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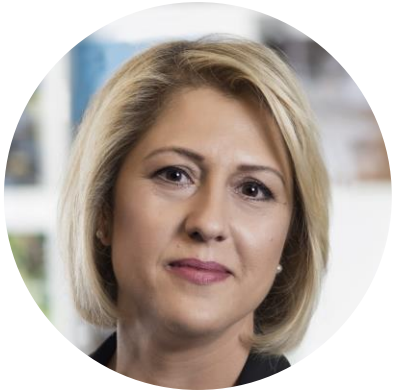
Opening remarks of the day

Andri Antoniou
CRI Group, Cyprus /
INSOL Europe Country
Coordinator

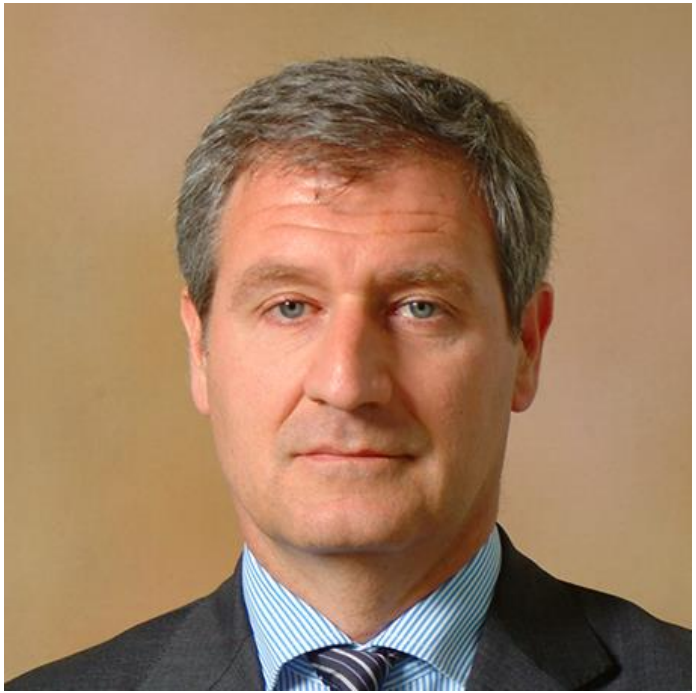


Incoronata Cruciano
Schiebe und Collegen, Germany /
INSOL Europe Council member
& Country Coordinator

Keynote speech:
The role played by the *commercialisti* in supporting companies

Prof. Elbano de Nuccio

President, Consiglio Nazionale dei Dottori Commercialisti e degli Esperti Contabili, Italy



Keynote Interview:

