

Academic Conference:

The emerging new landscape of European restructuring and insolvency

Paul Omar and Myriam Maily report from the Academic Forum Conference in Dublin



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The INSOL Europe Academic Forum Conference took place on 2-3 March 2022 at the Clayton Burlington Hotel in Dublin. Sponsored by Edwin Coe LLP and facilitated by Tomáš Richter (JŠK, Prague; Chair, IEAF), the event was attended by 64 delegates from nearly 20 different jurisdictions.

With a reminder of the need for solidarity, a minute's silence took place at the beginning of the first day's proceedings for the victims of conflict in Ukraine.

Topics in corporate preventive restructuring

Chaired by Jennifer Gant (Derby), panel speakers focused on the implementation of Directive 2019/1023 ("PRD") in French, Czech and Spanish laws. For France, Sarah Pople (Fidal Brittany) outlined reforms giving more weight to secured/priority creditors, while also forcing the hand of minority/recalcitrant creditors through a redesign of the Accelerated Safeguard Procedure. For the Czech Republic, Tomáš Richter suggested that transposition would result in a hybrid of German restructuring practice and post-2019 US Chapter 11 reforms by allowing courts to cram down a restructuring plan on a dissenting unsecured class of debt, though overall the reforms are a creative solution compared with hitherto. For Spain, José Carlos González Vázquez (Madrid Complutense) then analysed the reforms which aimed to solve the problem of shareholder holdouts and protect



creditors capitalising their lending from adverse legal effects (incl. subordination and de facto directors' liability).

Fresh start and other topics related to individual debtors

Chaired by Tomáš Richter, Gauthier Vandenbossche (Ghent) explored how the EU Directive's requirement for honest insolvent entrepreneurs to have access to a "second chance" could be fulfilled by member states applying the same principles on discharge to all natural persons, regardless of their entrepreneurial status. In the context of transposition of the Directive in Portugal, the situation of personal debtors was investigated in a joint presentation by Ana Filipa Conceição, Catarina Frade and Fernanda Jesus (Coimbra), who concluded that the transposition did not grant a true fresh start, thus resulting in a missed opportunity for a new personal insolvency paradigm. Finally, Jennifer Gant

(Derby) gave a presentation on how the post-pandemic period could offer the opportunity to explore the use of Fineman's vulnerability theory to respond to calls for fairness in insolvency and restructuring. This might require a new theoretical paradigm to consider the choices of stakeholders affected by corporate decisions.

Closing proceedings on the first day, Irene Lynch Fannon (UCC) delivered the "Gabriel Moss Memorial Lecture" by focusing on cross-border recognition of corporate restructuring arrangements with a special reference to Irish practice. Cooperation and coordination issues, beginning with the case of *Eurofood* and the Parmalat Group, were discussed, with a coda suggesting a review of common law tools predicated on jurisdiction. The Gabriel Moss Memorial Lecture was then followed by the Welcome Reception and the Academic Dinner.



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Design issues in restructuring and insolvency law

Opening the second day in a panel chaired by Luigi Lai (NIPI Warsaw), Jonatan Schytzer (Uppsala) analysed the treatment of environmental claims in bankruptcy and how principle-based changes could be implemented to reduce the risk when polluters cannot pay. Ioannis Bazinas (UCL) then suggested a difference in approach to “insolvency” and “restructuring” as concepts, inviting a fundamental distinction that has important cross-border implications, where a distinction between recognition of proceedings and recognition of plans might be useful. In a joint presentation, David Ehmke (GT Restructuring Berlin) and Eugenio Vaccari (Royal Holloway) focused on the harmonisation narrative of the EU and analysed alternative approaches, notably top-down regulation and bottom-up competition supporting the convergence of insolvency and restructuring laws across the Member States.

Cross-border and EU law topics

Chaired by Francisco Garcimartín (Madrid Autónoma), panel speaker Stephan Madaus (Halle-Wittenberg) asked how cross-border effects of restructuring plans could be secured, exploring whether a further legislative initiative was necessary and how best to approach a new cross-border framework for restructuring plan proceedings. Following this, Walter Nijjens (Fulda) analysed the interaction of state aid with insolvency, particularly in how the recovery of unlawful state aid could result in businesses facing financial difficulties, for which preventive restructuring or formal proceedings could be suggested at appropriate stages of the recovery process. Finally, Rodrigo Rodriguez (Bern) outlined how COMI-shifting techniques aimed at securing a restructuring in the



UK could impact on cross-border recognition of scheme plans and outcomes.

More topics in corporate restructurings and insolvencies

After lunch, the panel chaired by Gert-Jan Boon (Leiden) saw Dennis Cardinaels (Cadanz Brussels) highlighted the analogy between corporate solvency and insolvency governance. Attention post the 2008 financial crisis has (only) focused on corporate governance and related issues. Nonetheless, similar conflicts between unsecured creditors and directors/office-holders and between majority and minority unsecured creditors invite consideration of governance needs within insolvency. The second joint presentation by Flavius Motu (Judge, Cluj Specialised Court) and Andreea Deli-Diaconescu (Romanian National Institute for IP Training) noted the impact of Directive protections for interim and new financing, risking providers gaining leverage and speculating on the debtor’s vulnerability. Thus, member states should harmonise avoidance rules in subsequent insolvency proceedings to avoid forum shopping for safe-harbour jurisdictions. Closing proceedings, Theodora Kostoula (EUI Florence) proposed an answer to

the topical question of how and when to determine asset value in insolvency proceedings where the value is not easily established through an exploration of the world of crypto-assets to outline the main challenges in the context of EU insolvencies.

Edwin Coe Practitioners’ Forum

Chaired by Tomáš Richter, a joint presentation by Reinhard Bork (Hamburg/Oxford) and Michael Veder (Radboud Nijmegen) of the results of an intensive research project dealing with the harmonisation of transactions avoidance rules in the EU has given rise to a Model Law comprising nine sections recommended for implementation into the national insolvency laws of EU Member States. This was then commented upon via a lively discussion overseen by Francisco Garcimartín and Christina Fitzgerald (Edwin Coe).

In winding up the event, Tomáš Richter thanked the speakers and participants and looked forward to a return next October in Dubrovnik. ■



The Edwin Coe Practitioners Forum presented the results of an intensive research project dealing with the harmonisation of transactions avoidance rules in the EU



Presentation slides are available at: www.insol-europe.org/academic-forum-events

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