**Dubrovnik Congress Report: Resilience in the face of adversity**

*Friday 6 October 2022*

*Opening remarks* were provided by Frances Coulson (Wedlake Bell, UK), who would also serve as Facilitator, Jelenko Lehki (Lehki Law Office, Croatia) welcoming delegates to his homeland and Frank Tschentscher (Deloitte, Germany), who enters the final phase of his Presidency at this conference.

*Keynotes*

According to Bojan Fras (Vice-Governor, HR National Bank), there are noticeably impressive NPL amounts, but banks have managed to clean up their balance sheets, soon to be assisted by new EU NPL Directive framework (transposition due by end 2023). Much data is available with data sets received from EU authorities monthly. But is there a connection between NPL ratios and insolvency in Croatia? Growth trends look causal with other countries in Central and Eastern Europe displaying similar profiles. But, for the EU as a whole, insolvency frequency does not follow the NPL trends: good news for some (insolvency cases constant). For the future though, there is a fear that NPLs will rise. Inflationary trends at the global level will erode purchasing power, savings and costs. No shelter for most! Regulators/banks should refocus on NPLs, though banks now better prepared and resilient.

Continuing the theme of precarity, José Garrido (Legal Dept, IMF): states that the role of law in a global economy is amply illustrated by contemporary developments. The IMF maintains international financial stability while promoting economic growth. It deals with crisis and provides financial support to member states. The Asian Financial Crisis was the first such crisis where insolvency law and frameworks were identified as a critical element. The GFC put many systems to the test, including the US. Access to credit became tight; recourse to insolvency became the norm. If no proper insolvency framework exists, then the financial system burdened with NPLs, winding down businesses is slow and costly, loss of productivity and performance underpin effects of economic shocks. Progress of crises not predictable/certain: fiscal shocks, impact on employment, private debt failures can occur in any order. Businesses hit hardest by the pandemic had elevated levels of debt, but even the most robust are now dealing with cost increases, due to war and supply chain problems. During the pandemic, the freeze on functioning of insolvency system accompanied by fiscal and financial support; this moved to a transition phase with more targeted support to viable sectors/businesses with insolvency procedures resuming. The current phase, though, can be described as a “crisis upon a crisis”. State support and involvement seems set to become a permanent feature.

What role will insolvency law play? Some argue no role, instead state support through bail outs/ins will become a permanent feature. Others see insolvency as being artificially reduced, but will rebound as businesses are increasingly saddled with debt and rising costs. Insolvency may return suddenly in many countries and accelerate in some economies to beyond 2019 levels. The impact on MSMEs in particular has been neglected: in emerging markets/low-income countries, state intervention was weak/non-existent, lots of companies are still barely surviving (lots of zombies). Comparing restructurings to numbers of distressed businesses, the ratio is low and procedures tend to benefit large businesses more. Smaller businesses have simply closed, often without formal insolvency measures. Trade-offs need to be calculated to anticipate approaches policy makers need to take in future: fiscal support vs available resources (and well-targeted too, not just delaying liquidation); support measures vs space for insolvency to function (with appropriate types of procedures apt for use); withdrawal of support (and ensuing financial crisis) vs fiscal risks (from maintaining support). Even a robust system may need to be reinforced with view to increasing capacity and avoiding courts being overwhelmed (through having wide tool-box to enable in- and out-of-court/hybrid restructurings).

The weaker the insolvency system, the slower the recovery. IMF determines robustness to withstand a corporate debt crisis through indicators looking at elements of the tool-box and capacity of the support framework (courts etc). Advanced economies seem better prepared, but improvements can still be made. Better preparedness seems to occur alongside low NPL amounts, but no causation/correlation can be established (so far). Growth and investment recover sooner with better prepared insolvency systems. So far, countries holding up, but NPLs increasing and more shocks may come. The involvement of the state looks set to increase, not just as a creditor.

