Academic Forum Sponsors

SHAKESPEAREMARTINEAU

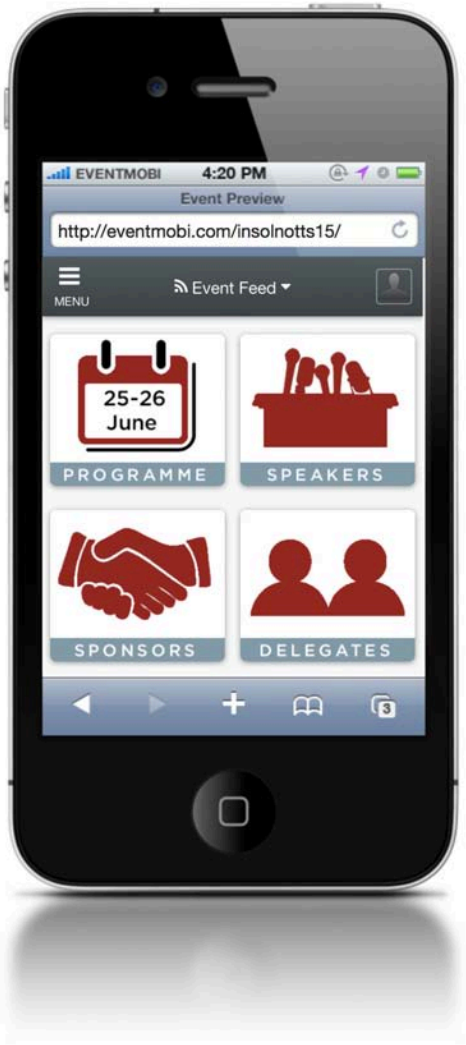
www.shma.co.uk

Formerly SGH Martineau

Re-Imagining Rescue

Follow the instructions in your workpack to access the Conference App

http://eventmobi.com/insolnotts15/



Welcome

Prof Janine Griffiths-Baker
(Dean, Nottingham Law School, Nottingham Trent University, UK)

Robert van Galen
(INSOL Europe President)

Prof David Burdette
(Professor of Insolvency Law and Director of the Centre for Business and Insolvency Law, Nottingham Law School, Nottingham Trent University, UK)

Prof Michael Veder
(Professor of Insolvency Law, Radboud University Nijmegen, Netherlands / Advisor, RESOR, Netherlands / Visiting Professor, Nottingham Law School, Nottingham Trent University, UK)

Key-note address

Prof G. Ray Warner

(Professor of Law & Associate Dean for Bankruptcy Studies, St John's University, School of Law, New York, USA)

First Session:

Why rescue? A critical analysis of the current approach to corporate rescue

Chair: Neil Cooper (Honorary Life President, INSOL Europe / Visiting Professor, Nottingham Law School, Nottingham Trent University, UK)

Speakers:

Dr Irit Mevorach (World Bank / Associate Professor in Law, University of Nottingham School of Law, UK)

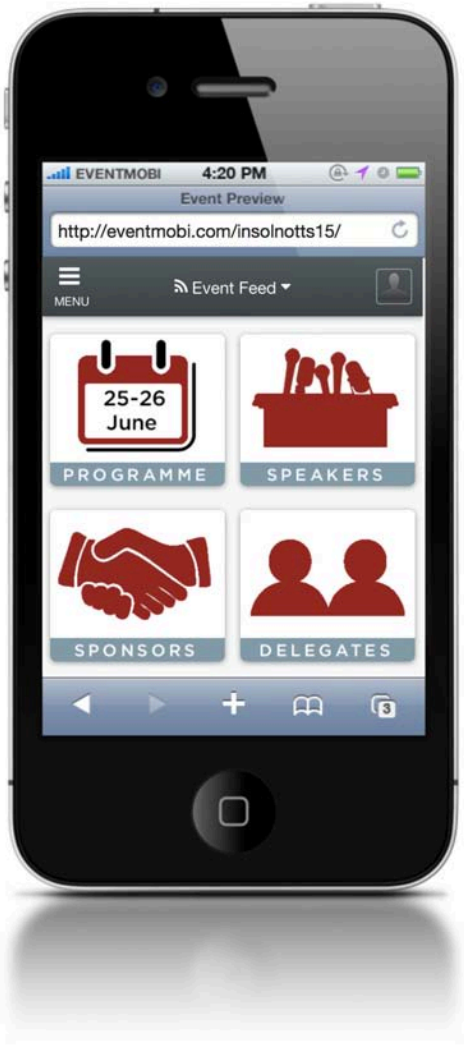
Jenny Clift (Secretariat, UNCITRAL Working Group V)