Giorgio Brandazza

CEO, Corneliani, Italy

by Giorgio Corno
Studio Corno Avvocati, Italy /
INSOL Europe President

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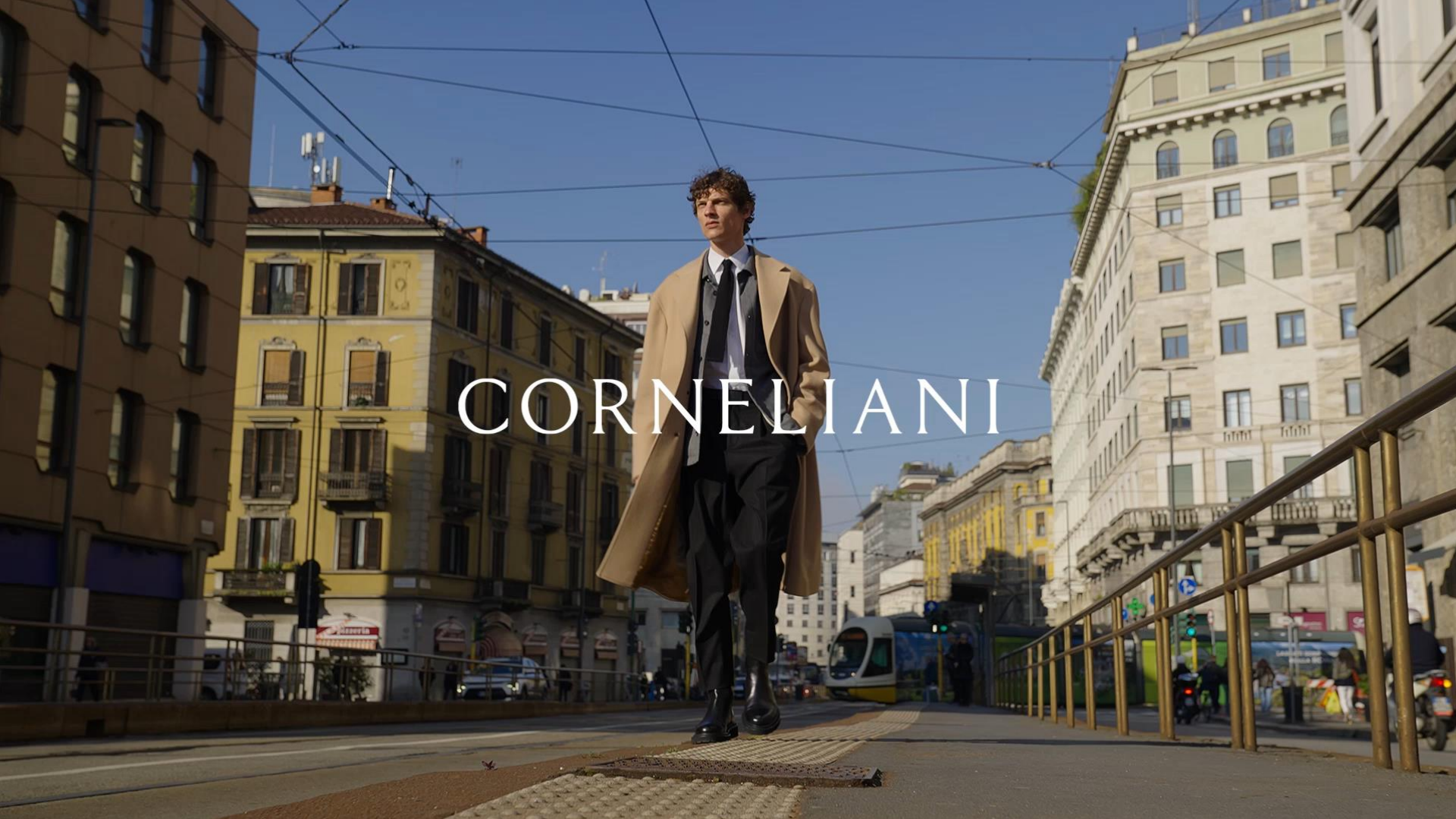
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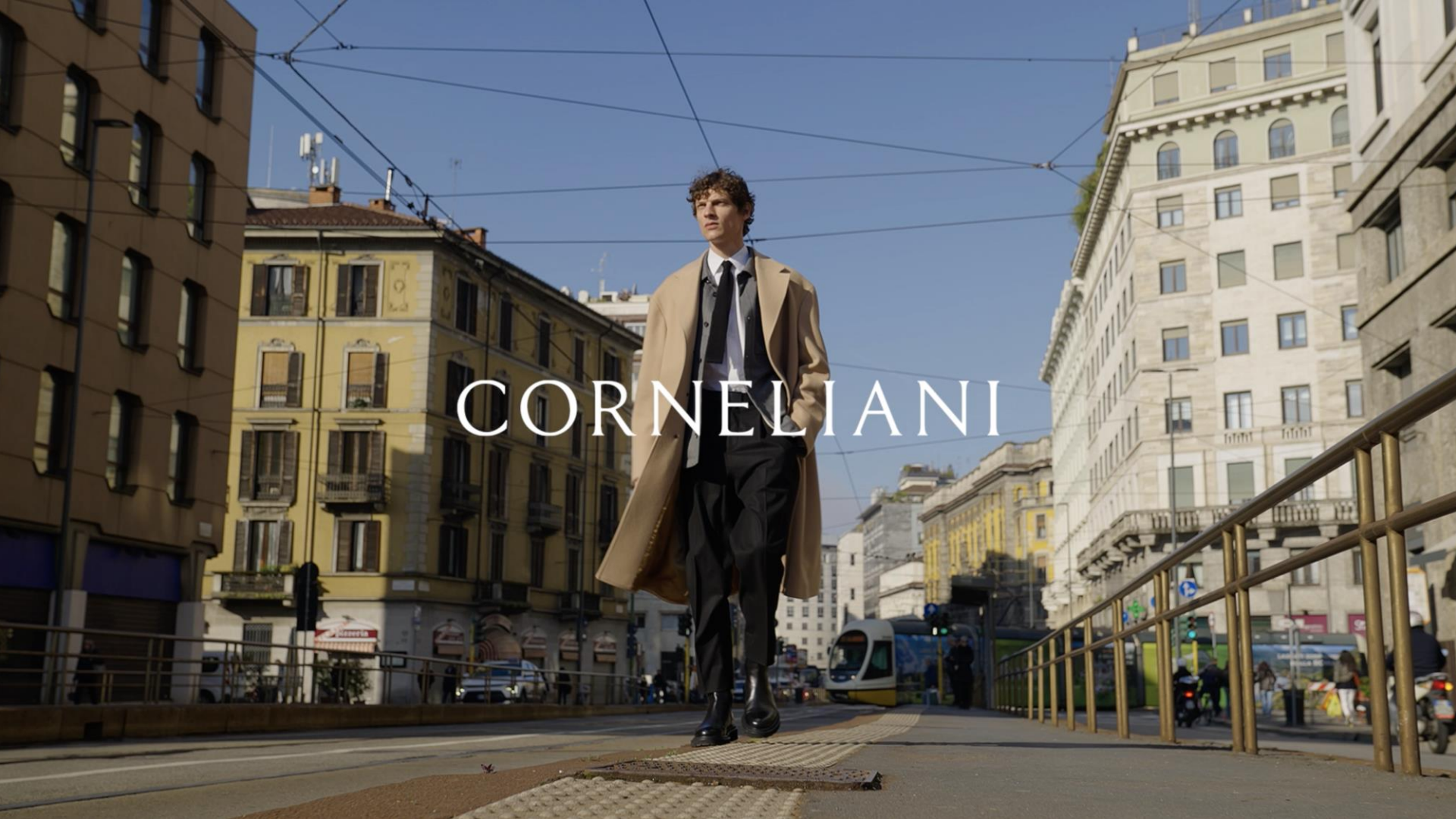
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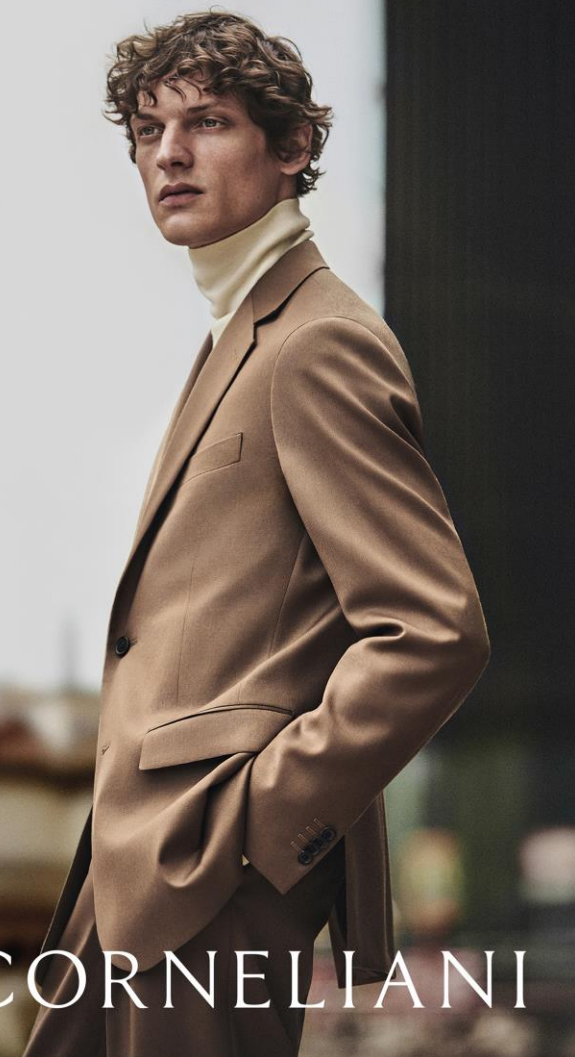
	DECLINE		CRISIS		NEWCO		
M€	2017 A	2019 A	2020 A	2021 A (*)	2022 A	2023 A	2023 PLAN
NET REVENUES	111,9 €	94,2 €	51,3 €	42,1 €	62,4 €	74,5 €	**66,8 €**
EBITDA ADJ	1,5 €	-5,1 €	-11,5 €	-9,4 €	3,2 €	4,3 €	**0,8 €**
	1%	-5%	-22%	-22%	5%	6%	**1%**
HEAD COUNT							
TOTAL	1.247	1.061	1.014	547	583	643	
ITALY	655	563	545	384	377	412	**337**