*First Plenary Session: Designing the New European Restructuring Plans*

Michaela Roepstorff (Plesner DK) chairing with panellists: Annerose Tashiro (Schultze & Braun DE), Stathis Potamitis (PotamitisVerkris GR) and Nuno Libano Monteiro (PLMJ PT) discussing a case study on an energy company with DE parent and 4 subs spread across the panellists’ jurisdictions. Issues examined include stays, cross-class cramdown, enforcement of the plan, viability of business/debtor, insolvency likelihood issue, what majority potentially exists to make embarking on the plan possible (in GR, but not in DK, though you will need to anticipate whether you will get a majority for the plan, which could also be used by the court to agree steps going forward). Court speed can be an issue, so securing interim financing is critical. Expertise might be necessary to assist the court. All these steps will require getting a stay to allow negotiations to happen and the restructuring to actually begin (in DE, the “stabilisation order” can be targeted to particular creditors/groups, but the company needs to show how creditor impact will be compensated for in the plan or otherwise; in GR, two stays available with targeting and exclusions both possible). Class divisions will be dependent on the structure in the respective laws and the rules will need to be read closely.

One issue that divides the jurisdictions is whether the rescue is of the business or of the entity (in PT, this might depend on whether business “insolvent”: a third-party sale is more likely if so). Position of security rights also an issue: DE new law allows plan to rewrite relationship between secured creditor and debtor, even adjusting priorities across group company creditors. Would individual plans only be possible or would a universal plan be possible? Flexibility of most laws might create space for the latter to happen, but need to watch out for creditors, majority and consents (e.g., in GR, votes never happen since an expert certifies that company has obtained requisite majorities). Would cramdown work across jurisdictions? Still a *tabula rasa*, but enforcement of a single plan across borders will be interesting (role of Annex B and whether proceedings are “public” might need to be pre-requisites, but with a difference in DK with Directive implemented, but not EIR). If not, some form of coordination will be necessary (risk of non-recognition highest in DK). Finally, development of jurisprudence around creditors’ interest will be interesting, as will the position of public creditors (ref: earlier IMF statement about state intervention).

*Break Outs*

(iv) Asset Tracking and Recovery in the EECC

Niculina Somlea (Stride RO) chairing with panellists: Stela Ivanova (bnt BG), Pawel Kuglarz (Tatara PL). The EU harmonisation initiative includes possible asset tracing rules (likely to appear in late 2022). Keys to BG information include the EGM number for natural persons; EIK for entities. These are stable lifetime numbers enabling data access (but issues can be Cyrillic/Latin transliteration and whether true entity status visible behind public-facing identity). In PL, a partly similar position exists with tax ID and national registration numbers available. Tracking on basis of databases possible: register of assets, financial filings, register of pledges etc. In RO, more information is better, the unique registration code enables data access, including info on security, HQ location, financial data, governance structure, ownership history. Beyond this, the state, bailiff enforcing a judgment or an IP can go.

For real estate, in BG: a database of real estate transactions is available (cheap electronic access), though data not always joined up re: a single debtor. In PL: real estate tracking through the electronic register (the most digitised type of asset) is common, while in RO: digital land registry with an abstract is available, but registration number is required and double-checking required (which takes about 30 days and may require notarial certification). Dissipation of movable assets a particular problem; even with land, geo-location not precise and may require legal action against neighbours to establish true extent of land.

For bank accounts, in BG: access is available to IPs only with enforceable orders and other hoops imposed by banks themselves. Problems though with resistance to foreign orders, alternative avenues available through the Central Bank register of accounts and safety boxes. With a CB “stamp”, banks can be pushed to act. In PL, there is a centralised data collection from banks, though only bailiffs have access. Supervisors of settlements were excluded originally, but a law amendment to ensure direct access by IPs is in progress. In RO: it is a straightforward process: IPs can send notice to banks to freeze accounts and avoid transactions, but no direct digital notice, it takes time to send and process the paperwork. For cars, in BG: car data is only available to IPs and bailiffs and difficult to access. In PL: a central register can be queried; toll data can be used to trace whereabouts (though data protection is still an unresolved issue). In RO: there are difficulties, as must quiz ministry/tax authorities for records since no digital register (30 days for responses).