Dr Sarah Paterson (Assistant Professor of Corporate Insolvency, London School of Economics, UK)

Coffee Break

Download the Conference App

http://eventmobi.com/insolnotts15/



Second Session:
Corporate rescue: Experiences and insights from the bench

Chair: Hamish Anderson (Partner, Norton Rose Fulbright, UK / Visiting Professor, Nottingham Law School, Nottingham Trent University, UK)

Panellists:

Mrs Justice Desiree Staal (Supervisory Judge, District Court Central Netherlands, Insolvency Division, Utrecht, Netherlands)

Mr Justice Prof Dr Heinz Vallender (Chief Judge, Cologne Bankruptcy Court, Germany / Professor of Bankruptcy and Civil Law, University of Cologne, Germany)

Mrs Justice Jeanette Melchior (Senior Deputy Judge, Maritime and Commercial Court, Copenhagen, Denmark)

Mr Justice David Richards (Chancery Judge, Chancery Division, Royal Courts of Justice, London, UK)

Joint International Insolvency Conference

Nottingham Trent University

25-26 June 2015

Re-Imagining Rescue

Corporate Rescue: Experiences and insights from the bench

Prof. Heinz Vallender
Cologne, Germany

Corporate Rescue: Experiences and insights from the bench

German rescue (reorganization) procedures

Overview

Under the insolvency process the most common way to rescue a business has been a **sale**, with the approval of the secured creditors, of all or part of the assets to a new legal entity.
This commonly used method was developed under the regime of the old German insolvency law (Konkursordnung).

In addition to this method, the option of an **insolvency plan** has been created. This offers a settlement to the creditors other than by way of liquidation and it needs the approval of the creditors, which can also be achieved by a cram down.

Corporate Rescue: Experiences and insights from the bench

On 1 March 2012, the German Law on Further Facilitating the Restructuring of Companies (ESUG) came into force in order to improve the environment for the restructuring of companies threatened with insolvency.

Creditors interests where particularly to be strengthened, self-administration (protective proceedings) supported and plan proceedings made easier.

See particularly Sec. 225a Insolvency Statute

„(1) The share rights and membership rights of those persons with a participating interest in the debtor shall remain unaffected by the insolvency plan, **unless otherwise provided in the plan**.

(2) The constructive part of the plan may provide that the creditors' claims may be converted into share rights or membership rights in the debtor. Such conversion shall be ruled out if it is against the will of the creditors concerned. In particular, the plan may provide for a decrease or increase in capital, the provision of contributions in kind, the ruling out of subscription rights, or the payment of compensation to outgoing shareholders.

Corporate Rescue: Experiences and insights from the bench

Similar to the introduction of the insolvency plan, the introduction of the legal institution of **debtor-in-possession proceedings** has been also part of the reform of the German insolvency law carried out in 1999.

Debtor-in-possession proceedings entitle the debtor company to manage the insolvency estate itself, under the supervision of a creditors. trustee, and to dispose of the same autonomously. Debtor-in-possession proceedings presuppose the institution of insolvency proceedings and may be ordered within the framework of either insolvency proceedings or an insolvency plan.

