takata supplied defective products to the automakers, which at a minimum creates claims for breaches of contract, for the $12 billion of reported losses. It is not clear who, between Takata and the automakers, is paying the costs of the airbag recall, but it is a reasonable assumption that Takata is unable to absorb all of the costs, and that the automakers are absorbing a significant share.

There has been no indication that Takata is not paying its suppliers in the ordinary course of business. Faced with uncertainty, vendors often impose cash-before-delivery terms on its customers, to hedge against a potential loss should the customer file for insolvency protection, including a Chapter 11 filing. A material imposition of cash payment terms for Takata will impact its working capital requirements and pressure its lenders and investors to cover this additional cost. The scope and ultimate loss for the class action lawsuits will not be known for some time. As with mass tort lawsuits generally, the number of plaintiffs is increasing as losses continue to occur and there will be future plaintiffs. Ultimately, there will be pressure to create a dedicated fund, or source of funds, to address these losses over an extended period of time.

Takata's corporate structure

Takata was started in 1933 in Japan primarily producing lifelines for parachutes and other textiles. Over time, Takata expanded into seat belts, child restraints, and airbags. To accommodate a world-wide auto industry, Takata expanded geographically, including in the U.S., Mexico, Brazil and Uruguay. In Europe, Takata has facilities in Germany, Czech Republic, Poland, Hungary, Romania, and Russia. In Asia, Takata maintains facilities in Singapore, the Philippines, Thailand, Malaysia, Korea, China, India and Indonesia.

Prior to the airbag recall which began in 2013, Takata had a seat belt recall in the U.S. in 1995 relating to about 8.5 million vehicles built from 1986-1991, which at the time was identified as the second largest recall in the 30 year history of the U.S. Department of Transportation.

The restructuring

Faced with the consequences of the impact of the airbag recall, in February, 2016, Takata's Board of Directors appointed a steering committee to explore solutions

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including a restructuring of its businesses. According to the *Wall Street Journal* on May 25, 2016, Takata engaged Lazard Ltd. to seek a cash infusion and negotiate with automakers over "the ballooning" costs, and to help craft a restructuring plan to deal with "billions of dollars" of liabilities. *Reuters* reported that the restructuring would focus on Takata's Michigan-based assets, which account for one-half of Takata's global sales. Takata's Michigan-based entity is TK Holdings, Inc. Indeed, Takata also engaged the well-known New York-based restructuring law firm, Weil, Gotshal & Manges LLP to advise regarding a restructuring.

Numerous news reports including from *Reuters*, *Bloomberg* and the *Wall Street Journal* in the fall of 2016 indicated that Takata solicited bids from various strategic and financial buyers or investors with respect to certain of its assets, presumably primarily the U.S.-based assets. The reported bidders included Daicel Corp., Autoliv Inc., Bain Capital, Kohlberg Kravis and Roberts (KKR), Key Safety Systems, Inc. and Carlyle Group. On October 17, 2016, the *Wall Street Journal* reported that a joint bid of $3.5 billion was made by Daicel and Bain Capital, which was one of five bids that cleared the first round of bids. Subsequently, based on November 16, 2016 *Wall Street Journal* and December 15, 2016 *Bloomberg* reports, the automaker-customers preferred a bid that included either Sweden's Autoliv or Michigan-based Key Safety Systems, as automakers seek a partner with a track record of quality control and operations in major world markets.

Based on the continuous flow of news reports from reliable sources, it is clear that Takata is attempting to address the financial and other issues arising from its airbag recall. It is now clear that a restructuring is being considered, that would involve an investment or purchase of assets by a combination of financial and strategic buyers. The bidding process continues and on December 15, 2016, *Bloomberg* reported that the successful bidder may be named in the 1st quarter of 2017. Reportedly, all of the bidders' proposals have included a U.S. Chapter 11 filing of certain of Takata's U.S.-based subsidiaries. Undoubtedly, the bidders prefer a Chapter 11 filing to obtain the benefits and protection of Section 363 of the Bankruptcy Code, which generally allows a debtor to sell assets free and clear of liens and encumbrances to a third party buyer, with liens attaching instead to the proceeds of the sale. However, news reports indicate that Takata Corporation's management expressed a preference to avoid a bankruptcy filing. One wrinkle of the Section 363 strategy is the recent U.S. 2nd Circuit Court of Appeals ruling in the General Motors case holding that "new GM" (the Section 363 purchaser) could be sued for faulty ignition switches made by "old GM" prior to its Chapter 11 filing. Perhaps bidders would be willing to pay less or require a purchase price holdback, to account for this potential risk.

Another interesting question will be, in the event of a Chapter 11 filing, would the normal Section 363 procedures be followed? The Lehman Brothers Section 363 sale to Barclays in 2008 clearly demonstrated a U.S. Bankruptcy Court's willingness to flex the customary Chapter 11 procedures to accommodate business goals. Lehman Brothers was sold to Barclays, as the sole bidder, within five days after Lehman's Chapter 11 filing, to avoid an apparent meltdown of the global financial markets.

Normally in a Section 363 sale, a debtor procures a "stalking horse" bid that is subject to higher and better bids, and ultimately court approval. It appears that the "auction" may already be occurring and upon a Chapter 11 filing, a single-bidder Section 363 sale could be presented to the Bankruptcy Court. Takata could assert to the U.S. Bankruptcy Court that the Section 363 sale procedures and safeguards were in fact followed pre-petition, and provide evidence that the winning bid was indeed subject to rigorous marketing, negotiation and auction, albeit pre-petition, and that the highest and best bid is in the best interests of Takata's estate and stakeholders.

Whether any non-U.S. Takata entities seek insolvency protection under foreign insolvency laws is far from clear. Thus, whether such Takata entities may also seek recognition of the foreign proceeding the U.S. pursuant to a Chapter 15 petition for recognition is likewise uncertain. It nevertheless appears somewhat likely that Takata's U.S.-based entities will seek Chapter 11 protection in 2017 to address the economic consequences of its unfortunate airbag recall. ■

Note:

1 Takata Corp. is a limited reporting company in the U.S., thus financial and other information produced by the company is not available. Reliable business news sources including the *Wall Street Journal*, *Reuters*, *Bloomberg* and *Dow Jones* have frequently reported on the airbag recall, the potential losses and potential restructuring.

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IT IS NOT CLEAR WHO, BETWEEN TAKATA AND THE AUTOMAKERS, IS PAYING THE COSTS OF THE AIRBAG RECALL, BUT IT IS A REASONABLE ASSUMPTION THAT TAKATA IS UNABLE TO ABSORB ALL OF THE COSTS

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How do we value start-ups facing insolvency?

