

**INSOL Europe Academic Forum & Nottingham Law School  
Joint International Insolvency Conference  
28 & 29 June 2012**

Nottingham Law School was delighted to be able to host the first 2012 conference of the INSOL Europe Academic Forum. The theme "Too big to fail? Large national and international failures under the spotlight" provided a highly topical area of discussion. The papers on the first day focused on insolvencies within the banking and financial services industry, whilst the papers delivered on the second considered the issues arising in the context of enterprise and group insolvencies with some thoughts on the design of insolvency systems.

Delegates were welcomed to the conference by Jim Luby, President of INSOL Europe and welcomed to Nottingham Law School by its Dean, Professor Andrea Nollent. In her address, Professor Nollent was delighted to announce that Dr Paul Omar of the University of Sussex and current secretary of the INSOL Europe Academic Forum, would be joining the staff of Nottingham Law School as Professor in the new academic year.

*Day one*

The first paper of the conference was delivered by Professor Andrew Campbell of Leeds University and Paula Moffatt of Nottingham Law School. Jointly written with Rebecca Oliver of Norton Rose LLP, it considered the idea proposed by Dr Eva Hupkes that, rather than trying to preserve failing banks, insolvency supervisors should work on protecting their vital functions (namely, payment and settlement systems, the protection of depositors and the preservation of the credit intermediation function) and went on to analyse how far the current UK bank insolvency regime protected these vital services. Broadly, the Banking Act 2009 has gone some way towards achieving these protections, but there are still a number of practical issues associated with managing a bank failure which, when coupled with the likely political reluctance to let a major clearing bank fail, suggest that there is room for improvement.

The next two papers, delivered by Dr Jessica Schmidt of Friedrich Schiller University, Jena and Dr Michael Schillig of Kings College London, moved on to consider the European dimension. Dr Schmidt's paper provided a detailed overview of the new European System of Financial Supervision made up of the European Systemic Risk Board (responsible for macro-prudential oversight) and the three supervisory authorities with micro-prudential oversight: the European Banking Authority, European Insurance and Occupational Pensions Authority and the European Securities and Markets Authority.

Dr Schillig's paper then took delegates through the proposed new European regime for bank insolvency and provided some comparative analysis as to how this might work in the context of the existing regimes in the UK (the 2009 Banking Act) and Germany (the Restrukturierungsgesetz). The four main resolution tools are: the sale of business tool (all or part of a failing bank would be sold to another bank); the bridge institution tool (good assets and essential functions are separated into the "bridge" bank); the asset separation tool (whereby bad assets are transferred into a separate vehicle); and, the "bail-in"<sup>1</sup>

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<sup>1</sup> The concept of the bail-in is explained in the Independent Commission on Banking Final Report and Recommendations of September 2011 at paras 4.15 and 4.62. Contingent convertible bonds (cocos) are discussed at para 4.65. The basics are that, in order to address moral hazard, a process is needed whereby debt can bear losses if equity is wiped out without unacceptable side effects (such as a run on the bank). The general consensus is that this is best achieved by agreeing up front that long term debt must bear losses ahead of other (non-capital) liabilities, including ordinary deposits. Debt can

tool, whereby the bank is recapitalised with shareholders wiped out or diluted. The Banking Act 2009 already includes a number of these features, other than provisions for bail-ins, but it is clear that the Restrukturierungsgesetz needs more work.

Delegates were then introduced to two case studies where financial institutions had become insolvent. Martine Gerber-Lemaire of OFP Partners Luxembourg, discussed the Luxembourg experience of managing the insolvency of three Icelandic banks (Kaupthing, Glitnir and Landsbanki). Overall, the Luxembourg courts had taken a pragmatic approach to managing the insolvencies. This included the approval of a reorganisation plan by the Luxembourg court of appeal which diverged from the concept of equal treatment of creditors on the grounds that: depositors and suppliers were repaid in full, the Central Bank was subordinated and a majority of the institutional investor creditors had approved the plan. Similarly, Virginia Torrie from the University of Kent explained how the Canadian courts had taken a pragmatic and flexible view when managing the insolvency of the asset backed commercial paper market under the Companies Creditors' Arrangement Act 1933 ("CCAA"). Enacted in the aftermath of the great depression, the CCAA has proved a flexible tool to enable what were, effectively, trusts to be treated as though they were companies. The Canadian court affirmed the principle that the CCAA was a remedial tool to be liberally construed and designed to be flexible.