Corporate Rescue: Experiences and insights from the bench

Sec. also 270b Insolvency Statute - introduced by Law on Further Facilitating the Restructuring of Companies (ESUG) -

Preparations for Reorganisation

(1) If the debtor has made his request for the opening of insolvency proceedings on account of imminent insolvency or overindebtedness and has requested debtor-in-possession management and if the intended restructuring does not manifestly lack the prospect of success, the insolvency court shall, upon the request of the debtor, set a deadline for submission of the insolvency plan. The deadline may not exceed three months. The debtor shall enclose with the request certification, with grounds, provided by a tax advisor, accountant or lawyer with experience in insolvency matters or a person with comparable qualifications which provides evidence of the imminent insolvency or overindebtedness but that the debtor is not already insolvent and that the intended restructuring does not manifestly lack the prospect of success.

(2) In the order referred to in subsection (1), the court shall appoint a provisional insolvency monitor in accordance with section 270a subsection (1) who must not be the same person issuing the certification referred to in subsection (1). The court may decide not to appoint the provisional insolvency monitor proposed by the debtor only if the proposed person is manifestly not suited to taking on the office; the court shall provide reasons for its decision. The court may order provisional measures in accordance with section 21 subsection (1) and (2) no. 1a, 3 to 5; it must order measures in accordance with section 21 subsection (2) no. 3 if the debtor submits a request therefor.

Corporate Rescue: Experiences and insights from the bench

(3) Upon the request of the debtor the court must order that the debtor provide grounds for the debts incumbent on the estate. Section 55 subsection 2 shall apply mutatis mutandis.

(4) The court shall revoke the order in accordance with subsection (1) before the deadline expires if

1. the envisaged restructuring no longer has prospects of success;
2. the provisional creditors' committee requests that the order be revoked or
3. a creditor entitled to separate satisfaction or a creditor requests that the order be revoked and circumstances become known that lead to the expectation that the order will lead to the creditors being placed at a disadvantage; the request shall be admissible only if no provisional creditors' committee has been appointed and the party filing the appeal can show the circumstances to the satisfaction of the court.

The debtor or the provisional insolvency monitor shall immediately notify the court of the debtor becoming insolvent. After revoking the order or after expiry of the deadline the court shall take a decision regarding the opening of insolvency proceedings.

Corporate Rescue: Experiences and insights from the bench

In 2011 some German administrators published an article in a law magazine (ZInsO 2011, p. 860, 861) which includes the statement that German insolvency judges would have no way to promote the restructuring of companies.

This statement is wrong!

My thesis is:

The insolvency judge affects with his decisions in a significant way the conduct of the proceedings and thus the success of the targeted restructuring.

Let‘s have a look at the first stage of the court reorganization proceedings.

Corporate Rescue: Experiences and insights from the bench

Preliminary Proceedings

The period of time between the filing and the decision of the court whether to open final insolvency proceedings is the so called preliminary insolvency proceeding (*vorläufiges Insolvenzverfahren*).

The Insolvency Court does not automatically open insolvency proceedings upon receipt of a corresponding filing. During the preliminary proceedings it determines whether an insolvency ground on fact exists.

In restructuring cases the opening proceedings lasts normally about 3 months. This corresponds to the period time during which the employees are allowed to claim insolvency money.

Employees are protected by so called “insolvency money” (*Insolvenzgeld*) which covers wages for the period of three months. Contracts of employment are not automatically terminated by the initiation of the insolvency proceedings but may be terminated with three months notice or, if applicable, with a shorter notice period. Certain other employee rights are limited in insolvency proceedings as well.

Corporate Rescue: Experiences and insights from the bench

As a general rule, the Court appoints a preliminary (provisional) administrator.

Usually, the Court orders that all or certain transactions require the preliminary administrator's consent. In this case the debtor's legal representatives remain in charge of conducting the debtor's business.

In the case of **sec. 270b** Insolvency Statute (Preparations for Reorganisation – the debtor has requested debtor-in-possession management -) Court orders who **entrust the debtor with special representative power** could be of high importance.

But it is not clear whether the judge is allowed to release such orders. In its decision of February 2013 the Federal Court left the question open.

