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Welcome from the Editors



EDVINS DRABA



JOSÉ CARLES

As we have bid farewell to 2023, I would like to reflect on some of the events that shaped the past year and are likely to remain topical in 2024.

Firstly, looking at our own developments, I am happy to see that the Country Coordinators platform and other ideas brought to life in the recent years have helped to expand and rejuvenate INSOL Europe. As a result, our membership has reached almost 1,350 members last year, with a significant number of younger members (p. 8).

Here, it is important to emphasise that as much as we in INSOL Europe treasure our history spanning more than 40 years, we are also aiming to be at the cutting edge of the trends in the legal field and beyond.

It is hard to argue that one of such prominent trends in 2023 was the explosive growth of artificial intelligence (AI). According to the survey by McKinsey, approximately a year after many of the tools of generative AI (e.g. OpenAI's GPT) debuted, as much as one-third of the survey's respondents have said that their organisations are using generative AI regularly in at least one business function. Moreover, last year robots officially started replacing humans in the driver's seat (literally), as two US taxi companies – Waymo (an Alphabet subsidiary) and Cruise (a General Motors subsidiary) – were authorised to collect fares for driverless rides. And, although the ride has not been without bumps in these early stages for the said companies, this marks the dawn of a new era in how we travel.

Our readership knows that we have been following closely the various aspects of AI that are of interest for

insolvency professionals and we will continue to do so in this year alike (p. 14).

Another milestone was the adoption of the EU MiCA Regulation. Although cryptocurrencies and other crypto-assets have been around for a while, the MiCA Regulation paves the way for crypto-assets to finally make it from the thing of digital nomads, outliers and outlaws to the mainstream finance and broader society. The legal act will fully enter into force by the end of the year, with the first licences of crypto-asset service providers such as crypto exchanges or crypto wallet service providers likely to be issued in early 2025. However, Member States may apply a transitional period until 1 July 2026, when the entities licensed under an existing national regime (if any) will be able to continue their operations. Therefore, the experience accumulated in large insolvency or fraud cases that involved crypto-assets from the past years will remain topical in the EU and abroad (p. 19).

2023 was also another year marked by the profound impact of sanctions enacted against Russia on businesses and whole industries. The intricacies of the interaction between insolvency law and the sanctions law were studied several times on various events by INSOL Europe and fellow organisations throughout the year (p. 11, p. 22).

Whilst for Ukraine, it was the second year of a full-scale war. We remember this and we aim to continue publishing articles on the developments there (p. 30).

To conclude, I wish our readers a Happy and Peaceful New Year!

Edvins

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RESIGNATIONS
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IN TEXAS

Building on our success for the future

Giorgio Corno reviews INSOL Europe's goals and plans for the future



GIORGIO CORNO
INSOL Europe President

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Thanks to the work of the Membership Development Committee, the association has grown to nearly 1350 members, with a significant number of younger members

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In introducing my first letter to you, I would like to thank my predecessors and, among them, Barry Cahir and the INSOL Europe team for their hard work, which made it possible to achieve many successful results, among which a record-breaking Annual Congress in Amsterdam as well as the EEC annual event and several joint conferences.

Developing members

During the members' meeting in Amsterdam, I confirmed my commitment to implement our association's goals, as set out in our strategic plan for 2020–2025. Notwithstanding the pandemic crisis in 2020 and 2021 that made it more difficult to implement the goals, much has already been done. The **Membership Development Committee (MDC)**, leading the Country Coordinators, under the relentless guidance of our Deputy President Alice van Schee, has significantly contributed to making our association more visible and embedding its activities throughout Europe at a national level.

Thanks to its work, several cooperation agreements with Member State associations have been concluded in *Belgium, Croatia, Germany, Ireland, Italy, France, the Netherlands, Portugal and Romania*, to enhance cooperation, support and promotion through the exchange of relevant information and organizing co-labelled



events. In late 2023, I had the pleasure of intervening in several conferences with local associations and, specifically, at the UNPIR regional conference in **Romania**, the Alba conference organized by the Associazione Albese Studi di Diritto Commerciale in **Italy**, and at the ARE (*Association pour le Retournement des Entreprises*) /CEDAG (*Centre des Affaires et Gestion*) colloquium in **Paris**.

Also thanks to the work of the MDC, the membership has grown to nearly 1350 members, with a significant number of younger members. This allows us to get more energy and to look at our future with hope for the consolidation of our association, while we aim at reaching the targets set in our strategic plan for 2020–2025.

Increasing connections

We are working on increasing our connection with other international organizations and institutions, taking mutual

advantage of our activities in the area of restructuring and insolvency.

Technical and topical information on restructuring and insolvency has been constantly disseminated through our website and our monthly newsletter; as well as by means of specific initiatives, such as our trackers on the implementation of the EU Directive on Restructuring and Insolvency in the EU Member States and, previously, on Coronavirus (COVID-19) related insolvency reforms; our case registers on European Insolvency Regulation and Worldwide Digital Assets; our insolvency statistics from all jurisdictions across Europe as well as updated insolvency laws and state reports.

Academic excellence

Our Academic Forum conferences and publications aim to lead the study, evaluation, and development of restructuring and insolvency law, techniques and practice in Europe. We aim to further the technical training of

members, their staff and others. Specific attention will be devoted to the effects of the implementation in Member States of Directive (EU) 2019/1023 on restructuring frameworks; as well as to the approval process of the Commission proposal of 7 December 2022, aimed at addressing the main discrepancies in national substantive insolvency laws, which have been recognized as obstacles to a well-functioning Capital Markets Union. To that extent, we aim to be acknowledged by European and international bodies as the first port of call for all matters regarding restructuring and insolvency in Europe.

Sharing experience

In allowing our membership to facilitate business development and the exchange of professional experience, we will put our efforts into the **EECC Conference in Krakow** on 13–14 June 2024 as well as the Annual Congress in Sorrento on

3–5 October 2024. Specifically, the technical committee for the **Sorrento Congress**, under the supervision of Rita Gismondi and Bart de Moor, and with the precious help of Emmanuelle Inacio, is already working hard on preparing an exciting programme that will capture the attention of the audience. Some outstanding keynote speakers have already agreed to provide their views, while others are being targeted.

We will continue promoting our association and its benefits, together with those who are willing to, in many local and co-labelled conferences. Some of them have already been announced, such as the **Joint Fraud Advisory Panel/INSOL Europe/R3 Fraud Conference**, which takes place in London on 29 February; and the **Joint R3/INSOL Europe International Restructuring Conference**, which takes place in London on 27 June 2024. Others are being programmed and organized with other associations.

Strategic planning

We are working on our 2025–2030 strategic plan for the development of INSOL Europe's strategy for the period ending 2030. The task force has already been formed and plans to start its activities in the first quarter of 2024, after having chosen an advisor who will make the activities smooth and efficient.

A lot of the work which is being done would not be possible without the support of our sponsors. Our sponsorship team has worked hard under the guidance of David Rubin to reach outstanding results. Now that the lead has been taken by Frank Tschentscher, we look further forward to their continuous support.

Finally, I would like to thank our executive, our council, our fabulous staff members, working under the guidance of Paul Newson and, most of all, you all for supporting INSOL Europe.

I wish you all a Happy New Year and look forward to seeing you soon. ■

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We are working on our 2025–2030 strategic plan for the development of INSOL Europe's strategy for the period ending 2030

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

New Judicial Wing publication launched

We are pleased to announce the completion of the latest project by INSOL Europe's Judicial Wing: "The Relevance of the UNCITRAL Model Law on Cross Border Insolvency in the EU Member States, Albania, England & Wales."

The 25th anniversary of the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) in 2022 made members of the Judicial Wing explore its impact on insolvency proceedings crossing borders between EU Member States in which the European Insolvency Regulation (EIR) applies, and non-EU Member States as well as Denmark, where the EIR does not apply. Generally, such proceedings are not governed by the EIR but by the local autonomous "international insolvency laws" of the involved jurisdictions.

The project analysed those autonomous laws and the types of procedures made available by them, as well as the practices of the insolvency courts in the respective jurisdictions.

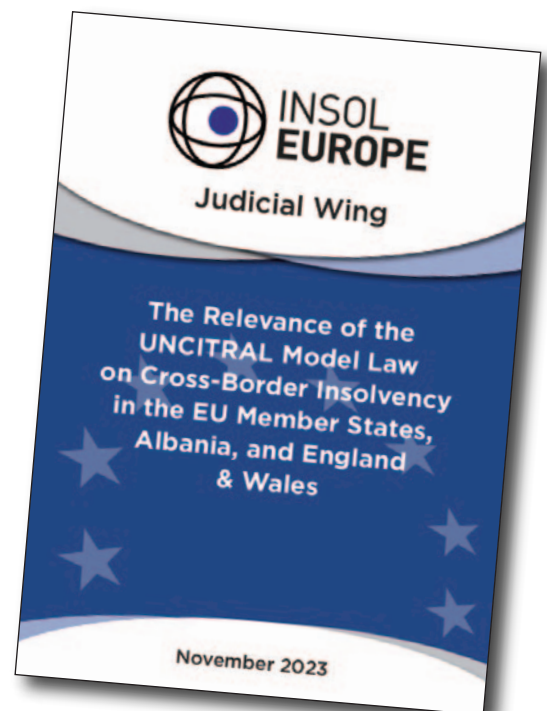
The analysis was focused on the recognition of foreign insolvency proceedings, the available relief in case of recognition, on judicial cooperation and assistance in cross-border insolvency cases, and on the enforcement of insolvency-related judgments.

The required information was provided by twelve members of the Judicial Wing who agreed to fill out a questionnaire with questions on the above topics. Six of them sit in countries which have adopted the MLCBI (Albania, England & Wales, Estonia, Greece, Poland, Romania), and the other six sit in countries which have not adopted the MLCBI (Bulgaria, Czech Republic, Denmark, Germany, Latvia, Spain).

The responses by the twelve judges showed that the provisions on the recognition of foreign insolvency proceedings of the autonomous "international insolvency laws" in their respective countries are not uniform but quite heterogeneous. The answers to questions on practical experience with cross-border cases made us conclude the following:

Although some of the responding judges had dealt with cross-border cases, it looks like, overall, there is not much opportunity for the insolvency courts and practitioners to deal with cross-border cases.

This means that they cannot gain much experience with the application of their local provisions governing cross-border cases, no matter whether or not they are based on the MLCBI.



To the extent that they have dealt with cross-border cases, some courts have made endeavours to develop mechanisms and identify solutions for judicial assistance and cooperation. However, as of today, those processes are still in the stages of infancy in most civil law jurisdictions.

If you have any questions relating to this project, please feel free to contact the project coordinators, Nicoleta Mirela Năstasie and Eberhard Nietzer.

The new publication is available to download for free to all members of INSOL Europe at: www.insol-europe.org/publications/technical-series-publications

How to deal with sanctions to Russian-related entities in insolvency: the GTLK Europe, Mints and ATB cases - ABI Restructuring Symposium

Report by Carmen Perales, Debtwire

The invasion of Ukraine in February 2022 followed by sanctions on Russian entities has significantly affected insolvency in Europe. A panel of legal professionals from INSOL Europe consisting of Frank Tschentscher (past INSOL Europe President, Deloitte, Germany), Andri Antoniou (CRI Group Nicosia, Cyprus), Job van Hooff (Stibbe, Amsterdam, The Netherlands) and Damien Murran (Teneo, Dublin, Ireland) addressed practical cases GTLK Europe, Mints, and Amsterdam Trade Bank (ATB) in the American Bankruptcy Institute's conference in Lisbon on 3 November.

Teneo senior managing director **Damien Murran** said that the Irish High Court in May appointed him and Julian Moroney as liquidators over *GTLLK Europe DAC*, an Irish leasing platform with 45 aircraft in Russia, and 36 more scattered around the world.

Parent *JSC GTLK* is owned by the Russian Ministry of Transport and was addressed by EU, UK, and US sanctions in early 2022.

Under the sanctions, advisors and auditors could not act for *GTLLK Europe*, lessees issued termination notices, payment agencies and banks froze assets, and the company could not make payments due under the bonds held by non-Russian entities, Murran added.

Teneo was then approached by non-Russian creditors owed a considerable amount of money, and his firm needed to assess whether they could take the appointment and sell the assets, he said.

The firm saw that it could not do its job without the regulators' support, and engaged with the Central Bank of Ireland - as the competent authority regarding asset freezing.

Within six weeks, the liquidators obtained a judgment clarifying that the control relationship with the

Russian parent was broken, and the asset freeze under EU sanctions rebutted, according to Murran.

Murran believes that insolvency processes can protect the integrity of sanctions while allowing the recovery of capital, and that building trust with regulators has been "critical".

Director of CRI Group in Cyprus **Andri Antoniou** spoke about the judgment of the Court of Appeal on *Boris Mints* in London in early October. Mints was a shareholder of *Otkritie Bank*, the latter being targeted by US, EU, and UK sanctions.

Russian state-owned *Otkritie* and *National Bank Trust (NBT)* claim that Mints and others conspired to defraud the banks of hundreds of millions of dollars.

Mints asked the London court to indefinitely stay the case, arguing that money judgments could not be made in relation to sanctioned entities, and that the *Office of Financial Sanctions Implementation (OFSI)* could not authorise litigation steps such as adverse and favourable costs orders and/or security for costs.

Mints also held that NBT is also caught by the sanctions because it is controlled by sanctioned entities, namely, Vladimir Putin and/or the governor of the *Central Bank of Russia*.

The first instance judge rejected Mints' stay request, and the Court of Appeal dismissed his challenge, holding that the right of access to justice, including a judgment, was not curtailed by the sanctions, while OFSI could authorise litigation steps.

The Court of Appeal also decided that 'control' can be established by whatever means, including political and corporate office, and NBT was controlled by Putin and/or the Central Bank governor as they can exert influence through their political office, so it was caught by the sanctions.



INSOL Europe members at the ABI Symposium in Lisbon

Job van Hooff, a partner heading the restructuring practice of Stibbe's Amsterdam, was the court-appointed bankruptcy trustee of *Dutch ATB*, subsidiary of *Russian Alfa Bank*.

After Russia invaded Ukraine, the UK imposed sanctions on ATB due to the Alfa Bank link - whose co-owner was oligarch Mikhail Fridman - and the US announced sanctions in April 2022.

In these circumstances, van Hooff noted, *Microsoft* turned off its "digital switch" causing employees to lose their Outlook, their Excel files, and all files not locally saved on a laptop.

His firm was appointed as silent administrator on 14 April 2022 and on 22 April the bank went bankrupt. The administrators had to apply for different US and UK licenses to operate within the sanctioning regime.

The current situation is that most ATB assets are liquidated, and most creditors have been repaid for approximately €695m, while the administrators have remaining assets that could not be sold with a face value of around €50m, and an approximately €105m sum, he added.

Read the full report at:
<https://ionanalytics.com/insights/debtwire/sanctions-on-russian-entities-due-to-ukraine-war-affect-european-insolvency-landscape/>

Download INSOL Europe's panel slides at: <https://www.insol-europe.org/download/documents/2761>

Younger academics present bright future for insolvency scholarship

Autumn marked a busy period for the Younger Academics Network on Insolvency law (YANIL). In October they met in Amsterdam for the 4th research workshop on restructuring and insolvency law. This was followed by the announcement in November of the first prize winners of the YANIL research prize for outstanding and innovative research. Gert-Jan Boon (Chair YANIL; Leiden University, the Netherlands) reports.

