



Our story...



1980: French association headed by Yannick Pavec organised a conference in Vienna with speakers from at least six other European countries and it proved a great success.

1981: Sir Kenneth Cork, organised a meeting in London. He arranged for the incorporation of **Association Européenne des Practiciens des Procédures Collectives (AEPPC) in France** and formed the first Council.

1982: British practitioners celebrated the 21st birthday of their Association, the IPA, with a conference in Cape Cod, USA, inviting North American practitioners and as a result, Richard Turton (UK) and Ian Strang (Canada) founded **INSOL International**.

1984: AEPPC joined INSOL International as a member association.

Late 1990s: Developments in France made AEPPC an antiquated term and the name of the organisation was changed to **INSOL Europe** at the Paris Council Meeting in **April 2000**.

INSOL Europe has undergone great changes with a combination of globalisation, the development of the insolvency professions in both Western and Eastern Europe, the continually increasing emphasis on effective reorganisation of ailing businesses, and the development of global models such as the European Insolvency Regulation and the UNCITRAL Model Law on Cross Border Insolvency.

INSOL Europe has risen to these challenges and continues to grow and thrive.

Members



INSOL Europe members are professionals who specialise in insolvency, business reconstruction and recovery - lawyers, accountants, judges, regulators, academics and bankers.

We have over 1,250 members from more than 50 countries in Europe and further afield including: **Argentina, Australia, Bermuda, Canada, Cayman Islands, Israel, South Africa and the USA.**



Benefits of membership



- **Our Council has direct contact with the EU.** We regularly appear before the European Parliament and are in constant dialogue with the European Commission.
- **Our members are at the forefront of developing European insolvency law as an academic discipline.** The principal goals of INSOL Europe's Academic Forum are to study insolvency matters emanating from EC insolvency regulations and to promote the further development of insolvency law as an academic discipline throughout Europe.
- **Copies of publications:** Technical Series, Eurofenix and INSOL World.
- **Eurofenix benefits:** advertise at negotiable rates.
- **Weekly emails** with European insolvency news from international and specialist sources.
- **Monthly membership e-newsletter** including inside stories from members.
- **Opportunities to write articles** for Eurofenix, the website and e-newsletter.
- **Events:** INSOL Europe and INSOL International Congresses at discounted rates.
- **Recognition:** Working groups and publication of articles.
- **Exclusive information:** Access to the Practical Law Company's "Cross-Border Restructuring and Insolvency Guide" and members only access to www.insol-europe.org
- **Membership to INSOL International**



Visit INSOL Europe's website for:

- Forthcoming events, member offers, updates from our working groups and committees
- Rolling newsfeed on insolvency stories across Europe. Five stories a week selected and highlighted in a weekly email to our membership.

Members only features include:

- Glossaries of Terms relevant to insolvency laws of most European countries.
- Membership database.
- Latest editions of Eurofenix in French and English.
- Technical material from the Accession Countries and Eastern Europe Committee.
- Papers by the Academic Forum and Judicial Wing.
- Access to the Members Forum online discussions.

Communications



- **You can find us on Twitter @INSOLEurope** for up to date European insolvency stories directly from our newsfeed.
- INSOL Europe has over 1,200 members in our **LinkedIn Group**.
- Our **press office** releases all the latest INSOL Europe announcements to our international media database.
- **Monthly e-newsletters** to our membership.
- **Weekly emails** to our members with the top five European insolvency stories.
- Our **Facebook** page shows all the upcoming events.

Publications



INSOL Europe's quarterly journal

Technical Series publications



Special publications



Turnaround Wing Guidelines



- **INSOL Europe Turnaround Wing Guidelines for Restructuring and Turnaround Professionals:**
Developed in 2015 by INSOL Europe's Turnaround Wing, through consultation with members practising throughout Europe and beyond



**INSOL EUROPE
TURNAROUND WING
GUIDELINES FOR
RESTRUCTURING
AND TURNAROUND
PROFESSIONALS**

Working groups & committees



- Academic Forum
- Anti-Fraud Forum
- Eastern European Countries' Committee
- Judicial Wing
- Financial Institutions Group
- Turnaround Wing
- Young Members Group
- EIR Case Register
- Insolvency Office Holders Forum
- Congress Technical (for each Congress)
- Constitution
- Eurofenix Editorial Board
- EU Monitoring
- INSOL International & National Organisations
- Membership Structure & Approval
- PR, Publications & Website
- Sponsorship
- Glossaries



Technical



- **Case Register:** Over 500 abstracts are now uploaded at www.insolvencycases.eu. Currently considering the next stage of a subscription basis for non-members.
- **Glossaries of insolvency terms:** Over 20 countries currently covered.
- We **contribute to the Global INSOLvency** website on a weekly basis.
- State reports, updated insolvency laws, EIR reform process, how to become an IP across Europe and national insolvency statistics are all **available on our website**.

Conferences 2017



DATE FOR YOUR DIARY
EASTERN EUROPEAN
COUNTRIES' COMMITTEE
CONFERENCE 2017




BUDAPEST
HUNGARY
12 May 2017 • Mercure Buda


**Winding up of (assetless)
companies in Central-Eastern
Europe - The reality show**

Simultaneous translation from English to Hungarian will be available

For further information visit:
www.insol-europe.org/events



Date for your Diary
INSOL EUROPE
ANNUAL CONGRESS
5-8 October 2017
Warsaw
Poland



For further information visit:
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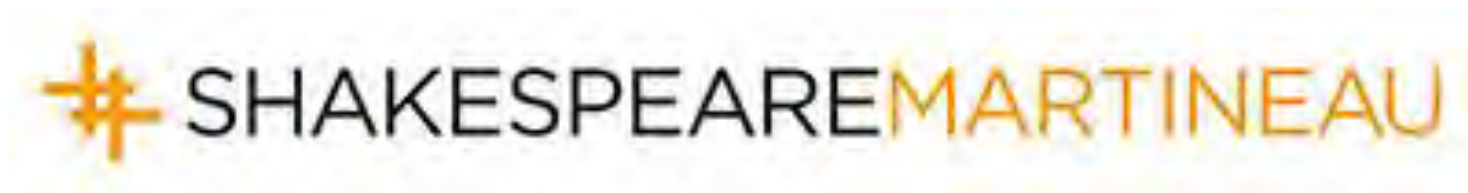
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A Joint Approach to Combating Fraud

London, 8-9 November 2016

Interviewing, Interrogation, Recollection and Evidence – the Science and the Snake Oil

Robert Hunter



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London, 8-9 November 2016

Robert Hunter

roberthunter@emmlegal.com

www.emmlegal.com



- **Partner, dispute resolution, London**
- Robert Hunter is a partner of Edmonds Marshal McMahon. He is an experienced solicitor-advocate who has specialised in cases involving fraud, asset tracing and breach of trust since the early 1990's. He has particular expertise in applications for emergency injunctive relief such as Freezing and Proprietary injunctions, Search Orders, and Norwich Pharmacal applications. Robert has been involved in many of the largest fraud and trust cases to come before the English courts and has experience of pursuing asset tracing claims and claims for breach of trust in all the major offshore jurisdictions.
- He has been ranked as the star fraud practitioner in the Chambers guide since the category was first used and is rated as the joint star practitioner in Contentious Trust litigation for the first time in the 2016 Chambers Guide to the Legal profession.



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From a Chambers blog

- “A good witness statement can greatly improve the chances of success in any case, whereas conversely a poorly drafted one can undermine what may otherwise be a potentially strong claim or defence.”



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Preparing Witness Statements for Use in Civil Proceedings

Guideline from the Professional Standards Committee of the General Council of the Bar
(Chancery Guide) (continued)

- “Save for formal matters and uncontroversial facts, should be expressed if practicable in the witness’s own words.”



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Preparing Witness Statements for Use in Civil Proceedings

**Guideline from the Professional Standards Committee of the General Council of the Bar
(Chancery Guide)**

“Although it is not the function of a witness statement to answer such questions as might be put in cross-examination, great care should be exercised when excluding any material which is thought to be unhelpful to the party calling the witness and no material should be excluded which might render the statement anything other than the truth, the whole truth and nothing but the truth.”



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“The Daily Princetonian” 27th December 1951

“This observer has never seen quite such a disgusting exhibition of so-called "sport." Both teams were guilty but the blame must be laid primarily on Dartmouth's doorstep. Princeton, obviously the better team, had no reason to rough up Dartmouth. Looking at the situation rationally, we don't see why the Indians should make a deliberate attempt to cripple Dick Kazmaier or any other Princeton player. The Dartmouth psychology, however, is not rational itself.”



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“The Dartmouth” 27th November 1951

“... the Dartmouth-Princeton game set the stage for the other type of dirty football. A type which may be termed as an unjustifiable accusation.

Dick Kazmaier was injured early in the game....Other stars have been injured before, but Kazmaier had been built to represent a Princeton idol...So what did the Tiger Coach Charley Caldwell do? He announced to the world that the Big Green had been out to extinguish the Princeton star. His purpose was achieved.”



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“The Dartmouth” 27th November 1951

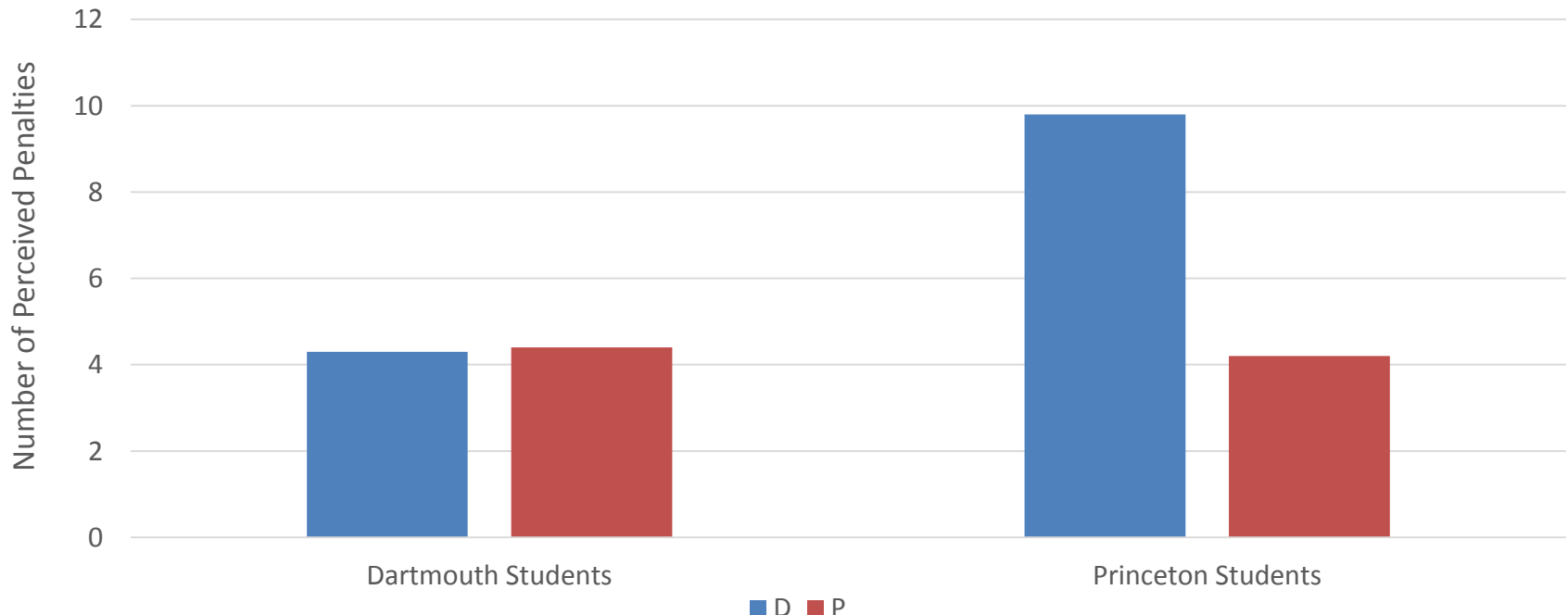
....The game was rough and did get a bit out of hand in the third quarter. Yet most of the roughing penalties were called against Princeton while Dartmouth received more of the illegal-use-of-the-hands variety.”



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Hastorf, A. H. & Cantril H. (1954). They saw a game: A case study. *Journal of Abnormal and Social Psychology*, 49, 129-134.





