**Report**

**R3 & INSOL Europe’s 2023 International Restructuring Conference**

The 17th R3 and INSOL Europe’s International Restructuring Conference held in London on 15 June 2023 was a magnet for restructuring and insolvency professionals with an interest in cross-border matters and all professionals interested in cross-border restructuring and insolvency.

The event sponsored by Lumon who took place at the sumptuous venue, No.11 Cavendish Square, was sold out! 110 delegates participated enthusiastically, contributing views from a range of jurisdictions including the UK, the Netherlands, Ireland, Germany, Italy, Spain, France and Greece.

The leading South Square practitioners Barry Isaacs KC and Stefanie Wilkins provided an update on significant recent cross-border insolvency cases.

In *Re* *Cimolai*, the English Court recognised Italian insolvency proceedings in respect of two Italian companies as foreign main proceedings under the Cross-Border Insolvency Regulations 2006 (CBIR). Pursuant to the recognition orders, proceedings commenced before the English Courts against the *Cimolai* companies by a number of international banks and financial institutions following defaults under numerous structured foreign exchange derivatives will remain stayed pending the consideration and, if thought fit, approval of linked Concordato Preventivo and Part 26A Restructuring Plans in Italy and in the UK.

In *Kireeva*, the Court of Appeal unanimously held that the Russian trustee in bankruptcy’s application for recognition as under common law should be remitted to the High Court for cross-examination on an allegation of fraud. What is of more import is the decision that the English courts will not assist a foreign trustee, whose appointment has been recognised at common law, in relation to immovables in this jurisdiction. The court had to consider how modified universalism interacts with the immovables rule. The court’s decision on the latter issue is rooted in the so-called “immovables rule”, namely, the rule that rights over immovable property would be governed by the *lex situs* of the property.

The *Norwegian Air* examinership proceedings key significance was then reminded. Indeed, this decision introduces the recognition of a statutory inroad into the well-established common law principle of the rule in Gibbs which may now provide an opportunity for foreign insolvency proceedings such as the Irish scheme of arrangement and potentially the new scheme of arrangement of Cayman Islands to compromise English law governed debt in certain circumstances.

Finally, in *Adler*, the Group restructuring plan to prevent the German property company's imminent collapse was approved by London's High Court, despite opposition from some bondholders. This is the first time that German law governed debt issued by a Luxembourg holding company was compromised through an English Scheme or Plan. *Adler* put forward evidence to the Court in the form of expert witness submissions regarding the likelihood of recognition in Germany. Following review of the evidence, the English Court was satisfied on the balance of probabilities that there is a reasonable prospect that the plan would be recognised in Germany.

A panel session on the latest developments from the crypto sector chaired by Henry Page (Mercer & Hole) featuring renowned crypto experts Charles Kerrigan (CMS), Julia Marshall (Alvarez & Marsal Europe) and Allister Manson (Opus Business Advisory Group, UK) took place. Cryptoassets span a wide and rapidly evolving range of digital instruments, although the market continues to be dominated by unbacked cryptocurrencies such as Bitcoin. They have the potential to bring benefits to financial services and the wider economy but also pose significant risks, given their significant price volatility and associated risk of losses. Cryptoassets are increasingly being used by criminals in scams, fraud and money laundering and therefore will crop up in the growing number of company failures and personal bankruptcies in the near future. This is ever more prevalent with a number of recent high-profile crypto insolvencies including *Three Arrows Capital*, *Celsius Network* and *FTX*. Effective regulation of cryptoassets should help to foster innovation and maximise any potential benefits of cryptoasset technologies, while also mitigating risks. Insolvency practitioners need to be on the front foot quickly to identify and realise such cryptoassets; failure to do so could materially impact the return to creditors and expose an officeholder to a claim by creditors.

John Willcock, editor of Global Turnaround, interviewed Christopher Farmer of Teneo BVI on his experience at the coalface on the *Three Arrows Capital* liquidation. Three Arrows conducted a high-profile and prominent cryptocurrency business as a digital asset hedge fund, reportedly operating assets in excess of US$10bn at one stage. Owing to the volatility in the crypto market the company entered liquidation in June 2022 with significant liabilities. The latest auction saw the company’s collection of NFTs bring in nearly $11 million from a Sothby’s House action in New York. Some of the NFTs owned by the collapsed crypto hedge fund were sold privately bringing the figure closer to $17 million.

Before 2021, companies from all over the world have frequently and routinely made use of English insolvency and restructuring laws to deal with their financial troubles. For companies in EU Member States, access to English law company voluntary arrangements or schemes of arrangement was predictable and recognition at home was secured under applicable EU Regulations. As EU law ceased to apply in 2021, the question arose whether this disruption and the resulting legal uncertainty would effectively limit the use of English procedures by EU-based companies.

To answer this question, a panel session titled “Do you recognise me?” on recognition of UK and EU Member States cross-border insolvency proceedings in the Brexit aftermath took place, led by Chris Laughton (Mercer & Hole, UK) who is also INSOL Europe Honorary Officer in recognition of his outstanding contribution to the work of INSOL Europe as President in 2010 - 2011 and Treasurer from 2015 to 2020. This panel session focused attention on INSOL Europe experts from different types of mainland jurisdictions including a country that has a form of the exequatur procedure (Italy with Giorgio Corno of Studio Corno Avvocati who is also INSOL Europe Deputy president), a country that has adopted the UNCITRAL Model Law on Insolvency (Greece with Alexander Metallinos of POTAMITISVEKRIS) and a country that has provisions within its own private international law for companies in third countries, which look at where the company’s centre of main interests is, even though the EIR Recast does not apply, to grant recognition (Germany with Andrea Metz of Barckhaus).