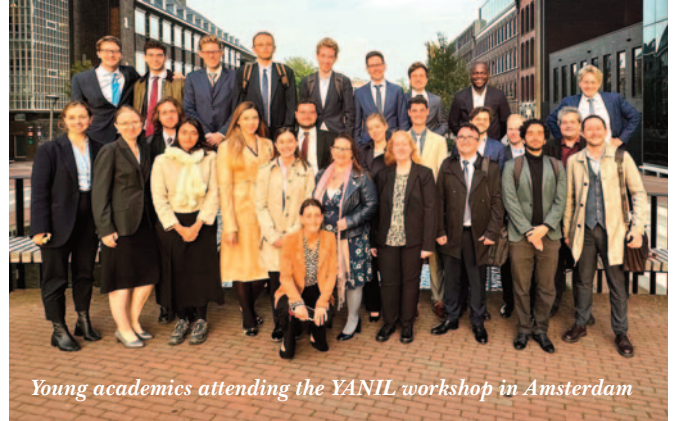
4th Annual Research Workshop

On 10 and 11 October 2023, YANIL organised its annual research workshop for younger researchers in the field of restructuring and insolvency. Hosted this year by former YANIL chair **Professor Rolef de Weijs**, some 30 attendees met at the University of Amsterdam for lively debates with 10 younger academics presenting their latest research. The presentations included a variety of topics on preventive restructuring and insolvency law, especially at its intersection with company law, private international law and contract law. Whereas most research draws on traditional legal dogmatic methods, some researchers demonstrated their ongoing empirical and law and economics methodologies.

The presenters included **Michelle Kluge** (Germany), who spoke about the alteration of intra-group third party securities under German insolvency and restructuring plans. **Olivier Roodhooft** (Belgium) presented his research on the consequences of exclusion or withdrawal of insolvent shareholders from the company on their personal creditors. Continuing the debate on shareholders, **Marco Novara** (Italy) discussed their position under the new Italian Insolvency Code. **Isabelle Vanwalleghem** (Belgium) also presented interim results of an empirical study on rules on director's liability in Belgian legal practice.

Gauthier Vandenbossche (Belgium) presented a new approach on how to fund practitioners in those insolvency cases which appear as empty estates. Next was Dorota Nowacka (Italy), who adopted a legal comparison to study the differences in the protection of secured and preferential creditors in five EU jurisdictions. **Abbas Abbasov** (Azerbaijan) discussed how a fair balance could be achieved in recognition foreign restructuring plans in light of the rule in Gibbs and the standards for recognition under the US Chapter 15 proceeding.

In the last session, **Defne Tasman** detailed how the Belgian legislator has pursued implementation of the Preventive Restructuring Directive (2019/1023), while **Vasile Rotaru** (UK) discussed his study on the effects of selective bargaining approaches by offering private benefits in restructuring proceedings in the UK and France. The workshop was concluded with a presentation by **Filippo Viola** (Italy), critically analysing the relationship between shareholders and directors at the stage where debtors commence Italian insolvency plan proceedings.



Young academics attending the YANIL workshop in Amsterdam

The workshop provided for vibrant debates with peers and some experienced academics, discussing research design, methodology and, of course, the (interim) results. In addition, the workshop succeeded in connecting many younger academics from across Europe and beyond.

YANIL Research Prize on Innovative and Outstanding Research

This year, YANIL launched a new Research Prize for Innovative and Outstanding Research. Younger academics contribute with refreshing ideas to further restructuring and insolvency research, by raising new questions, applying different methods, or suggesting new solutions. The YANIL Research Prize aims to raise awareness of this research and support their academic careers by raising awareness of outstanding and innovative research that deserves to be read.

The jury, which was comprised of **Professor Rodrigo Rodriguez** (chair of the INSOL Europe Academic Forum) and the YANIL board, awarded three prizes:

- A gold prize to **Dr. Fabian Kratzlmeier** (Germany) for his research on 'Twisted ways to a coherent body of European insolvency law – Coordination Deficits between pre-pack proceedings and the EIR'.
- A silver prize to **Raghav Mittal** (India) for his research on 'SME Debtors' Equity Retention: Comparing the Relative Priority Rule with the Fair and Equitable Test'.
- A bronze prize to **Marco Novara** (Italy) for his research on 'The trigger point of crisis relevance. Italy's transposition of EU Directive 2019/1023: between a rigid and a flexible mode'.

Part of the competition involved the submission of short videos presenting the key findings of the research. These videos are available on the YANIL webpage of INSOL Europe. The workshop and the YANIL research prize have been made possible with the kind support of the Foundation Bob Wessels Insolvency Law Collection.

EECC Conference 2024: Krakow, Poland

We are pleased to announce that the Eastern European Countries' Committee Conference will take place in Krakow, Poland, from 13-14 June 2024.

Co-Chairs of the EECC, Stela Ivanova (bnt attorneys in CEE, Bulgaria) and Georges-Louis Harang (Addleshaw Goddard, France) are currently working on the technical programme.

More details will be announced on our website and registration will be opening soon at: www.insol-europe.org/events



The banner features the INSOL EUROPE logo on the left, a Polish flag in the center, and a red diagonal banner on the right that reads "DATE FOR YOUR DIARY". Below the flag, the text "Krakow, Poland 13-14 June 2024" is displayed. A red banner at the bottom left reads "EASTERN EUROPEAN COUNTRIES' COMMITTEE CONFERENCE 2024". The BDO logo and "MAIN SPONSOR" text are at the bottom left, and "BDO RESTRUCTURING" is at the bottom center.

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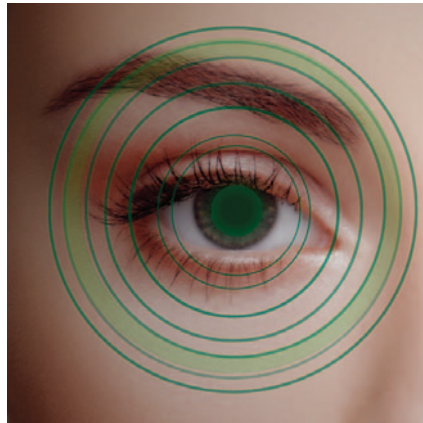
The (very) near future of Fraud & AI

Conference preview by Carmel King (Co-chair of INSOL Europe's Anti-Fraud Forum, Grant Thornton, UK) and Frances Coulson (INSOL Europe Vice President, Wedlake Bell, UK)

Artificial Intelligence ("AI") is perhaps the most significant technological innovation since the internet went mainstream. AI and machine learning has featured heavily in our daily lives for some time now – most of us use 'phone assistants, maps and navigation, help chatbots and digital assistants such as Siri and Alexa.

The potential to usefully apply this technology across a range of industries is immense. It is already happening in education, healthcare, gaming and finance to name a very few sectors. The release of ChatGPT a year ago was a watershed moment, and in addition to writing articles for us on the near future of fraud (joke!), it is probably the advent of ChatGPT and similar generative AI applications (and some of their well-publicised issues) that has prompted much argument over whether AI is a force for human advancement or will trigger the rise of the machines to the detriment of mankind.

Where there is opportunity, there will always be bad actors seeking to exploit others for financial gain. A recent video by Deutsche Telekom titled *Without Consent** posted on social media considered this point and provoked a passionate response. The video demonstrated the risks parents take when posting footage of their children on social media, oblivious to the potential future impact. In the film, an adult "Ella", whose pictures as a child her parents had posted, and now AI-generated from that posted footage, tells her parents about the consequences of their actions. Bad actors steal the photos and videos and use them in humiliating and criminal ways. Ella's identity is stolen and used for credit card fraud, decimating her credit rating. Using AI tools, her voice is used in 'phone scams, leaving her vulnerable to criminal



action herself, and her original childhood images used to create child sexual abuse material ("CSAM"). To her parents, Ella's pictures were warm memories, but to others, they are useful data to be manipulated and sold.

So, are parents negligent by posting to their own social media, or is this alarmist, anti-tech propaganda? In reality, images and data are captured every day, such as CCTV security footage, online account KYC and public service records. But a parent sharing multiple images of their child without consent, without an adequate understanding of the security settings of their account, without knowledge of who their social media friends are and without consideration of the convergence between memory and data is likely to face tough questions from those children in time. The ability of technology to spread any data worldwide in a nano second makes the risk of demonstrating parental pride rather more of a risk than when it just entailed passing round a few snaps around a known friends group (and then taking them back).

This is a data protection issue. For many years now, we have been clicking on the "Agree" button of various terms and conditions without reading the small print. The

benefits of exercising personal caution are obliterated by the frequent hacks of organisations aimed at stealing our personal information for sale on the dark web. This genie is not going back in the bottle. With AI, the maintenance of one's virtual privacy is a complex issue. Who is responsible for maintaining transparency and trust in a digital world? Do we blame users or tech companies for the malicious use of our data, or law enforcement for a failure to pursue the bad actors? Is existing and planned legislation and regulation at all equipped to manage the issues thrown up by AI and deepfakes? Is AI detection technology keeping pace to enable us to identify this manufactured material? Of itself does it make us all more angry? The endless feeling of being under attack for one's data- nothing can be done without accepting or rejecting cookies, agreeing terms, running through a list of "legitimate interests". Legitimate to whom? It is not as if there is a choice to go analogue much these days, folk are forced into this technology ready or not.

This is not a dystopian future; this is happening now. It has been reported that AI-generated images of CSAM are on the rise, as is deepfake revenge porn and fraud, all notably caused by human abuse of an ethically neutral technology. Can humans keep control? Will our baser selves take over through AI?

Whether we are equipped to deal with these issues will be an overarching theme of [The Fraud Conference](#) in February 2024, jointly organised by R3, the Fraud Advisory Panel and INSOL Europe on the theme "[The future of fraud: Is seeing believing?](#)"

Find out more and register at: www.thefraudconference.com

*See: www.youtube.com/watch?v=FrDhsX8R_AY

ARE and CEDAG Joint Symposium, Paris

Report by Emmanuelle Inacio, INSOL Europe Chief Technical Officer

Since 2022, a total of nine cooperation agreements have been made between INSOL Europe and local associations. One of them was signed between INSOL Europe and the French association ARE (*"Association pour le Retournement des Entreprises"*) which is a professional turnaround association gathering over 300 members in France.

On 5 December 2024, ARE & CEDAG (*"Centre des Affaires et Gestion"*: the research lab of Paris Descartes University) organised a joint symposium in cooperation with INSOL Europe titled *"Cross-views on the Ec various newly introduced restructuring plan regimes"* in the building of Paris Cité University's School of Medicine (12 rue de l'Ecole de Médecine) classified as a historical monument.

The joint event covered the practical aspects of the transposition of the Directive on Restructuring and Insolvency in Germany, the Netherlands, Spain and France on preventive procedures, the role and powers of shareholders, the composition of classes of affected parties and litigation related to restructuring plans.

Our members **Céline Domenget-Morin** (WEIL GOSTHAL, France), **Hélène Bourbouloux** (FHBX, France), **Justice Elsbeth de Vos** (Rechtbank Amsterdam, The Netherlands), **Adrian Théry** (Garrigues, Spain), **Robert Hänel** (Anchor, Germany)

and **Andreas Spahlinger** (Gleiss Lutz, Germany) were speaking at this event.

The last panel of the event gathered representatives of the Ministry of Justice, Ministry of Economics and Finance, the president of the Commercial Court of Nanterre, the director of the

CEDAG and the vice-president of ARE to discuss on future developments of French restructuring and Insolvency law as well as on the future Directive harmonising certain aspects of insolvency law.

INSOL Europe President **Giorgio Corno** delivered concluding remarks in French and emphasized on the aim of the agreements between INSOL Europe and local organisations which is to facilitate and stimulate cooperation, support, promotion, exchange of relevant information and organising successful co-labelled events.



Giorgio Corno at the ARE Conference in Paris

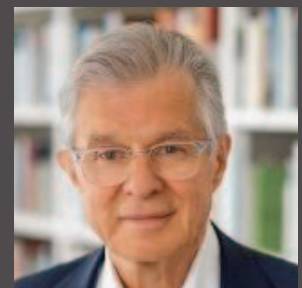
Twentieth Anniversary of the Portuguese Insolvency Law



The Institute of Enterprise and Employment Laws at the Faculty of Law of the University of Coimbra will mark the twentieth anniversary of the adoption of the insolvency law with a conference to be held in the city of Coimbra on Friday 22 March 2024. A full day's programme will cover topics such as the insolvency of SMEs, court practice in the analysis of restructuring plans, the liability of insolvency office-

holders, the judicial role in procedures, impact on special contracts, such as franchising agreements, and the scrutiny of enterprise directors and possible fraud in insolvency matters. A key-note will also talk of the future of harmonisation in European insolvency laws.

Further details and conference registration can be obtained from the Institute website at: idet.fd.uc.pt



It is sad news that we report the passing of former INSOL Europe member Dr. Bruno M. Kübler, who died on 13 November. "He was a great author, lawyer, and insolvency administrator. His unique generosity and empathy will be greatly missed," wrote Ines Kübler-Schulzon on behalf of all employees from KÜBLER Restructuring Insolvency Administration Tax Consulting. The funeral service took place on 27 November.

A closer look at...

The Committee on Economic and Monetary Affairs' (ECON) opinion on the EC's Directive proposal harmonising certain aspects of insolvency law



EMMANUELLE INACIO
INSOL Europe
Chief Technical Officer

Further to the European Commission's (EC) proposal for a directive harmonising certain aspects of insolvency law of 7 December 2022¹, in the European Parliament, the referral was announced in plenary on 26 January 2023 and the file was assigned to the Committee on Legal Affairs (JURI), with Pascal Arimont (EPP, Belgium) as rapporteur.

If the Committees on Economic and Monetary Affairs (ECON) and on Internal Market and Consumer Protection (IMCO) have been asked to give opinions on the EC's Directive proposal, IMCO has decided not to give an opinion. On 30 November 2023, the ECON, published its opinion, with René Repasi as rapporteur (S&D, Germany)², which brings *inter alia* amendments on the very controversial rules on winding-up of microenterprises of the EC's Directive proposal.

Rules on winding-up of microenterprises... and SMEs!

As regards Title VI on simplified liquidation proceedings for microenterprises of the EC's Directive proposal³, which covers approximately 90% of insolvencies in the European Union, the ECON opinion first proposes that these rules are extended to SMEs⁴.

This extension is coherent with the ECON's proposal to delete the last sentence of Recital 35 of the EC's Directive proposal stating that "Although the

provisions of this Directive concerning simplified winding-up proceedings only apply to microenterprises, it should be possible for Member States to extend their application also to small and medium-sized enterprises that are not microenterprises." (Amendment 11).

According to Article 2(j) of the EC's Directive proposal, "Within the SME category, a 'microenterprise' means a microenterprise within the meaning of the Annex to Commission Recommendation 2003/361/EC", i.e. enterprises which employ "fewer than 10 persons and whose annual turnover and/or annual balance sheet total does not exceed €2 million."⁵

Although the ECON opinion does not include the definition for SMEs in Article 2 devoted to definitions, according to the Annex to Commission Recommendation 2003/362/EC cited by the EC's Directive proposal, "Within the SME category, a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover and/or annual balance sheet total does not exceed €10 million."⁶ and "The category of micro, small and medium-sized enterprises (SMEs) is made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding €50 million, and/or an annual balance sheet total not exceeding €43 million."⁷

Thus, the ECON opinion widens the rules on simplified liquidation of microenterprises to

SMEs, meaning that the insolvency practitioner would only be appointed in large cases... If Title VI has been the most controversial issue of the EC's Directive proposal, the ECON opinion extending the rules on winding-up of microenterprises to SMEs should exacerbate the critical reactions...