(*) Jan–Nov 2021

Composition with creditors proceedings (concordato Preventivo) - Filing: June 2020
Composition with creditors proceedings (concordato Preventivo) - Admission June 2021
NewCo start date: December 1st, 2021



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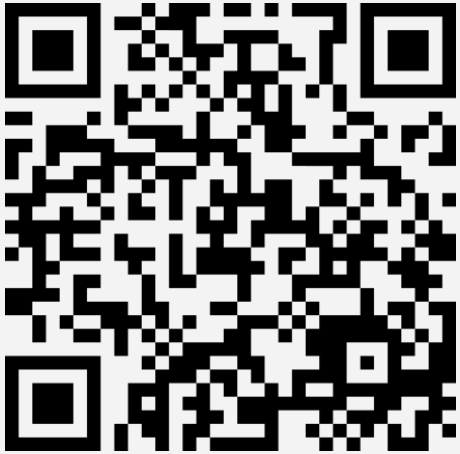

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An AI Boost for Bankruptcy and Insolvency Professionals - Using the powers of modern chatbots in the legal field to your advantage

Tom Braegelmann
Annerton, Germany

Coffee Break

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SUSTAINABILITY IN DISTRESS

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Law & Economics analysis of extra-judicial agreements
Deep reflections on practical applications

Panel leader:
Bart De Moor
Strelia, Belgium / INSOL Europe Council member & Country Coordinator

Prof. Jocelyn Martel
ESSEC, France

Paolo Rinaldi
AlixPartners, Italy

Adrian Thery
J & A Garrigues, Spain / INSOL Europe Council member & Country Coordinator

Introduction

- Concept of ”extra-judicial agreement”
- Meaning of ”extra-judicial” or ”out of court”
  - Possibility of approval by court or not
- Efficiency of the extra-judicial agreement to avoid insolvency
  - Is the formula successful? Is statistical information available?
  - Does it work?
  - How to choose between extra-judicial agreements and court proceedings?

A researcher's view

Jocelyn Martel

French-Canadian Professor of Finance
Law, Economics and Finance researcher

ESSEC Business School

Restructuring solutions for firms in financial distress

- Two restructuring solutions for firms in financial distress

  - ❑ Out-of-court (informal)
  - ❑ Court-supervised (formal)

Restructuring solutions for firms in financial distress

- Finance, economics and legal academics have studied the determinants of a firm's decision between informal and formal debt restructuring
- Most efficient restructuring mechanism **minimizes** the loss in asset value
- **General conclusion**: shareholders and creditors of firms in default have incentives to opt for informal restructuring to avoid the higher bankruptcy costs associated with formal restructuring

Restructuring solutions for firms in financial distress

- **Evidence**: a large number of firms opt for court-supervised restructuring

WHY?

Impediments to out-of-court restructuring

- Conflict of interest between classes of claimants, common pool and holdout problems (multi-creditors context)
  - Creditors have an incentive to free-ride and hold out to increase the relative value of their claims

- Incomplete contracts between a firm and its creditors
  - Costly and difficult to design contracts which specify the best procedure to follow in all contingencies

Impediments to out-of-court restructuring

- Asymmetric information
  - Informational advantage of managers over investors on the value of assets and future cash flows

- **Conclusion**: creditors may prefer a formal and more costly procedure to:
  - Freeze the rights of creditors and avoid a race to the firm's assets
  - Reveal more accurate information on the firm's value

Factors in favour of out-of-court restructuring

- Firm's profitability, solvency and size
- Larger proportion of liquid and tangible assets
- Presence of collateral (especially personal guarantee of managers)
- Closer and longer relationship with banks (small pool of banks)
- Higher proportion of bank and long term debt
- Lower proportion of current portion of long term debt and secured debt

Factors in favour of out-of-court restructuring

- Lower debt complexity (number of categories of debt and creditors, number of bondholders)
- Categories of institutional ownership for equity and bonds (banks, hedge funds, insurance companies, investment advisors, …)
- Country specific institutional setting (debtor / creditor – friendly)
- Public perception and stigmatisation

An economist's view

Paolo Rinaldi

Italian Chartered Accountant, Statutory Accountant
Chief Restructuring Officer, Economist

AlixPartners

In-court restructuring strongly impacts business

- **Supply cha**in moves to cash-on-delivery
- **Clients** start questioning long-term business continuity
- **Competitors** increase aggressive behaviour
- Loss of relevant **key executives**
- **Financial support** to current trading faces increasing RWA on banks
- **Industrial investors** tend to « watch from a safe distance »
- **Uncertainty** and **time** required for restructuring process create heavy risks

