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The journal of INSOL Europe
Summer 2019

Early Warning Systems
in Denmark and beyond...

EU Directive on Preventive Restructuring Frameworks
finally adopted

Also in this edition:
- Demystifying offshore territories
- France: Status of crypto-currencies
- Spain: Acquisition of production units
- Ljubljana, Stockholm, St. Petersburg, Copenhagen: Conference News

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Welcome from the Editors


FRANK HEEMANN


CATARINA SERRA

Whenever I look around seeking for inspiration to write the editorial it is inevitable that the past editorials come to my mind.

In this particular case I was struck by a paradox. My last editorial was about change and the quick passage of time; yet, the topics then are still the topics now: the escalating US-China trade war, the never ending story of Brexit; the chronicle of a Directive foretold.

The only news, in the strict sense of the word, are the European elections. Confirming the worst fears of some, the results indicate a significant fragmentation. A struggle over the future direction of the EU is likely to outbreak.

In the insolvency world, we were recently confronted with the sad news of the departure of Gabriel Moss. He was an outstanding expert and his work was an inestimable contribution for the development of the "insolvency cause" (*p.13*).

Not all is gloomy, thankfully.

At last, the eagerly awaited Directive on preventive restructuring frameworks was adopted by the Council. Though some differences between jurisdictions are likely to subsist, there is no doubt that the adoption of the Directive is a significant step towards the harmonisation of a rescue culture. Therefore, I definitely agree with Emma Inacio when she suggests taking a closer look at it (*p.14*).

Continuing in the way of harmonisation, you will be pleased to know that Reinhard Bork is now leading a new project aimed at the harmonisation of Transactions Avoidance Laws in Europe (*p.11*).

Another great piece of news is INSOL Europe's recently approved "Legal Tech & Digital Assets" wing. As its name gives away, it is aimed at acquiring and developing knowledge in the field of legal technology and digital assets (*p.10*). The connection between (insolvency) law and technologies is also addressed in the guest editorial, focused on increasing efficiency of law firms through data driven decisions (*p.8*), and is taken up further, to the subject of crypto-currencies in insolvency proceedings in France (*p.28*).

In light of the objective of maximising asset value in insolvency proceedings, let me draw your attention, firstly, on the need to recognise and assist insolvency office holders (IOH) operating in offshore centres (demystifying offshore is in order) (*p.30*) and, secondly, to the instrument of acquisition of production units in Spain, which, if properly used, accomplishes the goal of the sale of the business as a going concern (*p.32*).

Worth reading about is also the "early warning" in Denmark. Impartial, confidential and gratuitous, the mechanism has successfully assisted thousands of businesses in distress. It is there, ready to be replicated in other countries (*p.20*).

Talking about Denmark, I cannot help reminding you that the INSOL Europe Annual Congress in Copenhagen is approaching (26-29 September). As usual, we may expect the coverage of a multiplicity of themes, while standing out, of course, will be the pre-insolvency system as designed by the recently adopted Directive. The Academic Forum (which, incidentally, is celebrating its 15th anniversary) will hold its Conference just before (25-26 September). Read both previews (*p.22 & p.24*) and do come along!

In the meantime, to stay on top of events, or even anticipate them, just have a look at our freshly printed journal (containing not only the highlighted articles but a lot more). I wish you all good reading and a happy summer!

Catarina

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Co-ordinating our expansion in Europe

ALASTAIR BEVERIDGE
INSOL Europe President

Alastair Beveridge reports on recent developments and events within INSOL Europe and its members

> THE COMMITTEE IS DESIGNED TO EXPAND THE REACH AND INFLUENCE OF INSOL EUROPE IN, ULTIMATELY, ALL OF THE INDIVIDUAL COUNTRIES IN EUROPE

We are almost half way through 2019 and it has been a very busy year so far. Despite the fact that when I wrote my last column Brexit was going to happen on 29 March, it still hasn't and we aren't really any closer to knowing when or what it will look like.

Life goes on however and regardless of what happens, the UK will still be in Europe and I hope we in the UK will continue to feel part of Europe, I certainly will, whatever happens.

Development Committee update

You will recall from my last column that an important new facet of the organisation is the Development Committee. This is comprised of Alberto Núñez-Lagos (who covers Southern Europe), Radu Lotrean (Eastern Europe) and Alice Van Der Schee (Northern and Western Europe) and Alice acts as the Chair. The Committee is designed to expand the reach and influence of INSOL Europe in, ultimately, all of the individual countries in Europe.

The initial objective has been to source a Country Co-ordinator/(s) for each country in Europe, who would be responsible for devising a plan of action for the specific country. I am pleased to announce that candidates for a number of countries have been sourced and approved and plans for those countries are currently being developed. The Executive is looking forward to supporting those plans as we deliver on our Taskforce 2025 plan to put this initiative at the centre of our long-term agenda.

The list of candidates who have so far been approved is shown in the table below and work continues for the countries not listed. I would encourage you all to make contact with the relevant Country Co-ordinator with your ideas and suggestions. Where no Country Co-ordinator has been appointed please contact the relevant Development Committee member with your thoughts and I look forward to providing further updates in the next edition.

INSOL Europe Country Co-ordinators

Country	Co-ordinator	Company
Austria	Susanne Fruhstorfer	Taylor Wessing
Belgium	Bart de Moor	Strelia
Cyprus	Irina Misca	CITR
Denmark	Henrik Sjørslev	DLA Piper
France	Jean Baron	Administrateur Judiciaire
Germany	Frank Tschentscher	Schultze & Braun
Greece	George Nikopoulos Exintaris	N-Solution
Ireland	Barry Cahir	Beauchamps
Italy	Giorgio Corno	Studio Corno Avvocati
Luxembourg	Christel Dumont	Dentons
Netherlands	Alice van der Schee	Van Benthem & Keulen
Poland	Laurent le Pajolec Michal Barlowski	EXCO A2A Wardynski
Portugal	Alberto Núñez-Lagos	Uría Menéndez Abogados
Romania	Cristina Ienciu	CITR
Spain	Adrian Thery	J & A Garrigues
Sweden	Hans Renman	Hamilton Advokatbyrå
Switzerland	Sabina Schellenberg	FRORIEP Legal AG
UK	Frances Coulson and David Rubin	Moon Beever David Rubin & Partners

The Directive Project

You will be aware that on 6 June 2019 the *Directive on Preventive Restructuring Frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30* (the "Directive"), was adopted by the EU.

The European Council said that "*the overall objective of the Directive is to reduce the most significant barriers to the free flow of capital stemming from differences in Member States' restructuring and insolvency frameworks, and to enhance the rescue culture in the EU, based on the principle of second chance*."

Each country must enact legislation which will capture the key areas of the Directive, but some room is left for flexibility and countries can adopt some areas more fully than others, but this must be done within the next two years (with one additional year available if it is all too hard).

Your Council discussed this issue at length at our Spring meeting in London and felt that INSOL Europe could provide a valuable role in promoting guidelines on the most appropriate approach to take, given our pan-European outlook. We also agreed we needed to be swift, given the legislative timetable which has already been set.

A small group has therefore been put together to work on this, with input from our Insolvency Officer Holders Forum, the Turnaround Wing, the Academic Forum and from a judge, as it was felt that approaching this form multiple angles would be most effective. The group comprises:

- Adrian Thery (Spain) – Chair
- Jean Baron (France)
- Evert Verwey (Netherlands)
- Alberto Núñez-Lagos (Spain)
- Tomáš Richter (Czech Republic)
- Ben Schuijling (Netherlands)
- Rita Gismondi (Italy)
- Michael Quinn (Ireland)

This group has already had a number of discussions and will be examining the Directive in detail. The group will work on a paper in which the Directive will be analyzed in such a way that the Member States and the stakeholders will have a point of reference on how the Directive should be implemented and on the differences between the various alternatives in terms of insolvency practice.

The EECC Conference – 6-7 June 2019, Ljubljana, Slovenia

Many of you will know that INSOL Europe held a one-day conference in an Eastern European city for each of the last 15 years. This has been a mainstay of our efforts to help educate and train our members and I was delighted to attend the 2019 conference in Ljubljana in early June. The conference had one of the biggest turnouts of any of our EECC conferences with almost 200 participants and was a huge success. You will be able to read more about this in the review on page 16.

I would like to thank Marko Zaman of ZUS (the Slovenian Insolvency and Restructuring Association) for co-ordinating a significant support for the event and for making the whole INSOL Europe team feel very welcome in the beautiful city of Ljubljana.

The AIJA Conference – 13-15 June, Mallorca, Spain

We have also just held our first joint conference with AIJA, the global Young Lawyers Association. I am pleased to say it went very well and I am hopeful if will be the start of a strong long-term relationship with the organisation. Huge thanks to our Young Members Group co-chairs Georges-Louis Harang and Anne Bach for their efforts in organising this event; and you will be able to read about how it went in more detail in the next edition.

Council elections

Within the next month you will see that a number of our Council seats are subject to election. This is **your** opportunity to choose the most appropriate representative or to get involved yourself – please look out for the message on this and I would encourage you all to participate.

Other updates

I am pleased and excited to let you know that our website re-design is progressing well and we expect to launch the new and updated site for testing in July and then formally unveil it at the Copenhagen conference. As this site is the window for the outside world to find out about and interact more closely with our organisation, it is important that is it modern, functionally capable and interesting – I think you will find it is all of these things. All feedback on the website is welcome.

Book reviews

My selection this time take a little bit of explaining. By accident I came across a book called "*Thinking, Fast and Slow*" by Daniel Kahneman – a Nobel Prize winning behavioural economist - which I thoroughly enjoyed but which was a little heavy. It sparked my interest in the topic and then, when Michael Lewis (The Big Short, Liars Poker and others) wrote a book called "*the Undoing Project*" which was about the lives of Daniel Kahneman and Amos Tversky, I jumped at it. These two extraordinary people challenged many areas of economics and proved that things are not as simple as many experts had previously suggested – they effectively undid theories. It is a very human story and they both had incredible lives and I would commend it to you over the summer.

Whilst on the topic, I was reading a book called "*If I could tell you just one thing…*" by Richard Reed, in which he meets many icons and asks them this simple question. The idea was to get people to share valuable wisdom – many topics were touched on, but for me, Bill Gates covered it best – he said, "*foster a love of reading… start as early as you can and keep reading*". So it is not just me…

I wish you a good summer and look forward to seeing you in Copenhagen. ■

> **THE CONFERENCE IN LJUBLJANA HAD ONE OF THE BIGGEST TURNOUTS OF ANY OF OUR EECC CONFERENCES WITH ABOUT 200 PARTICIPANTS**

Increasing a law firm's efficiency through data-driven decisions

Aidas Kavaliauskas of data-management company *Amberlo* puts the rise of legal-tech into perspective for our profession

AIDAS KAVALIAUSKAS
Partner at amberlo.io

1.9 billed hours per lawyer per day or a utilisation rate of only 25% is a figure taken from the 2018 Legal Trends Report.[1] And while most law firms see increasing the firm's revenue and growing the client base among their top priorities, very few show interest in increasing efficiency.

And they should. In contrast to law firms, IT consulting firms have much higher utilisation rates, varying between 65 and 85%. Surely IT consulting is another business, but both kinds of firms deal in professional services, so is there a way to increase efficiency at law firms? Let's try to find out.

What happens to 75% of the time?

Beside working for clients, lawyers need to work on emails and documents, organise sales and business development, track time and expenses, issue invoices, track payments and manage staff. All this is done while continuously multitasking and dealing with information spread over multiple sources and systems, often implying manual processes and repetitive tasks.

Humans are so bad at multitasking. Our brain can do only one thing at a time. Switching between tasks creates stress and waste of time: multitasking can result in up to 40% loss of productivity.[2] While there is no way to completely eliminate multitasking, we can make it more efficient by improving planning and execution, reducing information-management efforts, automating repetitive tasks and improving visibility. All this can be achieved with the help of modern legal technologies.

> **SWITCHING BETWEEN TASKS CREATES STRESS AND WASTE OF TIME: MULTITASKING CAN RESULT IN UP TO 40% LOSS OF PRODUCTIVITY**

70 years of computing

Actually, it all started nearly 200 years ago, when British mathematician Charles Babbage invented the first 'programmable' computer.[3] But after Charles Babbage, there was little happening for the next 120 years, until 1948, when the first software program was loaded into a computer's memory and executed. Over the next 70 years a whole new industry was created, with a huge impact on every other industry. During the same time GDP created per hour has multiplied by 2.5 in G7 countries[4], which is not a coincidence.

In 1966 the Apollo missions started using computers for controlling space ships. In 1975 microcomputers became affordable to every household. In 1993 the worldwide web emerged and connected everyone and everything in this world. The connected world paved a way for connected applications and eventually we stepped into a cloud computing era. In 2018 73% of all enterprises were using cloud applications.[5]

Software development processes and tools have undergone radical changes as well: from punching holes in punch cards and manually loading piles of cards into a mainframe computer, to using integrated development tools and automated building, testing and deployment processes in the cloud.

The hardware and software that we use daily now on our smartphones could not even be imagined by NASA at the time when the first man landed on the moon, just 50 years ago!

Innovations in the legal industry

During the INSOL Europe Annual Congress in Athens, one lawyer told me that the way law is practiced has not changed much over the past hundred years. I cannot agree with this statement. While the way the legislator works and the manner in which laws and regulations are adopted remain similar, the way law is practiced and the legal services rendered has changed a lot, already because of tools like the fax and copying machines, computers, word processing, internet and specialised software, which enable lawyers to work more efficiently. But it is also true that the legal industry, compared to other industries, is very reserved when it comes to adopting new technologies.

So why is the legal industry staying "at a safe distance" from technologies?

One reason could be that only very few law schools in Europe[6] have legal-tech in their educational programs, thus creating a distance from the technology, already in the early days of professional education. Another explanation could be the relatively slow changes in the legislation itself.

At the same time, we witness an ever increasing pressure to change and innovate everything. It stems from an information overload resulting in constant multitasking, from clients who demand more for less, from new

privacy laws and new technologies like cloud computing, from the appearance of cryptocurrencies, from a major generation change thanks to which millennials and post-millennials are joining law firms and become clients of law firms as well, or even from the new forms of G2C relationships, like virtual citizenship.

Tools like emails, word processing, spreadsheets, Google search and the manual, repetitive processes built around them do not cope well with the new challenges. Recently we hear a lot about artificial intelligence replacing all lawyers and judges soon, though the reality is that most small to mid-size law firms in Europe are still running their business on email and spreadsheets. No one in Europe can quote exact figures, but those provided by The American Bar Association show that in 2018 only 22% of the law firms in US were using cloud-based legal solutions.[7]

But there are signs that change has already started. In 2018 investments in the legal-tech sector have grown by a staggering 713%.[8] This means that we can expect many innovations in the upcoming years, and, in fact, the first seem to be just around the corner. Lithuania is already using an automated system for selecting a suitable insolvency practitioner for a particular insolvency case, not just randomly, but based on certain criteria. Estonia seems to be prepared to go one step further as it recently announced plans to launch a robo-judge which will rule on cases with limited claim value.[9] When properly implemented, this should help save a lot of time and money. There is a number of other examples in the public and private sector. The general trend is that sophisticated technologies earlier used only by top enterprises, become more affordable and available to a much wider audience today.

A way to a higher efficiency

Today's top productivity killer is the accelerating world around us, which creates a growing information overload and a perceived need for continuous multitasking.

Reducing multitasking, the information overload, and automating repetitive tasks, while centralising information-management or focusing on what's important, are the key enablers for higher efficiency. The problem is that the manual processes built around emails, spreadsheets, and various other general-purpose and outdated software provide little support for it. That is why the legal industry needs to invest in new technologies.

Physics books say that efficiency "is a measure of how much work or energy is conserved in a process".[10] To measure the business process efficiency you need to find the difference between the efforts spent and the outcome.

It all starts with the planning and execution. Then follow measuring, reviewing, optimising, automating, executing and repeating everything again and again.

High quality decisions today are data-driven and require these data to be consistent and of high-quality. Making such decisions is therefore only possible when data collection becomes an integral part of an organisation's business processes by using business tools that collect high-performance data automatically. Otherwise data collection is hardly possible, meaning that decisions will be based on potentially faulty assumptions. Likewise, any business process automation – with or without an AI – is hardly possible without having access to high quality data first.

To give you an example: a sales team at a major financial institution was blaming high interest rates, bad economy and strong competition for unsatisfying sales results. After introducing an automation software, it took less than a month to find out that the main reasons for the bad results were related to the large amount of time spent to manually process financing requests in addition to late follow-ups or no follow-ups at all. These findings would not have been possible without having the relevant data.

