INSOL EUROPE 40 YEARS 1981-2021

ACADEMIC FORUM INSOL Europe

Academic Conference

Dublin • 2-3 March 2022

WORKPACK

The Emerging New Landscape of European Restructuring and Insolvency

ACADEMIC FORUM SPONSORS

EdwinCoe LLP
LAW FIRM

Our Restructuring and Insolvency partners are highly recommended in Chambers UK 2022. We advise corporates, funders and office holders on all aspects of corporate restructuring and personal insolvency, in addition to the traditional collective insolvency procedures: bankruptcy, administration and liquidation.

Edwin Coe has always been at the forefront of a developing cross-border legal landscape. We have helped our clients navigate in turn the Cross Border Insolvency Regulation, the Recast Regulation, and the Transition phase into the current legal relationship between the UK and our European friends and trading partners. The Edwin Coe team continues to pick a path no matter the shift in the ground beneath our feet.

For further information, please contact:

Ali Zaidi - Head of Litigation & Insolvency
e: ali.zaidi@edwincoe.com

Simeon Gilchrist - Partner
e: simeon.gilchrist@edwincoe.com

Christina Fitzgerald - Partner
e: christina.fitzgerald@edwincoe.com

TOP RANKED Chambers UK 2022 Edwin Coe LLP

Ranked in Band 1 Restructuring/Insolvency for Personal Insolvency UK-wide
Chambers UK 2022

Edwin Coe LLP | 2 Stone Buildings | Lincoln's Inn | London | WC2A 3TH
t: +44 (0)20 7691 4000 | **e:** info@edwincoe.com | edwincoe.com

Dear Colleagues and Friends

Tomáš Richter
Chair,
INSOL Europe
Academic Forum

It is with great excitement that I present to you the workpack of the INSOL Europe Academic Conference to be held in Dublin on 2 and 3 March 2022.

When the Academic Forum last met in Copenhagen in October 2019, little did we know that it will take more than two years for us to reunite. As we all know now, those two years were unlike anything any of us has seen or lived through, both personally and professionally.

In the latter context, our bread-and-butter tools of insolvency law have unprecedentedly been "switched off" across Europe for a good part of 2020. And contrary to common wisdom, the follow-up wave of restructurings and insolvencies widely expected as the result of the pandemic simply did not arrive in 2021.

Yet legal development did not stop: the pandemic did not switch-off the clock measuring the time to the 2022 deadline for the implementation of the European Restructuring Directive. Nor did it prevent European academics from applying their minds to that topic and other questions in our field of enquiry. Quite the contrary. Our call for papers for the Dublin conference met with an overwhelmingly positive response, resulting in the INSOL Europe Academic Forum Board selecting from close to 30 very thoughtful paper proposals. We are very thankful to all authors who have replied to the call.

The technical programme that we proudly present to you here testifies to the breadth and depth of insolvency and restructuring research conducted in Europe today, and to the unique role which our Academic Forum plays in giving that research an outlet. A brief look at our programme should leave no one in doubt that the INSOL Europe Academic Forum is where cutting-edge insolvency and restructuring research is presented and debated, in a way that is relevant not only to academics but to lawyers and others practicing in the field as well.

We look forward to seeing you all for a successful conference.

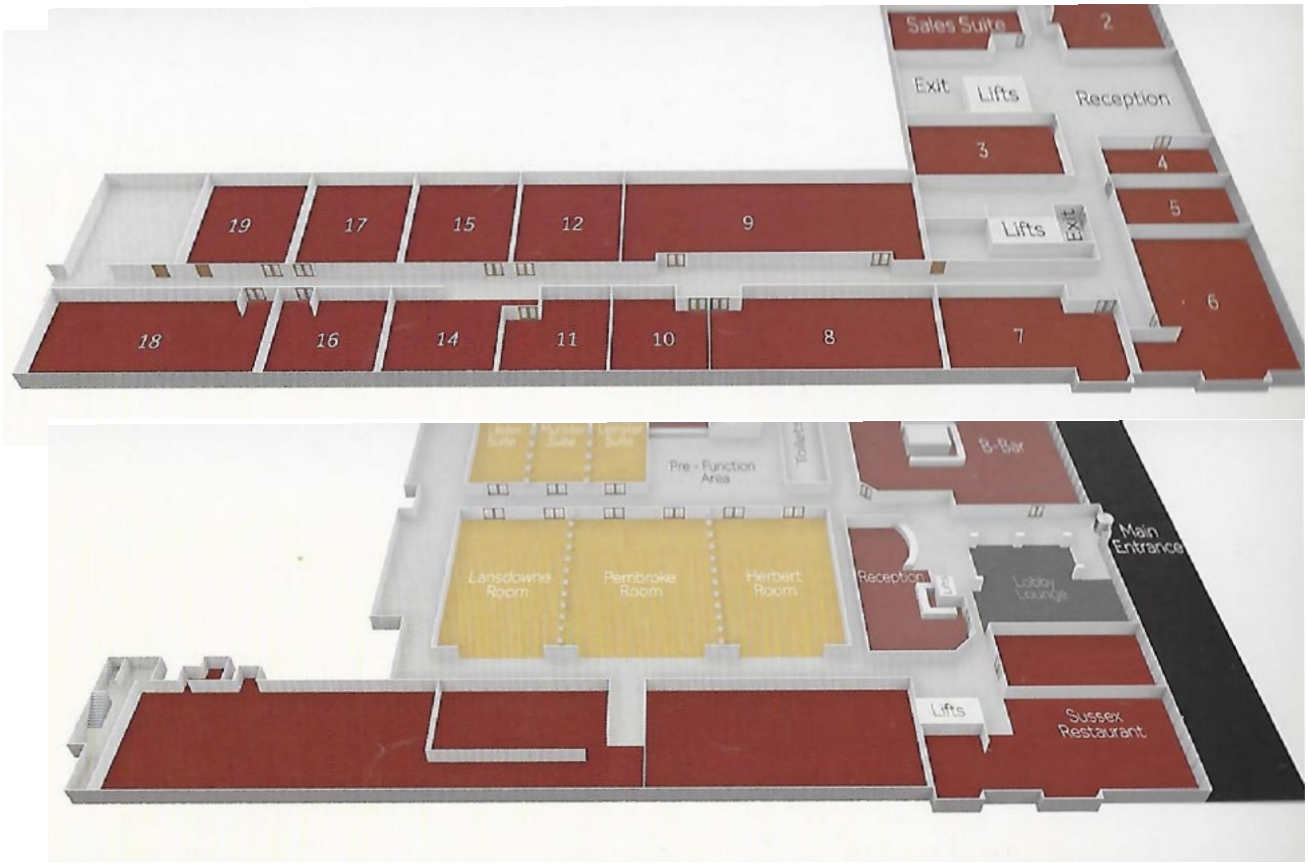
Abbas Abbasov

Richard Turton Award Winner

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

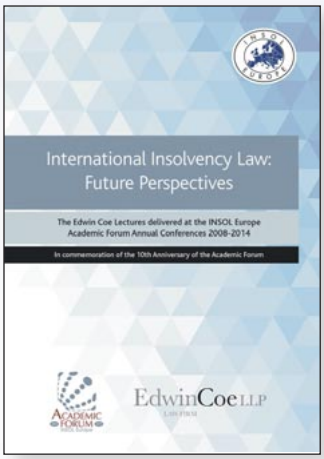
The panel adjudicating this year's applications was made up of Neil Cooper, INSOL International, Nicky Fisher, R3 Association of Business Recovery Professionals, Maurice Moses, Insolvency Practitioners Association (IPA) and Robert van Galen, INSOL Europe

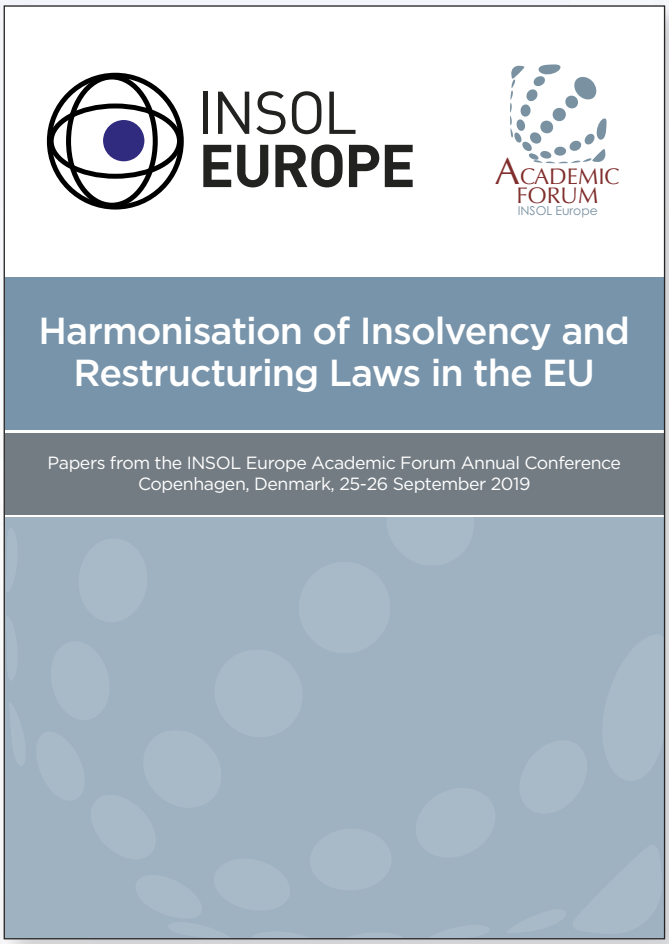

Bar
Toilets
Toilets
BBar
Ulster Suite
Munster Suite
Leinster Suite
Pre - Function
Conference Centre Entrance
Reception
stairs
Main entrance
Lansdowne Room
Pembroke Room
Herbert Room
lift
The Lobby Lounge
Executive Lounge
Sussex Rest 1
lift
The Conference & Banqueting Kitchen
Sussex Rest 3
Sussex Rest 2

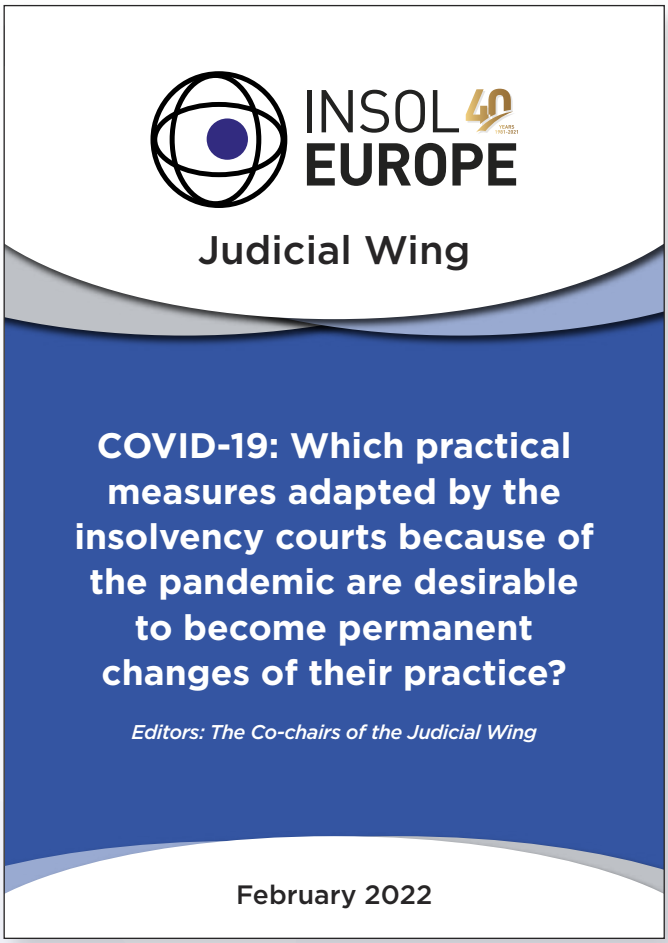

Sales Suite
2
Exit
Lifts
Reception
3
4
5
19
17
15
12
9
Lifts
EXIT
6
18
16
14
11
10
8
7
Pre - Function Area
B-Bar
Main Entrance
Lansdowne Room
Pembroke Room
Herbert Room
Reception
Lobby Lounge
Lifts
Sussex Restaurant

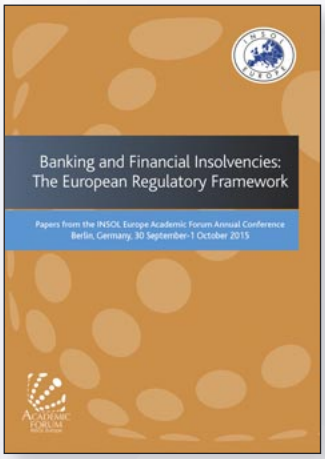
Technical Series Publications

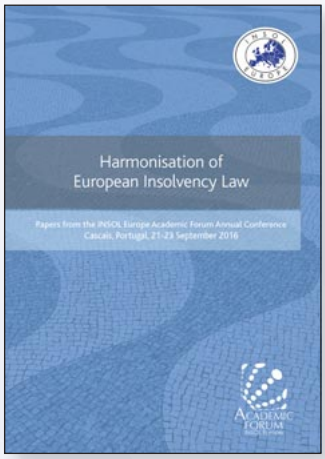
INSOL Europe are pleased to announce further additions to the current Technical Series, arising from events organised by INSOL Europe. The publications contain papers delivered by speakers and panellists at those conferences. Ancillary texts (draft laws and rules) debated at the conferences are also included. The texts form a comprehensive report of the conferences and contain accounts of recent research in the insolvency field that will be useful for academics and practitioners alike.











Only €20 each

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

INSOL EUROPE 40 YEARS 1981-2021

ACADEMIC FORUM INSOL Europe

Conference Programme

THE EMERGING NEW LANDSCAPE OF EUROPEAN RESTRUCTURING AND INSOLVENCY

WEDNESDAY 2 MARCH 2022

12:45–13:15	**Registration & Welcome Coffee**	*Pre Function Area*
13.15–13:30	**Welcome address by the Chair of the Academic Forum** *Tomáš Richter*	*Ulster & Munster Suites*
13:30–15:00	**Session One – "Topics in Corporate Preventive Restructuring"** **Chair: Jennifer L.L. Gant** **Implementation of the 2019/1023 Directive in French Pre-insolvency and Insolvency Law: The Debtor-Creditor Juggle** *Sarah Pople* **The Relatively Absolute Priority Rule in the Czech Preventive Restructuring Bill** *Tomáš Richter* **The Role of the Shareholders in the Restructuring Plans in the Spanish Project of Implementation of the 2019/1023 Directive** *José Carlos González Vázquez*	
15:00–15:30	Coffee break	*Pre Function Area*
15:30–17:00	**Session Two – "Fresh Start and other Topics Related to Individual Debtors"** **Chair: Line Herman Langkjær** **Natural Person Ltd.: Towards a Unified Discharge Regime for Entrepreneurs and Consumers** *Gauthier Vandenbossche* **Portuguese Transposition of the Directive (EU) 2019/1023 – Where it Fell Short Regarding Personal Insolvency** *Ana Filipa Conceição, Catarina Frade and Fernanda Jesus* **Reconsidering Fairness for Vulnerable and Involuntary Stakeholders in Insolvency and Restructuring** *Jennifer L.L. Gant*	
17:00–18:00	**The Gabriel Moss Memorial Lecture** **Cross Border Recognition of Corporate Restructuring Arrangements: Reflections on the Preventive Restructuring Directive 2019/1023, National Restructuring Frameworks and the EIR Recast 2015/848** *Irene Lynch Fannon*	
18:30–19:30	Welcome Reception	*Executive Lounge*
19.30–late	Academic Dinner	*Sussex 1*

THURSDAY 3 MARCH 2022

08.30–09.00	Retrieval Registration / Morning Coffee	*Pre Function Area*
09.00–10.30	**Session Three – "Design Issues in Restructuring and Insolvency Law"**	*Ulster & Munster Suites*
	Chair: Luigi Lai	
	Sustainable Liquidation: Pluralism of Interests in Insolvency Proceedings *Jessie Pool*	
	Preventive Restructuring Frameworks and the Separate Domain of Cross-Border Restructuring Law *Ioannis Bazinas*	
	Harmonizing Restructuring Frameworks: Top-Down, Bottom-Up, or Both? *David Ehmke and Eugenio Vaccari*	
10.30–11.00	Coffee break	*Pre Function Area*
11.00–12.30	**Session Four – "Cross-Border and EU Law Topics"**	
	Chair: Francisco Garcimartin	
	Preferential Treatment of State Aid Recovery Claims in Insolvency Proceedings and Preventive Restructuring Frameworks *Walter Nijnens*	
	Recognition of UK Schemes of Arrangement and Restructuring Plans in the Continent: Two Examples Involving Switzerland *Rodrigo Rodriguez*	
	A New Cross-Border Framework for Restructuring Plan Proceedings *Stephan Madaus*	
12.30–13.30	Lunch	*Sussex 2*
13.30–15.00	**Session Five – "More Topics in Corporate Restructurings and Insolvencies"**	
	Chair: Gert-Jan Boon	
	Insolvency Law: Quo Vadis? About the Regulatory Protection of Non-Controlling Unsecured Creditors prior to and during Insolvency Procedures *Dennis Cardinaels*	
	Relativism and Determination in the Restructuring Frameworks – New and Interim Financing *Flavius Motu, Andreea Deli-Diaconescu*	
	Valuation of Crypto-Assets in Insolvency Proceedings: An EU Perspective *Theodora Kostoula*	
15:00–15:15	Coffee break	*Pre Function Area*
15:15–16:15	**The Edwin Coe Practitioners Forum**	
	Chair: Tomáš Richter	
	The Harmonization of Transactions Avoidance Law in the EU *Reinhard Bork, Michael Veder, Francisco Garcimartin and Christina Fitzgerald*	
16:15–16:30	Closing Address *Tomáš Richter*	

NOTES

Speaker CVs

Ioannis Bazinas

Organisation: University College London (UCL)

Position: PhD Candidate/Associate Lecturer (Teaching)

Address: 17 Great Cumberland Place, Flat 1 W1H7AS, London, England

Experience

- 2019- Present: PhD Candidate/ University College London
  - Thesis: Cross-border restructurings and the recognition of foreign judgments
  - Tutorial teaching in the module "Conflict of Laws" and course tutor in the Private International Law component of the Notarial Practice Course
- 2016-Present: Associate/ Bazinas Law Firm/ Athens, Greece
  - Legal practice focused on the areas of insolvency, international litigation and commercial contracts.
- 2014-2016: Short Term Consultant (STC) International Finance Corporation/World Bank/ Istanbul,Turkey and Washington, DC
  - Part of the Finance & Markets Global Practice providing technical assistance in advisory projects on insolvency law and the regulation of insolvency practitioners.

Publications of Interest

- 'The Legal Framework for Non-Performing Loans in Greece', with Yiannis Sakkas, Eurofenix, Spring 2016
- 'Greek debt deal: Breakthrough or Ball and Chain?', with Yiannis Sakkas, Eurofenix, Summer 2018

Gert-Jan Boon

Organisation: Leiden University

Position: Researcher/Lecturer

Address: University of Leiden, Leiden Law School, Steenschuur 25
2311 ES Leiden

Tel: +31 (0)71 527 7939

Email: j.m.g.j.boon@law.leidenuniv.nl

Experience

Gert-Jan Boon LL.M MSc is a researcher and lecturer at the departments of Corporate Law and Business Studies at the Leiden Law School. Before, he has finished masters in Marketing (Free University Amsterdam) and in Corporate Law (University of Leiden). He conducts research in the field of turnaround, rescue and insolvency of financially distressed businesses. Gert-Jan has been involved in several international research projects, including the project of the European Law Institute on rescue of business in insolvency law. His PhD research comprises a study of the Debtor in Possession.

Gert-Jan is the chair of the Younger Academics Network of Insolvency Law (YANIL) of INSOL Europe.

Publications of Interest

- David C. Ehmke, Jennifer L.L. Gant, Gert-Jan Boon, Line Langkjaer & Emilie Ghio, 'The EU Preventive Restructuring Framework: a hole in one?', International Insolvency Review, 2019, 28(2), p. 1-26.
- Gert-Jan Boon & Stephan Madaus, 'Toward a European Business Rescue Culture', in: Jan Adriaanse & Jean-Piere van der Rest (eds.), Turnaround Management and Bankruptcy: A Research Companion (Routledge Advances in Management and Business Studies), Routledge, 2017, p. 238-258.

Reinhard Bork

Organisation:	University of Hamburg/ Radboud University Nijmegen
Position:	Chair for Civil and General Procedural Law
Address:	Rothenbaumchaussee 33, 20148 Hamburg, Germany
Email:	bork@uni-hamburg.de

Experience

Professor of Law at University of Bonn in 1989. Since 1990 Professor of Law at University of Hamburg, where he holds a chair for Civil and General Procedural Law. Robert S. Campbell Visiting Fellow at Magdalen College Oxford 2010/2011 and 2015/2016. Professor for International Insolvency Law, Radboud University Nijmegen 2019-2022. Senior Research Fellow, Commercial Law Centre, Harris Manchester College, Oxford/UK 2020-2023. Also served as a judge at the Upper State Court (Court of Appeal) in Hamburg. He has been invited for talks and as Visiting Professor to various universities worldwide, among others National Taiwan University Taipei, Oxford University, Pontificia Universidad Católica de Valparaiso, Tsinghua University Beijing, and has published extensively on Civil, Civil Procedural, Insolvency, and Commercial Law. He has broad experience as an arbitrator in national and international cases since 1994.

Publications of Interest

Rescuing Companies in England and Germany, Oxford University Press 2012; Principles of Cross-Border Insolvency Law, Intersentia, 2017; Corporate Insolvency Law, Intersentia, 2020; Einführung in das Insolvenzrecht (Introduction to Insolvency Law), MohrSiebeck, 10th ed. 2021 (translated into Chinese and Korean); European Cross-border Insolvency Law, Oxford University Press, 2nd ed. 2022 – together with Renato Mangano.

Dennis Cardinaels

Organisation:	University of Leeds
Position:	Doctor of Law
Address:	Avenue Van Overbeke 212, letterbox 85, 1083 Brussels (Ganshoren), Belgium
Tel:	+32 492 57 93 01
Email:	cardinaelsdennis@gmail.com

Experience

2021-..: Cadanz Law Firm: Attorney-At-Law

2020-..: University of Lincoln: Lecturer (2020-2021); Online Learning; Facilitator (Associate Lecturer) (2021-ongoing)

2018-2020: University of Leeds: Module Assistant (Contract Law and Company Law)

2017-2021: University of Leeds: PhD Corporate Insolvency Law

2016-2017: Monard Law: Attorney-at-law

Publications of Interest

- D. Cardinaels, "Differentiation between groups of unsecured creditors: a solution to reduce vulnerability?" [2019] 3 Insolvency Intelligence 116-122
- F. De Leo, R. Verheyden and D. Cardinaels, "De hernieuwde remuneratieregeling van curatoren" [2018] 372 De Juristenkrant 6
- F. De Leo and D. Cardinaels, "Remuneratie curator. Het bureau voor rechtsbijstand is geen insolventieverzekeraar, maar wie dan wel?" [2017] 367 NJW 566
- D. Cardinaels, 'PhD Thesis: Companies' and creditors' distress: how to untie the Gordian knot in the non-controlling unsecured creditors' interests?' 295p. forthcoming on https://etheses.whiterose.ac.uk/

Ana Filipa Conceição

Organisation:	Centre for Social Studies – University of Coimbra; Polytechnic of Leiria
Position:	Assistant Professor
Address:	Morro do Lena, Alto do Vieiro, Apartado 4163, 2411-901 Leiria – Portugal
Email:	ana.conceicao@ipleiria.pt

Experience

Assistant Professor at the Polytechnic of Leiria since 2005, teaching Insolvency Law, Business Law, and Tax Law. Visiting investigator at the Centre for Social Studies – University of Coimbra, since 2019. Board member at APDIR – Associação Portuguesa do Direito da Insolvência e Recuperação, since 2021. Instructor at training courses for IP's and business restructuring mediators, since 2019. Phd in Insolvency Law – Salamanca University, since 2012.