Out-of-court restructuring needs to be confidential & enforceable

- **Lack of confidentiality** leads to almost same negative consequences of in-court restructuring
- Agreements must be **solid** and **enforceable**
- Protection for **lenders** (new money and/or reactivation of suspended RCF)
- Protection for **extraordinary administration** acts
- **Incentive** system to be balanced with **responsibility** for delayed early warning

Most important items in out-of-court restructuring agenda

- **Timely approach** is essential to maintain viability
- High attention to **cash** management and cash-flow projections
- Accurate **choice of parties** to be involved in negotiations
- Trade-off with **strength of impact** on debt
- High complexity when negotiating with a **large number** of non-financial creditors
- **Forensic** results might lead to in-court restructuring

A lawyer's view

Adrian Thery

Spanish abogado, Head of Restructuring & Insolvency

Garrigues

Restructuring Plans in 2019 EU Directive

- In-Court or Out-of-Court restructuring?
- In-Court features:
  - solution to common pool problems: stay
  - solution to anti-common problem: Cram-down
  - safe-harbours against clawback actions (interim and new money protection)
  - possibility to challenge the Plan

Restructuring Plans in 2019 EU Directive

- Out-of-Court features:
  - no formal verification and admission of claims
  - « consent and approval »: no need of formal creditors' meeting
  - Restructuring Expert: no divestment of the debtor: enterprise valuation role
  - limited appeals

Restructuring Plans in 2019 EU Directive

- Consensual agreements as optimal outcome
  - negotiation in the shadow of non-consensual plan regulation
    - need for legal certainty and stable case law
- No statistics of consensual agreements VS non-consensual plans
  - consensual agreements likely to increase
- Choice for plan VS agreement:
  - alternatives or sequence?
    - factual pattern

Restructuring Plans in 2019 EU Directive

- Leverage to convince stakeholders:
  - best interest of creditors
  - but also: fairness: based on enterprise valuation
- Role of directors / expert: duty shifting?
- Importance of possibility to file competing plans: otherwise first proponent has an edge

Key issues for Member States to streamline in the EU:

- Perimeter (ability to affect only a subset of stakeholders):
  - financial VS industrial: claims VS contracts
- Confidentiality: is it overrated?
  - defence rights
  - procedural stigma
  - implications for recognition abroad

Key issues for Member States to streamline in the EU:

- Shareholders:
  - In-Court or Out-of-Court?
  - Competing Plans:
    - ❑ importance in a world with Cram-down
    - ❑ procedural implications: joinder

Discussion - Conclusions

How to choose between extra-judicial agreements and court proceedings? Determining factors:

- Court approval
- External factors
- Lack of time

Panellists

Jocelyn Martel, Professor of Finance, ESSEC Business School

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Paolo Rinaldi, Partner and Managing Director, AlixPartners, Italy

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Adrian Thery, Abogado, Partner, Garrigues, Spain

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Moderator

Bart De Moor, Advocaat, Partner, Strelia, Belgium

bart.demoor@strelia.com

Pre-packs repackaged?

Panel leader:
Rita Gismondi
Gianni & Origoni, Italy / INSOL Europe Country Coordinator

Ilan Spinath
Resor,
The Netherlands

Christophe Thevenot
Thevenot Partners, France / INSOL Europe TRIP Group Co-Chair

Fedra Valencia
Cuatrecasas
Spain

Pre-Packs in the Proposal for a Directive of the European Parliament and of the Council harmonising certain aspects of insolvency law

- More value can be recovered in liquidation by **selling the business as a going concern** rather than by piecemeal liquidation. In pre-pack proceedings the debtor in financial distress, with the help of a "monitor", seeks possible interested acquirers and prepares the sale of the business as a going concern before the formal opening of insolvency proceedings, so that the assets can be quickly realised shortly after the opening of the formal insolvency proceedings (Recital 22)

- Safeguards are provided in order to ensure that potential buyers are reached out to and that the **best possible market value** is achieved as a result of a competitive sale process.

Pre-Packs based on 2 consecutive Phases

- **preparation phase**, aimed at finding an appropriate buyer for the debtor's business
- **liquidation phase**, aimed at approving and executing the sale of the debtor's business and at distributing the proceeds to the creditors.