Chris reminded the INSOL Europe/ LexisPSL 2022 Joint Guide on “*How EU Member States recognise insolvency and restructuring proceedings of a third country*”[[1]](#footnote-1) as a useful tool for all professionals interested in cross-border restructuring and insolvency and then covered the recognition of continental insolvency procedures/plans into UK and.

If the recognition of UK Cross-Border insolvency in the EU in the Brexit aftermath is still difficult, Chris highlighted the “*Study on the issue of abusive forum shopping in insolvency proceedings*”[[2]](#footnote-2) commissioned by the European Commission’s DG JUST. Indeed, the study provides an assessment of the UK schemes of arrangements and restructuring plans and possible mechanisms for their cross-border circulation in the EU and concludes that Court judgments or orders confirming (or sanctioning) a UK scheme of arrangement may be entitled to EU wide recognition under the Hague Convention of 2 July 2019 on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters where also the EU is considering accession.

Chris also mentioned the study titled “*ensuring Efficient Cooperation with the UK in civil law matters*”[[3]](#footnote-3) commissioned by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs that analyses the implications of Brexit in relation to the profile of judicial cooperation in civil matters. The study examines the existing legal framework in order to identify the areas of law in respect of which there is a gap in the relationship between the EU and the UK and the consequences of the UK's failure to accede to the 2007 Lugano Convention. According to the study, the conclusion of new treaties between the EU and the UK should be pursued in relation to those areas where there is a regulatory gap. As regards the field of judicial cooperation in insolvency proceedings, the non-application of the regulations in respect of the UK will indeed lead to the possibility of parallel proceedings taking place, with the risk of conflicting decisions regarding the interests of creditors. In addition, there will be obstacles inherent in the circulation of judgments. According to the study, it would also be important to reintroduce forms of coordination between the different proceedings opened in different states, in order to facilitate the satisfaction of creditors and, ultimately, the same interest of the person declared insolvent in a speedy closure of bankruptcy proceedings and an efficient liquidation of assets, not to mention the possibility of easier access to debt restructuring measures or composition

The question of the limited use of English procedures by EU-based companies in the Brexit aftermath loomed even larger as EU Member States had begun to improve their laws and saw their own “schemes” come into effect in 2021, most prominently in the Netherlands and Germany, following the implementation of the Directive on Restructuring and Insolvency of 20 June 2019.

A panel session comparing expert practitioners’ experiences of the English restructuring plan, the Dutch WHOA and the German StaRUG including Kate Stephenson (Kirkland & Ellis, UK), Sebastiaan van den Berg (RESOR, The Netherlands) and Marlene Ruf (Kirkland & Ellis, Munich) who has been leading the *Adler* restructuring took place. The case of the German *Adler* Real Estate Group indicates that the disruption caused by the Brexit has done little damage to the comfort of foreign companies and their legal advisors in making use of English procedures to day.

Although the Directive on Restructuring and Insolvency adopted on 20 June 2019 has not been transposed in all Member States yet, the European Commission already published on 7 December 2022 the proposal for a Directive harmonising certain aspects of insolvency law. The last panel session led by Rita Gismondi (Gianni & Origoni, Italy) focused on this proposal and featured Niels Pannevis (RESOR Amsterdam, The Netherlands) and Kat Burke (IWIRC European Regional Director). The objective of this proposal is to reduce differences in substantial insolvency laws and hence address the issue of more inefficient insolvency laws in some Member States, increasing the predictability of insolvency proceedings in general and lowering obstacles to the free movement of capital. By harmonising targeted aspects of insolvency laws, the proposal aims, in particular, to reduce information and learning costs for cross-border investors thus expanding the choice of funding available to companies across the Union. The panel leader and the panellists analysed the targeted areas of harmonisation law i.e. avoidance actions, tracing assets, pre-pack proceedings, duties of directors, simplified winding-up proceedings for microenterprises and creditors’ committee.

**R3 & INSOL Europe: enthusiastic networking!**

Other features of the day were the enthusiastic networking and the engagement of delegates throughout the day, Morgan Bowen’s, Sebastiaan van den Berg’s and Christos Christoforou’s able chairing of the conference.

The President of R3 Nicky Fisher (Herron Fisher, UK) highlighted that R3 will continue to work closely with INSOL Europe and the profession across Europe, to promote the work of insolvency and restructuring professionals, and to share knowledge and best practice.

Last but not least, the president Barry Cahir’s reminded the benefits of membership of INSOL Europe, explaining the work and reach of the association and encouraging delegates who were not already members to join us. Barry also reminded that reaching out to our colleagues in R3 is so important. Swapping expertise and building contacts are central to our industry! R3 and INSOL Europe are already eager to run the joint event next year!

1. <https://www.insol-europe.org/technical-content/insol-europelexispsl-joint-projects> [↑](#footnote-ref-1)
2. <https://commission.europa.eu/system/files/2023-02/Final%20Report%20-%20Abusive%20Forum%20Shopping_Febr%202022.pdf> [↑](#footnote-ref-2)
3. <https://www.europarl.europa.eu/thinktank/en/document/IPOL_STU(2023)743340> [↑](#footnote-ref-3)