Good management software is a key enabler to data-driven decisions. If somebody would ask me to make a checklist for a such software, it would be a very long list with quick to start, affordable, easy to use and engaging, cloud based software, supporting automated high-performance data collection and tracking, providing good budgeting and agile planning, having good email and document automation and all the possible integrations, among priorities. There is no single ideal solution, but good solutions exist, to choose from, and they are improving every day.

Thus, finally, in order to build a successful organisation, you need to have a plan, a great team that can execute and implement efficient processes and the best tools to give the team in order to succeed. Once you get started, you will find yourself with more time, making less mistakes and being overall more productive. ■

Footnotes:

1 www.lawtechnologytoday.org/2018/12/the-legal-trends-report-whats-new-in-2018/
2 www.psychologytoday.com/intl/blog/brain-wise/201209/the-true-cost-multi-tasking
3 https://en.wikipedia.org/wiki/Difference_engine
4 https://data.oecd.org/lprdty/gdp-per-hour-worked.htm
5 www.forbes.com/sites/louiscolumbus/2018/08/30/state-of-enterprise-cloud-computing-2018/
6 www.llmstudy.com/search/llm-programs/europe/?q=legaltech
7 www.lawtechnologytoday.org/2019/01/tech report-2018-cloud-computing/
8 www.forbes.com/sites/louiscolumbus/2018/08/30/state-of-enterprise-cloud-computing-2018/
9 www.wired.com/story/can-ai-be-fair-judge-court-estonia-thinks-so/
10 www.softschools.com/formulas/physics/efficiency_formula/29/

> VERY FEW LAW SCHOOLS IN EUROPE HAVE LEGAL-TECH IN THEIR EDUCATIONAL PROGRAMS, THUS CREATING A DISTANCE FROM THE TECHNOLOGY

We welcome proposals for future articles and relevant news stories at any time. For further details of copy requirements and a production schedule for the forthcoming issues, please contact Paul Newson, Publication Manager: paulnewson@insol-europe.org

INSOL Europe Council Elections

This is the time of year when we consider retirements from and elections to our Council.

Countries with 30 or more members are entitled to a reserved seat on Council and in October this year, vacancies will arise for the following: **Austria, Denmark, Ireland, The Netherlands, Romania and Switzerland.**

Therefore, members from these countries will shortly receive an email requesting nominations for candidates from their country.

In the meantime, two non-reserved seat vacancies on Council (which may be occupied by any country) will also become available and in addition, two further non-reserved seat vacancies will become available to allow for countries with under 30 members to be represented.

Closing date for nominations: 21 July 2019

Information about how to nominate a candidate will be emailed to members. Contact Caroline Taylor, INSOL Europe's Director of Administration at carolinetaylor@insol-europe.org if you have not received your copy of the nomination form.

New Wing created: "Legal Tech & Digital Assets"

INSOL Europe's Council meeting in March approved the creation of a new Wing to be called "Legal Tech & Digital Assets" and appointed Frank Heemann (bnt attorneys in CEE), José Carles (Carles Cuesta Abogados) and Laurent Le Pajolec (Exco A2A Polska) as its co-chairs. The wing is currently in its set-up phase.

The new Wing will operate as a specialised working group, bundling and developing know-how and expertise in the field of legal technology and digital assets, and thus enabling INSOL Europe to successfully implement its goals and strategies in times of an ever increasing impact of modern technology.

The general goals of the Wing are:

- to study and develop the legal framework for legal tech and digital assets;
- to educate and train members (e.g. by way of conference panels, seminars, a new column in *eurofenix* dedicated to legal tech and digital assets); and
- to attract new members (including new a type of members from the legal tech industry).

At the beginning, the Wing will focus on the following two projects:

Associations / Organisations / Contact persons in various countries: We will screen and collect information about associations and organisations that have been formed and are active on a national level in the area of legal tech and digital assets. The aim is to create a database of relevant organisations and associations, with the contact persons' names, in order to enable INSOL Europe and our Wing to approach these players for information sharing and future projects.

Monitoring and informing about developments, products, services, providers: We will establish a manner of monitoring the developments in the field of legal tech and digital assets and to inform INSOL Europe members on developments, products, services, providers.

The new column for legal tech and digital assets in *eurofenix* will be one of the communication channels for this purpose.

Other projects will also depend on the composition of the Wing and the involvement of its members.

Members interested in joining and contributing to the Wing's activities are invited to contact one of the co-chairs.

New appointment and new project for Prof. Reinhard Bork

Effective from 1 April 2019, Professor Reinhard Bork, chair and manager of INSOL Europe's Case Register on the European Insolvency Regulation, has been appointed professor for two years at the Business and Law Research Centre of Radboud University Nijmegen (The Netherlands).

Reinhard is a full professor at Hamburg University since 1990 and is one of the world's leading academics in the field of insolvency law. His academic interests are mainly in various fields of national and cross-border insolvency law.

The appointment in Nijmegen is connected with a budget for a larger research project. Reinhard is using it for financing an independent working group which was established as a consequence of Reinhard's talk on "Clash of Principles: A new Approach to Harmonisation of Transactions Avoidance Laws?" presented to the annual conference of INSOL Europe's Academic Forum in Athens last year.

The group consists of avoidance law experts, academics, as well as practitioners, from all the Member States of the EU. It is chaired by himself and Michael Veder (Radboud University Nijmegen, currently Chair of INSOL Europe's Academic Forum) and aims at

elaborating a proposal for a harmonised transactions avoidance law.

It had its first meeting in Amsterdam on 9 May 2019 discussing a questionnaire which is designed to ascertain the national transactions avoidance laws in the Member States, as well as their underlying principles (core values). The questionnaire is meant to gather the information necessary for drafting the harmonisation proposal. The group is confident to submit the research results in spring 2021.

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INSOL Europe & INSOL International join forces in Stockholm

This one-day seminar on 22 May in the beautiful city of Stockholm drew together over 80 delegates from ten jurisdictions, namely Denmark, Finland, Norway, Sweden, Estonia, Belgium, France, The Netherlands, the UK and Australia, *reports Emma Inacio, INSOL Europe Technical Officer*

Despite the sunny weather and temperatures reaching 30°C degrees outside, the delegates did not quit the Seminar room at the Grand Hotel, concentrating on the topical programme prepared by the chair and main organising Committee.

The welcome speech was given by the President of INSOL Europe, *Alastair Beveridge* (AlixPartners, UK). Following after the successful seminars in 2017 in Tel Aviv and in 2018 in Helsinki, Alastair announced that INSOL International and INSOL Europe were delighted to organise their 2019 Joint One-Day Seminar in Stockholm, with the support of restructuring professionals from across the Nordic region. Indeed, the cooperation between both organisations which act at a global and local level is indispensable and should be maintained for the future.

The chair of the main organising committee who acted as the Seminar chair, *Erik Selander* (DLA Piper, Sweden), announced the first session devoted to the discussion of the forthcoming European Directive on Preventive Restructuring Frameworks ('the Directive') by the representatives of the Ministries of Justice (MoJ).

After an overview of the provisions of the Directive presented by the chair of the session, *Prof. Annina H. Persson* (Örebro University, Sweden / INSOL Europe European Insolvency Case Register Correspondent for Sweden), the representatives of the MoJ in Estonia, Finland and Sweden addressed the question of how the respective ministries will take into account the implementation of the Directive in their national laws.

Triin Tõnisson pointed out that the MoJ of Estonia was sceptical about the harmonisation of the preventive restructuring frameworks, questioning its relevance. She pointed out that the Estonian framework will have to face many challenges for the transposition of the Directive, such as the actual absence of early warning tools, class formation, cross-class cram-down mechanisms and protection of new financing.

Some concerns were also raised on the strict periods of the stay of individual enforcements, the excessive data on the performance of procedures to be collected in order to monitor the implementation and application of the Directive and its interference with labour law.

Tuukka Vähätalo (MoJ, Finland) and *Johan Klefbäck* (MoJ, Sweden) shared the concerns of the representative of the MoJ of Estonia re the maximum duration of the stay of individual enforcements and the interference of the Directive with labour law. They also highlighted the confusion on the ways of appointing a practitioner in the field of restructuring provided by Article 5 of the Directive and the provisions on the duties of directors where there is a likelihood of insolvency.

The first session was then followed by a discussion between the audience and the panellists in relation to the rationale of the Directive on the stay in order to support restructuring negotiations, and the risk that the provisions on the duration of stay could hamper the prospects of the debtor's business restructuring, as they are not flexible enough.

The Seminar chair concluded that instead on focusing on issues in the transposition of the Directive and calling for a minimum harmonisation, Member States should rather concentrate on their needs and the opportunities that the Directive offers, as there is a lack of preventive restructuring tools in the Nordic and Baltic jurisdictions.

The second morning session was the occasion for the practitioners – after the representatives of the Ministries of Justice – to discuss about the future Directive.

As an introduction to the session, the chair, *Matti Engelberg* (Hannes Snellman, Finland), asked his panellists to express their views on the existing insolvency frameworks in their jurisdiction.

Lars-Henrik Andersson (Deputy Chairman REKON, Cirio, Sweden), *Piya Mukherjee* (Horten, Denmark) and *Evert Verwey* (Clifford Chance, The Netherlands) were of the opinion that the most important companies are restructured out-of-court as they fear formal proceedings, while only the SMEs go into in-court restructuring because they react at a relatively late stage.

The question then arose as how to force the debtor and the creditors to use in-court restructuring, this process appearing to be the most democratic, involving all the stakeholders. If early warning tools called by the Directive and already existing in Denmark are useful to warn the debtors of the urgent need to act, taking into account the limited resources of SMEs for hiring experts, all panellists agreed with Piya Mukherjee that these tools are not sufficient: the liability of directors would be the only real incentive.

The Seminar ended with two hot topics: Brexit and Board Liabilities presented by a panel chaired by *Alexander Hagberg* (EY, Sweden).

Regarding the impact of Brexit on debt restructuring and insolvency practise, Dr Helena Raulus (UK Law Societies' Joint Brussels Office, Belgium) reminded that the UK is still unable to decide if and how it will leave the European Union. The EU meanwhile granted the UK an extension of the original 29 March 2019 deadline for their exit till 31 October 2019. A hard Brexit is still possible, which would see the UK crashing out of the EU without a transition period and without an EU-UK Free Trade Agreement in place. The UK will immediately fall back to the status of "third country" and will only be able to trade on the basis of WTO rules. The current state of play and uncertainty is neither in the interest of the EU, nor of the UK, so that an emphasis was put on the catastrophe of a no-deal Brexit.

Erik Selander wrapped up the Seminar with closing remarks underlining that the Directive on preventive restructuring frameworks, as highlighted throughout this Joint One-Day Seminar, should be seen as an opportunity to harmonise the pre-insolvency legislation in the Nordic and Baltic countries.

INSOL Europe holds panel at III International Insolvency Forum Conference, St. Petersburg

INSOL Europe was invited to hold a panel at the III International Insolvency Forum which took place during the Annual St Petersburg International Legal Forum (SPBILF) from 15 to 17 May 2019, *reports Emma Inacio, INSOL Europe Technical Officer*

The III International Insolvency Forum is one of the conferences organised under the aegis of the Annual SPBILF, founded in 2011, which is organised under the auspices of the President of the Russian Federation and the Ministry of Justice of the Russian Federation, and attended by circa 1400 delegates including representatives of international organisations.

On Thursday 16 May, *Evert Verwey* (co-chair of the INSOL Europe EECC) and *Emmanuelle Inacio* (co-chair of the INSOL Europe High-Level Course on Insolvency) co-moderated the INSOL Europe panel session devoted to the implementation of a rescue culture. The panellists invited to join the INSOL Europe panel were *Christina Fussi* (Co-Chair of the Insolvent Financial Institutions Subcommittee of the IBA Insolvency Section), *Carrie-Ann James* (Vice-President of the Insolvency Practitioners Association), *Edward Olevinsky* (head of the Advisory Council of the Russian Union of Self-Regulated Organisations of Arbitration Managers) and *Artur Trapitsyn* (member of the Board of the Russian Union of Self-Regulated Organisations of Arbitration Managers and chairman of the Self-Regulated Organisation of Arbitration Managers "Merkuriy").

After a presentation of INSOL Europe, the panel took the form of a discussion where the participants identified the main

elements of the pre-insolvency procedures in their own jurisdictions and presented the future directive on preventive restructuring frameworks as an opportunity to seize not only to harmonise the rescue culture in the European Union but beyond, which was greatly welcomed by our Russian hosts.

INSOL Europe was proud to be present at the 2018 and 2019 SPBILF which has emerged as a foremost international platform for discussing a broad range of urgent questions confronting the contemporary international community of legal professionals.

Gabriel Moss QC

We are sad to report the untimely passing of Gabriel Moss QC, who died suddenly on Friday 15 March 2019. Gabriel was a leading light of the bar and a titan of the insolvency and restructuring world. He was an avid supporter of INSOL Europe and was a speaker at our events for many years.

Gabriel's practice was wide-ranging, encompassing banking law, company law, financial services, commercial chancery, off-shore law, and litigation, as well as, of course, insolvency and restructuring. In the latter field, in particular, he was pre-eminent, a fact all the more impressive in light of his confession in a 2016 podcast for OUP promoting the third edition of *Moss, Fletcher and Isaacs, The EC Regulation on Insolvency Proceedings* that he had come to specialise in insolvency rather by accident, and had been attracted to a career in law in part by "silly things" like the popular British TV series of the 1950s and 60s "*Boyd QC*".

Gabriel's expertise was recognised in the legal directories over decades. Most recently, Legal 500 described him as the "*doyen of insolvency law*" and he appeared in the top "Star" category of QCs rated by *Chambers & Partners. Who's Who Legal: Restructuring and Insolvency 2018* listed Gabriel as one of the 25 "*thought leaders*" in the world. The *Lawyer Monthly Legal Awards* named Gabriel Restructuring and Insolvency Lawyer of the Year 2017 and Banking & Finance Barrister of the Year 2018.

Other notable appointments included the Insolvency Committee of Justice, the British section of the International Commission of Jurists, the Association of Fellows and Legal Scholars of the Center for International Legal Studies (Salzburg), the Insolvency Law Sub-Committee of the Consumer and Commercial Law Committee of the Law Society and a fellowship of the Society for Advanced Legal Studies at the Institute of Advanced Legal Studies. He was a member (by invitation) of the International Insolvency Institute (III) (and Director between 2003 and 2010 and since 2010 Director Emeritus) and Co-

Chair of III's Committee on Inter-Court Communications in Insolvency Matters. In 2011 he was appointed to the PRIME panel of financial experts.

Gabriel was as prized for his friendship as for his intellect. He was supremely approachable and humble, kind and thoughtful (as well as having a dry, and occasionally subversive sense of humour). Away from his intellectual pursuits, Gabriel's interests included tennis, theatre, cinema and travel and, of course, his family, who meant the world to him. He also loved opera and concerts, and every Friday afternoon would play Mozart and Beethoven (among others) at thunderous volume in his room in Chambers.

A closer look at...

The adoption of the Directive on Preventive Restructuring Frameworks

EMMANUELLE INACIO
INSOL Europe Technical Officer

> ON 6 JUNE 2019 THE EUROPEAN COUNCIL FORMALLY ADOPTED THE DIRECTIVE ON PREVENTIVE RESTRUCTURING FRAMEWORKS

On 6 June 2019 the European Council formally adopted the directive on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 (directive on preventive restructuring frameworks).

The formal vote of the European Council marks the end of the legislative procedure after the Directive Proposal was adopted by the European Commission on 22 November 2016. The Directive will now be formally signed and will enter into force on the twentieth day following its publication in the Official Journal of the European Union. The Member States will then be required to transpose the Directive's provisions into their respective legal systems within two years. Member States that encounter particular difficulties in implementing this Directive will be able to benefit from an extension of a maximum of one year.

To sum up, the Directive requires each Member State to implement harmonised legislation on:

- Access for the debtors to one or more clear and transparent early warning tools which can detect circumstances that could give rise to a likelihood of insolvency and can signal to them the need to act without delay.
- Preventive restructuring frameworks available for debtors to enable them to address their financial difficulties at an early stage, when it appears likely that their insolvency can be prevented and the viability of the business can be ensured.
- Procedures aimed at discharging the debts of insolvent entrepreneurs in order to give them a second chance in business.
- Measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

Members States must ensure that the preventive restructuring frameworks include the following characteristics:

Debtor-in-possession regime

Debtors accessing preventive restructuring procedures must remain totally, or at least partially, in control of their assets and the day-to-day operation of their business. The appointment by a judicial or administrative authority of a practitioner in the field of restructuring must be decided on a case-by-case basis, except in certain circumstances where Member States may require the mandatory appointment of such a practitioner in every case. However, Member States must provide measures for the appointment of a practitioner in the field of restructuring and ways to assist the debtor and creditors in negotiating and drafting the plan, at least:

i. where a general stay of individual enforcement actions is granted by a judicial or administrative authority;
ii. where the restructuring plan needs to be confirmed by a judicial or administrative authority by means of a cross-class cram-down; or
iii. where it is requested by the debtor or by a majority of the creditors.