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Dartmouth infraction

Dartmouth
Students:

1 “flagrant” to 2
“mild”

Princeton infraction

Princeton
Students:

2 “flagrant” to 1
“mild”

1 “flagrant” to 2
“mild”

1 “flagrant” to 3
“mild”.



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Roediger and McDermott (1995)

- Door
- Glass
- Pane
- Shade
- Ledge
- Sill
- House
- Open
- Frame
- View
- Breeze
- Sash
- Screen
- Shutter



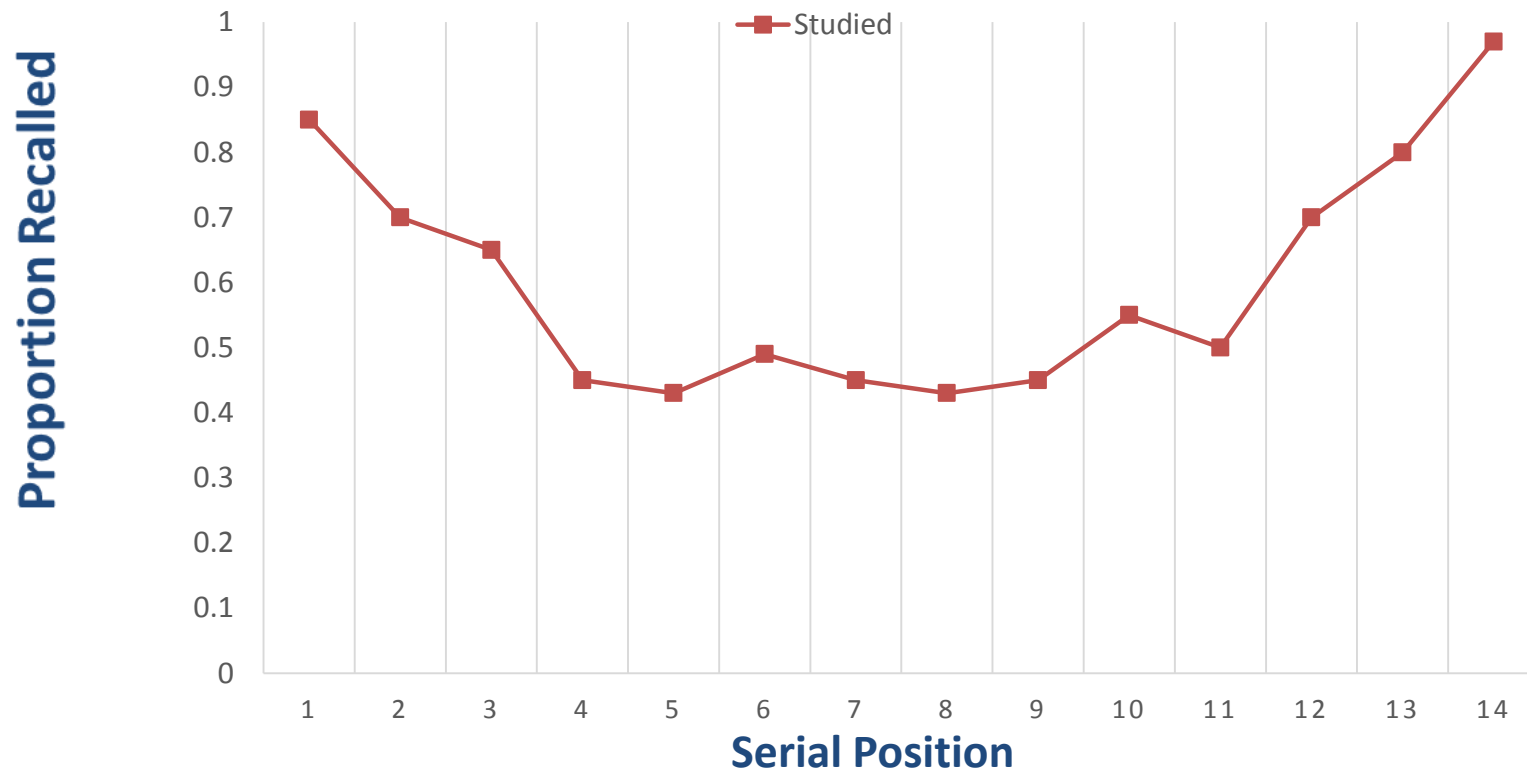
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Memory and Suggestibility in the Forensic Interview

Eisen et al

STUDIED





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Roediger and McDermott (1995)

Window



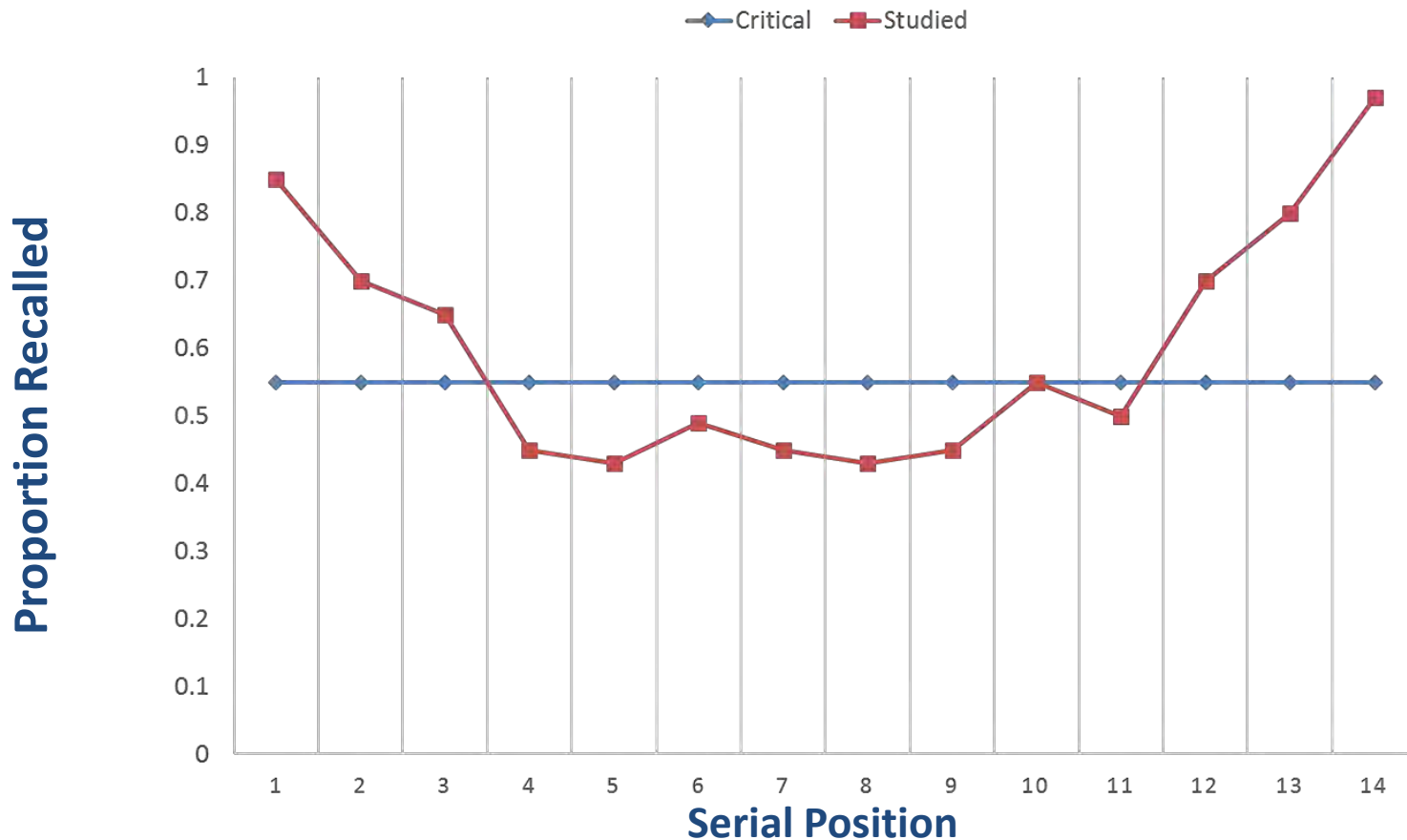
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The question

(Roediger and McDermott 1995)

“Do you recognise the word because you can remember it’s actual occurrence on the list or rather because you know the word was on the list but cannot recall any details about its occurrence?”

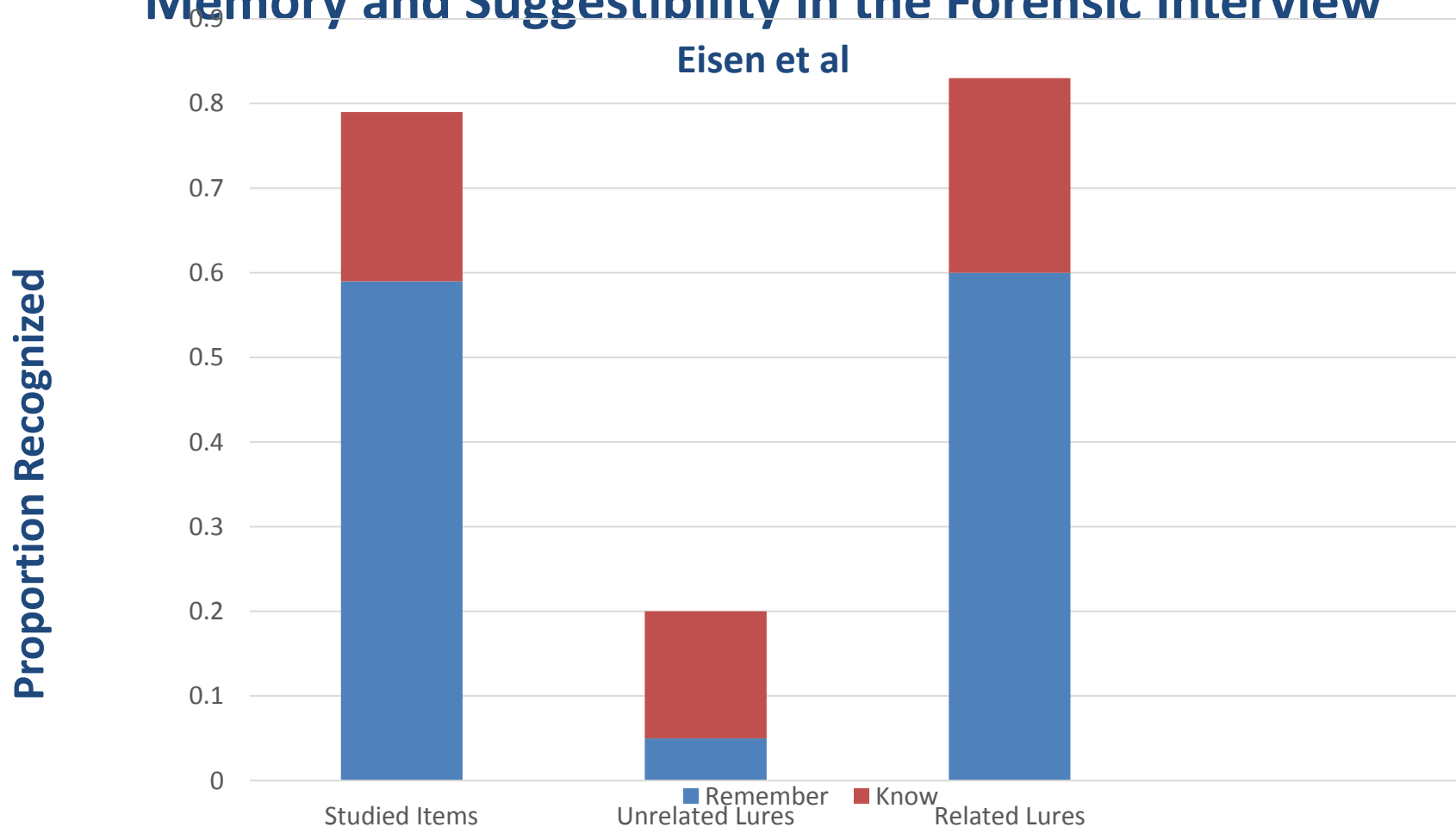


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Memory and Suggestibility in the Forensic Interview

Eisen et al

“The data in ...[the prior graphs] reveal a powerful memory illusion occur in in a straightforward paradigm: People recall, recognize, and remember the occurrence of events (words appearing in a list) that objectively never happened.”

p 12



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Elicited Misinformation and Suggestibility in Legal Contexts

Wiley, London (continued)

“Misinformation effects are among the most reliable and robust experimental findings in all of psychology.”