IPs' appointment where no up-to-date current balance sheet

Then, the ECON opinion proposes that the following Article 39 of the EC's Directive proposal relating to "insolvency practitioner" is amended: "Member States shall ensure that in simplified winding-up proceedings an insolvency practitioner may only be appointed if both of the following conditions are met: a) the debtor, a creditor or a group of creditors requests such an appointment; (b) the costs of the intervention of the insolvency practitioner can be funded by the insolvency estate or by the party that requested the appointment."

The ECON calls on the JURI to replace Article 39 with the following wording: "Member States shall ensure that in simplified winding-up proceedings the debtor, a creditor or a group of creditors may request that an insolvency practitioner is not appointed provided that the microenterprise or SME has an up-to-date current balance sheet. The request needs to demonstrate that the microenterprise or SME has submitted its most recent required

“

If Title VI has been the most controversial issue of the EC's Directive proposal, the ECON opinion extending the rules on winding-up of microenterprises to SMEs should exacerbate the critical reactions...

”

annual statement to the relevant state authorities.” (Amendment 52)

As the ECON extends the rules on simplified liquidation proceedings of microenterprises to SMEs, its opinion proposes that the following Recital 40 of the EC’s Directive proposal is deleted: *“In simplified winding-up proceedings, the appointment of an insolvency practitioner is usually unnecessary given the simple business operations carried out by the microenterprises that make their supervision by the competent authority possible and sufficient. Therefore, the debtor should remain in control of its assets and day-to-day operation of the business. At the same time, to ensure that simplified winding-up proceedings can be conducted effectively and efficiently, the debtor should, upon commencement of and throughout the proceedings, provide accurate, reliable and complete information relating to its financial position and business affairs.”*

Thus, as the ECON opinion proposes that the rules on simplified liquidation proceedings of microenterprises have a bigger scope, extending them to SMEs, the appointment of the insolvency practitioner is not left to the discretion of the debtor, a creditor or a group of creditors. Indeed, Amendment 52 allows for the compulsory appointment of insolvency practitioners. However, the debtor, a creditor or a group of creditors have the possibility to request that an insolvency practitioner is not appointed if the microenterprise or SME has an up-to-date current balance sheet, i.e. has submitted its most recent required annual statement to the relevant Member State authorities.

The ECON opinion is in accordance with the European Economic and Social Committee’s (EESC) one of 22 March 2023 on the EC’s Directive proposal as regards the necessary appointment of insolvency practitioners in simplified liquidation of microenterprises. Indeed, the effective involvement of independent insolvency practitioners has proved to be beneficial, especially for poorly

organised micro-entrepreneurs in simplified liquidation proceedings⁹.

IPs’ appointment even where intervention’s costs not funded

Additionally, the opinion proposes that a second paragraph is inserted to the amended Article 39 which states that *“The lack of funding by the insolvency estate or by the party that requested the appointment shall not constitute a reason for requesting that an insolvency practitioner is not appointed.”* (Amendment 55).

The ECON opinion confirms that in winding-up proceedings of microenterprises and SMEs, the appointment of the insolvency practitioner is not left to the discretion of the debtor, a creditor or a group of creditors. By way of exception, if the debtor, a creditor or a group of creditors have the possibility to request that an insolvency practitioner is not appointed if the microenterprise or SME has an up-to-date current balance sheet, however, they don’t have the possibility to request that an insolvency practitioner is not appointed if the costs of his/her intervention cannot be funded by the insolvency estate or by the party that requested the appointment.

The ECON is in line with the EESC’s opinion: if national courts are made responsible for assessing whether a microenterprise is indeed insolvent and for conducting the necessary lengthy proceedings, including the realisation of assets and distribution of the proceeds, this can lead to an overburdening of national judicial systems. In previous opinions¹⁰, the EESC reminds that it had already stated that resorting systematically to the courts may not be the preferred option. Therefore, the EESC recommends resorting to other competent players, such as insolvency practitioners which would assume responsibility for this task, to help reducing the burden on the judiciary. The EESC is of the view that engaging insolvency practitioners should be actively considered.

In any case, the appointment of an insolvency practitioner in all insolvency proceedings would be consistent with Title III of the EC’s Directive proposal which aims to strengthen the tracing of assets belonging to the insolvency estate since only an insolvency practitioner can request the courts to access bank account registries or access registries relating to the debtor’s assets¹¹. Indeed, access to this information would not be possible in the context of simplified winding-up proceedings for microenterprises if an insolvency practitioner is not appointed. Therefore, it would not be possible to protect the value of the insolvency estate for creditors in this case...

To be continued... ■

Footnotes:

- 1 European Commission, Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 7 December 2022, COM/2022/702 final, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52022PC0702>
- 2 Opinion of the Committee on Economic and Monetary Affairs for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council harmonising certain aspects of insolvency law, 30 Nov. 2023, COM(2022)0702 - C9-0410/2022 - 2022/0408(COD), https://www.europarl.europa.eu/doceo/document/ECON-AD-752615_EN.pdf
- 3 EC, Proposal for a Directive harmonising certain aspects of insolvency law, Rec. 34-46; Art. 38-57.
- 4 Ibid., Amendments 5, 11-13, 15, 16, 19, 49-52, 56-63, 66-69.
- 5 Commission Recommendation concerning the definition of micro, small and medium-sized enterprises, 6 May 2003, C(2003) 1422, OJ L 124 of 20.5.2003, p. 36-41, Art. 282, <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003H0361>
- 6 Ibid., Art. 283.
- 7 Ibid., Art. 281.
- 8 Opinion, European Economic and Social Committee, Enhancing the convergence of insolvency proceedings, 22 March 2023, INT/1007-EESC-2022-01-01-05781-00-00-AC-TRA, <https://www.eesc.europa.eu/en/our-work/opinions-information-reports/opinions/enhancing-convergence-insolvency-proceedings>
- 9 The World Bank, Principles for effective Insolvency and Creditor/debtor Regimes, Revised Edition 2021, Principles C6.1 and C19.6, <https://openknowledge.worldbank.org/server/api/core/bitstreams/3824fe8e-edb3-5f9b-aa28-f5ak759e562/content>
- 10 Including EESC Opinion on Business insolvency, Opinion of the Economic and Social Committee on the “Proposal for a Directive of the European Parliament and of the Council on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU”, 30 June 2017, COM(2016) 723 final - 2016/0359 (COD), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:OJJC_2017.2.09.01.0021.01.ENG
- 11 EC, Proposal for a Directive harmonising certain aspects of insolvency law, Title III, Art. 13-18.



The effective involvement of independent insolvency practitioners has proved to be beneficial, especially for poorly organised micro-entrepreneurs in simplified liquidation proceedings



INSOL Europe Insolvency Tech & Digital Assets Wing

This section brings you the most relevant news in the field of insolvency tech and digital assets. To propose an idea or article for a future edition, please send your proposal to: insolvencytech@insol-europe.org or one of the Co-Chairs:
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Cryptocurrency exchanges and the challenges of bankruptcy



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 bnt attorneys in CEE,
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Crypto has become recently almost an obligatory part of many specialist conferences. It wasn't any different at the INSOL Europe 2023 Annual Congress in Amsterdam, where panellists Max Mailliet, Pierre-Gilles Wogue, Gwilym Jones and David Oršula as moderator discussed the current developments what happens when a crypto exchange goes bankrupt. Max Mailliet and David Oršula summarize the content of the panel.¹

A hazy outlook

Despite more entities holding cryptocurrencies, there is insufficient attention to how they are treated in the event of bankruptcy. The lack of clear guidance from bankruptcy courts on classifying cryptocurrencies within insolvency laws increases uncertainty for creditors. Unlike currency, cryptocurrencies operate in a regulatory grey area in bankruptcy proceedings.

Pertinent questions

Cryptocurrency exchange insolvencies, like FTX's filing in 2022,² pose critical questions for the insolvency regime. Adapting the legal framework is essential in order to protect creditors, streamline

exchange restructuring or liquidation and maintain the integrity of the financial system.

A cryptocurrency exchange in a nutshell

A cryptocurrency exchange, in an era of just over a decade with blockchain, facilitates the exchange of cryptocurrencies for assets like fiat (traditional) money or other digital currencies. Individuals can acquire crypto through methods like peer-to-peer services (known as "decentralized exchanges") or, more commonly, broker-exchanges (known as "centralized exchanges") such as Coinbase, Binance.US, or (previously) FTX.

Understanding claims against an insolvent crypto exchange

In the context of an insolvent crypto exchange, the nature of a claim can be examined based on its trading and custody functions.

1. Trading function:

A claim may arise if the exchange fails to execute a transaction instruction due to intervening insolvency. In such cases, the claim typically involves the value eroded by the inability to transact with the cryptocurrency held in the custodial wallet during bankruptcy. This claim might be excluded contractually, as exchange contracts often contain broad waivers from liability.

2. Custody function:

The focus shifts to whether customers with the cryptocurrency in the custodial wallet have a proprietary claim against the insolvent crypto exchange. If so, their claim takes priority over other creditors in relation to their cryptocurrency. Alternatively, customers may have a personal claim, resulting in them sharing in any liquidation distribution on a *pro rata* basis, potentially incurring a significant loss.

Determining the legal status of cryptocurrencies: implications for the trustee

Clarifying the legal standing of cryptocurrencies holds significant importance as it directly influences the distribution of remaining digital assets by the curator/ trustee/liquidator. In the case of *Ruscoe v Cryptopia Ltd (in Liquidation)*,³ the New Zealand High Court held that cryptocurrencies are considered property, implying that individuals may hold legal title to them.

Cryptocurrency classification: rights in rem or in personam?

The issue of classifying cryptocurrencies as property or personal rights varies across jurisdictions. Practically, the key



MAX MAILLIET
 Founding Partner,
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questions that arise are: Can crypto assets be reclaimed in collective proceedings? Are crypto assets subject of ownership (right to restitution) or subject of a claim (right to damages)? The varying conclusions that are reached in different jurisdictions, such as in Netherlands (Koinz Trading), Japan (Mt. Gox), Russia or (even) at EU law level, emphasize the necessity of addressing the legal classification of crypto assets at an international level.

Ownership & insolvent crypto exchange bankruptcy

A pivotal and unresolved issue in crypto exchange bankruptcy proceedings revolves around the classification of digital assets held by the exchange for its users. The key question is whether these assets can be considered as part of the exchange's corporate assets, potentially being used to satisfy the debts of other creditors. A ruling in the bankruptcy case of *Celsius Network LLC*¹ sheds light on this matter. Celsius, a cryptocurrency platform enabling users to take loans, make payments and receive interest on account holdings on crypto assets, including stablecoins, was custodian to billions of dollars in crypto assets, including US\$ 23 million in stablecoin, when it filed for bankruptcy.

Customers, who had deposited funds with expectations of high returns, contested Celsius's claim that the assets were its property rather than belonging to customers. Customers submitted extensive claims of fraudulent activities against Celsius, seeking the intervention of the Bankruptcy Court. In January 2023, the Court ruled that the majority of crypto assets in Celsius's custody were property of the debtors' estates.⁵ The Court held that, despite the use of the term "loan" in describing what Celsius' customers were doing with their crypto "no ownership or lien in [favour] of the Account Holders was intended."⁶ Therefore, if reserve assets are considered estate property, they will be available to satisfy all creditors based on the priority structures of the insolvency law, which could place competing creditors at a higher priority level than coin holders.

Navigating cryptocurrency insolvencies: addressing volatility

Insolvency professionals face unique challenges when dealing with businesses immersed in the cryptocurrency world, necessitating a re-evaluation of traditional approaches to insolvency appointments. The inherent intangibility and volatility of digital assets pose complexities in their valuation and realization. Any insolvency professional attempting to realize value will need to carefully consider their statutory obligations when determining whether, and when, transferring assets for funds aligns with the creditors' interests or if retaining the cryptocurrency in its current form proves more advantageous in the long run. Given these considerations, seeking Court approval for any cryptocurrency asset realization strategy becomes a prudent course of action.

The general lack of case law on cryptocurrencies in bankruptcy leaves bankruptcy courts with limited guidance on how and when to value these unique assets. This point is exemplified in the case of an infamous Japanese bitcoin exchange, which was handling over 70% of all bitcoin transactions worldwide by early 2014, Mt Gox.

Learning from Mt. Gox: A cautionary tale in cryptocurrency bankruptcy

This major Bitcoin exchange filed for bankruptcy in Japan after experiencing a cybertheft incident resulting in the disappearance of 650,000 bitcoins. At the time of filing, Mt. Gox held around 202,000 bitcoins designated for the bankruptcy estate, intended to address the multitude of creditor claims. During the bankruptcy proceedings, the value of Bitcoin skyrocketed and, by 2018, the trustees found themselves managing funds valued at approximately US\$ 1.5 billion. Capitalizing on this significant surge in value, the trustee envisioned valuing creditors' claims based on the market value of Bitcoin at the time of the bankruptcy filing. This strategy would allow the liquidation of Bitcoin at the current market price, fulfilling all creditors' claims in full, while still retaining a surplus of US\$ 1 billion.

The decision to hold onto the assets proved to be advantageous, showcasing the potential benefits of strategic planning and maximizing the bankruptcy estate for both the debtor and creditors. The Mt. Gox debacle underscored the principle that Bitcoin and, by extension, cryptocurrencies forming the basis for creditors' claims, should be valued as of the petition filing date.

This case also highlights the importance of maintaining a consistent valuation date. If the Court had ruled differently, allowing creditors to amend claims throughout the case to maximize value, it could disrupt the efficient administration of the bankruptcy. Such a ruling might incentivize creditors to delay filing claims strategically, creating uncertainty for the trustee in determining the actual currency value of each claim until the precise moment of distribution.

The European regulatory landscape: MiCA Regulation

Published in the Official Journal of the EU on 9 June 2023, Regulation (EU) 2023/1114, known as the MiCA Regulation, has established a unified regulatory framework for markets in crypto-assets across the European Union (EU). The primary objectives of the MiCA Regulation are to safeguard investors, maintain financial stability, ensure market integrity, all while fostering innovation within the crypto-asset sector.

Despite being drafted prior to the collapse of FTX and the subsequent crisis in the digital asset market, the MiCA Regulation addresses numerous issues encountered during this crisis. It specifically tackles the challenges that contributed to FTX's collapse by advocating for a strict regulatory framework. This includes imposing high capital requirements, governance standards comparable to the banking sector and a demand



A pivotal and unresolved issue in crypto exchange bankruptcy proceedings revolves around the classification of digital assets held by the exchange for its users



for transparency and expertise from regulated entities.

While the MiCA Regulation cannot entirely eliminate fraud, the supervision it establishes, coupled with the resources deployed by European and national supervisory authorities, aims to closely monitor digital asset providers. Notably, the comprehensive regulatory framework mandates that most crypto-asset issuers, traders and exchanges have a registered office or place of management in the EU to obtain authorization for operations. This emphasizes the commitment to effective oversight and regulatory compliance within the European crypto-assets market. ■

Footnotes:

- ¹ Max Mailliet would like to thank his associate Stella Gencel for her collaboration on this article.
- ² *In re FTX Trading Ltd.*, No. 22-11068 (Bankr. D. Del. filed 11 November 2022).
- ³ See *Ruscoe v Cryptopia Ltd* (in Liquidation) [2020] NZHC 728.
- ⁴ *In re Celsius Network LLC*, No. 22-10964 (Bankr. SDNY filed 13 July 2022).
- ⁵ *In re Celsius Network LLC*, No. 22-10964 (MG), 2023 WL 34106, at 1 (Bankr. SDNY 4 January 2023).
- ⁶ *Ibid.* at 19.