Stay of individual enforcement actions

Debtors must benefit from a stay of individual enforcement actions to support the negotiations of a restructuring plan whose initial duration must be limited to 4 months and whose total duration, including extensions and renewals, must not exceed twelve months.

Class formation

Debtors have the right to submit restructuring plans for adoption by the affected parties. Member States must ensure that affected parties are treated in separate classes, which will reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law. As a minimum, creditors of secured and unsecured claims must be treated in separate classes for the purposes of adopting a restructuring plan.

Cross-class cram-down mechanisms

The restructuring plan which is not approved by the required majority in every voting class may be forced upon dissenting voting classes by means of a cross-class cram-down mechanism. Member States are free to opt for the absolute priority rule or the

relative priority rule.

According to the absolute priority rule, Member States may provide that a dissenting class can be bound to a restructuring plan whether the claims of affected creditors in a dissenting voting class are satisfied in full by the same or equivalent means where a more junior class is to receive any payment or keep any interest under the restructuring plan. Derogations are however allowed where

i. they are necessary to achieve the aims of the restructuring plan; and
ii. the restructuring plan does not unfairly prejudice the rights or interests of any affected parties.

According to the relative priority rule, a dissenting class can be bound to a plan as long as dissenting voting classes of affected creditors are treated at least as favourably as any other class of the same rank and more favourably than any junior class.

New financing and interim financing

Financing must be adequately protected against avoidance actions and civil, administrative or criminal liability in case of any subsequent insolvency of the debtor.

Duties of directors

Where there is a likelihood of insolvency, directors must have due regard, as a minimum, to:

i. the interests of creditors, equity holders and other stakeholders;
ii. the need to take steps to avoid insolvency; and
iii. the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business.

Individual and collective workers' rights under EU and national labour law must not be affected by the preventive restructuring framework.

Transposition

The Directive on preventive restructuring frameworks provides a high degree of flexibility, the Member States being able to adapt the new legislation to their existing frameworks. It is hoped that Member States will not sacrifice the rescue culture, a key driver behind the Directive, by choosing to implement only the minimum standards proposed.

Please consult the text of the Directive here:

https://data.consilium.europa.eu/doc/document/PE-93-2018-INIT/en/pdf

IT IS HOPED THAT MEMBER STATES WILL NOT SACRIFICE THE RESCUE CULTURE, A KEY DRIVER BEHIND THE DIRECTIVE, BY CHOOSING TO IMPLEMENT ONLY THE MINIMUM STANDARDS PROPOSED

We want you!

Call for expression of interests for the INSOL Europe 2020 Sorrento Congress

by the Co-chairs of INSOL Europe's 2020 Sorrento Congress, Giorgio Corno (Italy) & Simeon Gilchrist (United Kingdom)

The Technical Committee for the INSOL Europe 2020 Congress, which will be held in Sorrento from 1 to 4 October 2020, invites all INSOL Europe members to express their interest to participate as speakers at our flagship event.

All expressions of interest should be sent to the Secretary to the INSOL Europe Conference Technical Committees, Emmanuelle Inacio, at **emmanuelleinacio@insol-europe.org**, and should indicate (a) the speaker's nationality, affiliation and qualifications, (b) the topic on which the speaker would be interested in speaking, and (c) a short statement as to what unique or compelling perspective the speaker would like to bring to the congress. The Technical Committee seeks in particular proposals from speakers who have not been speakers at the last two Annual Congresses.

Expressions of interest should be sent as early as possible, no later than **15 September 2019**. All expressions of interest will be considered by the Technical Committee, although due to the large number the Committee expects to receive, the Committee likely will not be able to accommodate all, or even most, requests.

ITALY

EECC Report:

Ljubljana... City of love (and dragons)!

Paul Omar reports on the 15th EECC Conference in Ljubljana

PAUL OMAR
Technical Research Coordinator, INSOL Europe and Consultant, EBRD

Slovenia, one of the smaller Members of the European Union, played host for the first time to the EECC event in Ljubljana on Friday 7 June. Accompanied by a sudden climb of the thermometer and fair weather, the conference welcomed almost 200 delegates, many of these drawn from the local practice environment.

The event was preceded by a convivial dinner on Thursday evening at the newly renovated castle, with panoramic views over the city and river, over which the statues of the city's tutelary dragons presided.

Popularly, Ljubljana's name is alleged to derive from the Slovenian word "ljubljena" (beloved), confirmed, it is said, by the attractiveness of the city in the eyes of inhabitants and visitors alike.

> "MARKO SIMONETI OUTLINED SOME OF THE LEGISLATIVE AND ECONOMIC HISTORY OF THE COUNTRY"

Legislative history

The conference began with a welcome address from Alastair Beveridge (President, INSOL Europe) and the Co-Chairs of the EECC Committee, Evert Verwey and Radu Lotrean.

Setting the scene for the delegates, Professor Marko Simoneti (Faculty of Law, University of Ljubljana), gave a keynote speech in which he outlined some of the legislative and economic history of the country.

He included the surprising revelation that Slovenia could have followed the major Eurozone casualties (such as Spain and Greece) into a major default scenario. That it avoided this was in no small part due to the intervention of the Government, though the functioning of the insolvency law has come under scrutiny for its alleged unpreparedness for dealing with the situation of debtors in danger of failure.

Not all these problems have been resolved, a view supported by the statistics which reveal very modest take-up rates of procedures, as much of the restructuring takes place in out-of-

Alastair Beveridge welcomes delegates to Ljubljana

Keynote speaker Prof. Marko Simoneti addressing the delegates

court processes. As such, the absence of a fundamental rethink of the framework and the lack of appropriate options may seemingly place Slovenia behind comparable jurisdictions, in the Professor's opinion.

The Directive

The three Technical Sessions which followed in the morning were set against the background of the adoption of the Preventive Restructuring Directive (**PRD**), news of which came as delegates were travelling to Slovenia on the eve of the conference.

The first session addressed the text of the PRD viewed as experienced in three Member States: Poland, Germany and Latvia.

Under the guidance of the panel chair, Edvins Draba (Sorainen, Latvia), who contributed perspectives from his jurisdiction, Florian Bruder (DLA, Germany) and Pawel Kuglarz (Taylor Wessing, Poland) discussed key themes from the text, such as the moratorium, cram-down, priority rules and the safe harbour provisions. All elicited some controversy, likely to resurface in the transposition period which now opens.

Eurofenix asked Jelena Bajin, a lawyer from ŠunjkaLaw in Serbia about her experience of the conference from a first-time-attendee's perspective.

"As a first-time attendee at any INSOL Europe conference, I was surprised by the extent of the conference programme, even though it was a one-day event. The conference programme included a fantastic presentation made by the keynote speaker, Prof. Marko Simoneti, who provided an insight into the restructuring process of banking, corporate and state sectors after crisis. For me, this presentation was extremely valuable, as I come from a country with a similar historic, economic and legal background to Slovenia.

Furthermore, the level of communication between panellists and delegates during each panel was surprisingly elaborate and lively, which shows that the organisation made an effort to include topics and speakers that are interesting and stimulating for the delegates, encouraging the delegates to state opinions and ask questions.

Of all the panels, my favourite panel was that on "Increasing efficiency in insolvency proceedings: the appointment of IPs", where a discussion on IT-based appointment sparked a discussion between the panellists themselves, with difference in opinions and approaches to IT and AI. So, kudos for organisation!

Looking from the outside, the delegates could seem like a close-knit group of people, having in mind that most of

them already knew each other. Nonetheless, as a first-time attendee, I felt more than welcome. It was indeed a pleasure to talk to delegates, share knowledge and experiences and make connections which I am sure will last."

Responding with insights into the thinking of the European Commission, Andrej Vondraček, praised the text for its ability to provide a template for all jurisdictions to update their laws, because it does not follow any particular national model, but constitutes a compromise between prevailing trends in the preventive restructuring world.

Attitudes to insolvency

In the second session, following the coffee break, restructuring experts broached the topic of investor attitudes to insolvency.

Andrej Vondraček continuing the debate into the coffee break

Inna Zhuranskaya

> **THE MORNING TECHNICAL SESSIONS WERE SET AGAINST THE BACKGROUND OF THE ADOPTION OF THE PREVENTIVE RESTRUCTURING DIRECTIVE**


Panelists responded to audience questions


Frank Heemann on IT

Glen Flannery on pre-packs

> **THE PRE-PACKS PRESENTATION ADDRESSED THE MANY CRITICISMS OF THE PROCESS INCLUDING TRANSPARENCY AND VALUE PRESERVATION**

Chaired by Roman-Knut Seger (BDO Restructuring, Germany), panellists Radek Werich (Giese and Partner, Czech Republic), Dr Wojciech Wąsowicz (Noerr, Poland) and Inna Zhuranskaya (Kredirel Group, UK) attempted to provide predictions, not only about investment decisions, but also about how attitudes to insolvency, particularly the balance between risk-aversion and risk-taking, might condition investor behaviour when debtors suffer financial distress and in the run-up to insolvency.

Technological assistance

Immediately before lunch, the third and final session of the morning introduced the topic of technological assistance to insolvency processes. Though the theme of the panel addressed online auctions, the discussion moderated by Anto Kasak (Kasak and Missik, Estonia) touched more widely on the utility of technology. While praising such systems for expanding markets for asset sales and avoiding collusion in asset disposals, Peeter Viirsalu (TGS Baltic, Estonia), Ales Weiksler (NetBid, Ljubljana) and Marc André (former President, CNAJMJ, France) detailed how online bidding systems functioned, but also what difficulties are evidenced in such systems when they deal with complex sales in restructuring.

Pre-packs

The post-lunch panel on pre-packs, headed by Glen Flannery (CMS, UK) began with his introducing a film aptly highlighting how pre-packs function. The presentation addressed the many criticisms of the process, including transparency, value preservation and the risk of phoenixism through connected party sales.

Responding to it, Michał Barłowski (Wardyński & Partners, Poland) raised further critical considerations on how pre-packs function related to solvency, on whether sales occur on commercial terms and on the ever-thorny issue of employee protection. He affirmed that Poland will be embarking on reforms, anticipated to extend the availability of pre-packs beyond liquidation scenarios.

Nina Plavšak (former Judge, Slovenia) continued on this theme, describing, from her experience, how sales plans conceived under the current law serve well enough as potential vehicles for restructurings in Slovenia. After her, Petr Sprinz (Havel and Partners, Czech Republic) highlighted the flexibility of the Czech law in its approach to reorganisation plans, and how it has largely eliminated abuse in the appointments of pre-pack trustees.

New technology

Returning to the theme of technology, the panel before the coffee break focused on the appointment of insolvency practitioners through software. Chairing the panel, Frank Heemann (bnt, Vilnius) reported on the results of a survey of the appointments frameworks in 18 countries, confirming the trend towards using IT as an aid to appointments. Together with Dimitri Konstantinov (Ilyashev and Partners, Russia), Kersti Kerstna-Vaks (Judge, Tartu

Circuit Court) and Hans-Georg Kantner (KSV1870, Austria), the discussion offered very contrasting views on themes such as whether trust is enhanced through appointments generated by non-human intervention, whether such random appointments are efficient, in what types of procedures could such systems be useful (consumer bankruptcies being suggested) and the ethics underpinning the introduction of software-based solutions.

Aviation

Following coffee, a panel on aviation and cross-border issues explored several case studies on recent airline insolvencies. Christoph Schiller (Anchor Rechtsanwälte, Germany) kicked off the discussion, inviting his fellow panellists to demonstrate how airlines are apparently different from other cross-border enterprises. His presentation elicited memories of the Fairchild Dornier case from 2002: a cross-border case in which assets were sold and production discontinued. Major themes in the case included regulatory issues, a need to support cross-border understanding of the function of insolvency procedures and environmental pressures militating against the continuation of operations.

Speaking of more recent events, Ulla Reisch (ULRS, Austria) addressed the Niki Air COMI competition between Austria and Germany, different factors in the business operations motivating the courts to impose their jurisdiction. The operational reality that only active companies can transfer slots motivated the agreement of a cooperation protocol between the practitioners seeking abandonment of litigation/appeals and an equitable division of the proceeds.

Coordination of procedures was also a theme raised by Paulius Markovas (Cobalt, Lithuania) in the Small Planet Airlines case, while for Tobias Schulten (Clifford Chance, Germany), the Air Berlin case was significant, not only concerning the need to ensure repatriation of customers, but also, while the sales process was continuing, ensuring that maintenance and repairs obligations continued to be met, with regulation having a substantial impact on the likelihood of financing being continued.

Information and confidentiality

The final panel of the day on the themes of information and confidentiality, presided over by Evert Verwey (Clifford Chance, the Netherlands) offered insights into how information means value in terms of understanding the composition of the estate, tracing assets, evaluating the prospects of litigation, etc.

The principle of parity of information for creditors raised the role of public report requirements in insolvency legislation, particularly in the Netherlands.

Responding to this, Maja Zerjal (Proskauer Rose, USA) suggested that a predominant feature of insolvency processes

Ulla Reisch on Niki Air

was the role of public information in the form of filings and financial and disclosure statements, with value not just for creditors, but for all stakeholders. In the US, the conduct of insolvency proceedings is enhanced by the strong presumption for compliance with notice requirements, though care has to be taken over commercially sensitive information.

Concluding matters, Anže Pavšek (Zaman and Partners, Slovenia) highlighted the availability of public information in Slovenia through an e-portal, assisting creditors to have access to court and other creditor filings.

Through a list of questions composed by the panel chair, the panellists were finally quizzed on the extent of the information dynamic, revealing some differences in the approach to the balance between access to information and confidentiality across the jurisdictions examined.

Rounding off the day, closing remarks by Radu Lotrean and Evert Verwey highlighted the success of the event in attracting a record number of attendees and speakers, thanks in no small part to the INSOL Europe and the Slovenian local organisations, for enabling and hosting the event.

The day was concluded with the Young Members' Drinks Meeting at the Terrace Bar of the Vanders Hotel in downtown Ljubljana, where revellers were gathering for Friday night conviviality on the river promenade with its outstanding views of the "beloved" city. ■

> **THE FINAL PANEL OF THE DAY OFFERED INSIGHTS INTO HOW INFORMATION MEANS VALUE**

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

Early warning systems in Denmark and Europe

Morten Møller and Piya Mukherjee provide an overview of the advisory programme in Denmark which is being rolled out in a number of Member States

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Early Warning Europe

PIYA MUKHERJEE
Partner, Horten law firm,
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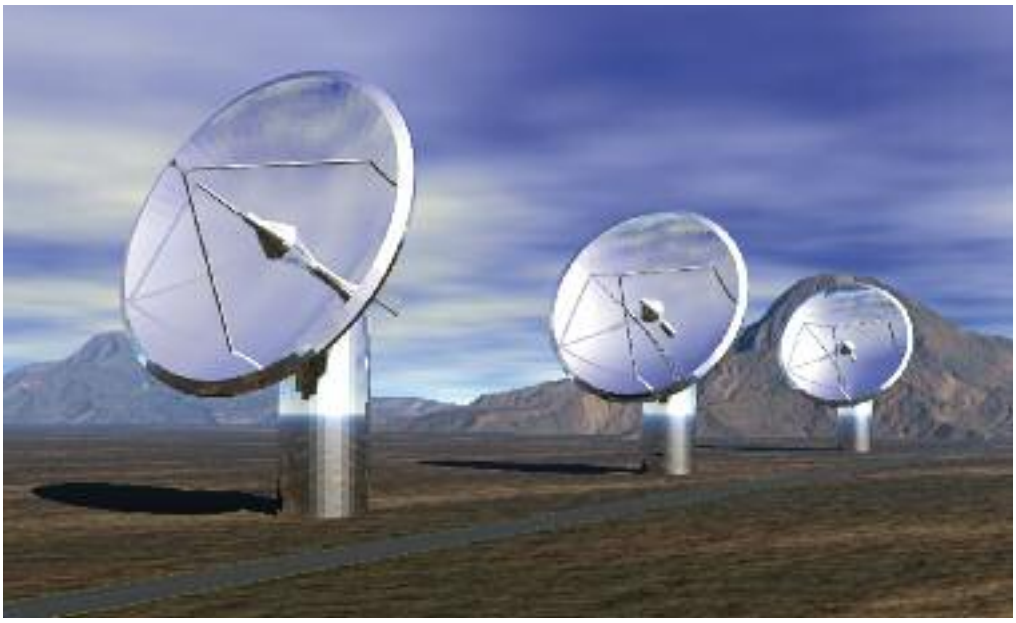
INSOL Europe



Early Warning Denmark ('EWD') is a system providing impartial and confidential assistance to businesses in distress and heading towards insolvency, at no cost.

