



INSOL
EUROPE



Academic Conference
AMSTERDAM
11-12 October 2023

MAIN SPONSOR



THE SOCIO-LEGAL OBSTACLES TO THE RESCUE CULTURE

Emilie Ghio

Lecturer in Corporate & Insolvency Law, University of Edinburgh

Donald Thomson

Thorntons LLP; University of Dundee



INSOL
EUROPE

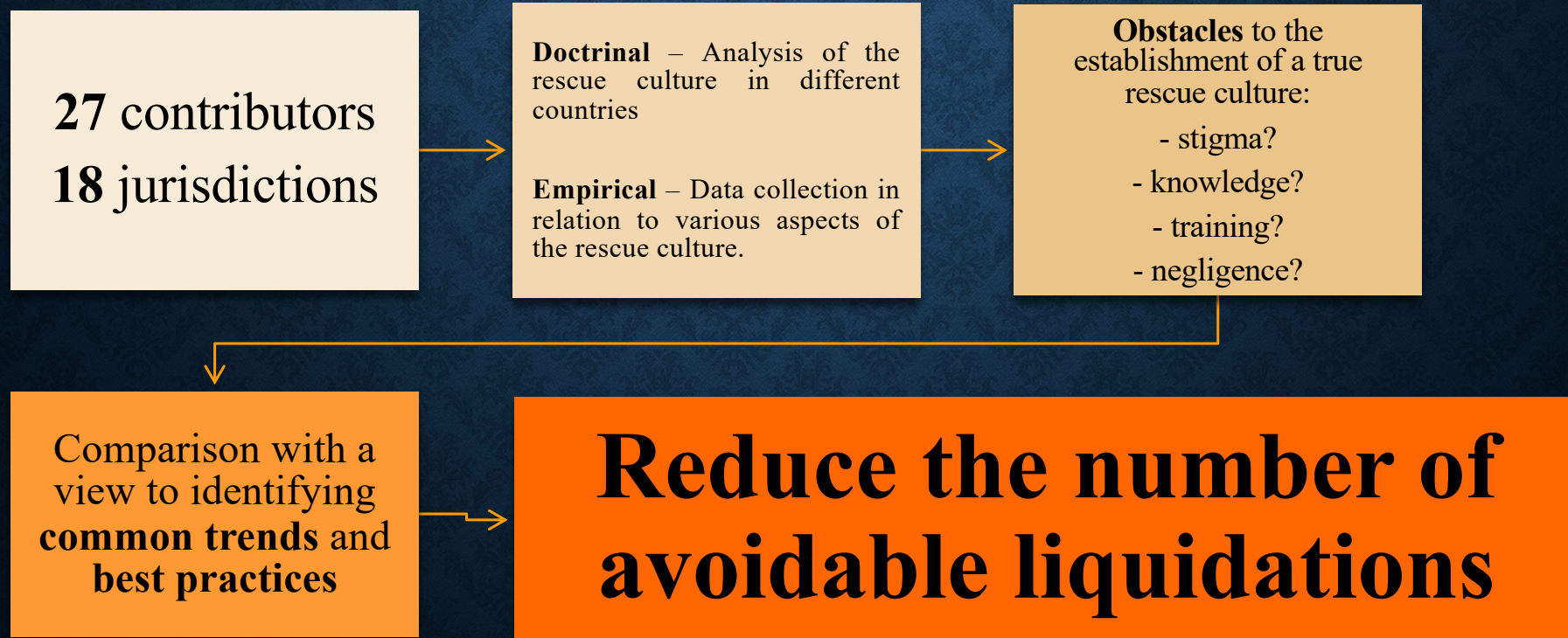


Academic Conference
AMSTERDAM
11-12 October 2023

MAIN SPONSOR



The failure of the rescue culture Project





INSOL
EUROPE



Academic Conference
AMSTERDAM
11-12 October 2023

MAIN SPONSOR



THE RESCUE CULTURE

The development of the rescue culture

Nationally

- **1942:** Italy, concordato preventivo
- **1955:** France, judicial settlement
- **1986:** UK, Administration; Company Voluntary Arrangements
- **1990:** Ireland, Examinership
- Wave of reforms in the early 2000s: e.g. Finland (2004); France (2005); Netherlands (2004); Slovakia (2005); Spain (2003)
- Again after the Global Financial Crisis of the late 2000s.