Corporate Rescue: Experiences and insights from the bench

During the preliminary proceedings another important switch stand for a successful restructuring of a company is the **appointment of a provisional creditors' committee** by the judge.

The members of the creditors' committee shall support and monitor the insolvency administrator's execution of his office.

They shall demand information on the progress of business affairs, have the books and business documents inspected and the monetary transactions and the available cash verified (see sec. 69 of the German Insolvency statute).

It is important to appoint the „right“ members. In particular, the judge has to avoid to appoint a so called „family and friends“ committee.

Corporate Rescue: Experiences and insights from the bench

The most important decision for the success of the the restructuring of a company is the **appointement of the (provisional) administrator.**

Appointment of an Insolvency Administrator

See Art. 56 Insolvenvy Statute

(1) From among all those persons prepared to take on insolvency administration work the insolvency court shall select and appoint as insolvency administrator an independent natural person who is suited to the case at hand, who is particularly experienced in business affairs and independent of the creditors and of the debtor. The willingness to take on insolvency administration work may be restricted to certain proceedings.

Corporate Rescue: Experiences and insights from the bench

The requisite independence shall not already be ruled out on account of the fact that

1. the person's name was put forward by the debtor or by a creditor,
2. the person in question had given the debtor advice of a general nature on the course and consequences of the insolvency proceedings prior to the request for the opening of insolvency proceedings being filed.

(2) The insolvency administrator shall receive a letter documenting his appointment. Upon termination of his office he shall return such letter to the insolvency court.

In the German Insolvency law system the IP is „the master of the universe“.

See sec. 80: Right to Manage and Transfer the Insolvency Estate Vested in the Insolvency Administrator

(1) Upon the opening of the insolvency proceedings the debtor's right to manage and transfer the insolvency estate shall be vested in the insolvency administrator.

That‘s why it is so important to appoint the „right“ administrator.

Corporate Rescue: Experiences and insights from the bench

Switch stand insolvency plan proceedings

The success of a reorganization depends in case of the submission of an insolvency plan quite often by the rapid implementation of the plan.

Here again, the economically minded bankruptcy judge is required.

Refusal of the Plan

(1) The insolvency court shall refuse the insolvency plan ex officio

1. if the provisions governing the right to submit a plan and its contents, in particular regarding the forming of groups, are not complied with, and the submitting party is unable to correct such defect or does not correct it within a reasonable period of time fixed by the court;
2. if a plan submitted by the debtor obviously has no chance of being accepted by the parties concerned or approved by the court; or
3. if the claims provided for the parties under the constructive part of a plan submitted by the debtor obviously cannot be satisfied.

The court shall take its decision **within two weeks following submission of the plan.**

Corporate Rescue: Experiences and insights from the bench

In a **2014-ESUG study** of Roland Berger Strategy Consultants and the German commercial law firm NOERR, 2,100 decision-makers including creditors, insolvency administrators, lawyers, **judges**, investors and managers were surveyed on their practical experience in implementing the new insolvency law.

The conclusion is that almost two years after the coming into effect of the ESUG, while the amendments continue to be controversially discussed, approximately 90 % of those surveyed see their expectations fulfilled.

There is a clear trend in favour of protective proceedings.

In 2013, approximately one third of the self-administrations applied for were at same time protective proceedings. Self-administrations which began as protective administrations were, according to the participants in this study, more frequently and more rapidly successfully completed (41 %), unlike provisional self-administrations (23 %).

Corporate Rescue: Experiences and insights from the bench

However, more than half of those surveyed complained of the complexity in the application for self-administration – above all by the high degree of legal uncertainty (51 %) and comprehensive documentation obligations (43 %). Nevertheless, the experts believe that the new insolvency law can achieve its objectives mainly by easier self-administration (74 %) and a stronger regard for the interests of creditors (59 %). Those surveyed particularly value the introduction of a provisional creditor committee and its influence on the selection of an administrator (44 %).