The backbone of the system, managed by the regional Business Development Centres, is a group of highly qualified volunteer advisors with a deep understanding of relevant business sectors and a coverage of all relevant disciplines, such as law, accountancy, management, strategic planning, marketing, logistics, etc. A number of leading Danish insolvency law firms contribute to the Early Warning mechanism by providing their specialist advice to businesses heading towards insolvency.

The Early Warning mechanism has been operational in Denmark since 2007 and has assisted close to 6000 businesses in distress. It is a unique opportunity for business owners to get professional assistance at a time in their business' life cycle when they are often unable to pay for-profit consultants to help them get back on track.

Over these 12 years, the implementation team has learned a number of important lessons. Among these is the fact that the number of businesses needing assistance in times of hardship is relatively constant regardless of the economic ups and downs affecting specific sectors or the whole economy.

Despite awareness-raising and visibility campaigning, many business owners approach EWD very late, at a time when problems and debt have become unmanageable and the options for a successful turnaround are limited. Often, business problems also become personal problems, because the owners may lose their perception of the state of the company and their lucidity in decision-making. Recurrent features in this stage include denial of the actual state of the business, blame on others for the problems affecting the business,

and a feeling of intense stress or apathy when faced with difficult decisions and the need to make changes. In such circumstances, the advisors from EWD work simultaneously with the hard and soft skills required to turn the business around or – when no other options are available – to bring the business to a quick and orderly closure with limited losses.

Early Warning Europe

Since 2016, the experience gained in EWD has benefitted a number of other European countries through the project 'Early Warning Europe' ('EWE'). Funded by the COSME programme of the EC and led by the Business Development Centre of Central Denmark, the project has now set up fully operational early warning mechanisms in Poland, Italy, Greece and Spain, serving more than 2000 businesses to date. The next wave of countries joining in May 2019 include Finland, Croatia, Lithuania and Slovenia.

In order to make the early warning mechanism successful in new countries, much work has gone into the adaptation to the legislative, cultural and institutional contexts of these countries. Operator models, public-private partnerships and phased rollouts with pilot regions have all been tested, and much peer learning between the first four pilot countries has taken place.

From the beginning, EWE was received with scepticism and a general perception that senior business people would not volunteer to work in the pilot countries. Nevertheless, some 600 Polish, Greek, Italian and Spanish senior managers and specialists are now active and exchanging experience and inspiration from their assistance cases. Three of the four pilot countries have integrated the early warning mechanism into their national policies for employment, entrepreneurship and business support.

Reaching the businesses in distress and their owners has been a challenge, requiring a sustained effort across various communication channels, including traditional media outreach, political championing at all levels, social media campaigns, newsletters, company databases and a long series of local meetings in municipalities and associations where company owners meet. Testimonials from entrepreneurs who have been through distress, bankruptcy and second starts have proven particularly fruitful, possibly due to their identification effect among the viewers and readers. With the four pilot countries having very different business support systems, ranging from the relatively comprehensive to the virtually non-existent, these awareness-raising efforts have been crucial to the success of EWE.

A software model was developed by the Danish Business Authority for the purpose of exploring the potential of big data and artificial intelligence in identifying distress signals in the annual accounts filed digitally by companies. Using the output of the model, senior early warning consultants were able to detect distress signals with relative accuracy and reach out to the relevant company owners who were often not aware of the extent of their problems. There are interesting opportunities for developing and refining the model further.

Early warning and the directive on preventive restructuring frameworks

Art. 3 of the Directive imposes an obligation on the Member States to ensure that "*debtors have access to one or more clear and transparent early warning tools which can detect circumstances that could give rise to a likelihood of insolvency and can signal to them the need to act without delay*".

Such early warning tools may include:

- alert mechanisms when the debtor has not made certain types of payments;
- advisory services provided by public or private organisations;
- incentives under national law for third parties with relevant information about the debtor, such as accountants, tax and social security authorities, to flag to the debtor a negative development.

Thus, the Early Warning mechanism as described above is clearly one of the ways the Member States can fulfil their obligations under Art. 3, in order to provide debtors access to early warning tools, such as advisory services.

EWD has operated in Denmark for the past 12 years and has produced very good results indeed. However, insolvency practitioners in Denmark still encounter a substantial number of owners of insolvent businesses, who would have benefitted greatly from Early Warning, if they had accepted this unique offer in time. Unfortunately, many business owners, lenders, accountants and advisors are not aware of the existence of EWD.

Even though business owners could easily find information on Early Warning, they are reluctant to face reality and seek advice.

You can lead a horse to water, but you can't make him drink.

One of the objectives of the Directive is to save more businesses by offering access to restructuring measures at an early stage. The impartial, confident assistance at no cost that Early Warning schemes offer is paramount to achieving this objective. However, in order to be truly successful, authorities, institutions and advisors with relations to the business owner and insight into the financial status of the business must have an incentive, even duty, to recommend the business owner to reach out to Early Warning for advice.

Some can actually make the horse drink! ■

"EVEN THOUGH BUSINESS OWNERS COULD EASILY FIND INFORMATION ON EARLY WARNING, THEY ARE RELUCTANT TO FACE REALITY AND SEEK ADVICE"

(Un)necessary preventive restructuring frameworks: Where are the limits?

Emmanuelle Inacio invites you to our Annual Congress in the happiest city of the world and introduces the forthcoming technical sessions

EMMANUELLE INACIO
INSOL Europe Technical Officer

What could be more enchanting than inviting you to Copenhagen, the happiest city in the world and the world's most liveable city for our forthcoming Annual Congress?

Every bit of Copenhagen is designed for life, from the buildings and architecture, the food and the water, the many bikes and the intelligent infrastructure, to free education, free health care, and a society firmly focused on the life balance between work and play.

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There is certainly inspiration to be found in Copenhagen which seems to have found an exceptionally successful combination of a dynamic economy and social security and our Congress could not take place under better auspices.

The main theme for our forthcoming Copenhagen Congress could not be more topical than **"(Un)necessary preventive restructuring frameworks: where are the limits?"** as the thread connecting the sessions of the technical programme prepared by the co-chairs of our Annual Congress Technical Committee, **Michala Roepstorff** (Plesner, Denmark) and **Florian Bruder** (DLA Piper, Germany).

Indeed, the Directive on preventive restructuring frameworks was formally adopted by the Council on 6 June 2019. This Directive is the first instrument designed to harmonise the early intervention mechanisms in the European Union, for the purposes of continuing and improving a viable business, preserving jobs, maximising value and appropriately allocating returns to all stakeholders. The harmonisation of preventive proceedings is also meant to reduce the number of unnecessary liquidations of viable businesses and avoid unnecessary job losses.

Member States will have now to transpose the Directive in their own jurisdictions and although the idea of harmonisation of a rescue culture in the European Union can be praised, there will necessarily be differences amongst the jurisdictions. This phenomenon will be strengthened by the Member States who already anticipated the final text of the Directive and have implemented preventive mechanisms in their own legislation. Our main theme will be the opportunity to explore the different approaches, the issues of regulatory competition and also related topics.

The opening day

The very unconventional professor of formal philosophy at the University of Copenhagen, **Vincent F. Hendricks**, has honoured us by accepting our invitation to open our Congress on Friday 27 September with a keynote speech which will help the audience to get an overview of our Congress topics, as his primary research focuses on logic, decision, information processing, irrational group behaviour, bubble studies, formal democracy studies and the financial crisis.

The first panel session chaired by **Florian Bruder** (DLA Piper, Germany) will analyse the scope of application of the Directive on preventive restructuring frameworks, its strengths and limits, as well as the shopping forum issues arising from the discrepancies in its implementation.

The United Kingdom will inevitably be the subject of discussions as it is currently expected that it will cease to be a Member State of the European Union on 31 October 2019. As a no-deal Brexit is still possible, in which case the UK leaves the EU without a withdrawal agreement or another deal, the discussion on the potential impact of a no-deal Brexit on cross-border corporate recovery and insolvency will be led by **Eduardo Peixoto Gomes** (Abreu Advogados, Portugal).

Our delegates will then have the difficult task of choosing two break-out-sessions from four very interesting practical and sectoral topics in the light of the Directive on preventive restructuring frameworks.

- **Daniel Fritz** (Dentons, Germany) as the chair of the first breakout-session will cover the healthcare insolvencies and explain the factors that make

healthcare-provider insolvencies particularly complicated. He will also lead the discussion on the implications and potential ramifications for such providers in insolvency proceedings, and outline strategic approaches for restructuring.

- As the number of retailers going insolvent is increasing year after year in a number of jurisdictions, **David Conaway** (Shumaker, USA) - as the leader of the second breakout session - will look into the problems facing the retail industry and what the future holds for the sector.
- **Henrik Sjørslev** (DLA Piper, Denmark) will moderate the third breakout-session devoted to the airline insolvencies, will analyse the reasons for the failure of the airlines in Europe and instruct how to manage a successful emergency landing.
- The fourth breakout-session led by **Prof. Ignacio Tirado** (Universidad Autonoma de Madrid, Spain/UNIDROIT, Italy) will appraise the appropriate approach to the treatment of MSMEs which represent 99% of all businesses in the European Union and thus should benefit from a more coherent approach.

Inspired by the US Chapter 11 model, the preventive restructuring frameworks are based on the principle of an agreement concluded between the - at least - "likely insolvent" debtor and its main creditors which is binding on dissenting creditors upon (cross-class) cram-down. In order to achieve a cross-class cram-down, the Directive offers the Member States the choice between an absolute priority rule and a relative priority rule. These two mechanisms will be covered by a plenary session directed by Reinhard Dammann (Clifford Chance, France).

Alberto Nunez Lagos (Uría Menéndez-Proença de Carvalho, Spain and Portugal) will look at the issue of non-performing loans (NPLs) in Europe. He will lead a discussion on the approach to tackling NPLs, but also on the preventive restructuring frameworks which are considered as a tool to prevent the build-up of non-performing loans and mitigate the adverse impact on the financial sector

Our Congress will be the occasion for **Michala Roepstorff** (Plesner, Denmark) to chair a panel presenting the biggest cross-border bankruptcy estate in the recent Danish insolvency history: the OW Bunker group, a case on third-party effects on assignments under a trans-national credit facility.

A session on the issue of recognition of insolvency-related judgments will close the first day of the Congress. This panel, chaired by **Prof. Rodrigo Rodriguez** (Luzern University, Switzerland), will deal with the parallelisms and differences between the EU Brussels Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, the European Insolvency Regulation and the UNCITRAL Model-Law on the recognition of insolvency-related decisions.

The second day

We have the honour of seeing the second day of the Congress opened by a keynote speech by **Henning Jørgensen**, Professor at the Department of the Political Science of the Aalborg University and former Director of the European Trade Union Research Institute (ETUI).

The first panel of the day will focus on litigation funding which is taking on a bigger role in the cross-border legal industry. The panel session guided by **Carmel King** (Grant Thornton, UK) will examine this phenomenon and its opportunities – how it works, who provides it and why it can benefit the creditors.

The second panel of the day will move the debate on Social Media (SoMe) issues in insolvency. As our world is becoming more and more digital, unquestionably, the insolvency practice is evermore challenged with the question of how to protect and recover digital assets. The panel chair **Piya Mukherjee** (Horten Law Firm, Denmark) will have the task of assessing whether the SoMe accounts may be considered as assets in insolvency and showing the implications of the EU General Data Protection Regulation (GDPR) in this regard.

Among other things, the preventive restructuring frameworks provide that early warning tools should be put in place by the Member States to warn debtors of the urgent need to act. Indeed, the earlier a debtor company can detect its financial difficulties and can take appropriate action, the higher the probability of avoiding an impending insolvency or, in the case of a business the viability of which is permanently impaired, the more orderly and efficient the liquidation process would be. The panel session directed by **Rita Gismondi** (Gianni Origoni Grippo Cappelli & Partners, Italy) will explore the main issues relating to early warning tools, as well as the question of the duties of directors where there is a likelihood of insolvency, and the interests of creditors, equity holders and other stakeholders.

A final panel will be devoted to the use of pre-packs (these are agreements for the sale of all or part of the debtor's business or assets which are fully negotiated before the commencement of formal insolvency proceedings and completed immediately post commencement) and their impact on employees. The impact of the recent decisions of the Court of Justice on prepacks and the transfer of a business (Dutch/Belgium cases) will be also analysed.

Last but not least, we are pleased to announce that one of our members, **Chris Laughton** (Mercer & Hole, UK) will act as Congress Facilitator in order to ensure the fluid development of our programme.

With such a programme, surely, you will agree that INSOL Europe's Annual Congress in 2019 will be an event not to be missed! ■

The INSOL Europe Annual Congress 2019 will take place in Copenhagen from 26-29 September with the Academic Forum Annual Conference preceeding it from 25-26 September. For more information visit: www.insol-europe.org/events

CHRIS LAUGHTON WILL ACT AS CONGRESS FACILITATOR IN ORDER TO ENSURE THE FLUID DEVELOPMENT OF OUR PROGRAMME

2019 Academic Forum Conference, Copenhagen

Michael Veder introduces the 15th anniversary of the Academic Forum in Copenhagen this Autumn

MICHAEL VEDER
Chair of the INSOL Europe Academic Forum; Radboud University, The Netherlands

The Academic Forum celebrates its 15th anniversary in Copenhagen this Autumn.

On 25 and 26 September 2019 the Academic Forum will gather in Copenhagen to discuss current topics in insolvency law. This year marks the 15th conference of the Academic Forum, which was first established as the Academic Wing under the leadership of prof. **Sebastian Kortmann** (Radboud University) and launched at the INSOL Europe conference in Cork in 2003.

With the formal adoption of the EU Restructuring Directive by the European Council on 6 June 2019, the theme of this year's Academic Forum conference is very apt: "**Harmonisation of insolvency and restructuring laws in the EU**".

The conference focusses on the preventive restructuring frameworks that the EU Directive seeks to implement throughout the EU Member States. In six sessions, key elements of the restructuring framework as contemplated in the EU Directive will be discussed, as well as their (current and future) implementation and application in the Member States.

These conference sessions will deal with the design and implementation of preventive restructuring frameworks, the role of directors and the position of the '**debtor-in-possession**', the manner in which and extent to which creditors can be affected and protected by preventive restructuring frameworks (e.g. through a stay and cross-class cram-down mechanisms) and the administration of the restructuring process, with ample attention for the role of practitioners (in the field of restructuring) and judges.

The traditional session of the **Younger Academics Network of Insolvency Law (YANIL)** this year forms a truly integral part of the conference programme, with younger academics talking about the EU Restructuring Directive.

The final session of the conference, on Thursday 26 September, the **Edwin Coe Practitioners' Forum** – to which all interested practitioners having already arrived in Copenhagen at that time are cordially invited – will explore the scope and limits of the stay.

We are very honoured and pleased that **Prof. Ignacio Tirado**, professor of Commercial, Corporate and Insolvency Law at the Universidad Autónoma of Madrid, Spain, and Secretary-General of UNIDROIT, has agreed to deliver this year's Edwin Coe lecture. Prof. Tirado will share his thoughts with us on a highly debated issue under the EU Restructuring Directive: the "relative priority rule" as an alternative to the "absolute priority rule".

I hope that many of you will join us to debate and celebrate in Copenhagen! ■

For more information and the latest technical programme, visit:
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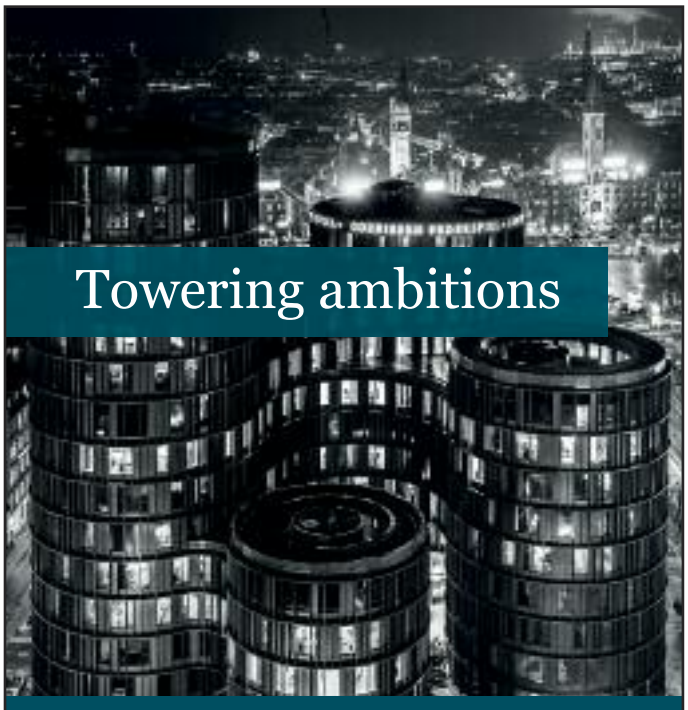

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New Bankruptcy Code of Ukraine: What to expect

Olha Stakheyeva-Bogovyk informs us of what to expect from the new code in Ukraine

OLHA STAKHEYEVA-BOGOVYK
Associate at Hillmont Partners, Kiev (Ukraine)

Global tendencies and the intensively developing restructuring and bankruptcy legal environment across the globe make it impossible to ignore such processes. Ukraine does not.