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Anna Lindh, Swedish Foreign Minister





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Mijailo Mijailovic





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Mijailo Mijailovic - CCTV footage





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R. V Momodou and Limani

[2005] EWCA Crim 177; [2005] 2 Cr.App.R 6

“The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids, any possibility that one witness may tailor his evidence in light of what anyone else said, and equally avoids any unfounded perception that he may have done so.”



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Memory Conformity

Critical factors:

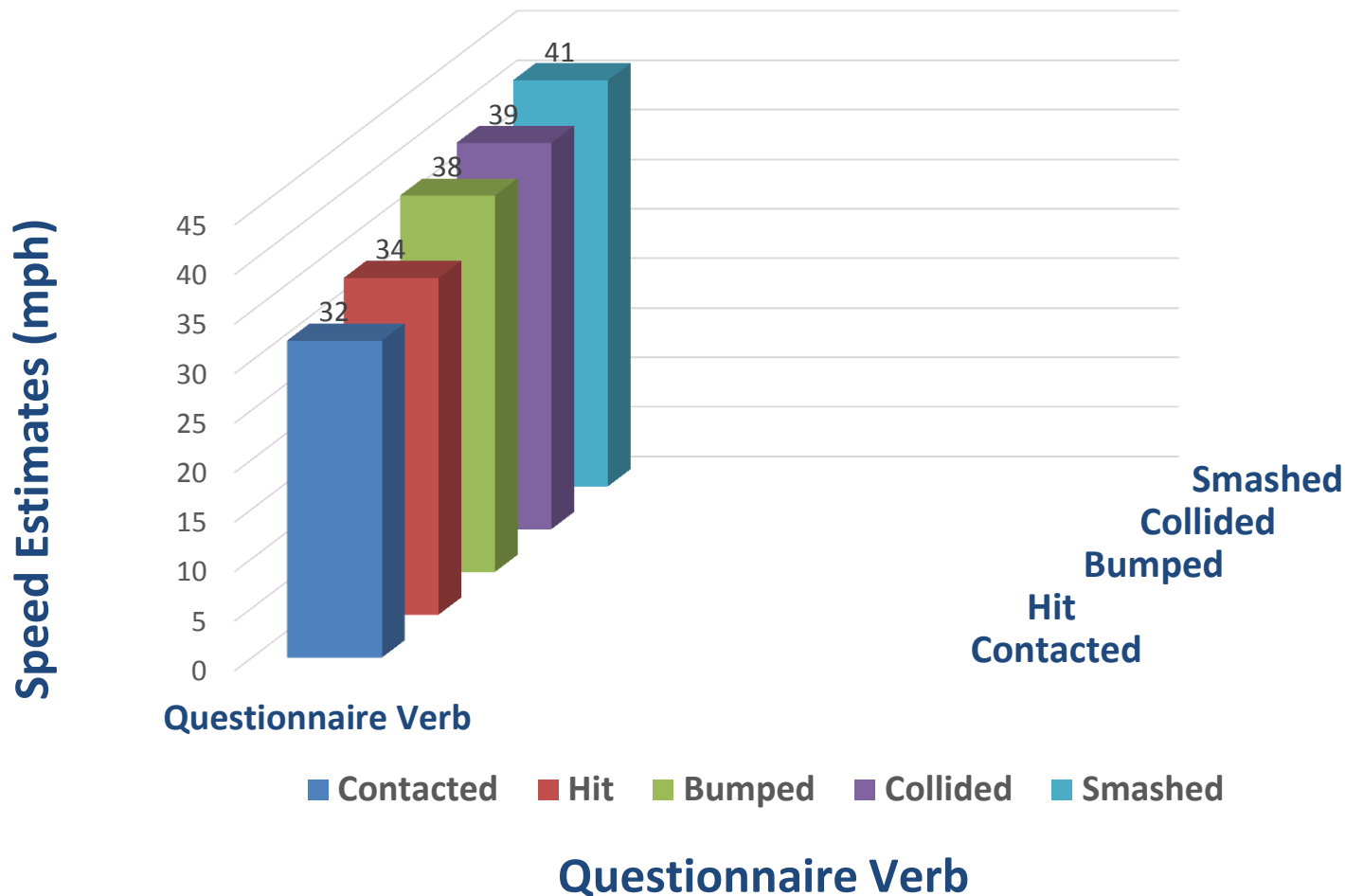
- (a) Length of time between discussion and statement;
- (b) Prior relationship of co-witness;
- (c) Personal involvement.



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Loftus and Palmer (1974)





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Suggestibility in Legal Contexts

Wiley, London (continued)

“...findings suggest that participants [in eyewitness evidence experiments] forget their initial responses were guesses.”



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Suggestibility in Legal Contexts

Wiley, London

“...there is now considerable evidence that, in retention intervals as short as one week, participants are prone to developing false recollections of having witnessed the items they knowingly fabricated earlier.”

(pp 33, 34)



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Gudjonsson “GCS 1 and 2”

- Narrative
- Recall
- Repetition
- Questioning
- Feedback
- GCC
- Acceptance



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Memory and Suggestibility in the Forensic Interview

Eisen et al

“The CI has been found in both scientific laboratory and field studies to produce significantly more information than standard police Q&A interviews, and the protocol is legally acceptable to the courts.”



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Ultraframe (UK) Ltd v G Fielding and 4 others

[2005] EWHC1638 (Ch) (continued)

“It is, of course, dangerous for a judge to play amateur psychologist and deliberately to look for clues to the question whether a witness is telling the truth. But everyone knows that when we watch and listen to people speaking a great deal is communicated non-verbally. It is impossible to disentangle the verbal from the non-verbal aspects of the communication. I think that is all that judges mean when they say that the ‘demeanour’ of a witness has played.”



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Verbal Lie Detection

1. Criteria based content analysis;
2. Reality monitoring;
3. Scientific content analysis;
4. The Reid Technique;
5. The Verifiability Approach;
6. Increasing cognitive load;
7. Trojan Horse Technique



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Preparing Witness Statements for Use in Civil Proceedings

Guideline from the Professional Standards Committee of the General Council of the Bar
(Chancery Guide) (continued)

“Whether it is wise and in the client’s interest in any given case to exclude unfavourable material which can properly be excluded is a matter of judgment.”



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Country report – France

Combating fraud within the context of the
insolvency proceedings

Georges-Louis HARANG – Lawyer

HOCHE
SOCIÉTÉ D'AVOCATS



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Scope:

- Judicial reorganisation
- Judicial liquidation
- ✓ Pre-insolvency proceedings / Safeguard proceedings are excluded



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1.1 CIVIL Approach – Repairing by recovering assets

- Protection of the collective interest of creditors by the « *mandataire judiciaire* », the administrator, the liquidator, the « *contrôleur* »
- Protection of the creditor's sole interest in specific cases

What kind of legal action?

- Action for avoidance of transaction / payment during the « *suspect period* »

✓ Art. L 632-1 / L 641-14 Commercial code

- Action for fraud

✓ Art. 1341-2 (previously 1167) Civil code (« *action paulienne* »)

✓ Art. 643-11 Commercial code (individual action after the closing of the insolvency proceedings)



What kind of results?

- Recovering assets / Rebuilding the debtor's asset / Payment under insolvency rules



- Fraudulent act or transaction being held unenforceable against the claimant/creditor

- Recovering assets

✓ Cass. com., 27 mai 2014



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1.2 CIVIL LIABILITY– Professional sanctions

French legal provision –
art. L.653-1 to L.653-11 Commercial code v/ art. 1382 Civil code

Who is liable ?

- Natural person - Legal representative
- Natural person - *De facto* director
- ✗ Except : Members of monitoring body and/or of supervisory body

Who can initiate legal action ?

- The public prosecutor
- The « *mandataire judiciaire* »
- The liquidator
- The « *contrôleurs* »

Concurrence of penalties

- Civil and Criminal Courts cannot implement both professional sanctions (either one or the other)

Faults

- **Misconduct** before the opening of the insolvency proceedings
 - Misappropriation of assets
 - Fraudulent increasing of the company's debts

Sanctions

- Personal bankruptcy
- Prohibition on management



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2.1 CRIMINAL Approach – Controlling the economic environment

Who is liable ?

- **Legal representative** of the legal entity
- ***De facto* director**
- Director of the company who is a legal representative of a company in liquidation

Who can initiate legal action?

- The public prosecutor
- Other parties :
 - The “*mandataire judiciaire*”
 - The administrator
 - The liquidator
 - The IP appointed to supervise the proper implementation of the plan
 - The “*contrôleurs*”
 - The employees’ representative



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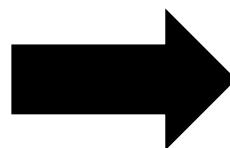
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2.2 CRIMINAL LIABILITY – Main offences

■ **Criminal bankruptcy**

French legal provision - art L.654-1 to L.654-17 Commercial code

- ✓ **Misconduct** before the opening of the insolvency proceedings
 - Misappropriation of assets
 - Fraudulent increasing of the company's debts



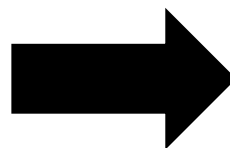
■ Main sanction :

5 years' imprisonment - € 75,000 fine

- Damages
- Additional sanctions

■ **Fraudulent organisation of insolvency**

French legal provision - art 314-7 Criminal code



■ Main sanction :

3 years' imprisonment - € 45,000 fine



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Combat fraud and retrieve assets in insolvency

Bart Heynickx

ALTIUS - Brussels



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- Short overview – topics
 - Reorganisation proceedings
 - Insolvency proceedings
- Fraud – safeguarding assets
- Civil and criminal



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- Fraud in framework of reorganisation proceedings: 2 examples
 - Secret agreement with some creditors
 - Principle
 - Outside protection period
 - No court intervention
 - Bankruptcy proof
 - Fraud?



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- Fraud in framework of reorganisation proceedings
 - Exaggerating amounts in collective arrangements
 - Principle
 - Vote by the creditors
 - Court decision
 - Effects
 - No court approval
 - Fraud – criminal proceedings – presence of public prosecutor



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- Fraud in framework of reorganisation proceedings
 - Criminal consequences: Reorganising company (debtor) and claimant
 - Knowingly (debtor) – fraudulent intent (claimant)
 - 1 month to 2 years and/or fine of 5 to 125,000 EUR
 - Initiatives by Public Prosecutor
 - Introduce request to end reorganisation proceedings and claim bankruptcy
 - Apply possibilities in framework of bankruptcy law



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- Fraud in framework of bankruptcy proceedings
 - Legal framework: Bankruptcy Code and Criminal Code
 - Guiding principles - articles in Bankruptcy Code:
 - Possible actions depend on time
 - Payments and transactions after bankruptcy cannot be opposed to the mass of creditors
 - Request return from third parties
 - No fraudulent intent required



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- Fraud in framework of bankruptcy proceedings
 - Prior to bankruptcy – during suspected period
 - Some transactions not opposable to mass of creditors (receiver)
 - » Transfer of goods for free or low price
 - » Payment of undue claims
 - » New securities for old debts
 - All other payments or transfers in suspected period
 - » if bankruptcy conditions have been met
 - » If third party was aware of bankruptcy status
 - Clawback possible



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- Fraud in framework of bankruptcy proceedings
 - Guiding principles in Bankruptcy Code:
 - All possible transactions - Timing irrelevant
 - Fraudulent intent to harm creditors



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- Fraud in framework of bankruptcy proceedings
 - Guiding principles in Criminal Code – overview of some criminal acts by merchant
 - Possible different timing
 - Company - administrators
 - By acting
 - Accepting onerous (contractual) conditions
 - Beneficial treatment of some creditors
 - Making accounts or assets disappear
 - Hindering the bankruptcy proceedings
 - By neglecting:
 - Not providing information
 - Not filing for bankruptcy
 - Not cooperating with bankruptcy receiver



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- Fraud in framework of bankruptcy proceedings
 - Guiding principles in Criminal Code – overview of possible criminal acts by merchant
 - Intent:
 - postpone bankruptcy
 - fraudulent intent
 - Parties to initiate actions
 - Bankruptcy receiver
 - Creditor
 - Public Prosecutor



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A Joint Approach to Combating Fraud

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- Fraud in framework of bankruptcy proceedings
 - Guiding principles in Criminal Code – overview of possible criminal acts by merchant
 - Punishment:
 - 1 month to 2 years imprisonment
 - fine of 100 to 3 mil EUR
 - Publication in Belgian State Gazette
 - Work prohibition
 - Criminal proceedings independent from bankruptcy proceedings



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- Closing remarks



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A Joint Approach to Combating Fraud

London, 8-9 November 2016

Patrik Kalman

Lawyer and Partner at Trägårdh Law Firm

Trägårdh



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The Economic Fraud Legislation of Sweden

- More specifically - the Swedish “tool box” for me as a lawyer *in fraud related litigation*

Other legislation as for example tax and criminal law is hence excluded



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What are the basics for fraud related litigation

- Collecting information
- Legal grounds for claims/insolvency
- Security measures
- Enforcement of a court decision



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Collecting information

- No general duty to provide information (no pre-trial discovery), however...
- In bankruptcies there is (restricted to use in Sweden but applies to assets abroad).
- Creativity and in this respect...
- It is possible to purchase information (agreement to purchase witness is invalid but still valid evidence).