In a 2012- study only 73 per cent of the respondents argued that the judges apply the new provisions correctly.

Corporate Rescue: Experiences and insights from the bench

Cross border cases

What is needed? A judge who is willing to communicate and to coorperate!

See Art. 42 and 43 of the recast EIR (communication and cooperation in main- and secondary insolvency proceedings)

See also Art. 57 and 58 of the recast EIR (communication and cooperation in the insolvency proceedings of members of a group of companies).

Corporate Rescue: Experiences and insights from the bench

Case no 1: The Collins & Aikman Case

Facts

On 15th July 2005 the debtor – a German company with limited liability being a member of the Collins & Aikman group – filed for insolvency at the High Court of Justice, Chancery Division, in England.

It did so on the grounds that its Centre of Main Interest (COMI) according to Art. 3 of the EC Regulation on Insolvency Proceedings was in England.

On the same day, the High Court pursuant to this filing opened main insolvency proceedings on the German company.

Corporate Rescue: Experiences and insights from the bench

Some days later and in addition to that, on 18th July 2005, the debtor filed for insolvency at the Insolvency court of Cologne.

Apparently, this was done with regard to views in Germany that a filing with a foreign court would not discharge the director from his duty under German law to file for insolvency. The step was taken to avoid a breach of that duty and its consequences in any event.

The debtor therefore explicitly stated that the only reason for additionally filing in Germany was to fulfil that duty. Furthermore the debtor pointed out that this submission should not be taken as filing for secondary insolvency proceedings.

Corporate Rescue: Experiences and insights from the bench

The insolvency court of Cologne dismissed that filing for insolvency.

- The court stated that it could not decide on the subject following the decision of the High Court in London.
- In addition it held that there was no need for legal relief.

By filing for insolvency proceedings and the respective decision of the High Court of Justice to open insolvency proceedings on 15th July 2005 the debtor had fulfilled its obligation to file for insolvency under German law provided that such filing took place in due time.

Corporate Rescue: Experiences and insights from the bench

German law:

- duty of managing directors of companies with limited liability to file for insolvency proceedings within a maximum of three weeks upon occurrence of either illiquidity or overindebtedness.

- Breach of such duty has serious consequences for the managing directors. In particular, managing directors are personally liable for compensation of any payments made by the company after illiquidity or overindebtedness.

Corporate Rescue: Experiences and insights from the bench

Issue

Crossborder insolvencies gave rise to the question whether a managing director of a German company discharges the duty to file by submitting an insolvency petition in another EU Member State. Or is double filing necessary for managing directors to avoid personal liability?

Corporate Rescue: Experiences and insights from the bench

Case no 2: Scope of the court‘s duty

I. The legal problem

In its decision of 1 December 2005 - 71 IN 564/05 -, the **Cologne Insolvency Court** for the **first time addressed the question of the scope of the court’s duty to ascertain information** in the case of insolvency applications involving a domestic branch office. The decision was based on the following

Facts

The head of the branch office petitioned for the initiation of insolvency proceedings on the assets of the branch office; the branch office is registered in the Commercial Register of the Local Court of Cologne; the debtor is a limited company with registered offices in Dartford, United Kingdom.

Corporate Rescue: Experiences and insights from the bench

The authorised representative of the debtor stated that he did not know whether main insolvency proceedings had already been opened on the assets of the debtor, nor was he familiar with the financial situation of the debtor.

Corporate Rescue: Experiences and insights from the bench

Case No 3:The PIN Group case

PIN Group S.A. (Luxembourg)

Court order from the 19th of February 2008 of the Amtsgericht Köln (Cologne Insolvency Court) – 73 IE 1/08 –

Commentators think the following decision is quite noteworthy especially with regard to its handling of the conditions to accept jurisdiction as set-out in the Eurofood decision of the ECJ in 2006.

Corporate Rescue: Experiences and insights from the bench

Facts

The PIN Group AG is the holding company of the whole PIN group with 11.500 members of staff, and one of the biggest competitors of Deutsche Post AG, which deals with private postal delivery and its amenities.