Andreea Deli-Diaconescu

Organisation:	Romanian National Institute for Training Insolvency Practitioners
Position:	Member of the Board
Address:	23 Vulturilor Street, 4 Floor, 3 District, Bucharest
Email:	andreea.deli@das-law.ro

Experience

- PhD, West University from Timisoara, Faculty of Law, December 2018, qualification "Magna Cum Laude";
- Member of the Bucharest Bar since 2000;
- Member of the Romanian National Association of Insolvency Practitioners since 2005, Scientific Consultant for Phoenix, National Insolvency Publication;

Publications of Interest

- Co-Author of "INSOL - World Bank Group Global Guide: Measures Adopted to Support Businesses Through the COVID-19 Crisis", Romanian Chapter, 2021 and currently of undergoing project "INSOL International Publication "MSME's – Practical Challenges and Risk Mitigation Post Covid-19", 2022, Romanian Chapter;
- Author of the book "Problems of Compatibility between Insolvency Law and Civil Procedure Code", under coordination of Judge Nicoleta Tandareanu and Judge Florin Motiu, Universul Juridic, Bucharest, 2019;
- Co-Author and Co-Coordinator of Practical Manual of Insolvency, published by National Institute for Training Insolvency Practitioners, 2014;
- Co-Author of the book "Practical Treatise of Insolvency", Hamangiu, under coordination of Prof. Radu Bufan, Bucharest, 2014

David Ehmke

Organisation:	GT Restructuring
Position:	Associate
Address:	Budapester Straße 35, 10787 Berlin
Tel:	+49 30700171520
Email:	david.ehmke @gtrestructuring.com

Experience

David C. Ehmke is an associate in the Restructuring and Insolvency Group of GT Restructuring at Greenberg Traurig in Germany. He focuses his practice on insolvency law, insolvency administration, restructuring, and contractual workouts outside of formal insolvency proceedings.

A strong focus of his interdisciplinary studies and work is on international restructurings and insolvencies. He has spent several years of studies and research in the area of law and finance/economics at Humboldt-University of Berlin, University of Oxford, University of Pennsylvania, and Columbia University. David regularly publishes articles on insolvency and restructuring from a legal and economic perspective.

Publications of Interest

- E. Ghio, G.-J. Boon, D. Ehmke, J. Gant, L. Langkjaer, and E. Vaccari, 'Harmonising insolvency law in the EU: New thoughts on old ideas in the wake of the COVID-19 pandemic' (2021) International Insolvency Review 429.
- B. de Bruyn, D. Ehmke, 'StaRUG&InsO: Sanierungswerkzeuge des Restrukturierungs- und Insolvenzverfahrens' (2021) Neue Zeitschrift für Gesellschaftsrecht (NZG) 661.
- D. Ehmke, J. Gant, G.-J. Boon, L. Langkjaer, E. Ghio, 'The European Union preventive restructuring framework' (2019) 28 (2) International Insolvency Review 1.

Christina Fitzgerald

Organisation:	Edwin Coe LLP
Position:	Partner | Restructuring & Insolvency, Vice President of R3
Address:	2 Stone Buildings, Lincoln's Inn London, WC2A 3TH
Email:	christina.fitzgerald @edwincoe.com

Experience

Christina joined Edwin Coe's top ranked Restructuring & Insolvency team in February 2021 and deals with all aspects of contentious and non-contentious corporate and personal insolvency.

She is a Licensed Insolvency Practitioner and advises insolvency practitioners, accountants, banks, asset based lenders and other commercial organisations. Christina has particular expertise in advising troubled professional practices and distressed charities, not for profit organisations and corporate simplification. She also acts for clients in a wide variety of disputes including corporate, shareholder and partnership litigation, complex contractual disputes and professional negligence.

Publications of Interest

- Bankruptcy Orders made by the Insolvency Service Adjudicator's Office (ISAO). How do we make a Court application? - https://www.edwincoe.com/blogs/main/bankruptcy-orders-made-by-the-insolvency-service-adjudicators-office-isao-how-do-we-make-a-court-application/
- Top Tip: Concurrent service of Statutory Demands and Schedule 10 Notices - https://www.edwincoe.com/blogs/main/top-tip-concurrent-service-of-statutory-demands-and-schedule-10-notices/

Catarina Frade

Organisation:	Faculty of Economics and Centre for Social Studies – University of Coimbra
Position:	Assistant Professor
Address:	Colégio de S. Jerónimo Largo D. Dinis - Apartado 3087 3000-995 Coimbra, Portugal
Email:	cfrade@fe.uc.pt

Experience

- Degree in Law and a Master and PhD in Economics from the University of Coimbra.
- Full researcher of the Centre for Social Studies and Professor of Law in the Faculty of Economics of the University of Coimbra.
- Coordinator/researcher of several international and national research projects related to corporate and consumers' insolvency, including project ACURIA - Assessing Courts' Undertaking of Restructuring and Insolvency Actions: best practices, blockages and ways of improvement", funded by DG-Just (january 2017 - 30 April 2019).
- Member of several research networks, including CERIL, ECDN and the Portuguese Association of Political Economy.

Publications of Interest

- Frade, C., Fernando, P. and Conceição (2020), A. The Performance of the Courts in the Digital Era: the case of insolvency and restructuring proceedings, International Insolvency Review, 29(3), 346-349
- van Dijck, Gijs et al. (2020), Insolvency Judges Meet Strategic Behavior: A Comparative Empirical Study, Maastricht Journal of European and Comparative Law, 27(2), 158-177, 2020
- Frade, C., Jesus, R. (2020), NINA/LILA Debtors under the Portuguese Insolvency Act: A Hidden Problem in Plain Sight?, International Insolvency Review, 29(1), 77-94, 2020 DOI: 10.1002/iir.1360

Jennifer L. L. Gant

Organisation:	University of Derby School of Law
Position:	Lecturer in Law
Address:	3 Cornmill Close, Calver, Hope Valley, S32 3XZ United Kingdom
Email:	jenniferl.l.gant@gmail.com

Experience

Jennifer is currently a lecturer in law at the University of Derby School of law. In 2021 she completed a postdoctoral project at University College Cork exploring Judicial Co-Operation supporting Economic Recovery in Europe (JCOERE) funded by the EU Justice Programme. The project identified obstacles to judicial co-operation presented by the implementation of the preventive restructuring directive. A monograph entitled Corporate Recovery in an Integrated Europe based on the findings of the JCOERE Project will be published by Elgar in 2022.

She has also recently been the European rapporteur for a project consisting of building an insolvency index measuring the attractiveness of insolvency laws around the world conducted by the Singapore Global Restructuring Initiative within the Centre of Commercial Law in Asia at Singapore Management University.

Her research interests include insolvency and corporate rescue, social policy, employment and labour law, legal history, legal theory and jurisprudence, and contract and commercial law and her current research trajectory is based around the concept of vulnerability theory and resilience of stakeholders and institutions in the context of insolvency and restructuring. Her most recent publication deals with these matters in a Guest Editorial published in the International Insolvency Review in January 2022: "Optimising Fairness in Insolvency and Restructuring: a Spotlight on Vulnerable Stakeholders."

Francisco Garcimartin

Organisation:	Linklaters
Position:	Consultant
Address:	C/Almagro 40 28010 Madrid, Spain
Tel:	+34 91 399 6051
Email:	francisco.garcimartin @linklaters.com

Experience

Francisco is a Chair Professor of Private International Law at Universidad Autónoma de Madrid. He graduated in Law at the Universidad Autónoma de Madrid (1987) and earned his Ph. D in Law at the aforementioned University (1991). His main fields of expertise are focused on International transactions, cross-border company law, cross-border insolvency, as well as international litigation.

Publications of Interest

Francisco has published in most of the leading Law Journals on different aspects of Private International Law and cross-border transactions and he is co-authored with professor Virgós of The European Insolvency Regulation: Law and Practice, The Hague, Kluwer, 2004.

He is also the author of the course "Cross-Border Listed Companies", published in the Recueil de cours of the Hague Academy, vol. 328 (2007).

Other Information

Francisco has represented the Spanish government as national expert in different international organizations, such as UNIDROIT, UNCITRAL, The Hague Conference or the Counsel of the European Union and he is a member of bankruptcy expert group of the European Union Commission.

José Carlos González Vázquez

Organisation:	Complutense University of Madrid
Position:	Commercial Law Professor
Address:	Facultad de Derecho (Law School) Ciudad Universitaria, s/n 28040-Madrid
Email:	jcgv@der.ucm.es

Experience

Degree in Law from the University of Granada (Extraordinary Award), Phd in Law from the University of Bologna (Avv. Doménico Belvederi Award), Expert lawyer in corporate governance, M&A, Banking & Finance Law, Restructuring and Insolvency Law for more than 20 years. Bankruptcy administrator. Partner in CECA MAGÁN ABOGADOS. Head of the Restructuring and Insolvency Department. Best Lawyers 2022 in Banking & Finance, M & A / Corporate Law and Corporate Governance.

Publications of Interest

- "Las acciones de reintegración", AA.VV., Tratado Práctico del Derecho Concursal y su Reforma, dir. por F. Martínez Sanz y coord. por A. Puetz, Ed. Tecnos, Madrid, 2012, pp. 588-651.
- "Comentario a los arts. 148 a 153" en AA.VV., Comentario a la Ley Concursal, dir. por J. Pulgar, Ed. La Ley Wolters Kluwer, Madrid, 2016, pp. 1.605-1.722.
- "La prima applicazione della procedura di risoluzione bancaria del SRM: dubbi e valutazioni (provvisorie) alla luce del caso "Banco Popular", Innovazione e Diritto, Rivista di Diritto Tributario e dell'Economia, 2017, nº 6, p. 102-144.
- "Luces y sombras del modelo europeo de resolución bancaria", en AA.VV., Regulación bancaria y actividad financiera, dir. por J.C. González Vázquez y J.L. Colino, Ed. Wolters Kluwer, Las Rozas (Madrid), 2020, pp. 303-374.

Line Langkjær

Organisation: Aarhus University

Position: Associate Professor

Address: Bartholins Allé 16,
8000 Aarhus C, Denmark

Email: linehl@law.au.dk

Experience

Practice:

- 2008-2015: Attorney at Lett Law Firm (now DLA Piper, Denmark) specialising in insolvency law. Submitted to the Danish Bar Association in 2012

Academic:

- 2021-: Associate Professor in Insolvency Law and Procedural Law
- 2018-2021: Assistant Professor in Insolvency Law and Procedural Law
- 2015-2018: Ph.D fellow at Aarhus University

Other:

- 2018-: Advising and representing Denmark at UNCITRALs working group V (insolvency)

Other Information

- Member of III's next gen program, class of 2020
- Board Member, Insol Europe Academic Forum
- Board Member, YANIL

Fernanda Jesus

Organisation: Centre for Social Studies,
University of Coimbra

Position: Junior researcher

Address: Centre for Social Studies
Colégio de S. Jerónimo
Apartado 3087
3000-995 Coimbra, Portugal

Email: fcostajesus@ces.uc.pt

Experience

- Since 2011: Junior researcher at the Centre for Social Studies, University of Coimbra. Research team member in several projects concerning personal finances and indebtedness. Recently added to Observatory of Justice team and currently research fellow in QUALIS project - Quality of Justice in Portugal! Impact of working conditions in the performance of judicial professions.
- Phd Student in Social Psychology, developing a thesis in credit decision making.
- 2008: Master in Educational Psychology. Faculty of Psychology and Educational Sciences, University of Coimbra.
- 2006: Degree on Psychology, area of pre-specialization of Social Psychology. Faculty of Psychology and Educational Sciences, University of Coimbra.

Publications of Interest

- Jesus, F., & Oliveira, J. M. (2013). Perceived effort of credit repayment over time. In C. Speelman (Ed.), Enhancing human performance (pp. 106-130). Newcastle upon Tyne, UK: Cambridge Scholars Publishing.
- Lopes, C., Frade, C., & Jesus, F. (2011). The ultimate victims of the economic crisis: a portrait of Portuguese overburden families. In W. Backert, S. Block-Lieb, & J. Niemi (Eds.), Contemporary issues in consumer bankruptcy (pp. 147-161). Frankfurt am Main: Peter Lang Publishing.

Theodora Kostoula

Organisation:	European University Institute
Position:	Ph.D. Reseacher
Address:	Via Bolognese 156, Villa Salviati 50139 Florence, Italy
Email:	theodora.kostoula@eui.eu

Experience

Theodora Kostoula is a Ph.D. Researcher at the Law Department of the European University Institute (EUI) with a project on the crossroads of distributed ledger technology and EU insolvency rules. She is actively involved in the Digital Assets & Private Law legislative project of UNIDROIT, currently as an invited expert and previously as a Sir Roy Goode Scholar, conducting research in the field of Information technology, digital assets, security rights, and insolvency. Theodora is Teaching Associate in the FinTech course at the Florence School of Banking and Finance (Robert Schuman Centre), and a coordinator of the Finance, Innovation and Regulation Working Group (EUI). She holds an LL.M in Comparative, European and International Laws (EUI), an LL.M in Transnational and European Commercial law (International Hellenic University, Thessaloniki, Greece) and a Degree in Law (Aristotle University of Thessaloniki). Since 2018 she is a qualified lawyer in Greece with professional experience in the legal industry. Her main expertise includes private and commercial law, focusing on company and insolvency law, property law and civil procedure, as well as distributed ledger technology and regulation.

Publications of Interest

- Cross-Border Insolvency of Groups of Companies Under the Regulation (EU) 2015/848' (2019) 16(3) European Company Law, 74–82 - Kluwer Law International

Luigi Lai

Organisation:	National Information Processing Institute, Warsaw, Poland
Position:	Research fellow
Address:	al. Niepodległości 188 b - 00-608 Warsaw Poland
Tel:	+48 607 065 233
Email:	luigi.lai@opi.org.pl

Experience

Luigi read Law at Warsaw, Sevilla and Cagliari universities, qualifying as an avvocato in 2009.

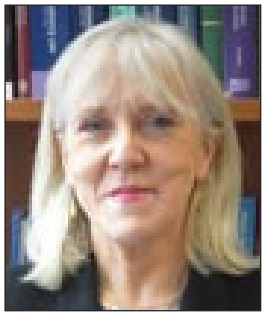
He focuses on legal aspects of innovation and new technologies, including in particular, the protection of technology companies in a state of financial distress. Luigi also regularly holds lectures at the Warsaw School of Economics on the latter topic.

Publications of Interest

- Luigi. Lai, Marek Świerczyński (eds.) Legal and Technical Aspects of Artificial Intelligence, Warsaw 2021.
- Luigi. Lai, Marek Świerczyński (eds.) Prawo sztucznej inteligencji, Warszawa 2020.

Other Information

- Admitted to the Bar in Italy, Spain, and Poland.
- President of the International Lawyers Group at the Warsaw Law Bar (www.ora.waw.pl).
- Member of the International Commission at the Supreme Bar Council of Poland.



Irene LYNCH FANNON

Organisation: Matheson

Position: Head Of Knowledge Management

Email: i.lynchfannon@ucc.ie

Experience

Irene Lynch Fannon graduated with a BCL from University College Dublin in 1982. She went on to qualify as a Solicitor in 1985 with The Incorporated Law Society of Ireland. Following this she read for the BCL at Oxford. She was awarded a Senior Scholarship by Somerville College. Finally, she obtained her doctorate from the University of Virginia, Charlottesville, USA (Doctor of Juridical Science, 1999).

She is Chair of the Insolvency Committee of the Irish Company Law Reform Group and has held that position since 2020. www.clrg.org

She is a member of the European Commission Expert Committee on Insolvency and Restructuring Law.

Professor Lynch Fannon maintains an interest in comparative EU-US corporate law theory and stakeholder effects. Publications in this area include Working Within Two Kinds of Capitalism (Hart Publications, Oxford and Portland Oregon, 2003) and various book chapters on this subject.

During her 30 year career at University College Cork Irene served as Head of the Department of Law at UCC, Dean of the Faculty of Law and finally as the Head of the College of Business and Law, a senior management position at the university. She has held Visiting Academic positions in a number of universities, most recently at the Oxford Law Faculty, in 2014 whilst on research leave.

In 2021 she joined Matheson law firm as Head of Knowledge Management. www.matheson.com

Stephan Madaus

Organisation: Martin Luther University Halle-Wittenberg (Germany)

Position: Law Professor

Address: Department of Law, Universitätsring 2, 06108 Halle (Saale), Germany

Email: stephan.madaus@jura.uni-halle.de

Experience

Prof. Dr. Stephan Madaus has held his chair at the Martin Luther University Halle-Wittenberg since April 2014, where he was the head of the Law School from 2016 to 2018. He teaches property law (including secured transactions), insolvency and civil procedure law, as well as contract and tort law. Prof. Madaus is currently a board member of the International Insolvency Institute and a Founding Member of the Conference of European Restructuring and Insolvency Law (CERIL). He has been appointed to the European Commission's Expert Group on Restructuring and Insolvency.

His research interests are in dealing with debt burdens and consequently focus on insolvency and restructuring law, with a special focus on the comparative analysis of relevant regulatory approaches in jurisdictions worldwide as well as in the soft law of international organizations. Together with Prof. Bob Wessels, he headed the "European Law Institute's Project on Rescue of Business in Insolvency Law" from 2013 to 2017 (OUP 2020). He was a member of the research team that evaluated the 2012 insolvency law reform ("ESUG") for the German Ministry of Justice in 2017/2018. As a member of an international research team, he helped to develop the "Modular Approach for MSME Insolvencies" (OUP 2018).

Flavius Motu

Organisation:	The Specialized Court of Cluj, Romania
Position:	Judge
Address:	Cluj-Napoca, str. Predeal, no. 30A, ap. 9, 400073, Romania
Tel:	+40 742 02 55 79
Email:	flavius.motu@just.ro

Experience

- Junior judge: 01/08/2003 – 10/04/2004
- Appointment as a judge: 10/04/2004
- Court or First Instance of Gherla: 2003 – 2006
- Court of First Instance of Cluj: 2006 – 2007
- Specialized Court of Cluj: 2007 –

Publications of Interest

- Articles on various insolvency legal topics published in: Pandectele romane, Revista romana de dreptul afacerilor, PHOENIX – Revista de insolventa
- (Co-author to) "Practical Treatise on Insolvency", Hamangiu Publishing House, 2014
- "The actions to set aside fraudulent conveyances", Universul Juridic Publishing House, 2015
- "The Impact of the Second Chance Approach on the Secured Creditors' Rights in Cross Border Insolvencies", Party Autonomy and Third-Party Protection in Insolvency Law - Papers from the INSOL Europe Academic Forum Annual Conference, 2018
- (Co-author to) "Trade Credit vs. New / Interim Financing in the Context of the Preventive Restructuring", INSOL Europe Academic Forum Annual Conference, Copenhagen, 2019

Walter Nijnens

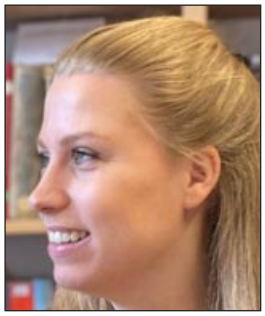
Organisation:	Fulda University of Applied Sciences and Martin-Luther-University Halle-Wittenberg
Position:	Doctoral Candidate / Lecturer
Address:	Leipziger Str. 139, App. 102, 36037 Fulda, Germany
Email:	walter.nijnens@w.hs-fulda.de

Experience

- 2017 – LL.B. Dutch Law – Maastricht University (NL)
- 2018 – LL.M. European Law – Radboud University (NL)
- 2018 – LL.M. Corporate and Insolvency Law – Nottingham Trent University (UK)
- Since 2019: Doctoral Candidate Fulda University of Applied Sciences and Martin-Luther-University Halle-Wittenberg (DE), researching cooperation and communication obligations in European insolvency law
- Since March 2022: Lecturer – Fulda University of Applied Sciences (DE)

Publications of Interest

- Walter Nijnens, 'Corporate Rescue Transplants and Religious Influences in Developing Countries' (2018) 24 Comparative Law Review 207
- Dominik Skauradszun and Walter Nijnens, 'Brussels Ia or EIR Recast? The Allocation of Preventive Restructuring Frameworks' (2019) 16 International Corporate Rescue 193
- Dominik Skauradszun and Walter Nijnens, 'The Toolbox for Cross-Border Restructurings post-Brexit – Why, What & Where?' (2019) 7 Nottingham Insolvency and Business Law eJournal 1



Jessie Pool

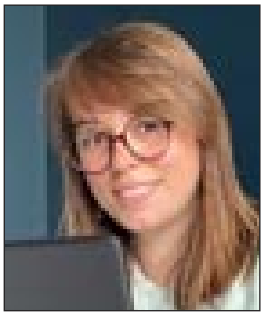
Organisation:	Leiden University
Position:	PhD Fellow Company and Insolvency Law
Address:	Steenschuur 25 | 2311 ES Leiden, The Netherlands
Email:	j.m.w.pool@law.leidenuniv.nl

Experience

Jessie Pool is a Ph.D.-Fellow (researcher and lecturer) at the company law department of Leiden University. Jessie is currently writing her PhD thesis on enforcement of directors' duties by the insolvency practitioner. Her innovative research is practice based and the use of both qualitative and quantitative empirical research methods allows her to compare law in the books with law in action. In addition, she is currently conducting a research assignment at the insolvency department of the Midden-Nederland District Court.

Jessie is an active member of various academic and professional associations for insolvency and restructuring experts (INSOL International, INSOL Europe and a member of Class X of the Insolvency Institute Institute's 'NextGen Leadership Program' (New York City, October 2021).

Jessie obtained her double bachelor's degree in Dutch Law and Economics & Business Economics at the Erasmus University Rotterdam in 2016. In 2018, she obtained her master's degree in company law (cum laude) at Leiden University. Her thesis on guarantees for unsecured creditors in a pre-pack insolvency was assessed with an 8,5/10. During her study, she followed several internships at international law firms in the finance & restructuring/insolvency practices where she worked on international insolvency and restructuring cases with some of the most influential lawyers in the Dutch insolvency practice.



Sarah Pople

Organisation:	Fidal – Brittany Regional Direction
Position:	Regional and International Restructuring Advisor
Address:	2 rue de la Mabilais, CS 24227 35042 Rennes Cedex, France
Tel:	(+33)(0)2 99 33 88 88
Email:	sarah.pople@fidal.com

Experience

- Since June 2019 - Regional and International Restructuring Referent, Fidal (Brittany Office)
- 08/2016 – 06/2019 - Associate, AJIRE (Insolvency practitioner's Office)
- 09/2015-05/2016 - Work placement in Associate Rôle, SCP MAURAS JOUIN – Mandataires judiciaires (Insolvency Practitioner's Office)

Other Information

- 2020-2021 - Foundation certificate in cross border insolvency - INSOL INTERNATIONAL
- 2016 – Research Master Degree in Restructuring and Business Distress – Panthéon Sorbonne Paris 1 University – under the la co-direction of Professor François-Xavier LUCAS and Maître Marc SENECHAL, Mandataire Judiciaire – Practical Case under the direction of Maître Hélène BOURBOULOUX, Administrateur Judiciaire – Research Dissertation : Preventive restructuring frameworks in French, English and American Law
- 2015 - Master Degree – Business Law – Nantes University
- 2014 – Law Degree – French-British specialisation – Nantes University

Tomáš Richter

Organisation:	JŠK, advokátní kancelář, s.r.o. Prague / Institute of Economic Studies, Charles University, Prague
Position:	Advokát / Associate Professor
Address:	JŠK, Ovocný trh 12, 110 00 Praha 1, Czech Republic
Email:	tomas.richter@jsk.cz

Experience

- Qualified to practice as Czech advokát since 1998; university lecturer since 2001/2002

Publications of Interest

Most recently, the commentary on Articles 6, 7 and several other provisions of the European Restructuring Directive in Paulus/Dammann (eds), European Preventive Restructuring, Article-by-Article Commentary, Beck, Hart, Nomos, 2021

For a full list of publications, see: https://ies.fsv.cuni.cz/sci/publication/user/id/73/lang/en

Other Information

- Chair of the INSOL Europe Academic Forum, Member of the Board of Directors, International Insolvency Institute

Rodrigo Rodriguez

Organisation:	University of Lucerne (Switzerland)
Position:	Tenured Professor
Address:	Frohburg 3, 6002 Luzern (Schweiz)
Email:	Rodrigo.rodriguez@unilu.ch

Experience

Rodrigo Rodriguez completed university, PhD and bar exam in Switzerland. He practised in several law firms in Zurich. Since 2014 he is the head of the Swiss federal supervisory authority on debt collection and insolvency in Bern. Since 2017 he is tenured Professor of Civil Procedure Law, specialising in Debt Collection and Bankruptcy, at the University of Lucerne.

