

Spring Online Conference: “Don’t Worry, Restructure!”

Paul Omar and Myriam Maily report on INSOL Europe’s springtime event



PAUL OMAR
INSOL Europe Technical
Research Coordinator



MYRIAM MAILLY
INSOL Europe Technical Officer

“

There is a worry that pragmatism will not return because of Brexiter hostility, despite major problems with exports

”

On the theme of restructuring, the springtime event, also marking the 40th anniversary of INSOL Europe, took place across 4 and 18 March 2021. Averaging over 80 participants and facilitated by Chris Laughton (Mercer & Hole, UK), the event’s sponsors were Moon Beever and Abreu Advogados.

Part 1: 4 March 2021

With the session opened by Marcel Groenewegen (INSOL Europe President), co-chair John Briggs (3/4 South Square, UK) introduced financial journalist and author **William Keegan** (Senior Economics Commentator, Observer, UK), responding to questions on the latest of his recently published “Nine Crises”: *Austerity and the Referendum*.

To the question of whether the UK was likely to be tempted back into austerity, there is a danger, given the obsession with the deficit and the need to balance an under-performing economy during COVID-19. The current risk is that tax increases by manipulating tax allowances could cause a blow to confidence and further reductions in public spending likely to cause harm. As to how the EU-UK relationship will develop in the future, the reduction of output through COVID-19 (c. 10%) and the Brexit effect (c. 6%) is of grave concern. There is a worry that pragmatism will not return because of Brexiter hostility, despite major problems with exports. To the thought of *quid* restructuring, if the Government believes in “Global Britain”, there should be some sympathy for industry, including the sectors harmed because of the

current economic policies.

Implementation of the Directive on Restructuring and Insolvency

In the chair of this panel, **Gottfried Gassner** (Binder Grösswang Rechtsanwälte, Austria), introduced updates on the implementation of the Directive. **Andreas Dimmling** (GSK Stockman, Germany) focused on the German legislation commencing in January as a possible game-changer, though overall likely take-up is still not known. However, a significant impact is possible for companies with complex debt structures or where cram-downs are needed. **Aroen Kuitenbrower** (Allen & Overy, The Netherlands) outlined the recent introduction of the Dutch WHOA, not purely an implementation of the Directive, but arising from an ongoing project to provide an out-of-court restructuring tool. A follow-up (WHOA-II) will fill the implementation gap in respect of the Directive. A few cases thus far have been seen, mostly for restructuring balance sheets and as a bankruptcy avoidance technique.

Aviation in Crisis: Emergency Exit

João Vacas (Abreu Advogados, Portugal) and **Andrew O’Leary** (KPMG, Ireland) analysed the pandemic’s disastrous impact on the airline industry. Both report that, despite the pandemic, many restructurings have occurred over the last year (e.g. Norwegian, TAP, LATAM, EVA Air etc.), so no major bankruptcies have been experienced, except those occasioned by pre-pandemic stresses (e.g. CityJet, Thomas Cook). Plans seen so far have included renegotiating leases,

embedding state aid and rationalising costs, pending possible recovery in late 2021/early 2022. Caution is expressed though that, if recovery is too slow, companies on “forbearance agreements” could be pushed into procedures.

Part 2: 18 March 2021

Chris Laughton having opened the session, co-chair **Clarissa Nitsch** (Co-Chair of the Young Members Group / Binder Grösswang Rechtsanwälte, Austria) introduced the keynote speaker: **Professor Georg Kodek** (Vienna University of Economics and Business; Judge, Supreme Court). Recounting history both professional and personal, Judge Kodek noted Austria’s early foray into bilateralism coinciding with the publication of Jabez Henry’s treatise on insolvency cooperation. Referring to the European Insolvency Convention and the diversity of European procedures, Austria’s approach has been quite modern with its introduction of amicable composition in 1934. By the time the European Insolvency Regulation text is finalised, the globalisation phenomenon is real with cross-border contacts increasing with effect across frontiers. Tension arises between objectives, but cooperation overall has resurged with many conferences devoted to the theme. Current challenges, Judge Kodek suggests, include the focus on restructuring, opening up insolvency for consumer over-indebtedness and recognition of proceedings and their consequences, such as discharge.

Jurisdiction, Recognition and Enforcement post-Brexit

In a two-header, **Mark Arnold QC** (3/4 South Square, UK) began

with an outline of the post-Brexit position, essentially a hard Brexit on recognition and enforcement in the insolvency context. The big concern is not jurisdiction, but post-sanction recognition. So far, experiences, through the UNCITRAL Model Law, could be seen as a viable alternative owing to its light-touch formalities for recognition and automatic and extended assistance.

In response, **Christoph Paulus** (White & Case, Germany) sounded a note of caution: as UK procedures will be treated at the level of autonomous domestic law, many EU judges might have to resort to rules that are unfamiliar to effect recognition and, perhaps, more contentiously, may re-examine UK insolvency to ensure “compliance” with European insolvency principles. Canvassing examples from Germany and Spain, Professor Paulus is confident schemes will be recognised under the Rome I framework. In fact, if the Model Law connection increases in importance, certain Member States may become

important restructuring links.

Experiences on the Front Line – Insolvency Practice in the Pandemic

David Rubin (David Rubin & Partners, UK) outlined the Cafc Concorto CVA proposal. Given Covid measures (rate relief, furlough, extension of tax return dates, bounce back loans, prohibition on forfeiture, suspension of proceedings, etc.), most landlords have taken the commercially sensible option of cooperation, especially if debtors had been previously good payers. It was surprising that a minority refused to engage, with one even effecting forcible entry (now being investigated for breach of lockdown and non-enforcement rules). Despite this, a CVA was recently approved in February 2021, a good move overall.

Offering a German perspective, **Frank Tschentscher** (Luther, Germany) noted the major impact on retail, department stores and major chains under siege. Despite this, there seems to be

relative calm, with insolvency figures still quite low: Q4 2020 statistics are similar to Q4 2019 with a downward trajectory in cases. The reason seems to be strong government intervention (funds, state guarantees, furlough, short time work, suspension of filing requirements). Could this be the calm before the storm? Matters appear quite complex, especially with repayment concerns over crisis loans in the medium-term and visible impact for companies not covered by the loans criteria. Fatalities are likely with a substantial hit in the property sector.

Ending the final session, **Chris Loughton** thanked all those contributing to the success of the spring event. With many practical perspectives offered by speakers, issues like landlords, zombie companies etc. will undoubtedly form challenges for future practice. With a final expression of hope that delegates can meet at Dublin 2022 in person, the conference was closed. ■

**With thanks to our
main conference
sponsors:**

MOON BEEVER
SOLICITORS

Abreu:
advogados

Spring Conference Main Sponsor

MOON BEEVER
SOLICITORS

Moon Beever LLP is home to a substantial team of 20 insolvency & restructuring specialists covering domestic and cross-border work from personal bankruptcy to distressed partnerships and corporate restructuring

Bedford House, 21a John Street, London WC1N 2BF

info@moonbeever.com +44 (0)20 7400 7770

www.moonbeever.com