Innovation required: Technology challenges for insolvency practice ahead

Paul Omar looks at the EU regulatory environment in the context of recent technology challenges

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The onset of the coronavirus pandemic has put electronic communications and virtual platforms to the fore. Given quarantine restrictions on face-to-face meetings and travel, insolvency practice has moved, apparently seamlessly, to enabling working from home, remote access to information and even virtual teamwork.

Depending on the country and the preparedness and adaptability of the civil justice system, access to the courts has enabled case-management to continue, hearings to take place and judgments or orders to be obtained. Yet, technology and its potential were not always the uppermost considerations when it came to understanding how practice functioned once upon a time.

Early assessments of the practice environment

In 2014, the European Bank for Reconstruction and Development ("EBRD") published the results of a comprehensive survey into the insolvency practice environment in its client group, of which 27 out of 35 were the subject of an assessment.[1] The two-year project resulted in individual country profiles being created and made available online and which were subsequently updated in 2016. While insolvency law reform had been and still is a feature in many of these States, the project was also apparently the first time that research had been undertaken into the structure of the insolvency profession in these jurisdictions. Since then, the results of the project have informed further technical assistance projects to some countries, such as Croatia, Cyprus and Greece.[2] In fact, in Cyprus, the EBRD is still engaged in a number of projects, recently producing a 2019 report on the enforcement of commercial creditors' claims in that jurisdiction. It has also been participating in two other projects focusing on implementing the new insolvency framework in the country, through assistance to the newly-founded Insolvency Service, as well as supporting the new framework for insolvency practitioners through benchmarking best practice and carrying out capacity building, this latter being a joint collaboration with the Ministry of Energy, Commerce and Industry.

The most essential component of the 2014 project's findings was the great diversity in terms of status, qualification and training of insolvency practitioners, and the framework for their registration, supervision and discipline. Nonetheless, interesting trends emerged from the analysis, notably the strong correlation between the presence of self-regulatory models or state-sponsored regulatory agencies with performance across the assessment criteria. Overall, while minimum educational standards and professional entrance exams were often prescribed, the project revealed weak performance in areas such as continuing professional development and training needs. Similarly, lacunae also existed at the level of the development of professional associations and of ethical rules. Finally, issues were identified in relation to the court supervision of insolvency office holders with a risk of over-monitoring present in some jurisdictions, while overall the structure of the appointments system in cases, as well as remuneration, were felt to be insufficiently encouraging of competition for professional services.[3] In summary, the terms of the 2014 report revealed that there was much to do relative to improving the environment and framework for practice in almost all of these States. The 2016 updates for the countries involved were able to report some positive changes happening even in the relatively short interval.

One palpable difference, apparently, between the 2014 and later projects has been the understanding of technology as a part of practice. The 2014 project largely encompassed structural issues, only mentioning in passing the experiment in some States with electronic appointment systems. Later projects have been much more conscious of the changing environment of practice, consonant with the increasing adoption of technology seen in work milieus and the evolution of these technological developments. These have gone beyond workaday communications to involving more sophisticated data processing and analysis, as well as changes affecting the very substance of processes within the practice environment. In general terms, looking towards essential capacity building, more recent projects have also sought to determine the preparedness of the insolvency practice environment for challenges, to identify the necessary steps towards familiarisation with changes in practice and to assess the scale of exposure to new technologies.

The EU regulatory environment and technology

Within the European Union, some of whose Member States were also subject to the EBRD assessment, the regulatory environment in insolvency has come to be conscious of technology, albeit in a modest way and mostly directed at information and data-sharing. The Recast European Insolvency Regulation[4] ("Recast EIR") sets out a paradigm in its recitals and articles for a technological underpinning to insolvency processes. The main objectives of the framework are to cure the problem of information asymmetry (on as costless a basis as possible), all the while balancing public access and data protection and privacy concerns. Enhancing procedural participation appears to be a conscious by-product of this initiative which incidentally serves to underpin the communication and cooperation imperatives behind this text.