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Navigating insolvency with trust and integrity in Amsterdam

Paul Omar reports on the technical sessions of our 42nd Annual Congress in Amsterdam



PAUL OMAR
INSOL Europe Technical
Research Coordinator

A fulsome introduction from Carmel King (Grant Thornton, UK; Co-Chair Technical Committee) and Enda Lowry (Teneo, Ireland) opened events with Barry Cahir (Beauchamps, Ireland; President, INSOL Europe) and Alice van der Schee (Van Benthem and Keulen, Netherlands; Co-Chair Technical Committee) delivering a warm welcome to the assembled audience in Amsterdam.

Day 1: Sunshine before the rain

First on the agenda were the keynotes, the first from **Erik Schoppen**, a Dutch expert on neuroscience, brand management and design and psychology, on the role of trust in business. His presentation, covering a wide range of related topics, from sustainability issues in developing a social dimension to neuroscience to brand equity and leadership, positive psychology etc. enthralled the audience. Following him was **Mathijs Bouman**, an economist and journalist and regular commentator in the Dutch financial press on financial crises and institutions, talking about the IMF approach to the restructuring of states set against the background of weakening state economies and global pressures.

The efficiency of cross-border insolvency

The morning then led into the first panel on “*Making cross-*



border insolvency more efficient”, leading off with **Frank Tschentscher** (Deloitte, Germany) on universalism in the context of development of European insolvency framework and raising the Insolvency-III initiative as an example of possibly unwanted harmonisation. In reply, **Ondrej Vondracek** (DG Just) explained the concept behind the need to provide new tools, despite member states surprise at the extent of changes. As to Insolvency-III, the choice was made for absolute musts albeit Council’s approach is for minimum harmonisation and greater flexibility. Continuing the thought, **Laila Medina** (AG, EUCJ) responded to the question on whether the courts actually understand insolvency, particularly in light of the four freedoms. In defending these, the courts promote establishment rights, balancing these against the threats of forum-shopping and fraud. In harmonisation, key steps are to understand the rules as they emerge, with flexibility,

open-mindedness. So too, capacity-building with good insolvency office-holders and courts to support implementation and development. Closing this debate, **Jasper Aerts** (ESM, Luxembourg) offered a financial markets perspective, in which banking union, capital markets union and financial stability are all important, but in which “rules alone are not enough”, there also being a need for correct infrastructure and support, especially to deal with financial distress, for which harmonisation may be part of the path to restoring stability after distress.

Break-out sessions

Four break-out sessions were programmed into the schedule on “*Pre-pack Proceedings*”, “*Asset Tracing and Recovery of Debtor’s Assets*”, “*Winding up proceedings for micro-enterprises*” and “*Creditors’ committees*”. In the second of these on asset-tracing and recovery, **Antonia Mottironi** (Ardenter Law, Switzerland) led the discussion focusing on the collection of

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First on the agenda were the keynotes, from Erik Schoppen, a Dutch expert on neuroscience, followed by Mathijs Bouman, economist and journalist

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assets for repatriation to foreign insolvency estates, coping with a culture of privacy and criminal sanctions and the prevalence of Ponzi schemes. Continuing the discussion, **Daniel Lowenthal** (Patterson Belknap Webb & Tyler LLP, US) told the story of Charles Ponzi and his fraudulent career promising huge returns to investors and the impact of the “winners” and “losers” court debate about who gains or loses from such schemes, depending on their position at the end the Ponzi scheme.

Adding to the debate, **Louise Brittain** (Azets, UK) praised the UK judicial system providing for appointments without notice, backed with search and seizure warrants and freezing orders in hand to secure cash and data, accompanied by the expansion of cross-border frameworks to help foreign office-holders and the use of “dishonest assistance” to target secondary parties. Offering insight into fraudulent schemes, **Patrik Kalman** (Tragardh Advokatbyrå, Sweden) explained the difference between pyramid and Ponzi schemes, in which recovery requires turning “winners” into “losers”, looking for “red flags” and visible signs of complicity in order to found recovery action. Giving a practical illustration of the process, **Xavier Pareja** (Xavier Pareja, Spain) described working on two Costa Rican schemes in natural woods which attracted overseas investments relying on environmental and sustainability motivating factors.

The third break-out on micro-enterprises in insolvency featured **Michala Roepstorff** (Plesner Law Firm, Denmark) offering a focus on the role of office-holders under the proposed framework in Chapter 6 of the Insolvency-III Directive, what might happen to trigger appointments and who would pay the costs. Outlining the Spanish antecedents to the EU proposal, **Rubén García-Quismondo Pereda** (Quabbala, Spain) showcased its structure and treatment via a dedicated e-platform (mostly



470 delegates took part in the main plenary and technical sessions

geared towards liquidation), control by the debtor and role of private auctioneers involved in asset disposals. Closing the panel discussion, **Jean Baron** (CBF Associés, France) agreed with the need to help SMEs to navigate new systems, especially with online components, albeit worrying whether the loss of scrutiny by office-holders might in fact lead to more fraud.

Cyber-Game

The afternoon's proceedings began with **Vijay Rathour** (Grant Thornton, UK) testing out possible situations affecting office-holders and clients. Prefacing the case-study with the observation that all events have a psychological and emotional impact, the facts moved through a series of cyber-incidents causing business interruption and supply chain issues, responses to which required the establishment of a business resilience framework and an emergency response team structure to strategise, develop tactics and implement operations against a background of possible data breaches, reputational risks and impact on clients. Closing the debate, **Carmel King** (Grant Thornton, UK) stated that, for office-holders, business interruption has become incredibly significant, ransom attacks increasing by 14% in last 5 years with an average down time of 22 days with the cyber-

threat landscape changing in many complex ways.

The real effects of failure

Leading out the panel discussion on anticipating failure, **Frances Coulson** (Wedlake Bell, UK) outlined the work of the Insolvency Service's directors hub for information as a shift from *ex post* to *ex ante* control, albeit with no qualification requirements for office on the horizon. Extending the discussion, **Jan Adriaanse** (Leiden University, Netherlands) outlines the role of psychology in insolvency with each link in the chain from healthy company to strategic, earnings and liquidity crises to bankruptcy requiring a bespoke response. The existence of and need to avoid a range of biases, including optimism, the Semmelweis reflex, similarity, overconfidence or confirmation bias begs the question of whether office-holders and business leaders are fully rational in decision-making. Responding to this, **Patrizia Riva** (Studio Patrizia Riva, Italy), outlined the Italian model, which relies on external (and usually professional) advice and tools, such as a statutory audit board, expert facilitators and independent auditors to help formulate restructuring plans. As an independent director, her role is to look at risk, monitor the use of powers and (effectively) veto some decisions by seeking justification for choices.

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Four break-out sessions were programmed into the schedule on “Pre-pack Proceedings”, “Asset Tracing and Recovery of Debtor's Assets”, “Winding up proceedings for micro-enterprises” and “Creditors' committees”

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Elina Nikolaidou
(AG Erotocritou
LLC, Cyprus)



Professor Bob Wessels
(Leiden University,
Netherlands)

“

The second day of the conference opened with a keynote offered by Emeritus Professor Bob Wessels (Leiden University, Netherlands) on Rembrandt's changing fortunes

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The impact of sanctions and insolvency for the protection of assets

The closing panel of the day featured **Elina Nikolaidou** (AG Erotocritou LLC, Cyprus) outlining the crossfire catching Cyprus investments business and legal services, with the principal need for office-holders to obtain licences and evaluate the risk of taking on mandates. **Sam Alberts** (Dentons, US) then offered an insight into how the US sanctions regime overlaid insolvency, with a special licence from the Department of Justice required for advisers, even with the constitutional impact of rules on access to justice permitting representation in litigation. Following this, **Lech Gilicinski** (Soltysinski Kawecki and Szlezak, Poland) offered the experience of dealing with Russian entities as far back as 2012, when hostile takeovers prompted the Polish Government to act as a financial saviour. Due to EU sanctions regulations of 2006 and 2014 forbidding the exercise of voting rights by Russian shareholders, this risk has been minimised, particularly now with the new post-2022 rules. Even where appointing receivers over Russian-owned property or businesses is an option, value destruction is an issue, particularly where collateral

damage occurs through sanctions. Finally, **Luca Jagmetti** (Baer & Karrer, Switzerland) noted Swiss practice now adopting the 11 EU sanctions packages, in relation to which the issue of legal services provision has become paramount, especially for incidentally connected entities.

Day 2: More rain, but sunshine within

The second day of the conference opened with a keynote offered by **Emeritus Professor Bob Wessels** (Leiden University, Netherlands) on Rembrandt's changing fortunes, particularly in light of intra-family property transactions raising the spectre of intentional moves to defeat the prospect of creditors actions. Set against the background of Rembrandt's life and artistry and the legal frameworks of the age, the presentation offered an insight into how talent was not immune to changing fortunes and economic vicissitudes.

Cryptocurrency exchange and insolvency

The first panel of the morning saw **David Orsula** (bnt attorneys in CEE, Slovakia) quizzing panellists on the fate of cryptocurrency exchanges in

insolvency. In this light, **Max Mailliet** (E2M Luxembourg) offered an outline of the types of exchanges and mechanisms for investment through various cases, such as Mt.Gox, and the “Crypto Winter” of 2022 which saw lots of exchanges suspended and failed with trillions in value lost. Looking forward, another wave of insolvencies may yet happen, Binance and others reported as being in some difficulties. Although not a fan of regulation, the circumstances now demand regulation to avoid fraud, lots of state lacking resources to conduct investigations. **Pierre-Gilles Wogue** (Advant-Altana, France) continued the discussion by outlining why exchanges fail, some through fraud, but also finance start-ups being exposed to wide market fluctuations and ensuing loss of trust by customers leading to a downturn. The role of custodians can also cause risks if corporate governance principles are not adhered to. Closing the debate, **Gwilym Jones** (Henderson and Jones, UK), set out his experience of crypto cases, with key issues being the ground for claims, tracing and recoverability of assets, the identification of fraudsters and available assets and varying returns and litigation risks also featuring.

2023 Richard Turton Award
winner, Marinela Majnova



Cleaning up the mess: How to deal with contaminated assets?

Outlining the increasing impact of environmental disasters, **Christel Dumont** (Dentons, Luxembourg) stated individual efforts might feel insufficient to solve problems, but concerted action could achieve good outcomes. Adding to this, **Andrew McIntosh** (Aon, UK) asked delegates to understand the work necessary, to contact people; identify and manage risks and anticipate implementation of policies, e.g. clean-up, and the role of disclaimers, insurance against risks, and other factors to consider, such as liability in any enforcement actions. **Christophe Thévenot** (Thévenot and Partners, France) agreed a person-centred approach was very necessary, especially where employees had specialist knowledge of sites and operations and can inform office-holders about previous site renovations (perhaps revealing historical problems). In his view, knowing about risks always helps in the mitigation process and to justify extracting money from estate to cover clean-up costs in the face of possible creditor objections. Finally, **Joost de Groot** (Netbid, Netherlands) outlined the niceties of the valuation process for assets with ongoing liabilities with values

dependent on high-risk parameters resulting in low asset values and clean-up work costs tending to be absorbed by estate values.

Insolvency and ethics

The final panel of the day saw **Barbara Rumora-Scheltema** (NautaDutilh, Netherlands) using the audience survey to lead out the case study examples and quizzing the audience to explain some views. **Irene Lynch Fannon** (Matheson, Ireland) referred to the EU Experts Group and to their work on pre-packs and the Insolvency-III Directive proposals, especially in relation to professional organisation conduct standards. Relating the discussion back to previous presentations by Schoppen and Adriaanse, issues arising include the limitation of domestic legislation/regulation to (some, but not all) domestic processes, but not work carried out under another external professional status within the jurisdiction or in another jurisdiction using a professional title. Ethical values such as independence, objectivity might be coloured by biases (as Adriaanse described), so there is a need to re-examine how ethical principles contribute to maintaining trustworthiness and the reputation of office-holders.

Barry Cahir (Ireland) handing
over to Giorgio Corno (Italy)



Closing and handover

Goodbye and thanks came from **Enda Lowry**, **Carmel King** and **Alice van der Schee** with thanks to the Secretariat and conference team. Concluding his term as President, **Barry Cahir** announced **Francis Coulson** as the new Vice-President, **Frank Tschentscher** as an Honorary Member with a special mention and award going to **David Rubin** for his long service as Council Member, Treasurer and Head of Sponsorship Committee. **Giorgio Corno** was then introduced as the incoming President. Giving thanks to his predecessors, he hoped to implement the final Strategic Plan and start its next cycle, also to sustain and extend the networking/cooperation with European and national associations. He also promised to do his best to ensure that the organisation prospered and that the 2024 conference in Sorrento would be a success. ■

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*Giorgio Corno
was introduced
as the incoming
President, taking
over from Barry
Cahir*

”

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

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Charting “The Perpetual Renewal of European Insolvency Law”

Myriam Mailly and Paul Omar report from the Academic Conference in Amsterdam



MYRIAM MAILLY
INSOL Europe Technical Officer



PAUL OMAR
INSOL Europe Technical
Research Coordinator



The Academic Forum Annual Conference was attended by over 80 delegates from 24 different jurisdictions



The INSOL Europe Academic Forum Conference 2023 took place on 11-12 October 2023 with the exciting theme of “The Perpetual Renewal of European Insolvency Law”. New Chair, Professor Rodrigo Rodriguez and new Deputy Chair, Jennifer Gant, welcomed the delegates to the Hotel Okura set against the outstanding cityscape of Amsterdam.

The Annual Conference was attended by over 80 delegates from 24 different jurisdictions. Opening the event, Rodrigo welcomed delegates and thanked the sponsors Edwin Coe LLP for enabling talented speakers to be selected and to share their knowledge at the two-day event.

Day 1: Setting sail

The sessions that followed captured some of the essential themes of insolvency and restructuring law today, beginning with “The Ever-Evolving Landscape of Preventive Restructuring”, which saw **Jaka Ceppec** (Ljubljana University) talk on ‘Absolute Priority Rule Dilemmas in the Case of Slovenia’, exploring the implications of priority rules in corporate bankruptcy law and their application in Slovenia. This was followed by **Remigijus Jokubauskas** (Mykolas Romeris University Vilnius) focusing on ‘Effectiveness of Discharge of Debt of Entrepreneurs in EU Law’ and issues such as discharge of debt and fraudulent forum shopping, which harmonisation through the Preventive Restructuring Directive seeks to avoid. Closing this session



was **Sjur Swensen Ellingsæter** (BI Norwegian Business School) presenting on ‘The Preventive Restructuring Directive and national choices of priority rules: Sparking convergence or entrenching past approaches?’, whose paper also charted the role of priority and its compatibility with the rationale of promoting cross-border investments and lending.

The second session on the “Softer Sides of Corporate Rescue: A Closer Look at Social Fairness and Public Interest” saw **Emilie Ghio** (Edinburgh University) and **Donald Thomson** (Thorntons LLP; Dundee University) deliver a paper on ‘Socio-legal obstacles to the rescue culture’, outlining how the rescue culture has sadly not translated into rescue mechanisms over the years, leaving stigma in the system. Next up came **Elina Moustaira** (National and Kapodistrian University of Athens) asking the question: ‘Is Par Conditio Omnium Creditorum just a legend?’, the answer to

which is that the principle of equality is disputed and steadily undermined, but that it remains a central target of international insolvency law. Closing this session, a paper on ‘Securities Dominance – Once and Forever’, jointly presented by **Paul Omar** (Technical Research Coordinator, INSOL Europe) and **Christoph Paulus** (Humboldt University Berlin Emeritus), explored whether moving to forms of non-traditional cooperation between creditor and debtor to secure funding would require reconceptualising the meaning of “ownership” in property law.