(iii) Healthcare

Sam Alberts (Dentons US) and Anne O’Dwyer (Kroll IE) presenting. In US, healthcare restructurings are 20% of US business; creeping privatisations across the world following the trends there. Healthcare heroism during pandemic lauded, some elements trading very well (PPE, supplies etc), but stresses in frontline treatment (in hospitals and care homes), leading to burnout and employees moving elsewhere, non-nationals especially returning to home countries. Today, energy costs are a critical issue, with 24/7 needs, but significant impact on profitability. A perfect storm with health and care standards continuing issues. In US, increase in healthcare costs for critical services (particularly labour), but consequent delays to elective surgeries (the high profit treatments). Some costs cannot be reduced (e.g., energy), making it difficult for lenders to monitor costs and/or intervene (possible reputational/litigation risk for lenders).

In IE, there was a 2014 case in relation to private maternity hospital in wake of GFC/recession with turnover dropping by a third with annual losses. Private healthcare suffered a decline with an impact on such hospitals, particularly where competing services provided free by public hospitals. Costs were high (employees very well paid) and the group heavily reliant on drawdown facilities for working capital. IPs were appointed to deal with inevitable liquidation. Orderly wind down and closure, insurance risks, dealing with employees etc. all big issues. Information leaked early to the press, making the IP mandate difficult, with a high degree of press and political interest and public concern. A patient helpline was set up to manage concern (particular the >500 expectant mothers). Communication was key to managing challenges. A big issue around patient records and extremely sensitive data; managing transition to other institutions and maintaining future access to data were critical.

In the US, time to prepare is also critical, particularly figuring out an exit strategy. There are life and death issues, and managing a sale can be critical because the hospital may be the only healthcare provider in area. Bankruptcy can be useful to restructure employment, debts, pensions (and other legacy costs) etc. to enable third-party purchase. There is still an interesting issue over applicability of state regulation to new buyers. In the case highlighted, a bankruptcy sale enabled a “cram down” of state conditions and to ensure collective bargaining outcomes were preserved at pre-sale levels.

*Second Plenary Session: Recognition of Insolvency(-related) Decisions*

Rita Gismondi moderating with panellists: Barbara Rumora-Scheltema (NautaDutilh NL), Geir Gestsson (Jonsson & Hall IS), Craig Martin (DLA Piper US) and David O’Dea (McCann Fitzgerald IE). Though the EIR is the main instrument governing recognition, due world events, other texts are in play: the UNCITRAL Model Laws 1997/2018, the Hague Convention 2005, the Lugano Convention 2007 and the Brussels Regulation 2012, though many deal only with R&E bilateral judgment scenarios, thus inviting the EU to consider a text on R&E of PRD procedures (as a separate text or a chapter in the EIR). In NL, issues arising include state-sponsored expropriation in the form of foreign judgments. In IE, judgments can be R&E in UK through s426, IA86 and CBIR provisions, but insolvency would have to be shown. Schemes could be subject to common law recognition, but insolvency law relief is wider in the CBIR and even broader in s426 (with a choice between home and host law available).

On contract-based processes, the rule in *Gibbs* poses a problem, as the *Norwegian Air* case showed (cramdown, lease repudiation and debt compromise issues). A QC Opinion was provided to help comfort the IE court, but on basis of application of home law through s426, as doubted that other avenues could bypass *Gibbs* rule. Interesting possibility through voluntary submission, but if not possible, then parallel proceedings would be an option. In US, views on the *Gibbs* rule approach were canvassed in HR *Lex Agrokor*-based proceedings asking for R&E, where UK creditors turned up arguing that debt cram down should not happen. The US court refused to entertain the submissions, on basis Chapter 15 expressly permitted it. The *Peruvian Fisheries* case also featured UK creditors claiming to applying *Gibbs*. As a result, to compromise debt, plans were filed in NY and London to cover respective debt.