Ludovic Van Egroo examines the particular problems facing start-up businesses when it comes to putting a value on their assets

LUDOVIC VAN EGROO
Altedia Lee Hecht Harrison, Paris, France
Institut d'Etudes Politiques, Lille, France

"SINCE THE 1990s AND SINCE THE INTERNET BECAME WIDELY ACCESSIBLE, NOT ALL START-UPS WERE AS SUCCESSFUL AS GOOGLE"

Introduction: what differentiates start-ups from other businesses?

The Larousse Dictionary (www.larousse.fr) defines a start-up as a young, innovative company in the new technology sector.

According to Patrick Fridenson[1], the company historian and EHESS director, "*It's neither the age, the size, or the business activity that define a start-up, but the following three conditions:*

1. *Strong growth perspective*
2. *Use of new and innovative technologies*
3. *Need for significant funding, through fund raising.*"

One more criteria can be added to these: Dematerialised intangible assets (software, patents, trademarks, or simply a website or an application).

However, since the 1990s and since the internet became widely accessible, not all start-ups were as successful as Google, Facebook, Uber or Critéo.

So we have to know: do start-ups meet the same difficulties like classical companies? Can they be avoided? If so, how? In case of failure of this new category of businesses, how can we proceed to an evaluation of assets?

What are the key factors of success and the difficulties faced?

In February 2015, the COFACE[2] shortlisted three key success factors for start-ups:

- **Managerial staff training;**
- **Behaviour:** despite of conditions favourable for creation and innovation, cultural norms can slow down the capacity to take entrepreneurial risks; and
- **Financing:** investment in start-ups must be encouraged in order to benefit a larger number of them.

These keys factors of success can also lead to the collapse of a start-up. Indeed, as start-ups grow faster than "traditional" businesses, they must also confront in a short period of time issues related to team management and production process organisation while business profitability is still uncertain. Start-ups are mostly weak during their early stage and not well prepared when facing difficulties that can lead to failure.

In 2002 the Commercial Court in Paris identified the main hurdles as:

- The tax and social security liabilities;
- Assets valued at 1/8th of the liabilities; and
- An issue with the disposal of assets and their valuation.

In case of business collapse, what can be done?

In case of failure, two main questions may be helpful to identify the possible course of action.

Did the company reach its profitability threshold?

If so: the company could be granted a business recovery proceedings and benefit from a recovering program. Or not: it won't be possible to launch a recovery proceedings without the investors' financial support.

How to value the start-up's assets?

When the company collapses and a judicial procedure is implemented (in particular liquidation, safeguarding or restructuring proceedings), a transfer plan can be requested for approval or become an obligation. It thus becomes necessary to evaluate intangible assets. This evaluation helps to define the company's potential for growth and the value of assets.

If the value can help repay liabilities: the company could sell all or a part of its assets and start the business again. If the value cannot repay the liabilities: the start-up probably goes on judicial liquidation.

However, it is sometimes difficult to value start-up assets due to their intangible nature, i.e. non-physical (software and licences, patents, brands, stock in trade, trademarks, copyright…). Start-ups have substantial funding needs during the early phase until they attain their break-even point. During this period, businesses call on venture capital funds and business angels and seek funding from individuals (relatives). In this situation the start-up managers will have to treat with their financial partners and look for a solution while the company is unprofitable. Due to this context the legal investor's situation is important in order to find a solution.

How to treat the investors' legal status ?

A loan can be taken against a collateral whereas, in France, equity investments and the associate's current account will be treated after the unsecured debts. Nevertheless, being a shareholder gives you the right to monitor the company's management, which is not the case of a bank loan.

Typically, start-ups in this digital era often lack the tangible assets (material goods) to secure investments. The company, in its early years, is in a weak financial situation with a high risk of failure as it is yet to become profitable. It is in this context that public institutions may offer the necessary guarantees to support and sustain private investment (which is one of the main challenges for start-ups).

These investments can take the form of loans or acknowledgments of debt, stakes in the capital or associate's current account. In case of bankruptcy, the treatment of creditors – individuals or legal entities – depends on the form of their investment. Indeed, a loan, an equity stake or the associate's current account are not treated in the same way, as shown in *Table 1* below.

“ TYPICALLY, START-UPS IN THIS DIGITAL ERA OFTEN LACK THE TANGIBLE ASSETS (MATERIAL GOODS) TO SECURE INVESTMENTS ”

1. Summary comparison between an equity stake and an associate's current account

Kind of investment	Loan	Current Account
Guarantee	Can guarantee assets	None
Decision makers	Can decide to require judicial assistance in case they are not paid	Can require judicial assistance as soon as they consider the situation needs it. Can take the decision to inform the start-up manager about the situation and the solution.
Information access	Get the information notified by the start-up director	Must be aware about the financial and economic decision to make
Priority refund	Can get some priorities (e.g. conciliation as judicial procedure)	It is the last resort

IT IS IMPORTANT TO ENHANCE THE RELIABILITY AND SYSTEMATISE INDICATORS WHICH WILL HELP TO EVALUATE THE COMPANY'S INTANGIBLE ASSETS

2. Summary comparison between traditional and digital leasehold rights components

Leasehold rights component	Traditional retail funds	Digital business
Leasehold rights	Condition of the shop	Condition of the web site / application
	Lessor (contract)	Web site host / platform (hosting contract)
	Address and location	Domain name and key words
Clients and their loyalty	Rate of frequentation (primary or secondary street)	Web site visitors and referencing
	Customer catchment zone	Consumer habit and qualified web site frequency

In such conditions the current account investors' interest is to be more engaged than the loan investors who could guarantee some assets. In both cases, the main issue is to value the start-up assets.

How can we value intangible assets?

Start-ups' intangible assets can be:

- Registered and protected at INPI (e.g.: trademarks, patents, licences etc)
- Unregistered and unprotected intangible assets (e.g.: domain name, website, application etc). Usually combined with a registered asset but not taken into consideration during evaluation or a contract. However, in the absence of judicial protection, these assets can be forgotten or destroyed without any evaluation.

Start-ups' assets evaluation can be done using the conventional revalorisation approach (leasehold rights and client Loyalty…). Thus, websites, domains names and applications could be considered as digital business capital.

A summary comparison between traditional and digital leasehold rights components is shown in *Table 2* above.

Indeed, we can quantify and qualify web sitetraffic thanks to new technologies and collect consumer insights (e.g.: purchase or interests) which can represent a substantial value for investors or the company's purchaser.

This intangible asset valuation for start-ups means that the position of the website and platform hosts should be reviewed and they could be considered as traditional shop leasehold right lessor. Website hosts and lessor are a potential non-recovered asset that can quickly be depreciated.

During judicial procedures, judicial representatives and judicial administrators may have to conduct an in-depth research and analysis of assets in order to get all the information needed for optimising their evaluation.

