**"Virtual Sorrento" Academic Forum Meeting 2020**

**30 September, 2020 – 4:00 to 5:40 PM (CET)**

**Online Event (Zoom)**

**Prof. Horst Eidenmüller, Prof. Kristin Van Zwieten, University of Oxford**

**Stabilizing Corporate Workouts (Out-Of-Court Restructurings) in Times of the COVID 19-Pandemic and Beyond: The Case for Creditor Cooperation Duties**

*Short CVs*

Horst Eidenmüller is a Statutory Professor for Commercial Law at the University of Oxford and a Professorial Fellow of St. Hugh’s College, Oxford. He is a Research Member of the European Corporate Governance Institute and a Member of the Berlin Brandenburg Academy of Sciences and Humanities. Full details are [here](https://www.law.ox.ac.uk/people/horst-eidenm%C3%BCller) .

Kristin van Zwieten is Clifford Chance Associate Professor of Law and Finance at the University of Oxford and the Gullifer Fellow at Harris Manchester College, Oxford. She is Director of the Commercial Law Centre at Harris Manchester College and a Research Member of the European Corporate Governance Institute. Full details are [here](https://www.law.ox.ac.uk/people/kristin-van-zwieten) .

*Paper Abstract*

In this paper, we investigate the case for creditor cooperation duties in corporate workouts. We demonstrate how such duties could facilitate beneficial out-of-court restructurings and what their doctrinal basis is or could be in key jurisdictions (United States, United Kingdom, Australia and Germany).

The COVID 19-Pandemic causes financial distress for firms on an unprecedented scale. Millions of economically viable firms worldwide are affected. A large subset of these firms will need to be restructured. Workouts (out-of-court restructurings) are preferred to court-supervised processes because they involve much lower direct and indirect insolvency costs. But workouts are inherently unstable: they are based on consent and may be undermined by the presence of free-riders (holdouts). Creditors face a multi-party prisoners’ dilemma. Cooperating to implement an out-of-court restructuring plan is in the interest of the creditors as a whole (and in the interest of the debtor). However, each creditor has an incentive to hold out and freeride on the contributions of others.

Laws governing corporate workouts differ. Creditor autonomy and contractual freedom are central to the workout regimes in many jurisdictions. At the same time, at least in some jurisdictions, tort laws, rules on quasi-contract or even company laws impose limits on selfish creditor behavior in a workout setting—for the benefit of the creditor community. These rules may be used to develop a system of “creditor cooperation duties” to stabilize a corporate workout. Under certain specified conditions, creditors would no longer be free to “do what they want” in a workout setting. They would be obliged to negotiate a restructuring plan in good faith, and they might even have to agree to such a plan. We explore this idea by investigating the legal regime governing workouts in the United States, the United Kingdom, Australia and Germany.

**Lydia Tsioli, King's College London**

**Viability Assessment: Models and filtering mechanisms from U.S. Chapter 11 to the European Directive**

*Short CVs*

Lydia Tsioli is a PhD in Law Candidate at King's College London as well as a Qualified Lawyer at the Athens Bar Association. From January till July 2020 she has been a Visiting Researcher at the University of California, Berkeley School of Law. Full details are [here](https://kclpure.kcl.ac.uk/portal/en/persons/lydia-tsioli(2f4cd8be-c179-4f84-8c6d-cc4ae228f092)/biography.html) .

*Paper Abstract*

Distinguishing viable companies from non-viable ones is at the epicentre of the law of corporate distress. Providing for frameworks that facilitate the restructuring of financially distressed yet viable companies, while at the same time succeed in filtering out non-viable ones towards liquidation has always been a real challenge for legislators. At European level, despite the numerous references of the directive on restructuring and insolvency to the notion of viability, the latter has not yet received equally high levels of attention in Europe compared to the United States, a leading jurisdiction in this field. In building a true rescue culture upon correct foundations across Europe, a close reflection on the notion of viability, especially on a comparative basis, would thus be beneficial.

As such, this paper takes as a starting point the intricate notion of viability, its meaning and role for a corporate debt restructuring framework, as well as what these two signify for the scope of such a framework. It then presents the different existing models of viability assessment and subsequently focuses on what the author defines as the “filtering mechanisms” employed by one of these models. More specifically, the paper investigates the filtering mechanisms embedded into U.S. Chapter 11 and juxtaposes these with the provisions of the European directive on restructuring and insolvency with the aim to evaluate the latter under the comparative light of Chapter 11.

In developing the above, the paper uses both legislative provisions and extensive case law in order to demonstrate how the notion of viability both permeates Chapter 11 and constitutes the “litmus test” underlying the filtering mechanisms embedded into its framework. These conclusions serve as a springboard for a close look at the provisions of the European directive. Through this, the paper evaluates the European framework and puts forward suggestions for its interpretation/potential reform in order for it to achieve an effective filtering of viable companies from non-viable ones.