Overall though, US courts are very liberal: a single filing in *Norwegian Air* for R&E of IE and NO cases was approved and 90% of Ch 15 filings overall accepted. For the converse situation, IE has to resort to common law for R&E of US decisions and very few cases provide authority for scope of assistance, hence need for a parallel process, but it will have EU potential. IS is in the strange position with 4 freedoms applying and access to Single Market, but no R&E framework in bankruptcy with EU, albeit a connection to other Nordic countries through the Copenhagen Convention 1933. There is a phenomenon of forum shopping for litigation choosing jurisdictions where IS orders unlikely to be recognised. The creditor equality principle is also breached by cherry picking jurisdictions and employing freezing orders to ensure payment out of priority to “local” creditors. In IE, schemes function in effect as an insolvency process, but can benefit from R&E under the Brussels Regulation. Some controversy ensued from a 2014 case, the first time IE courts considered the use of a scheme, particularly with the BR bankruptcy exception and specific terminology: “judicial arrangements and compositions”. IE court ultimately applied the “dovetail” argument and applied BR because schemes were specifically not in EIR. For NL (and other EU jurisdictions), R&E of UK decisions is an issue with very varying treatment of such judgments where tested, with conflicting outcomes due the recourse to national law and the risk of public policy intruding.

*Third Plenary Session: Harmonisation of Transactions Avoidance Law*

Reinhard Bork (University of Hamburg DE) presented a Model Law, devised with Michael Veder (RESOR; Radboud Nijmegen NL), to address the cross-border situation of transactions avoidance and that was worked on in a number of the sessions of the European Commission Group of Experts on Restructuring and Insolvency held in 2021. The suggestion is that this will greatly assist in the development of the Insolvency III initiative, by its expected inclusion in the text to appear towards the end of 2022. The rules are a distillation of common European themes and are grounded on a principles-based approach.

*Fourth Plenary Session: Anti-Fraud Forum: The Dangers of Cyber-Attacks*

1 in 5 businesses report cyber-attacks risking their insolvency, increasing by 25% over the past year. The pandemic and remote working has enhanced risks, according to presenters Bart Heynickx (ALTIUS BE) and Vijay Rathour (Grant Thornton UK), self-described as an “ethical hacker”. Cyber-attacks affect all, victims of fraud are everywhere, including law firms. Some context is required: legal and practical perspectives thinking of practical impacts on corporate clients by considering the rationale and strategy of hackers: no geographical boundaries, no regulatory boundaries. Types of fraud proliferate and can affect anything, as witness the attack on the GTA5 game recently, where the hacker tried to sell access to the data to others, but got caught quickly. The risk was the value of the game: USD 8 billion. Annually, USD 2-4 trillion worth of crimes are committed. Cyber incidents constitute 44% of business expenses. Data breaches/loss also risks regulatory fines (e.g., under GDPR), risking further working capital.

Anything that confers value is a target: it is common to defraud people and use people to defraud others. The psychopathy of criminals is very variable: from cyber warfare/terrorism (including by state actors), through insider crime (facilitating hacking through unknowingly sharing data used for passwords) all the way to hacking for “pleasure”/“principle” (“hacktivism”). Much is opportunistic, but organised crime is growing, hiring hackers to service particular needs (taking down competition etc.). No effective sanctions for the moment (civil and/or criminal), with very limited police success in pursuing. Many cyber-criminals are in jurisdictions outside enforcement potential. Police strategy now to disrupt cyber-chain by reducing opportunities: e.g., “penetration testing” in regulatory environments. Burden of protecting against crime mostly falls on the victim: burden-shifting and paying as a victim for loss and guarding against future attacks.

Cyber-insurance has become a mandatory way of guarding against risks, but how effective is it when risks are higher than for ordinary insurable incidents (fire, theft, driving)? GDPR drives some protective behaviour, but there is no standard protocol for dealing with data and no harmonisation. Current trends in crime include ransomware situations (fascinating social problem because of goodwill haemorrhaging/loss of brand credibility/legacy of the experience): two-thirds of such businesses will pay and there are now professional intermediaries (ransom negotiators), but not all payers get their data back (and can be susceptible to further ransoms of data: “double” and “triple” dipping being seen). The more hackers gain access, the more costs and time are incurred. Stopping at Stage One (when hackers are roaming around the perimeters) is key. Also, controlling supply chain environment (i.e., how information is shared) is necessary: hackers do not have to hack Apple if they can hack their contracting partners/lawyers/licensed manufacturers etc.