Conclusion

The differences between a start-up and a traditional company is in particular due to its innovative aspect that needs a substantial source of funding. If a start-up struggles to reach its break-even point and collapses, it must be able to convince the buyer and the investor of its value and its growth perspectives. Intangible asset valorisation is thus necessary for start-ups but not only, as "traditional" businesses are also progressively going digital (e.g.: e-commerce or applications for services activities of chemist's offices, hairdressing salons, restaurants etc). That is why it is important to enhance the reliability and systematise indicators which will help evaluate the company's intangible assets.

The company's funder and manager must also take in consideration the investors' status and the consequences in case of difficulties. Indeed, their position will change taking in consideration their goals and objectives and possible dependency.

Moreover, in order to facilitate the research and the implementation of solutions, start-ups and creditors can request the "*médiation inter-entreprises*"[3] assistance (help for mediating between companies) with the objective of negotiating an agreement that satisfies the parties involved. ■

Footnotes:

1. Published in the newspaper Capital 10/08/2015 "By the way, what is a start-up?" www.capital.fr/bourse/actualites/au-fait-c-est-quoi-une-start-up-1063221
2. COFACE PANORAMA, France, a suitable land for Start-ups development? February 2015
3. Business mediation: https://lannuaire.service-public.fr/gouvernement/administration-centraleou-ministere_188194

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Is it time for a sandbox for start-ups in Estonia?

Anne Veerpalu and Nikolay Demchuk explain why Estonia needs a sandbox and what sandbox regimes are in place at the moment

ANNE VEERPALU
Attorney at law, Associate partner,
Njord Advokaadibüroo OÜ,
Tallinn, Estonia

NIKOLAY DEMCHUK
Lawyer, Associate,
Njord Advokaadibüroo OÜ,
Tallinn, Estonia

Estonia is well-known in Europe as a highly developed country in the ICT sector.

Almost everyone has encountered the headlines about Estonia as a "*startup paradise*" (the Reddit), "*the most digitalized country*" (MarketWatch), "*digital utopia*" or "*internet titan*" (the Guardian), "*leader in technology*" (the Economist) etc. There are approximately 30.6 startups per 100,000 inhabitants and digital innovations like Skype, TransferWise, e-Government and e-Residency have earned Estonia such praise. Estonia is rivaling Israel, South Korea and Singapore for the digital hub position worldwide.[1]

There are many reasons why people choose Estonia as a country of incorporation of their startup. First of all, because of the favourable tax system where profit of the company is only taxed upon distribution, and then because of the availability of public e-services and the tech-savvy residents. Estonia is like a tiny incubator where you can prototype your products and services in.

What is a sandbox within the world of the financial technology sector?

Generally speaking, a sandbox is a special gate for businesses to enter the market and test ideas "in a live environment" without immediately incurring normal regulatory consequences. In other words, a sandbox could be a solution which helps new innovative FinTech startups to test their products and services in a real market, with real consumers, without obtaining appropriate licenses or complying fully with existing laws.

It is well known that national legislation together with EU laws – regulations, directives, case law and soft law – become burdensome for startups and it costs them both time and money to realize under which laws their innovative business will be regulated. Usually the founders of startups are not skilled lawyers and they do not usually have financing to consult professionals on compliance. But investors want to know exactly about the functionality and the compliance before making large investments: here we have a typical catch 22.

A sandbox regime, however, gives an alternative to test the product or service without obtaining a license or other compliance and without waiting for an official approval by an authority. This is a unique opportunity for businesses to try out their product or service. You only need to match certain conditions set by the sandbox authority to test the business in a live environment.

Certainly, there are also some requirements in order to be eligible to submit an application to the sandbox itself, but these are minuscule in comparison. The financial supervisory authority will also benefit from the activities of the sandbox as they will be able to ensure that new startups are not going to affect the safety and robustness of the financial services ecosystem.

The world's first FinTech sandboxes are forming already

It comes as no surprise that the United Kingdom was the first country that included a sandbox regime into their financial regulatory system. So far readiness for sandbox regulations has also been announced by Australia, Singapore and Malaysia.

The first criterion that differs between the UK, Australia and Singapore is the eligibility for applying for a sandbox. In the UK and Singapore, both new and existing businesses are able to apply. Australia allows only new businesses to apply.

Once the business is eligible to be entered in a sandbox it has to match some further requirements. In the UK, the product or service has to be very innovative, or provide a consumer benefit. Additionally, it should be intended for the UK market and its activity should be within the scope of the UK's Financial Conduct Authority's (FCA) regulatory regime.

Opposite to the UK, Australia has no such requirement as innovativeness or consumer benefit, but the business is required to be funded by an organization recognized by the Australian Securities and Investment Commission (ASIC). The aim is to guarantee that the new business does not harm consumers. The eligibility requirements in Singapore are similar to the ones in the UK and in addition the applicants must show an intention to further deploy the FinTech solution in Singapore after a successful completion of testing in the sandbox.

Regarding the time period for testing, the UK agreed to three to six months duration for new businesses. Australia considers that one to six months is enough with no possibility to extend this period. Singapore suggests a more flexible procedure giving the businesses the right to decide how much time they need and including the possibility of extension.

The most important part of the sandbox idea is the consumer protection issue. As there is no clarity how the new business will affect the consumers, procedures in these countries are different or still under consideration. For example, in the UK the businesses can test their innovative ideas only on consumers who have previously agreed to be involved in the test. The FCA also emphasizes that it will define the consumer rights/limits in every single case. In Australia, the businesses have to be members of an ASIC-approved external dispute resolution scheme and have to comply with the interests duty and conflicted remuneration provisions as if the businesses were acting under an AFS license. Singapore has not yet defined how it will deal with this issue.

The businesses testing their products or services in the UK must submit weekly and final written reports to the FCA about the results. After the FCA reviews the reports, the business can decide whether it will start offering the tested new product or service on the market. If yes, the business must apply for a proper license. There is no obligation of ongoing reporting in Australia. When a business finishes testing, ASIC gets the information about their experience. If the business wishes to operate further, a licence will be required. After the completion of testing in Singapore, the business can deploy their product or service only if the Monetary Authority of Singapore (MAS) is satisfied with the sandbox results and the startup is able to comply with the appropriate laws and regulations.

In the future, the sandbox test might even become a good tool for helping companies in insolvency-related matters. Innovative ideas in restructuring will also find their testing place in the sandbox. Only recently it was almost impossible to imagine that new services or products could be tested in such a complicated matter without obtaining licences and without complying with complicated regulatory requirements. Today, however, this will become reality in the countries who have introduced the sandbox test. Therefore, it is time for lawyers in the countries where the sandbox is a subject of public discussion to come up with better regulation for the test, in order to ensure that during the testing period the new services will not harm consumers and the business itself.