The Monitor

- The monitor is appointed in the preparation phase, in a situation of insolvency, or declaration of insolvency in which, however, the debtor remains in control of its assets and the day-to-day operation of the business
- The monitor (a) documents and reports each step of the sale process; (b) justifies why it considers that the sale process is competitive, transparent, fair and meets market standards; (c) recommends the best bidder as the pre-pack acquirer; (d) states the best bid does not constitute a manifest breach of the best-interest-of-creditors test.
- The monitor may be appointed as insolvency practitioner in the subsequent liquidation phase
- Civil liability of the monitor (and of the insolvency practitioner) for the damages that their failure to comply with their obligations causes to creditors and third parties affected by the pre-packs

The Sale Process 1/3

- Sale process is competitive, transparent, fair and meets market standards, but a public auction is possible in the liquidation phase
- When there is one binding offer, that offer shall be deemed to reflect the business market price
- Business is sold free of debts and liabilities (unless the acquirer expressly consents to bear debts and liabilities)

The Sale Process 2/3

- In the liquidation phase the sale is authorised by the court to the acquirer proposed by the monitor, on the basis of an opinion of the latter
- If the sale is not authorised, the court continues with the insolvency proceedings
- In the event of public auction (which shall be iniziated within 2 weeks as of the opening of the liquidation phase and shall last no longer than 4 weeks) the offer selected by the monitor shall be used as the initial bid in the public auction. Protections granted to the initial bidder in the preparation phase are proportionate, and do not deter potentially interested parties from bidding in the liquidation phase.

The Sale Process 3/3

- Parties closely related to the debtor are eligible to acquire the debtor's business, provided that all of the following conditions are met:

(a) they disclose in a timely manner to the monitor and to the court their relation to the debtor; (b) other parties to the sale process receive adequate information on the existence of parties closely related to the debtor; (c) parties not closely related to the debtor are granted sufficient time to make an offer.

- Where the offer made by a party closely related to the debtor is the only existing offer, additional safeguards for the authorisation and execution of the sale are needed (e.g. duty for the monitor and the insolvency practitioner to reject the offer if it does not satisfy the best-interest-of-creditors test)

Assignment or termination of executory contracts

- The acquirer is assigned the executory contracts which are necessary for the continuation of the debtor's business and the suspension of which would lead to a business standstill. No consent of the counterparties is required
- The court may decide to terminate the executory contracts, provided that one of the following conditions applies:

(a) the termination is in the interest of the debtor's business; (b) the executory contract contains public service obligations for which the counterparty is a public authority and the acquirer does not meet the technical and legal obligations to carry out the services

European Union Insolvency Harmonisation Update

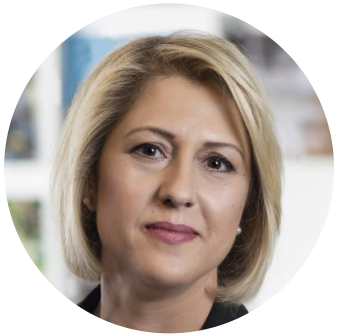
Ondrej Vondracek
Civil Justice Unit,
DG JUST, European
Commission

Prof. Antonio Leandro
University of Bari Aldo
Moro, Italy

Closing remarks of the Annual Congress

Joint Facilitators, President and Technical Committee Co-Chairs

Andri Antoniou
CRI Group, Cyprus / INSOL Europe Country Coordinator



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Studio Corno Avvocati, Italy / INSOL Europe President

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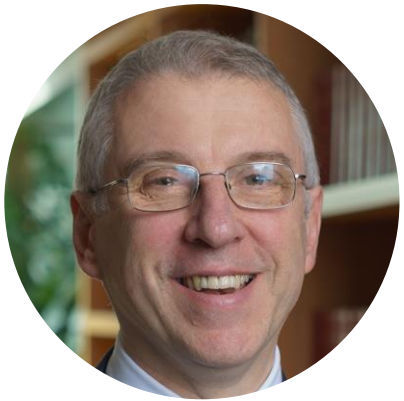
Gianni & Origoni, Italy / INSOL Europe Country Coordinator

Bart De Moor
Strelia, Belgium / INSOL Europe Council member & Country Coordinator

President Handover



Giorgio Corno
Studio Corno Avvocati, Italy

INSOL Europe President
2023-24

Alice van der Schee
Van Benthem & Keulen, The Netherlands

INSOL Europe President
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Delegate & Guest Lunch

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