The PIN Group AG is recorded in the commercial register of Luxembourg (Registre de Commerce et des Societes de Luxembourg). Its statutory domicile was Luxembourg.

The holding company was responsible for the planning and constituting of the group policy, especially concerning the M&A (Management and Accounting) strategy of the group. Until December 2007, all functional entities were based in Luxembourg.

Corporate Rescue: Experiences and insights from the bench

At the end of December 2007 the shareholders of the group appointed – for the first time – a new CEO (Chief Executive Officer) and a new CRO (Chief Restructuring Officer), who both had their businesss domicile in Cologne/Germany, as well as two more members of the board of directors (*Verwaltungsrat*) with the same predisposition.

Between the end of December 2007 and the end of January 2008 the following measures – amongst others – were taken by the board of directors:

- all statuary books,
- all personal files,
- and other substantial documents

were transferred to a rented office in Cologne.

Corporate Rescue: Experiences and insights from the bench

The top management was based in Cologne. The board of directors launched an executive commitee (*Lenkungsausschuss*) which held its meetings only and regularly in Cologne. The areas of finance/controlling and human resources were all transferred to Cologne pp. At the end the only parts that remained in Luxembourg were a small departement (which had no functional duties and more – their tasks were completed by the board of directors) and a registry to forward mail.

Does the Cologne Insolvency court have jurisdiction for the case?

Mrs Justice Jeanette Melchior
(Senior Deputy Judge,
Maritime and Commercial Court,
Copenhagen, Denmark)

Denmark

- Bankruptcy code chapter 2 on reconstruction
- Enforced by law in 2010 and came into operation April 1st, 2011
- Suspension of payments as we knew it ceased to exist

Who?

- Both the debtor and a creditor can file for reconstruction of a company – usually the debtor itself
- A personal debtor can also file for reconstruction
- Debtor-in-possession

How

- File to the court
- The court appoints an administrator (suggestion of the debtor) – usually a lawyer – and nominee skilled in accounts
- Advertisement in special national paper
- Meeting in court within four weeks with all creditors and debtor and administrator
- Temporary plan for rescue has to be sent to all creditors and court a week before the meeting

Meeting in court

- Administrator presents the temporary plan
- Creditors and court can ask questions
- Plan is adopted unless a majority votes against it and the majority represents at least 25% of the known creditors with the right to vote
- The court can postpone the vote to a meeting to up to four weeks later. Unless the creditors vote against it…

Who can vote

- Creditors whose claims are not secured
- Creditors whose claims are accepted
- Creditors whose claims are disputed – but accepted by the court (for now)

Removel of the administrator and/or the nominee

- At any time but the judge needs a very good reason
- The debtor will be given time to find a replacement
- If an other is not found the debtor will be declared bankrupt

Next meeting (1)

- At the latest six month after the first meeting
- A final rescue plan has to be sent to the creditors and the court before (14 days)
- The meeting is announced in the special paper
- The court can postpone the decision on the proposal (at a meeting) up to two months – twice
- Reorganisation proposal is adopted unless a majority of creditors vote against it

Next meeting (2)

- The court has to affirm the reconstruction proposal or decide not to
- Finally the court decides the fees to the administrator and the nominee

Power of the judge

- To open the reconstruction case
- To appoint the administrator and the nominee
- To remove the administrator and the nominee
- To appoint an extra administrator
- To allow the decision on the first meeting to be postponed
- To decide whether a creditor with a desputed claim has the right to vote

Power of the judge

- To assess the value of certain pledged or mortgaged assets to decide the unsecured share of the creditor's claim
- To declare the debtor bankrupt if the proposed reconstruction plan cannot be accepted by the creditors
- To affirm the reconstruction proposal or in special circumstance, refuse to confirm the proposal
- To decide fees of the administrator and the nominee

Comfort Break

Bus leaves for Riverbank Restaurant at 18:30 sharp