On 15 April 2019 the President of Ukraine finally signed the first ever Code of Ukraine on bankruptcy procedures ("Bankruptcy Code of Ukraine"), drafted with the assistance of the IMF and the World Bank. It shall replace the current Law of Ukraine "On Restoring Solvency of the Debtor or Declaring It Bankrupt" ("Law of Ukraine") on its full enactment date, i.e. 21 October 2019. It is expected that the national restructuring and bankruptcy frameworks should become more effective, transparent and predictable than before.

Among the key anticipated developments that the Bankruptcy Code of Ukraine suggests, are the following.

Improved preventive restructuring framework

The national preventive restructuring framework, the so-called 'rescue procedure of the debtor before the opening of the bankruptcy proceeding', is relatively new for Ukraine. It was introduced not that long ago and purported to rescue a debtor before it becomes insolvent.

In fact, under the former framework envisaged by the Law of Ukraine, no real practical implementation was possible. Mostly, the problem concentrated around the all-secured creditors' consent, needed for the approval of the rescue plan, which was almost impossible to obtain.

With the adoption of the Bankruptcy Code of Ukraine the whole concept of this procedure has undergone some significant changes. The former 'dead' provisions on preventive restructuring have been perfected to give way to more practical implementation. The amended preventive rescue procedure is now more akin to the English scheme of arrangement under the UK Companies Act and also embraces some features of the Chapter 11 US Bankruptcy Code restructuring procedure.

Among the most significant developments is lowering of the voting threshold for the affected secured creditors (from 100% reducing to 2/3 of those voting in the class).

In practice, the introduction of a within-class cram-down of the dissentient secured creditors mechanism should prevent them from impeding the approval of the rescue plan to a certain extent. Therefore, chances of getting a restructuring plan approved and implemented in the zone of insolvency increase, which was not the case before. In this sense, Ukraine should become a more preventive-restructuring-friendly jurisdiction in order to facilitate the within-country preventive restructuring, instead of 'chasing' for some popular foreign restructuring hubs.

> "THE FORMER 'DEAD' PROVISIONS ON PREVENTIVE RESTRUCTURING HAVE BEEN PERFECTED TO GIVE WAY TO MORE PRACTICAL IMPLEMENTATION"

Imposition of joint liability on the debtor's director

Previously, the Law of Ukraine set a general obligation of the debtor in case of a mere likelihood of insolvency (when repaying to one creditor will result in inability to repay the others in full) to file an application for the opening of the bankruptcy proceedings. However, now, under the Bankruptcy Code of Ukraine, the debtor shall be bound by a strict time-limit, i.e. to file the application within 1 month as of the date of the appearance of distress circumstances.

Should the director fail to comply with the above-mentioned obligation in the zone of insolvency, the bankruptcy court can hold that the director shall bear a joint liability before the creditors. Moreover, the ruling of the bankruptcy court holding the infringement shall alone suffice to expose the debtor's director to the joint liability, without the need to prove his/her 'fault' in a separate criminal proceeding.

In practice, setting strict deadlines for actions to be taken by the debtor when in the likelihood of distress and a prospect of a straightforward director' joint liability before the creditors are deemed to serve as a good instrument to discipline the

day-to-day management of the debtor, to monitor the viability of the business and be ready to detect the problem at an early stage and thus to effectively tackle it as soon as possible.

Easy "entry" into the bankruptcy case

The grounds for the opening of bankruptcy proceedings have been simplified. No longer is the initiation of the bankruptcy case linked to some burdensome and time-consuming requirements. Namely, the creditor is no more dependent on the existence of following:

a) a debt threshold (i.e. the outstanding uncontested claim in the amount of 300 minimal wages[1] (approx. €41,454.00));
b) the collection of debt proofs via the court and enforcement authorities (i.e. obtaining of the final court decision and the ruling on the opening of enforcement procedure) and
c) the debtor's failure to repay the debt within a three-month period as of the set date for its settlement.

Instead, to initiate a bankruptcy case under the newly adopted Bankruptcy Code of Ukraine, the creditor is to provide in the application the information on the amount of debt owed by the debtor, along with the circumstances of the case, as a ground for opening of the bankruptcy proceedings. Moreover, along with submitting the application for the opening of the bankruptcy proceeding, the creditor or the debtor (depending who files) is to secure a trustee's advance payment of 3 minimal wages (approx. €415.00), together with paying the court fee in the amount of 10 living minimums[2] (approx. €636.00).

Introduction of the automatic lifting of a moratorium (a stay) for secured creditors

Generally, the opening of the court bankruptcy proceedings in Ukraine automatically triggers a moratorium (a stay) to protect the debtor and the property from claims and enforcement, foreclosure actions.

Given the above, by virtue of the moratorium it was not possible to foreclose on the collateral whenever the secured creditor deemed necessary. In fact, that was only possible in the liquidation procedure via an auction sale.

However, such a general bar on foreclosure actions has been circumvented by the new provisions of the Bankruptcy Code of Ukraine. Namely, provided no court ruling on the opening of the rescue procedure or decision on declaring the debtor bankrupt is rendered, the moratorium should automatically be lifted for the secured creditors upon the lapse of 170 calendar days as of the date of opening the administration procedure. In practice, that should mean that the secured creditor shall have a chance to foreclose on the collateral just after the administration procedure and before other rescue or liquidation procedures start, should the abovementioned conditions be met.

Amended claw-back period in avoidance transaction actions

Now the claw-back ("twilight") period has been extended from one year to three. It means that the transactions that were entered into by the debtor three years before or after the opening of the bankruptcy proceedings and which caused damages to the debtor or creditors, can be subject to avoidance actions within the bankruptcy proceedings, upon the trustee's or the creditor's motion.

Sale of the debtor's assets via an electronic auction

The sale of all debtor's assets shall exclusively take place via an electronic auction. This measure should promote transparency of the sale procedure and eliminate (or reduce to the minimum) any external intervention.

Takeaways

The effectiveness and deficiencies of the adopted Bankruptcy Code of Ukraine shall be possible to detect only via its practical application. In any case, it is deemed that the vector that is being pushed forward corresponds to the global tendencies towards facilitating the rescue of viable businesses in the zone of insolvency and increase the efficiency of the bankruptcy procedures. ■

> THE VECTOR THAT IS BEING PUSHED FORWARD CORRESPONDS TO THE GLOBAL TENDENCIES TOWARDS FACILITATING THE RESCUE OF VIABLE BUSINESSES

Footnotes:

1 One Minimal Wage amount as of 1 January 2019 till 30 June 2019 = UAH 4,173.00; 300 minimal wages = UAH 1,251,900.00; (1 EUR = UAH 30.2 as of April 2019)
2 One Living Minimum as of 1 January 2019 till 30 June 2019 = UAH 1,921.00.

Crypto-currencies in insolvency proceedings in France: Dealing with highly volatile assets

Anja Droege Gagnier and Léa Marlière explain how the new technologies are handled in France

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Born in the early 2010's, crypto-assets[1] have gradually gained ground in the real economy thanks to services allowing them to be purchased or sold in exchange for national currencies, to be stored, or to be used as a financing instrument within Initial Coin Offerings (ICOs).

There are now nearly 1,600 crypto-currencies in circulation. Three of them, namely *Bitcoin*, *Ethereum* and *Ripple*, dominate digital transactions and capitalisations.

Considering the rise of digital assets, worldwide regulators and legislators must implement in a coordinated way an appropriate legal framework for these peculiar assets. In this respect, French legislators have attempted to be pioneers: they allowed in France the use of '*Blockchain*' technologies for the transmission of unlisted financial securities and minibons[2], and have recently focused on the legal framework of ICOs and the taxation of crypto-assets[3]. It seems that the French legislators do not consider for now the issues relating to the legal qualification of crypto-currencies and their handling within insolvency proceedings.

The legal qualification

Crypto-currency, an available asset?

Acting as a barometer to evaluate the severity level of financial difficulties encountered by a company, the concept of "cash-flow insolvency"[4] and its detection require an isolated and precise evaluation of the available assets of the distressed company. The company's 'available assets' include all liquidity and immediately realisable assets. In practice, crypto-currencies have a "store-of-value" function and can be immediately converted into monies following their sale at market price on dedicated trading platforms, so that they should thus be taken into account in the valuation of the company's available assets.

Consequently, digital assets might 'inflate' available assets, allowing the company facing financial difficulties to temporarily escape from the cash-flow insolvency. However, if a company's available assets are largely composed of crypto-assets, the slightest fluctuation in their value may suddenly lead to a cash-flow insolvency, meaning that the legal representatives must be very vigilant regarding their legal duties.

Crypto-currency, intangible asset or 'real' currency?

The creditors of a company may be tempted to file their due claims to the creditors' representative in crypto-currencies, which would then be assimilated to a foreign currency.

The many reports issued by French and European regulatory authorities agree and state that crypto-currencies cannot constitute an official currency which is legal tender, since such assets are not state-related and do not benefit from any official recognition[5]. Consequently, a claim cannot be expressed in crypto-currencies when filed.

The owners of crypto-currencies might consider these assets as a means for granting a security. However, granting a security on these complex assets is hardly practicable. For instance, the granting of a so-called 'non-possessory' pledge ("*nantissement sans dépossession*")[6] on crypto-currencies would offer a very weak guarantee to the secured creditor, assuming that the pledge is validly granted[7]. Similarly, the granting of a so-called 'possessory pledge' ("*nantissement avec dépossession*") would require the transfer of the pledged crypto-currencies into the hands of the secured creditor or a third party, causing significant practical difficulties. More generally, the complexity and very high degree of value fluctuation of these assets would constitute a source of uncertainty for the creditor when enforcing the guarantees.

In this respect, can crypto-currencies be subject to a title clause, so that they could be claimed by a creditor who considers himself as the true owner? Such a scenario cannot exist in practice. Blockchain technology allowing the circulation of crypto-currencies leads de facto to a transfer of

ownership, in such a way that it should not allow the provision of a title clause or a deferred payment of the transferred digital assets. As a result, a debtor company holding crypto-currencies would necessarily have full ownership of them.

The processing

Before the opening of insolvency proceedings

Two scenarios can be considered separately: payments made in crypto-currencies and the conversion of crypto-currencies into monies during the clawback period[8].

Payments made in crypto-currencies during the clawback period could be challenged, as transactions made in crypto-currencies do not (yet) constitute a "*commonly accepted payment means in business relationships*"[9]. However, such a challenge would not be relevant, considering that the value of the crypto-currencies may have increased or decreased significantly between the occurred payment and the moment when these assets are returned to the seller as a result of the cancellation of the challenged transaction.

To the contrary, conversions of crypto-currencies into monies may not be challenged during the clawback period. However, a manager well aware of the approaching difficulties, who would quickly sell the company's crypto-currencies for a low price, could be held personally liable for any shortfall of assets, since this conversion could be considered as mismanagement, leading to increasing the liabilities of the company facing financial difficulties.

During insolvency proceedings

In order to create cash flows highly valuable to finance the company's continued business in the "observation period"[10], the insolvency administrator may sell the crypto-currencies. To do so, he/she would need the cooperation of the legal representatives of the debtor company, who should give him/her access to the various storage methods of the crypto-currencies held by the company.

Could the insolvency administrator be held liable if he/she resells the crypto-currencies held by the debtor company at a low price (at the expense of the insolvency proceedings) in order to quickly obtain cash? This risk seems excluded as long as the insolvency administrator has previously been granted the insolvency judge's authorisation to proceed with the sale of the crypto-currencies.

In the context of a global or partial sale, purchasers will have to propose a purchase price to the Court, taking into account, among other things, the value of the held crypto-currencies. However, since the submitted offers cannot be amended until the Court's ruling (except in a more favourable direction), the purchasers will have to assume the risk of a crash in the value of the crypto-currencies, occurred prior to the Court order deciding on the sale.

In the context of isolated disposals of the debtor company's assets, the issue linked to the crypto-assets' valuation may not arise thanks to the insolvency judge, who authorises (or not), the sale of crypto-currencies by public auction or through private sales, at the price and conditions he earlier determines. Under these circumstances, the value of crypto-currencies would be debated at the public auction or may be determined at an early stage by the insolvency judge.

In summary, French insolvency law shows a certain rigidity which is inconsistent with the high degree of value fluctuation of crypto-currencies. In order to anticipate the first French insolvency proceedings processing crypto-currencies, bankruptcy practitioners will have to train themselves to safely handle these very peculiar assets. ■

Footnotes:

1 Crypto-currencies and tokens
2 Ordinances of 8 December 2017 and 28 April 2016 on the "shared electronic recording device" and the implementing decree of 24 December 2018
3 "PACTE" (plan for the growth and transformation of companies) Law of 11 April 2019 and Finance Law 2019
4 In France, cash-flow insolvency is the sole factor allowing the opening of insolvency proceedings (judicial liquidation and reorganisation proceedings), pursuant to Articles L.631-1 and L.640-1 of the French commercial Code
5 ESMA, ACPR, AMF, Banque de France, Focus n°16 "*The emergence of bitcoin and other crypto-actives: challenges, risks and prospects*", 5 March 2018
6 Under French law, a non-possessory pledge is a security that does not transfer the possession of the pledged asset into the hands of the secured creditor
7 The pledge will be enforceable against third parties, provided that it is published on the specialised French register
8 In France, period between the date of cash-flow insolvency and the date of issue of the order opening insolvency proceedings
9 Article L.632-1 of French commercial Code
10 In France, period (of 6 to 18 months) starting from the opening ruling during which an economic and social report on the Company is

> **FRENCH INSOLVENCY LAW SHOWS A CERTAIN RIGIDITY WHICH IS INCONSISTENT WITH THE HIGH DEGREE OF VALUE FLUCTUATION OF CRYPTO-CURRENCIES**

Demystifying offshore: Recognition and assistance in overseas territories

In this first of a series of articles, the authors outline the statutory and common law recognition and assistance orders available to Europe-based liquidators, highlighting recent cases

DESPITE THE SUBSTANTIAL FINANCIAL ACTIVITY THAT TAKES PLACE IN MAJOR OFFSHORE FINANCIAL CENTRES, MANY EUROPE-BASED INSOLVENCY PROFESSIONALS HOLD UNDULY PESSIMISTIC VIEWS OF WHAT CAN BE ACHIEVED THERE

In a global financial environment, insolvency office-holders will often need to look beyond their home jurisdictions in order to undertake their principal function of getting in and realising assets.

Within the EU this task is simplified by the detailed provisions of the Insolvency Regulation. Yet, despite the substantial financial activity that takes place in major offshore financial centres such as the British Virgin Islands, Cayman Islands, Guernsey and Jersey (which, for convenience, we will name the **Four Crown Dependencies and Overseas Territories (CDOT**s)[1] many Europe-based insolvency professionals hold unduly pessimistic views of what can be achieved there. As the recent seminars hosted by INSOL Europe's Anti-Fraud Forum have illustrated, such pessimism is often misplaced.

While none of the Four CDOTs are members of the EU, and none of them have legislation in force which is based on the UNCITRAL Model Law on Cross-Border Insolvency 1997 (**Model Law**), each of the CDOTs have well recognised procedures for assisting foreign office-holders, that can be used for a variety of purposes, including to secure assets or obtain the necessary books and records in those territories.

Ancillary liquidations

Often foreign office-holders will first consider whether there is a sufficient connection between the entity over which they are appointed and the relevant CDOT jurisdiction in order to enable an ancillary liquidation to be commenced there. Similar to secondary proceedings in Europe, an ancillary liquidation of a foreign company generally provides office-holders with the same local powers as they would have been accorded if appointed over a domestic company.

Cayman, Jersey and the BVI permit the winding up of foreign companies where, *inter alia*, they carry on business or have property located in those jurisdictions. At present there is no power to appoint a liquidator in Guernsey over a foreign company, but it is proposed to introduce such a power later in 2019.

Recognition and assistance

European office-holders may also consider seeking recognition of their appointment and assistance orders from the court of the relevant CDOT jurisdiction. They are not being appointed by the court as office-holders, but rather their status and power to act on behalf of the company is given domestic effect, and the court will assist this function through the making of other various orders.

Applications will usually follow a letter of request issued by the office holder's appointing court, setting out the nature of the recognition and the assistance sought[2].

Such orders are generally available either under statute or at common law.