European Union

- **2011:** European Parliament Resolution (Recitals J and L)
- **2012:** EU Communication “Single Market Act II – Together for Growth” (Key Action 7)
- **2012:** EU Communication “A New approach to business failure and insolvency”
- **2014:** EU Recommendation on a New Approach to Business Failure and Insolvency
- **2015:** Capital Markets Action Plan
- **2019:** EU Directive on Preventive Restructuring Frameworks



Academic Conference
AMSTERDAM
11-12 October 2023

MAIN SPONSOR



The reality of the rescue culture

- While it is applauded and recognised that, as we have known for some time, rescue is, in many cases, the more efficient use of judicial and creditor efforts, **it has sadly not translated into an uptake of rescue mechanisms.**



INSOL
EUROPE



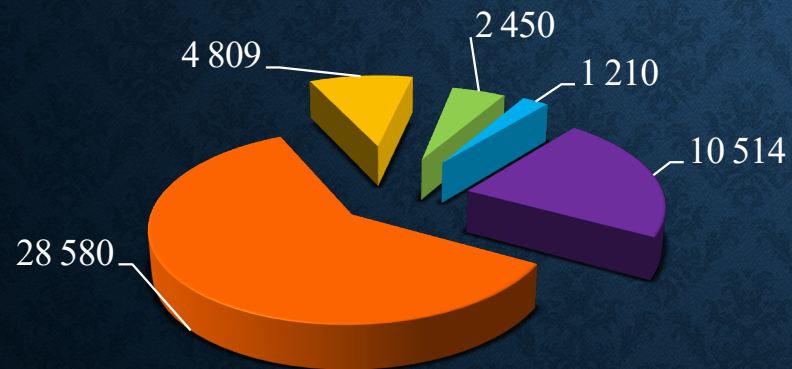
Academic Conference
AMSTERDAM
11-12 October 2023

MAIN SPONSOR

EdwinCoeLLP
LAW FIRM

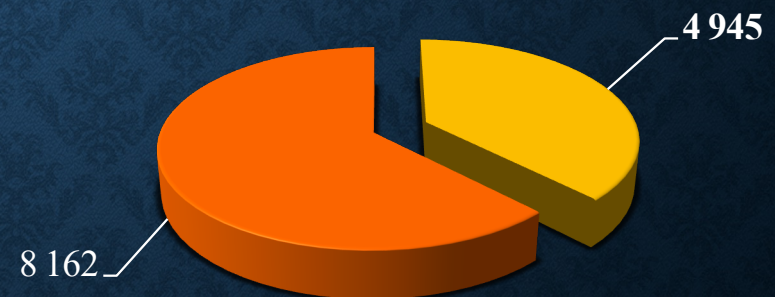
Outliers

France 2022



■ Liquidation
■ Conciliation
■ Redressement judiciaire
■ Mandat ad hoc
■ Sauvegarde

