Cooperation with the EBRD: Advancing insolvency norms

Paul Omar provides an update on our collaboration with the EBRD

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Over the period of the pandemic, the European Bank for Restructuring and Development (EBRD), under the stewardship of Catherine Bridge Zoller, Senior Counsel in their Legal Transition Team, began a review of key benchmark texts.

The two core texts, first published by the organisation in the decade immediately after the Millennium, were the Core Principles of an Effective Insolvency System (2005) and the Principles for an Effective Professional and Regulatory Framework for Insolvency Office Holders (2007). Since then, the Global Financial Crisis, whose echoes are arguably still felt today, and the Covid-19 pandemic, with its still unfolding aftermath, have come to pose serious challenges for the restructuring and insolvency worlds.

Also in this period, big changes in legal and regulatory frameworks that have seen the development of new strategies in insolvency (hybrid procedures; preventive restructuring) and the resurgence of a focus on alternative processes, such as out-of-court mechanisms and alternative dispute resolution, have meant that the content of the principles needed to be updated to reflect the new environment for law and practice. The background formed by technology and other practice changes was also a factor prompting reconsideration of the principles. In this process, in its role representing the world of practice, INSOL Europe and its members were included in providing advice on the drafting and content of the rules, particularly through the participation of the European Study Group, the Insolvency Office-Holders Forum as well as country coordinators, supported by the wider membership.

Effective Insolvency Frameworks (2005 to 2020)

At their inception, these rules were designed to offer legislators and policy-makers with high-level guidance on the essential elements of an effective insolvency system. The principles highlighted economy, transparency and speedy resolution in procedures, the need to provide for rescue and liquidation alternatives and for clear tests to access these processes. The availability of interim/conservatory measures was recommended, as was avoidance of interference with enforcement of security (an issue of contention, even then). Parity of creditor treatment, independent review of managerial transactions, giving new financing priority were all issues for the rules, as was the need to ensure practitioner independence and impartiality. Almost an afterthought, perhaps because at the time still in their infancy, the rules advised that cross-border insolvencies also be catered for.

Beginning in late 2020, the revision of the rules took on board the need to provide a specific focus on the problems of Micro-, Small- and Medium Enterprises, work that has also been progressed in recent times by UNCITRAL Working Groups I (MSMEs) and V (Insolvency Law) on pertinent texts within their respective remits. The consultation process in which INSOL Europe members were involved proceeded through an internal questionnaire on the first EBRD-provided draft, followed by direct input on subsequent drafts, naturally covering substantive issues, but also precise definitions and wording. The issues of special focus were MSMEs, technology, variation in and articulation between insolvency procedures and the further promotion of international insolvency texts and benchmarks and guidelines produced by other international bodies active in the sector.

Ultimately, the text adopted in November 2020 responds to all these concerns.[1] It also attempts to anticipate the continuing impact of the Covid-19 pandemic as capacity and resilience in the business sector is slowly restored. With the exception of financial institutions, for which special regimes are recommended, the principles suggest the tailoring of insolvency law to the needs of major market participants, the preservation of value for creditors, while not neglecting the interests of the debtor and employees, and making a range of procedures available, from consensual financial restructurings, through reorganisation, to liquidation with stakeholders being given rights of initiation as appropriate.

Enabling transparency, efficiency and cost-effectiveness through the use of digital tools is viewed as a pre-requisite to success in achieving outcomes. Suspension of enforcement is a key principle in order to ensure equal treatment of creditors, albeit alongside preservation of

the interests of security-holders. So too, the ability to hold management to account and to enable insolvency office-holders with appropriate training and expertise to manage cases. For reorganisations in particular, keeping a debtor-in-possession (DIP) option, being able to deal with all claims and protecting new finance are all seen as critical features. Lastly, appropriate support from a court is seen as underpinning these principles together with the support of a cross-border framework for relevant instances.