Statute

Orders under the BVI Insolvency Act, the Jersey Bankruptcy (Désastre) Law 1990 (**Jersey Bankruptcy Law**) and the Insolvency Act 1986 (Guernsey) Order, 1989 (**1989 Order**) can only be granted to office-holders from a small list of designated jurisdictions[3]. No such limitations apply in Cayman, where the Companies Law[4] empowers the court to make orders in support of any bankruptcy proceedings in the entity's country of incorporation or establishment.

Under the Cayman statute, orders can be made for a number of listed purposes which include recognition of the office holder to act in the name of the company, preventing or staying proceedings or enforcement actions against the company, requiring the production of information or documents to the office holder, and the turnover of the property of the company (including the bringing of avoidance claims).

Similar orders are available in BVI (under the Insolvency Act5), Jersey (under Article 49 of the Jersey Bankruptcy Law) and Guernsey's 1989 Order. While the BVI Insolvency Act provides a similar (but not identical) list of orders that can be made to that in Cayman6, the Jersey or Guernsey statutes do not.

The BVI, Jersey and Guernsey courts may apply either domestic law or the law applicable in respect of the foreign proceeding when making assistance orders[7], whereas under the Cayman statue only domestic law can be applied[8].

Common law

The Four CDOTs also retain certain powers to grant recognition and assistance at common law.

In Jersey and Guernsey where the statutory coverage is less extensive, common law plays a more active role. In Jersey the courts may grant assistance to overseas office-holders, even when there are concurrent Jersey bankruptcy proceedings on foot. Similarly, in Guernsey, when a request comes from an overseas office holder appointed outside a designated jurisdiction, the court may exercise its inherent power to provide recognition and assistance. Following private international law principles, office-holders appointed by a national court in which a company is incorporated will be recognised by both the Guernsey and Jersey courts.

By contrast, in the BVI, it appears that the legislation essentially limits the beneficiaries of the Court's assistance to those foreign representatives appointed only within some designated jurisdictions[9].

Nature of the discretion

The principles governing recognition or assistance orders which will be granted are similar in all Four CDOTs. They are set out under the relevant Cayman and BVI statutes, and include taking into consideration a number of factors, such as such as "*matters which will best assure an economic and expeditious administration of* [the overseas liquidation] … *consistent with*", "*the just treatment of all [the creditors claiming in that* liquidation]", "*the protection of* [local claim holders] *against prejudice and inconvenience in the processing of claims in the foreign* [liquidation]" and "*comity*"[10] Similar considerations are likely to inform the decisions of the Guernsey and Jersey courts.

Common law – post *Singularis*

One objective of modern cross-border insolvency is reflected in the principle of modified universalism: that assets of a debtor should be collected and distributed on a worldwide basis in a single insolvency procedure, with domestic courts still protecting the interests of local stakeholders where necessary. Following *Cambridge Gas*, it was understood that the common law courts' power to assist foreign winding-up proceedings was to be extended to making orders *as if* the relevant entity were in liquidation in the domestic forum.

The subsequent Supreme Court decision *in Rubin* and the Privy Council decision in *Singularis* have rolled-back the scope of modified universalism considerably. Whilst it remains part of common law, it is much more limited in scope than articulated in *Cambridge Gas* and, in particular, the domestic court can only ever act within the strict limit of its statutory and common law powers, and not make *as if* orders.

The full extent of those powers is still being explored. In *Singularis*, a majority held that there exists a common law power to require persons subject to the court's jurisdiction to provide information to overseas office-holders, as long as similar orders can be made in the office-holders' home forum. This has proved controversial in Guernsey, at least in the context of personal insolvency, with the Royal Court declining to follow the majority in *Singularis*, finding instead that the foreign trustee in bankruptcy of a foreign debtor could not use information collecting powers in Guernsey.[11]

In two recent Cayman cases[12] the court has provided common law assistance to office-holders appointed by the Hong Kong court over Cayman companies. It granted them recognition to apply in the name of those companies for relief, available to the companies under Cayman law (namely the commencement of a scheme of arrangement and the presentation of a winding-up petition, respectively), together with case management directions intended to stay Cayman proceedings against those companies. Both cases involved straightforward facts, in which there was no likelihood of a competing winding-up process and no potential prejudice to creditors from the orders being sought.

Conclusion

As set out above, the scope for ancillary proceedings or recognition and assistance orders in the Four CDOTs is considerable.

The courts in these jurisdictions, supported by well-qualified legal and accounting professionals, are responsive to global developments and well-versed in cross-jurisdictional insolvencies. European office-holders should not be deterred from seeking appropriate orders from the courts of those jurisdictions. ■

Footnotes:

1 There are, of course, a significant number of other such jurisdictions, not considered in this article.
2 This is required in Guernsey, when applying under the 1989 Order.
3 For Guernsey: the UK, Isle of Man and Jersey; for the BVI: Australia, Canada, Finland, Hong Kong, Japan, Jersey, New Zealand, the UK and the USA; for Jersey, the United Kingdom; the Isle of Man; Guernsey; Australia and Finland.,
4 Part XVII, supplemented by the Foreign Bankruptcy Proceedings (International Co-operation) Rules, 2018
5 Part XIX of the Insolvency Act (Orders in Aid of Foreign Proceedings). The Insolvency Act also contains Part XVIII (Cross Border Insolvency), which has provisions based on the UNCITRAL Model Law. It has never been brought into force.
6 S.467(3)
7 BVI Insolvency Act, 2003, s. 467(5); 1989 Order; Article 49 of the Jersey Bankruptcy Law as applied in *Re Estates and General Developments Limited 2013* (1) JLR 145. See also the Guernsey case of Batty v Bourse Trust Company Ltd [2017] GLR 54 where an order was made under the 1989 Order, applying English law avoiding undervalue transactions
8 Picard v Primeo [2014(1) CILR 379]
9 In the matter of C (A Bankrupt) BVIHC(COM) 80 of 2013
10 Sections 242 and 468 respectively
11 Brittain (Trustee in Bankruptcy of X) v GTC (Guernsey) Limited [2015] GLR 248
12 China Agrotech 2017 (2) CILR 526 and Changgang (FSD 270 of 2017)

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Acquisition of production units in Spain

Julio Menchaca Vite presents an analysis of the acquisition of production units at each stage of the insolvency proceedings

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The acquisition of production units (PU), defined by article 149.4 of the Insolvency Act 22/2003 (IA) as "a set of means organised for the purpose of carrying out an essential or ancillary economic activity"[1], can be structured in each of the phases of the Spanish insolvency procedure, i.e.:
(i) common phase,
(ii) composition phase,
(iii) liquidation phase, and
(iv) pre-pack process; each of them with the specificities analyzed below:

Acquisition of PU in the common phase

The common phase begins with the declaration of insolvency and finishes with the opening of the composition phase or the opening of the liquidation phase (article 21.2 IA), and does not have as its main objective the sale of assets or the PU of the debtor. However, the IA allows acts of disposal to be carried out at this stage if they are performed for the benefit of the insolvency proceedings and are duly justified.

As a general rule, the disposal must be authorised by the Judge (article 43.2 IA), although there are exceptions where it can be executed directly by the insolvency administrator (article 43.3 IA). In the case of the sale of the PU, the aim is mainly to ensure the viability of the company, which usually takes place when delaying the insolvency proceedings may lead to the loss of the main customers and suppliers' agreements, the departure of key workers, or the obsolescence of machinery or technology.

Given that the sale of the PU at this stage is an exceptional case, the room for manoeuvre is wide for the Judge or the insolvency administrator, allowing them broad flexibility to decide on the form and terms of the sale, on the possibility of having or not having publicity, or on the method of assessing the bids.

However, the discretionary powers for the sale at this stage are not absolute, since in any case the sale rules in articles 146 bis and 149 IA, which refer to the specialties in the transfers of PU and on the legal rules of liquidation, respectively, must be complied.

Acquisition of PU in the composition phase

We can distinguish two different phases of composition, (i) the early proposal of composition, and (ii) the "regular" phase of composition.

In accordance with article 104 IA, the early proposal of composition may be filed if the opening of the liquidation has not been requested, from the opening of the insolvency proceedings until the period for notification of the credits by the creditors has passed, that is, one month after the publication of the declaration of the insolvency proceedings in the Official State Gazette (article 21.1.5º IA).

On the other hand, the composition phase that we have called "regular", to differentiate it from the anticipated proposal, takes place after the common phase (article 111.1 IA).

In both scenarios it is possible to include the sale of PU within the composition (article 100.2 IA), where the purchaser may or may not assume the debts towards the creditors. If they do not assume them, the transfer of the PU will take place outside the composition. On the contrary, if the debts are expressly assumed by the purchaser (article 146 bis.4 IA), he must sign the composition and proceed to the payment of the debts in the terms set in it, as a condition for the transfer of the PU.

This is usually the option to be executed when the buyer wishes to maintain the relations

> **THE ROOM FOR MANOEUVRE IS WIDE FOR THE JUDGE OR THE INSOLVENCY ADMINISTRATOR, ALLOWING THEM BROAD FLEXIBILITY**

with the creditors, or when they have guarantees on assets which are vital for the development of the activity.

Acquisition of PU in the liquidation phase

The liquidation phase, which is the other alternative of ending the common phase together with the composition phase, requires that the insolvency administrator files a plan of liquidation (PL), in which, if possible, the sale of the PU will be contemplated (article148 IA), as the legislator prefers the sale as a whole over the fragmented sale of the assets.

The PL will be filed before the Judge, who, before approving it will put it to the consideration of creditors, workers and the same debtor for a period of 15 days, so that they can express their observations or proposals for modification and, in the case of workers, may issue a report through their representatives.

Once this period has elapsed, the Judge will proceed to approve the PL and, if appropriate, may modify it in the aspects that he deems appropriate. He may also agree to the liquidation in accordance with the legal rules of article 149 IA.

In this sense, it is possible to observe the convergence of the many interests that influence the PL and that the possible buyer must take into account when presenting his offer. This is without prejudice to the possibility that the same bidders may make observations or proposals for modification to the PL, since some authors argue that said bidders are entitled to do it because of their legitimate interest in the proceeding, by virtue of article 184.4 IA.

Acquisition of PU through a pre-pack process

A mechanism increasingly used for the acquisition of PU is by means of the so-called pre-pack process, consisting of the presentations of the insolvency proceedings application together with a binding purchase offer, being applicable to the abbreviated procedure (art. 190.3 IA), in order to proceed to the sale as promptly as possible.

This option is based on section IV of the Statement of Reasons of the IA, which states that "*The law seeks, secondly, that the solution of insolvency should not be delayed in time, something that only harms the insolvent party and its creditors by reducing the value of their assets on whose disposal their collection depends, eliminating possibilities of guaranteeing their viability and increasing costs. To this end, the insolvency proceedings are simplified and streamlined, favouring the anticipation of liquidation, promoting and regulating a true abbreviated procedure.*"

The recent experiences we have had executing this formula have confirmed its effectiveness, achieving transmissions in record time and with results that clearly benefit the insolvency proceedings in terms of continuity of activity and preservation of jobs.

Conclusions

The Spanish legislation, in its aim to encourage the sale of the PU as a whole, to meet the objectives of maximising the value of the assets, maintaining the activity and preserving jobs, permits the disposal of the PU in each and every one of the phases of the insolvency proceedings, finding different formulas that can be more or less attractive to each concerned party. According to our experience, such sales are effective, increasing the number of PU that are successfully transmitted and opening a wide range of possibilities for investors. ■

Footnotes:

1 Concept that is consistent with Article 1.1.b of Council Directive 2001/23/EC of 12 March 2001 on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses, which defines the PU as "*an economic entity which retains its identity, meaning an organised grouping of resources which has the objective of pursuing an economic activity, whether or not that activity is central or ancillary.*"

> **IT IS POSSIBLE TO OBSERVE THE CONVERGENCE OF THE MANY INTERESTS THAT INFLUENCE THE PL AND THAT THE POSSIBLE BUYER MUST TAKE INTO ACCOUNT**

10 Years of YANIL: Restructuring across Europe and the EU Directive on Restructuring and Insolvency

Gert-Jan Boon, Line Langkjaer, David Christoph Ehmke, Jennifer L. L. Gant & Emilie Ghio present a 10 year anniversary celebration of YANIL collaboration

> SINCE ITS FOUNDING, YANIL HAS GROWN STEADILY AND CURRENTLY COMPRISES OVER 70 MEMBERS FROM MORE THAN 20 JURISDICTIONS

In 2009, Prof. Em. Bob Wessels and Dr. Myriam Mailly took the initiative to establish the Younger Academics Network of Insolvency Law (YANIL). It is a branch of the INSOL Europe Academic Forum (IEAF) which brings together postgraduate and PhD students along with early career academics.

The founders rightly observed the need to have the younger academics connect with their peers and overcome the limited opportunities to engage in the insolvency academy, as sometimes experienced by those still early in their careers.

This year, YANIL celebrates its ten-year anniversary. Since its founding, YANIL has grown steadily and currently comprises over 70 members from more than 20 jurisdictions. It aims to foster the exchange of information on specific sources, teaching and research opportunities, research funding and support. YANIL group members meet annually at the IEAF, being present on a dedicated YANIL panel during the conference, and also connect at other insolvency-related events throughout Europe and beyond. Over 30 younger academics have been invited over the last ten years to present and discuss their research at the annual YANIL panel of the IEAF.

To mark this anniversary, five members of the board of YANIL conducted a comparative study on preventive restructuring across Europe and the impact of the EU Directive on Restructuring and Insolvency (**Directive**)[1]. The study includes country reports from Denmark, Germany, France, the Netherlands and United Kingdom. Here we will briefly discuss this study.

Promoting restructuring in Europe

The perception of insolvency and restructuring laws in Europe has been subject to significant changes in recent years, following a fresh breeze coming from national reforms, topped by more radical and substantive reforms envisaged in the proposed Directive.[1]

For decades, the (continental) European application of the insolvency law was merciless. The troubled debtor company's directors were subject to strict liability and, in some jurisdictions, even criminal punishment for a failure to file for an insolvency procedure. The stigma of insolvency was firmly attached to the insolvent debtor company and often was one of the reasons for a debtor's late filing for the commencement of insolvency proceedings. This almost always led to the dissolution of the debtor company and the piece-meal liquidation of its assets.

Legal reforms in many of the EU Member States' insolvency laws prove, however, that insolvency and restructuring proceedings are now considered not only a tool for dissolutions of non-viable businesses, but also a tool to facilitate a going-concern's rehabilitation and a way to grant the debtor a second chance for the benefit of value-maximisation.[2] However, not all Member States have focused on this shift from dissolution to rehabilitation. With the implementation of the Directive, a first baby step is taken toward a minimum harmonised restructuring framework based on the underlying proposition that a timely and cooperative restructuring, incentivised by carrots rather than being beaten by sticks, should create a surplus, in contrast to a delayed in-court insolvency procedure: a surplus that could be shared among the creditors.

Once adopted and implemented, the Directive will have an impact on substantive insolvency laws. In order to establish to what extent it will impact legislation in the Member States, country reports were prepared on the "state of the art" of restructuring law and practice in Denmark, France, Germany, the Netherlands, and the United Kingdom. For each jurisdiction, the country reports elaborate upon:

(1) the development of the restructuring culture;
(2) the available legal tools to support the restructuring of insolvent companies; and
(3) the avenues for improvement of the restructuring laws.

The country reports show that

there is a great diversity of approaches in force among national legislators and in the different EU jurisdictions. Even though restructuring has become more prominent in most jurisdictions, the divergences remain significant.

The added-value of the Directive

The Directive leaves much liberty to the Member States, which makes it hard to foresee what the effects of the implementation will be. Minimum harmonisation requirements may not lead to the convergence envisaged by the 2014 Commission Recommendation[3] or the Directive. The wording in the Directive tends to take an almost optional approach, using the verb "may" instead of a more prescriptive word that would present a more obligatory implementation parameter. The impression left by the wording in the Directive's Articles is voluntarily vague. These watered provisions can be due to the hesitancy of the Member States to accept obligatory changes prescribed by the EU, given the legal culture-laden aspects of the approach to insolvency and preventive restructuring in general.

However, if fully implemented, the Directive will significantly impact restructuring in Europe with its debtor- and restructuring-friendly approach. The combination of a debtor-in-possession pre-insolvency regime, a stay and a cross-class cram-down goes beyond what is the current restructuring practice in the UK, with its scheme of arrangement, and is more like an EU version of the US Chapter 11 Bankruptcy Code. As this may be a step too far for some, it could motivate some Member States to take a cautious approach when implementing the Directive.

The Directive tends to codify what has been considered best practices across the Member States. While this does not change much in relation to pre-existing preventive restructuring frameworks in a number of EU countries, it does set a baseline for those jurisdictions that do not yet have such effective regimes, to improve their approach.