*Saturday 7 October 2022*

*Opening Remarks* welcoming delegates back were provided by Frances Coulson (Wedlake Bell UK) and Jelenko Lehki (Lehki Law Office HR).

*Keynote*

Fabris Peruško (CEO, Fortenova: Agrokor spinoff) gave some impressive statistics on the case of Agrokor: a EUR 7.8 billion bankruptcy. The debt was equivalent to 15% HR GDP (compared to JP tsunami 5% impact; Parmalat was twice the debt, but the company was ten times the size). An extraordinary administration of HR’s largest retail chain with 27% market share, so new law passed in March 2017 (copied from IT Parmalat law). 60,000 jobs were saved, while 150,000 dependent suppliers were reassured. Impact was just as HR exiting from GFC, so profoundly serious for economy as a whole and a personal challenge. Concentration within Extraordinary Administration on 3 major areas: liquidity of system (stabilising business, delivered by a super-priority facility of EUR 550 million and a centralised treasury), managing a settlement plan with creditors (6000 creditors, largest of whom Sberbank had EUR 1.1 billion exposure, also VTB EUR 400 million: both banks subject to sanctions due to Crimea invasion), operational improvement (profitability and performance with development of liability plans), all helping for the turnaround together with a massive DES of about EUR 5 billion (Sberbank ended up with 48% ownership). Average 60% recovery for creditors and more for secured creditors, but not the bondholders. The group was reorganised, though keeping similar trading names, under overall Fortenova umbrella. Current moves include removing sanctioned Russian shareholders and cleaning up complex credit facility structure and to refinance the group on the regular markets. Today Agrokor is still the largest regional retailer, beverage group, edible oil producer and meat producer.

*Fifth Plenary Session (Part 1): The Restructuring Regime in the UK*

According to Richard Snowden LJ (UKCA), despite Brexit, EW law is still used for debt instruments and has influenced the development of the PRD; UK practitioners and judges are still highly skilled and plenty of experience. Recent upgrades through CIGA 2020 of the underlying insolvency/restructuring framework. The scheme (SoA) is an anomaly: largely judge-made law, not in EIR Annex A pre-Brexit, but used to restructure finance/bond issues. The trend to use SoA for foreign companies was the result of lack of restructuring opportunities in other countries. “Sufficient connection” and “likelihood of recognition” (to avoid dissenting creditors attacking the scheme) were used as tests, though could be problematic where COMI was not in UK and the only connection is the debt: but *Gibbs* rule gives the support necessary. Because judges were receptive, companies approached the courts and changed their choice of law under the debt instrument to create the connection. This can be considered good forum shopping if it leads to restructuring. Under the BR, submission to jurisdiction and convenience of location for creditors provided a basis for assistance with support from opinion (remember: experts have duty to hold an honest opinion). Post-Brexit, a dissenting creditor can still turn up to argue non-recognition and insufficiency of *Gibbs* to found jurisdiction. Exorbitant jurisdiction would not be well-regarded and judges are aware of this. Some CIGA RP cases have been seen with challenges (including to valuations), but the Insolvency Service reports market views that RP is working well. Access by SMEs remains an issue, due to complexity and cost.

*Fifth Plenary Session (Part 2): To Sanction or not to Sanction, that is the Question*

Robert Paterson (Wedlake Bell UK) moderating with panellists: Snowden LJ (UKCA), Judge Nicoleta Mirela Nastasie (Bucharest tribunal Section VII RO) and Judge Katarina Franković (Dubrovnik Commercial Court HR). In the UK: recent SoA procedures involve large companies and debt with sophisticated financing structures: there are issues for courts whether the plan satisfies domestic law and, particularly, whether it complies with procedural fairness. Proper information is provided on a transparent basis enabling decision on best interests, also there are suitable incentives for creditors to participate (adequate notice) and take evidence on how the scheme will be regarded elsewhere if important for future of scheme. In RO: the reorganisation of large companies is rare, most simple cases involving small companies. Covid has not had the effect on case numbers that might have been feared, albeit with some impact on energy and construction sectors. Work transposing the PRD has complicated matters, but provided 2 new procedures, albeit with issues over evaluation of viability (as opposed to compliance with legal tests).