Insolvency Office Holders (2007 to 2021)

Building on the World Bank Principles and Guidelines and the UNCITRAL Legislative Guide, these principles sought to advance integrity, fairness and efficiency of the insolvency law system through ensuring appropriately qualified professionals managed cases. To this end, a robust qualifications, licensing and educational system were seen as key. Conditions for appointment, review of and removal from position as well as replacement procedures were necessary. So too, appropriate standards of professional conduct and a code of ethics, boosted by reporting and supervision requirements within cases, subject to some oversight by a creditors' committee, as well as an overall regime of regulatory, investigatory and disciplinary powers exercised by a professional or other independent body. Structuring an appropriate remuneration framework was also seen as important, as was recourse to professional indemnity insurance and a system for releasing office-holders from liability post-conduct of cases.

The revision process, initiated in 2020, occurred along similar lines as the framework principles noted above. An early draft provided by the EBRD was worked on by an INSOL Europe team and circulated to key working group members for comment. A to-and-fro drafting exercise helped develop the articulation of language and terminology in the text with the intended outcomes of the exercise, which included incorporating some of the main findings of the Insolvency Office Holder Assessment survey undertaken by the EBRD in 2014,[2] itself built on the framework of the 2007 principles, as well as responding to some of the developments introduced by the Directive on Preventive Restructuring and Insolvency 2019, which acknowledges potentially a more limited involvement for office-holders in DIP processes and the different roles they may play in reorganisation procedures.

Overall, the version that emerged in 2021[3] kept most of the framework intact, but refreshed much of the terminology and rules to respond to contemporary developments. As such, greater detail on the pre-requisites for admission and registration has been provided, along with the ability for legal entities to undertake case-management. So too, the elements of training and qualifications processes have been fleshed out to a greater depth, as well as enabling the appointment of experts in appropriate cases. The appointment, review and replacement framework have been brought up to date with the benchmark being the matching of relevant skills, qualification and expertise to the complexity and importance of cases.

Professional standards and ethics rules have been improved by reference to a duty to continuing professional development as well as to maintaining objectivity, confidentiality, legal and regulatory compliance and proper communication with stakeholders. References to regular reporting and to different modes of supervision are contained in an update of the relevant rules on oversight, while insurance is dealt with by updating the rules to reflect the practice in some jurisdictions which allow the creation of professional guarantee fund mechanisms. Finally, options for remuneration frameworks have been set out with an especial mention of the need for flexibility and cost-effectiveness, particularly for MSME cases.

Summary

The experience of cooperating with the EBRD has been a good one for INSOL Europe and its members, not just in terms of the organisation's remit and representation of practice, but also for understanding how international benchmarks and rules are formed. Being able to feed into that process at a high level to shape rules which are of benefit to policy-makers, legislators and regulatory bodies is a very useful exercise. Alongside participation in these two projects, INSOL Europe was also a partner in the EBRD's 2020 launch of an insolvency assessment on formal business reorganisation procedures, whose final report was issued in 2022.[4] This too has provided a learning opportunity to be able to anticipate the trajectory of reform for domestic laws and international benchmarks in this field. Overall, the experience of involvement with partner organisations, such as the EBRD, lends vitality to keeping the dialogue flowing and reform agendas better placed to respond to contemporary economic shocks. ■

Footnotes:

1 See: <https://www.ebrd.com/legal-reform/ebrd-insolvency-core-principles.pdf>.

2 See: <https://www.ebrd.com/sites/Satellite?c=Page&cid=1395277175709&d=Touch&pagename=EBRD%2FPage%2FArchive>.

3 See: <https://ebrd-restructuring.com/storage/uploads/documents/13472%20EBRD%20(Insolvency%20Office%20Holder%20Principles%20ARTWORK).pdf>.

4 See: <https://ebrd-restructuring.com/storage/uploads/documents/13472%20EBRD%20(Insolvency%20Assessment%20Database%20REPORT%20ARTWORK).pdf>.

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