Publications of Interest

- Recognition of a UK Solvent Scheme of Arrangement in Switzerland and under the Lugano Conventions, IPRax 40/4 (2020), p. 372-378 (with Patrik Gubler).

Further Publications see https://www.unilu.ch/en/faculties/faculty-of-law/professorships/rodriguez-rodrigo/staff/prof-dr-rodrigo-rodriguez/#tab=c57210

Other Information

- Rodrigo Rodriguez represents Switzerland at the UNCITRAL Working Group V (Insolvency) since 2007

Eugenio Vaccari

Organisation:	Royal Holloway, University of London
Position:	Lecturer in Law
Address:	School of Law and Social Sciences, Royal Holloway, University of London, Egham Hill, Egham, Surrey, TW20 0EX (UK)
Email:	eugenio.vaccari@rhul.ac.uk

Experience

- 01/2021 – ongoing: Lecturer in Law at Royal Holloway, University of London;
- 09/2018 – 12/2020: Lecturer in Law at the University of Essex
- 09/2015 – 09/2018: PhD candidate and GTA at City, University of London

Publications of Interest

- E Vaccari and E Ghio, Corporate Insolvency Law: A Primer (EE Publishing, 2022);
- E Vaccari and T Van Ho, 'Insolvency Law through the Lens of Human Rights Theories', in E Ghio J Gant and J Wood (eds), Rethinking Insolvency Law Theories (EE Publishing 2022);
- E Vaccari, 'WHOA, Brexit! Which future for London as Europe's (largest) insolvency forum?' (2022) 37(2) JIBLR 46
- E Vaccari, 'Conceptualising the Anti-Deprivation Principle Vis-à-Vis Freedom of Contract' (2022) 31(2) I.I.R. (awaiting publication)
- E Ghio, GJ Boon, D Ehmke, JLL Gant, L Langkjaer and E Vaccari, 'Harmonising insolvency law in the EU: New thoughts on old ideas in the wake of the COVID-19 pandemic' (2021) 30(3) I.I.R. 427;
- E Vaccari, 'The New 'Alert Procedure' in Italy: Regarder au-delà du modèle français?' (2021) 30(1) I.I.R. 124

Gauthier Vandenbossche

Organisation:	Ghent University
Position:	PhD Researcher and Academic Assistant
Address:	Ghent University Department of Accounting, Corporate Finance and Taxation; Sint-Pietersplein 7; 9000 Ghent; Belgium
Email:	gauthier.vandenbossche@UGent.be

Experience

Gauthier Vandenbossche (1997) is a PhD candidate and academic assistant at the Faculty of Law and Criminology (Department of Interdisciplinary Study of Law, Private Law and Business Law and Financial Law Institute) and the Faculty of Economics and Business Administration (Department of Accounting, Corporate Finance and Taxation) at Ghent University. He joined the Financial Law Institute in October 2020.

Publications of Interest

Gauthier publishes within the field of insolvency law, business law and tax law. Bibliography: https://research.ugent.be/web/person/gauthier-vandenbossche-0/publications/en

Michael VEDER

Organisation: Radboud University Nijmegen

Position: Professor of insolvency law

Tel: +31 20 5709026

Email: michael.veder@ru.nl

Experience

Michael Veder is professor of insolvency law at the Radboud Business Law Institute, vice-dean of research of the Faculty of Law of Radboud University and adviser at the Amsterdam based law firm RESOR.

Michael is admitted to the bar in the Netherlands. He specialises in (international) insolvency law and secured transactions. He holds a doctorate in law from Radboud University. He is a member of the European Commission Group of Experts on Restructuring and Insolvency Law and was a member of the European Commission Expert Group on cross-border insolvency.

He chairs the Dutch Insolvency Law Commission (Commissie Insolventierecht) that advises the Dutch government and parliament on matters relating to insolvency and restructuring. He is fellow of the Dutch Insolvency Practitioners Association (Vereniging Insolventierecht Advocaten (INSOLAD)), member and former chair of the Netherlands Association of Comparative and International Insolvency Law, honorary member of INSOL Europe, for which he was a member of its Council and chair of its Academic Forum, and member of INSOL International, for which he is a member of its Academics' Steering Committee.

Michael regularly publishes, lectures and advises on (international and comparative aspects of) property law, secured transactions, insolvency and restructuring (and related disputes) and frequently speaks at conferences in the Netherlands and abroad.

NOTES

Speaker Presentations: Wednesday

Session One – 13.30-15.00

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Implementation of the 2019/1023 Directive in French pre-insolvency and insolvency law : the debtor-creditor juggle

Sarah Pople
FIDAL

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

1

Safeguarding new creditor security given in preventive framework

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

2

More weight for secured/priority creditors (CPA)

Session One – 13.30-15.00 (continued)

Session One – 13.30-15.00 (continued)

Session One – 13.30-15.00 (continued)

Summary

1. The Problem: The Shareholder Hold-out.
2. The current Spanish "Solution" (since 2014).
3. The Different Alternatives allowed by the Directive.
4. The Option adopted by the Spanish Project.
5. Some Doubts and Proposals for Improvement.

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

1. The Problem: The Shareholder Hold-Out

- The well-known **risk of extortion by the debtor or the shareholders to obtain a "bigger piece of the pie"** in the restructured company because the have (almost) nothing to lose if they file for bankruptcy (Limited Liability Companies).
- "Member States should ensure that **they cannot unreasonably prevent the adoption of restructuring plans** that would bring the debtor back to viability" (recital 57).

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

1. The Problem: The Shareholder Hold-Out

- But, **we cannot forget** the opposite problem (also present in the Restructuring negotiations): **The risk of expropiation** of shareholders **by the company's creditors**.
- The shareholder is something more than a creditor (even residual one): **is owner** of the enterprise, has political rights (control power), and also **the right to recieve the restructuring surplus** after paying all the company's creditors.

Session One – 13.30-15.00 (continued)

INSOL EUROPE The Emerging New Landscape of European Restructuring and Insolvency ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022 ACADEMIC FORUM

2. The current Spanish "Solution"

- The shareholders **have the right to participate** in the Restructuring Agreement (RA) **when their rights are affected**.
- So, **the approval of the SGM is necessary when the RA includes matters of its competence** (reduction or increase of legal capital, merger, spin-off, sale of essential assets, etc.).

INSOL EUROPE The Emerging New Landscape of European Restructuring and Insolvency ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022 ACADEMIC FORUM

2. The current Spanish "Solution"

- But **in 2014**, the Spanish Insolvency Act (IA) was **reformed to facilite** the adoption of increase of capital by conversion of company's debts (**Debt-Equity-Swap**), with several measures (arts. 634 and 668 IA):
  - **Reduction of the mayorities** for the adoption of the resolution in the SGM (legal ordinary majorities).
  - Establishing that all the Company's debts will be **considered "liquid, due and payable"** (to comply wiht art. 301 Spanish Company Act).

INSOL EUROPE The Emerging New Landscape of European Restructuring and Insolvency ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022 ACADEMIC FORUM

2. The current Spanish "Solution"

- **"Incentives"** to participate in the Debt-Equity-Swap (**for creditors**):
  - The new shareholders (previously creditors) **will not be considered "specially related to the debtor"** in case of consecutive bankrupty (it would mean "subordinated" creditors). Art. 283.2 first paragrah IA.
  - The express consent of the creditors is needed for the conversión, but those creditors that do not give it **will suffer a reduction equal to the nominal amount that would have received in the debt-equity-swap** (art. 625.2 IA).

Session One – 13.30-15.00 (continued)

2. The current Spanish "Solution"

- **"Incentives" for the debtor and the shareholders** to approve the Debt-Equity-Swap (the "star" and most controversial measure):
  - The consecutive Bankruptcy **will be considered "guilty"** if:
    - **Directors did not propose** the adoption to the shareholders, **without reasonable cause** (art. 700 IA).
    - **Shareholders have refused, without reasonable cause**, to adopt the Debt-Equity-Swap resolution (or an issue of securities or convertible instrument), or have voted against the proposal (art. 701 IA).

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

2. The current Spanish "Solution"

- **Valuation**:
  - **Lack of solid legal justification** (Company Law).
  - Lack of consistency with the porpuse of Bankruptcy qualification.
  - There is no legal duty to colaborate in the entreprise rescue and viability.
  - Lack of consistency with the right to freedom of enteprise and property rights (option to liquidate it/file for bankruptcy) and. Unconstitutional?
  - **Many technical deficiencies** that hinder its application.
  - **Practical irrelevance** (never applied) and ex post effects.
  - **Lack of provision for other SGM resolution** (reduction of capital, sale of esencial assets, etc.)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

3. The Different Alternatives allowed by the Directive

- A Harmonization that hardly harmonizes:
  - Option A: applying arts. 9-11 Directive (especially, **Cross-class Cram-down**), ensuring that equity holders are not allowed to unreasonably prevent or create obstacles to the implementation of a restructuring plan.
  - Option B: **ensure by other means that** those equity holders **are not allowed to unreasonably prevent or create obstacles** to the adoption and confirmation of a restructuring plan (art. 12.1 Directive).

Session One – 13.30-15.00 (continued)

3. The Different Alternatives allowed by the Directive

- In any case, SM are **allowed to adapt what it means to unreasonably prevent or create obstacles** to take into account:
  - whether the debtor is an **SME or a large enterprise**;
  - the proposed restructuring **measures touching upon the rights** of equity holders;
  - the **type of equity** holder;
  - whether the debtor is a **legal or a natural person**; or
  - whether partners in a company have **limited or unlimited liability**.

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

3. The Different Alternatives allowed by the Directive

- "Equity holders of SMEs that are not mere investors, but are the owners of the enterprise and contribute to the enterprise in other ways, such as managerial expertise, might not have an incentive to restructure under such conditions. For this reason**, the cross-class cram-down should remain optional for debtors that are SMEs"** (Recital 58).
- Equity Holders are able "to **provide** non-monetary restructuring assistance by drawing on, for example, their **experience, reputation or business contacts**" (Recital 59), and so, may have right to retain a "piece of the pie".

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

4. The Option adopted by the Spanish Project

- When the restructuring plan contains measures that require **the consent/resolution of the partners/shareholders** of the debtor, **the legal regime established for the type of company will apply** (art. 631.1 Spanish Project (SP)).
- So, shareholders are not considered as a more class of creditors (2/3 votes in favor, ¾ if they are secured creditors)

Session One – 13.30-15.00 (continued)

4. The Option adopted by the Spanish Project

- But **with especial rules** to speed up and facilite the agreement, in case of SA and SRL (art. 631.2 SP):
  - **Just 10 days between the call and the meeting** of the SGM (If Listed, 21).
  - The SGM can be held after the file for confirmation of the Restructuring Plan (RP), and can be called by the Judge.
  - If the **SGM is not called, or is not held, or does not approve the RP within the following 10/21 days, it will be considered that they reject the RP.**
  - The **agenda will be limited** to the approval or rejection of the RP.
  - The resolution will be **adopted with the legal ordinary quorum and majority** (not apply legal or bylaws supermajorities).
  - This resolution will be **challenged exclusively by the procedure to challenge the decision on the confirmation** of the RP by dissenting affected parties.
  - Company's debt will be **considered liquid, due and payable in case of Debt-equity-swap** (art. 632 SP).

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

4. The Option adopted by the Spanish Project

- Possibility of **confirmation of the RP without shareholder approval** (cross-class cram-down), when (art. 639 SP):
  - It has been **aproved by majority of classes (one of the privileged creditors) or, at least a class of creditors that is "in the money"** (report of a restructuring expert about the Enterprise value as going concern).
  - The company is **in inminent (3 months) or current insolvency** (not in case of "probability of insolvency" -2 years-) (art. 640.2 SP).
  - The **company is not allowed to file for bankruptcy** (opposition of restructuring expert of more than 50% of affected credits). (art. 637 SP).

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

4. The Option of the Spanish Project

- **Exception to the Absolute Priority Rule** (APR): "when it is **essencial to ensure the viability of the company** and the credits of the affected creditors are **not unjustifiably harmed**" (art. 655.3 SP), for example, shareholders "to provide non-monetary restructuring assistance by drawing on, for example, their experience, reputation or business contacts" (Recital 59).
- In case of **SME, it is possible cross-class cram-down applying RPR**: It is enough that the dissident class receive more favorable treatment that any other of lower rank (art. 682.4 SP).

Session One – 13.30-15.00 (continued)

4. The Option of the Spanish Project

- Exceptions to confirmation of the RP without shareholder approval:
  - **No** in case of **SME** (less tan 50 workers; les tahn 10MM incomes) (art. 682.1 y 2 SP).
  - **No** when any partners or **shareholders are liable for company debts** (art. 640.2 SP).

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

5. Some Doubts and Proposals for Improvement

- Doubts:
  - What happens with the **SHA? Also "deactivated"?**
  - What about **special rules in the company´s bylaw**? For example, requiring previous SGM authorization to iniciate the negociation of a RP or its approval in any case
  - What about **instructions by the SGM to the directors?**

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

5. Some Doubts and Proposals for Improvement

- Proposals:
  - To **restore preemptive rights** in Debt-Equity-Swap.
  - To **respect,if it is the case, the supermajorities established in the bylaws.**
  - To establish a legal **option in favor of the shareholders on the shares acquired by the creditors** (Price = fase value of their credits converted), in orther to avoid their expropiation by the flucrum class of creditors.

Session Two – 15.30-17.00

Natural person ltd. : towards a unified discharge regime for entrepreneurs and consumers

Gauthier Vandenbossche
PhD Researcher and Academic Assistant
Ghent University

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Overview

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Introduction

- Insolvency and over-indebtedness
  - Social + Economic (initiative ↓ - productive capacity ↓ - productivity ↓)
- **Personal** insolvency procedures (incl. discharge of debts)
  - Fresh start / second chance
  - Entrepreneurs / non-entrepreneurs (*i.e.* consumers)
- Should EU-MS run separate systems of discharge of debts for entrepreneurs and non-entrepreneurs?

Session Two – 15.30-17.00 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

1. Directive 2019/1023: discharge of debt for *entrepreneurs*

- Directive (EU) 2019/1023
  - *"This Directive lays down rules on: procedures leading to a discharge of debt incurred by insolvent **entrepreneurs**"*
- Optional extension to non-entrepreneurs
  - *"Member States **may** extend the application of the procedures referred to in point (b) of paragraph 1 to insolvent natural persons who are **not** entrepreneurs."*
  - *"For those reasons, although this Directive does not include binding rules on consumer over-indebtedness, it would be advisable for Member States to apply also to consumers, **at the earliest opportunity**, the provisions of this Directive concerning discharge of debt."*

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

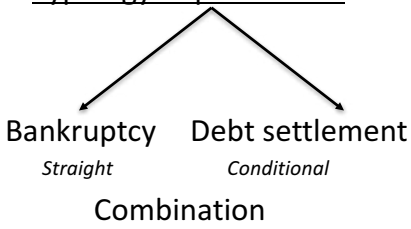
1. Directive 2019/1023: discharge of debt for *entrepreneurs*

- Impact Assessment:
  - *"However, it needs to be taken into account that Member States would be obliged to regulate a discharge period for entrepreneurs in line with the minimum requirements of a Directive. In those circumstances **even non-binding provisions** on the extension of that regulation to consumers could **have tangible impact** on the ground over and above the 2014 Recommendation, **particularly in view of the fact that many Member States have common rules for entrepreneurs and consumers** and that in practice very often the consumer and business debts of an entrepreneur can hardly be distinguished."*

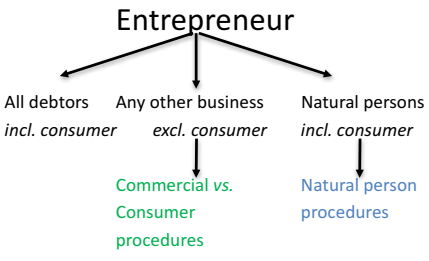
The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

2. Typology of insolvency procedures

- Typology of procedures



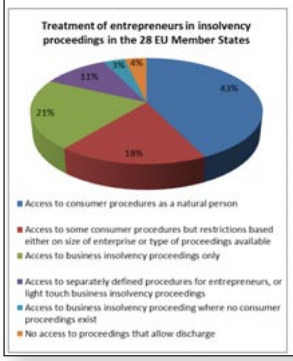
- Typology of debtors



Session Two – 15.30-17.00 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

2. Typology of insolvency procedures



Source: EUROPEAN COMMISSION (DIRECTORATE-GENERAL FOR JUSTICE AND CONSUMERS) and UNIVERSITY OF LEEDS (G. McCORMACK, A. KEAY, S. BROWN and I. DAHLGREEN), Study on a new approach to business failure and insolvency: Comparative legal analysis of the Member States' relevant provisions and practices, January 2016, No. JUST/2014/JCOO/PR/CIVI/0075, https://op.europa.eu/s/uVEI, 287.

- Typology of debtors

Entrepreneur

All debtors	Any other business	Natural persons
incl. consumer	*excl. consumer*	*incl. consumer*
	Commercial *vs.* Consumer procedures	Natural person procedures

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

3. The case for a unified discharge regime for natural persons

- Reason 1 – Problems of delineation
  - Defining the concept of 'entrepreneur'
    - Company directors
    - Changing labour markets
  - Business and private debts
- Reason 2 – Same concerns
  - Similar issues
  - NINA and LILA debtors
  - Risk-taking
  - Economic and social concerns
    - Economic rationale
      - Economic rehabilitation
    - Humanitarian rationale
      - Human rights

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Conclusion

- There is not any public policy rationale for consumers and entrepreneurs to be treated differently.

Session Two – 15.30-17.00 (continued)

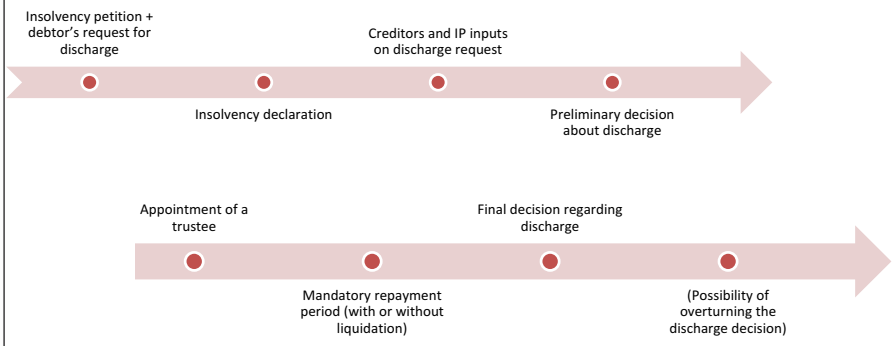
The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Portuguese transposition of the Directive (EU) 2019/1023 – where it fell short regarding personal insolvency

Ana Filipa Conceição
Catarina Frade
Fernanda Jesus
Centre for Social Studies – University of Coimbra

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Portuguese debt discharge mechanism – *exoneração do passivo restante* – at a glance (2004 Bankruptcy Code - CIRE)



The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Some perceptions about debt discharge in Portugal

- Structural lack of information about personal insolvency proceedings
- Too late access to any formal proceedings from both debtor and creditors
- Discharge still preferred to court and pre-court debt restructuring mechanisms
- In early years (since 2004 CIRE), courts adopted a conservative approach towards discharge (favouring creditors' side) and were inconsistent regarding debtors' access to repayment period and the rules for disposable income
- Discharge grown on judges and other judicial actors over the years, especially since 2011, when Portugal was bailout and personal insolvencies burst

Session Two – 15.30-17.00 (continued)

Some statistical data on insolvency proceedings

(source: Portuguese Ministry of Justice)

- Personal insolvency proceedings represent 3/4 of all insolvency proceedings, since 2011
- Credit recovery rate extremely low (below 10% of the amount claimed)
- 2021 data on discharge:
  - **7200** debtors discharged
  - **112** debtors were refused discharge at preliminary stage
  - **5106** debtors entered into repayment period
  - **887** debtors breached their duties during repayment period
  - **441** debtors were denied discharge at the end
  - **1** discharge decision was overturned

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Law 9/2022 of January 11st (transposition of the Directive 2019/1023) (overview)

- Law 9/2022 will come into force on April 11, 2022, and the new provisions will apply to all pending insolvency proceedings
- News provisions of the law apply to all debtors, not only to entrepreneurs (article 1/4 of the Directive)
- Mandatory repayment period drops from 5 to 3 years (articles 235 and 237/b) of CIRE)
- In case of a breach of duties that may disturb or delay the repayment scheme, the debtor, his/her creditors, the trustee or the IP may ask the court for an extension of the repayment period up to 36 months (article 243 of CIRE following article 23 of the Directive)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Law 9/2022 of January 11st (transposition of the Directive 2019/1023) (overview)

- Other rules apart from the directive:
  - court may order a post-closing/supervening liquidation (no assets during proceedings – article 241-A of CIRE)
  - definitive court order regarding the classification and ranking of claims before granting payment to the creditors (article 241/1 d) CIRE);
  - new deadline for creditors to ask for the IP's supervision of the debtors' duties during the repayment period (article 242/3 CIRE);
  - reduction, from one year to six months, of period for creditors to require early termination of the repayment period due to the breach of duties by the debtor (article 243/3 CIRE);
  - the value of the claim, for purposes of appeal regarding this incident, will be the value of the dischargeable debts (article 248-A CIRE)

Session Two – 15.30-17.00 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Where did Law 9/2022 fell short?

- *Overall, a missed opportunity for a new personal insolvency paradigm, based on straightforward discharge, and fewer and simpler procedures*
- *A sum of timid and insufficient measures to explore the Directive possibilities and to address the practical difficulties pointed out by judicial players*

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Where did Law 9/2022 fell short?

- Provision of more information to debtors (dedicated websites, debt counseling services; insolvency information services, financial education)
- Elimination of disperse and ineffective debt restructuring proceedings (sole pre-insolvency proceeding)
- Elimination of mandatory repayment period and immediate discharge (repayment plan would remain for those debtors who would like to keep their assets)
- Creation of incentives/rewards for debtors with a repayment plan (or in mandatory repayment period)
- Discharge extended to tax claims

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Where did Law 9/2022 fell short?

- Provision of a different treatment for mortgage debts (in 2015, represented circa 80% of the total amount due in personal insolvencies)
- Possibility of a sole proceedings for companies and shareholders, whenever there is a high percentage of personal guarantees
- Reform of the trustee's tasks during the repayment period
- Elimination or cut in personal insolvency proceedings fees, when debtor fills for insolvency

Session Two – 15.30-17.00 (continued)

Reconsidering Fairness for Vulnerable and Involuntary Stakeholders in Insolvency and Restructuring

Dr Jennifer L. L. Gant
Lecturer in Law
University of Derby School of Law

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Introduction: Revelations of the Pandemic

The ability to respond to vulnerability demonstrates the relative resilience of an individual or an institution

Different insolvency stakeholders demonstrate different levels of resilience

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Consumer Vulnerability in Bankruptcy

- Ondersma: make relief that is ***legally*** available ***actually*** available.
- Recognising that 'It is unjust and nonsensical to require impoverished debtors to undergo an expensive and burdensome process to obtain relief.'

Session Two – 15.30-17.00 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Not an Entirely New Idea!

- Korobkin, 'Vulnerability, Survival, and the Problem of Small Business Bankruptcy' (1994) 23(1) Capital University Law Review 413

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Challenging the Status Quo

- Views on the resolution of financial distress have been changing
- A potential turning point?
- A new framework within which the balancing act between wealth maximisation and fairness can be viewed.

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

A New Theory Responding to Fairness

- Law and economics approaches are exclusionary
- A socio-legal perspective allows for an analysis of current legal structures directly linked with the social circumstances
- Martha Fineman: Vulnerability Theory

Session Two – 15.30-17.00 (continued)

INSOL EUROPE
The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022
ACADEMIC FORUM INSOL Europe

Is Equal Treatment Always Fair Treatment?

