The future of restructuring and insolvency professions

Members of the Young Members Group from Finland, Germany, France and Switzerland discuss the future of their profession

> *France has now passed from a doctrine of "whatever the cost" to a so-called policy of "tailor-made assistance"*

On 21 October, INSOL Europe held its 2021 Online Seminar. Robert Peldan (Co-Chair, Young Members Group), moderated the Young Members Group panel on the "Future of Restructuring and Insolvency Professions" with group members represented by Incoronata Cruciano, Stéphanie Oneyser and Georges-Louis Harang sharing their views.

This article is a summary of the discussion between the panellists.

What have been the latest trends and new tools in the toolbox that you have come across during the past 18 months?

In **Germany**, the latest 18 months were influenced and shaped by the economic impact of the pandemic and the government measures that followed, like changes in the law and a financial assistance programme. Regarding the financial measures, they included, for example, special loan and interim aid programmes, deferred tax payments and short-time work allowance.

As to the legislative changes, Germany acted very quickly and introduced a temporary suspension of the obligation to file for insolvency as of 1 March 2020 for all companies where the insolvency event was caused by the pandemic, which is presumed to be the case if the company was not insolvent at the end of December 2019. Since 1 May 2021, the obligation to file is once again in effect. Another important legal measure was the possibility to reduce the rent for business premises. Due to this extensive government aid, the expected "wave of corporate insolvencies" has been avoided, even in heavily affected sectors. And furthermore, we even have a decline in corporate insolvencies of 25.8% in May 2021 compared to May 2020. The recognizable willingness of the new government to take further support measures will not fundamentally change this trend until 2022.

In **France**, trends have been felt regarding political measures implemented and regarding figures related to insolvency proceedings. The French government has indeed tried to remedy to the pandemic's effects on economy by guaranteeing all loans granted to companies in distress (up to 90% of the sums borrowed for some of companies fulfilling the criteria). These loans have been allocated to a large part of companies in situation of a strain on their cash flow. It was named the so-called policy of "whatever the cost". Regarding the figures, France has seen a decline of around 40% of insolvency proceedings since the beginning of the COVID-19 crisis.

To reinforce the possibility to restructure, the French Government has also adopted exceptional measures, notably in the out-of-court phase (e.g. interruption/prohibition of judicial actions for the payment of further sums or to terminate contracts; interruption/prohibition of any enforcement proceedings implemented by creditors; the possibility of asking the President of the Commercial Court to postpone or spread-out payments due to creditors for a period of up to two years). Even if the French government has reaffirmed its support by allocating public aid, France has now passed from a doctrine of "whatever the cost" to a so-called policy of "tailor-made assistance". Some of the previous measures are extended in the crisis exit plan. Therefore, there should be probably no wave of bankruptcies in the nearest future.

The recent transposition of the Directive on Restructuring and Insolvency maintains part of the measures adopted to face the COVID-19 crisis. The debtor is now able to ask the judge to postpone or spread-out payments due to creditors for a period of up to 2 years. Thanks to this transposition, we can also say that safeguard proceedings have been modified to fulfil the Directive's requirements in terms of the creation of classes of creditors, the "cross-class cram-down" and other new concepts, such as the notion of the "best-interest-of-creditors test". Coming with these new tools and these new concepts in French law, we can foresee new areas of expertise for insolvency practitioners.

As for **Switzerland**, the prepack deals have been confirmed as being an efficient tool for restructuring companies of a certain size. Despite the COVID-19 situation, Swiss law has not developed any new restructuring tools from a long-term perspective (i.e. long-lasting measures) so far. In other words: either the company in financial distress is able to use the existing

tools (composition proceedings, subordination of claims, recapitalisation, etc.) to overcome the financial distress or it will go bankrupt eventually. Instead, the Swiss government preferred to intervene in a directed manner at the pre-insolvency stage. For instance, in 2020, the Swiss government guaranteed loans granted by the banks to companies meeting certain criteria. In this context, a new provision was introduced, according to which such loans are not considered as debts on the balance sheet, meaning that companies cannot be deemed to be overindebted solely based on these loans. The future will tell us whether this system has truly helped sustainable companies that were affected by the COVID-19 situation or whether it helped financially unstable companies to temporarily circumvent the rules on filing for bankruptcy.