How can Estonia benefit from the sandbox regime?

Estonia should either benefit from the experience of the countries which have already introduced sandbox regimes or benefit from the experience of the countries which have drafted a white paper for a broader discussion in order to encompass the interests of all stakeholders.

Already, the Estonian Financial Supervisory Authority (FSA) has taken the initiative to set up a FinTech Task Force which is to look into innovative solutions for the financial sector. A sandbox is really only just a few steps away. According to Kilvar Kessler, the head of FSA, (at a recent conference in Tartu), "Estonia as a country is almost like just a tiny sandbox", yet at the time being compliance with all regulations of the EU and the laws of Estonia is still a necessity for all Estonian FinTech start-ups. ■

> "A SANDBOX IS A SPECIAL GATE FOR BUSINESSES TO ENTER THE MARKET AND TEST IDEAS IN A LIVE ENVIRONMENT WITHOUT NORMAL REGULATORY CONSEQUENCES"

Footnotes:

1. Baltic Start-ups in Numbers: Estonia Leading the Way, available at: http://www.investinestonia.com/en/about-estonia/news/article/1050-baltic-startups-in-numbers-estonia-leading-the-way

Further References:

1. ASIC consults on regulatory sandbox for Fintech startups: file:///C:/Users/User/Downloads/Financial%20Services%20Update%20-%20ASIC%20consults%20on%20regulatory%20sandbox%20for%20fintech%20startups.pdf
2. Regulatory sandbox (the UK): https://www.fca.org.uk/firms/project-innovate-innovation-hub/regulatory-sandbox
3. Singapore: http://www.mas.gov.sg/~/media/MAS/News%20and%20Publications/Consultation%20Papers/Consultation%20Paper%20on%20FinTech%20Regulatory%20Sandbox%20Guidelines.pdf

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Personal guarantees: for all the wrong reasons

Ieva Strunkiene looks at the growth of personal guarantees in Lithuania

IEVA STRUNKIENE
Associate with Triniti, Advocates, Vilnius, Lithuania; Winner of the Richard Turton Award in 2011

Personal guarantees are a very old form of security, used almost universally. Everyone is familiar with the concept of the director's personal guarantee. Generally this works to the benefit of the company by making it possible for the lender to advance necessary working capital.

However, in Lithuania, the standard practice of financial institutions granting credit is to require virtually all loans to be guaranteed[1] by the company's shareholders or managers. This is particularly the case of small and medium-sized enterprises. This article explores the failed logic and misleading results of such "security" for the banking sector.

Shareholder or manager's limits of liability

In the Republic of Lithuania, as in most of Europe, legal persons are divided into those with limited and unlimited civil liability. Where the property of a legal person with unlimited liability is insufficient to discharge its obligations, the members of the legal person shall be liable for its obligations while members of a legal person of limited liability are not liable. Sole trader enterprises and commercial partnerships are legal persons of unlimited civil liability.

Since personal suretyship of a shareholder or the manager of the company is now a common feature of a credit relationship in Lithuania, the boundary between limited and unlimited liability legal entities blurs. As a result, the expectation of a member of a limited liability legal entity that his personal property will be protected in the case of business failure is illusory. The surety is liable to the same extent as the debtor for the payment of principle, interest and penalty and any compensation for damages[3].

The company's bankruptcy will not avoid obligations to the credit institution

Quite typically, the surety contracts used by Lithuanian credit institutions provide for the principal debtor and the guarantor to be joint debtors with joint and several liabilities whereby the credit institution is entitled to look to both principal debtor and guarantor and either one of them separately. Thus, the bankruptcy of the company is not going to avoid the surety's liability to the creditors.

The recent growth in personal guarantees and in personal bankruptcy

Recently, the volume of loans guaranteed by natural persons (as opposed to corporate entities) has

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increased dramatically. In Lithuania, banks typically provide loans to small businesses and, in cases where the debtor is unable to provide the collateral of choice, real estate, the banks almost always require that the obligations be guaranteed. In 2015, sureties by natural persons were provided for 75 percent of loans to individual enterprises and over 30 percent of public and private limited liability companies. Moreover, in 76 percent of cases, the availability of an appropriate surety was the initial condition of credit institutions approached for the provision of a business loan. This means that for owners of small enterprises, the provision of a personal guarantee is the only means of obtaining access to the business finance.

The Bank of Lithuania has sought to establish the extent and reason for the growth in the use of guarantees as security for business loans and the significant increase in the proportion of business loans secured by personal sureties. In the period 2004 to 2009, this proportion increased from 4% to 20%, and in the period 2010 to 2014, business loans secured by personal sureties increased by a further 15%. Therefore, personal surety secured almost one in three business loans over the past three years.

Of course, the requirement for a surety has no negative consequences if the primary borrower fulfils the terms and conditions of the credit agreement. However, the analysis of the causes of bankruptcy of natural persons in 2013-2015 reveals that the granting of sureties for the obligations of others is the second greatest cause of the bankruptcy of natural persons (25%), closely related to the debtor's loss of his or her employment (55%). While the bankruptcy of the principal debtor will precede the bankruptcy of the surety, one can see the cumulative consequences of job loss and the illusory protection granted by sureties under the current system.

Who is to blame?

It would be easy to criticise the individuals agreeing to guarantee these loans but one must also challenge the banks. It would appear that commercial banks and other credit institutions do not properly evaluate the risks of granting credit to many borrowers: their enthusiasm to lend regardless of the risk of bad debts; without assessing the risk born by the guarantor, or the extent of their income or property that would be available to meet any claim made under their guarantee should the principal debtor fail.

According to the typical conditions of Lithuanian contracts of suretyship, if the debtor fails to perform the obligation, both the debtor and the surety shall be liable as solidary debtors to the creditor for the fulfilment of this obligation. The essence of solidary liability of borrowers is that the credit institution is entitled to require that both the principal debtor and the surety or either of them separately shall comply with the obligation. The Supreme Court of Lithuania has stated that, when a company faces the problems related with the credit payments, the credit institution has the right to immediately redirect the requirement to the surety and his property. And in this case, the natural person guarantor will not be able to offer the defence that the principal debtor has not failed; that he did not understand the obligations, made a mistake or was deceived, since the word "to guarantee" reveals its main meaning, i.e. to ensure, to secure.

There is no problem if the guarantor has sufficient assets to fulfil the suretyship obligations, or the income of the guarantor enables them to fulfil the obligations in the credit agreement, but in real life the obligations assumed by a company usually exceed the assets of a natural person, and the repayments under a credit agreement usually exceed the income of the natural person. Therefore, in such a situation, the

> COMMERCIAL BANKS AND OTHER CREDIT INSTITUTIONS DO NOT PROPERLY EVALUATE THE RISKS OF GRANTING CREDIT TO MANY BORROWERS

> **LITHUANIAN BANKS GRANTED MOST OF THE CURRENT GUARANTEED LOANS DURING THE ECONOMIC CRISIS, WHEN MANY COMPANIES FACED FINANCIAL DIFFICULTIES**

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natural person has no alternative but to go bankrupt, i.e. to open insolvency proceedings of a natural person.