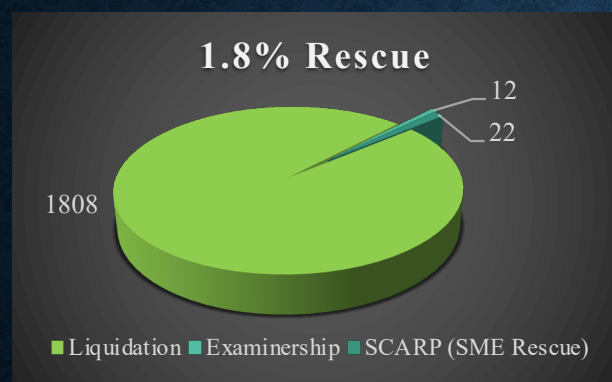
United States 2022



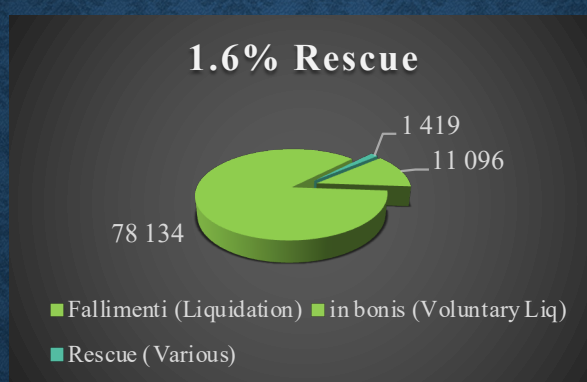
■ Chapter 11 (Rescue Procedure) ■ Chapter 7