- Different social values of debts owed to different stakeholders
  - Employees
  - Tort creditors
  - Environmental damage

INSOL EUROPE
The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022
ACADEMIC FORUM INSOL Europe

The Concept of Vulnerability in Corporate Insolvency

- Vunlerability describes:

'a universal, inevitable, enduring aspect of the human condition that must be at the heart of our concept of social and state responsibility.'

Fineman 2008

INSOL EUROPE
The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022
ACADEMIC FORUM INSOL Europe

Social Implications of Corporate Insolvency

- Adjusting the theoretical lens through which we view non-economic features of corporate insolvency
- Focus on stakeholder vulnerability may uncover the weaknesses of institutions
- Redesign with greater fairness in mind

Session Two – 15.30-17.00 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Conclusion

'…[as] law should recognise, respond to, and, perhaps, redirect unjustified inequality, the critical issue must be whether the balance of power struck by the law was warranted.'

Fineman 2017

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Thank You

- Dr Jennifer L. L. Gant
- Jenniferl.l.gant@gmail.com

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Picture Credits

1. Thomas Claes and Kristina Rehbein, 'Middle-income countries' debt trap' (IPS 2021) <https://www.ips-journal.eu/topics/economy-and-ecology/middle-income-countries-debt-trap-5607/>
2. 'What is Customer Vulnerability' (2020) <https://callminer.com/blog/what-is-customer-vulnerability>
3. 'Vulnerability and the Law' (New Legal Realism) <https://newlegalrealism.org/2015/11/30/fineman-on-vulnerability-and-law/>
4. Alexandra Ebert, 'We Want Fair AI Algorithms – But How To Define Fairness?' (Mostly AI 2020) <https://mostly.ai/blog/we-want-fair-ai-algorithms-but-how-to-define-fairness/>
5. 'Corporate Insolvency in the UK – Business Law Guide' (Unlock the Law) <unlockthelaw.co.uk/corporate-insolvency-law.html>
6. Ashley Crossman, 'The Major Theoretical Perspectives of Sociology' (Thought Co 2020) <https://www.thoughtco.com/theoretical-perspectives-3026716>
7. '45 Inspirational Quotes on Vulnerability' (2021) <https://graciousquotes.com/vulnerability/>

Speaker Presentations: Thursday

Session Three – 09.00-10.30

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Preventive Restructuring Frameworks and the Separate Domain of Cross-border Restructuring Law

Yiannis Bazinas
PhD Candidate/Associate Lecturer (Teaching)
University College London

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Basic premise of the approach

The traditional view of insolvency and restructuring

- Insolvency and restructuring law are two sides of the same coin
- The only difference is the outcome: liquidation v reorganization
- Reflected in the EIR definition of insolvency proceedings (Art. 1(1) EIR)

Challenging the traditional view

- Focus on legal rules instead of proceedings
- Considering the function of legal rules can provide significant nuance

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Insolvency law and the collective action problem

- In the absence of insolvency law, there would be a destructive creditor race against the debtor's assets (tragedy of the commons)

- Insolvency law replaces individual enforcement with a system of collective enforcement that addresses this economic problem

Session Three – 09.00-10.30 (continued)

Restructuring law and the holdout/holdup problem

- Restructuring constitutes contractual renegotiation between the debtor and its multiple creditors
- If the debtor were left to the devices of contract law, there would be free riders and holdouts (tragedy of the anticommons)

↓

- Restructuring law creates a framework for collective renegotiation under a majoritarian decision making rule
- **BUT** it also places limits to majority rule to protect the minority against the risk of holdup (e.g. assigning creditors in separate classes, limiting bargaining to the restructuring surplus etc.)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Insolvency and restructuring: separate domains

- Rules of insolvency law and restructuring law aim at dealing with distinct economic problems (commons v anticommons)
  - However, some rules may have dual functions (e.g. the stay on enforcement)
  - It is possible that these problems arise concurrently (although evidence from restructuring practice indicates that this happens less frequently than before particularly for large firms)
- Important to note that this distinction is not based on a contractual view of restructuring law

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Cross-border implications of the dichotomy

Cross-border insolvency

- Recognition of the consequences of the commencement of insolvency proceedings
- Protection of creditor assets, wherever located
- Recognition of the commencing judgment and the Insolvency Representative's authority
- Art. 19 EIR

Cross-border restructurings

- Recognition of the effects of the restructuring plan
- Resolution of holdout problem, wherever creditors are located
- Essentially recognition of judgments
- Art. 31 EIR, provided however that the commencement of the proceeding has been recognized under art. 19

Session Three – 09.00-10.30 (continued)

The problem of minority protection in cross-border restructurings

- If restructuring law is also concerned with holdup, should there be any limit to the recognition of restructuring plans?
- A case in point: *Portuguese Railroads* (Nadelmann, 1948)
  - A Portuguese restructuring plan had modified the claims of French bondholders
  - The French court refused to recognize the plan, as inconsistent with French public policy because all creditors had voted in a single class
- Is the public policy defence in the EIR (Art. 33) sufficient to deal with similar issues in cross-border restructurings in the EU?

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

The EU Directive on Preventive Restructuring Frameworks

Preventive restructuring frameworks → Structured bargaining proceedings

Collective action concerns

- Stay on creditor enforcement actions and its effects (Arts. 6-7)

Holdout/holdup resolution

- Minimum content of restructuring plans (Art. 8)
- Requirements for the adoption of restructuring plans, including classification requirements and majority decision making (Art. 9)
- Requirements on the confirmation of a plan by a court, including the best-interests of creditors, equal treatment and cross-class cramdown (Art. 10)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Cross-border implications

In the context of preventive restructurings, the most pressing issue will most likely be the recognition of restructuring plans	Recognition is automatic under art. 32 EIR (provided that the commencement of the proceeding can be recognized under art. 19)	Uniform rules on the adoption and confirmation of the plan are likely to remove any potential obstacles or objections to recognition	Substantive harmonization is a necessary corollary of automatic recognition

Session Three – 09.00-10.30 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Harmonising Restructuring Frameworks: Top-Down, Bottom-Up, or Both?

Dr Dr David C Ehmke
Associate at GT Restructuring, Berlin (DE)

Dr Eugenio Vaccari
Lecturer in Law at Royal Holloway, University of London (UK)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Harmonisation in the EU

- The objective of harmonisation is increased legal similarity across the EU Member States, which is ultimately conducive of European integration.
- Main theoretical approaches:
  - universalism (Westbrook, 2000: "Because bankruptcy is a market-symmetrical law, a global market requires a global bankruptcy law") and modified universalism **[supra-natural view];**
  - territorialism (LoPucki, 1999) and cooperative territoriality – principles of territoriality and plurality **[inter-governmental view]**;
  - contractualism (Rasmussen, 1997) and universal proceduralism (Janger, 1998).


WILEY
Harmonising insolvency law in the EU: New thoughts on old ideas in the wake of the COVID-19 pandemic

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Harmonisation in the EU (2)

- Practical implementation:
  - top-down harmonisation through the creation of an area without internal frontiers, for the promotion of the 4 fundamental freedoms (art 114 TFEU):
    - issues: time-consuming, no learning curve because of a lack of try and err, lack of competition, race-to-the-bottom, inability to compromise, interference with aspects of national sovereignty and legal cultures, before PRD limited to procedural rules in insolvency/restructuring.
  - regulatory competition to imitate best (?) practices and attract businesses:
    - issues: forum shopping, regulatory race-to-the-bottom, possibly uncertainty and strategic behaviour.
- Problem: efficient allocation of assets (trade-off, finding the right balance):
  - top-down uniform rules lower transaction costs and increase legal certainty;
  - regulatory competition encourages MSs to develop new strategies for businesses.


WILEY
Harmonising insolvency law in the EU: New thoughts on old ideas in the wake of the COVID-19 pandemic

Session Three – 09.00-10.30 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Harmonisation in the EU – A "menu" approach?

- Need to embrace a wider-encompassing definition of legal harmonisation:
  - multi-layered concept, encompassing bottom-up as well as top-down phenomena;
  - ultimate aim to increase legal similarity across legal systems while minimising negative externalities arising from the choice of either bottom-up or top-down approaches, and allow for sufficient flexibility to quickly adjust to new challenges;
  - create a level-playing field of national insolvency laws, which would, in turn, lead to improved access to credit and foreign investment.
- Need to acknowledge what is happening in practice (law-in-action methodology):
  - case-study approach on the implementation of the PRD across different "European" jurisdictions.


WILEY

RESEARCH ARTICLE

Harmonising insolvency law in the EU: New thoughts on old ideas in the wake of the COVID-19 pandemic

Emilie Ghio | Gert-Jan Boon | David Ehmke | Jennifer Gant | Lisa Langkjaer | Eugenia Vaccari

Abstract

The COVID-19 pandemic revealed that top-down harmonisation of insolvency (i.e., introduced at EU level) has been temporarily halted. The urgency to contain or mitigate the economically and financially destructive effects of the pandemic has, nevertheless, forced European governments to adopt domestic strategies and laws in the area of insolvency. Interestingly, however, such measures show that insolvency and restructuring law responses to the COVID-19 pandemic, albeit largely uncoordinated, reflect a phenomenon of bottom-up harmonisation (i.e., introduced by Member States) indicating a convergence towards common approaches. This paper interrogates the insolvency law responses to the COVID-19 pandemic in six European countries (Denmark, France, Germany, Italy, The Netherlands, the United Kingdom). It uncovers the inadequacy of the EU's harmonisation

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

ENTRY CRITERIA

- *recital 26* and *art 5(3)*: MSs should be able to introduce a viability test as a condition for access to the preventive restructuring procedure provided for by this Directive;
- *recital 28:* MSs should be able to extend the scope of preventive restructuring frameworks to situations in which debtors face non-financial difficulties (but likely unable to pay debts);
- *Art. 4*: MSs are entitled to limit the availability of preventive restructuring procedures to companies that are "worthy".

- *Re Cheyne Finance Plc* [2007] EWHC 2402 (Ch): commercial insolvency is not to be ascertained by a slavish focus only on debts due at the relevant date; *Re Casa Estates* [2014] EWCA Civ 383: the cash flow and the balance sheet tests need to be used at the same time;
- *Re A Company* [2020] EWHC 1551 (Ch): injunction restraining the advertisement of a winding-up petition on the basis of COVID-19 and impending legislation;
- Pt 26A plans: **available to all companies that are likely to encounter financial difficulties** that may affect their ability to carry on business as a going concern (s.901A(2) CA 2006).

- **accessible for debtors expected to be unable to pay their debts when they fall due within next 24 months**; no solvent restructuring possible;
- generally not accessible for debtors already over-indebted (liquidity shortage in less than > 12 month) or unable to pay their debts;
- entry tests relies on established insolvency law tests (though recently reformed for prognosis period), no additional viability test.

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

CREDITORS and SHAREHOLDERS' PARTICIPATION

- *recital 10*: Any restructuring operation, in particular one of major size which generates a significant impact, should be based on a dialogue with the stakeholders (and employees);
- *recitals 60-61*: Throughout the preventive restructuring procedures, workers should enjoy full labour law protection, and should receive adequate information to assess the restructuring plan;
- Restructuring procedures should be conducted by the debtors (*art. 5*), and the stay on enforcement actions shall not extent to workers' claims (*art. 6(5)*).

- CIGA 2020: reforms to CVA and introduction of Pt 26A restructuring plans, BUT:
  - **Debtors have more power than before,** no major reforms/additional powers for workers;
  - "Punitive" approach towards certain categories of creditors, such as landlords:
    - *Discovery (Northampton) Ltd v Debenhams Retail Ltd* [2019] EWHC 2441 (Ch) and *Lazari Properties 2 Ltd v New Look Retailers Ltd* [2021] EWHC 109 – landlord CVAs;
    - *Re Virgin Active Holdings Ltd* [2021] EWHC 1246 (Ch);
    - No winding-up petition for debt under business tenancy (until end March 2022).

- **debtor selects affected parties** (shareholders and creditors) = novelty (no SoA-equivalent in Germany); future claims (e.g. by landlords for future rents) are not subject to plan (cf. CVA);
- affected parties vote on plan and may object restructuring instruments (cram-down, stay, etc.);
- no pro-active role, no substantive control rights for creditors and shareholders; no procedural rights of workers and no infringement of their claims;
- principle = **debtor in possession** (cf. possible in insolvency).

Session Three – 09.00-10.30 (continued)

INSOL EUROPE
The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022
ACADEMIC FORUM INSOL Europe

AUTOMATIC STAY on EXECUTORY ACTIONS

- *recital 32* and *art. 6*: A debtor should be able to benefit from a temporary stay of individual enforcement actions, also for the benefit of guarantors and collateral givers;
- *recital 35*: a stay of individual enforcement actions should apply for up to 4 months.

- CIGA 2020: Pt A1 moratorium providing businesses *in financial distress* with a breathing space (20+ business days) during which they can explore rescue and restructuring options, BUT:
  - the debtor must continue to pay for some contracts (new supplies, rents, loans, liabilities arising under a contract involving financial services, etc.);
  - absence of any super-priority status for funding provided during the Pt A1 moratorium;
  - possibility for lenders to accelerate their debt in a Pt A1 moratorium.

- **stay only upon debtor's request**; (automatic in insolvency, on request in opening procedure);
- stay may be **selective** (only selected parties) or comprehensive;
- initially up to 3 months + 1 month;
- additional 4 month (**max. 8 months** in total) after court confirmation of plan has been requested.

INSOL EUROPE
The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022
ACADEMIC FORUM INSOL Europe

TREATMENT of EXECUTORY CONTRACTS

- *recital 40*: *ipso facto* clauses triggered by reason of the company's insolvency or restructuring should not be triggered, esp. if the debtor is otherwise meeting their contractual obligations;
- *art. 7(5) and (6)*: ban on the enforceability of *ipso facto* clauses should come into consideration whenever the clause is triggered by the opening of the restructuring proceeding or a stay on executory actions (or a request for them). It could also apply to netting arrangements in financial, energy and commodity markets.

- CIGA 2020: widened the scope of the restriction on the enforceability of termination clauses from essential suppliers (ss. 233-233A IA 1986) to all suppliers of goods and services for companies which entered an insolvency or restructuring procedure, or applied for a Pt A1 moratorium. BUT:
  - *Laverty v British Gas Ltd* [2014] EWHC 2721 (Ch): suppliers are not priority creditors;
  - *Re Sahaviriya Steel Industries Ltd* [2015] EWHC 2726 (Ch): international reach of UK law;
  - *BNY v Eurosail-UK 2007-3BL Plc* [2013] UKSC 28: you cannot contract out of insolvency.

- ***ipso facto* protection** against termination/modification (established insolvency/ case law);
- stay (if requested) on counter-parties' right to withhold performance / terminate / modify contract based on debtor's past non-performance and delay;
- **no modification/termination right of executory contracts** for debtors (only in insolvency).

INSOL EUROPE
The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022
ACADEMIC FORUM INSOL Europe

CROSS-CLASS CRAM-DOWN PROVISIONS & VOTING THRESHOLDS

- *recital 52*: "best-interest-of-creditors" test, meaning that no dissenting creditor is worse off under a restructuring plan than it would be either in the case of liquidation or next best alternative;
- *recital 54*: It should be possible that, where a majority of voting classes does not support the restructuring plan, the plan can nevertheless be confirmed if it is supported by at least one affected or impaired class of creditors;
- *art. 9(6)*: MSs shall lay down the majorities required for the adoption of a restructuring plan. BUT: not higher than 75 % of the amount of or the number of affected parties in each class.

- CIGA 2020: the Pt 26A plan introduced a cross-class cram-down mechanism & lower voting thresholds. Courts can authorise it subject to the "**no worse off**" and "**economic interest**" **tests**:
  - landlord CVAs;
  - *Re DeepOcean 1 Uk Ltd* [2020] EWHC 3549 (Ch): "no worse off" test is analogous to establishing a suitable comparator for class purposes in the context of a Pt 26 scheme;
  - *Re Virgin Active Holdings Ltd* [2021] EWHC 814 (Ch): how to value the debtor's business;
  - *Re Hurricane Energy Plc* [2021] EWHC 1759 (Ch): rescue is not "a port for every storm".

- class cram-down: **75% majority in value** (no headcount); (cf. insolvency: 50% and headcount test)
- cross-class cram-down requires compliance with **modified absolute priority rule**:
  - **flexibility** to treat creditors of equal rank differently with sound economic reason;
  - exception for managing shareholders adding value, minor infringements of creditor rights.
- **best-interest test** only for dissenting parties who show probable cause of being worse-off;
- developed from established insolvency principles/case law.

Session Three – 09.00-10.30 (continued)

Session Four – 11.00-12.30

Preferential Treatment of State Aid Recovery Claims in Insolvency Proceedings and Preventive Restructuring Frameworks

Walter J. E. Nijnens, LL.M. LL.M.
Doctoral Candidate and Lecturer in Business Law (Fulda University of Applied Sciences and Martin-Luther-University Halle-Wittenberg)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

- Member States need to notify the Commission of plans to grant State aid (Article 2(1) Regulation 2015/1589).
- If the aid is not compatible with the internal market -> negative decision (Article 9(5) Regulation 2015/1589).
- Recovery decision (Article 16(1) Regulation 2015/1589): the Commission "shall decide" / Member States "shall take all necessary measures".
- Article 16(3) Regulation 2015/1589: "without delay" and "in accordance with the procedures under the [Member State's] national law".

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

- Why should incompatible State aid be recovered?
  - Level playing field on the internal market
  - Incompatible State aid gives the recipient an unlawful advantage.
  - Therefore, the *status quo ante* must be restored.
  - Aid + interest (Article 16(2) Regulation 2015/1589)

Session Four – 11.00-12.30 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

- Article 16(3) Regulation 2015/1589: "in accordance with the procedures under the national law of the Member State concerned, provided that they allow the **immediate** and **effective** execution of the Commission's decision".
- CJEU C-232/05, *Scott*, para 53: National provisions which do not ensure immediate and effective execution must be left unapplied.

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

- Insolvency:
  - Settled case law since 1986 and recently confirmed (CJEU 20 January 2022, C-51/20, *Commission v Greece*):
  - Paras 57-58: If the recipient is in financial difficulty or insolvent -> Member State must bring about liquidation of the company + register its recovery claim in the company's schedule of liabilities (or other measure).
  - Para 59-60: However, if the claim is not met in full -> liquidation + definitive cessation of activities.
- No special ranking is required (CJEU C-499/99, *Magefesa II*, para 37).

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

- What about restructuring?
  - Commission Notice on the recovery of unlawful and incompatible state aid, para 131: "proceedings aimed at the restructuring or temporary continuation of some or all of the activities of insolvent undertakings […] must be left unapplied insofar as, in absence of timely recovery of the full recovery amount, they prevent the winding up and cessation of activities of the aid beneficiary".
  - Para 132: A Member State may only vote in favour of a plan which provides for continuation, if the entire aid is recovered.

Session Four – 11.00-12.30 (continued)

Session Four – 11.00-12.30 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Recognition of UK Schemes of Arrangement and Restructuring Plans in the Continent: Two Examples Involving Switzerland

Rodrigo Rodriguez
Prof. Dr., attorney-at-law,
University of Lucerne, Switzerland

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

- The cases
- The scheme and the restructuring plan
- The qualification game
- Consequences for jurisdiction
- Consequences for recognition

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

- Cross-border «group insolvnecy»
- Relevant group entities across Europe (Switzerland)
- Relevant creditors across Europe

Session Four – 11.00-12.30 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Situation 1 (simplified):

- The relevant financial agreements have valid forum selection clauses in favour of UK courts (or they can be validly modified)
- Or: the debt, but the UK court admits its jurisdiction anyway and the Lugano Convention of 2007/the Brussel I Regulation applies

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Situation 2 (simplified)

- The relevant financial agreements have not (or not all) selected UK courts (and cannot be validly modified), but
- The debtor has its COMI in the UK (or has shifted it unsuspiciously to the UK…)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Why recognition matters

- Scheme Company is a UK Company (often a new company or a comi-shifted)
- One or more of the Borrowers under financial agreements subject to the Scheme is a/are Swiss Company/ies
- The Scheme results in a reduction of a claim amount of a dissenting creditor against the Swiss Borrowers.
- Creditor files his claim in a court in Switzerland against the Swiss Borrower. He asks for repayment of the full amount in accordance with the (originally) agreed terms… *quid?*
- *And… the UK judge wants to know in advance..*

Session Four – 11.00-12.30 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

What is the right «indirect competence» from a Swiss (or continental) perspective?

- «Proper» jurisdiction in **commercial** matters:
  - Forum agreed in the contract

- «Proper» jurisdiction in **insolvency** matters:
  - Registered seat (CH) or COMI (UK/CH) of the debtor

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

«commercial» vs. «insolvency» qualification, jurisdictional and recognution aspects

Situation 1:

No company in the UK, but: choice of forum in favour of UK courts in the relevant financial instruments.

-> Appropiate «commercial» forum – but improper forum for insolvency

Situation 2:

Some relevant creditors have not submitted to UK courts but to – say – New York courts. But the debtor ist located in the UK

-> Appropiate «insolvency» forum – though disregarding the forum selection clause(s)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Qual[illegible]f the Part 26 Scheme

«commercial»	[illegible]ncy»
Encompasses only a set of laws/rules)	and *effect* is to restructure debts – binding on [illegible]g creditors
«imminent» or «likely» ins	main field of application…]
Is regulated in the Companies Law	
[Is not in Annex A]	
No divestment of the debtor	[many newer proceedings have none]
No insolvency practitioner	[many newer proceedings have none]
No stay of enforcement	[not always mandatory…]

Session Four – 11.00-12.30 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Qualification of the Part 26A P

«commercial»	«insolvency»
Encompasses only a set of creditors (submitting to UK laws/rules)	*Purpose* and *effect* is to re… dissenting creditors
«imminent» or «likely» insolvency is not a requirement	likeliness of insolvency is a re…
Is regulated in the Companies Law	Introduced in a law relating to insolvency
	Provides for a 'cram down'
No divestment of the debtor	[many newer proceedings have none]
No insolvency practitioner	[many newer proceedings have none]
No stay of enforcement	[not always mandatory…]

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Qualification and its consequence for the applicable source for recognition

Recognition of Schemes and Plans, CVA in Switzerland

	Scheme (Part 26)	Plan (Part 26A)	CVA
qualification	*Commercial (Swissport)*	*insolvency (GateGroup)*	insolvency
sources			
until 2021	**Lugano (=BXL I)**	**SPILA on insolvency**	
since 2021/2019	**SPILA (contracts)**	**(new) SPILA on insolveny**	

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Qualification and its consequence for the applicable indirect jurisdiction criterion

Recognition of Schemes and Plans, CVA in Switzerland

	Scheme (Part 26)	Plan (Part 26A)	CVA
qualification	*commercial*	*insolvency*	insolvency
Grounds for jurisdiciton			
until 2021	**«who cares?»**	**Registered seat**	
since 2021/2019	**Choice of forum**	**Registered seat or COMI**	

Session Four – 11.00-12.30 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Practical consequences ?

- Part 26 UK Schemes «worse off» since UK out of Lugano
- No (valid) overvoting in a Scheme of (Swiss) creditors that have *not* agreed to UK courts

- But:
  - The Part 26A Restructuring Plan opens new possibilities:
    - Disregarding choice of court by applying the debtors COMI in the UK !
    - And: if there is no UK company, we make it up or move it..(«COMI shifting»)
      - Result: claims subject to a UK Restructuring though never related to UK law or courts..