This is the issue. Under the responsible lending principles required by the laws of the Republic of Lithuania, financial institutions are obliged to verify their client's financial situation and their ability to fulfil the contract obligations prior to the conclusion of a credit agreement. In case of suretyship, however, despite the solidary principle of joint liability, the financial institution's only customer is the principal borrower, and not the guarantor. Therefore, the bank is not obliged to, and as a matter of principle, does not, check the guarantor's property or income.

Significantly, the banks only establish the guarantor's financial situation when the borrower is insolvent and the bank pursues the surety. The Supreme Court of Lithuania has supported the view that banks are not required to establish the viability of sureties for loans they are granting to their customers but this ignores the fact that the banks' demand for suretyship is economically unjustified.

The amount guaranteed is not only the amount of the credit obtained

Of course, the amount to be repaid by the guarantor will include not only the company's indebtedness accumulated over the term of the loan. Depending on the funding relationship and the terms and conditions of the agreement, the guarantor may also be liable for outstanding interest (indirect losses), penalties, damages, additional expenses, and fines.

The form of liability, i.e. joint or several, assumed under a suretyship agreement should be equally important to the guarantor, and he should understand the scope of liability. In other words, no matter how busy the shareholders or executives of companies are, guarantors need to consult professionals in the field and agree the relevant terms and conditions with the credit institution. It needs to be better understood that signing a suretyship agreement is not just a formality but a genuine risk to one's assets and, in the event that the guarantor has a family, to the family-owned assets.

Conclusions

While the provision of security to providers of finance is commonplace and, properly operated can rightly be claimed to reduce the risks of providing credit to small and growing businesses, the system as operated in Lithuania has potentially adverse consequences.

Firstly, by absolving the banks of any responsibility to enquire into the adequacy of sureties, banks are able to justify lending to poor business propositions on the basis that the loan is fully secured[4]. Secondly, the existence of ruinous personal sureties has the effect of deterring executives and shareholders from the timely initiation of restructuring or bankruptcy proceedings.

Thirdly, the existence of a personal surety is frequently used by credit institutions to justify delays in pursuing overdue repayments of loans and to defer the timely recovery of overdue amounts and ultimately the company's bankruptcy, thereby increasing their eventual demands on sureties.

Hardly surprisingly, Lithuanian banks granted most of the current guaranteed loans during the economic crisis, when many companies faced financial difficulties. In truth, the banks' restructuring of most corporate loans were little more than the demand for personal suretyship to prop up the banks' existing exposures. This was seldom in the best interest of those shareholders or executives who provided sureties but, in doing so, they effectively accepted unlimited responsibility for the company's obligations to their principal creditors, the banks. Whether this is good banking practice is a matter for the banking regulator, the Bank of Lithuania. ■

Footnotes:

1 According to the Civil Code of the Republic of Lithuania, suretyship is a contract by which the surety binds himself to be liable to the creditor of a principal debtor (either gratuitously or for a remuneration) in the event that the principal debtor fails to perform the obligation, in whole or in part. In its essence, suretyship is in theory a way to ensure that the obligation is fulfilled, either by the debtor or someone else on the debtor's behalf.

2 The guarantee is typically in the form of a surety.

3 Unless otherwise established by the contract of suretyship, which would be unlikely.

4 This is similar logic to the sub-prime lending in the USA which brought about the global financial crisis.

Ranking and Priority of Creditors

Annika Wolf reviews the latest publication in the Oxford University Press' series on International and Comparative Insolvency Law

Editors:
Dennis Faber
Niels Vermunt
Jason Kilborn
Tomáš Richter
Ignacio Tirado

Publisher:
Oxford University Press
2016

618pp, £195

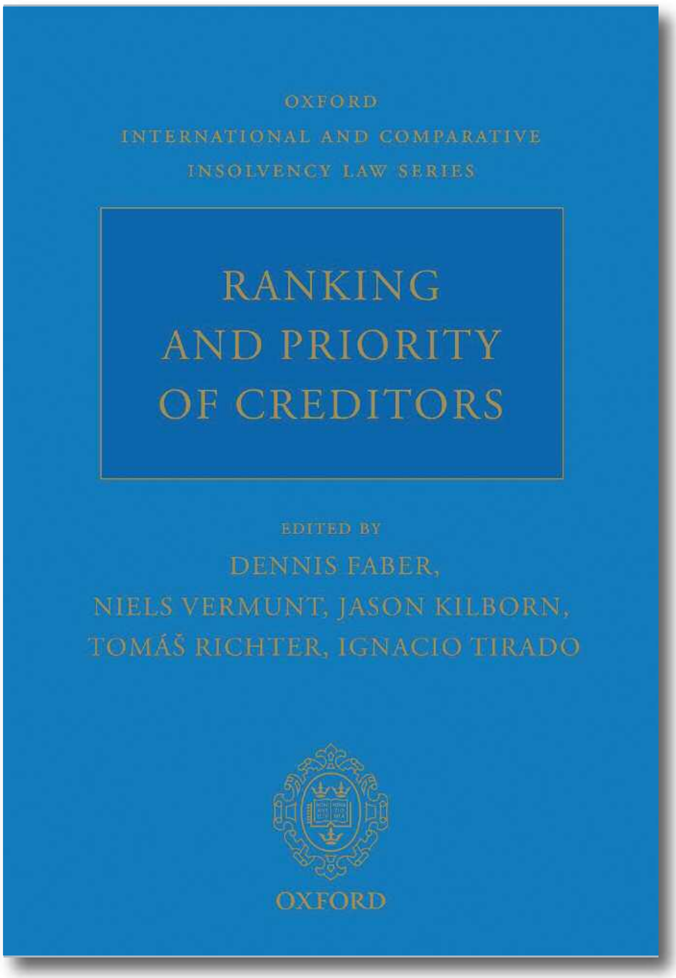
ISBN 978-0-19-872729-3

Review by Dr. Annika Wolf, Visiting Fellow, Department of Law, European University Institute, Florence

After the first two Volumes on Commencement of Insolvency Proceedings (2012) and the Treatment of Contracts in Insolvency (2013), Ranking and Priority of Creditors is the third Volume of the Oxford University Press' International and Comparative Insolvency Law Series.

The book stays within the tradition of the previous works of compiling national reports over a number of developed and emerging markets, namely Australia, Austria, Belgium, Brazil, Canada, People's Republic of China, Czech Republic, England, France, Germany, Mexico, The Netherlands, Poland, Russia Federation, South Africa, Republic of Korea (South Korea), Spain, Sweden, United States.