Gabriel Moss Memorial Lecture

At the end of the first day came the Gabriel Moss Memorial Lecture, which featured a presentation by **Professor Bob Wessels** (Leiden University Emeritus) titled “As The Wheels Turns - On Paradigm Shift and New Dynamics in European Insolvency Law”. This charted

changes past, present and future in this very dynamic area of research, with a particular focus on the role of courts and of insolvency office holders. Issues canvassed included the need to encourage further cooperation between the various insolvency actors and greater efforts in training professionals as well as the sharing of best practice. The day then ended with the Welcome Reception and a convivial Academic Dinner.

Day 2: Land ahoy

Sessions on the second day started with “*Harmonisation and Coordination in Cross-Border Insolvency and Restructuring*”, the opening presentation on ‘*The Jam in the Sandwich – the EIR’s Strengths and Shortcomings in the Crypto-asset Market*’ was delivered by **Dominik Skauradszun** (Fulda University; Frankfurt Court of Appeal) and **Paula Moffatt** (Nottingham Trent University), examining the results of a study undertaken with CERIL on the tools available for addressing crypto-asset service provider insolvency. After this, **Nicoleta Mirela Nastasie** (insolvency practitioner, Bucharest) gave a presentation focusing on the ‘*Treatment of intellectual property rights - trademarks - in cross-border insolvency*’, which charted the diversity in national approaches in insolvency or restructuring proceedings to the treatment of intellectual property rights. Closing this session was a joint presentation by **Reinhard Bork** (Hamburg University Emeritus), **Ben Schuijling** and **Michael Veder** (Radboud University Nijmegen) sharing the fruits of work in progress on a ‘*Definition of Insolvency*’, based on one of the key issues that emerged on the agenda of the European Commission as part of the insolvency harmonisation initiative.

The final morning session on “*Modern Issues Affecting Corporate Insolvency*” saw presentations offered by **Eugenio Vaccari** (Royal Holloway

University of London) and **David Ehmke** (Associate, Willkie, Farr & Gallagher LLP) on ‘*A Principled Approach towards the Disclaimer of Environmental Liabilities: Lessons from Europe (and the Rest of the World)*’ on the thorny issue of disclaimers and their impact on the constitution of insolvency estates as well as by **Giulia Pancioli** (Doctoral Candidate, Ferrara University) speaking about ‘*A sustainable approach to Insolvency Law: Insights from EU law and the Italian Model of WBOs*’, offering an insight into sustainability and inclusiveness, central elements of the EU’s long-term economic recovery strategy, and their impact on insolvent enterprises. Closing this session was **Lidija Šimunovic** (Osijek University) focusing on ‘*ESG Opportunities in Pre-bankruptcy and Corporate Restructuring: A comparative study of the US and the EU approaches*’ (a joint paper with **Christoph Henkel**), looking at comparisons between national and regional approaches to ESG requirements.

The afternoon sessions opened with “*Asset Tracing and Transaction Avoidance*” with three further papers, **Antonio Leandro** (University of Bari Aldo Moro) speaking about ‘*Tracing and Attaching Bank Accounts in EU Cross-border Insolvency Proceedings*’, **Olha Stakheyeva-Bogovyk** (Associate, McDermott Will & Emery UK LLP) on ‘*Ukraine vs UK: Limitation Period for Transaction Avoidance: (Un)limiting the Possibilities of Asset Recovery in Insolvency?*’ and **Antun Bilic** and **Marko Bratkovic** (University of Zagreb), dealing with ‘*Distressed Financing In-Between Regulatory Regimes*’. Conference then ended with the Edwin Coe Practitioners’ Forum discussing “*The Changing Paradigm of Directors’ Duties*” from academic and practice perspectives. In closing **Jennifer Gant** and **Rodrigo Rodriguez** thanked the sponsors, speakers and participants and looked forward to Sorrento 2024. ■



Profiles, abstracts and presentation slides have been published at: www.insol-europe.org/academic-forum-events

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Consumer bankruptcy and the Western Balkan countries: Why do they need it?

Marinela Majnova, winner of the Richard Turton Award 2023, presents a summary of her article



MARINELA MAJNOVA
Ph.D. candidate at the
University of Ljubljana

This article is a summary of the full paper written by the 2023 Richard Turton Award winner, Marinela Majnova from North Macedonia.

As part of the award, Marinela was invited to attend the INSOL Europe Annual Congress in Amsterdam in October 2023.

You can read the full version of the award-winning paper on our website: www.insol-europe.org/richard-turton-award

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*“And forgive us our debts as we have also forgiven our debtors”
(Luke 6:37)*

”

In the last three decades, consumer debt and credit, which have deep historical roots, have seen significant changes in Europe, particularly in the context of consumer bankruptcy legislation. While consumer bankruptcy was not a topic of discussion in most European countries 30 years ago, various factors, such as increased consumer credit accessibility, the rise of consumerism, economic shifts, and welfare system transformations, have led numerous European nations to reconsider their stance on consumer bankruptcy laws.

However, despite the global proliferation of consumer bankruptcy legislation, 11 European countries still lack such regulations, down from 13 just nine months ago, as Uzbekistan and Kazakhstan recently adopted consumer bankruptcy legislation following the Russian framework. This eastward wave of legislation seems to have overlooked some central and eastern European countries that were also part of the socialist and post-communist bloc. Unfortunately, there has been limited academic attention on the reasons behind the absence of consumer bankruptcy laws in these jurisdictions. In this context, the author, who has practical experience in one of these jurisdictions, seeks to address two fundamental research questions:

- (1) *Why are policymakers in developing countries, such as those in the Western Balkans, hesitant to adopt consumer bankruptcy regimes?; and*
- (2) *Why do these countries need consumer bankruptcy legislation in the first place?*

Countries without consumer bankruptcy regulation: The case of the Western Balkans

The Western Balkans, with its post-socialist history, presents a unique case in the absence of consumer bankruptcy regulations. The region faced economic challenges in the early 1990s, including hyperinflation, which eroded savings and confidence in the banking system. While some countries in Central and Eastern Europe adopted consumer bankruptcy legislation, others in the Western Balkans remained excluded, with little academic discussion about the reasons behind this exclusion. These countries are not immune to modern diseases after all, which makes it quite challenging to understand why they appear resistant to contemporary remedies for excessive over-indebtedness, like consumer bankruptcy legislation. The reasons can be grouped depending on the costs and the benefits from its implementation, on social and administrative aspects or institutional and procedural design.

One of the challenges these countries face is skepticism about the benefits of consumer bankruptcy legislation. Some argue that consumer over-indebtedness in these countries has not reached a level that justifies the cost of implementing such legislation. Additionally, setting up the infrastructure for an effective personal insolvency system can be expensive, which may deter policymakers in emerging economies. Choosing the appropriate institutional framework for consumer bankruptcy legislation is another challenge. Transplanting complex procedures from wealthier countries may not be advisable, as it could overwhelm the judicial systems

in these countries, which may lack administrative and financial capacity. Hence, building on existing institutional infrastructures and keeping procedures simple is often recommended. The diversity of legal traditions across Europe makes it challenging to determine a one-size-fits-all approach to consumer bankruptcy legislation.

Western legal traditions have influenced Central and Eastern European legal systems, but differences persist. Policymakers in these countries may have varying views on the most effective methods and approaches to regulate behaviour through social or economic means. Many countries have only recently, since 1990, implemented insolvency procedures exclusively for individuals, which means they do not have an extensive legal history of managing the challenges of such proceedings. This absence of established tradition has given rise to diverse and innovative procedural approaches that differ from one country to another. The complexity escalates further when policymakers in these nations face even more formidable challenges, as they lack a foundation or an existing model for reference or comparison.

The need for regulation in Western Balkan countries

Bankruptcy, as practiced in market economies, was unknown and unneeded in centrally planned ones. After the fall of the Berlin Wall, there is almost no Eastern European country that has not implemented a new consumer bankruptcy law. In light of the special needs in Eastern and Central Europe (and in the former Soviet Union), it is questionable whether the initial

bankruptcy laws for these countries should have followed so faithfully the laws of a developed country. However, they did and new consumer bankruptcy laws were enacted in Estonia in 2004, the Czech Republic and Slovakia in 2006, Slovenia and Latvia in 2008, Poland in 2009, Lithuania in 2013, Hungary, Croatia and Russia in 2015, Romania in 2018, Bulgaria in 2019 and, finally, Kazakhstan and Uzbekistan the latest members to join the group in January and March 2023.

Despite the differences between the law on the books and the law in action, evidence shows that these countries, many of them historically sharing similar economic, social, and legal backgrounds as former members of the communist bloc, are positive examples of bankruptcy law implementation. Even in the face of various challenges (administrative complexity and compliance costs, system administration and filing fees, case administration and trustee compensation, and private advisor fees for guidance in preparing and pursuing a relief application.), they seem to be successfully managing. The slowly established practice in the last decade presents the functionality of consumer bankruptcy as a remedy for over-indebtedness in these countries.

The need for consumer bankruptcy legislation in the Western Balkan countries is rooted in economic, socio-cultural and legal considerations. The link between bankruptcy and economic factors, such as GDP, inflation, interest rate, household debts and credit markets has been examined many times in the literature and the effects of the so-called economics of bankruptcy have already been carefully elaborated by many authors. When it comes to microeconomic aspects, the most common factors include age, education, gender, homeownership, type and number of debts, income and number of dependent children. The existing literature also offers various evidence that social, moral and cultural factors such as moral hazard, stigmatization, resocialization, culture influence, unemployment, divorce and illness are very highly related to the need for consumer bankruptcy and its implementation.

Some attempts and failures to regulate

The case of Macedonia can be highlighted, where the absence of consumer bankruptcy legislation led to the adoption of an enforcement law, resulting in thousands of debt cases and blocked bank accounts for debtors. Serbia shares a similar challenge, with over 4 million enforcement requests submitted since the establishment of the enforcement system in 2012.

Macedonia, Serbia and Montenegro are currently the only countries that are operating with private enforcement and have established private enforcement agents appointed by the Ministry of Justice. In Bosnia and Herzegovina, as well as Albania, from the aspect of valid bankruptcy regulations, bankruptcy is still carried out almost exclusively over the assets of legal entities. An exception exists in terms of the liability of members of companies that are unlimited and jointly responsible for the company's obligations, in the way that its property can be covered by bankruptcy proceedings. As we see, provisions of bankruptcy regulations do not apply to all natural persons, so the institution of consumer bankruptcy in the Bosnian and Albanian legal systems is currently unknown.

In contrast to its Western Balkan counterparts, Montenegro enacted consumer bankruptcy legislation in 2015. However, the happiness did not last very long, because only three months later, on 11 December 2015, the validity and constitutionality of the law were challenged by two lawyers from Podgorica who submitted a request for judicial review to the Constitutional Court. A year later, on 30 November 2016, the Constitutional Court decided that there were enough arguments for further investigation and decided to start a procedure for examining the constitutionality of the consumer bankruptcy law. Finally, on 24 February 2017, the court adopted a final decision by majority vote repealing the law as unconstitutional. The overgeneralized, ultra-formalistic, and senseless argumentation of the

petitioners and its acceptance and poor interpretation by the court makes this case very interesting, important and dangerous at the same time, because of the possible consequences and future implications to the other Western Balkan jurisdictions. It demonstrates the challenges faced by countries attempting to implement consumer bankruptcy laws and underscores the need for legal clarity.

Conclusion

The rapid expansion of the consumer credit market, along with the issue of consumer over-indebtedness, is a subject that warrants increased scholarly attention, particularly in regions where there is no existing remedy for this problem. The exclusion of Western Balkan countries from this trend is both challenging to accept and comprehend. This paper represents a modest step in the ongoing discourse aimed at removing Western Balkan countries from this list. Equally important is the task of developing the appropriate institutional framework for these nations, which currently stands as an unexplored area within academic research.

The view of the Constitutional Court of Montenegro is a challenge for all other Western Balkan countries and their constitutional courts and judges who undoubtedly will be more than interested in the case of their Montenegrin colleagues. Re-examining the historical evolution of bankruptcy is not only absurd but also dangerous. The metamorphosis from “punishment” to “rehabilitation” is a hard-won battle through the centuries. The last thing that these countries need today is constitutional courts that will open questions and debates that were closed several decades ago. Instead of negotiating the best practices and frameworks for consumer bankruptcy implementation, ten steps backward were made. This can and has to be changed, and is also one more reason and argument about why the Western Balkan countries need consumer bankruptcy. ■

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The need for consumer bankruptcy legislation in the Western Balkan countries is rooted in economic, socio-cultural and legal considerations

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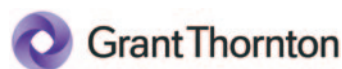
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Ukraine and Russia: Recent case law

Vadym Kizlenko provides an overview of creditor claims against persons connected with the Russian Federation, citing recent case law



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A number of regulations have been adopted aimed at protecting the country's economy from the aggressor state



Since the beginning of the full-scale Russian invasion of Ukraine, a number of regulations have been adopted aimed at protecting the country's economy from attempts of the aggressor state to influence the activities of domestic companies through the use of legal mechanisms, including through bankruptcy proceedings.

1. The Cabinet of Ministers of Ukraine adopted Resolution No. 187 dated 3 March 2022 on Ensuring the Protection of National Interests in Future Claims of the State of

Ukraine in Connection with the Military Aggression of the Russian Federation ("Resolution No. 187"), which introduced a moratorium (ban) on the fulfillment of monetary and other obligations, the creditors (collectors) of which are the Russian Federation (aggressor state) or persons associated with the aggressor state.

2. Section XIII of the Law of Ukraine On Enforcement Proceedings was supplemented by Clause 10² in accordance with Law No. 2129-IX dated 15 March 2022, according to which,

before the Law on the Regulation of Relations Involving Persons Associated with the Aggressor State enters into force, the execution of enforcement procedures is suspended and the substitution of the execution creditors in enforcement proceedings in which the execution creditors are the Russian Federation or persons associated with the aggressor state is prohibited.

3. The National Bank of Ukraine adopted Resolution No. 18 dated 24 February 2022 on the Operation of the Banking System During the

Period of Martial Law, which, among other things, prohibits banking and other authorized institutions from carrying out any currency transactions, a participant in which is a legal entity or an individual, located (registered/permanently residing) in the Russian Federation or in the Republic of Belarus, as well as currency transactions to fulfill obligations to legal entities or individuals located (registered/permanently residing) in the Russian Federation or in the Republic of Belarus.

Case law developments

At present, case-law is developing quite dynamically regarding the procedure for considering monetary claims of creditors associated with the aggressor state, where the provisions of the above regulations have been applied.