The session was completed by Dr Alexandra Kastrinou's consideration of the impact of state aid in rescuing failing banks, questioning whether this was the best approach. Professor Bob Wessels rounded the day off with a reflection that a pragmatic approach which achieved a solution with the involvement of the various stakeholders was probably better than the latest EU approach to bank insolvencies which seemed to be trying to legislate for all eventualities – something that was probably impossible to achieve.

#### *The conference dinner*

The conference dinner took place at The Carriage Hall, Plumtree. Neil Cooper, Honorary Life President of INSOL Europe and Visiting Professor at Nottingham Law School, introduced the Hon. Mr Justice Norris who went on to speak both eloquently and entertainingly. He stressed the importance of the role of the academic in reflecting upon and questioning aspects of legal practice in order to improve it, commenting that most working judges had only a limited amount of time for these activities. He identified a number of areas where judges involved in cross-border matters could be assisted in their practice by relevant academic research.

The academic research that is likely to be of greatest use to judges will be research that leads to practical solutions. Areas worthy of research include: the identification of common principles of insolvency law across jurisdictions so that these can be applied when deciding cases; a review of the rules governing the way in which property held in different jurisdictions should be treated (as these are outdated); the manner in which groups of companies which have a presence in multiple jurisdictions (and, therefore, possibly more than one centre of main interest) should be dealt with; and the development of practice notes for English judges which explain insolvency processes and judicial proceedings in other jurisdictions.

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either be written down, or be converted into equity. Cocos are designed to be converted into equity on a trigger (e.g. the risk weighted assets ratio dropping below a certain level) whilst a bank is still viable: the idea being that it recapitalises the banks so that it can continue to function.

## Day two

The first session on "Enterprise and Group Insolvencies" was chaired by Dr Irit Ronen-Mevorach who has written extensively in this area. The first paper, delivered by Professor Catarina Serra from the University of Minho, considered how effective the Portuguese Insolvency Act 2012 is in the rescue of large corporations. It appears that, despite the introduction of a mechanism to restructure a company outside formal insolvency, the new legislation has not reformed the mechanism for promoting rescue in corporate insolvency cases, causing Professor Serra to ask whether the Portuguese legislature intended that all insolvent corporations be doomed to winding up.

Richard Sheldon QC of 3-4 South Square, then took delegates through a number of circles of hell in his consideration of the *Wind Hellas* case. His illuminating overview explained how a company, incorporated in Luxembourg and running a business in Greece, shifted its centre of main interests ("COMI") to England to enable it to be the subject of a pre-packaged, English law administration. It seems clear that it is much easier to achieve a COMI shift for a service delivery company than it would be for, say, a manufacturing entity.

Two papers were then presented on the Asian perspective. Professor Aishah Bidin explained the range of procedures available for rescuing companies as a matter of Malaysian law. The main vehicles are the Danaharta Act of 1998 and the Corporate Debt Restructuring Committee ("CDRC") which was described as being similar to the London Approach. CDRC tends to be used for entities with debt over RM50 million – most of which tend to be government linked companies (so it appears that there is an element of state rescue). The second paper of the pair was an insight into the Chinese regime presented by Professor Xian-Chu Zhang of the University of Hong Kong. It seems that, despite the introduction of a new Chinese Bankruptcy Law in 2006, the number of bankruptcy applications in China dropped during the financial crisis. During this period, the political imperative has been to protect state assets through a variety of mechanisms which include: a prohibition on the transfer of assets to foreigners; the postponement of a legislative process for dealing with insolvent banks until 2013 (this was envisaged in the 2006 legislation but never enacted); and directions to the judiciary that business are to be kept going, regardless of the interests of creditors.