While the general themes of the volume is predictable and almost universal as to the procedural tools for the efficient collectivisation of claims, the national reports show interesting variations among national approaches. This book does a great service by providing a general outline of the questions in the beginning that the different sections deal with, and the authors of the national reports, all local experts and most of whom are well known and highly respected in international insolvency circles, then follow this outline.



The detail

In detail, the general outline provides:

(I) an introduction where remarkable features of the domestic law are mentioned;
(II) a definition and the scope of insolvency claims (A), divided into further sub-categories in accordance to the general claims (e.g. secured, preferential, unsecured and subordinated) and additional categories where applicable as well as submission, verification, and admission of insolvency claims (B), and the ranking of insolvency claims (C);
(III) the administration of claims with a definition (A), registration, verification, and satisfaction of administrative claims (B), ranking of administrative claims (C), and voting or other participation rights (D); and
(IV) non enforceable claims with its scope and definition (A) and treatment of non-enforceable claims (B).

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The authors even recommend further readings on each jurisdiction at the end of the book.

In general, this approach is well-executed. The national reports are informative and thoughtful, and their compilation is a very useful contribution to the professional literature and an important resource to anyone interested in this aspect of comparative insolvency law and on the specific features of the foreign legal system, professionals and academics alike. In a few areas, some of the national reports are too cursory and do not provide enough detail for an ingenuous reader's first encounter with the foreign law and may lead to mis-understandings about how the particular jurisdiction addresses ranking and priority of claims.

Snapshot view

There are two limitations that are common to most comparative law projects published in a series – and this book is no exception. The first is that the national reports provide a snapshot view of the status of the law as it was in the publishing year 2016, or even earlier; the second that Volume 1 Commencement of Insolvency Proceedings has touched upon many of the issues further developed in this Volume. The editors were wise to recommend readers of Volume 3 to have Volume 1 at hand because cross-reference to it are plentiful.

An aim of the book is to provide clear indications of those effective elements in each domestic framework, which can provide a useful model for legislative reform in other jurisdictions. It would have been valuable for the interested reader to obtain an insight from the local experts where they see an area for such reform, or where they would criticize their own national legal approach with comparison to other jurisdictions, especially in light of the ongoing reform efforts around the world.

Nonetheless, the national reports in this book provide a very interesting and educational background of the different national approaches taken by various jurisdictions to the ranking and priority of creditors in insolvency law, and are a great and very useful contribution to the existing literature, both professional and academic. ■

Other titles in the Oxford International and Comparative Insolvency Law Series:

- Commencement of Insolvency Proceedings, edited by Dennis Faber, Niels Vermunt, Jason Kilborn, and Tomáš Richter, (OUP 2012) ISBN: 9780199644223.
- Treatment of Contracts in Insolvency, edited by Dennis Faber, Niels Vermunt, Jason Kilborn, and Kathleen van der Linde, (OUP 2013) ISBN: 9780199668366.

> "THE NATIONAL REPORTS ARE INFORMATIVE AND THOUGHTFUL, AND THEIR COMPILATION IS A VERY USEFUL CONTRIBUTION TO THE PROFESSIONAL LITERATURE"

Country Reports

Winter 2016/17

Updates from Slovakia and Italy

MGR. FILIP TAKÁČ
Associate,
bnt, Bratislava (Slovakia)

"HIGHER RATES OF SATISFACTION OR LONGER PAYMENT PERIODS ARE POSSIBLE ONLY IF PARTICULAR CREDITORS AGREE TO A BIGGER HAIRCUT"

Slovakia: Proposal of new rules for restructuring

Restructuring under "Slovak standards" generally means that a large company in debt makes arrangements with its banks (secured creditors), hires a responsible and effective trustee, and gets court approval for a huge debt haircut.

This "standard" raised public concern in 2014, when the Váhostav – SK, a.s. ("Váhostav") construction company, with about 1500 employees, and alleged to have government connections, underwent restructuring.

In the Váhostav case, unsecured creditors were awarded only 15% of their receivables. After public and media pressure, the government lost its nerve, adopted *ad hoc* legislation, and offered to repay the creditors at least 50% from the state budget.

Despite adoption of the *ad hoc* amendment of the Bankruptcy and Restructuring Act ("BRA"), the essential problems of restructuring proceedings remained untouched. The necessity of additional BRA amendment was soon underlined by the restructuring of another large company, a network of Carrefour supermarkets in Slovakia, in which approved unsecured creditors took a 97% debt haircut.

Slovak legislation often forces unsecured creditors to decide whether they want a higher satisfaction of their claims over a longer period, or less money a bit earlier. To keep their businesses alive, small entrepreneurs generally have no choice but to accept the faster plan, with lower satisfaction of their claims.

The new proposal for BRA amendment will certainly improve conditions for creditors. The proposal requires plans to be drawn up so as to ensure the highest possible creditor satisfaction. Unsecured creditors are guaranteed at least 20% more than they would receive in a bankruptcy proceeding. The proposal also introduces new reasons for courts to reject plans:

(i) unsecured creditors' satisfaction in an approved restructuring plan must be at least 50%, and
(ii) payment must be accomplished within five years.

Higher rates of satisfaction or longer payment periods for unsecured creditors are possible only if particular creditors agree to a bigger haircut. The question is whether this is in line with the plan's requirements of feasibility and sustainability.

An important provision forbids the debtor from distributing profits or any other equity to its shareholders before the unsecured creditors' claims are satisfied in full. But a slightly different provision is present in current legislation, and debtors have found ways to avoid it by, for example, shifting their profits to related persons.

The proposal also tries to bring transparency to the appointment and remuneration of restructuring trustees. Currently, the trustee is selected by the debtor, and remuneration is by mutual agreement, so that it can be said that the trustee represents the debtor's interests. The trustee has expansive rights even before the first creditors' meeting, including the right to contest the creditors' claims. The contested creditors then lose their voting rights and have absolutely no influence over the restructuring. The proposal's solution is to randomly assign trustees electronically. Then, the remuneration contract for the preparation of the restructuring plan should be annexed to the plan. This should guarantee the transparency and independence of the administrator.

The most likely outcome of these changes to restructuring proceedings in Slovakia is a lower interest of companies in restructuring. The aim of restructuring is to keep the company and its business alive. We fear that if the BRA amendment is passed as proposed, restructuring will lose its rationale and attractiveness.

Italy:
Reform of the Bankruptcy Law

> THE NEW PROVISIONS ARE BASED ON THE PRINCIPLE OF SAFEGUARDING THE VALUES OF DISTRESSED COMPANIES

The bill drafted by the Rordorf Commission, for the reform of the Italian insolvency system, has been recently approved by the Council of Ministers. With such an approval, the Government has been delegated to issue one or more legislative decrees for the reform of the rules governing business crisis and insolvency.