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Legal grounds for claims/insolvency

- Strong corporate veil protecting owners, however...
- In exchange quite extensive recovery possibilities and tort law, when it comes to board of directors or other representatives of the company.

Example: The Windsor Case

- Legal grounds for insolvency somewhat problematic
 - No general duty to place company in bankruptcy
 - Presumption rules (which require undisputed claims)
 - The Gusum Case



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Security measures

- Of course provisional attachment and, my favorite

Chapter 15 Section 3 of the Swedish Code of Judicial Procedure

- which states

*"If a person shows **(A)** probable cause for a claim and **(B)** if there is a risk for sabotage the court may make an order for **measures suitable** to secure the applicant's right.*

What is 'measures suitable'?

This may include:

(1) *a prohibition order, subject to a default fine*

(2) *an order, subject to a default fine, to have regard to the applicant's claim (to perform a certain activity)*

(3) *the appointment of a receiver*

(4) *Give someone else voting rights to shares*

(5) *Interim enforcement*



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Enforcement of a court decision

- Enforcement of payment obligation – works generally well, with one exception
 - Physical shares
- Enforcement of non-monetary obligations is more problematic
 - Under penalty of fine
 - Enforcement Authority can perform certain obligations
 - The party which is requesting performance can be given right to perform, however
 - No substitution possibilities (for instance to have someone sign a certain document in place of the one who is obliged)



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Reform of asset recovery law in Germany

Dr. Robert Schiebe

Schiebe und Kollegen, Frankfurt



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Case study - ATC Group

- Typical Ponzi scheme, a group (25 different entities) collected app. EUR 70m
- 4500 private investors/aggrieved persons
- Criminal investigation in early 2012, judgments against management in 2014
- First insolvency proceedings in 2014
- The prosecutor seized assets worth EUR 20m
- The insolvency administrator additionally collected another EUR 10m



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Problems in the ATC Group case

- Before an insolvency proceeding the investors need individual court orders which are often expensive and time consuming. Individual enforcement on a first come first serve basis.
- The prosecutor can seize assets. Individual creditors can ask to be prioritized by the prosecutor (Rückgewinnungshilfe/asset recovery sec. 111g StPO).
- Often problems occur in cases where criminal and insolvency proceedings coincide. The goal of securing assets is the same but both are not harmonized.
- In some court decisions the opening of insolvency proceedings end the preliminary seizure of assets (OLG Nuremberg 2 Ws 561/12, 2 Ws 590/12). The distribution of the assets follows the rules of the insolvency laws.



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- In the case of ATC Group the Higher Regional Court of Frankfurt, 09.07.2015 - 3 Ws 355/15 decided that the insolvency administrator as the successor of the fraudulent company can not collect and distribute the secured assets to the creditors/aggrieved persons.
- Only the individual claimants can enforce their claims to the seized assets. BUT during an insolvency proceeding enforcement of individual claims is not allowed.
- This leads to the situation that no claimant can enforce claims to any assets if they are seized by the prosecutor. So the insolvency proceeding blocks the recovery of assets. After a period of 3 years the state can keep the seized assets (sec. 111i StPO).



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Solutions under current law

- Early communication with the prosecutors
- Joint investigation and asset recovery approach
- Collection of fraudulent assets and distribution by the insolvency administrators
- Informal communication and cooperation between prosecutor and insolvency administrator described above often depends on willingness of prosecutor



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New legislative reform of criminal procedure code to solve these problems (reform of the law of asset recovery in criminal cases)

- The new law differentiates between cases in which the assets are sufficient or insufficient to cover the damages of a criminal act.
- In case of sufficient assets the recovery will be handled through the criminal court administration. Even in a later insolvency proceeding the administrator will not have access to the secured assets. Only a surplus will be handed over to the administrator.
- In case of insufficient assets the distribution of the partial assets should be done by the administrator.
- In case of insufficient assets the prosecutor will have an own right to file for insolvency.



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Insolvency Fraud: Latvian and Portuguese Experience

Edvīns Draba

Sorainen

Eduardo Peixoto Gomes

Abreu Advogados



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Latvia: case study

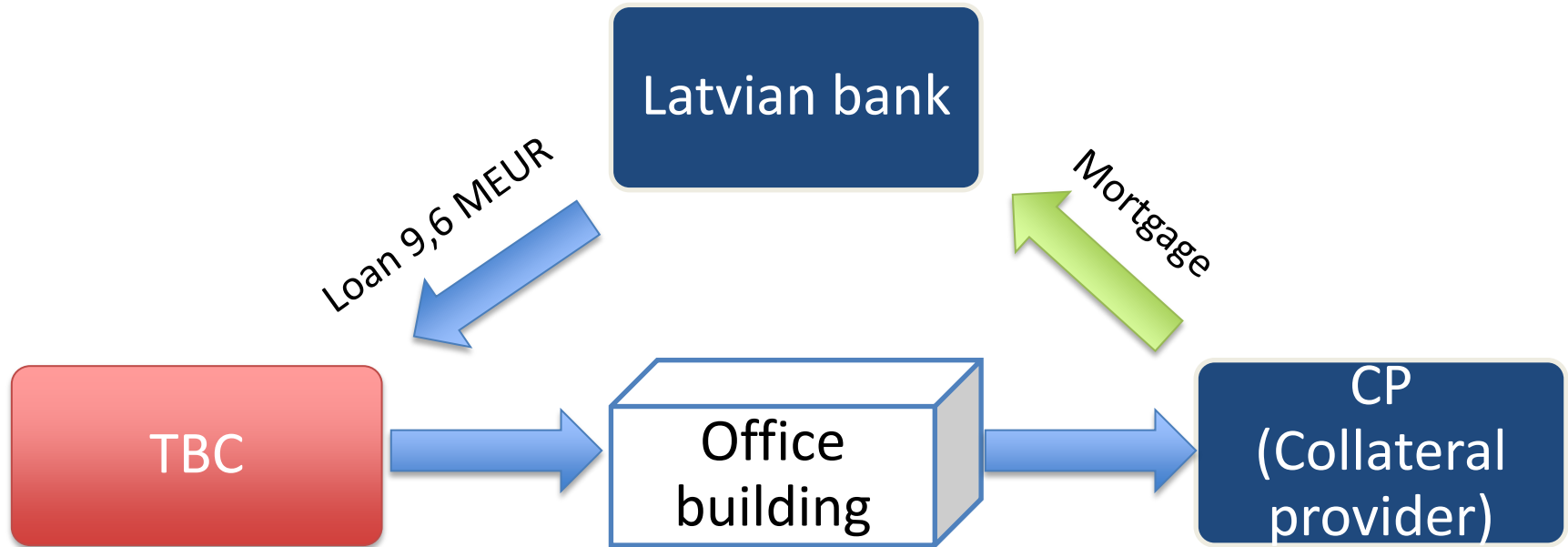
- Strategic use of legal protection proceedings (out-of-court restructuring)



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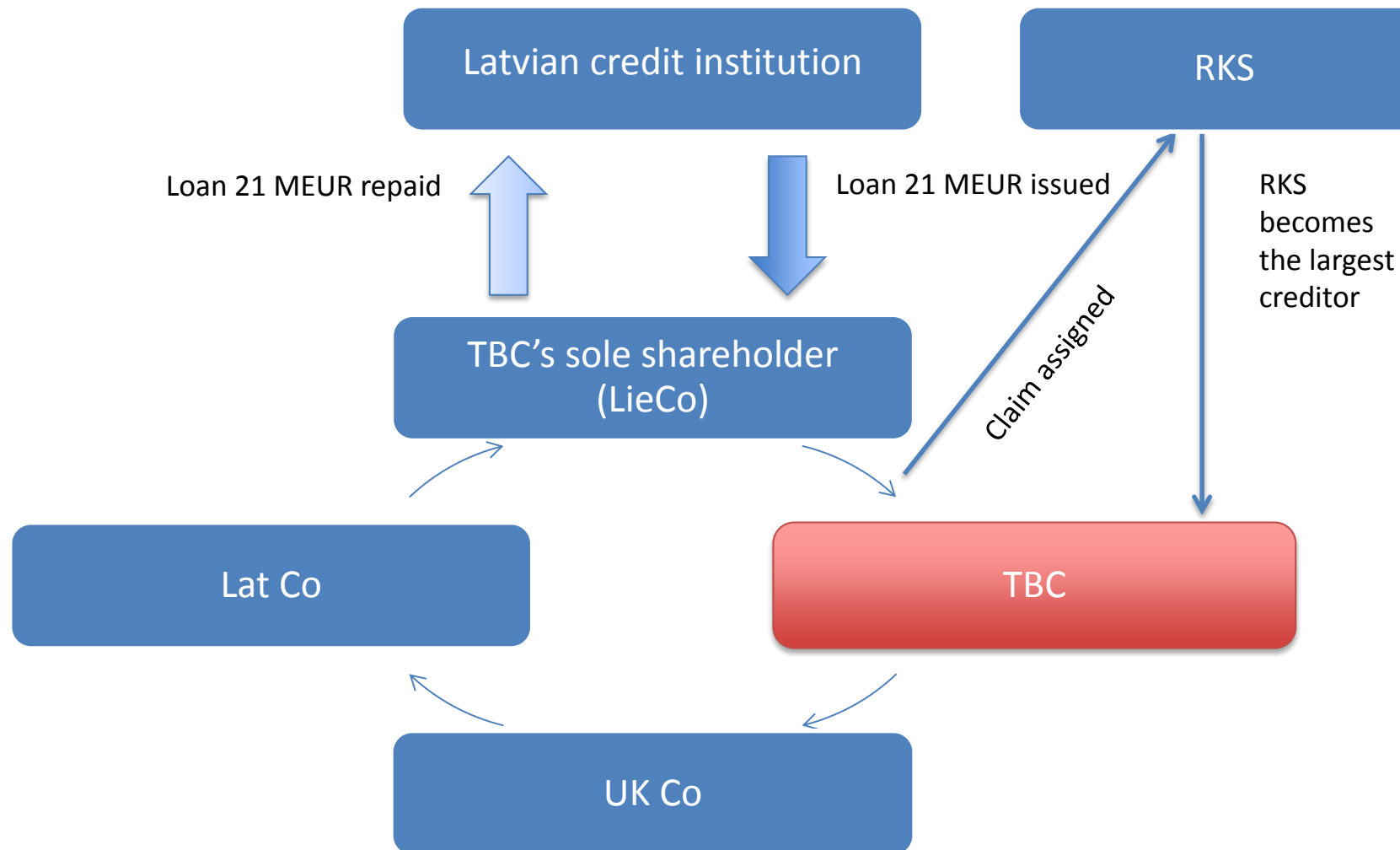
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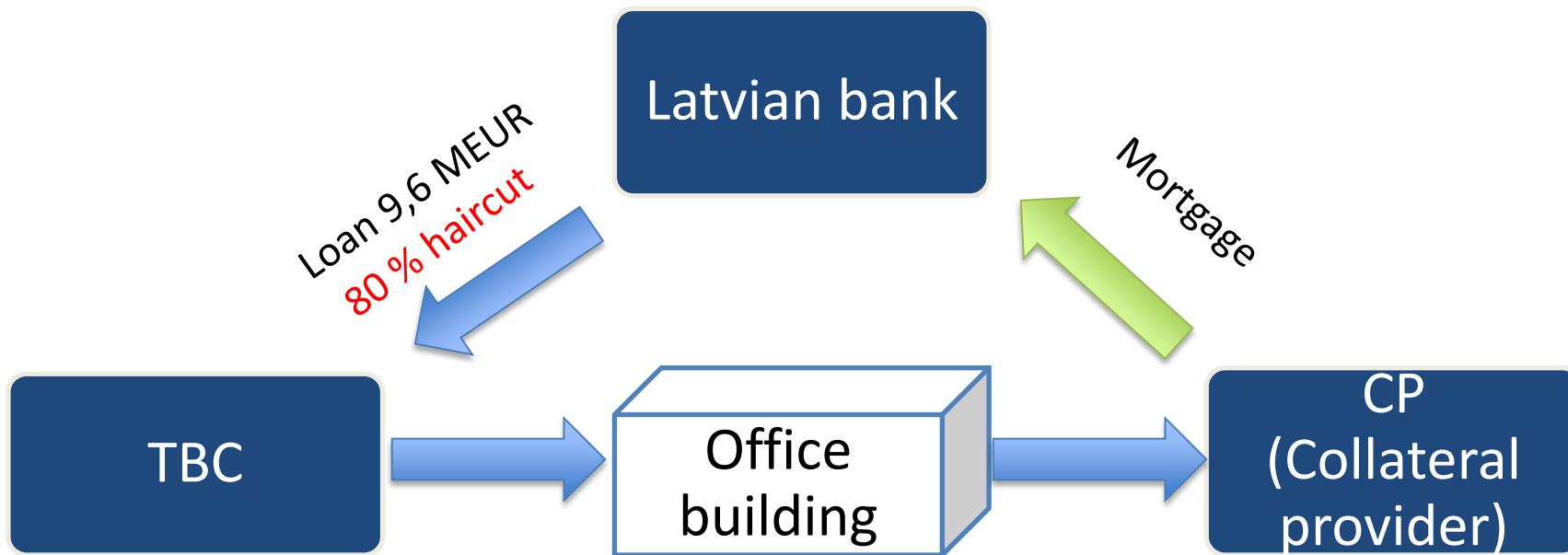
Restructuring of TBC