- Consequence:
  - UK Law(yers) may find a way to restructure your group from the UK and prove an argument for recognition
  - This compensates a bit the legal blow of «Brexit»/«Lugexit»

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

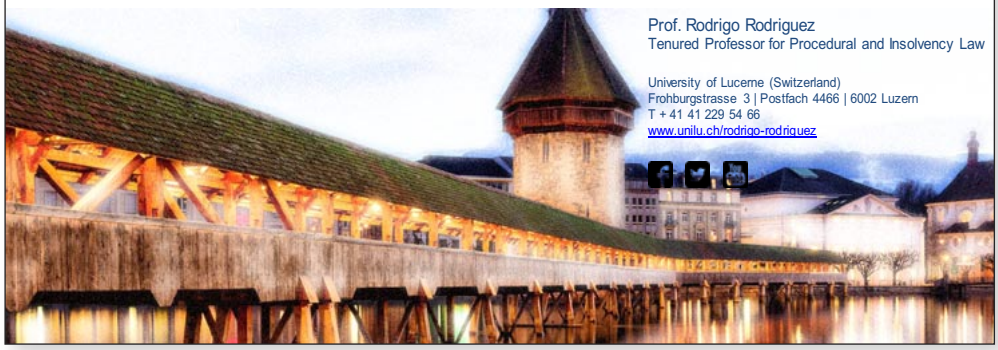
Practical consequences ?

- Now…does that really work?

  - In theory yes…
  - But «dont overstrecht it..» (COMI shift ? – COMI only of a new company ? Extension to a Borrower with no COMI in UK/no submission of counterparties ..?)
  - Not court-tested yet in Switzerland!

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Thank you – questions and debate welcome!



Prof. Rodrigo Rodriguez
Tenured Professor for Procedural and Insolvency Law

University of Lucerne (Switzerland)
Frohburgstrasse 3 | Postfach 4466 | 6002 Luzern
T + 41 41 229 54 66
www.unilu.ch/rodrigo-rodriguez

Session Four – 11.00-12.30 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

A New Cross-Border Framework for Restructuring Plan Proceedings

Prof. Dr. Stephan Madaus

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

1. Do we need yet another legislative initiative?
   (1) Shortcomings of the EIR 2015
   (2) Shortcomings of the Brussels Ibis Regulation
   (3) The gap in national rules

2. How to approach a new cross-border framework for restructuring plan proceedings?
   (1) Minimum content
   (2) Guiding principles

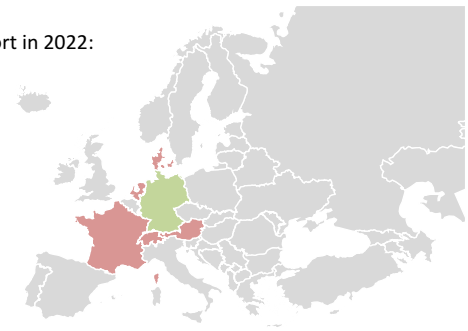
The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

1. Do we need yet another legislative initiative?

The reality of cross-border restructuring support in 2022:

- Debtor: German start-up company based in Berlin
- Customers all across Europe
- Successful product line

- Product liability claims (defective packing)
- Business is viable if claims are restructured.



Session Four – 11.00-12.30 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

1. Do we need yet another legislative initiative?

The reality of cross-border restructuring support in 2022:

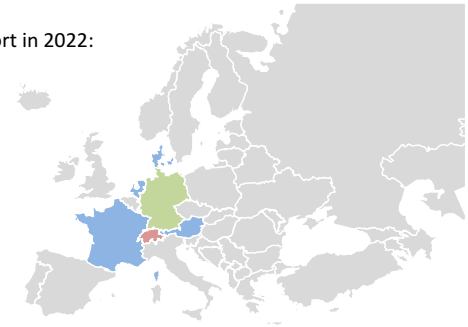
Option 1: German StaRUG restructuring

- ➢ Effective abroad?

a) Art. 32(1) EIR 2015 – not applicable

b) Art. 36(1) Brussels Ibis Regulation

- – Applicable? Art. 1(2) lit. b?
- – Jurisdiction? Art. 4(1), 8(1) – 'defendant'?
  Art. 7(1)/(2)? Art. 18(2)? consumer!
  Art. 25? Art. 19(1) – COC only *ad-hoc*
- – Applicable law? *lex fori* for modifications of substantive rights?



The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

1. Do we need yet another legislative initiative?

The reality of cross-border restructuring support in 2022:

Option 1: German StaRUG restructuring

- ➢ Effective abroad?

c) National laws: (no EIR, no Brussels Reg.)

- – Jurisdiction? § 35 StaRUG (COMI)
- – Applicable law? open question (*lex fori*)
- – Recognition?
  - ➢ Pursuant to national laws in target jurisdictions:

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

1. Do we need yet another legislative initiative?

The reality of cross-border restructuring support in 2022:

Option 1: German StaRUG restructuring

- ➢ Effective abroad?

c) National laws:

- – Recognition?
  - ➢ Pursuant to national laws in target jurisdictions:
    - ✓ Austria (§ 240 IO or § 480 VG – no case law yet)
    - ✓ France (case law recognition principles – yet to be tested)
    - ✓ Switzerland Art. 175 PILA or Lugano Conv. – yet to be tested)
    - – Netherlands (restrictive case law)
    - – Denmark (restrictive case law)

Session Four – 11.00-12.30 (continued)

INSOL EUROPE

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

ACADEMIC FORUM INSOL Europe

1. Do we need yet another legislative initiative?

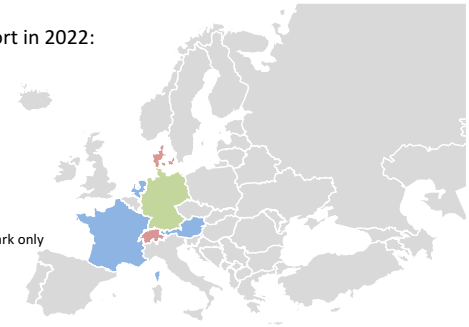
The reality of cross-border restructuring support in 2022:

Option 2: Public German StaRUG restructuring

- Effective abroad?

a) Art. 32(1) EIR 2015: Annex A (July 2022)

- Jurisdiction? COMI
- Applicable law? *lex fori concursus (also Art. 8, 10, 11)*
- Recognition? Automatic in Member States except Denmark only
- Pitfalls?
  - Secondary (liquidation!) proceedings (Art. 34)?
  - Payments to non-affected creditors (Art. 23)?
  - Filing and verification of claims mandatory (Art. 53)?



INSOL EUROPE

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

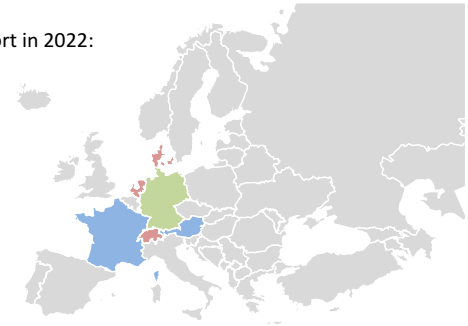
ACADEMIC FORUM INSOL Europe

1. Do we need yet another legislative initiative?

The reality of cross-border restructuring support in 2022:

Conclusion:

- *No feasible centralised restructuring option*
- *Parallel proceedings? too expensive*



INSOL EUROPE

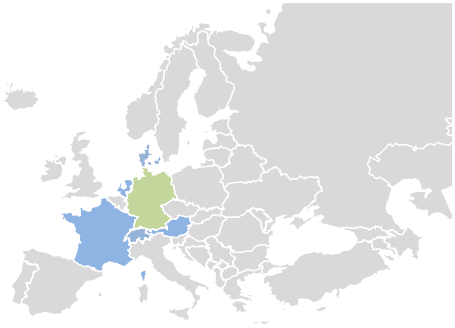
The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

ACADEMIC FORUM INSOL Europe

2. How to approach a new cross-border framework for restructuring plan proceedings?

(1) Minimum content:

- Jurisdiction
- Applicable law
- Recognition of proceedings and tools



Session Four – 11.00-12.30 (continued)

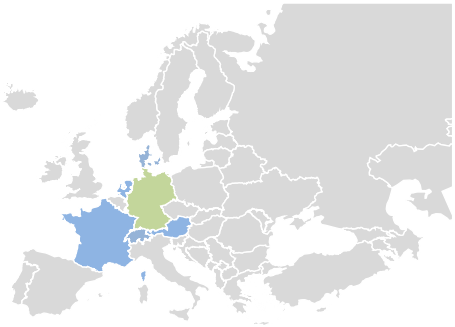
The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

2. How to approach a new cross-border framework for restructuring plan proceedings?

(2) Guiding principles:

- **Universalism** – there is only one debt
- **Debt-oriented**, not asset oriented
- **Automatic** recognition and grounds for refusal

Sources:
- UNCITRAL Model Laws and Legislative Guide
- EIR and Brussels Ibis Regulation
- PIL principles

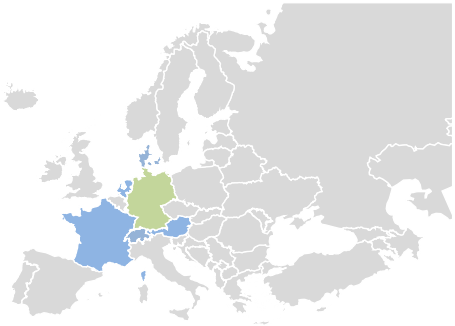


The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

2. How to approach a new cross-border framework for restructuring plan proceedings?

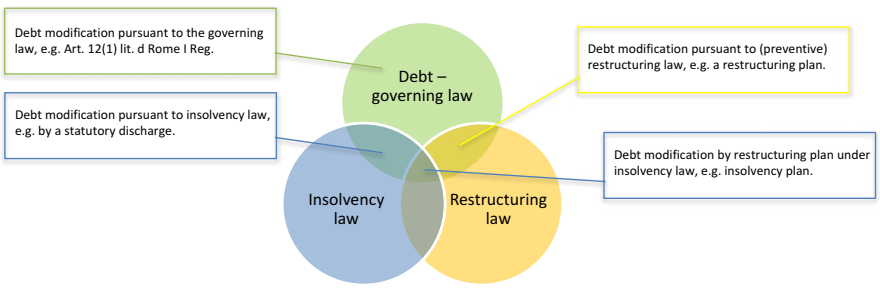
(2) Guiding principles - conclusion:

- Jurisdiction:
  - Where? **Closest** or **sufficient** connection to **debt**
    → Agreements (CoC)
    → Debt (CoL, *lex causae*)
    → COMI? Creditors' domicile?
- Applicable law:
  - **Closest** connection → *lex causae* → also **sufficient** connection (*lex fori*)
- Recognition of proceedings and tools:
  - Principle of automatic recognition
  - (a) Restructuring with **closest** connection to debt: only public policy objection
  - (b) Restructuring with mere **sufficient** connection to debt: *lex causae*-based objections (akin Art. 6(2) Rome I)



The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Connection to insolvency law and workouts: multiple layers of principles and rules



Session Five – 13.30-15.00

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Insolvency Law: Quo Vadis? About the regulatory protection of non-controlling unsecured creditors prior to and during insolvency procedures.

Dr. Dennis Cardinaels
Attorney-at-law Cadanz Law Firm (Brussels, Belgium)
Online Learning Facilitator (Associate Lecturer) University of Lincoln (UK)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Table of contents

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Introduction

- *Actors*: analogy between corporate governance and insolvency governance:

	Solvent company		Distressed/Insolvent company
1	**Shareholders**	≅	**Unsecured creditors**
2	Management	≅	Management or Office-holder
3	Third party constituents	=	Third party constituents

- *Opportunistic conflicts*: similar analogy?

Session Five – 13.30-15.00 (continued)

2. Majority v. minority conflict between unsecured creditors: case-illustrations

- *Case-overview*
  - England and Wales
    - *Gertner & Anor v CFL Finance Ltd* [2020] EWHC 1241 (Ch)
    - *Charnesh Kapoor v National Westminster Bank plc, Kian Seng Tan* [2011] EWCA Civ 1083
  - Belgium
    - Antwerp, 13 February 2014, *RW* 2015-16, 311
    - Brussels, 13 March 2019, *TIBR* 2020, RS-27

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

2. Majority v. minority conflict between unsecureds: case-illustration cont'd

- Economic perspective: potential 'agency problem' between unsecured creditors
  - Solvent company: controlling (majority) shareholders v. non-controlling (minority) shareholders
  - Distressed/insolvent company: controlling unsecured creditors v. non-controlling unsecured creditors
- Economic risks for non-controlling unsecureds (cf. *infra*):
  - Opportunistic/exploitative behaviour
  - Inefficient behaviour

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

3. EU Restructuring Directive 2019

- *Class differentiation: solution?*
  - **Recital 44** – "It should also be possible for Member States to lay down specific rules supporting class formation where nondiversified or otherwise *especially* ***vulnerable creditors, such as workers or small suppliers, would benefit from such class formation***."
  - **Article 9.4** – "Member States shall ensure that affected parties are treated in separate classes which reflect sufficient commonality of interest based on verifiable criteria, in accordance with national law. (…) ***Member States shall put in place appropriate measures to ensure that class formation is done with a particular view to protecting vulnerable creditors such as small suppliers.***"
  - **Article 9.6** – "A restructuring plan shall be adopted by affected parties, provided that a *majority in the amount of their claims or interests is obtained in each class*."

Session Five – 13.30-15.00 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

3. EU Restructuring Directive 2019

- *Directors' duties: Stakeholder-oriented approach?*
  - **Recital 71**: "(…) It is therefore necessary to ensure that, in such circumstances, directors avoid any deliberate or grossly negligent actions that result in personal gain at the expense of **stakeholders** (…). Member States should be able to implement the corresponding provisions of this Directive by ensuring that judicial or administrative authorities, when assessing whether a director is to be held liable for breaches of duty of care, take the rules on duties of directors laid down in this Directive into account."
  - **Article 19**: "Member States shall ensure that, where there is a likelihood of insolvency, directors, have due regard, as a minimum, to the following: (a) the interests of creditors, equity holders and other **stakeholders**; (b) the need to take steps to avoid insolvency; and (c) the need to avoid deliberate or grossly negligent conduct that threatens the viability of the business."

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

3. EU Restructuring Directive 2019

- *Criticisms*
  - Class formation: no guarantee of adequate protection
  - How to determine vulnerability of unsecured creditors?
  - Focus on 'nature' of the creditor's claim (e.g. 'consumer' or 'employment' claim)
  - Content of restructuring plan insufficiently focuses on vulnerable creditors
  - No clarity as to *how* vulnerable creditors could (or should) be protected
  - No definition of 'stakeholder'

    ➔Good intentions but impact on vulnerable creditors is debatable.

    ➔National legislator: solution?

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

4. Determination of non-controlling position of unsecured creditors

- *What is control?*
  - Ability to influence decision-making power of the debtor's management prior to and/or during insolvency procedure
  - Examples of influence:
    - Determination of remuneration (UK ⇔ Belgium)
    - Initiating a liability procedure (or pressing the office-holder to start a claim)
    - Asking questions during creditors' meetings
    - Suggesting alternative rescue possibilities (cf. infra)?
  - Determination of controlling position: cf. *infra* (next slide)

Session Five – 13.30-15.00 (continued)

4. Determination of non-controlling position of unsecured creditors cont'd

Abstract factors		Concrete/practical factors
- *Size of the unsecured claim (and related percentage of voting rights)* - *Bargaining power of the unsecured creditor* - *Legal/financial knowledge and expertise of the unsecured creditor* - *Information (about the debtor) known to the unsecured creditor* - *Financial funds of the unsecured creditor* - *Nature of a creditor's claim (e.g. consumer claim)*	+	- *Attitude of the unsecured creditor during insolvency procedure (e.g. Coalitions built amongst unsecureds?)* - *Amount of votes of the unsecureds (dependent on the size of their claim and coalitions potentially built)* - *Actual exercising of voting rights*
Non-cumulative abstract factors INDICATIVE of potential non-controlling position of unsecureds		**Practical/concrete factors CONCLUSIVE of actual non-controlling (or controlling) position of unsecureds**

INSOL EUROPE 40 YEARS 1981-2021
ACADEMIC FORUM INSOL Europe
The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

4. Determination of non-controlling position of unsecured creditors cont'd

- *Risks*
  - Exploitation situation
    - Example: *Gertner; Kapoor* (cited above)
    - Bad faith / willingly trying to bypass *pari passu*
  - Inefficiency situation
    - Example: distressed debt trading
    - No bad faith / no willingness to bypass *pari passu*
- *Observations*
  - Low level of engagement of (unsecured) creditors
    - Concerns about costs of involvement
    - Insufficient legal/financial knowledge
  - Funding issues regarding insolvency litigation
  - Lack of regulatory incentives of insolvency practitioners
  - Control of courts: marginal control (Belgium) resp. ex post control (CVA/IVA – UK)

INSOL EUROPE 40 YEARS 1981-2021
ACADEMIC FORUM INSOL Europe
The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

5. Insolvency Theories

- *Creditors' bargain theory*
  - Proponents: Thomas Jackson; Douglas Baird
  - Insolvency law = debt-collection regime/private interests of creditors should primarily be considered.
  - Not enough regard for *inter alia* the protection of non-controlling unsecured creditors.
- *Communitarian theory*
  - Proponent: Karen Gross
  - Insolvency law = public law-focus/wide range of constituents' interests should be considered
  - Accountability risks
    - In whose interests should the company be managed?
    - No clear guidance for directors/office-holders
    - Two many masters
  - No (clear) framework as regards the protection of non-controlling unsecured creditors

Session Five – 13.30-15.00 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

6. Insolvency Values

- *Cumulative application*
  1. Efficiency
     a) Efficiency of the regulatory framework (aggregate costs of a rule/policy < aggregate benefits of a rule/policy)
     b) Efficiency of the business/corporate decisions
  2. Fairness
     a) Procedural fairness
     b) Substantive fairness
  3. Accountability
     a) Information availability
     b) Explanation and justification of actions/decisions
     c) Opportunity to (dis)approve actions/decisions
     d) Consequences
- *No hierarchy*

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

7. Regulatory Suggestions

- *General overview:*
  - Approach:
    - Not rooted in communitarian/stakeholder theory nor creditors' bargain theory.
    - Not merely theoretical.
  - Enhanced protection of unsecured creditors and vulnerable (non-controlling) factions of unsecured creditors.
    - Clarity: focus on one (sub)faction of stakeholders
    - Practical approach
    - In line with the 3 insolvency values
    - Measures
      - Private measures
        - » Non-governance related measures
        - » Governance-related measures
      - Public measures

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

7. Regulatory Suggestions Cont'd

- *Private Measures*
  - Non-governance-related measure: trust mechanism
    - Public trust: enhancing ability to fund insolvency litigation
    - Trust accounts: cf. *Re Kayford* case
  - Governance-related measures:
    - Creditors' activism
    - Derivative actions for (unsecured) creditors
    - Reporting requirements of directors and office-holders (cf. *infra*)

Session Five – 13.30-15.00 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

7. Regulatory Suggestions Cont'd

- *Increased reporting requirements*

Prior to insolvency procedure	Corporate Rescue Procedure	Liquidation/bankruptcy procedure

• Determination which creditors might be vulnerable
• Seeking amicable agreement with creditors (if possible)
• Consideration *how* business decisions affect non-controlling creditors
• Creation of ring-fenced fund (*Re Kayford*-case) + justification
	• Actors:
	  • DIP/CVA/..: directors
	  • Judicial restructuring: directors/office-holder
	• Justification of business decisions (e.g. decision to leave classes (un)impaired)
	• Information regarding availability of remedies (if creditors dissatisfied)
	• Opportunity for unsecureds to offer alternative
		• Actors: liquidator/bankruptcy trustee
		• Examination of differential treatment between unsecureds (e.g. claims to swell asset pool such as preferences)
		• Information: claims against e.g. former directors
		• Justification of decisions taken during winding-up + impact on unsecured creditors
		• Information: availability of remedies (if creditors dissatisfied)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

7. Regulatory Suggestions Cont'd

- *Increased reporting requirements*
  - Hard law?
    - Not necessary? Assessment as part of *existing* directors' duties
    - Deterrent effect + risk-aversion
    - Economic/transaction costs
  - Soft law
    - More flexibility
    - Tailor-made solutions by directors/office-holders
    - Insolvency Governance Code?

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

7. Regulatory Suggestions Cont'd

- *Public measures*
  - Which?
    - One single public regulator (⇔ 4 RPBs (recognised prof. bodies) in the UK)
    - An Insolvency Ombudsman (e.g. ASIC – Australia)
      - More responsibilities (⇔ RPBs)
      - Easily accessible
      - Low (or no) costs for unsecured creditors
      - Reduces burden on courts
      - Enhancing accountability + fairness
  - Why?
    - Solving the remaining 'gaps' as regards private measures/enforcement

Session Five – 13.30-15.00 (continued)

8. Conclusion

- Analogy: shareholders (solvency) = unsecured creditors (insolvency)
- Risk of economic conflict: controlling v. non-controlling unsecured creditors (~ shareholder conflicts)
- Growing recognition (?) to protect 'vulnerable' factions of creditors
  - How?
    - Criteria to determine 'vulnerability' of creditors;
    - Regulatory suggestions:
      - Private: governance and non-governance related suggestions
      - Public: single regulator + insolvency ombudsman

INSOL 40 EUROPE
The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022
ACADEMIC FORUM INSOL Europe

"All animals are equal, but some animals are more equal than others."

(G. Orwell, *Animal Farm*)

Session Five – 13.30-15.00 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Relativism and Determination in the Restructuring Frameworks – New and Interim Financing –

Andreea Deli, PhD
Flavius-Iancu Motu, Judge

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Introduction

- Traditionally, when restructuring, **financing** is of the essence, thus a *measuring unit* of its success.
- But, is **financing** a *sine qua non*, altogether beneficial instrument devised to save the debtor's business?
- Our underlying assumption: *different interests* arise when the debtor in financial distress.
- The financing provider steps in because he/she/it *chooses to*, while the debtor and his/her/its creditors are already there, although *none of the latter really wanted to*.
- Interim financing must be "reasonable" and "necessary". No such conditions for the new financing.
- What if the financing is necessary, but *not reasonable*?

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

The Institutions Covered by the Analysis – A Theoretical (*Static*) Approach

- (Recital 66): "*The success of a restructuring plan often depends on whether financial assistance is extended to the debtor to support, firstly, the operation of the business during restructuring negotiations and, secondly, the implementation of the restructuring plan after its confirmation.*";
- (Recital 68): "*When interim financing is extended, the parties do not know whether the restructuring plan will be eventually confirmed or not. Therefore, Member States should not be required to limit the protection of interim finance to cases where the plan is adopted by creditors or confirmed by a judicial or administrative authority.*";
- (Recital 68) : "[...] *this Directive should not prevent Member States from introducing an ex ante control mechanism for interim financing.*";

Session Five – 13.30-15.00 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

The Institutions Covered by the Analysis – A Theoretical (*Static*) Approach

- (Recital 48): "*Confirmation is particularly necessary where*: […] *the restructuring plan contains provisions on new financing;* […]";
- (Recital 68): "*To avoid potential abuses, only financing that is reasonably and immediately necessary for the continued operation or survival of the debtor's business or the preservation or enhancement of the value of that business pending the confirmation of that plan should be protected.*";
- Art. 17 (1)(a): "*Member States shall ensure that new financing and interim financing are adequately protected. As a minimum, in the case of any subsequent insolvency of the debtor: new financing and interim financing shall not be declared void, voidable or unenforceable*";
- (Recital 68): "*However, encouraging new lenders to take the enhanced risk of investing in a viable debtor in financial difficulties could require further incentives such as, for example, giving such financing priority at least over unsecured claims in subsequent insolvency procedures.*";

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

The Institutions Covered by the Analysis – A Theoretical (*Static*) Approach

- Art. 17 (4): "*Member States may provide that grantors of new or interim financing are entitled to receive payment with priority in the context of subsequent insolvency procedures in relation to other creditors that would otherwise have superior or equal claims.*";
- Art. 6 (2) of the Directive requires the provision of an alternative scenario to the restructuring plan = Next-Best-Alternative Scenario ("**NBAS**").

- Our analysis focuses on the 'business core collateral' available for new funding, *i.e.*: core assets already encumbered by pre-existing security interests / assets involved in the core operational business to be encumbered by the new security interests created during the restructuring.

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Interim & new financing must be "reasonable" as to prevent a *game of reversed chances*

- It is difficult to determine the best financing solution for a distressed business so that it meets the *reasonability standard.*
- Certain criteria to be further identified:
- The "individualistic" interests of the financier may be *of a different nature* than the interests of: (i) the pre-existing secured / unsecured creditors; (ii) the debtor; (iv) the equity holders;
- Insufficient funds ⇒ useless sacrifice of the core-business collateral;
- Excessive financing ⇒ the costs of financing are not fairly backed by equivalent collateral; collateral is downgraded / loses its potential;
- The fairness of such financing may be assessed by: (i) a "forced" realization of the security; (ii) the profit margin of core-business collateral in place.
- *Vexata quaestio:* Is there a *standard model* of financing in restructuring frameworks?