On 30 May 2023, the Supreme Court adopted a pilot decision, which actually determined the future of creditors connected with the Russian Federation in bankruptcy cases. In its resolution of that date in Case No. 925/1248/21, the Commercial Cassation Court within the Supreme Court refused to recognize the monetary claims of the creditor, who turned out to be a legal entity established and registered in accordance with the legislation of the Russian Federation. The court came to the following conclusions:

“...And therefore, the moratorium (ban) given in the first subparagraph of [Resolution No. 187(1)] on the Fulfillment of Monetary and Other Obligations, the creditors (collectors) of which are legal entities, established and registered in accordance with of the legislation of the Russian Federation (Clause 8.4) in relation to the provisions of the Code of Ukraine on Bankruptcy Procedures On the Rules and Effects of the Appeal and Recognition of Monetary Claims of a Creditor Against a Debtor in

a Bankruptcy Case (Clause 8.5) excludes the possibility of recognizing, according to the rules of this Code, the monetary claims of those creditors who are persons defined in [Resolution No. 187], in particular, legal entities established and registered in accordance with the legislation of the Russian Federation, which is an LLC. Consequently, despite the presence of formal grounds for dismissing the LLC's monetary claim against the Debtor on the basis of the fourth subsection of Article 202 and the fourth paragraph of Article 226 (1) of the Civil Procedure Code of Ukraine, taking into account the circumstances established by the courts that the LLC is registered in Moscow, Russian Federation (code 50877746028662) (Clause 4.6), that is, that the LLC legal entity was created and registered in accordance with the legislation of the Russian Federation, the Court concludes that these circumstances exclude the possibility of recognizing the monetary claims of the relevant entity (entities) against the debtor in a bankruptcy case according to the rules of national legislation - Code of Ukraine on Bankruptcy Procedures...”

In case No. 910/8991/21, Alfa-Leasing Ukraine LLC filed a claim with the Commercial Court of Kyiv City to initiate bankruptcy proceedings against the Ukrainian State Corporation for Transport Construction Ukrtransbud, citing the existence of outstanding debts. During the hearing of the case by the courts of the first and appellate instances, it was established that the initiating creditor, in accordance with Resolution No. 187, is a person associated with the aggressor state, and therefore there is a moratorium (ban) on the fulfillment and forced fulfillment, of monetary and other obligations in favour of Alfa-Leasing Ukraine LLC.

The courts concluded that at the time of the moratorium established by Resolution No. 187, the Ukrainian State Corporation for Transport Construction Ukrtransbud had

no legal grounds to fulfill its obligations in favour of Alfa-Leasing Ukraine LLC. As such, the circumstances of the presence of contradictions (disagreements) established in case No.

910/8991/21 indicate that there is a dispute about the right in substantive relations on which the initiating creditor's claims against the debtor are based and, therefore, the courts refused to initiate bankruptcy proceedings.

On 7 August 2023, during hearing of case No. 910/9131/16 on the bankruptcy of PJSC Creative, the Commercial Court of Kyiv City established that one of the creditors - OJSC Mytishchi Milk Factory is a legal entity established and registered in accordance with the legislation of the Russian Federation. Under such circumstances, the court concluded that the repayment of the claims of OJSC Mytishchi Milk Factory would be considered a violation of the legislation of Ukraine, taking into account the moratorium established by Resolution No. 187.

With reference to the provisions of Article 607 of the Civil Code of Ukraine, the court concluded that the moratorium established by Resolution No. 187 terminates the debtor's monetary obligation, and therefore, there is no subject of the dispute, as a result of which the proceedings were closed regarding the claims of such a creditor.

Summary

In conclusion, it should be noted that this approach of national courts is justified and fair. The opinion of the courts regarding such creditors is a consequence of state policy implementation in relation to the aggressor state in terms of the maximum limitation of economic opportunities for the influence of the aggressor state both within Ukraine and abroad. ■



Case-law is developing quite dynamically regarding the procedure for considering monetary claims of creditors associated with the aggressor state



Harmonization within the EU: Spain, Belgium and The Netherlands

José Carles, Bart Heynickx and Juliette van de Wiel compare the Status of pre-packaged sales in Spain, Belgium and The Netherlands



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On 7 December 2022, the EU Commission introduced its Proposed Directive on the harmonisation of certain aspects of insolvency law. Regarding Pre-Pack proceedings, the text foresees two phases, the first a “preparation phase” in which the company tries to find an agreement with a buyer with the help of a court-appointed monitor and, during which, it can request protection against creditors.

The second “liquidation phase” is very “debtor and transfer friendly”, making it easy to transfer ongoing agreements to an interested third party, even without taking over the associated debts.

The status of prepacks: An overview

In **Spain**, pre-packaged sales have their origin in the practice of the Barcelona Courts during COVID times. They were introduced by statute in September 2022 during the implementation of the Restructuring Directive. Spanish pre-packs follow a two-phase approach: (i) the pre-insolvency stage with the request for a Court appointment of a pre-packer (a silent trustee who receives offers under a competitive process, while the debtor remains in possession); and (ii) a subsequent insolvency petition including a binding offer from a buyer. The pre-packer becomes the Court-appointed insolvency practitioner and issues

a report with an opinion on the offer. This report benchmarks the offer against the best interest of creditors’ test and, if favourable, is understood as a request to authorise the sale. There is no extra competition at this stage, given that the competition process has taken place under the pre-insolvency phase.

In **Belgium**, formal pre-pack proceedings were introduced on 1 September 2023 as a result of the implementation of the Restructuring Directive. The text, containing a limited number of articles, focuses on the preparation phase, describing how the future bankruptcy receiver has to try to reach an agreement on the sale of the company’s assets, which is then executed after formal bankruptcy proceedings have been opened.

In the **Netherlands**, the pre-pack practice is based on case law (since 2012) and still has no statutory basis. The procedure enables a debtor in financial distress and the future bankruptcy trustee to prepare for bankruptcy in a confidential phase. Research from 2015 shows that the preparation phase takes two weeks on average.

The Dutch pre-pack entails that the court, at the debtor’s request, specifies whom it will appoint as bankruptcy trustee and as supervisory judge should the debtor file for bankruptcy. During this phase, the debtor is in charge of preparing the transaction. The prospective bankruptcy trustee has no formal powers, but has a role in gathering information to form

an opinion on whether the prospective transaction is in the creditors’ best interest. Following the preparation phase, the debtor files for bankruptcy and the court appoints the prospective bankruptcy trustee as the actual bankruptcy trustee. If the preparations have been successful, the trustee can finalize and execute the prepared asset transaction soon after appointment because of prior involvement.

Despite being one of the front-runners with regard to the pre-pack, the procedure has rarely been used in the Netherlands since the ECJ’s *Smallsteps* ruling in 2017.¹

Employees and social security claims

In **Spain**, it is now clear that the buyer can “cherry pick” the labour contracts associated with the productive unit. Under Spanish law, the buyer is normally liable for unpaid salaries and social security debts of the workers included within the perimeter of the offer (“*sucesión de empresa*”). However, the buyer may request for an authorization to not assume labour and Social Security claims for the amount covered by the Salary Guarantee Fund.

In **Belgium**, the buyer can also freely choose the employees taken over in the framework of the execution of the Pre-Pack deal. The buyer enters into a new contract with these employees and, in principle, does not take

over the outstanding unpaid salaries and social security debts (an exception made for employment seniority).

For a buyer of assets in a bankruptcy *not* preceded by a pre-pack, the situation in the **Netherlands** is similar to the Belgian situation. However, different rules apply in case of a pre-packaged transaction. In the 2017 *Smallsteps* ruling, the ECJ held that the exception to a transfer of undertaking does not apply to a sale prepared in a Dutch pre-pack. As a result, all employment agreements will automatically transfer to the buyer. This ruling was more or less reversed in the 2022 *Heiploeg* case.² The ECJ, however, also ruled that, in order for the exception to transfer of undertaking to apply, the pre-pack must be governed through statutory provisions, which is still not the case in the Netherlands. Therefore, all eyes are currently on the Dutch legislator:

Transfer of supply or customer contracts

Under **Spanish** law, the buyer assumes the position of the debtor in contracts that are expressly included within the offer (excluding public contracts). If the premises are included in the offer, this also applies to licenses and administrative authorizations. This operates *ex lege*, which means there is no need for the counterparty's consent. However, this does not mean that the outstanding claims arising from those contracts have to be paid by the buyer. In fact, the buyer assumes no obligation in this regard (unless they expressly decide to do so).

In **Belgium**, contractual consent on both sides is still needed. As a result, the implementation of the Proposed Directive would have a major impact on Belgian law. However, in the framework of reorganisation proceedings, the buyer can identify contracts necessary for the continuation of the business and an automatic transfer of these contracts (with all

the associated debts and claims) can be achieved, even without the contractual counterparty's consent.

Freedom of contract is one of the major principles of **Dutch** contract law. Any transfer of an agreement requires the contracting party's agreement, also in insolvency proceedings. There is only one (very strict) exception for rental contracts of shops and restaurants. The extensive possibility of a forced contract take-over in the Proposed Directive interferes with this principle. The Dutch legislator has already identified this provision as problematic.

Secured claims

In **Spain**, if the sale of the productive unit foresees that the security interest subsists, there is no need to obtain the consent of the secured creditors. The secured claim and the asset just “disappear” from the debtor's liabilities and estate.

If the sale of the productive unit happens with no release of the security, secured claims have the right to repayment taking into account the proportion of value of the secured asset within the total value of the total price paid. Usually, the offer expressly states the value of the secured assets within the total value of the price paid. If it covers the whole amount of the secured claim, there is no need to obtain the consent of secured creditors. However, if the price for the business unit does not cover the value of the security in full, at least 75% of secured creditors need to consent.

In **Belgium**, the assets sold in the bankruptcy proceedings are “liberated” from the security that were previously attached to these assets. The secured creditors' claims are transferred to the price of the sold goods. Regarding the sale of real estate, the secured creditors can request the court to set a minimum price.

Secured creditors are a major factor in **Dutch** insolvency proceedings. The insolvency practitioner cannot sell secured

assets without the security holder's consent. Furthermore, under Dutch law, it is possible to establish security rights on almost all types of assets. The ‘goodwill’ of the company is one of the few exceptions, as in legal terms this is not actually a thing or right. This means that the insolvency practitioner and the secured creditor generally need each other to achieve a sale of the business as going concern.

Connected persons

In **Spain**, connected persons are allowed to buy a productive unit under a pre-packaged sale. However, they do not benefit from any debt release (outstanding debt with suppliers, employees, social security, tax claims, etc.), which could be a clear disincentive for these sales.

The **Belgian** legal system does not provide for a specific mechanism regarding connected persons.

There are no specific rules for a sale to related parties in the **Netherlands**. Case law does not forbid such a sale. However, the general consensus is that the prospective bankruptcy trustee should exercise extra diligence in such cases, especially if the debtor has not contacted other potential buyers.

Conclusion

The Proposed Directive includes some very good ideas and is well drafted. Criticism can be voiced that the proceedings are conducted exclusively through self-administration, do not require a likelihood of insolvency and are capable of massively interfering with employee and creditor's rights, especially when it comes to the transfer of ongoing contracts. ■

Footnotes:

- ¹ Judgment of the European Court of Justice, 22 June 2017, C-126/16 (*FNv v Smallsteps*).
- ² Judgment of the European Court of Justice, 28 April 2022, C-237/20 (*FNv v Heiploeg*).

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Despite being one of the front-runners with regard to the pre-pack, the procedure has rarely been used in the Netherlands since the ECJ's Smallsteps ruling in 2017

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Who gets the Pie? Distribution in UK corporate insolvency

Asad Khan asks who gets the biggest share of the pie during an insolvency



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It has been over 20 years since data was analysed to assess the rate of return to creditors, specifically those unsecured, during corporate insolvency. The last similar research was by R3 in 2001.¹ This article provides an overview of a recent empirical study conducted by the author.²

A company usually goes insolvent when it cannot satisfy its debts. There are around 20,000 corporate insolvencies in the UK every year.³ During distribution, fixed charge holders are repaid first, followed by provisions for expenses, preferential creditors, prescribed part contributions, floating charge holders, unsecured creditors and, finally, deferred claimants.⁴

In 2001, R3 found that unsecured creditors received on average less than 7% repayment of debt and got nothing in over 75% of corporate voluntary liquidations ('CVLs'). The research was based on surveys and is fairly dated. Arguably, there was a need to provide updated statistics that examines a creditor's realistic prospect of repayment during insolvency. This may not only help parties assess their scope for returns and contract accordingly, but it could also help reveal areas for development to the regime.

Empirical research project findings

The empirical research discussed here analysed over a thousand English CVLs initiated between 2016 and 2018. Only concluded cases with complete data were examined. CVLs were chosen

because they represent the most frequently occurring insolvency process, meaning that findings could be projected on all corporate insolvencies more generally.⁵

The research shows that the most regularly featured type of creditor in a CVL was the unsecured creditor, followed by the fixed charge, floating charge and then the preferential creditor. In terms of debt, the unsecured creditor was owed the most, followed by the floating charge, fixed charge and, lastly, the preferential stakeholder. This is to be expected as there will usually be many unsecured parties and only a few fixed, floating and preferential creditors. Interestingly, there were many instances where single unsecured creditors were owed significant sums and the class was not merely made up of several debts of insubstantial amounts.

Even after discounting HMRC's interests (the Crown was unsecured back then), it is still the unsecured creditor who was owed the most. However, unsecured parties got less than 2% in repayments. Furthermore, unsecured creditors enjoyed distribution in just 10% of CVLs and not 25% as found by R3. The position of unsecured creditors is effectively much more dire than previously thought.

It is perhaps expected that, as unsecured creditors are low in the order of priority, they would suffer. However, even secured creditors (fixed and floating charge holders) did not enjoy majority repayment, despite their superior rank. Fixed charge holders received about 50% repayment, while for the floating

charge it was less than 2%. These findings question the ability of such instruments to mitigate against the risk of a debtor's insolvency. For preferential creditors, the rate of return was around 13%.

The fact is that a debtor goes insolvent because there are not enough assets to satisfy debts. Hence, it is understandable that all creditors face low returns. However, the question is why fixed charge holders only enjoyed 50% repayment and not more? By getting repaid first, the fixed charge holder should arguably be able to secure their interests fully or at least to a larger extent. Some explanations could be that the creditor under-secured their debt or the value of the asset diminished over time. For our purposes, it is noteworthy that returns to fixed charge holders are seldom over 50%.

Principally, there are no winners during distribution, as none of the creditors recoup a majority of their debt. If there is a so-called winner, it is the expenses of proceedings. Costs claimed over half the available realisations. Of the 900 CVLs where assets were available, expenses depleted the estate 80% of the time.

Though in many cases the available funds were low, it is still significant that expenses claimed over 51% of realisations and cost £10,000 on average. CVLs took about 2 years to conclude, during which time costs were being incurred to the detriment of distribution. Lower expenses would result in more available realisations to repay creditors. As such, cost and time efficiency emerge as important areas for improvement.

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Principally, there are no winners during distribution, as none of the creditors recoup a majority of their debt

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The research also questions the significance of the prescribed part. Payments were only made in 4% of cases where a floating charge featured in the population, and the value of the fund covered less than 3% of unsecured debt. For a tool created to better the position of unsecured creditors,⁶ the prescribed part arguably makes an insignificant impact. This is yet another area for development.

Regarding preferential parties, despite enjoying priority, the creditor class was repaid less than 13% of debts. Arguably, preferential status fails to provide adequate protection to those subject to it. The National Insurance Fund currently takes the place of employees during distribution. However, with just 13% rate of repayment, the Fund is potentially subrogating employees at a high cost to itself. Thus, improving protection to preferential creditors and lowering the National Insurance Fund's costs could be another area for reform.