The new provisions are aimed at completing and enhancing the provisions enforced by Decree 83 of 2015 on "*Urgent measures on bankruptcy, civil procedure and the organization and functioning of the judicial administration*", implementing a systematic and organic reform of the insolvency law as well as pursuing a timely recovery of businesses from the crisis that would, on one hand, limit losses and, on the other, ensure the preservation of corporate values.

The new provisions are based on the principle of safeguarding the values of distressed companies. In fact, suitable alert procedures have been established in order to anticipate the recovery of the business from the crisis through an in-depth analysis of the causes behind the economic and financial difficulties of the company and through supporting the negotiations in view of a final agreement with the creditors.

Such alert procedures must be confidential and extrajudicial. The jurisdiction for alert procedures and crisis composition is deferred to a specific section of the crisis composition bodies.

Furthermore, the draft law provides for the obligation for corporate control and auditors' bodies to communicate the state of crisis to the administrative body, and for qualified entrepreneurs (i.e. Italian Revenue Agency, Social Security Agencies) to report to the entrepreneur or to the administrative control bodies of the company the persistence of non-fulfillments of significant amounts due.

In order to promote the use of the debtor's recourse, a series of incentives have been provided for entrepreneurs that timely make use of the procedure and foster positive outcomes.

The draft law foresees a comprehensive reorganisation of the composition with creditors procedure; among the most relevant novelty, it is worth mentioning the prominence given to the composition with creditors enabling corporate continuity, currently governed by article 186 bis of the Bankruptcy Law.

It has limited, however, the use of liquidation proposals, which are permitted only in cases of external resources contribution which would significantly increase the satisfaction of creditors.

In relation to restructuring agreements, the elimination or the reduction of the 60% threshold of credits employed to reach an agreement with the creditors is suggested. This is aimed at facilitating and encouraging debtors to make use of this solution.

The draft law also suggests the extension of the effects of the agreement or of any moratorium to non-participating creditors if the agreement is reached with creditors representing at least 75% of the credits.

The draft law, moreover, focuses on presenting the new "judicial liquidation" principles suggested by the Rordorf commission, which will replace the current bankruptcy procedure by making it quicker and more flexible in its application, while retaining its key existing elements.

Another aspect worth mentioning is the intent to revise the procedure of over-indebtedness in order to harmonise it with the amendments concerning regulation procedures of insolvency and business crisis.

As of today, it is considered unlikely that the Government will implement the draft law within the current year. However, given the importance and the relevance of the matter, we can presumably expect new developments within the year 2017.

GIORGIO CHERUBINI
Partner, EXPLegal,
Rome & Milan (Italy)

GIOVANNA CANALE
Junior Associate, EXPLegal,
Rome & Milan (Italy)

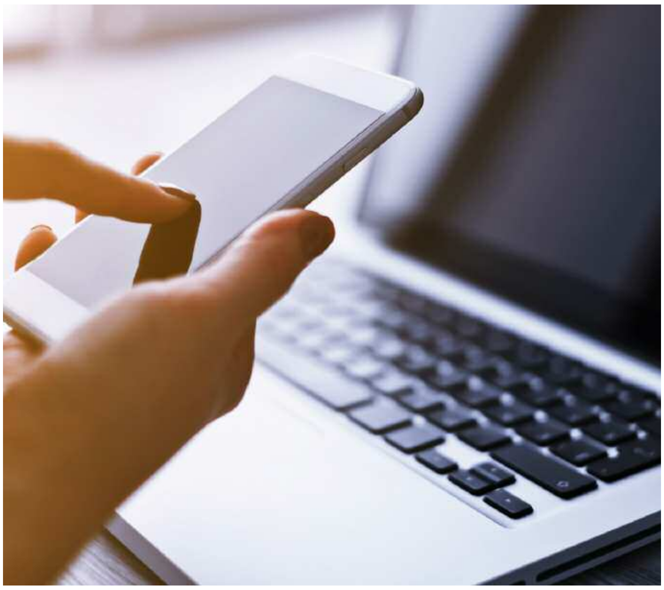
Technical Update

Winter 2016/17

Myriam Mailly, Technical Officer of INSOL Europe, reports on the new technical content available and other updates on the INSOL Europe website. You can contact her at: technical@insol-europe.org

MYRIAM MAILLY
INSOL Europe Co-Technical Officer

> "502 ABSTRACTS ARE UPLOADED ON THE LEXIS NEXIS / INSOL EUROPE EUROPEAN INSOLVENCY REGULATION CASE REGISTER PLATFORM"



Since the last technical column published in the Winter 2015 edition of Eurofenix, a number of new articles, resources, information and contributions have been published on the Technical Content sections of the INSOL Europe website.

Glossaries of Insolvency Terms

We are pleased to announce that Piya Mukherjee from Horten Law Firm (Denmark) has kindly accepted to contribute for the Danish Glossary of Insolvency Terms. In addition, Simona Maria Milos from INPPI (Romania), in collaboration with Andreea Deli, will produce the glossary for Romania.

Updates for Luxembourg (kindly provided by Laurent Fish, FischFayot, Luxembourg) and for Cyprus (kindly provided by Panayiota Georgiou, KPMG, Cyprus) have also been published.

National Insolvency Statistics

Statistics for the following countries have been published:

- Cyprus (1996-Q3 2016)
- Denmark (2010-Q2 2016)
- England and Wales (Q4 2015, Q1-Q2-Q3 2016)
- France (Q4 2015, Q1-Q2 2016)
- Germany (2015-Q2 2016)
- Greece (1998-2013)
- Ireland (Q4 2015-Q3 2016)
- Luxembourg (Q4 2015-Q2 2016)
- Portugal (Q4 2015- Q3 2016)
- Scotland and Northern Ireland (Q4 2015, Q1-Q2-Q3 2016)
- Spain (2015-Q1 2016)
- Switzerland (2010-2015)

European Insolvency Regulation Case Register

As of 14 December 2016, 502 abstracts are uploaded on the Lexis Nexis / INSOL Europe European Insolvency Regulation Case Register platform.

Since our last column, new abstracts from these countries have been published:

- Bulgaria (x 12)
- France (x 3)
- Greece (x 3)
- Luxembourg (x 1)
- The Netherlands (x 9)
- Slovakia (x 1)
- CJUE (x 3)

More new abstracts will follow soon from Luxembourg (x 2) and the CJUE (ENEFI, 9 November 2016, C-212/15).