- TBC applies for out-of-court legal protection proceedings (**LPP**)
- RKS votes in favour of the restructuring plan as the largest unsecured creditor
- The court approves the plan



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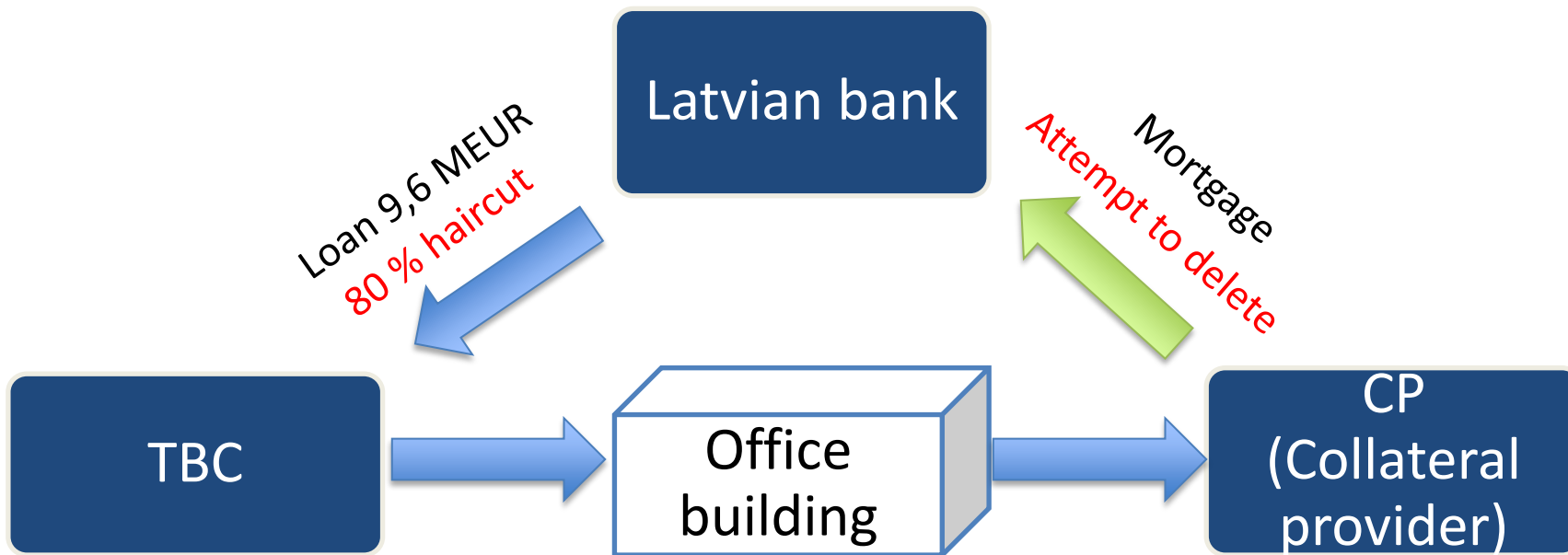
Restructuring of CP

- CP applies for out-of-court legal protection proceedings, as well
- The restructuring plan claims that the bank's secured claim has been extinguished in full
- The largest creditor (an English LLP) votes in favour, while being a dominant undertaking exercising decisive influence over CP



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Supreme court ruling

- Both restructuring proceedings must be considered in conjunction
- 75 – 80 % haircut – uncharacteristic for commercial activity
- Implications of a haircut in the restructuring of one company may not affect the liabilities of third parties – collateral providers
- Decision on CP legal protection proceedings overruled, later legal protection proceedings terminated



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Developments - law & practice

- Acquisition of a creditor's claim from a related party < 2 years – not eligible to vote on a restructuring plan
- Administrator in restructuring has a right to examine creditor's claims and opine whether a given claim is *prima facie* unfounded
- An administrator who supervises restructuring does not survive if the restructuring turns into insolvency



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Portugal



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The Portuguese legal regime

- The Portuguese Insolvency and Corporate Recovery Code (CIRE) deals with insolvency and business restructuring and stipulates an insolvency qualification incident.

Insolvency Qualification Incident

- 2004 amendments to CIRE aimed to obtain greater and more effective accountability of company's shareholders and directors, and was designed to ascertain, with no effect on the criminal or civil liability, if the insolvency is culpable or fortuitous.
- The purposes of the insolvency proceedings and, before that, the very purpose of avoiding fraudulent or intentional insolvencies, would be seriously harmed if on companies' directors, in fact or in law, did not befall any consequences when they have contributed to such situations.
- Otherwise, under the cover of the technical expedient of a legal person, it would be possible to the directors to practice, in an unscathed way, the most varied acts detrimental to creditors.



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Insolvency Qualification - A mandatory Incident

Under article 185 of CIRE, insolvency is qualified as **culpable** or **fortuitous**.

Insolvency is **culpable** when the situation has been created or worsened as consequence of willful misconduct or gross negligence of the debtor or the debtor's legal or de facto directors in the three years preceding the start of the insolvency process.

Insolvency is always considered **culpable** when the directors are at fault by (**irrebuttable presumption**):

- a) *Destroying, damaging, rendering inoperable, hiding, or causing to disappear, all or considerable part of the debtor's assets;*
- b) *Artificially creating or worsening debts and losses, or reducing earnings, expressly causing the company to enter into detrimental deals or for personal benefit or for the benefit of personal relations;*
- c) *Buying merchandise on credit, reserving or delivering the merchandise for payment at a lower price than is currently practiced, before the payment obligation is met;*
- d) *Making use of the Company assets for personal or third party gains;*
- e) *Exercising, under the name of the company, if applicable, an activity for personal or third party gain to the detriment of the Company;*
- f) *Using Company credit for purposes contrary to the interests of Company for personal or third party gain, namely to benefit another company in which there is a direct or indirect interest;*
- g) *Continuing, for personal or third party interests, a deficient operation, despite understanding or having the ability to understand that the operation had great probability of leading to a situation of insolvency;*
- h) *Failing to comply substantially with the obligation of keeping organized accounting, keeping fictitious or double accounting records or carrying out misleading records with relevant damages to the perception of the assets and financial affairs of the Company.;*
- i) *Unfulfilling repeatedly its duties of presentation and cooperation until 20 days after the date of the court dispatch that declares opened the qualifying insolvency incident.*



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The failure to comply with the following duties, is also presumed as gross negligence, because they reveal an elementary lack of care in the exercise of management duties (**rebuttable presumption**):

- a) The duty to apply for insolvency;
- b) The duty to draw up the annual financial statements, within the legal deadlines and submit them to the relevant auditing body or to deposit them at the Companies Registry.



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Consequences of the insolvency qualification as culpable (article 189.º CIRE)

In the judgment that qualifies the insolvency as culpable, the judge must:

- a) Identify the persons, namely directors, in fact or law, official accountants and certified public accountants, affected by the qualification, establishing, where appropriate, their degree of guilt;*
- b) Decide the inhibition to manage assets of third parties of those affected, for a period between 2 to 10 years;*
- c) Declare these people inhibited to be active in trade during a period of 2 to 10 years, and for the occupation of any office of corporate body of commercial company, civil society, association or private foundation of economic activity, public company or cooperative;*
- d) Determine the loss of any credits on the insolvency or the insolvent estate owned by the affected persons by the qualification and its condemnation in the return of property or rights already received in payment of such credits;*
- e) Condemn those affected to compensate creditors of the debtor declared insolvent in the amount of the credits due, to the limits of their assets, being joint the responsibility between all affected.*



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Practical case 1

A, friend of **B**, figures in the bylaws of **ABC Ltd.**, as managing shareholder by **B**'s request, the other managing shareholder, who is in charge of the operational and financial part of the company. **A** has never played any role in the company, never signed any check, never paid to the employees or suppliers, never dealt with any issue of the company with any public office. He only went twice to the headquarters of the company to sign two meeting minutes.

Four years following its incorporation, the company is declared insolvent, being the Social Security and a bank its largest creditors. Seven months before such declaration, **B** removed all the assets of the company and gave them an unknown destination.

The insolvency practitioner issued an opinion and, based on the facts above, considered the insolvency culpable and that both **A** and **B** should be affected.



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Practical case 1

Does Portuguese law allow a director in law, when it is not de facto, to free itself from the responsibility in the creation or aggravation of insolvency?

Article 64 of the Portuguese Commercial Companies Code

(Fundamental Duties)

1 – The company's managers or directors must comply with:

a) Their duty of care towards the organisation, displaying willingness, technical competence and an understanding of the company's business that is appropriate to their role, and executing their duties with the diligence of a careful and organised manager; and

b) Their duty to be loyal to the interests of the company, serving the long term interests of the partners and taking into account the interests of other relevant parties such as employees, clients and creditors in ensuring the sustainability of the company.

2 – Members of the corporate bodies with supervisory powers must execute their duties in the interests of the company, executing proper care and employing high standards of professional diligence and loyalty.



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Practical case 2

Suppose the opinion of the insolvent practitioner, in qualifying the insolvency as culpable, is based on the fact that **ABC Ltd** did not, in the past two years, have the accounting properly organized, invoices have not been accounted, no receipts have been issued and refused to display the accounting and other legally required documents.

He considers, based on such facts, that both **A** and **B** should be affected by the qualification.



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Practical case 2

Does Portuguese law allow the director in law, when it is not in fact, to free itself from the responsibility in the creation or aggravation of an insolvency?

