

Modern insolvency research: The bridge to the future

Jen Gant & Paul Omar report on the annual meeting of the Younger Academics' Network in Insolvency Law, Copenhagen



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Moody weather in the land of Scandi-noir dramas greeted the members of the Younger Academics' Network in Insolvency Law ("YANIL") meeting at the premises of DLA Piper in Copenhagen on a damp Tuesday morning.

After a fulsome welcome to those present by Henrik Sjørnslev (Insolvency and Restructuring Partner, DLA Piper), Jen Gant (YANIL Chair; Post-Doctoral Researcher, JCOERE Project, UC Cork School of Law) opened proceedings marking the 10th anniversary of YANIL. After an introduction of the board and a brief history of the body since its founding in 2009 by Bob Wessels (Emeritus Professor, Leiden), Dr Gant welcomed the group of twenty or so attending the first PhD conference organised by YANIL, the intention being that this would constitute the first of many such doctoral conferences and networking opportunities. The first panel of the morning, chaired by Dr David Ehmke,

focused on the topic of the moment: the adoption this year of the Preventive Restructuring Directive on Restructuring and Insolvency (the "**Directive**"). Sits Schreurs (PhD Candidate, Utrecht) posed the question of how the plan elements in the newly adopted Directive will have an impact on Article 36 of the European Insolvency Regulation ("**EIR**") which provides for the possibility of an undertaking to respect local priorities. In analysing the Dutch regime in particular, the suggestion was made that there is a need for some targeted reforms to ensure that the transposition of the directive does not conflict with existing local options. Following this, George Wabl (PhD Candidate, Vienna; Attorney, Binder Grosswang) suggested steps that directors should take when faced with the imminence of insolvency. Through an empirical study carried out across Austria, the views and behaviour of directors were examined, especially surrounding the duty to file. The

survey establishes that directors tend, if anything, to be concerned about insolvency prospects, but may be more negligent than criminal in their manoeuvres prior to declaring the fact.

Closing the session, Aoife Finnerty (PhD Candidate, Limerick) appreciated how the Irish examinership would fare on the advent of the directive. Despite the pre-eminence arguably enjoyed by Ireland having been the first to introduce preventive restructuring through a calque of the Chapter 11 model, the directive would bring some innovations, particularly as far as the stay, cram-down and priority provisions were concerned.

After the break, the second morning session presided by Dr Emilie Ghio (Birmingham City University) featured presentations on private international matters connected to insolvency. Walter Nijmens (PhD Candidate, Fulda) floated the thought of where preventive restructuring should fit in the binomial framework constituted by the EIR and the



Members of YANIL assemble in Copenhagen

Brussels IA Regulation. Exploring the prospect through an examination of Dutch law processes, an important element identified was the entry criterion for various processes, the definition of which can obscure the already delicate methodology for defining the scope of both texts. Following this, Oriana Casasola (PhD Candidate, Leeds) set out some ground rules for a proposed harmonisation of transaction avoidance provisions. The need for a doctrinal basis to appreciating what claims are firmly inside insolvency and what lies outside was expressed, for a proper understanding of how to integrate transaction avoidance, a key aspect of insolvency case-management, into the existing framework. Concluding proceedings before lunch, Chiara Lunetti (PhD Candidate, Milan/Sorbonne) continued the theme of harmonised rules by suggesting what could be the formula for jurisdiction in the case of annex actions, another issue where the need for a proper definition of what might be included is necessary.

Afternoon perspective

A pleasant *buffet à la Scandinave* preceded the afternoon session, which offered different regional perspectives on insolvency issues. Under the aegis of Dr Eugenio Vaccari (Lecturer, Essex), the first came from Jadesola Faseluka (PhD Candidate, Leeds), who provided a view on the utility of UK Corporate Voluntary Arrangements (CVAs) as a way of rescuing businesses under stress. Outlining recent developments in the retail and other sectors, the proposal was made that the setting of business rates, among others, might be a factor in the success of businesses exiting CVAs. Explaining the features of the UK insurance market, Geleite Xu (PhD Candidate, Essex) suggested new approaches to crisis management and market exit mechanisms for the industry. The lack of a special resolution mechanism, as it existed for financial institutions, placed the

spotlight on the need for change in the current inadequate framework, including the coordination of creditor decision-making and the introduction of new rescue procedures.

Reforms

Continuing the theme of reforms, Dennis Cardinaels (PhD Candidate, Leeds) produced a strong argument for the differentiation of unsecured creditors. Through a comparison of governance in insolvency and corporate governance norms, an exploration of the role of key actors creates the need to distinguish between the groups of unsecured creditors. The factor to be used would be whether creditors had the type of control normally associated with those in the position of shareholders or connected parties. The session ended with a final presentation by Frederik de Leo (PhD Candidate, KU Leuven), who provided a view on the thorny question of employee protection in the pre-pack procedures. Examining the position of the Belgian and Dutch legislations and using case-law examples drawn more widely, the suggestion was made that balancing the goals of employee retention and value-maximisation were not, as often thought, incompatible objectives. Reconciling the two, however, would require much more openness to innovation by legislators and the courts.

Research methodology

The final session of the day put the spotlight on the issue of research methodology and the appropriateness of a methodological approach to the insolvency research. Chaired by Dr Paul Omar (Technical Research Coordinator, INSOL Europe), three post-doctoral academics presented papers on the utility of variants of research methodology to their projects. Pushing the insights into the choice of methodological approach, Jen Gant explained how the JCOERE Project was

exploring judicial cooperation in the context of the transition to the Directive. Issues of terminology, language, legal culture and the perceptions of the contributors all featured as challenges in the process of developing a questionnaire and analysis of the responses. Dr Samantha Renssen (Assistant Professor, Maastricht) outlined the value of empirical research and statistical analysis in examining the prevalence of fraud and the value of resulting damage/harm in “*turbo liquidations*”. Issues such as the formulation of a simple, but precise, research question and the lack of accessible information do, however, constitute obstacles to the project, but the ability to consider the development of an analytical tool to predict outcomes can be a beneficial aspect to the project.

Winding up the debate, Dr Lézelle Jacobs (Senior Lecturer, Wolverhampton) considered how methodology informed the research project and how the choice of methodology was predicated on the expected scope (and perhaps also anticipated outcomes) of the project. Empirical, doctrinal, black-letter research, law in context, socio-legal research etc. were all options that could be explored variously for their appropriateness for particular projects, but flexibility in the way methodology (or multiple methodologies where useful) was used should always be considered.

The three presentations stimulated a lively and spirited question and answer session before a brief farewell from Gert-Jan Boon (Researcher, Leiden) rounded off proceedings for the day. Gert-Jan, who takes over as YANIL Chair, looked forward to future occasions as a showcase for the quality of research being carried out by YANIL members. ■



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