In HR: there is good compliance with EU standards and Model Law. PRD transposition took place in February 2022. Issues overall: trust in IPs, management seeing the company as their property, understanding by debtors about court information needs (ongoing contracts, business) impacting on willingness of court to assist, cross-border impact (e.g., notification of creditors), balance between privacy and transparency (e.g., constitutional prohibitions on violating secrecy of deliberations). In HR, there is an open access principle and obligation on IP to report. In the UK, issues remain over creditor assistance to court to test plan and economic assumptions, costs are not normally an issue in the same way as commercial litigation (loser pays). Other issues in RO include public policy, Model Law exclusions impacting on general civil rules. Overall, reciprocity is an issue, particularly with Model Law (open or reciprocal adoption).

*Sixth Plenary Session: Hard and Soft Skills*

Robert Peldan (Borenius FI) chairing with panellists: Jelenko Lehki (Lehki Law Office HR), Mira Hajdić (Mira Hajdić Office HR) and Laura Ruiz (Pérez-Llorca Abogados ES). Hard skills are job-specific, while soft skills include empathy, problem solving, assertiveness, team working etc. All are developed via experience and measurable really by on the job performance with value ascertainable for hard skills directly, though soft skills require some context by which to measure (e.g., better results, happier work environment). Dynamic, competitive, complex and changing environments invite the development of both types of skills. Management skills (problem solving, delegating, time management, communications) are particularly prized. Good communications assist in people becoming effective and more focused on their work. Leadership is also a set of skills to be developed: “A leader is a manager with vision”.

Communications can also be key to improving diversity; mixing work groups can lead to better problem solving because viewpoints and predispositions can be challenged. When polled, the audience has mixed views on whether organisations are “led” or “managed”. Leadership challenges: micro-management, ego/profile, emotional intelligence and team composition. Also nurturing talent, validation of others, letting others display skills and take responsibility. Admiration can be sincere flattery, but you have to be careful when ego takes over: a leader includes someone who does not always know the answer, but who can ask the right questions or get their team to do so: inspiring others is more worthwhile and humility helps.

*Seventh Plenary Session: Energy*

Eduardo Peixoto Gomes (Abre Advogados PT) moderating with panellists Mylène Boché-Robinet (Boché Dobelle Avocats FR), Piotr Grabarczyk (WKB PL), Zara McGlone (4 Stone Buildings UK) and Christian Reinert (Ince DE) giving their view on the current energy crisis sand the impact on business and consumers. For most, energy dependence was the critical issue with the RU-UA war leading to severe disruption across Europe, even for countries not directly dependent, but who are competing for supplies on the world market. The development of alternative strategies, self-reliance for some, storage and new sourcing for others, has been fast with many acting swiftly in response to actual or anticipated disruption. Nonetheless, these strategies have not been uniform in impact on domestic economies with priority tending to go to consumers and general business or targeted sectoral interventions taking longer to develop. Overall, this is still a work in progress and Governments will need to pay close attention, especially to the impacts over winter on supplies, black-outs even being predicted in some countries, and likely replenishment needs come early 2023.

*Eighth Plenary Session: Harmonisation of Insolvency Laws in the EU*

Robert Hänel (Anchor Rechtsanwalte DE) musically interviewed Miha Žebre (DG Justice) on progress in harmonisation within the EU. Developments canvassed included the progress of transposition of the PRD, the key developments in the work of the Experts Group that might be seen in the new Insolvency III initiative (and its likely timetable) and the general dynamic of cooperation between EU authorities and member states in the field, particularly the change in emphasis from judicial cooperation frameworks to the Capital Markets Union imperative.

*Closing remarks* were provided by Frances Coulson (Wedlake Bell UK), Jelenko Lehki (Lehki Law Office HR) and Frank Tschentscher (Deloitte DE). Delegates were bid farewell till the next occasion, whether in May in Vilnius (EECC) or October in Amsterdam (Main and Academic Conferences).