Article 65 of the Portuguese Commercial Companies Code - Duty to Disclose Financial Statements and Annual Reports

- 1 - The members of the board must prepare the financial statements, the annual report and other financial statements required by law in relation to the financial year, and submit them to the competent bodies of the organisation.
- 2 - The annual report, the financial statements and other financial statements must be prepared in accordance with the applicable legal provisions. The articles of association may complement, but not derogate from these legal provisions.
- 3 - The annual report and the financial statements for the period must be signed by all members of the board. Refusal to sign by any board member must be justified in the document itself and explained in person to the competent bodies, even if the officer no longer holds his or her position.
- 4 - The annual report and the financial statements shall be drafted and signed by the managers or directors in office at the time the documents are submitted. However, former members of the board must disclose any information requested for this purpose, relative to the period in which they held the position or office.
- 5 - With the exception of specific cases provided for by law, the annual report, the financial statements and other financial statements must be submitted to the relevant bodies for review no later than three months following the end of each financial year, or within five months for organisations that submit consolidated accounts or that use the equity method.



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- What the law intends, for reasons of legal certainty, is that there is coincidence, concrete and practical, between the concepts of *director de facto* and *director in law*, so that the first does not stop being an unwanted phenomenon;
- The director in law, when it is not *de facto*, is still required to comply with a set of duties incumbent on the members of the board in general.



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- Are the conducts breaching a statutory duty, a specific legal duty or a general legal duty (duty of care and/or duty of loyalty)?
- Are the conducts translated into an action or an omission?



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The business judgment rule

Article 72 of the Portuguese Commercial Companies Code

(Responsibility of Board Members towards the Company)

1 – The managers or directors shall be responsible for damages caused by acts or omissions resulting from dereliction of their legal or contractual duties, unless the managers or directors can prove that they did not act willfully or maliciously.

2 – This liability shall be waived if any of the persons to which the previous paragraph refers is able to prove that he or she acted in an informed manner, free of any personal interest and using the criteria of corporate rationality.

(...)



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Conclusions

The director in law, when it is not de facto, may free itself from the responsibility in the creation or aggravation of insolvency, only if it is able to prove that:

- in the face of certain conduct of the perpetrator director, has complied with all the duties he was legally obliged to; and
- had no fault in the creation or aggravation of a state of insolvency.



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Many thanks for your attention!



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Identifying, Investigating and Preventing Fraud Using Forensic Tools and Technologies

Vijay Rathour

Partner – Digital Forensic Technologies



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1. Why do people commit Fraud?
2. What are the challenges for fraud detection in modern businesses?
3. Big Data – new problems, new solutions
4. Catching Behaviours not Keywords
5. Questions

Why Do People Commit Fraud?

Opportunity



**Fraudsters
Hiding in plain sight**

Motivation

Rationalisation

With **traditional tools**, even the best systems of **internal controls** cannot provide absolute safeguards against **aberrant human behaviour**.



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The Information Challenge – Disparate Data

As of 2011, the global size of data in healthcare was estimated to be

150 EXABYTES

[161 BILLION GIGABYTES]



**420 MILLION
WEARABLE, WIRELESS
HEALTH MONITORS**

Variety
DIFFERENT
FORMS OF DATA

**4 BILLION+
HOURS OF VIDEO**

are watched on
YouTube each month



**30 BILLION
PIECES OF CONTENT**

are shared on Facebook
every month



400 MILLION TWEETS

are sent per day by about 200
million monthly active users





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The Information Challenge – Big and Often

- Geography
 - Telephones
 - Cloud
 - Big Data
- Hardware
- Software
- Document Types
- Languages
- Social Media
- Jurisdiction/Privacy

The New York Stock Exchange captures

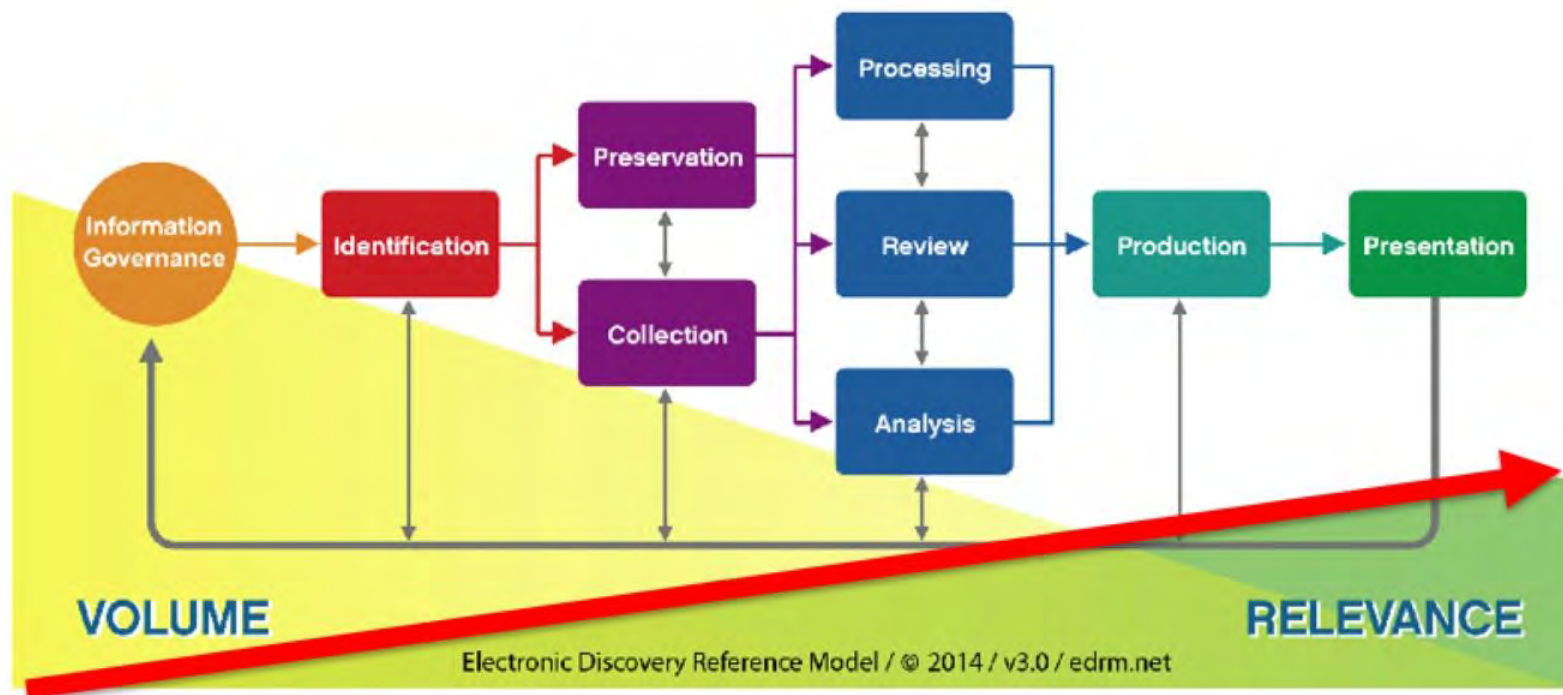
**1 TB OF TRADE
INFORMATION**

during each trading session



The Discovery Challenge: Relevance vs Volume

Electronic Discovery Reference Model

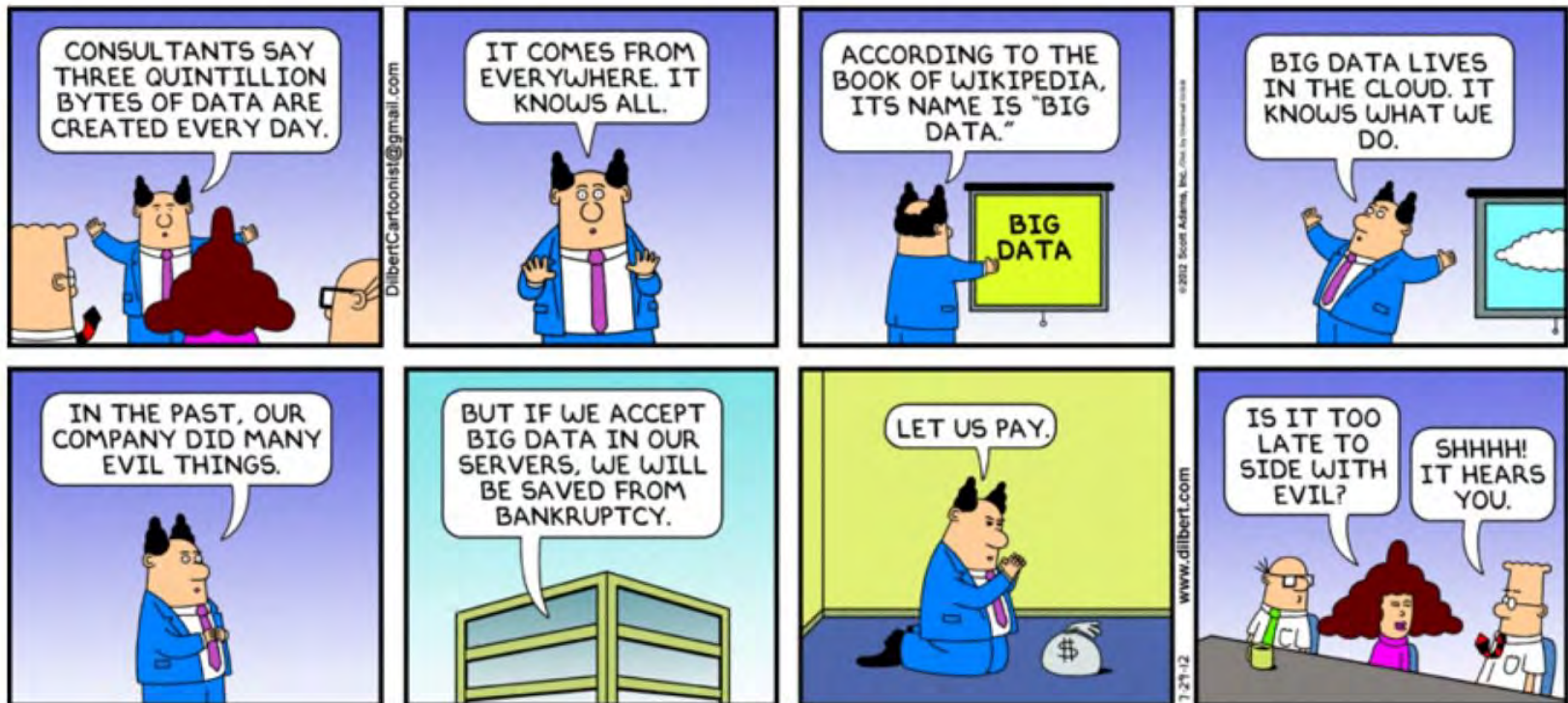


Investigations - The Traditional Approach

- Document by Document Review
- **Fishing for keywords**
- Keywords – a **straightjacket** on your review
- What data are you sitting on?
- How do you know what you don't know?
- Risks of failing to review effectively:
 - *West African Gas Pipeline Company Ltd v Willbros Global Holdings Inc [2012] EWHC 396 (TCC)*



Big Data – Challenge and Solution?