~ 37%

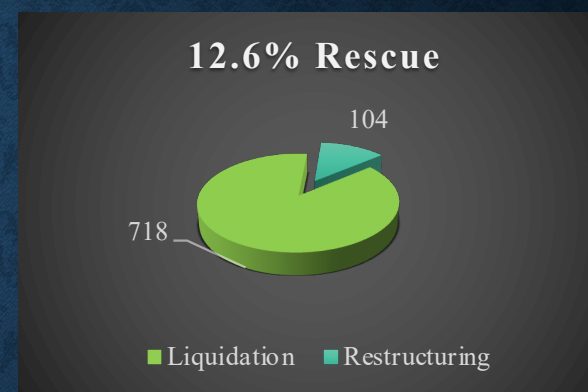
Ireland 2022



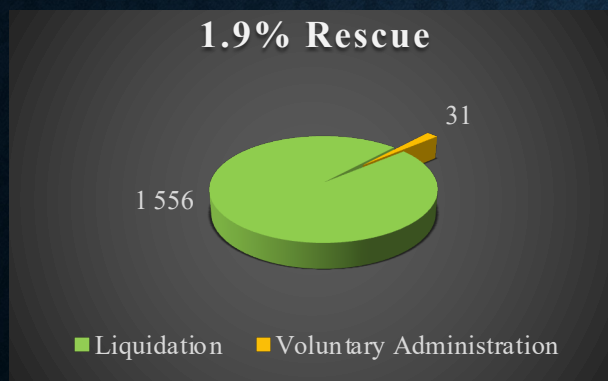
Italy 2019



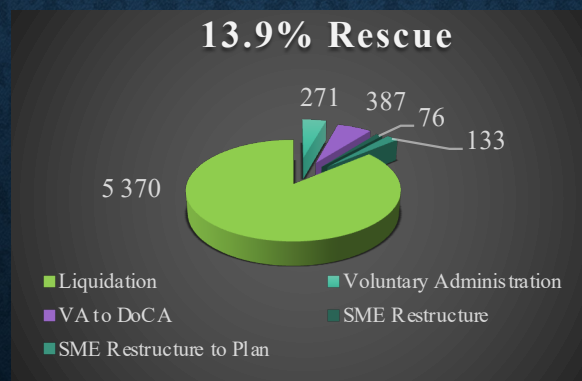
Finland 2022



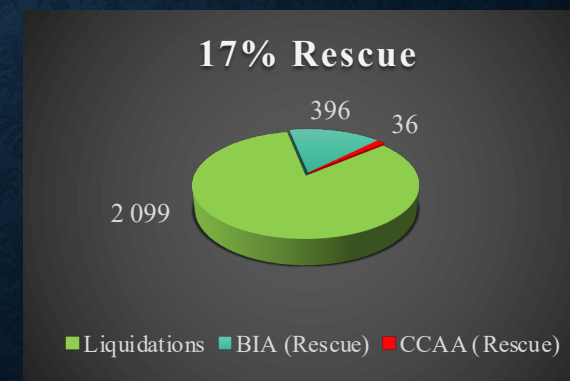
New Zealand 2021/2022



Australia 2022

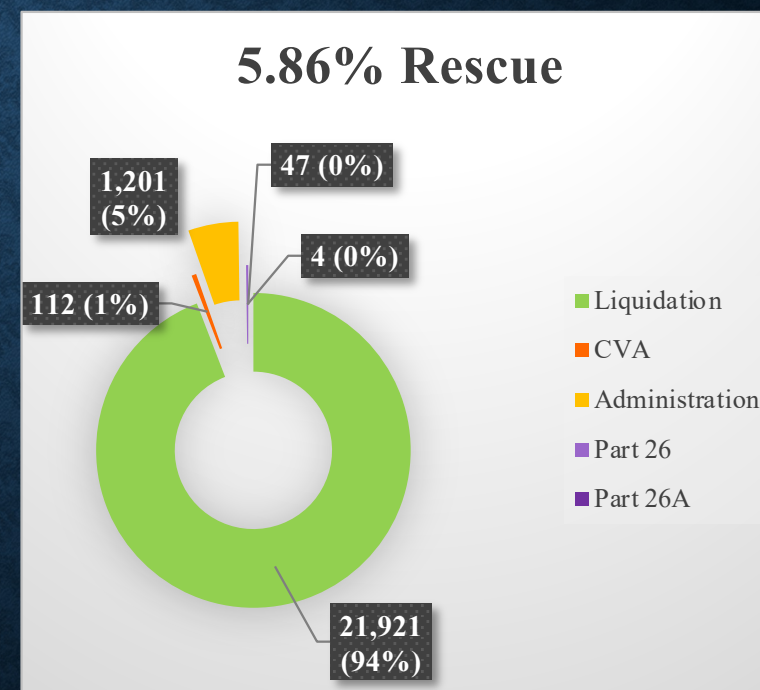


Canada 2022



UNITED KINGDOM

- Even in the UK, heralded as
 - “bankruptcy capital of Europe” *This is Money* (2010)
 - “brothel for bankruptcy tourists” *The Guardian* (2010)
 - “restructuring hub” *see e.g. A. Gurrea-Martinez* (2021)



WHY?

While several factors may explain the low uptake of rescue procedures over the years, **stigma** has regularly been raised as one of significant importance

European Commission: “[t]he stigma of business failure is one reason why many [companies] in financial trouble conceal their problems until it is too late.”

Prof. Tibor Tajti: “the ubiquity and the determinative role of the bankruptcy stigma.”

UK Institute of Chartered Accountants of England and Wales: “[t]he stigma surrounding going out of business [...] prevents many from looking for help at the time it would provide the greatest chance of turning a business around.”

Prof. Reinhard Bork: “any earnest attempt to construct an efficient restructuring law must take it into account until there is evidence of a wide-ranging and sustained change in popular mentality.”

World Bank: “[t]he heavy stigma of bankruptcy and the failure to discharge debts in many countries remain obstacles to entrepreneurship”

Paul Omar and Jennifer Gant: “[w]hile the rescue culture may have been implemented through these new [rescue] procedures, perceptions of insolvency remain tainted with blame and the stigma of irresponsibility.”



INSOL
EUROPE



Academic Conference
AMSTERDAM
11-12 October 2023

MAIN SPONSOR



STIGMA

Defining stigma

Goffman (1963)

Stigma is a **mark**.

Stigmatised persons possess 'an attribute that is deeply **discrediting**' / the 'bearer was [...] a **blemished** person, ritually polluted, to be avoided, especially in public places.'

Jones et al. (1984)

We [...] reserve the concept of stigma for outcomes of a **discrediting** process, where the target person is viewed as morally **flawed** and arouses revulsion.