State Reports

State reports from various jurisdictions published in the last editions of Eurofenix (Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Estonia, EU, France, Germany, Greece, Hungary, Italy, Ireland, Latvia, Lithuania, Luxembourg, Poland, Portugal, Puerto Rico, Romania, Slovakia, South Africa, Spain, The Netherlands, Uganda, UK and USA) have now been published on the website.

The last state report kindly provided by Karol Tatara (Poland) relating to the first pre-pack in Poland has also been added.

Updated Insolvency Laws

We are grateful to George B. Bazinas and Yiannis Sakkas

Share your views!

(Bazinas Law Firm, Greece) for sharing with the members of INSOL Europe the Greek Insolvency Code as amended by Law 4336/2015 (with full English translation) as well as an article on the Greek Legislation on Non-Performing Loans, both now available on our website.

National Case Law

The commentary of a recent French supreme court case law entitled 'The co-employment is strictly defined (*Cour de cassation, civile, Chambre sociale, 6 juillet 2016*)' written up by Catherine Ottaway (Hoche Société d'Avocats, Paris, France) has been published.

Academic Forum Publications

Papers from the following INSOL Europe events have now been published in book format:

- Academic Forum Annual Conference, Istanbul, 8-9 October 2014 ('*Designing Insolvency Systems*').
- Academic Forum Annual Conference, Berlin, 30 September - 1 October 2015 ('*Banking and Financial Insolvencies: The European Regulatory Framework*').
- Academic Forum/ERA Joint Insolvency Conference, Trier, 19-20 March 2015 and the Nottingham Law School Joint Insolvency Conference, Nottingham, 25-26 June 2015 ('*Reimagining Rescue*').

2016 Events

For those who were not able to attend the 2016 INSOL Europe Academic Forum conferences, please be aware that the final technical programme as well as the presentation slides of the INSOL Europe Academic Forum Mid Year Symposium, titled "*Credit Institutions' Recovery and Resolution: Lessons To Be Learned by Commercial Insolvencies*" which took place in Berlin (Humboldt University) on 29 April 2016 and of the INSOL Europe Academic Forum Annual Conference on '*Harmonisation of European Insolvency Law*' which took place on 21-22 September 2016 in Cascais (Portugal) are now available on the INSOL Europe website.

In addition, the final programme, the presentation slides and the photographs of the INSOL Europe Eastern European Countries' Committee conference titled "*New Trends in Insolvency: Distressed Investing and the Evolution of Personal Insolvency across Eastern Europe*" which took place on 13 May 2016 in Cluj-Napoca (Romania) are also available.

Last but not least, the final technical programme, the final slides, the videos and the photographs of the INSOL Europe Annual Congress which took place on 22-25 September 2016 in Cascais (Portugal) are published on the website along with a Congress video.

Forthcoming Events

Information regarding the INSOL Europe Eastern European Countries' Committee Conference which will take place on 11-12 May 2017 in Budapest (Hungary) and the INSOL Europe Annual Congress which will take place on 4-8 October 2017 in Warsaw (Poland) will be made available on the INSOL Europe website in due course.

Contact Us

If you would like to publish any materials of interest for the benefit of INSOL Europe members, please do not hesitate to contact us at: technical@insol-europe.org ■

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

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National Case Law
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EIR Case Register
www.insolvencycases.eu

INSOL Europe Studies
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Working Groups
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INSOL Europe *Contacts*

INSOL Europe
PO Box 7149, Clifton, Nottingham NG11 6WD

Enquiries: Caroline Taylor
carolinetaylor@insol-europe.org

Tel/Fax: +44 (0) 115 878 0584
Website: www.insol-europe.org

The Executive

President: Steffen Koch
steffen.koch@hww.eu

Deputy President: Radu Lotrean
radu.lotrean@citr.ro

Vice President: Alastair Beveridge
abeveridge@alixpartners.com

Immediate Past President:
Alberto Núñez-Lagos
alberto.nunez-lagos@uria.com

Treasurer: Jim Luby
lubyj@mcstayluby.ie

Director of Administration:
Caroline Taylor
carolinetaylor@insol-europe.org

Secretariat

Communications Manager:
Paul Newson
paulnewson@insol-europe.org

Membership & Conference Registrations Co-ordinator:
Wendy Cooper
wendycooper@insol-europe.org

EECC Secretary: Florica Sincu
floricasincu@insol-europe.org

Technical Officers:
Emmanuelle Inacio
Myriam Mailly
technical@insol-europe.org

Sponsorship Co-ordinator:
Hannah Denney
hannahdenney@insol-europe.org

Working Group Chairs

Academic Forum: Michael Veder
m.veder@jur.ru.nl
Secretary: Anthon Verweij
anthon.verweij@gmail.com

Anti-Fraud Forum: David Ingram
david.ingram@uk.gt.com
Eitan Erez eitan@eitan-erez-law.com

Congress Technical (Warsaw):
Marcel Groenewegen
marcel.groenewegen@cms-dsb.com
Pawel Kuglarz
pawel.kuglarz@wolftheiss.com
Secretary: Emmanuelle Inacio
emmanuelleinacio@insol-europe.org

Constitution: Catherine Ottaway
ottaway@hocheavocats.com

EECC: Evert Verwey
Evert.Verwey@CliffordChance.com
Radu Lotrean, radu.lotrean@citr.ro

EU Research:
Robert Van Galen
robert.vangalen@nautadutilh.com

Financial Institutions Group:
Florian Joseph
florian.joseph@helaba.de
Alastair Beveridge
abeveridge@alixpartners.com

INSOL International:
Catherine Ottaway
ottaway@hocheavocats.com

IOH Forum: Marc André
Mandrelaw@aol.com
Daniel Fritz, Daniel.Fritz@hww.eu
Stephen Harris, sharris@uk.ey.com

Judicial Wing: Heinz Vallender
hvallender@t-online.de

Sponsorship: David Rubin
davidr@drpartners.com
Frank Tschentscher
FTschentscher@schubra.de

Turnaround Wing:
Alberto Nunez-Lagos
alberto.nunez-lagos@uria.com
Rita Gismondi, rgismondi@gop.it

YANIL: Jenny Gant
JenniferL.L.Gant@gmail.com

Young Members Group
Sabina Schellenberg
sschellenberg@froriep.ch
Slavomir Cauder
cauder@giese.cz

2017

11-12 May	**Eastern European Countries' Committee Conference 2017** *Budapest, Hungary*
4 & 5 October	**INSOL Europe Academic Forum Conference** *Warsaw, Poland*
5–8 October	**INSOL Europe Annual Congress** *Warsaw, Poland*

2018

3 & 4 October	**INSOL Europe Academic Forum Conference** *Athens, Greece*
4–7 October	**INSOL Europe Annual Congress** *Athens, Greece*

2019

25 & 26 September	**INSOL Europe Academic Forum Conference** *Copenhagen, Denmark*
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