Session Five – 13.30-15.00 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Rescue financing – rescue the debtor, rescue the business, rescue them both ?

- Who may be interested in financing the distressed business undergoing restructuring?
- The portrait of the financier in the restructuring frameworks: a *sophisticated investor* who holds significant experience in the techniques of the formal insolvency frameworks;
- The economic model used to examine a restructuring has two opposite outcomes: (i) *a justified salvation*; (ii) the *realism of failure*.
- => two analysis directions : (i) what is "obsolete" according to the market standards goes naturally into oblivion, if and because it does not evolve; (ii) where a business has the potential to grow but it does not, an investment "booster" may exponentially enhance its growth.
- => the opportunity to create a market for professional investors that act as funds providers in the restructuring proceedings. Corrective: such financiers should abide by rules that are clear, uniform, and verifiable by an unbiased, neutral observer.

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Relativity of successful restructuring: is it a chance for the debtor or for the business?

- Marketwise, the purpose of a restructuring should be the successful rescue of the business; (in other words, the market does not care whether the debtor survives or not, as long as the business survives);

- Just like relativity distorts the space and time, the rescue of the business may have different meanings, depending on the observer.

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Relativity of successful restructuring: is it a chance for the debtor or for the business?

a) Rescue the business, terminate the debtor (inspired by *Goodman International*)

- On the financial markets, an investor may choose to take the *short position* = the gain in this case results from the total losses of those who speculated on the growth thereof = zero sum game; Unlike the instruments specific to financial markets, the "short" position in a restructuring is unfortunately *invisible* for any other participant, except for the option holder.
- What if the financing is not extended, *ab initio*, with the intent to rescue, but to accelerate the failure, thus to facilitate the way for a hostile takeover? (*e.g.* lending with a debt/equity swap option)
- Similar to the *causa remota* in the insurance contracts, financing may be considered avoidable if, to a neutral, unbiased observer, it could never be recovered under the offered terms; (the insurance does not cover the self-inflicted risks).
- In the case of restructuring, the investor must act upon his/her/its intention to recover the investment and not aim at taking over with hostility a vulnerable, but still viable business.

Session Five – 13.30-15.00 (continued)

Relativity of successful restructuring: is it a chance for the debtor or for the business?

b) Rolling up the pre-restructuring debt (inspired by *Colt*)

- A pre-restructuring creditor playing *long*, with a twist: extending new financing subject to the pre-restructuring debt being rolled-up (included in the scope of the super-priority granted to the new financing provider);
- In this case, the *long* position is visible, but inevitable;
- In terms of avoidable transactions: (b) ➔ preference;
- First paradox: the new financier's priority is (and must be) "preferential" as an inducement;
- Second paradox: the "preferential priority" is created *ex lege.*

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

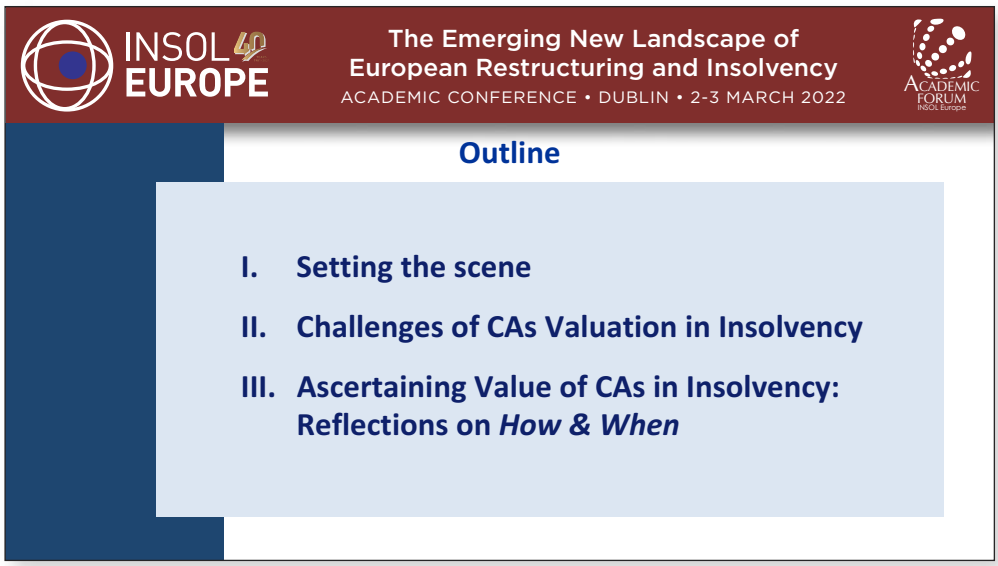
Conclusions

- Rescue financing is tremendously necessary in the restructuring frameworks;
- However, the mere enunciation of the *reasonableness* is not enough; it must be backed with *adequate criteria* for its determination, in order to ensure the predictability of safe restructurings;
- In the absence of such criteria, the potential clashes between the pre-restructuring secured creditors or the debtor itself, on one hand, and the interim / new financier, on the other hand, would, most probably, end up in the "victory" of the latter, thus denying the restructuring its very legitimacy;
- Uniform / harmonized rules should be adopted by the Member States, in terms of the avoidance actions with regard to such financing, to prevent the existence of "safe-harbor" jurisdictions;
- The financing provider's loan terms should be assessed in the light of the debtor's chances to revert to its pre-difficulty *status-quo*.

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

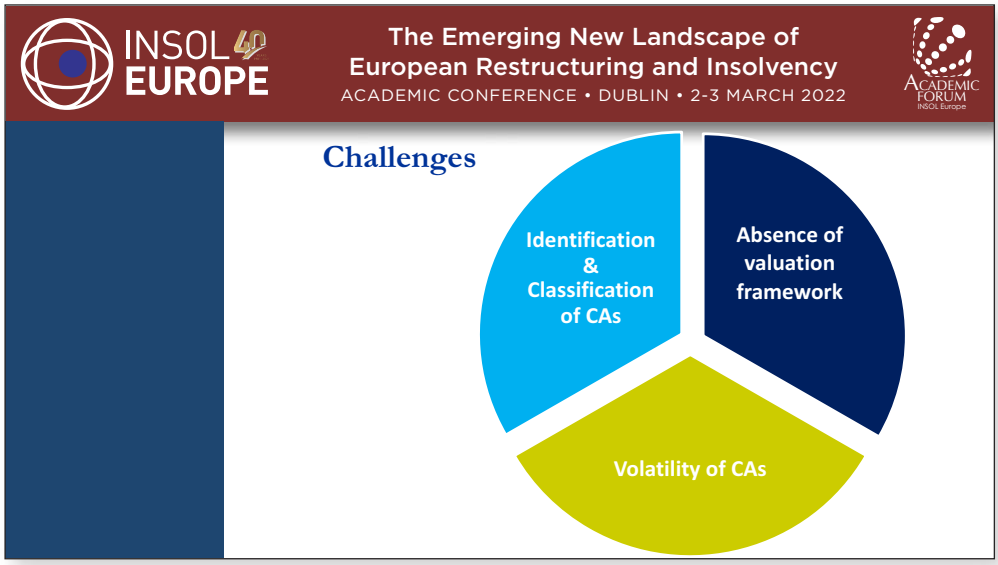
THANK YOU !

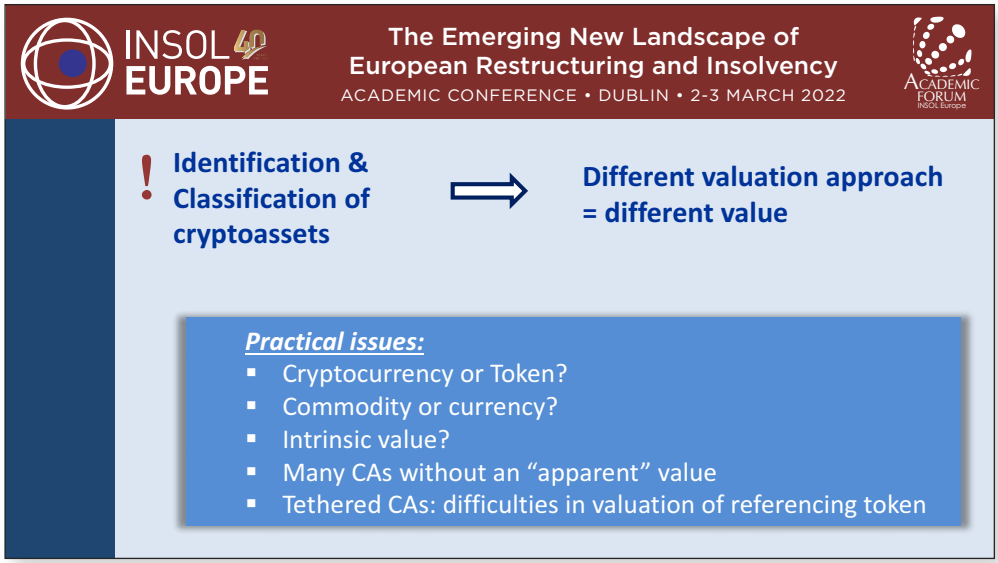
Session Five – 13.30-15.00 (continued)



Session Five – 13.30-15.00 (continued)

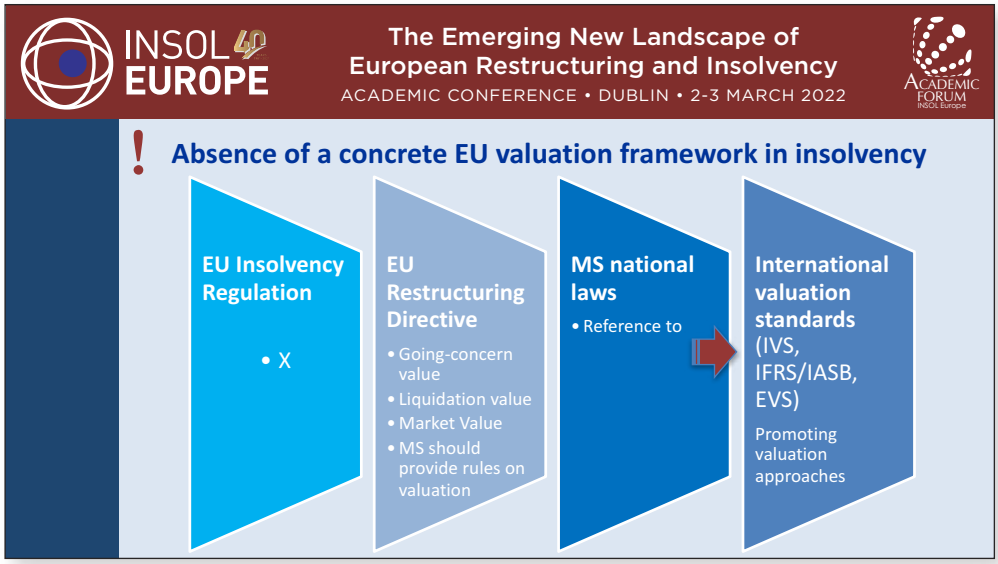
Session Five – 13.30-15.00 (continued)

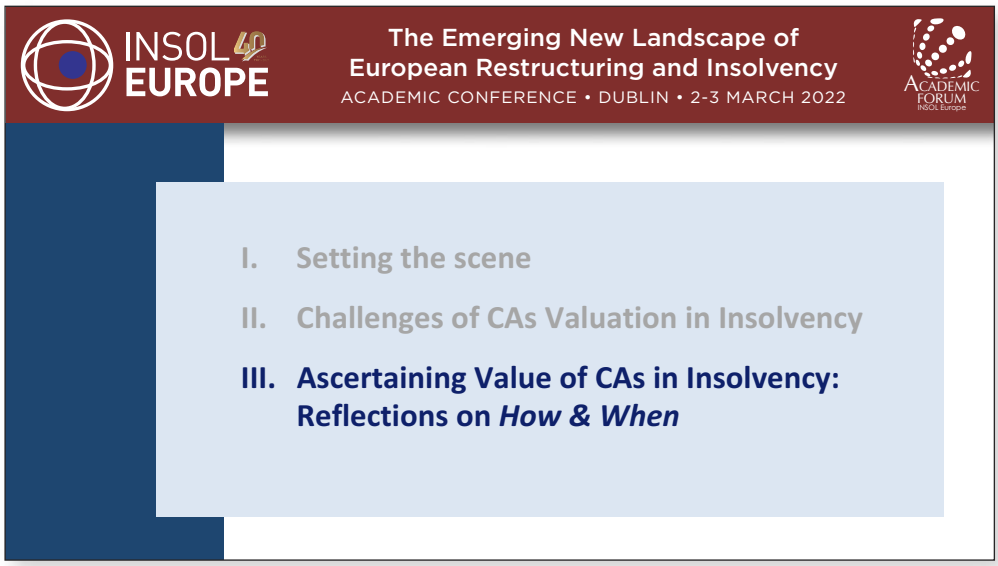




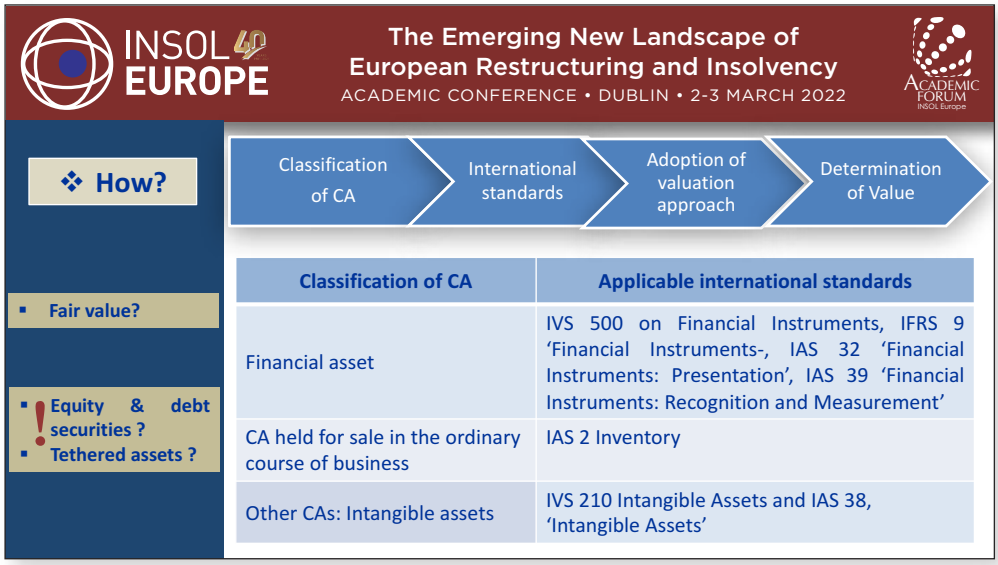
Cryptoassets	Value considerations
Cryptocurrencies	• Value linked to supply & demand, node count, production cost • Some without a market price
Stablecoins	Value based on the underlying external asset, e.g. fiat currency, gold
Security tokens	Value derived from the success of the entity or from an external, tradable asset
Utility tokens	• Value derived from the demand for the issuer's service/product • Meaningless resale value outside the platform
Tethered assets (NFTs, Wrapped & LP tokens)	• Valued as financial asset or based on the underlying asset • Fee earnings

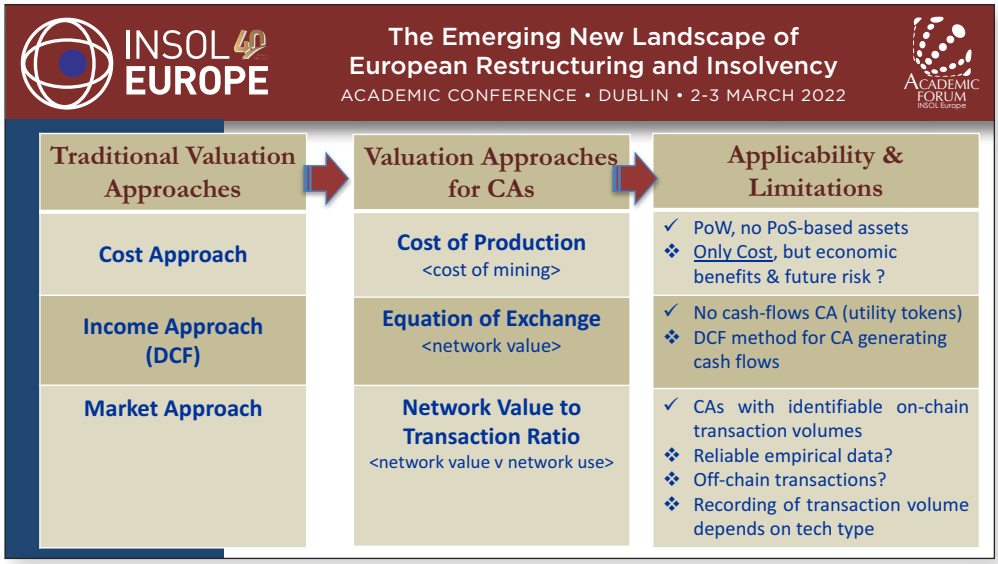
Session Five – 13.30-15.00 (continued)

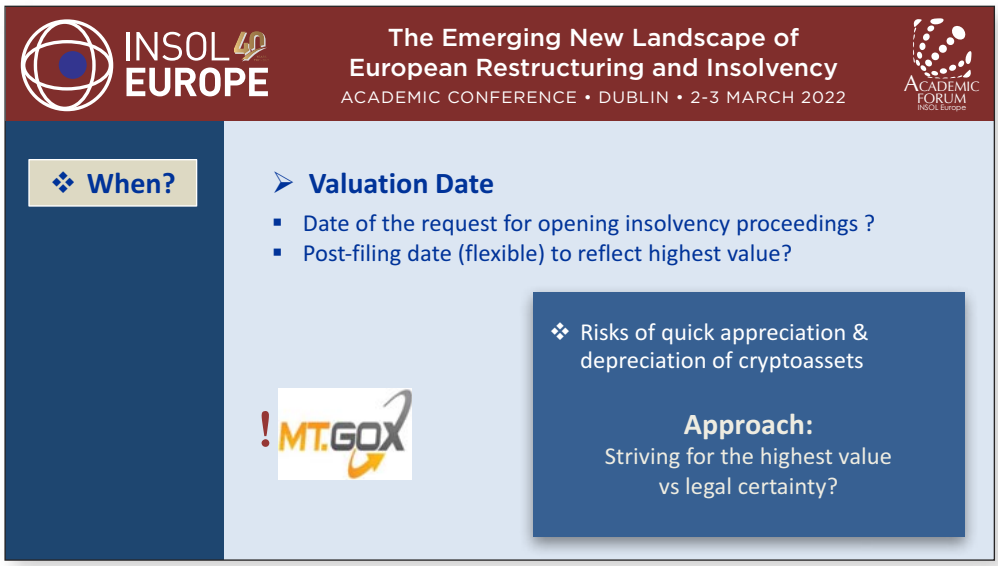




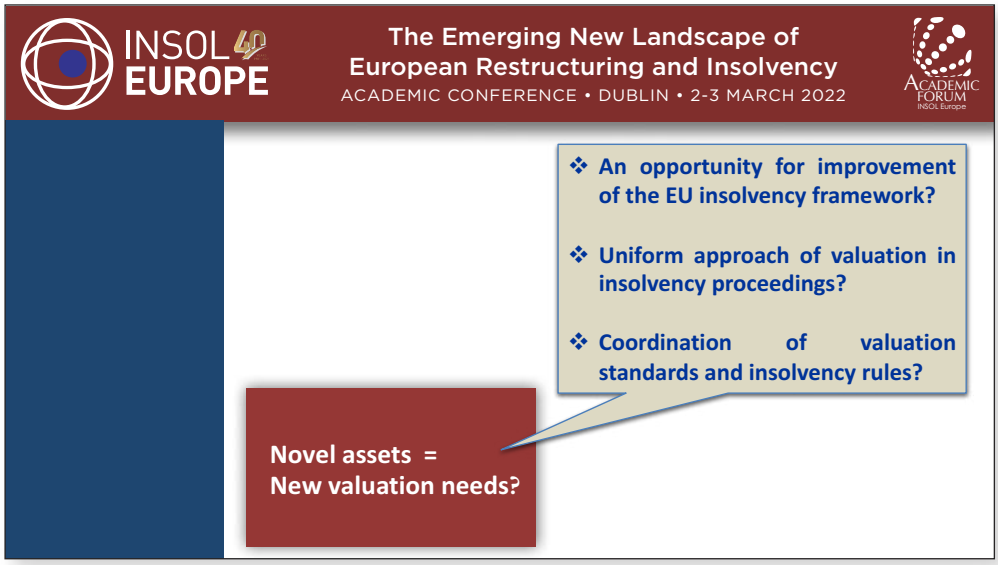
Session Five – 13.30-15.00 (continued)







Session Five – 13.30-15.00 (continued)



Edwin Coe Practitioners Forum – 15.15-16.15

Reinhard Bork / Michael Veder

EU Harmonisation of Transactions Avoidance Laws

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Overview

- **The project's aim**
- **The need for harmonisation**
- **The research project on harmonisation**
- **The way to harmonisation: a principle-based approach**
- **Fundamental decisions**
- **Challenges**
- **Details of our Model Law**

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

The project's aim

- **Elaborating a proposal for harmonising transactions avoidance laws in the EU Member States**
- **Set of rules which should be implemented in all national insolvency laws**
- **Legal certainty as to which transactions should (or should not) be challengeable in all Member States under the same conditions**

Edwin Coe Practitioners Forum – 15.15-16.15 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Need for Harmonisation

- **Transactions avoidance laws in Europe are diverse**
  - **as regards intensity**
  - **as regards details**
- **This hampers cross-border business, insolvency proceedings, and restructuring**
- **Art. 16 EIR is no solution**
- **No other elaborated proposals so far**
- **EC strives for harmonisation**

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Time frame

establishment of working group	November 2018	✔
questionnaire (28 pages, 122 questions) to members of working group	March 2019	✔
first conference (Amsterdam), discussing the questionnaire	9/10 May 2019	✔
national reports (25 out of 28)	1 December 2019	✔
second conference (Hamburg)	1-3 April 2020	-
draft proposal	March 2020	✔
third conference (Zoom)	April 2021	✔
proposal (final) to EC for internal use	May 2021	✔
impact assessments by national reporters	30 June 2021	✔
publication of the book by Intersentia	February 2022	✔

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Methodological Approach

- **All our deliberations are principle-based.**
- **We have therefore**
  - **elaborated the principles supporting and shaping transactions avoidance law**
  - **identified the topics to be addressed from a principle-based perspective**
  - **weighed and balanced relevant principles to find adequate solutions for every single topic.**

Edwin Coe Practitioners Forum – 15.15-16.15 (continued)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

PRINCIPLES OF TRANSACTIONS AVOIDANCE LAW

- **supporting principles**
  - **best possible satisfaction of the creditors' claims**
  - **equal treatment of creditors**
  - **collectivity**
  - **fixation**
  - **efficiency**
- **opposing principles**
  - **protection of trust**
  - **predictability (legal certainty)**
  - **proportionality**

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

Fundamental Decisions

- **This is an academic rather than a political exercise.**
- **That is why we have elaborated a Model Law, not a draft Directive.**
- **We were not dealing with advantages or disadvantages of national laws…**
- **… but rather trying to find recommendable solutions in the field of transactions avoidance law.**