In **Finland**, everybody was waiting for an avalanche of bankruptcies and restructurings to hit during Spring 2021, but now it has been proven that the predictions have been completely false. Actually, the amount of bankruptcy applications filed with the courts has been the lowest in 30 years. When focusing on the trends, it is fair to say that the latest trend has been an increased number of out-of-court workouts and prepacked bankruptcies. We have especially seen several prepacks during the past year; this is a fairly new change of perception in our market, which is very welcome since this is an effective way to salvage going concerns in a bankruptcy situation. Furthermore, we have been witnessing more distress M&A cases, in which insolvency lawyers work side-by-side with banking and finance lawyers. Apart from prepacks, distressed financing is the new kid on the block. We have come across several cases in which funds making investments in distressed companies have had a major role in recovering a debtor company that has been undergoing in-court restructuring proceedings.

What are your predictions for the future of restructuring work in 2022 or 2023?

In **Germany**, the noticeable trend is away from the classic insolvency filing and towards a culture of restructuring at an early stage. Since the beginning of the year, this trend has been supported by the German legislator, who, as required by the Directive on Restructuring and Insolvency, incorporated a preventive restructuring framework for businesses, the "StaRUG", which came into force on 1 January 2021. For the first time, the financial restructuring of imminently illiquid, but restructurable companies, is possible with the involvement of creditors, even against the will of individual creditors. Indeed, StaRUG is rather a tool for larger companies, because of the high costs for advisory and consulting support. As a new tool, it will take some time to make it useful in practice. And we also have to wait and see to which extend the companies will accept it.

In **France**, it would be of good benefit to have the continuation of the trends arisen during the pandemic period, especially regarding the use of out of court proceedings. In that case, the slow, but real development of new mentalities to anticipate financial problems can be anticipated with, maybe, an increase of anticipated reflexes from managers which are likely to be foreseen in the future. Managers might start the restructuring process of their business earlier than in the past, giving them more possibilities to find compromise with creditors and to settle a restructuring plan or a prepack deal either in a confidential environment (with *conciliation*) or not (with safeguard proceedings).

The recent transposition of the Directive into the French legal system might have this impact. The idea is to force the debtor to take measures at an early stage. The toolbox is full of various technical solutions if you start the process of restructuring your business as early as possible. They have to be selected on a case-to-case basis. As such, we can predict much more work within the context of out-of-court proceedings for lawyers, IPs and experts.

As for **Switzerland**, the latest trends observed should continue their progress. Nevertheless, bankruptcy proceedings or the threat of such proceedings should remain very important in the Swiss law landscape. The COVID-19 situation has added an additional level of complexity. Therefore, a careful analysis of the situation, the causes of financial distress and the options that are open will remain an important tool in restructuring work. In this sense, on the one hand, directors should become even more aware of their duties and act upon them when the company is in financial distress. On the other hand, we might accept more liability cases against directors, in particular if they failed to monitor the financial situation of the company and to take the appropriate measures to detect and to avoid over-indebtedness.

After looking into the crystal ball in **Finland**, we clearly see that out-of-court restructurings and cross-border work will become more common in the upcoming years. In particular, cross-border claw-back claims or collecting monies, which have been unlawfully disbursed to creditors or shareholders, are going to be the new normal. Avoiding in-court restructurings is going to be continued as a general trend in the future, since the financiers are very reluctant to commence official proceedings. This is mainly because the results, especially from bankruptcy proceedings, have been appalling, the banking regulation sets high demands on the equity ratio when holding non-performing debts on the banks' balance sheet, and, lastly, the banks are very conscious of their reputation and they are not willing to risk their public relations by filing bankruptcy applications against non-performing debtors. ■

ROBERT PELDAN
Borenius, Finland

INCORONATA CRUCIANO
Schiebe und Collegen, Germany

GEORGES LOUIS HARANG
Hoche Avocats, France

STÉPHANIE ONEYSER
Walder Wyss, Switzerland