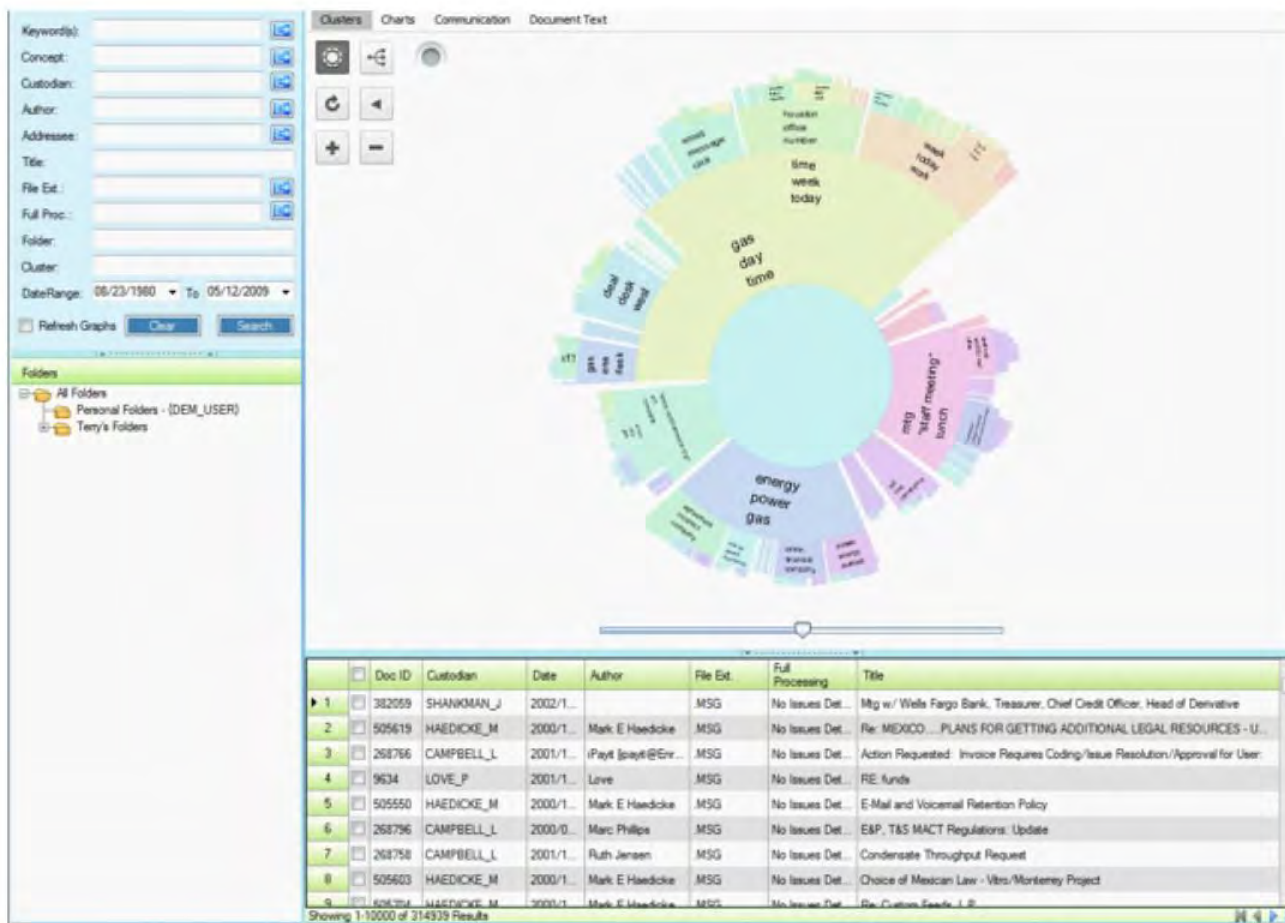


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Conceptual Clustering to Rapidly Review Data



[video]

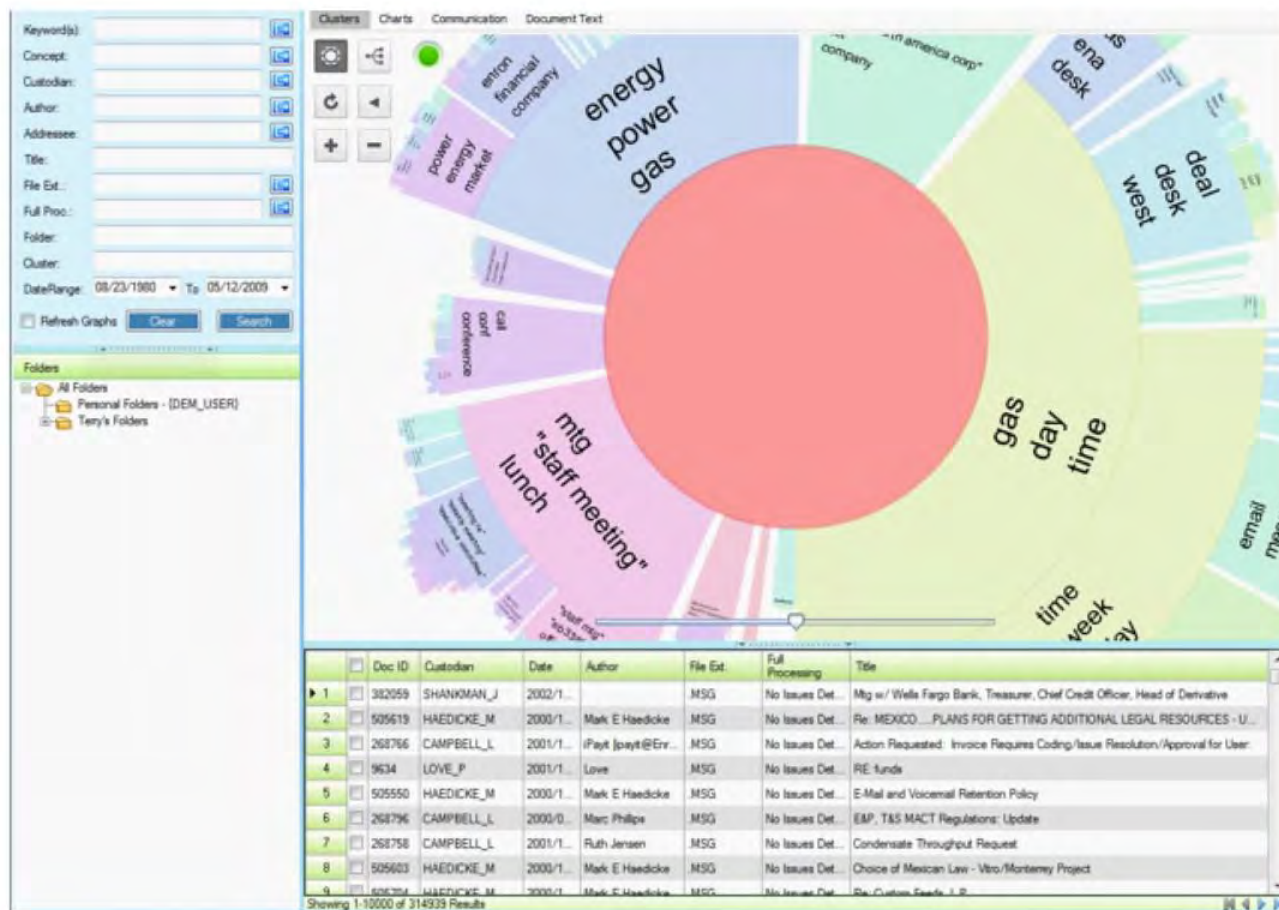


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Deep Dives into Data – Reduce Risk & Delay



[video]



	Doc ID	Custodian	Date	Author	File Ext	Full Processing	Title
1	318912	SAGER_E	1999/0...	Ronald Carol [C...	MSG	No Issues Det...	Fwd: Request for Rehearing and Affidavit
2	123818	TAYLOR_M	2001/0...	Sahotra, Rajeev...	MSG	No Issues Det...	FW: BolCap
3	661532	PIMENOV_V	2002/0...	Natalie Bondarev...	MSG	Issues Detected	FW: Pre Requisites Business Information for Liquids Product Train
4	661209	PIMENOV_V	2002/0...	Natalie Bondarev...	MSG	Issues Detected	FW: Pre Requisites Business Information for Liquids Product Train
5	602654	RING_R	2001/0...	Bolton, Stacey [S...	MSG	Culling Disallo...	FW: Fundamentals
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7	314297	SHACKLETON_S	2001/1...	levans@blackhill...	MSG	No Issues Det...	Enserco Energy, Inc. L.C. Address Info
8	309981	SHACKLETON_S	2001/1...	Sacka, Edward [J...	MSG	No Issues Det...	RE: Enserco Energy, Inc. L.C. Address Info
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[video]



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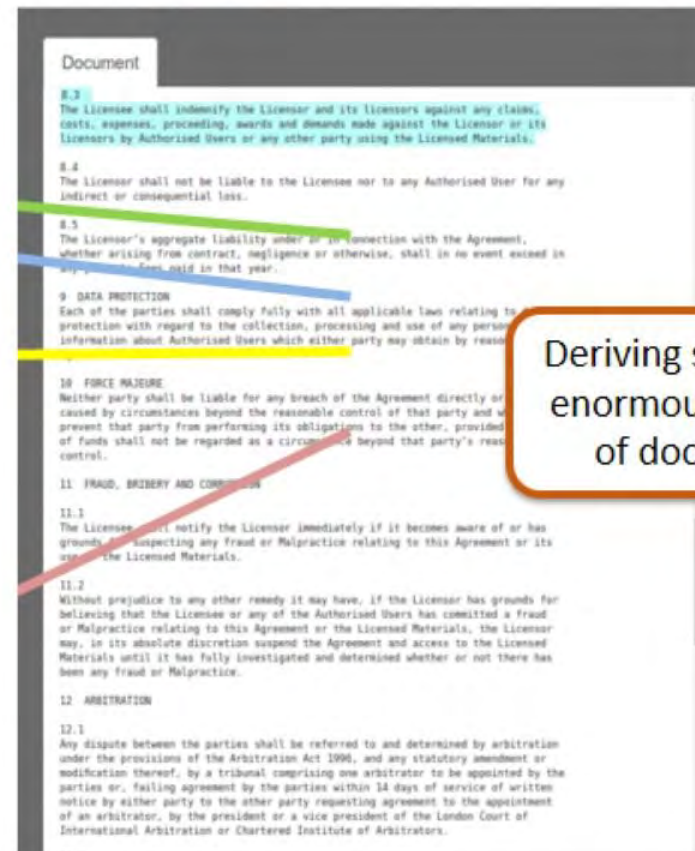
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Spotting Document Aberrations (Bribery/Fraud)

Inbox Agreement.tif

download



Deriving sense from
enormous volumes
of documents



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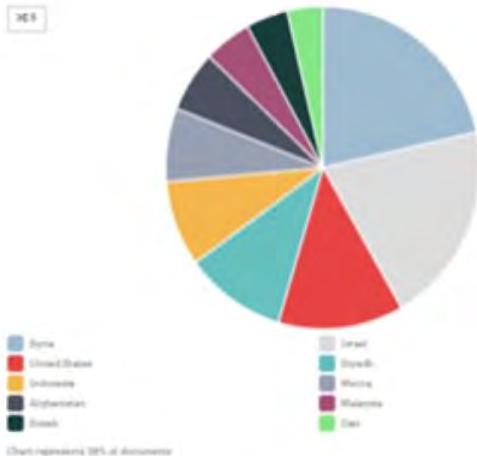
Ontological structuring – which Waterloo do you mean?

DASHBOARD | ANALYSE | FILES | SEARCH | TRENDS | SET

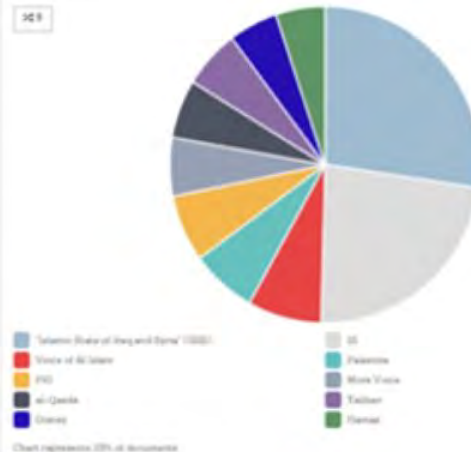
KEY STATS

Documents	1420
People	757
Organisations	428
Events	27
Places	431
Languages	14
Earliest Document	1998-08-18
Last Document	2013-10-27

PLACES (Top 10 of 431)



ORGANISATIONS (Top 10 of 428)



PEOPLE (Top 10 of 757)



EVENTS (Top 10 of 27)



Visualisation of:

- Entities
- Concepts
- Derived placed (eg Paris, if you are looking for France)
- Dates; and
- Behaviours



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Behavioural Analytics – Modelling and Prediction

- **Stop or pre-empt financial crime**
- Market Abuse Surveillance
- Supply chain, tenders, benefits, grants
- Rogue Trader Analysis
- Voice transcription
- Performance Evaluation
- **Effective** Systems and Controls





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Emotion and Behaviours

DASHBOARD | GRAPHS | SEARCH | ANALYSE | ? | FILES | SHMUEL+

GRAPHS

Chart	<input checked="" type="radio"/> Line <input type="radio"/> Pie
Date	<input checked="" type="radio"/> Date Range <input type="radio"/> Last Few Days
From	<input type="text"/>
To	<input type="text"/>
Saved Search	<input type="text"/>
Parameter	Person
Text	Obama