HMRC recently became a secondary preferential creditor.⁷ In many instances, the Crown is the single largest creditor. As an unsecured party, HMRC received less than 2% repayment. With preferential status, estimates claim that the Crown may recoup £195m every year.⁸ However, according to this research, the likelier outcome is that HMRC would recoup just £20m per year and not £195m. This is a substantial difference.

As HMRC is well-diversified and gets around £800bn in tax each year,⁹ an additional £20m, or £200m for that matter (which is just 0.025% of £800bn), is arguably insignificant. As a result, it could be maintained that Crown preference is unjustified. It may be better if, instead of prioritising HMRC, realisations are used to repay creditors who are potentially more directly affected by a debtor's insolvency. This may result in greater prospects for traders to be repaid, employees to receive wages, and customers to get refunds. Additionally, Crown preference



may encourage HMRC to file for claims which could negatively impact the success of a potential rescue.

Summary

So, who gets the pie during insolvency? The answer is that everyone just gets crumbs. There are too many creditors, with too big an appetite, and not enough pie. What is more, half the pie is lost to costs.

Fixed charge holders enjoy the greatest rate of repayment, but they just get back half of their debt. For a creditor who is repaid first, it is surprising that the rate of return is not higher. Preferential creditors are second with 13% and then come floating charge holders and unsecured creditors who get less than 2%. Despite being owed the most, unsecured creditors get minimal returns. Compared to R3's findings, the data shows that the position of unsecured stakeholders is much more miserable.

The research highlights certain areas for improvements that could increase returns to creditors. The most obvious is to lower costs and make proceedings more efficient. Such discussions,

however, go beyond the scope of this article. ■

Footnotes:

- 1 The Association of Business Recovery Professionals, *Surveys of Business Recovery in the UK* (9th Survey 2001), 7 and 18, available at: www.spi.org.uk/9thc/. This study was cited in Riz Mokai, *Corporate Insolvency Law: Theory and Application* (OUP, 2005), 95. Also see Riz Mokai, 'Priority as Pathology: The Pari Passu Myth' (2001) 60(3) *Cambridge Law Journal* 581, 589.
- 2 An extended article was published in: (2023) 32(3) *International Insolvency Review* 447.
- 3 There were 22,109 in 2022. See Insolvency Service, *Commentary – Company Insolvency Statistics October to December 2022* (National Statistics, 31 January 2023), available at: www.gov.uk/government/statistics/company-insolvency-statistics-october-to-december-2022/commentary-company-insolvency-statistics-october-to-december-2022
- 4 Kristen van Zwieten (ed), *Goode's Principles of Corporate Insolvency Law* (5th edn) (Sweet & Maxwell, 2019), 2. Also see Vanessa Finch and David Milman, *Corporate Insolvency Law – Perspectives and Principles* (3rd edn) (Cambridge University Press, 2017), 56.
- 5 For example, see *Insolvency Service, Insolvency Statistics – October to December 2017* (National Statistics, 26 January 2018), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/675931/Insolvency_Statistics_-_web.pdf; idem, *Insolvency Statistics – October to December 2018* (National Statistics, 29 January 2019), available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/780233/Commentary_domain_update.pdf
- 6 van Zwieten (ed) (above note 4), 243–245.
- 7 Pursuant to section 98, Finance Act 2020.
- 8 The Law Gazette, 'R3 Warns of Consequences of Finance Bill Insolvency Creditor Changes' (*The Law Gazette*, 24 July 2020), available at: www.thelawgazette.co.uk/all-notices/content/103789. Also see HMRC, *Introduction of Changes to Protect Your Tax in Insolvency* (Policy Paper, 11 March 2020).
- 9 Matthew Keep, *Tax Statistics: An Overview* (House of Commons Library, 16 January 2023), available at: <https://researchbriefings.files.parliament.uk/documents/CBP-8513/CBP-8513.pdf>.



There are too many creditors, with too big an appetite, and not enough pie. What is more, half the pie is lost to costs.





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Progress of sorts

Nicky Fisher, President of R3, the UK's insolvency and restructuring trade body, looks at the future of insolvency practitioner regulation...



On the face of it, the Government's plans for the future of insolvency regulation contained a number of positives. Proposals for a single regulator housed inside the Insolvency Service will not be progressed, the bonding regime will be reformed, and firm regulation will be introduced alongside the changes to regulation for licence holders.

But, there remain some areas of concern. While the single regulator will not be housed in the Insolvency Service, the prospect of one being introduced has not entirely gone away. The Government is also progressing with its plan for a compensation scheme and, while the news of firm regulation and bonding reform are both welcome in principle, the finer details of both proposals still need to be developed...

The practicalities of firm regulation

The Government has been clear that it sees firm regulation as a solution to the regulatory gap that has emerged as the profession – and the demands on it – have evolved following the introduction of the Insolvency Act in 1986.

And while we support the principle of firm regulation, as the majority of our members believe it will improve professional standards, we really need to see the details around these proposals. To date, the Government has only published an outline of how this process will work, which, given the size and scale of the change this will introduce, is a cause for concern.

We will continue to push Government for more details through our parliamentary engagement work to ensure we are able to respond and present the views of the profession at the earliest opportunity.

Compensation concerns

The compensation scheme was one of the more controversial proposals the Government put forward at the end of 2021 – and one which could create an onerous burden for the profession if it is not developed with the utmost care.

The Government has acknowledged that the proposed scheme will take into account the nature of the work undertaken by the profession and find a way around the issue of spurious or high-volume claims with its solution to these issues appearing to be to consult further.

But, we still need to see the details of how this will work in practice, so we will be keeping a close eye out for the consultation document, and ensuring the views and concerns of the profession around these proposals are clearly heard.

Two stages, many questions

The Government's two-stage approach to reforming the bonding regime was a mixed blessing. The amendments it intends to introduce via secondary legislation, which include increasing General Penalty Sum cover from £250,000 to £750,000, prescribing that a maximum indemnity period must be at least six years from the date of appointment and extending the

current minimum requirements of a bond, are positive.

It has been clear the bonding regime is in need of reform for some time now, so the decision to move forward with these changes – something we called for in our consultation response – was welcome.

However, the lack of detail around the Government's plans to review a number of areas of the bonding regime – including changes to IP Security and bonds for successor insolvency practitioners, among other things – are a cause for concern.

The Government intends to consult on these areas in the new year, and we will be taking every opportunity to clarify the details of what's planned for the future.

A ticking clock

The jury is still out on the Government's proposals for the future of insolvency regulation. While there were a lot of positives in the Government's announcement, there are still plenty of questions that need answering around the details of certain key areas.

And the window for responses is getting smaller. Several of these proposals are dependent on parliamentary time being available for legislation to be passed and there are some critical elements that are due for further consultation in 2024.

But, with a General Election likely to take place next year, the biggest question is how far the Government will be able to move forward with these before the legislative agenda is put on pause while the country goes to the polls. ■



NICKY FISHER
President of
R3, London

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The jury is still out on the Government's proposals for the future of insolvency regulation

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Trouble in Texas: Resignations and Scandal

David Conaway reports from Texas as Judge David Jones resigns as bankruptcy judge amid scandal



DAVID H. CONAWAY
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Loop & Kendrick, LLP



The fall of Enron

Texas is the second largest US state (after Alaska). It is an economic engine in the US, fuelled primarily by the oil and gas industry. When Houston-based Enron Corporation filed its Chapter 11 case in the Southern District of New York in 2001, Texans were mad. Enron was the largest US Chapter 11 case at the time. It also sparked one of the largest corporate scandals in US history.

The rise of Texas

In late 2020, the *Houston Chronicle* featured Judge Jones as “the judge who saved the Texas bankruptcy practice”, heralding a dramatic shift of filings of complex Chapter 11 cases from Delaware and New York to Texas. Since Enron, the Texas

Bankruptcy Court, specifically the Southern District of Texas in Houston, became one of the Chapter 11 “hotspots”, challenging the supremacy of Delaware and the Southern District of New York. In the first half of 2023, 16 of the 20 largest Chapter 11 cases were filed in the Southern District of Texas. This trend is similar in prior years, as the Southern District of Texas became the “go-to” venue for large Chapter 11 cases.

The rise of Venue- and Judge- shopping

In 2021, a US Senate Judiciary Committee conducted hearings on possible fraud in Chapter 11 cases, including receiving testimony from Georgetown Law School Professor, Adam Levitin. The essence of Levitin’s testimony was that “Big Law” handpicked not only the venue, but the

particular judge for filing cases. The Purdue Pharma Chapter 11 case was specifically filed in the Southern District of New York, White Plains Division. Only Judge Robert Drain handled cases filed in that Division. He had a reputation for approving Chapter 11 plans that contained broad non-consensual releases of non-debtors. The Purdue Pharma Chapter 11 Plan releases were approved by Judge Drain, but are now on appeal before the US Supreme Court, with oral arguments having occurred on 6 and 7 December 2023. Since the Senate hearings, the New York Bankruptcy Court has made all case assignments random.

Levitin also noted that a “Big Law” law firm ran into trouble in Delaware, when a judge was “furious” regarding the terms of DIP financing proposed by Big Law and also denied portions of the law firm’s fee application. According to Levitin, Big Law “took its business” to other judicial districts, particularly the

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When Houston-based Enron Corporation filed its Chapter 11 case in the Southern District of New York in 2001, Texans were mad

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Southern District of Texas, where large Chapter 11 filings surged.

The rise of Judge Jones

Judge Jones was instrumental in restructuring the Texas Bankruptcy Court that facilitated the Chapter 11 filing surge by implementing a case assignment procedure, where all “complex” Chapter 11 cases were automatically assigned to two judges: Judge Jones or Judge Marvin Isgur. Thus, companies, and their counsel, knew with certainty the identity of their judge, if they filed Chapter 11 in the Southern District of Texas. By contrast, Delaware’s case assignment procedure is random.

As national Chapter 11 counsel for creditors, we have appeared in dozens of Chapter 11 cases before Judges Jones and Isgur. Within a period of a week, Judge Jones presided over first day hearings for two cases in particular: Party City (18 January 2023) and Serta Simmons (24 January 2023). In both cases, in connection with the Debtors’ motions for DIP financing, Judge Jones’ statement was “I see you are going very fast. ... I want you to go faster”. He offered final approval of the DIP financing, when only interim approval was requested by the Debtors. Final approval of the DIP financing on a first day basis violates the Bankruptcy Code, which requires 20 days’ notice to all creditors.

The fall of Judge Jones

On 4 October 2023, a lawsuit filed by a *pro se* litigant and former shareholder of energy and construction company McDermott International, which had gone through a Chapter 11 restructuring approved by Judge Jones in 2020, accused Judge Jones of failing to disclose his relationship with a partner at Jackson Walker LLP.

The law firm of Jackson Walker LLP was frequently selected as local counsel by “Big Law” for their Chapter 11 cases in

Texas. A Jackson Walker partner Elizabeth Freeman has been in a romantic relationship with Jones and they were living together. Simultaneously, Jackson Walker and Freeman specifically were working on many cases over which Judge Jones presided. Many details of the Jones-Freeman relationship have been publicly reported in press, including in articles in the *Wall Street Journal*. Jones initially denied any wrongdoing and asserted that he had no duty to recuse himself from presiding over these cases because they were not married (they were “co-habiting”) and they did not commingle funds. However, the *Wall Street Journal* subsequently reported Jones and Freeman co-owned a home and had a joint bank account. Additionally, neither Freeman nor Jackson Walker disclosed potential conflicts required by the Bankruptcy Code in connection with applications to be retained and be paid by the Debtors.

Despite Jones’ denials, after the *Wall Street Journal* and other media reports of alleged facts, the Chief Judge of the US Court of Appeals for the Fifth Circuit filed a formal ethics probe into Jones’ failure to disclose the romantic relationship. Initially, Judge Jones did not resign, but all his cases were re-assigned to other Texas bankruptcy judges. Shortly after the initiation of the formal ethics probe, Jones resigned from the Bankruptcy Court altogether.

The potential impact and fallout from the scandal has yet to be determined. To date, the United States Trustee has sought to disgorge fees from Jackson Walker of at least USD 13 million. Also, any orders and rulings by Judge Jones, where recusal should have occurred, are potentially subject to being set aside. It remains to be seen whether further investigations will occur regarding Judge Jones, Freeman, Jackson Walker and Big Law.

Also, the Texas Bankruptcy Court has come under pressure to modify its case assignment procedure to become random, as in Delaware and New York.

The fall of Texas?

Since Judge Jones’ resignation, several large Chapter 11 cases have been filed in the Bankruptcy Court for the District of New Jersey, such as Rite Aid and WeWork, prompting speculation that New Jersey will become the new “hotspot”. New Jersey is also the venue for home goods retailer Bed Bath & Beyond’s Chapter 11 case as well as Johnson & Johnson subsidiary LTL Management’s second attempt to resolve its mass talc liabilities via bankruptcy. As one sanguine New York attorney noted, New Jersey and Delaware are much closer than Texas.

As a result of the Jones fallout, will companies switch to Delaware, New York, or New Jersey as restructuring venues? 2024 will be an interesting year.

Coda

It is common for foreign-based companies to file Chapter 11 in the US to implement restructuring objectives. Such companies and their counsel essentially have had their choice of forum and judges for the Chapter 11 filings. Scandinavian Airlines is a recent example, where the Swedish-based company filed Chapter 11 in the Southern District of New York to implement its restructuring. Houston-based energy and construction giant McDermott International filed Chapter 11 in Houston in 2020.

In September 2023, McDermott announced that it entered into a transaction support agreement (TSA) for a financial restructuring and commenced a Dutch Wet Homologatie Onderhands Akkoord (WHOA) proceeding and a UK restructuring plan (RP) under Part 26A of the UK Companies Act 2006 (CA 2006). On 9 October 2023, McDermott filed an ancillary Chapter 15 proceeding in Houston, primarily for the purpose of US approval and enforcement of the Dutch and English restructuring plans in the US. ■

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It is common for foreign-based companies to file Chapter 11 in the US to implement restructuring objectives

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Here we bring you short updates from our members including statistics updates and insolvency measures in response to the COVID-19 crisis in their jurisdictions. To contribute to a future edition, please contact: paulnewson@insol-europe.org

Corporate groups in France: Difficulties with related actions against foreign parent companies



JEAN-LUC VALLENS
Former Judge, Court of appeal of Colmar

The extension of insolvency proceedings provided for under French law allows the effects of those proceedings to be extended to another company or to an individual, if the court considers that there has been a confusion of assets or abnormal financial relations (C. com., art. L 621-2 al. 2).

This extension derives directly from the procedure and is closely linked to it. It naturally falls within the jurisdiction of the courts of the State where the insolvency proceedings have been opened (Reg. (EU) No 2015/848 of 20 May 2015, art. 6(1)).

In the instant case, a French liquidator filed a petition before a French court with the aim to apply this provision against the parent company of the insolvent French company, because the two companies were run by the same person and the subsidiary company was located in premises belonging to the parent company. The extension of the insolvency proceeding would have been possible if, for example, the subsidiary company paid excessive rent to the parent company or if all decisions were taken in the sole interest of the parent company.

However, there was an obstacle in this case: the parent

company was established in Germany. The Court of Justice of the European Union held that the extension of insolvency proceedings had the effects of an opening judgment on the assets and liabilities of the company concerned and ruled that the jurisdiction rule of the European Insolvency Regulation, based on the criterion of the debtor's centre of main interests (Reg. (EU) No 2015/848 of 20 May 2015, art 3), should prevail over domestic rules.

In that case, an additional condition should therefore have been met: the location of the centre of main interests of the targeted company in France (CJEU, 15 Dec. 2011, C-191/10, Rastelli). Having failed to demonstrate this, the liquidator's request was rejected in compliance with EU rules (Cass. com. 13 Sept. 2023, no. 22-12.855).