The framework requires Member States to enable access by creditors and other stakeholders to information contained in one or more registers made publicly available and interconnected via the European e-Justice Portal.[5] A minimum content of information is stipulated, which must be provided on a costless basis.[6] So too, the technology support itself for interconnection is a shared charge between the European Union and the Member States.[7] The Member States are free to add to the information provided and potentially to charge for access to information beyond the stipulated minimum.[8] An exception is provided, though, for information in relation to individual debtors (those not incorporated or with entity status), which can be limited to information deriving from their business operations.[9] Where the registers do contain information about procedures involving individual debtors, extra search criteria may be required to positively identify subjects (limiting the scope for random enquiries/searches) or a legitimate interest may need to be shown to access that data.[10] Otherwise, Member States could choose not to include such information, but would still be required to create a pathway for individual notification to creditors, though the absence of notification must not impact the status of creditors participating in the proceedings.[11]

Further information that Member States would need to include on the registers specifically addresses information on time-limits for claim filings and challenge periods.[12] In fact, where individual creditors have been notified of relevant deadlines, failure to comply can have adverse consequences, in contrast to the general principle of the absence of legal effect of any information accessible via the portal.[13] Payments in ignorance of information about the existence of insolvency proceedings may nonetheless be protected.[14] Fulfilling the needs of the interconnection project, a broad outline of technical specifications was set out in the Recast EIR,[15] to which end an Implementing Regulation[16] authorised by that text was passed in 2019 following the successful conclusion of an experiment involving 7 Member States that had proceeded with interconnection of their registers.[17] Due to the pandemic, the second wave of interconnection is expected to be completed in 2021.

Adding to this, the recently adopted Preventive Restructuring Directive[18] ("Directive") provides for the possibility of online access to dedicated early warning tools that can include, on the basis of notifications or communications, alert mechanisms based on default in payments, incentives for connected parties (such as tax authorities and auditors) to flag up developments to the debtor, as well as the provision of services in connection with early warnings.[19] This reflects some of the services already being provided by national organisations in countries such as France, providing commercial analysis of the business environment and providing diagnostic and other services. Other references to technology in the Directive focus on electronic means of communication and the possibility for procedural steps to be undertaken by means of technology, including filings, notifications, document service and submissions, as well as the lodging of appeals.[20]

The way forward

While the assessments of the practice environments have begun to get to grips with the impact of technology, the regulatory frameworks have so far been more modest in limiting the recognition and assistance of technology to dedicated avenues, mostly in communications, data-sharing and the fulfilment of procedural steps. This is not to say that there are no other technology-based challenges to practice. The oblique reference to electronic appointment systems in the 2014 EBRD Assessment is now the prevailing reality of operations in a number of Member States, which is not without its own challenges, particularly in ensuring that practitioners with appropriate skills are matched to complex cases. In fact, the Directive also reflects concern about appropriate levels of training for practitioners and judges in its provisions.[21] In light of the current crisis, many training providers have very quickly explored the potential for moving operations online and using increasingly sophisticated technologies to deliver e-learning, but issues of parity of access to training across Europe are still real.

Going beyond this, in recent years, the practice environment has also a hotbed of experimentation with electronic platforms for valuations and auctions, technological means for widening procedural participation and access, as well as the use of artificial intelligence, in treating data collection and analysis. The ongoing COVID-19 crisis has only accelerated the way in which consideration of the benefits of technology is being undertaken, not just as an adjunct to practice, but as a stimulus to considering how practice itself may change to take advantage of technological change. Eventually, and perhaps because of the push towards more and more technological solutions that is evident around us today, regulatory systems will have to better accommodate the reality of developing practice in the creation of insolvency frameworks and reflect, as best they can, this ever-changing environment in which technology never stands still. ■

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Footnotes:

1 EBRD, Assessment of Insolvency Office Holders: Review of the Profession in the EBRD Region (2014), a copy of which is available at: www.ebrd.com/what-we-do/sectors/legal-reform/debt-restructuring-and-bankruptcy/sector-assessments.html.
2 Ibid.
3 Ibid., Executive Summary, at 7-9.
4 Regulation (EU) 2015/848 of 20 May 2015.
5 Ibid., Recital 76; Article 25(1).
6 Ibid., Article 27(1).
7 Ibid., Article 26.
8 Ibid., Article 27(2).
9 Ibid., Recital 77; Article 24(1)-(4).
10 Ibid., Recital 79; Article 27(3)-(4).
11 Ibid., Recital 80; Article 24(4).
12 Ibid., Recital 78.
13 Ibid., Article 24(5).
14 Ibid., Recital 81.
15 Ibid., Recital 82; Article 25.
16 Commission Implementing Regulation (EU) 2019/917 of 4 June 2019.
17 See: https://e-justice.europa.eu/content_insolvency_registers-110-en.do.
18 Directive (EU) 2019/1023 of 20 June 2019.
19 Ibid., Recital 22; Article 3.
20 Ibid., Recitals 90-91; Article 28.
21 Ibid., Articles 25-26.