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

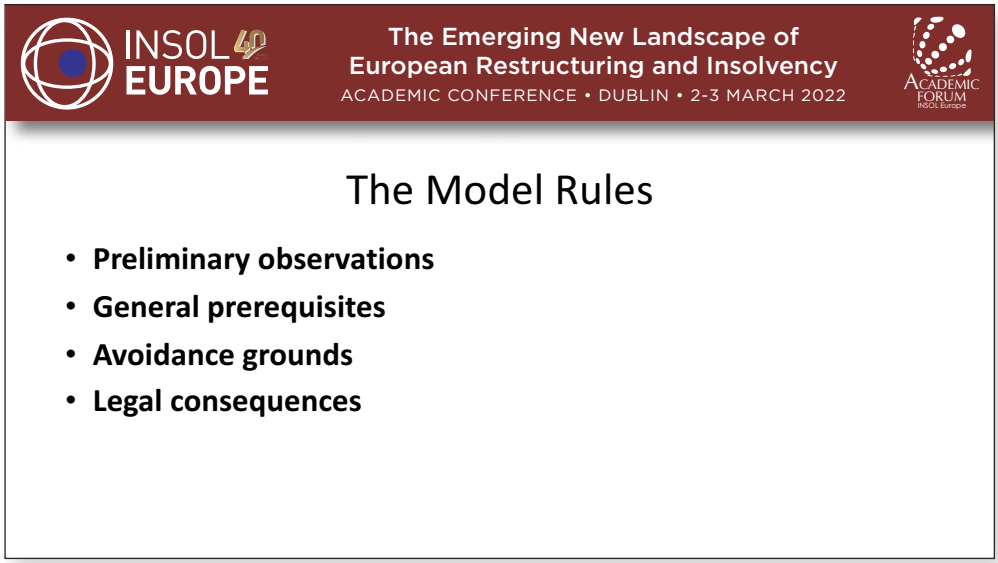
Fundamental Decisions

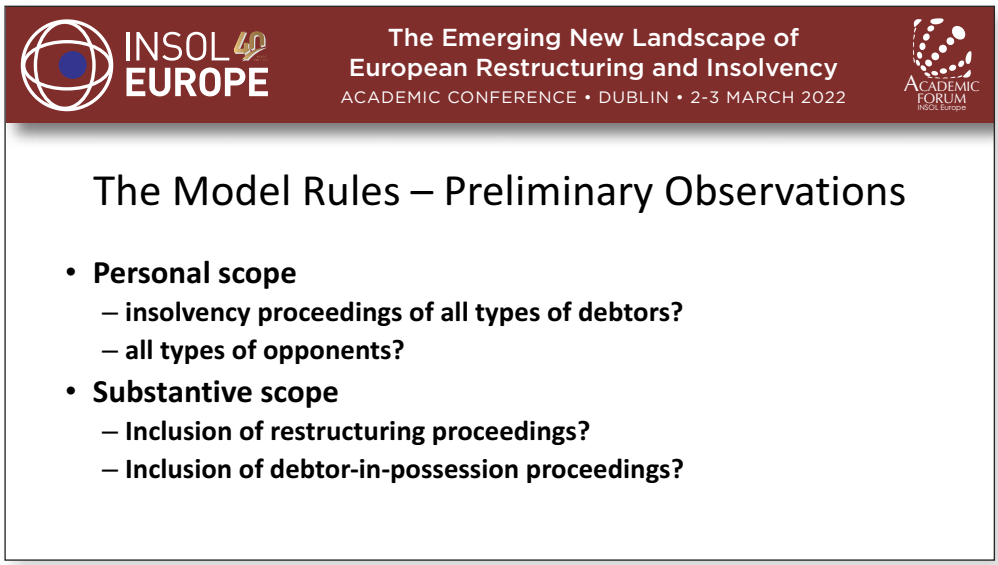
- **The proposal is restricted to transactions avoidance law.**
- **We have not addressed each and every detail (as regulated in some national laws).**
- **Our proposal aims at a "minimum harmonisation": what should (or should not) be challengeable in all Member States under the same conditions?**

  -> typical cases with relevance for the internal market

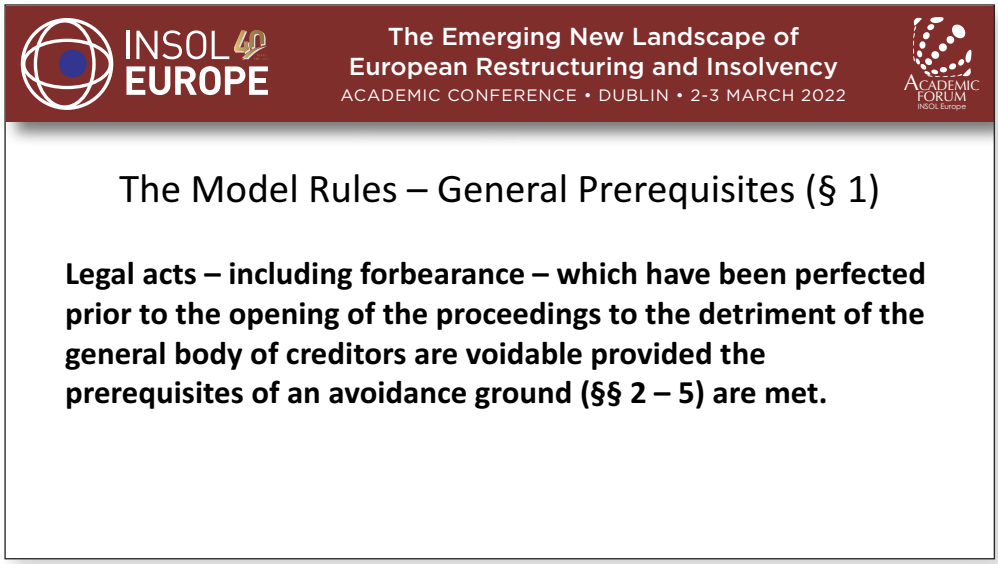
  -> no objections against stricter national laws

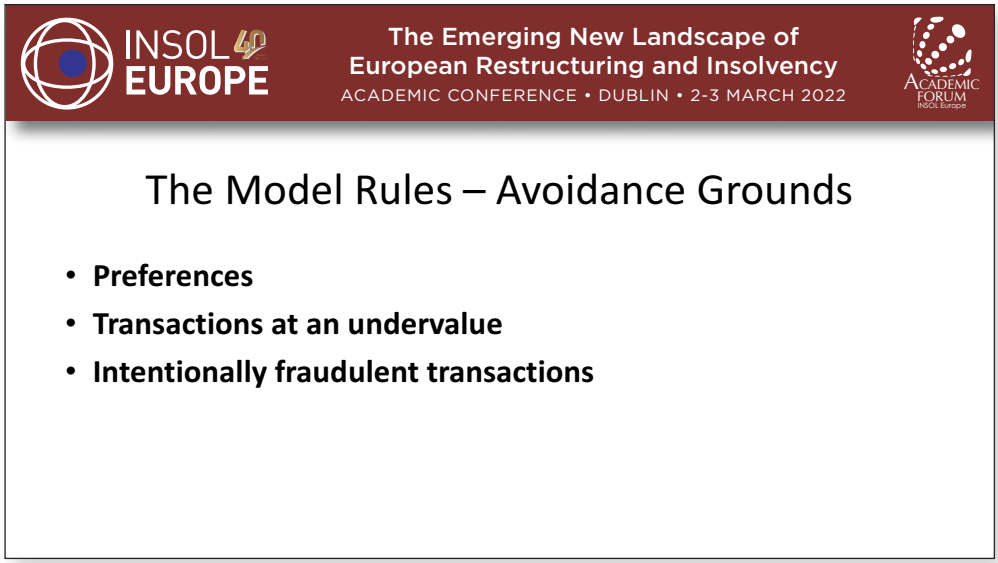
Edwin Coe Practitioners Forum – 15.15-16.15 (continued)

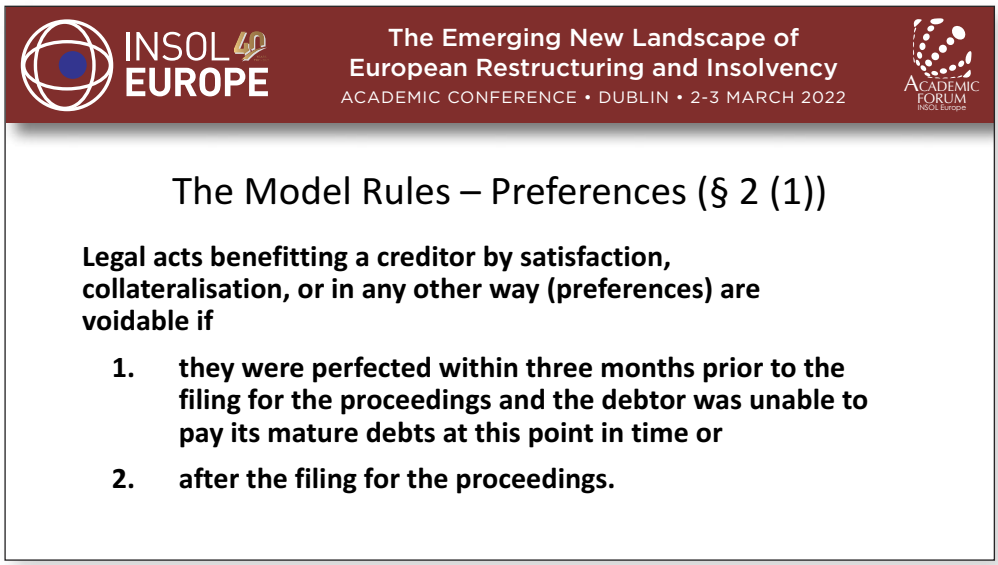




Edwin Coe Practitioners Forum – 15.15-16.15 (continued)







Edwin Coe Practitioners Forum – 15.15-16.15 (continued)

The Model Rules – Congruent Coverages (§ 2(2))

If a due claim of the creditor was satisfied or secured in the owed manner (congruent coverages), the legal act is only voidable if the prerequisites of paragraph 1 are met and the creditor knew, or should have known, the debtor's inability to pay debts or the filing for the proceedings. This knowledge shall be presumed if the creditor was a party closely related to the debtor.

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

The Model Rules – Exceptions(§ 3)

Not voidable as congruent coverages under § 2 paragraph 2 are:

1. **legal acts performed directly against fair consideration to the benefit of the estate;**

(…)

The Emerging New Landscape of European Restructuring and Insolvency
ACADEMIC CONFERENCE • DUBLIN • 2-3 MARCH 2022

The Model Rules – Legal Consequences (§ 7)

(1) The legal position resulting from the voidable legal act may not be invoked against the estate.

(2) The opponent is obliged to compensate the estate for the detriment caused by the voidable legal act.

(…)

Speaker Papers: Wednesday

Implementation of the 2019/1023 Directive in French pre-insolvency and insolvency law: the debtor-creditor juggle

Session One – Sarah Pople

The implementation of the 2019/1023 Directive into French law has helped French legal framework evolve in a direction that aims to rebalance debtor and creditor interests, whether it be during pre-insolvency and preventive procedures, or judicial insolvency proceedings.

French insolvency law provides particularly exemplary preventive legal framework. The implementation of the Directive has helped provide more efficiency for a debtor that uses these tools within the preventive procedures themselves, providing dissuasive measures for recalcitrant creditors. On the other hand, efficiency has gained ground by improving creditor security (in a legal and general sense of the term security) to allow any security given in the preventive proceedings to perdure if judicial proceedings follow, which was not the solution resulting from French Case law before implementation of the Directive.

In the case of a consensus in preventive proceedings, but not a unanimous one, French law provided for Accelerated safeguard and Financial Accelerated safeguard proceedings. The latter introduced in 2014 was reserved for creditors of a financial nature. Both remained legal instruments that were sparsely used, as certain criteria (notably concerning turnover, totals of balance sheet or number of employees) conditioned the possibility to use these insolvency tools. However, they played an important role in persuading parties to find an agreement in the preventive framework, in order to avoid a public collective proceeding that would have for effect to impose a largely agreed protocol ensuring the survival of the debtor company.

These tools have now merged into one, with the possibility for any company not hitting the criteria to ask to benefit from this procedure. In the redesign of the Accelerated safeguard procedure, this hybrid procedure has been remodelled to combine the best of preventive and judicial framework. However, in doing so and in order to check the boxes of the implementation of the EU Directive, the Accelerated safeguard procedure seems to have mutated into a perfect paradox. Previously regarded and used as a dissuasive tool for recalcitrant creditors to be subdued by collective proceedings to enforce the position of a majority, the procedure could now be used by creditors in a powerful position with regards to security or subordination agreements to force their conditions, and even possibly to expropriate shareholders. The collective nature of this procedure can even be called into question, as it would seem that the French legislator has opted to only include the creditors called to the preventive procedure in the subsequent Accelerated safeguard procedure.

The directive has also helped creditors in French judicial insolvency proceedings gain terrain in both enforcing their rights and their say in the direction of insolvency proceedings, as well as ensuring quicker procedural delays and neutralizing unrealistic debt-heavy plans that were instrumentalized to ensure a debtor's temporary survival at the cost of its creditors.

These changes further incite Director's to anticipate difficulties and use preventive framework in order to keep the upper hand on a debtor's future.

The Relatively Absolute Priority Rule in the Czech Preventive Restructuring Bill

Session One – Tomáš Richter

In the summer of 2021, the Czech Ministry of Justice presented its first draft of a bill implementing the EU Restructuring Directive 2019/1023 into Czech law (the "Implementation Bill"). In January 2022, following a round of intra-governmental comments, the Ministry of Justice submitted the draft Implementation Bill to the cabinet.

Rather than implementing the Directive into insolvency law proper, the Implementation Bill would take the form of a new stand-alone act, entitled the Act on Preventive Restructuring.

One of the Implementation Bill's chief novelties is the approach it proposes to take towards the position of equity in preventive restructurings.

Rather than adopting a strict absolute priority rule (which applies in reorganization in formal Czech insolvency proceedings under Act 182/2006), or attempting an experiment with so-called "relative priority", the Implementation Bill proposes to adopt what essentially is a codification of a market solution known in particular in the German restructuring practice, combined with a partial implant of a solution introduced in the 2019 reform of the US Bankruptcy Code's Chapter 11.

Under proposed Sections 28 to 30 of the Implementation Bill, the Czech restructuring courts would be able to cram a restructuring plan down on a dissenting unsecured debt class even if that class does not receive the full amount of its claims under the plan and even if shareholders' equity is not wiped out under the plan, provided that (i) all classes of debt junior to the dissenting class receive no payments under the plan, (ii) the dissenting class receives under the plan at least such cash payments in present value as would likely be distributed to it in case of a going-concern sale of the debtor's business in formal insolvency proceedings, (iii) the shareholders' shares are transferred into a "trust" by way of security for the debtor's obligation under the plan, (iv) the debtor company appoints new directors independent of the company and of parties related to it, (v) the debtor company appoints a new auditor independent of the company and of parties related to it, and (vi) the debtor company undertakes to make payments to the dissenting class for up to five years, or the total amount of the classes' claims (whichever is reached first) out of net profits earned by the company.

Half-jokingly, I refer to these rules as the "relatively absolute priority" - hence the paper's title.

The paper will describe the proposed rules and assess their ups and downs.

The role of the shareholders in the restructuring plans in the Spanish project of implementation of the 2019/1023 Directive

Session One – José Carlos González Vázquez

The paper will analyze the existing mechanisms or those that are planned to be introduced in Spanish law to solve the problem of the shareholders holdout in the new restructuring framework, analyzing how will be protected the legitimate interests of the shareholder and the role and duties of directors in the vicinity of insolvency in the cases that the restructuring plans include corporate measures to be adopted by the shareholders (for example, a debt-equity swap).

Since 2015, Spanish law represents a relevant singularity within the European jurisdictions in terms of legal measures to face the risk of a hypothetical holdout by shareholders of a refinancing agreement or financial restructuring plan, reducing the majorities and the legal requirements to adopt a capital increase agreement through a debt-equity swap, seeking to protect those creditors who capitalize their credits from certain possible adverse legal effects (subordination of their credits after capitalization, consideration as de facto directors of the company, etc. .) and, above all, allowing the eventual subsequent bankruptcy to be classified as "guilty", if the directors or shareholders of the company obstructed a refinancing agreement and, as a consequence, forcing the declaration of bankruptcy of the insolvent company. This qualification ("guilty bankruptcy"), under Spanish law, entails the possibility of an eventual liability of the shareholders to cover the insolvency deficit with their personal assets and without limits.

For its part, the current project for the implementation of the 2019/1023 Directive makes it possible to extend the effectiveness of a restructuring plan to shareholders, even if they have voted against it (cross-class cramdown), while maintaining at the same time the rest of the aforementioned legal regime introduced in 2015.

The paper aims to analyze the justification, rationale, and practical effects of this regulation, as a whole, comparing it with the legislative options adopted by other European countries (UK, Holland, German, etc.) to, where appropriate, propose some legal reforms that provide adequate protection to the interests of shareholders in a fair balance with that of corporate creditors.

Natural person ltd. : Towards a unified discharge regime for entrepreneurs and consumers

Session Two – Gauthier Vandenbossche

Directive (EU) 2019/1023 on restructuring and insolvency requires that Member States ensure honest insolvent entrepreneurs access to an automatic full discharge of debt after a maximum period of three years. This allows them a second chance. The focus of this paper is the option for Member States to extend the application of the discharge procedures to insolvent natural persons who are not entrepreneurs. Such a cautious approach towards consumer insolvency is problematic.

The thesis of this article is that Member States should apply the same principles on discharge to all natural persons, regardless of their entrepreneurial status. Firstly, in promoting a generous discharge limited to entrepreneurs, defining the concept of entrepreneur is a major difficulty. An illustration of the complex issues in this regard is given by the ambiguous position of company directors in the Directive and in different Member States. This became even more difficult with changing patterns of employment (cf. platform economy). Subsequently, the historical trader/non-trader distinction, based on the economic activity of natural persons, results in separate commercial and consumer insolvency proceedings.

As established by a European Commission report, in 20% of the Member States entrepreneurs have access to business insolvency proceedings only. As a result of this distinction, traders are often offered a swift discharge following bankruptcy, while for consumers long-term repayment plans serve as a primary remedy in debt settlement procedures. However, as stated above, the distinction between entrepreneurs and other natural persons should be questioned.

In fact, the position of individual entrepreneurs is – in current times – more similar to that of a consumer. Hence, based on national insolvency laws and the literature, this article advocates that the goal of providing a second chance is as relevant to consumer debtors as to entrepreneurs. This implies a need for a unified discharge regime for all natural persons.

An apparent justification to provide consumers with a different discharge regime than entrepreneurs is lacking. As the World Bank Report on the Treatment of the Insolvency of Natural Persons indicates, insolvent natural persons face a shared core of key issues. Predominantly, whether or not business activity is a part of the context of the insolvency, the debtor's unlimited personal liability is at stage in both cases.

Therefore, rehabilitation should be a primary purpose of an insolvency regime for natural persons, both from a humanitarian and an economic perspective. Here, discharge is the most effective way in which the debtor can resume productive activity. Consequently, the non-binding provision in the Directive to extend the application of the discharge principles to consumers is not sufficient.

Portuguese transposition of the Directive (EU) 2019/1023 – where it fell short regarding personal insolvency

Session Two – Ana Filipa Conceição, Catarina Frade, Fernanda Jesus

The Directive 2019/1023 offers a world of possibilities regarding personal insolvency, allowing the national legislators to create a more effective and balanced discharge mechanism. Unfortunately, the Portuguese transposition law proposal fell short since it is insufficient to grant a true fresh start to insolvent consumers and entrepreneurs.

Since 2004, the Portuguese Bankruptcy Code (CIRE) offers a discharge mechanism, presented as an alternative to a payment plan. Consumers, entrepreneurs, personal guarantors, and owners of insolvent companies have found a way out in the exoneração do passivo restante mechanism, one that became crucial in 2011, when the number of personal insolvencies have surpassed for the first time the number of company insolvencies. This mechanism is reserved for those insolvents who comply with the legal access provisions and surrender all their assets, including all their income for a five-year period. In the end, the debtor will benefit from discharge, unless he/she acted dishonestly or in bad faith. The Portuguese discharge mechanism was met with some skepticism by courts, which explains the large amounts of jurisprudence, especially in the early years. The available statistics show that this mechanism was seen as the only answer for most personal insolvencies and most debtors fulfilled their duties and obtained the discharge. However, the credit recovery percentages were very low, suggesting that the five-year probation period is long and ineffective for both creditors and debtors.

The transposition proposal lowers the probation period from five to three years, in line with the maximum duration foreseen in article 21 of the Directive and admits the extension of the three-year probation period in case of breaching of duties by the debtor, as stated in article 23 of the Directive. The proposal also includes the possibility of additional liquidation of assets acquired during the probation period, besides small operational adjustments to the proceedings.

In our opinion, the proposal was a missed opportunity to evaluate and reform the discharge mechanism of CIRE and to turn it into a straight discharge that allows for a real fresh start:

- the remaining of non-discharge of tax claims;
- the maintenance of a probation period for debtors without any viable income prospects or seizable assets;
- the unavailability of incentives to more committed debtors
- the lack of solutions to induce debt restructuring and timely insolvency filling
- the inexistence of a sound evaluation of CIRE's enforcement regarding the duration or the need for a probation period

We will try to sustain our opinion by showing some empirical findings resulting from interviews carried out with debtors, insolvency practitioners and other stakeholders.

Reconsidering Fairness for Vulnerable and Involuntary Stakeholders in Insolvency and Restructuring

Session Two – Jennifer L. L. Gant

The last couple of years have put the world's methods for dealing with acute and sudden financial distress under a microscope. Even at the time of writing, it is still unclear what might happen once the world goes back to 'normal' and all temporary measures have been withdrawn. The effect that the Pandemic has had on small businesses and individuals has been particularly acute. It could be we are at a turning point in how we should consider how to approach fairness in insolvency and restructuring, which may call for a new theoretical paradigm.

A theoretical framework that considers the choices of all stakeholders affected by the decisions of a corporate entity is worth exploring in these uncertain and changing times, before things begin to solidify into a new normal. Law and economics considerations, and by extension the Jacksonian adherence to creditor wealth maximisation as the underpinning rational for insolvency procedures, is exclusionary. It depends on legal ties connected to the law of contract. It does not allow for a balancing of the vulnerabilities caused by involuntary parties and information asymmetries inherent in processes instigated at the behest of a large creditor or powerful creditor. A socio-legal perspective, however, allows for an analysis of current legal structures in such a way that is directly linked with the social situation to which the law applies, thereby allowing for a focus on the impact on stakeholders who wield less power or who may be involuntary parties to an insolvency and unable to adjust their level of risk accordingly. These involuntary creditors may include environmental and tort claimants as well as other third parties.

Martha Fineman's vulnerability theory provides a potential theoretical framework within which these conflicting areas can be viewed and balanced. Although Fineman's theory was constructed with the very human dependencies associated with social and cultural discrimination, with some adjustment it can also provide a new lens through which to view legitimately vulnerable stakeholders to a corporate insolvency. Equality may even be an unjust measure when it is applied to 'situations of inescapable or inevitable inequality where differing levels of authority and power are appropriate' such as in an employer/employee relationship. Extending this to insolvency situations, it can serve to recalibrate fairness between the clearly differential power structure among the various stakeholders due to the rights attached to security and regulatory priorities where applicable.

This paper and presentation will explore the potential that Fineman's vulnerability theory may have for reframing the way that policy makers and legislators (and academics) look at insolvency and restructuring frameworks with a view to opening the discourse to encourage a reconsider our approach in line with the shifts currently occurring in the global economy.

Cross Border Recognition of Corporate Restructuring Arrangements: Reflections on the Preventive Restructuring Directive 1023/2019, national restructuring frameworks and the EIR Recast 2015/848

Gabriel Moss Memorial Lecture – Irene Lynch Fannon

COMI as a concept embedded in the original Insolvency Regulation of 2000 is central to the location of insolvency proceedings and consequent recognition of judgements emanating from the jurisdiction where the COMI is situated. This was considered in detail by Gabriel Moss and Ian Fletcher in the early days of the Insolvency Regulation and the lecture will being with a reflection on their early scholarship. Moss, Fletcher and Isaacs, The EC Regulation on Insolvency Proceeding (OUP, 3rd Edition 2016). From there the lecture will consider the development of cross border European restructuring post financial crisis (2008), focussing on English Schemes of Arrangement (Payne J. Schemes of Arrangement CUP, second Edition forthcoming).

