Benchmarking insolvency practice frameworks

Paul Omar and David Burdette discuss the challenges that lie ahead

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> **THE FRAMEWORK FOR PRACTICE FOR IOHs IS IN A STATE OF SOME FLUX**

The state of insolvency office holder ("IOH") regulation worldwide is a matter of some concern to the international bodies active in the insolvency field.

The European Bank of Reconstruction and Development held a conference on 7 November 2014 to disseminate the findings of a two-year project into the IOH regulatory environment in its client group, of which 27 out of 35 were the subject of an assessment.[1] While the laws of many of these States have been the subject of scrutiny with a view to reform, this was apparently the first time that research had been undertaken into the structure of the IOH profession in these jurisdictions.

The most essential component of the project's findings was the great diversity in terms of status, qualification and training of insolvency practitioners, and the framework for their registration, supervision and discipline. Nonetheless, some indications of cross-jurisdictional trends in these countries was possible, a notable example being that where a self-regulatory model or state-sponsored regulatory agency was used, there was a strong correlation with performance overall across the criteria being measured. While most States had a licencing regime in place, less performing countries tended to include those where Government directly exercised supervision over the profession or no regulatory framework existed at all.

Overall, while minimum educational standards and professional entrance exams were often prescribed, the project revealed weak performance in areas such as continuing professional development and training needs. Similarly, lacunae also existed at the level of the development of professional associations and of ethical rules. In many places, however, even where regulatory regimes were sufficiently robust, issues with resources tended to restrict active supervision of IOHs to the context of individual proceedings with the effectiveness of such monitoring dependent on the courts' own supervisory capacity. The role of the courts in the conduct of proceedings was also identified as an issue, particularly in the balance of control and supervision between creditors and the courts. Over-monitoring was stated as potentially a problem where it inhibited IOHs in the performance of their duties.

Finally, the structure of the appointments system in cases, as well as remuneration, were felt to be insufficiently encouraging of competition in the market for IOH services.[2] In summary, the terms of the report revealed that there was much to do in relation to improving the environment and framework for practice in almost all of these States, which also include 11 Member States of the European Union.[3]

Some of the issues reflected in the EBRD assessment were pre-figured in work carried out by the professional associations, including INSOL Europe, which as representative of the European insolvency community, has a watching brief on behalf of their membership over matters connected with reforms to insolvency law and practice. Although written in the context of the then anticipated review of the European Insolvency Regulation, INSOL Europe's 2010 Report on the topic of harmonisation, presented to the European Parliament Committee on Legal Affairs, largely advocated consideration of substantive harmonisation in a number of areas of insolvency law. In dealing with insolvency practice qualifications, however, it concluded that the different systems, especially for remuneration, in the Member States surveyed did not cause any difficulties, obstacles or disadvantages for companies with a cross-border dimension operating in the European Union.

Harmonisation of this area was not deemed necessary pending greater harmonisation in the insolvency and company law fields.[4] Nonetheless, an issue of concern, which has since been reflected in work by the Leiden Law School commissioned by INSOL Europe, is that of a possible ethical code at European level for IOHs.[5]

By way of contrast, however, the European Parliament's Report in 2011, which also picked up the harmonisation theme for insolvency law, did consider it worthwhile to deal with insolvency practice qualifications, insofar as qualification and competence were concerned. Other issues to which reference was made included the desirability of good reputation, independence and the need to avoid conflicts of interests.[6]

A small jump from the European Parliament's position saw IOH regulation appearing as one of the sub-themes in a project on "Substantive

Insolvency Law and the Prospects for Greater EU Harmonisation", which was funded by the European Commission and carried out by the University of Leeds. In this project, which arose from the need to analyse Member State compliance with the 2014 Recommendation,[7] mention is made of the need potentially to re-examine the "caution" explicit in the 2010 INSOL Europe report.[8]

In fact, the IOH-related component of the study is also reflected in the scope of the recently formed European Commission Experts' Group on Restructuring and Insolvency, which began its work in January 2016, whose (ambitious) mission includes the development of, inter alia, common principles and rules in areas connected to insolvency, such as the qualifications of insolvency practitioners.[9]

It is on the basis of the interest shown by the various bodies above that the insolvency practitioner regulation project ("IP Project") has been conceived. It is an international collaborative project involving the Centre for Business and Insolvency Law at Nottingham Law School, as well as the Business Law Research Centre at Radboud University Nijmegen, the Centre for Advanced Corporate and Insolvency Law at the University of Pretoria and the Commercial and Property Law Research Centre at the Queensland University of Technology.

The project has received funding from INSOL International and some interest in the project is also shown by the World Bank. The intention behind this project is to conduct a global survey of some 40 countries in four regions around the world, including those from the emerging, developing and developed worlds, to ascertain trends in regulation under a number of practice-related headings, including selection and appointment, qualification, remuneration, liability, removal and replacement as well as supervision frameworks.

With the information collected, a series of reports will be produced dealing with regional trends as well as common developments across each category (emerging, developing and developed).[10] Ultimately, the intention is to make recommendations for minimum standards of regulation appropriate for jurisdictions at various stages of development and to feed them into the process by which such standards are developed. Already, a submission has been made to the European Commission Experts' Group on a high-level principles-based text that could form the groundwork for future developments in the European Member States.

Summary

In summary, the framework for practice for IOHs is in a state of some flux. While individual States may be making advances in regulation to deal with particular problems, there is as yet no overall sense of whether it is desirable to have closer convergence between regulatory models and practices. Hopefully, the number of studies, both practice- and academic-led, point the way to understanding the critical issues that will face those desiring to improve standards and the benchmarks for practice. ■

Footnotes:

1 A copy may be seen at: http://assessment.ebrd.com/insolvency-office-holders/2014/report.html.
2 Ibid., Executive Summary, at 7-9.
3 Out of 13 countries acceding between 2004-2013 (the exceptions being Malta and the Czech Republic). Of these, only Cyprus was not surveyed.
4 See INSOL Europe, *Harmonisation of Insolvency Law at EU Level* (April 2010), at 23.
5 The IOH Principles and Best Practices, available at: http://www.tri-leiden.eu/project/categories/ioh-project/.
6 *See K-H. Lehne (Rapporteur), Report with Recommendations to the Commission on Insolvency Proceedings in the context of EU Company Law* (Document A7-0355/2011) (17 October 2011), at 10.
7 Recommendation on a New European Approach to Business Failure and Insolvency (Document COM(2014) 1500 Final) (12 March 2014).
8 Interim Report 3 of the Study on Substantive Insolvency Law, at 58.
9 Call for Expressions of Interest in the Experts' Group (September 2015), at paragraph 3.
10 The initial findings of the reports will be presented at the INSOL International Sydney Conference (March 2017) with the regional findings being presented at appropriate events.

> **THE PROJECT REVEALED WEAK PERFORMANCE IN AREAS SUCH AS CONTINUING PROFESSIONAL DEVELOPMENT AND TRAINING NEEDS**

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