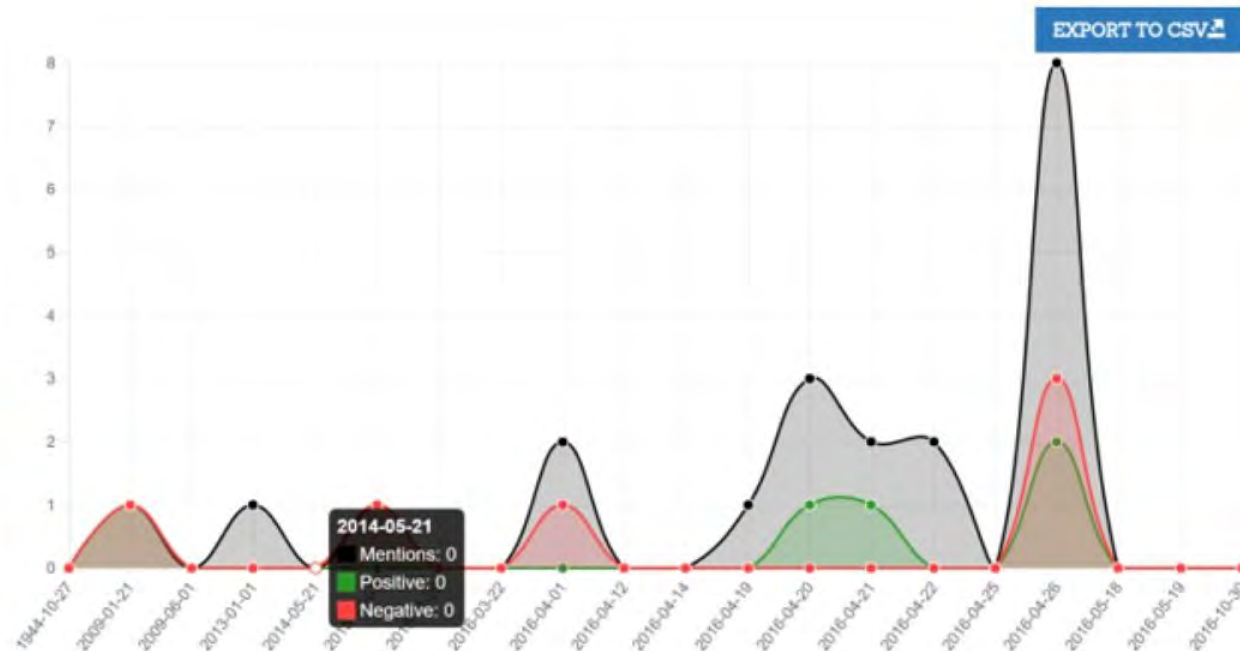
CLEAR ✕

SEARCH Q

SAVE TO DASHBOARD

Sentiment analysis can show us changes in group and large scale sentiment over time – do people like or dislike your organisation or group?

Between Dates	Analysed Documents	Documents mentioning Obama	Positive References	Negative References
1944-10-27 - 2016-10-30	212	21	5	6

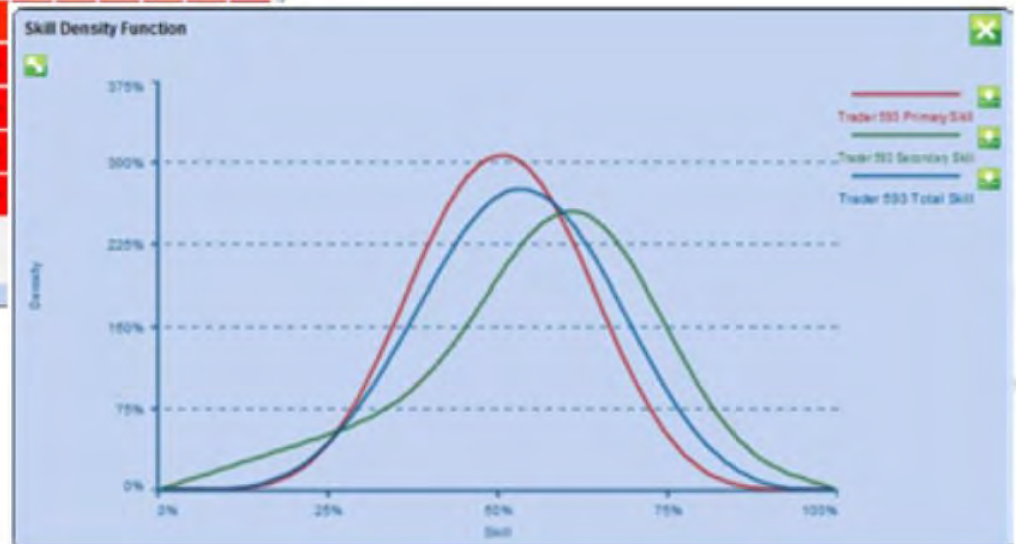
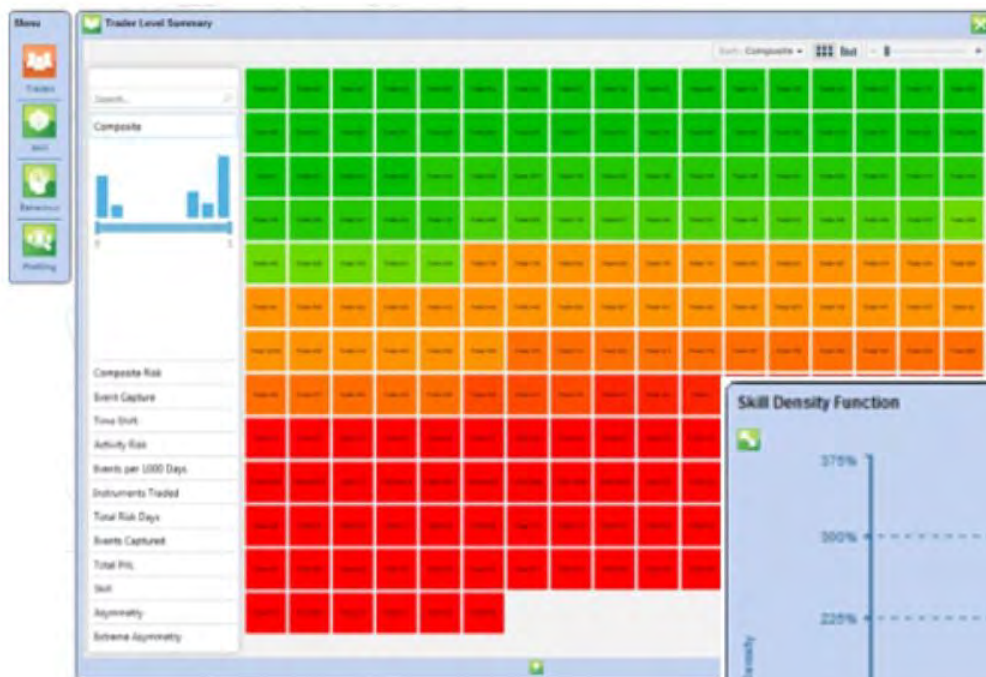




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Trader and Employee Performance Monitoring



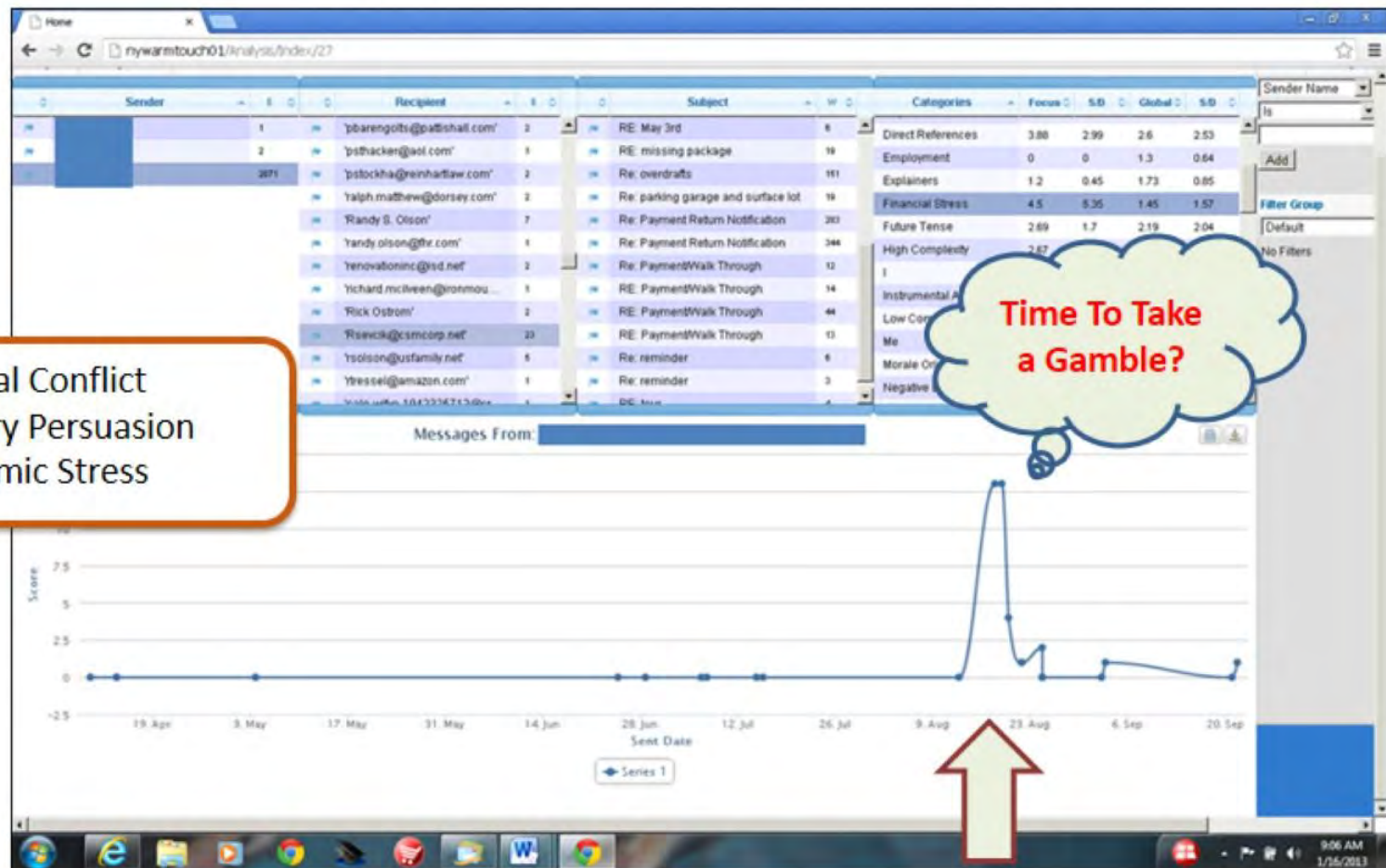


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Employee Sentiment Analysis



Political Conflict
Military Persuasion
Economic Stress



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Conclusions

- **Data volume** and diversity is a challenge
- Big Data analytics and **modelling** present opportunities to **predict fraud**
- Use **Predictive analytics** and behavioural / **sentiment analysis**
- **Intelligent investigations** can limit, pre-empt or mitigate harm and **improve Systems & Controls**



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Insolvency Litigation Funding; England and Wales

Nick Pike, Pinsent Masons



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England and Wales

- Until April 2016:-
 - Conditional fee agreements allowed with uplift of up to 100% recoverable from loser
 - After the event “ATE” insurance premium recoverable from loser



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England and Wales - present position

- Enhanced insolvency litigation cost and risk
- Some claims may not be pursued
- More third party funders
- More litigation assigned
- ATE market smaller



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Types of claim

- Company/bankrupt claims
- Officeholder claims



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Typical difficulties

- Small claims: what's the floor?
- No other assets
- Less focus on settlement
- Work required to establish claim



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IPs' options

Fund by:

- Professionals
- Creditors
- Third parties

Assign to:

- Stakeholders
- Defendants
- Third parties



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Funding

Pros

- IP retains control
- Easier to use IP's statutory investigation powers

Cons

- Funders' own agendas
- IP's own cost risk



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Assignment

Pros

- Quick cash?
- Limited IP costs

Cons

- Deferred consideration agreement needs care



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Assignment: clean break for IPs

- Risk of costs liability



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Creditors' buy-in

- Engage
- Demonstrate benefits
- HMRC
- Risk/return: creditor vs funder



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Conclusions

- Explore all funders and assignees
- Brokers useful
- Document decisions to maximise creditor benefits



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