Pfuhl (1980)

In brief and in theory, stigma denotes one's morally **spoiled** identity, one's social undesirability.

Schur (1983)

Stigmatized persons [...] are **little valued** as persons

Birenbaum and Sagarin (1976)

[When it comes to stigma], we are discussing the entire field of people who are regarded **negatively**, some for having violated [...] rules, others just for being the sort of people they are or having traits that are not highly valued.



INSOL
EUROPE



Academic Conference
AMSTERDAM
11-12 October 2023

MAIN SPONSOR

EdwinCoeLLP
LAW FIRM

Stigma and bankruptcy

01

Aetiology of corporate failure is the result of personal failure or of the failure of a group of persons.

02

Bankruptcy has long been regarded as more than mere failure – serious moral indiscretion.

03

In most major religions, defaulting on debt payment is seen as gravely sinful.

- ▶ Psalm 37:21 of the Old Testament states that '[t]he wicked borroweth, and payeth not again'
- ▶ Chapter 5 of the Qur'an ('The Feast') commands debtors to respect their promises through the verse '[o]h, ye who believe! Fulfil obligations.'



INSOL
EUROPE



Academic Conference
AMSTERDAM
11-12 October 2023

MAIN SPONSOR

EdwinCoeLLP
LAW FIRM

Stigma and corporate insolvency



Today still, financial failure is considered to be a **failure of character** and people in many countries consider it extremely negative – a ‘**major embarrassment**’ – if a business fails financially (Martin, 2005).



A company’s financial situation is attributed to the corporate officers’ **incompetence**. People interpret a company’s problems as **personal attributes** of its leaders (Meindl et al., 1977)



Prevailing view is that ‘the [...] owners were the ones whose **venality** or **incompetence** created the problem.’ (Westbrook, 1990)



INSOL
EUROPE



Academic Conference
AMSTERDAM
11-12 October 2023

MAIN SPONSOR



EU INITIATIVES



'Reducing the stigma of insolvency'

'A more supportive environment for business at risk may prevent failure. Furthermore, addressing the negative consequences of business failure when it occurs and its negative image would help make the best possible use of human creativity in Europe, boost entrepreneurship and promote innovation and job creation.'

Research on the profile of successful entrepreneurs shows that 18% had already run one enterprise. 6% had run two or more.

Bankruptcy is an opportunity. In the EU the general public often perceived bankruptcy as a criminal affair, no matter the cause.'

'The social stigma [and] the legal consequences [...] constitute important disincentives for entrepreneurs seeking to set up a business or have a second chance'

'Company managers should not be stigmatised when their honest business endeavours fail.'



INSOL
EUROPE



Academic Conference
AMSTERDAM
11-12 October 2023

MAIN SPONSOR



STUDIES



Academic Conference
AMSTERDAM
11-12 October 2023

MAIN SPONSOR



01

Pilot study (2022)

Empirical

Semi-structured interview

UK

02

Pilot study (2023)

Comparative

Questionnaire to academic contributors

International

EMPIRICAL STUDY (2022)

Semi-structured interviews with
directors of MSME directors in
the UK.

Stigma

Do you believe that business failure
is stigmatised?

“I don’t think there is a big
stigma associated with small
companies struggling [...]. I
think that’s expected [...]
Statistically it’s extremely
common.”

“The stigma would
automatically be the
assumption that you are bad at
running a business or even
worse, dishonest when it comes
to running a business.”

→ Mixed findings

Knowledge

Do you know what “liquidation” and/or
“rescue” mean?

“Liquidation, that would be
more for a franchise, I’m
guessing, where . . . the
Government would intervene.”

“I think that I know but I’m not
sure.”