The fourth session was chaired by Simeon Gilchrist from Edwin Coe LLP, the sponsors of the conference. Dr Arie Van Hoe from the University of Antwerp began this series of papers by suggesting that there is a "third way" that can be used to deal with the vexed question of insolvent groups. Traditionally, there has been a battle between the concept of the "single corporate entity" (with a corporate veil that cannot be pierced) versus the "enterprise approach" which seeks to match the legal and economic reality of the group by treating it as a single economic unit. Both approaches are flawed, but the concept of "identification" could provide a third way to deal with the problem and enable a more nuanced strategy. This would be achieved through balancing the legal reality of the enterprise group as an entity (i.e. that it is not a legal person) with the underlying principle of the legal rule involved.

In a highly entertaining canter through his overview of sovereign debt ("a monster with different heads?") Dr Rodrigo Olivares-Caminal of Queen Mary College, London, taught us that "Greece is not Spain" and that "Uganda is not Ireland" (or something roughly equivalent!). But his serious point was to ask whether, in fact, the European Stability Mechanism was anything more than the IMF in disguise. In his view, it would not provide a solution to long term structural problems.

Dr Rolof de Weijts from the University of Amsterdam concluded this session by asking the delegates why a separate bank insolvency regime was necessary. In his view, separate legislation was needed to enable swift action to be taken before a bank is in serious trouble so that insolvency can be avoided. If creditors are left to negotiate an outcome by themselves, each creditor will hold out for its best, individual position so causing delay in resolution. The imposition of a regime does, however, raise questions as to when, whether and how much compensation should be paid to shareholders and creditors: a particular issue arises if the bank is not yet insolvent - what price should be paid to shareholders, particularly when current thinking is that shareholders need to bear losses first?

In a special presentation Andres Federico Martinez, a representative of the World Bank, gave an overview of the work of the bank, focusing on its work in Eastern Europe. It was a fascinating insight and he ended with a summary of some of the lessons learned from this work. These lessons included: first, a recognition that banks need to find a predictable way to deal with assets in cases involving multiple creditors (failure to achieve this leads to further losses in value); second, that the procedural bias needs to move away from liquidation towards restructuring; third, that action must be swift; fourth, that, where possible, procedures should take place outside court; and finally, that even after reforming legislation has been enacted, reforms should continue at a local level to ensure that there are high quality judges and insolvency practitioners able to implement the law intelligently.

The final session of the day consisted of a round table discussion chaired by Professor David Burdette of Nottingham Law School. The panel was made up of Professor Adrian Walters of Chicago Kent University, Andres Federico Martinez of the World Bank and Catherine Bridge of the European Bank for Reconstruction and Development ("EBRD"). Professor Walters began by identifying trends in the US that might lead to useful avenues of research. Of particular interest was the Chapter 11 Commission which was set up in April 2012. The general consensus appears to be that Chapter 11 is "past its sell by date" as it was enacted in the late 1970s in a world where (unlike today which sees a dominance of service industries) manufacturing industries were the backbone of the US. Mr Martinez added to this list (echoing the remarks made by Mr Justice Norris) suggesting that it would be a useful exercise to identify the similar characteristics of different legal systems. If this could be achieved one might begin to consider whether it could be possible to have a single insolvency law for more than one country.

Ms Bridge provided delegates with an outline of the work of the EBRD, identifying four "pillars" of activity. The first of these is standard setting – which, in the insolvency context, involves the identification of best practice for office holders and the establishment of core insolvency principles. The second and third pillars of activity revolve around making assessments as to the effectiveness of the law in a particular jurisdiction and in respect of particular projects (for example, the application of and compliance with a Serbian code of ethics). The final pillar involves outreach work, achieved through speaking at conferences and in fostering ties with the academic community.

The conference ended with Dr Paul Omar thanking the organising committee and Professor David Burdette, in particular, for their help in putting together such a successful event.

**Paula Moffatt 2 July 2012**