For example, in Denmark, Germany and the Netherlands, it will prompt a legislative reform. In Denmark, a restructuring framework that provides tools for a debtor, prior to insolvency, is a major change, in particular with respect to restructuring secured credit. In Germany, it will promote a more restructuring-friendly approach. It may remove obstacles for an out-of-court restructuring option, enabling, in a pre-insolvency phase, that contractual arrangements are restructured. In the Netherlands, the Directive will support the current legislative reform introducing debtor-in- possession proceedings. In countries such as France and the UK, which already have an extensive framework of preventive restructuring, not much change is expected. However, the Directive introduces procedures that may also have the effect of lessening the degree of forum shopping as the competition for effective preventive restructuring procedures will also be minimised, should the Member States engage in a thorough implementation process in line with the Directive.

The question remains, however, if the Directive has introduced provisions of an obligatory enough nature to go beyond what was set out in the original Commission Recommendation. If the Commission Recommendation failed to encourage reform, will a watered Directive, allowing for significant margins of appreciation, be more successful? Or will the Member States, whose regimes are already quite different from the Directive, seek to maintain their status quo as long as possible, implementing the provisions in the least disruptive manner possible? Given that the current text is merely a confirmed compromise with a view to agreement, it is yet to be seen how its implementation in the Member States will affect preventive restructuring frameworks in Europe, and the EU's goal to harmonise them as far as possible.

Celebrating ten years of YANIL

The full comparative study, including the five country reports, is published in the International Insolvency Review in 2019. In addition, the ten-year anniversary of YANIL will be celebrated with a conference for younger academics. This will take place on Tuesday 24 September 2019 in Copenhagen, at the offices of DLA Piper. It will provide younger academics with ample room to present and discuss research with peers and experienced academics and a great occasion to kick-off the next ten years.[4] ■

Footnotes:

1 Directive of the European Parliament and of the Council on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt,and amending Directive (EU) 2017/1132 (Directive on restructuring and insolvency).

2 David Christopher Ehmke, Jennifer L.L. Gant, Gert-Jan Boon, Line Langkjaer & Emilie Ghio, 'The EU Preventive Restructuring Framework: a hole in one?', (2019) 28(2) *International Insolvency Review*, forthcoming.

3 European Commission's Recommendation of 12.3.2014 on a new approach to business failure and insolvency.

4 For more information and participation in the YANIL conference, visit: www.insol-europe.org/yanil-mission-statement.

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Madoff: Insolvency laws without borders

David Conaway reports on the recent US Court of Appeals ruling that the US Bankruptcy Code applies to transfers between foreign entities

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On February 25, 2019, the US Court of Appeals (2nd Circuit) ruled that the trustee in the Chapter 11 case for Madoff Investment Securities, LLC could use the US Bankruptcy Code to recover payments made between foreign entities.

Previously, the Bankruptcy Court for the SDNY and the US District Court for the SDNY ruled that the trustee could NOT sue the foreign entities based on principles of international comity and the presumption against extraterritoriality of US Laws, including the US Bankruptcy Code. The ruling revitalises 88 avoidance actions against foreign entities.

Bernard Madoff orchestrated the largest Ponzi scheme in history. He solicited investors to buy into "investment funds" that were to generate well above market returns. However, he commingled the investors' funds into a JP Morgan Chase checking account. When investors sought to withdraw their money, Madoff used this checking account, essentially "robbing Peter to pay Paul". The scheme worked until 2008 when the markets collapsed.

On December 15, 2008, Bernard Madoff Investment Securities LLC became a Chapter 11 debtor, and a trustee was appointed to administer the estate. The trustee sought to avoid payments to investors as "fraudulent conveyances" under US Bankruptcy Code Section 548(a)(1)(A). Regarding the 88 lawsuits at issue, Madoff made initial transfers to "feeder funds" (which pooled investors' money), which subsequently transferred the funds to investors. In this case, the

> IN EFFECT, THE MADOFF TRUSTEE SEEKS TO RECOVER PAYMENTS MADE BY ONE FOREIGN ENTITY TO ANOTHER FOREIGN ENTITY

feeder funds were foreign entities, as were the investors. While Section 548(a)(1)(A) allows the estate to avoid payments made, Section 550(a) allows the estate to *recover* payments from *both* "initial" transferees (the feeder funds) and "subsequent" transferees (the investors), all of which in this case were foreign entities.

In effect, the Madoff trustee seeks to recover payments made by one foreign entity to another foreign entity, which payments arose from initial transfers from Madoff's Chapter 11 estate to the feeder funds.

The lower courts dismissed the trustee's claims on two bases: (1) international comity, and (2) the presumption against the extraterritorial application of US laws, particularly in this case the US Bankruptcy Code. The lower courts ruled that foreign nations had a greater interest in transactions between foreign entities, which interests should be respected by the US. The courts further ruled that because the parties who both made and received the transfers were foreign entities, there was not a sufficient basis to apply US law abroad.

In "unpacking" the US Bankruptcy Code fraudulent conveyance statutes, the Court of Appeals noted that the transfers are avoidable under Section 548(a)(1)(A) which provides:

> *"The trustee may avoid any transfer … of an interest of the debtor in property, or any obligation … incurred by the debtor, that was made or incurred on or within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily … made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted …."*

Once a transfer is avoidable, it is recoverable, under Section 550(a), which provides:

> *"Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such*

property, from … (1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or … (2) any immediate or mediate transferee of such initial transferee."

The Court first addressed the presumption against extraterritoriality, noting that absent a clear congressional expression to the contrary, federal laws should have only domestic application. This presumption avoids international discord that can occur when US law is applied to conduct in foreign countries.

There is clear congressional intent that Sections 548(a)(1)(A) and 550(a) allow for avoidance and recovery of the initial transfer made by Madoff Securities to the foreign feeder funds. The lower courts concluded that there was no congressional intent to allow for avoidance and recovery of the subsequent transfer from the foreign feeder funds to the foreign investors. However, the Court of Appeals concluded that Sections 548(a)(1)(A) and 550(a) operate in tandem. The Court noted that Section 550(a) clearly regulates the debtor's initial transfer, which was the operative transfer that depleted the estate. Thus, recovery of subsequent transfers from one foreign entity to another does not eliminate the connection to and interest of the US arising from the initial transfer. The Court reasoned that any other outcome would "open a loophole" to allow parties to "recovery-proof" transfers by utilising a two-step transfer using foreign entities.

The Court next noted that international comity takes into account the interests of the US, the interest of the foreign state, and the mutual interests of the family of nations. While the US has a vested interest in domestic debtors' ability to recover funds for the benefit of their estates, there are circumstances where foreign proceedings create interests that trump US interests. However, in this case, there were no foreign parallel proceedings regarding Madoff Securities. Moreover, the foreign insolvency proceedings of certain of the feeder funds were not duplicative of the actions in the Madoff Chapter 11 proceeding.

As a result of the Court of Appeals' ruling, the 88 lawsuits against foreign entities have new life. However, the investors have indicated their intent to appeal the Court of Appeals ruling to the US Supreme Court, and have obtained a stay pending appeal such that the litigation is on hold until SCOTUS rules. Should SCOTUS affirm the Court of Appeals ruling, foreign entities will be more at risk for actions under the US Bankruptcy Code. The ruling dealt with Section 548, but the same logic would apply to Section 547 for transfers made to creditors within 90 days prior to a Chapter 11 filing.

Parting thought: In the event that the Madoff trustee is able to obtain judgments against any of the foreign defendants, can the judgments be enforced abroad? ■

THERE ARE CIRCUMSTANCES WHERE FOREIGN PROCEEDINGS CREATE INTERESTS THAT TRUMP U.S. INTERESTS

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Austrian associations for creditor protection

Susanne Fruhstorfer and Andreas Howadt explain an Austrian particularity: the existence of creditor protection associations (*Gläubigerschutzverbände*)

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Associations for creditor protection are a central component of the Austrian insolvency landscape.

As "privileged associations for creditor protection" legally anchored and equipped with so-called "preferential rights", they are an inseparable part of all insolvency proceedings conducted in Austria, providing services to creditors, insolvency practitioners and insolvency courts alike.

Origins

While there have been associations for creditor protection in Austria for about 150 years now, the first iteration of the current system was codified in February 1925.

At that time the legislator added a provision to the so called "*Ausgleichsordnung*"[1], granting associations for creditor protection designated by the chancellor's office a right for cost reimbursement for expenses incurred by identifying and safeguarding assets to the benefit of all creditors.

Shortly thereafter, on 10 March 1925, the first associations received the so-called "preferential right".

While the legal basis has changed over the years and further preferential rights have been added, the main idea has remained the same.

The central purpose of the "privileged" associations for creditor protection and the statutory "preferential rights" was, and still is, to protect the interests of all creditors involved in the insolvency proceedings and to support the courts and insolvency practitioners in order to maximise the recovered funds.

Today there are four "privileged" creditor protection associations in Austria:

1. Alpenländischer Kreditorenverband (AKV)
2. Kreditschutzverband von 1870 (KSV)
3. Österreichischer Verband Creditreform
4. Insolvenzschutzverband für ArbeitnehmerInnen (ISA)

Legal basis

After quite a few iterations, the requirements for becoming a "privileged" association, as well as the "preferential rights" granted to those "privileged" associations, are now codified in the Austrian Insolvency code.

According to section 266 of the insolvency code, only registered associations (*Vereine*)[2] can apply for the status of a privileged (*bevorrechtete*) creditor protection association.

Apart from the fact that the applicant must be a registered association, the following additional prerequisites must also be fulfilled cumulatively:

(i) there must be a need for a (further) creditor protection association;

(ii) the activities of the association must be "reliably" oriented towards the whole of Austria. This essentially bars all associations which either lack the resources, or are unwilling, to participate in all insolvency proceedings in Austria, for becoming a "privileged" association;

(iii) the association must not be profit-oriented - which, in view of the Austrian understanding of a registered association, is rather redundant;

(iv) the registered association must have "numerous members" or "numerous members who are non-profit making and represent the interests of a large number of creditors".

"Preferential rights"

Once an association is granted the status of a "privileged" association, the Austrian Insolvency Code provides for two special rights, enabling its participation in all insolvency proceedings.

The right to represent creditors

"Privileged" associations are entitled (as an exception to the Austrian principle that representation in court proceedings is generally reserved to lawyers) to represent creditors in insolvency proceedings and to exercise their rights. This includes not only the registration of claims and participation in meetings but also the exercise of voting rights.

The right to access all insolvency files

Even if the "privileged" associations do not represent creditors, they have the right (in principle only granted to creditors) to access the court file of the insolvency proceedings and (even if not expressly codified) to participate in all court hearings during the insolvency proceedings.

Practical consequences

These aforementioned rights grant these "privileged"

associations a unique position in the Austrian insolvency landscape.

A noticeable majority of creditors are represented by "privileged" associations:

By having access to all insolvency files (and being informed of the opening of proceedings by the courts), the associations know (often even before the appointed administrator) about the opening of all insolvency proceedings in Austria. Since most insolvency applications by debtors contain lists with creditors (including their addresses), the "privileged" associations usually know which creditors (should) have claims against the debtor (at least in the opinion of the debtor or his accounting department).

This information is then often used to inform the (potential) creditors of the opening of the insolvency proceedings and at the same time offer services to the creditor.

As a result, the majority of creditors involved in insolvency proceedings are often represented by the insolvency creditor-protection associations.

Restructuring proceedings are often dependent on the opinion of the "privileged" associations

In restructuring proceedings in particular, the "privileged" associations become central figures with major influence on whether the reorganisation efforts succeed or all company assets are liquidated.

The importance of the "privileged" associations lies in the fact that the restructuring plan offered by the debtor company (i.e. a quota with certain payment periods) must be accepted by the creditors (or their representatives) both with a capital majority (more than 50% of the unsecured claims registered) and with a head majority (more than 50% of the creditors present at the restructuring plan hearing).

In practice this often means that, at least as far as the head majority is concerned, without the approval of the creditors represented by the "privileged" associations, all reorganisation efforts are doomed to fail.

From a practical viewpoint the "bundling" of creditors does have some advantages for the debtor company and its representatives. From a logistical standpoint it is far easier to negotiate with fewer parties involved, which, additionally, are familiar with judging the feasibility of restructuring measures and the adequacy of the proposed recovery rate.

Abundant information - effective monitoring

Apart from the importance of "privileged" associations as representatives of creditors, participating in all insolvency proceedings conducted in Austria also means that the individual associations gather experience from thousands of proceedings each year (16,566 last year).

This means that the "privileged" associations are in the (rather unique) position to offer their help to judges and administrators with numerous best practice examples and to monitor the performance of the various administrators, appraisers, auctioneers and other parties involved across all proceedings in Austria.

Financing

By definition, creditor protection associations are non-profitable. However, the requirements that the law places on the "privileged" protective associations (activity throughout Austria, maintenance of the infrastructure necessary for the effective protection of creditor interests) result in extensive expenditure. To finance these expenses, the Austrian creditor protection associations obtain funds, in essence, from three sources.

(i) **Membership fees:** with the exception of the ISA which is the Association of the Austrian Chamber of Labour (the creditor protection associations offer memberships for which annual fees are payable).

(ii) **The services**: both the representation in insolvency proceedings and various other services, such as the services typical for credit agencies - are provided against payment.

(iii) **The statutory reward:** According to the Insolvency Act, creditor protection associations are entitled to a reward plus value-added tax "for their activities in support of the court and for the preparation of a restructuring plan or for the determination and safeguarding of assets for the benefit of all creditors".

This reward corresponds to a fixed percentage of the insolvency administrator's net remuneration. Depending on the type of proceedings, all associations together receive a net remuneration of 10% (in "normal" insolvency proceedings) or 15% (in restructuring proceedings) of the net remuneration of the liquidator. This total amount is then divided among the individual associations as follows: 30% is divided equally among all associations (which participated in the proceedings); the remaining 70 % shall be distributed among the associations other than the ISA proportionally to the number of creditors represented. This reward may be increased or reduced by the court, but experience has shown that this is extremely rare. ■

Footnotes:

1 A predecessor of the Austrian insolvency act.

2 According to the Austrian associations act (*Vereinsgesetz*), associations may only serve non-material (i.e. not profit-oriented) purposes.

> **"PRIVILEGED" ASSOCIATIONS ARE ENTITLED TO REPRESENT CREDITORS IN INSOLVENCY PROCEEDINGS AND TO EXERCISE THEIR RIGHTS**

Country Reports

Summer 2019

A short selection of updates from Belarus, Spain and Estonia

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Belarus: New draft laws on insolvency

The Government of the Republic of Belarus has submitted a new draft law on insolvency to the Parliament. The Resolution No.9 of the Ministry of Economy 'On electronic bidding for the sale of property in economic insolvency (bankruptcy) proceedings" will come into force on 13 November 2019.

The draft law is progressive, but its individual provisions require improvement. It is mostly focused on the protection of crisis managers' interests while in fact it should balance the interests of all the parties of the insolvency proceedings.

Now the draft law is being prepared for the first reading.

New grounds for filing an insolvency petition to court

The draft law establishes new grounds for filing an insolvency or bankruptcy petition based on the principle of non-payment. An insolvency petition now may be filed if the debtor is unable to fulfil its monetary obligations with the funds available within nine months of the due date. The debtor is obliged to file a bankruptcy petition if the value of its assets as of the first day of the quarter is not sufficient to settle its liabilities in full, regardless of the term of their fulfillment.

The debtor may file a counter-appeal to the creditor's bankruptcy petition and prove that the value of its assets is sufficient to settle the liabilities to all creditors in full.

Cash deposit to pay the crisis manager

The person filing an insolvency (bankruptcy) petition (except for government bodies) is obliged to transfer funds to the crisis manager's account within the time period prescribed by the court, in the amount of one average monthly salary of the debtor company's employees for the month preceding filing a petition. As of March 2019, the amount is 1 056.90 BYN or €450.

Pre-trial rehabilitation

Pre-trial rehabilitation is now related only to measures taken under the court's individual order. The court makes such an order if it finds out that the amount of debt recovered will not allow the debtor to conduct normal business activities. An individual order obliges the debtor to take measures on pre-trial rehabilitation within the time frame established by the court.

Crisis manager appointment

A crisis manager is to be appointed by the court on the basis of a random selection by the Chamber of Managers using an automated system. In contrast to the current practice, a manager will not be allowed to reject the appointment.

Self-governing body for crisis management and bankruptcy proceedings

An institution of self-regulation of crisis managers – the Belarusian Chamber of Crisis Managers – is planned to be set up, membership being obligatory. The main aim of the Chamber is to analyze the existing practice and facilitate the use of a uniform approach.

Insolvency of certain categories of entities

For some categories of debtors, for example forex companies, specific features of bankruptcy proceedings are established.