What possible solutions remain for insolvency practitioners?

Other actions appear to be more appropriate and more effective than the extension of insolvency proceedings to ensure that the liabilities of an insolvent company would be borne by its foreign parent company:

- a liability action against the parent company, if it can be considered as a *de facto*

manager;

- the opening of secondary proceedings, for which insolvency does not have to be demonstrated; in this regard, the CJEU already clarified that secondary proceedings may be opened even if the registered office is located in the State where those proceedings are opened (CJEU, 4 Sept. 2014, C-327/13, Burgo Group). It would be then efficient to coordinate both proceedings in the interests of the creditors of the main proceedings opened against the subsidiary;
- Finally, an avoidance action targeting specific preferential payments or transfers of assets that may have been made prior to the opening of insolvency proceedings to the detriment of that insolvent company for the benefit of its parent company without consideration or other valid grounds. ■



Other actions appear to be more appropriate and more effective than the extension of insolvency proceedings



Innovative tax deal for the Italian football team Sampdoria

An agreement, in many respects innovative, has been concluded between the Genoa Revenue Agency and *Unione Calcio Sampdoria*, one of the two historic Genoese Serie A football teams. This is the outcome of a negotiated settlement of the business crisis in which Sampdoria, then managed by Mr Ferrero, risked judicial liquidation.

Combined with a debt restructuring agreement and new management in the form of an Italo-British consortium, the Genoa-based club will receive a 65% discount on the €49 million cut in tax debt and a 10-year instalment plan for the 1/3 remaining debt, subject to security being offered by a pledge of the glorious club's trademark.

As a result of the agreement, signed on 11 August 2023, the new owners will have to pay to the tax authorities €17,130,840 out of the €48,495,257 due (some 35%), of which about €11 million by 30 September 2023 and the remainder in 40 quarterly instalments of €153,000 starting 31 December 2023. The restructuring of Sampdoria's debt, of which the tax portion accounts for slightly less than a third of overall debt, appeared to the Court to be the most advisable solution, given that the liquidation scenario showed net proceeds of only €17.6 million, not enough to satisfy even first-rank preferential creditors.

The *sine qua non* condition, consistent with the plan presented to the Court of Genoa for the restructuring of the overall debt, is however the establishment of a pledge over the "Shield of St George" trademark that appears on the club's kit in favour of the Revenue Agency. This will allow



the agency to enforce security in case of default, albeit simple delays in the payment of instalments are sanctioned, but only with a €1,000 *per diem* penalty.

The most innovative aspect of the tax settlement between the Revenue Agency and Sampdoria concerns its approval as part of a negotiated settlement of the business crisis combined with a debt restructuring agreement, allowing for the settlement of the tax claim (thus excluding the need for an agreement with the Revenue Agency). However, the Revenue Agency has specified that the conclusion of the agreement: *"does not avoid in any case any control, assessment and collection activities against the debtor by the Tax Administration, with respect to both the tax periods following the one of approval of the proposed settlement and the previous periods."*

Among the other *"non-financial creditors"*, as stipulated in the agreement approved by the Court, sports agents and attorneys will be satisfied at 40% and *ex lege* secured creditors and unsecured creditors at 70%. Thus, the agreement reached fully reflects the purpose of the tax settlement, which is to produce positive effects at the same time for the debtor, the

Revenue Agency, other creditors, stakeholders in general and the community.

In fact, thanks to this agreement:

- (a) the company was able to implement its corporate recovery, continuing its business and finding an investor who would put an acceptable amount into the residual value of the company;
- (b) the Revenue Agency will be able to recover amounts significantly higher than it would have been able to receive in a bankruptcy scenario or under any other kind of arrangement;
- (c) creditors will receive payments that, while not entirely corresponding to the debts owed them, will allow them, in many cases, to avoid difficulties consequent on a failure to collect their claims;
- (d) the company's employees will retain their jobs;
- (e) the Revenue Agency will avoid incurring social charges due to layoffs, mobility and the non-receipt of future income taxes from employees and suppliers, which it would inevitably have had to bear in case of failure of the debt restructuring. ■



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The most innovative aspect of the tax settlement concerns its approval as part of a negotiated settlement of the business crisis combined with a debt restructuring agreement



Insolvency within the EU and other technical updates

Myriam Maily writes about the latest information made available to the INSOL Europe members on the INSOL Europe website



MYRIAM MAILLY
INSOL Europe Technical Officer



State of play on the implementation of the EU Directive on Restructuring and Insolvency

I am pleased to announce that, since my last technical column, new reports have been published on the INSOL Europe website dedicated to the INSOL Europe/LexisPSL Joint Research on implementation of EU Directive 2019/1023 for **Belgium** and **Luxembourg**. Updated reports are also available for **Czech Republic** and **Slovenia**.

Future articles will be published to focus on legislative amendments introduced in **Bulgaria** and **Poland**, which are the latest countries to consider implementing the EU Directive. Overall progress on implementation is still available thanks to our tracker at: www.insol-europe.org/tracker-eu-directive-on-restructuring-and-insolvency

directive-on-restructuring-and-insolvency

At the time of writing, 26 reports (25 EU Member States + the UK) are available: Austria, Belgium, Croatia, Cyprus, Czech Republic (update), Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands (update), Portugal, Romania, Slovakia, Slovenia (update), Spain, Sweden and the UK.

Individual articles, as well as the consolidated table, are available at: www.insol-europe.org/technical-content/insol-europelexispsl-research-on-implementation-of-the-eu-directive-20191023

Please note that the results of this research are only available to **members of INSOL Europe** (you must log in to access the individual articles as well as the consolidated table).

European Insolvency Regulation Case Register update

I am delighted to confirm that the case register (which was previously hosted on Lexis Library) is now hosted on Legal Research in Lexis+. **Migration for active INSOL Europe members is now finalised** and new login details have been sent.

For details of how to use and search the case register, see the 'How to Guide' available at: www.insol-europe.org/technical-content/european-insolvency-regulation

As a reminder, the European Insolvency Regulation Case Register, which is a unique internet-based system for collecting and disseminating information on court decisions that consider a significant point relating to the Recast Regulation on Insolvency 848/2015 (or its predecessor, Regulation (EC) 1346/2000 on

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The EIR Case Register is now hosted on Lexis+ free for INSOL Europe members only

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Insolvency Proceedings), relies on a network of National Correspondents working closely with the Case Register's Management Board. In this connection, I am pleased to inform you that we recently welcomed a new national correspondent from Germany: **Prof. Dr. Dominik Skauradszun**.

At the time of writing, the case abstract service provides abstracts published in English for **852 judgments**, from the Court of Justice of the European Union and first instance and appeal courts of the EU Member States, including **67 abstracts applying the Recast Regulation on Insolvency 2015/848**: 1 from Austria, 2 from the CJUE, 11 from England & Wales, 7 from Estonia, 1 from France, 11 from Germany, 2 from Gibraltar, 5 from Italy, 20 from Lithuania, 2 from Netherlands, 4 from Portugal and 1 from Scotland.

Comparative guide to the law transposing the "Preventive Restructuring and Insolvency" Directive of 20 June 2019

I am pleased to inform INSOL Europe members that the French National School for the Judiciary (ENM) has recently published a **comparative guide** (October 2023) which aims at informing readers on the orientations and rules adopted by the Member States following the

implementation process of the EU Directive on Restructuring and Insolvency.

The comparative Guide contains a comparison of the main aspects of the EU Directive in 6 EU Member states (**Belgium, France, Germany, Italy, Netherlands and Spain**), in respect of:

- (1) Insolvency prevention mechanisms and procedures;
- (2) Formation of classes of affected parties and adoption of restructuring plans;
- (3) Voting on restructuring plans by creditors and equity holders;
- (4) Confirmation of restructuring plans by judicial authorities; and
- (5) Discharge of debt measures allowing insolvent individual entrepreneurs to recover.

This comparative Guide is complemented by a **Glossary**, which reproduces the terms for which the Directive of 20 June 2019 provides a definition as well as proposing definitions for the terms not explicitly defined in the Directive, but which are part of the concepts used. These definitions can serve as a guide to a good understanding of the rules and principles used. The texts, both funded by the European Justice Programme, are available in English, Spanish, French and Italian at: <https://www.insol-europe.org/academic-forum-news>

I am grateful to the French National School for the Judiciary for sharing this information with INSOL Europe members. ■

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

Other Useful Links



Coffee Breaks Series 2021

> www.insol-europe.org/publications/web-series

Updated Insolvency Laws

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

National Insolvency Statistics

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

EIR Case Register

> <http://tinyurl.com/y7tf2zc4>

European Insolvency Regulation

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

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

LinkedIn

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

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

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

EU Directive on Restructuring and Insolvency (2019)

> www.insol-europe.org/technical-content/eu-draft-directive

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

Brexit Publications

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USBC Chapter 15 Database

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The Fraud Conference

The future of fraud: Is seeing believing?

29 February 2024, Royal College Of Physicians, London



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

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

The Harmonisation of Transaction Avoidance in the EU

Oriana Casasola (1st edition) (2023, Edward Elgar, Cheltenham), 230pp, £90, ISBN 9781803928371

The law of voidable transactions in insolvencies is one of the most obvious areas in need of harmonisation at EU level, yet also one of the most complex. This excellent new text demonstrates how great the divergences in avoidance laws can be among different jurisdictions, with a detailed examination of the laws applicable in England and Wales, Germany and Italy.

It begins with an outline of the reasons why avoidance laws are necessary and important to insolvency systems. There then follows an examination of the EU approach to harmonisation of insolvency law to date, including the current approach to transaction avoidance. There is a critique of the presently unsatisfactory EU conflict of laws approach to transaction avoidance in Article 16 of the EU Insolvency Regulation (Recast) [2015] OJ L141/19, as well as a discussion of the case law that has addressed ambiguities in the original 2000 Regulation and its successor, the Recast. Remaining areas of ambiguity as to jurisdiction and conflict of laws in relation to transaction avoidance claims are identified.

The comparative chapters sensibly focus on the three main types of avoidance laws: preferences, transactions detrimental to creditors and gratuitous acts in the three selected jurisdictions. They adopt a thematic approach that looks at objective and subjective criteria, among other factors. There are two chapters: one that discusses the avoidance provisions available in insolvencies and another which deals with private law claims. In focusing on the main types of avoidance laws, it leaves aside other “outlier” laws that might enable transaction avoidance in the three jurisdictions.

As well as this comparative material, there is a review of existing scholarship on harmonisation of EU transaction avoidance laws. There then follows a suggested original approach that might be adopted to address transaction avoidance most effectively in the EU, stopping short of full harmonisation and avoiding the presently messy private international law approach under the Recast.



The text concludes with a critical review of the proposed EU directive on minimum harmonisation of certain substantive areas of insolvency law, including transaction avoidance. This thoroughly researched and referenced text would provide excellent reading material for anyone interested in harmonisation of transaction avoidance laws, both in the EU and beyond.

Rebecca Parry, Professor of Insolvency Law, Nottingham Law School

Financial Institutions in Distress: Recovery, Resolution and Recognition

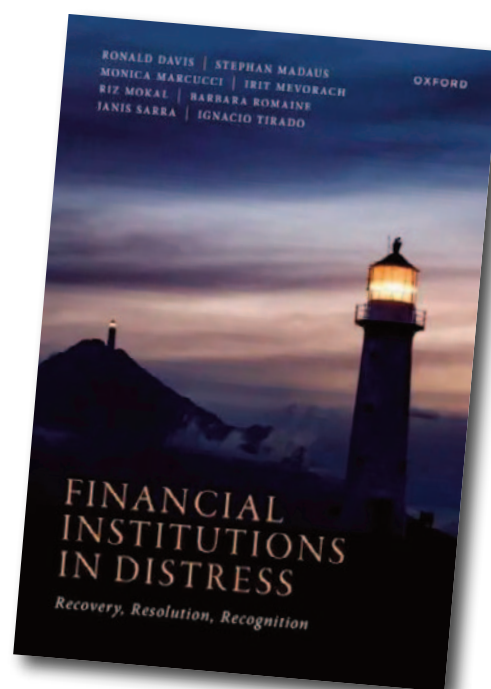
Ronald Davis, Stephan Madaus, Monica Marcucci, Irit Mevorach, Riz Mokai, Barbara Romaine, Janis Sarra and Ignacio Tirado (1st edition) (2023, OUP, Oxford), 464pp, £140, ISBN 9780192882516.

There are some book projects that I wish I were part of. This is one of them. The book “Financial Institutions in Distress: Recovery, Resolution, and Recognition” is written by a group of well-known experts in insolvency law. It aims to “close the cross-border resolution gaps” by proposing the “key features” of the Model Law on Cross-border Financial Institution Resolution (Model Law). The book is original, bold, topical, comparative and has a strong normative component. In 10 chapters, it gradually introduces the reader to the complexities surrounding financial institutions and their resolution.

Across the 400 pages, the authors justify the need for a special treatment of financial institutions in distress, describe the fundamentals for their prudential regulation, supervision and resolution, examine common resolution mechanisms,

and outline legal and institutional frameworks for the resolution of financial institutions in more than ten jurisdictions. They highlight the inadequacy of existing international resolution frameworks and suggest core principles that can help transcend substantive law differences, overcome “territorial” inclinations and support the new Model Law.

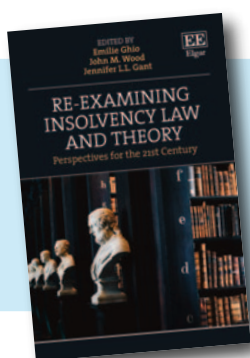
This Model Law constitutes a comprehensive legal framework harmonising certain cross-border aspects of resolution and offering a combination of private international and substantive law rules. Underlined by the principle of modified universalism, it contains special rules related to international jurisdiction (linked to the place of authorisation – home jurisdiction – rather than COMI), applicable law (law of the home jurisdiction with very few carve-outs), harmonisation of resolution measures, ex ante and ex post cooperation, and the expedient recognition of foreign resolution actions with limited and exhaustive grounds for refusal of recognition.



Only time will tell whether the proposals contained in the book will find support in countries around the

globe. There is a clear need for a coherent and effective framework for the cross-border resolution of financial institutions. Financial Institutions in Distress stands out for its significant contribution, shedding light on existing problems and presenting well-reasoned and flexible solutions. It is a must-read for policymakers, regulators, and everyone interested in regulation, recovery and resolution of financial institutions.

Ilya Kokorin, Assistant Professor, Financial Law Department, Leiden University



Just published: “Re-examining Insolvency Law and Theory” analyses the important role that legal theory plays in the development of insolvency law. It explores how law and theory are able to respond to issues of financial distress in the 21st century and questions how insolvency law could develop to address contemporary challenges. A more extensive review will follow.

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2024

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13-14 June [INSOL Europe EECC Conference –
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27 June [INSOL Europe & R3 Joint
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– London, UK](#)

2-3 October [INSOL Europe Academic Forum
Conference – Sorrento, Italy](#)

3-6 October [INSOL Europe Annual Congress
Sorrento, Italy](#)

2025

8-9 October [INSOL Europe Academic Forum
Conference – Vienna, Austria](#)

9-12 October [INSOL Europe Annual Congress
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CITR, selected by the European Commission, was appointed expert consultant to the Romanian Ministry of Justice for implementing EU Directive 2019/1023 on preventive restructuring frameworks and completed the implementation in the summer of 2022.

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