The lecture will then consider the PRD (due to be implemented by member states in June 2022) which provides a choice to include restructuring processes in the EIR or not, raising questions regarding how judgements are recognised and enforced, specifically in the context of restructuring. This will lead to a consideration of the Norwegian Air case and the interpretation of COMI as regards groups including a consideration of the intersection between national laws on restructuring and groups and the EIR Recast. The conclusion will reflect on effective recognition for cross border restructurings under the EIR, including the Norwegian Air 'add-on,' and under 'the London approach'.

Speaker Papers: Thursday

Sustainable liquidation: pluralism of interests in insolvency proceedings

Session Three – Jessie Pool

The emerging field of sustainability is one of the most topical areas of law, especially in light of the convergence of societal, environmental and economic crisis the world is facing. In particular in the area of company law, balancing the interests of shareholders (i.e. maximizing profits) and the interests of other stakeholders (e.g. employees, the environment or other societal interests) to promote sustainability has been subject of concern. The need to reform the legal system to promote the interests of all stakeholders has become apparent.

The balancing act between conflicting interests of stakeholders is challenging, even more so in insolvency proceedings. Traditionally, the purpose of insolvency proceedings is to maximize value for creditors. Bankruptcy trustees, therefore, are expected to achieve the highest possible yield at the lowest possible cost. Consequently, legal systems seem to discourage bankruptcy trustees to take other interests into account, because this usually impedes value maximalization. Recently, however, bankruptcy trustees are increasingly being confronted with obligations that do not focus on merely maximizing value but also on promoting societal interests, such as cleaning up hazardous waste sites or combatting fraud. Despite these obligations, the traditional purpose of insolvency proceedings has remained unchanged.

As societal interests become more important and more diverse, the question arises how bankruptcy trustees should balance the interests of all stakeholders in insolvency procedures. In this presentation, the speaker will provide insight in how bankruptcy trustees cope with the pluralism of interests in insolvency proceedings. She will give insight in potential conflicting interests in insolvency proceedings. Furthermore, she will argue how bankruptcy trustees should balance the interests of all stakeholders in insolvency procedures in order to promote sustainable liquidation. The presentation will shed light on what fundamental changes in the legal system may be deemed necessary in the near future to promote sustainable liquidation.

Preventive Restructuring Frameworks and the Separate Domain of Cross-Border Restructuring Law

Session Three – Ioannis Bazinas

The terms 'insolvency' and 'restructuring' law are nowadays very frequently used in colloquial conjunction to refer to a single set of legal rules that deal with the problem of financial distress and, in particular, the relationship between a debtor and its creditors. This view describes insolvency and restructuring as merely different sides of the same coin; both sets of legal rules deal with the problem of financial distress but, unlike insolvency, which usually leads to the liquidation of the debtor's business, restructuring aims at enabling the debtor to continue trading as a going concern, by essentially selling the business back to its creditors. This view however is misleading. Much of the confusion characterizing the current debate can be attributed to an insistence to focus on "proceedings" instead of the underlying legal rules. Nevertheless, a view that relies on the outcome of proceedings as the distinguishing factor between insolvency and restructuring misses much of the nuance of the underlying function of legal rules, especially rules of restructuring law.

From an economic perspective, insolvency law is primarily targeted at addressing a collective action problem between a firm's creditors after the onset of financial distress. Restructuring law fundamentally has a different aim, namely, to facilitate efficient bargaining between creditors, by providing a framework that addresses holdout and holdup concerns. Differently put, the fundamental rules of insolvency aim to achieve an efficient outcome due to a failure of private bargaining, whereas restructuring rules seek to incentivize actual private bargaining. Even though a proceeding may actually include both types of rules, this distinction is fundamental, and has important implications for the cross-border setting. Cross-border insolvency is preoccupied with the recognition of proceedings; namely ensuring that the consequences of the judgment commencing proceedings, especially the automatic stay and the appointment of an insolvency practitioner, are recognized in every jurisdiction, where the debtor has assets. In a cross-border restructuring on the other hand, the most important issue that arises is the recognition of the outcome of proceedings, namely the restructuring plan, in every jurisdiction, where creditors may be located. Thus, the dichotomy between insolvency and restructuring law is translated as the distinction between recognition of proceedings and recognition of plans.

This theoretical distinction is valuable for conceptualizing the cross-border issues that the new restructuring frameworks present. As this article will argue, this distinction does not suggest that preventive restructuring frameworks are contractual arrangements or should be treated as such from a private international law perspective. Since the fundamental issue that these frameworks present is the recognition of restructuring plans, it will be submitted that this can be achieved through targeted rules of judgment recognition. The EIR contains such a rule, which despite being tied to an overall framework of recognition of proceedings, can ensure that the new preventive restructuring plans can enjoy recognition throughout the EU. In this context, the primary utility of the new Directive is that it encourages the harmonization of national rules on the adoption of restructuring plans, especially aspects that relate to minority creditor protection. In doing so, it removes any obstacles that could potentially be raised against the automatic recognition that is envisaged by the EIR. Conceptually, the Directive serves as proof of how liberal rules of private international law can encourage substantive harmonization and convergence of legal fields across Member States.

Harmonising Restructuring Frameworks: Top-Down, Bottom-Up, or Both?

Session Three – David C Ehmke, Eugenio Vaccari

This presentation focuses on the harmonisation narrative of the EU. It focuses on the analysis of alternative approaches, notably top-down regulation and bottom-up competition, geared towards supporting the convergence of insolvency and restructuring laws across the Member States.

The PRD gives Member States a high degree of flexibility when implementing its rules. It merely sets minimum standards and leaves important definitions, such as the "likelihood of insolvency", to the EU Member States' discretion. Effectively, it is unclear whether the PRD promotes mostly watered-down restructuring procedures with high entry barriers, or procedures which outpace the debtor- and restructuring-friendly nature of the U.S. Chapter 11 procedure.

This flexibility may be perceived as detracting from the original purpose of having a harmonised restructuring framework across EU Member States. It may result in arbitrage between its members, a risk further enhanced by the state-specific measures introduced in the wake of the COVID-19 pandemic. However, while this flexibility could have led many European countries with a rather traditional insolvency framework to thwart their reforms and the restructuring-friendly nature of the directive, a preliminary state-by-state comparison suggests that the majority of the EU Member States have fully embraced this restructuring-friendly culture.

The authors of this presentation build on collaborative research carried out by themselves and the other members of the YANIL board to assess how the idea of harmonisation by top-down regulation interlinks with bottom-up national solutions and how possibly the COVID-19 pandemic might have influenced such development. To showcase our findings, we will analyse the reforms introduced in Germany (SanInsFoG/StaRUG) and the United Kingdom (Corporate Insolvency and Governance Act 2020 and The Administration Regulations 2021). While the U.K. is no longer compelled to follow the EU harmonisation agenda, it is a proper comparator because it is certainly influenced by competition and convergence trends in the European restructuring framework.

This presentation assesses the degree of uniformity and harmonisation achieved in Germany and the U.K. with reference to selected key innovations of the PRD, namely revised entry criteria; creditors and shareholder's involvement in the procedure; automatic stay on executory actions; treatment of executory contracts; voting thresholds; and cross-class cram-down provisions. This analysis will discuss the practical meaning of the notion of harmonisation, and propose best practices for future harmonisation efforts in other areas of insolvency law, such as claw-back actions.

Preferential Treatment of State Aid Recovery Claims in Insolvency Proceedings and Preventive Restructuring Frameworks

Session Four – Walter Nijnens

If EU Member States unlawfully award State aid to businesses, they are normally required by EU law to remedy this. Recovering the aid may, however, result in those businesses' facing financial difficulties. If these financial difficulties lead to there being a likelihood of insolvency for a debtor, preventive restructuring frameworks could perhaps be used to restructure this debtor's liabilities. A debtor might, however, also become insolvent due to the recovery claim. In this scenario, regular insolvency proceedings, either in the form of liquidation or rescue/restructuring proceedings, have to be commenced.

If a debtor intends to restructure the Member State's recovery claim in preventive restructuring frameworks or if such a claim contributes to the debtor's becoming insolvent, EU State aid law and EU restructuring/insolvency law apply simultaneously alongside national rules. It is, however, apparent that these fields of law sometimes have completely opposite aims. Under EU State aid law, Member States are obligated to restore the status which existed before the aid was awarded (status quo ante). To achieve this, they have to pursue their claim, if necessary, in insolvency proceedings. If the status quo ante cannot be restored, businesses have to be removed from the market, i.e. liquidated. EU insolvency and restructuring law, on the other hand, have as (one of) their goal(s) to enable businesses to be rescued.

This presentation will first show when, according to EU law, State aid should be recovered and how this can be done. It will subsequently focus on the question whether EU law makes it necessary for the recovery claim to receive preferential treatment in insolvency proceedings and preventive restructuring frameworks.

A New Cross-Border Framework for Restructuring Plan Proceedings

Session Four – Stephan Madaus

The Restructuring Directive requires Member States to provide for a 'Preventive Restructuring Framework' (Art. 4 to 19) in order to improve and harmonise national restructuring laws and their effects. The text of the Restructuring Directive does not specifically address the issue of cross-border effects of such a framework. More specifically, the Restructuring Directive does not mandate procedural options in a national preventive restructuring framework to be designed in a way that enables Member States to add them to Annex A of the EIR 2015. Recital 13 of the Restructuring Directive explains that, although this Directive does not require that procedures within its scope fulfil all the conditions for notification under that Annex, it aims to facilitate the cross-border recognition of those procedures and the recognition and enforceability of judgments. The question is how this is to be achieved?

The Restructuring Directive invites Member States to provide for court procedures that are fully compatible with the EIR 2015 and consequently added to Annex A for cross-border recognition and enforceability, but it does not require such an implementation. If Member States decide to provide for a different procedural design, however, the Restructuring Directive does neither indicate that the Brussels Regulation should apply and secure the aspired facilitated cross-border efficiency nor does it exclude the application of the Brussels Regulation. It only provides for a limited stay in case of a recent COMI shift. Member States are left with a legislative choice where only one option seems principally clear, while the other is not.

This paper aims to provide guidance by, first, analysing the benefits and shortcomings of applying the EIR 2015, the Brussels Regulation or the national cross-border laws to preventive restructuring cases. Second, the paper outlines the minimal content and guiding principles of a new cross-border framework for preventive restructuring proceedings, which could be introduced by designing a separate Regulation or by adding a separate chapter to the EIR in the next recast.

Insolvency Law: Quo Vadis? About the Regulatory Protection of Non-Controlling Unsecured Creditors prior to and during Insolvency Procedures

Session Five – Dennis Cardinaels

After the financial crisis in 2008, a lot of scholarly attention has focused on corporate governance and the potential economic conflicts between shareholders and directors on the one hand and between majority and minority shareholders on the other hand. Whether any similar conflicts between unsecured creditors and directors/office-holders one the one hand and between majority v. minority unsecured creditors on the other hand exist, has only been given scant (or even no) attention in insolvency governance. This might surprise given the stark analogy that exists between corporate solvency and insolvency governance.

Namely, once a debtor-company is on the brink of insolvency, unsecured creditors take over the economic position as residual risk bearers formerly (during the company's solvency) held by shareholders. In this regard, case-law in both the UK and Belgium clearly shows that between unsecured creditors (during the debtor's insolvency) similar problems akin to the 'majority' v. 'minority' problem between shareholders (during the debtor's solvency) may exist. This means that there could thus be occasions whereby some factions of unsecured creditors might attempt to opportunistically exploit their majority or controlling position at the expense of other weaker or non-controlling factions of unsecured creditors.

In this regard, the recent EU Restructuring Directive 2019 also acknowledged the need to protect vulnerable factions of creditors. The creation of different classes of creditors and an adjusted directors' duty is, subject to a 5-year review, believed (or hoped) to achieve this protection.

Nonetheless, it is questionable whether the creation of classes (and an adjusted director's duty) will be sufficient to adequately enhance the protection of unsecured creditors. Additionally, the directive arguably leaves many questions as regards the protection of vulnerable unsecured creditors unanswered. Namely, how will the vulnerability of unsecured creditors be assessed and by whom? What should the regulatory protection of (vulnerable factions of) unsecured creditors be if further protection is deemed necessary? And what should the role of directors/office-holders be in this regard?

In order to address these issues, my paper which is based on my doctoral research will focus on how vulnerability of unsecured creditors ought to be determined. After having examined this, the currently still existing legal and economic challenges that non-controlling unsecured creditors risk to endure pursuant to the regulatory framework at present will be elaborated on. After having done so, my paper will assess the insolvency values (i.e. efficiency, fairness and accountability) that are critical to enhancing the regulatory framework for unsecured creditors in order to end with several recommendations both from a non-governance and governance perspective. As part of the governance-related suggestions, a further distinction was made between private and public enforcement suggestions. Critically, all the recommendations were measured against and based upon the aforementioned insolvency values.

Relativism and Determination in the Restructuring Frameworks – New and Interim Financing

Session Five – Andreea Deli-Diaconescu, Flavius-Iancu Motu

Directive 2019/2013 awards both interim financing and new financing the benefit of not subsequently being avoided and exempts their grantors from civil, administrative or criminal liability, on the grounds that such financing is detrimental to the creditors, unless other additional grounds laid down by national law are present.

Since the debtor is usually in no position to offer unencumbered assets to the potential grantors of interim and / or new financing for the creation of new security interests, such grantors will benefit from the statutory super-priority, while the existing secured creditors would bear the risk of their collateral's decrease in value.

In order to determine the fair and necessary amount of financing, one should use: (i) a static criterion, i.e. the value of the business core assets; (ii) the profit margin of the business core assets, subject to the statutory super-priority.

A grantor of new finance may gain leverage and speculate the debtor's vulnerable position, going "short" or "long", depending on the value of the encumbered business core assets or, respectively, on their profit margin.

The grounds for avoiding any unreasonable financing in subsequent insolvency proceedings should be harmonized in the Member States in order to avoid forum shopping and safe-harbour jurisdictions when choosing the law applicable to interim / new financing.

Valuation of Crypto-assets in Insolvency Proceedings: An EU perspective

Session Five – Theodora Kostoula

How and when to determine the value of assets in insolvency proceedings when the value is not easily established? This question becomes more topical with the advent of distributed ledger technology (DLT) and the increasing number of crypto-assets. As many of them do not have an "apparent" value that may be readily established, for instance, through a secondary market, it is not always clear how they derive their value. This presents significant challenges for their proper valuation in the context of insolvency proceedings and requires certain attention to efficiently confront the implications on the determination of the retrievable amount. The identification and classification of crypto-assets, their highly volatile nature, and the absence of a concrete valuation framework relevant for insolvency proceedings in the EU, may affect the assessment of claims involving crypto-assets.

This presentation sets the scene by briefly exploring the crypto-assets world and their technological context. It then outlines the main challenges related to the valuation of crypto-assets in the context of the EU insolvency proceedings and seeks to reflect on the proper valuation approach and the choice of the valuation date. Given the silence of the EU insolvency framework as to the methods of and timing for valuation, it explores the valuation approaches, as advanced by the international standards (IVS, IFRS and IASB), and often by national laws and case-law. It suggests their use in insolvency proceedings, assesses their potential applicability to this specific asset class and considers possible adjustments tailored for crypto-assets, in accordance with their classification and the rights associated. The analysis continues with the consideration of the appropriate timing for valuation in the insolvency context. Due to the high volatility and uncertainty surrounding the value of many crypto-assets, the choice of the valuation date may be crucial for the recovery of the value of the asset and the equal treatment of creditors.

Besides exposing the valuation-related challenges and offering guidance in the valuation of crypto-assets in insolvency proceedings, this presentation aspires to pave the way for a concrete consideration of common standards and approaches of asset valuation in insolvency.

Model Law on Transactions Avoidance Law

The Edwin Coe Practitioners Forum – Reinhard Bork, Michael Veder

Transactions Avoidance

§ 1: General prerequisites

Legal acts – including forbearance – which have been perfected prior to the opening of the proceedings to the detriment of the general body of creditors are voidable provided the prerequisites of an avoidance ground (§§ 2 – 5) are met.

§ 2: Preferences

(1) 1Legal acts benefitting a creditor by satisfaction, collateralisation, or in any other way (preferences) are voidable if they were perfected

1. within three months prior to the filing for the proceedings and the debtor was unable to pay its mature debts at this point in time or

2. after the filing for the proceedings.

2Where several persons have filed for insolvency proceedings against the same debtor, the first admissible filing shall be relevant.

(2) 1If a due claim of the creditor was satisfied or secured in the owed manner (congruent coverages), the legal act is only voidable if the prerequisites of paragraph 1 are met and the creditor knew, or should have known, the debtor's inability to pay debts or the filing for the proceedings. 2This knowledge shall be presumed if the creditor was a party closely related to the debtor (§ 6).

§ 3: Exceptions

Not voidable as congruent coverages under § 2 paragraph 2 are

1. legal acts performed directly against fair consideration to the benefit of the estate;

2. payments on bills of exchange or cheques if the law governing bills of exchange or cheques would have barred the recipient's claims arising from the bill or cheque against other bill or cheque debtors (endorsers, the drawer, or drawee) if he had refused the debtor's payment. However, the amount paid on the bill or cheque shall be restituted by the last endorser or, if he endorsed the bill on account of a third party, by such party if the last endorser or the third party knew or should have known the debtor's insolvency or the filing for the insolvency proceedings on endorsing the bill or having it endorsed. § 2 paragraph 2 sentence 2 shall apply mutatis mutandis;

3. legal acts protected against transactions avoidance through the Directive 98/26/EC of the European Parliament and of the Council of 19 May 1998 on settlement finality in payment and securities settlement system (OJ L 166, 11. June 1998, p. 45–50) and the Directive 2002/47/EC of the European Parliament and of the Council of 6 June 2002 on financial collateral arrangements (OJ L 168, 27. June 2019, p. 43–50).

§ 4: Transactions at an undervalue

(1) 1Legal acts of the debtor against no or a manifestly inadequate consideration are voidable if they were perfected within one year prior to the filing for the proceedings or after the filing for the proceedings. 2§ 2 paragraph 1 sentence 2 applies accordingly.

(2) Paragraph 1 does not apply to usual gifts and donations of minor value.

§ 5: Transactions intentionally disadvantaging creditors

(1) Legal acts by which the debtor intentionally disadvantaged the general body of creditors are voidable if

1. they were perfected within a time period of four years prior to the filing for the proceedings or after the filing for the proceedings and

2. the opponent knew, or should have known, the debtor's intent; this knowledge shall be presumed if the opponent was a party closely related to the debtor (§ 6).

(2) § 2 paragraph 1 sentence 2 applies accordingly.

Model Law on Transactions Avoidance Law (continued)

The Edwin Coe Practitioners Forum – Reinhard Bork, Michael Veder

§ 6: Parties closely related to the debtor

(1) Parties closely related to the debtor (§ 2 paragraph 2 sentence 2, § 5 paragraph 1 No. 2) are persons which had preferential access to information on the debtor's financial affairs at the point in time when the legal act was perfected or within three months prior to the perfection of the legal act.

(2) Where the debtor is a natural person, closely related parties are in particular

1. the debtor's spouse or partner,

2. ascendants, descendants, and siblings of the debtor, or of the spouse/partner, and the spouses/partners of these persons,

3. persons living in the debtor's household,

4. persons having access to information on the debtor's financial affairs on a contractual basis,

5. legal entities if the debtor or one of the persons mentioned before is a director, member of the board, or in a similar position which provides for access to information on the debtor's financial affairs.

(3) Where the debtor is a legal entity, closely related parties are in particular

1. directors and members of the board,

2. shareholders with an interest of more than 50% of the share capital,

3. persons in similar positions which provide for access to information on the debtor's financial affairs,

4. persons which are closely connected according to paragraph (2) to the persons listed in this paragraph.

§ 7: Legal consequences

(1) The legal position resulting from the voidable legal act may not be invoked against the estate.

(2) 1The opponent is obliged to compensate the estate for the detriment caused by the voidable legal act. 2If the return of the received is not possible, the opponent is obliged to pay an amount equivalent to the value of the received. 3Lapse of enrichment can only be invoked if the opponent neither was aware, nor should have been aware, of the circumstances on which the transactions avoidance is based.

(3) The limitation period for all claims against the opponent resulting from the voidable legal act is three years starting with the opening of the insolvency proceedings.

§ 8: Rights of the opponent

(1) If and to the extent that the opponent compensates the estate for the detriment caused by the voidable legal act any claim that was hitherto satisfied by this legal act revives.

(2) 1Any counterperformance of the opponent performed after or in instant exchange for the debtor's legal act shall be refunded from the estate provided it is still available in the estate in distinct form or the estate is still enriched by its value. 2Other than that, the opponent may file claims for the return of the counterperformance as a pre-insolvency creditor only.

§ 9: Liability of third parties

(1) The legal consequences (§ 7) can also be enforced against an heir or other comprehensive successors of the recipient of the voidable legal act.

(2) The legal consequences (§ 7) can be enforced against individual successors of the recipient if the successor

1. acquired the asset against no or a manifestly inadequate consideration or

2. knew, or should have known, the circumstances on which the transactions' avoidance is based.

Date for your Diary

INSOL EUROPE 40 YEARS 1981-2021

ACADEMIC FORUM INSOL Europe

Academic Conference

Dubrovnik, Croatia

5-6 October 2022

For further information visit: www.insol-europe.org/events

INSOL Europe General Sponsors

MASTER DISTRESS, **TOGETHER.**

Lawyers, accountants and tax advisors providing comprehensive solutions in restructuring and insolvency situations.
In Berlin, Cologne, Frankfurt, Hamburg, Leipzig and wherever you need us.

Andersen Rechtsanwaltsgesellschaft Steuerberatungsgesellschaft mbH

Contact: Michael Thierhoff
Tel: +49 341 1493-105
Michael.Thierhoff@de.Andersen.com

ANDERSEN

VALUATION & DISPOSAL SERVICES

A full-service appraiser of business assets, providing appraisals on all classes of assets, on-going valuation updates and a variety of ancillary services including asset disposal. We serve corporations, lenders and insolvency practitioners. Our team operates across the UK and Europe.

For Information Contact
Chris Hall - CEO
+44 (0) 207 3745300
chall@hilcoglobal.eu

Hilco Valuation Services

Aon's Insolvency and Restructuring Solutions

Aon delivers a suite of specialist solutions for restructuring and insolvency situations to help enhance returns and reduce the total cost of risk to creditors.

Services include:

- Tax insurance solutions to help accelerate and enhance distributions
- Open/blanket cover for assets and liabilities of insolvency estates and in M&A situations (UK only)
- Bonds
- Portfolio defective title solutions
- Warranties & Indemnities
- Structured Capital / Trade Credit Insurance

For more information, please contact:

Andrew McIntosh
+44 (0)7557 294129
andrew.mcintosh@aon.co.uk

Sadie Easdown
+44 (0)7901 935116
sadie.easdown@aon.co.uk

Aon is authorised and regulated by the Financial Conduct Authority. FPNAT.478

AON Empower Results®

Kellerhals Carrard

Prof. Dr. Daniel Staehelin | Dr. Lukas Bopp

Basel – Berne – Geneva – Lausanne – Lugano – Sion – Zurich
www.kellerhals-carrard.ch

Begbies Traynor Group is a leading UK professional services consultancy working alongside businesses, individuals, professional advisors and financial institutions in the areas of restructuring and advisory, corporate and personal insolvency, commercial real estate advisory, corporate finance, forensic accounting, investigations and risk consulting.

As well as an extensive network of offices across the UK, we also have offices located in the British Virgin Islands, Cyprus, Gibraltar, Guernsey, Jersey and the Isle of Man. Please contact:

Mark Fry
National Head of Advisory & Restructuring
E: mark.fry@btguk.com

Adrian Hyde
Partner & Head of International
E: adrian.hyde@btguk.com

David Rubin
Partner
E: david.rubin@btguk.com

W: www.begbies-traynorgroup.com

Begbies Traynor Group
Member of BTG Global Advisory

BUCHLER PHILLIPS

CORPORATE RECOVERY, TURNAROUND AND RESTRUCTURING

Independent business advisory specialists for turnaround and restructuring, corporate and personal insolvency

David Buchler
+44 7836 777748
david@buchlerphillips.com

Paul Davis
+44 7976 328991
pauldavis@buchlerphillips.com

+44 20 7647 9011
www.buchlerphillips.com
6 Grosvenor Street, London W1K 4PZ