→ Conclusive findings

COMPARATIVE STUDY (2023)

Would you say that stigma is part of the insolvency narrative in your jurisdiction? Has it appeared in either legal texts or policy documents over the years

Germany: “[a]gainst this background, a uniform procedural relationship that integrates all legal aids would appear as an unnecessary formalism that would arouse associations with the procedural restructuring options of insolvency law and would therefore also be afflicted with the stigma that the latter sometimes still has.” (StaRUG bill)

The Netherlands: “people here still see bankruptcy to a considerable extent as a kind of certificate of incapacity or as an indication of the likelihood of its recurrence in the future [...] [B]ankruptcy stigmatises; it stands in the way of opportunities for entrepreneurs to start over. The possibilities of distinguishing between fraud and failure are too weak”

Italy: stigma of failure was, until very recently, ingrained within the language of insolvency itself

Romania: “delaying the start of insolvency due to social stigma and the withdrawal from business of entrepreneurs discouraged by the perception of failure affects the economy.”

Questionnaire circulated to
international academics and
practitioners

→ Conclusive findings



Academic Conference
AMSTERDAM
11-12 October 2023

MAIN SPONSOR



FINDINGS

Obstacles to the rescue culture

Stigma?

- Levels of stigma around insolvency and business failure are **moderate**;
- National and international efforts to lower insolvency stigma have thus far remained rather **notional** and have not translated into concrete action
 - Netherlands: a booklet was published in the mid-2000s presenting entrepreneurs' experiences about insolvency and explaining how they became successful restarters
 - Germany: in the early 2000s the State of North Rhine-Westphalia launched a "START AWARD" scheme for honest entrepreneurs who learned from business failure and succeeded the second time around, sponsored a regional start-up support agency and local state banks (KfW)

Knowledge?

- **Inexperience** and **incomprehension** of insolvency amongst managers would seem to play an equally important if not greater role than stigma;
- Sheer **complexity** of the modern **corporate landscape**;
- Possible desire for directors to **maintain** their own **financial positions** for as long as possible?
- **Reluctance to accept** the gravity of the situation in which they find themselves;
- Directors may not possess the aptitude, knowledge, or foresight to assess the gravity of the situation and seek help?

Responsibility ?

- Growing legislative efforts to **punish** directors who knowingly allow their own interests to supersede those arising from their duty to the company:
 - UK (2021): *BTI 2014 LLC v Sequana SA and others* [2022] considered, for the first time, the circumstances in which directors are *required* to consider the interests of creditors
 - World Bank (2016): "[t]he laws governing directors' obligations in the period approaching insolvency should promote responsible corporate behaviour while fostering reasonable risk taking and encouraging business reorganisation."

Project: next steps

Empirical studies

- Further enquiries to confirm the findings about stigma
- Further enquiries to confirm the findings about the knowledge of directors
- Investigate the success rates of rescue procedures

Comparative studies

- Uncover common issues
- Identify best practices

Australia - Canada – France – Germany
– India – Ireland – Italy – Netherlands –
New Zealand – People's Republic of
China – Romania – South Africa –
United Kingdom- United States

Dissemination

- Academic outputs: journal articles; book; reports
- Policy-level – national governments; EU Commission; UNCITRAL; World Bank

Contributors to the international study conducted in 2023:

Australia: Catherine Brown, Amanda Bull, Jason Harris

Canada: Anna Lund and Alfonso Nocilla

France: Adrien Bézert and Vasile Rotaru

Germany: Stephan Madaus

Ireland: Jonathan McCarthy

Italy: Francesca Burigo and Eugenio Vaccari

Netherlands: Gert-Jan Boon

New Zealand: Lynne Taylor

Romania: Nicoleta Nastasie

South Africa: Juanitta Calitz

United States: Laura Coordes

**Additional contributors for the overall project starting in the
fall 2023:**

India: Neeti Shikha

Japan: Junko Sugimoto

Netherlands: Niek Strohmaier

Nigeria: Bolanle Adebola

People's Republic of China: Shuai Guo and Rebecca Parry

South Africa: Andre Borraine

Switzerland: Rodrigo Rodriguez

Uganda: Hamiisi J Nsubuga