Electronic bidding in insolvency proceedings

On 1 April 2019, the Resolution on electronic bidding was adopted.

A new method of property sale with reduction is introduced. In the course of the electronic bidding the initial price of a lot is reduced every hour starting from the second hour, in equal shares to the minimum price of the lot, in the absence of rates for increasing the initial price. The price reduction is stopped by the first bid made by a participant of the electronic bidding.

For the first bidding the minimum price can be set by reducing the initial price to 40%, for secondary bidding to 80%. ■

> DISCONNECTION POLICIES ARE A GOOD TOOL TO AVOID SANCTIONS AND CLAIMS REGARDING MAXIMUM WORKING TIME AND HEALTH AND SAFETY AT WORK

Spain:
Employees' right to digital disconnection recognised

On 7 December 2018 the Organic Law 3/2018 on Personal Data Protection and Guarantee of Digital Rights "Ley Orgánica 3/2018, de 5 de diciembre, de Protección de Datos Personales y Garantía de los Derechos Digitales" (hereinafter, "LOPD") came into force in Spain.

Although the LOPD was initially intended to merely implement the EU General Data Protection Regulation (GDPR) in Spain, its scope was suddenly expanded in order to include what has been defined as "digital rights". The new LOPD grants for the first time a right to digital disconnection for the employees (article 88 of the LOPD), also known as digital detox. It is now compulsory for employers to issue a "digital disconnection policy" that regulates their right to digital rights ensures that this right is effectively guaranteed.

Under LOPD, employees have the right not to be connected or available during rest times and holidays in order to ensure a proper work-life balance. This means that employers in Spain will have to design a disconnection policy that guarantees the employees' right to digital disconnection in accordance with their position and establishes a culture that respects the right to digital disconnection. As way of example, the disconnection policy can forbid the use of corporate email outside working hours, restrict the access to servers temporarily during certain timeframes, or limit the number of persons that can be copied on an email. Companies that have employee representatives must discuss the content of their digital disconnection policies with them. Also, the new LOPD sets out that future sector collective bargaining agreements shall include specific digital disconnection regulations.

It is important to note that the LOPD does not set forth any specific penalties for breach of this obligation.

However, disconnection policies are a good tool to avoid sanctions and claims regarding maximum working time and health and safety at work, and can be seen as a new opportunity for employers to regulate the uses of corporate email and corporate devices.

The new regulations (article 87) expressly recognise the employer's right to access the devices with the purpose of monitoring and surveying the employee's fulfillment of the contractual obligations and the adequate use of the devices. The requirement to access the devices is granted if the employer has clearly stated the conditions of use of the devices and offers a minimum standard of privacy. It is important to note that the employee representatives must participate in the process of establishing the conditions of use, which must be duly communicated to each employee.

Finally, the LOPD allows for the use of voice recordings by the employer only in situations in which it is necessary to guarantee the safety of the company's premises, goods or persons.

It is yet to be seen whether the Spanish companies will comply with the new requirement of a digital disconnection policy, but this new regulation is an important step towards creating a culture of data protection in the workplace and improving the employee's work-life balance. ■

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SIGNE VIIMSALU
Head of EY LAW Estonia
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Estonia:
All insolvency laws under revision

Since 2016 the Estonian Ministry of Justice, in collaboration with a special task force group and reputed external experts, has been working on the revision of all insolvency laws in Estonia: the Bankruptcy Act (in force since 1992), the Reorganisation Act for entrepreneurs (in force since late 2009) and the Debt Restructuring Act for natural persons (in force since 2011).

One could perhaps wonder why this comprehensive revision is needed in such a young country as Estonia. The main goal of this revision is to make the respective insolvency proceedings more transparent, faster, and much more cost effective, which ideally would result in better recovery rates for creditors and Estonia's higher international reputation among foreign investors.

Obviously the current status based on World Bank's recent Ease of Doing Business Report is too far from being satisfactory for Estonia and requires some substantial far-reaching actions at the legislative level.

So far, the Ministry of Justice of Estonia has identified fifteen topics to deal with, from which three are the most important in order to meet the goals, in the legislator's opinion.

The most relevant topics are:

1) Insolvency ombudsman institution;
2) Terminology of temporary and permanent insolvency status; and
3) Specialisation of courts and judges in insolvency proceedings.

Potential creation of the Insolvency Ombudsman Institution as official state supervision body would be a completely new element in the history of Estonian insolvency laws. In this regard, the Estonian government has followed the example of the Finnish insolvency system. The main tasks of the insolvency ombudsman would be the supervision of the debtors (either natural persons or legal entities) and of the insolvency practitioners, to the extend applicable (mainly administrative supervision) and not covered by insolvency practitioners' own umbrella organisation *Kohtutäiturite ja Pankrotihaldurite Koda (Chamber of Bailiffs and Bankruptcy Administrators)*. The insolvency ombudsman would have special powers to explore what are the reasons of the insolvency, and to survey the particular insolvency proceedings when bankruptcy was reached unlawfully. The insolvency ombudsman would also create and leverage best practice among the participants of these proceedings. The Estonian legislator believes that with the help of the insolvency ombudsman only a minimum amount of asset-less insolvencies would be initiated in Estonia and that the recovery rates for creditors would grow significantly in the future.

Terminology related to insolvency and late submission of insolvency applications by the debtors to the court are inter-connected elements in Estonian laws. Too much litigation has been going on over the term "insolvent". Thus, the Estonian legislator claims that terminology should be much more precise, transparent, based on some criteria obviously publicly understandable and better determined, based on publicly known financial terminology, for instance. If the debtor states that the business is not permanently insolvent and proceedings should not be open, he or she has to submit relevant written evidences to the court, so that it could be considered otherwise. Based on the legislator's intentions under revision, the burden of proof will be on the debtor in the future.

It is obvious that insolvency proceedings last too long in Estonia and one of the reasons has been the lack of competent judges and court lawyers in this hybrid legal field. This lead to different court practice and more litigation among participants, who fight for their rights to get better recovery rates. The Ministry of Justice has a plan to create or consolidate the insolvency practice in special courts, so that the best insolvency law practice would be similar everywhere in Estonia and judges, assistant judges, lawyers, clerks, and so on, should be highly educated in different economic, financial, managerial and legal fields, thus, more competent in the future.

In addition, there are other interesting topics under consideration in this revision. For instance:

1) Ranking of loans, claims created by related persons of the debtor versus loans, claims submitted by the ordinary creditors;
2) Fee system and action plan of insolvency practitioners in all insolvency proceedings;
3) Defense of claims via written procedure (without face-to-face meetings in the future);
4) Claims, which are automatically considered as defended in the proceedings
5) Rights and obligations of the debtor, legal status of some statements given by the debtor to be used in other proceedings, such as criminal proceedings;
6) Rights in rem;
7) Deadline to submit claims and relevant content of the claim-submitting application to help the creditors;
8) Special regulation concerning the bankruptcy estates of deceased persons versus inheritance law.

According to the action plan publicly available at this point of time, it appears that the Estonian Ministry of Justice is planning to enact the respective laws with all amendments as of year 2021 at the latest. Indeed, with the new government, plans may change. Stay tuned! ■

> **THE MAIN GOAL OF THIS REVISION IS TO MAKE THE RESPECTIVE INSOLVENCY PROCEEDINGS MORE TRANSPARENT, FASTER, AND MUCH MORE COST EFFECTIVE**

European Update

Myriam Mailly, Co-Technical Officer of INSOL Europe, writes about the recent European information that members should be aware of and that is now available on the INSOL Europe website

National legislations to deal with the concrete application of the European Insolvency Regulation 2015/848

In a past column (*Eurofenix* Summer edition 2017, pp. 44-45), INSOL Europe members were informed that useful links were listed on the INSOL Europe website to help the insolvency actors to find relevant information on the national laws applicable to cross-border insolvencies, when applying the EIR Recast.

Indeed, the dedicated webpage which is regularly updated contains three main sections. The first section lists the official texts and amended Annexes (including the last consolidated version as at 27 July 2018) while the second section contains the links relating to the standard forms referred to in the EIR Recast. A third section was also created relating to the information on domestic legislations/registers.

With regard to that third section especially, a new set of information is now available and namely the national texts adopted in the Member States' domestic legislation to deal with the (concrete) application of the EIR Recast. I am pleased to announce that this information is now available for the following countries: Czech Republic, England & Wales, Finland, France, Hungary, Ireland, Latvia, Lithuania, Poland, Portugal, Romania, Slovakia, Spain and The Netherlands at: www.insol-europe.org/national-texts-dealing-with-the-eir-2015

If you want to contribute as well, please do not hesitate to send me any relevant information, articles etc... by email to: mailly.myriam@orange.fr

The EIR Case Register

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

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

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

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

The European Directive on 'restructuring and insolvency'

The latest texts of interest regarding the Directive on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt, and amending Directive (EU) 2017/1132 are now published on the INSOL Europe website.

Indeed, the **European Parliament legislative resolution** of 28 March 2019 and the **EU Council document PE 93 2018 INIT** of 15 May 2019 are now available at www.insol-europe.org/technical-content/eu-draft-directive

At the time of writing, the Directive is planned to be published at the Official Journal of the European Union in the course of June 2019. You will be informed accordingly in the next technical column. ■

MYRIAM MAILLY
INSOL Europe Co-Technical Officer

> **ACCESS TO THE INSOL EUROPE EIR CASE REGISTER FROM THE LEXIS LIBRARY HAS RECENTLY CHANGED**

Got a new book to review or preview?

Let us know and we will consider it for a future edition. Contact Paul Newson for more details on: paulnewson@insol-europe.co.uk

Pre-Insolvency Proceedings: A Normative Foundation and Framework

Nicolaes Tollenaar, Oxford University Press, 1st edition, 2019, 320 pages, ISBN 978-01-98799-92-4, £75

This recently published text presents a critically analytical discussion of preventive restructuring frameworks based on a nuanced version of the creditors' bargain theory. The Preventive Restructuring Directive has now been adopted and the transposition period has begun. The publication of this book is therefore timely because it indeed provides a normative foundation and framework for preventive restructuring generally, also commenting on the purpose, practicality and ultimately, the fairness of such frameworks.

By examining both the US Chapter 11 procedure and the UK's Scheme of Arrangement, the author interrogates the viability of both frameworks as preventive restructuring procedures as well as their relative 'fairness' to creditors within the normative framework of the creditor's bargain theory, though the author is also highly critical of that theoretical paradigm. The result is a framework for preventive restructuring that takes into account the faults and advantages of Chapter 11 and the Scheme of Arrangement, along with the author's solutions to some of these faults.

Overall, this text is useful in both the review of the two procedures and in describing succinctly how both the Scheme of Arrangement and Chapter 11 work, as well as what the author sees as their faults. He also sets out a fascinating review and critique of the classical insolvency theory, presenting a nuanced normative framework aimed specifically at the creation and application of preventive restructuring frameworks.

The research goes beyond a recommendation of the current progress toward a preventive restructuring framework in the EU to a design supported by highly critical analysis and reasons that could form the basis for future reforms. It could well be that Tollenaar has foreseen the problems that the current frameworks will encounter and has already provided potential solutions.

Dr Jennifer L. L. Gant
Post-Doctoral Researcher, JCOERE Project, University College Cork, Ireland

Dal Fallimento Alla Liquidazione Giudiziale
(From Bankruptcy to Judicial Liquidation)

Giorgio Cherubini, Maggioli Editore, 1st edition, 2019, 432 pages, ISBN 978-88-91631-62-6, €46

This text, published early in 2019, comes in the wake of profound changes introduced by the Law of 14 February 2019. Apart from some nomenclature being redefined, "bankruptcy" becoming "judicial liquidation", for example, as an attempt to reduce the stigma associated with the restructuring process, the law introduces a new concept: the "state of crisis" as a prerequisite for action. It also harmonises jurisdiction in domestic law with the position at European level through the universal application of the "centre of main interests" test. Other changes brought in by the law include redesigned rules in relation to the role of the statutory auditors and the prominence given to new alert procedures as part of the composition/settlement process.

While the law has certain elements in common with the previous regime, the newness of the changes it has introduced and their amplitude will come to be tested before the courts. Thus, the guidance provided by this text, written by an author of many years' experience in practice, is invaluable. The work addresses the needs of many stakeholders, the debtor companies and their directors, whose liability position has been somewhat restructured by the law, as well as of the creditors, who play a prominent role in the resolution of the debtor's difficulties. Overall, the clear structure of the text permits a better understanding of the reforms, which are the most important to have occurred for some time in Italy.

Paul J. Omar
Technical Research Coordinator

Turnaround Management: Unlocking and Preserving Value in Distressed Businesses

Alan Tilley, Globe Law and Business, 1st edition, 2019, 218 pages, ISBN 978-1-787421-68-4, £95

Based on the author's extensive experience in over 50 major turnaround cases over 25 years of practice, this text serves as a compendium of what to do and what to avoid. It looks at the rise of turnaround management as a specific function, appropriately distinguishing the roles of formal insolvency and pre-insolvency procedures, especially consensual procedures, and at understanding that not all cases of financial distress need be resolved by recourse to law. Where, increasingly, law has moved in to stake a position, the author charts the various regimes encountered and their merits or demerits. What makes this work particularly notable is the author's reference to case studies, many drawn from his experience, and how the materials in each chapter can be understood through analysing real-life scenarios.

The text moves through the life cycle of a business, looking at the role of turnaround managers and where their involvement becomes critical, in particular at how the "decline curve" and crunch points must signal the need for action. Essential pre-requisites for a successful turnaround are listed, particularly the role of adequate information and identifying priorities for action. Assessing enterprise value and resolving the problems that have led to distress form a natural part of the work leading up to a business plan, in which issues such as managerial reputation, negotiation strategies and operational aspects of the restructuring all play a part. How procedures come to an end and the reconciliation of creditor and debtor interests then form the backdrop to the overall conclusion of this work, not forgetting of course the necessary chapter focusing on cross-border issues.

In summary, a very useful and worthy text, not simply for the "war stories", but especially for the distillation of experience and reference to developments in a number of jurisdictions, lending this work a very strong comparative feel.

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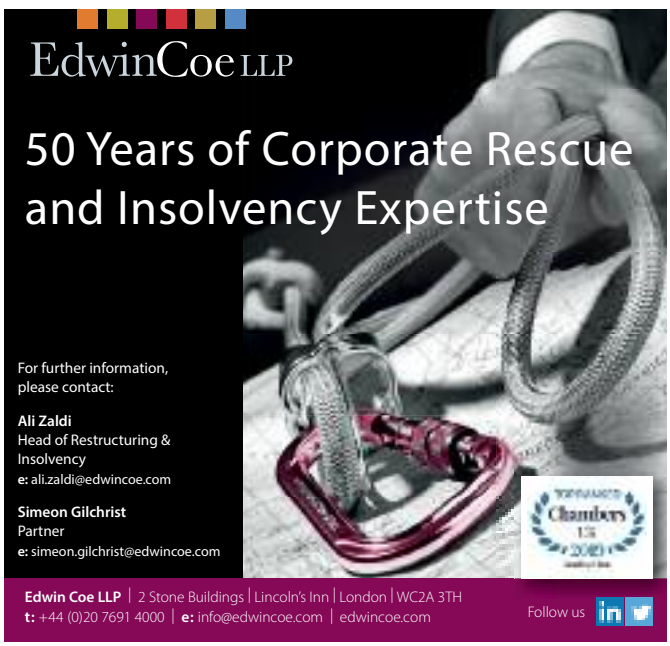

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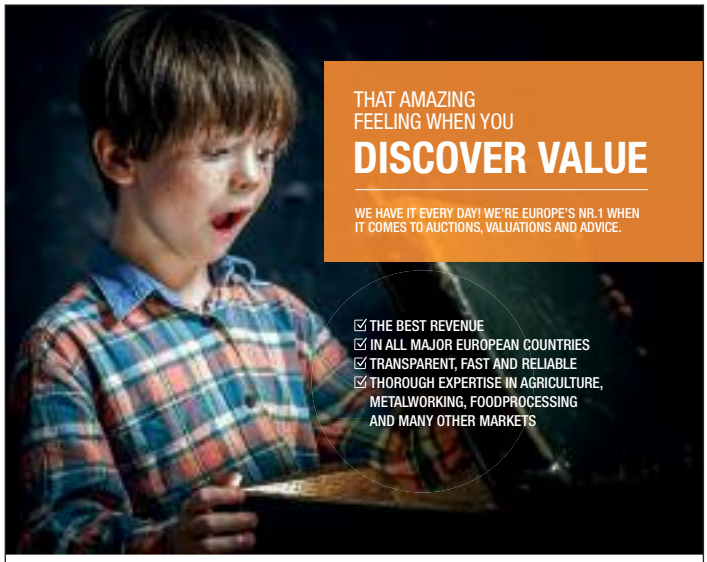

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