

Wonderful, Wonderful Copenhagen: Insolvency at the cutting edge

Line Herman Langkjaer, Jenny Gant and Paul Omar report on the 15th Academic Forum Conference in Copenhagen



LINE HERMAN LANGKJAER,
Secretary, Academic Forum,
Lawyer, Aarhus University, Denmark

The annual conference of the Academic Forum in its 15th anniversary year took place on 23-24 September in Denmark. The charms of Copenhagen were only mildly attenuated by the autumn chills and grey skies over the city. Professor Michael Veder (Chair, Academic Forum; Radboud Nijmegen) opened proceedings by inviting attendees to join in a moment of silence to honour the passing of Gabriel Moss QC earlier this year.

Warmly welcoming delegates numbering over 70 from nearly 20 jurisdictions across Europe and the globe, Michael Veder noted the significant anniversaries of both the Academic Forum and the Younger Academics' Network in Insolvency ("YANIL").

With Anthon Verweij (Secretary, Academic Forum) in the chair, proceedings began with a suite of presentations on the Preventive Restructuring Directive ("Directive"). Lydia Tsioli (Kings College London) opened with an exposition of the nature of the entry test and the knock-on effect on how viability might be defined being explored in her doctoral project. Following this, Professor Ray Warner (St John's New York) and Michael Veder considered how the Dutch plan procedures, conceived prior to the Directive, might be a suitable vehicle for realising its purpose and how the procedures might fare if an American court were asked to enforce any resulting restructuring plans. Concluding the panel, Aurelio Gurrea-Martinez (Singapore Management University) discussed the impact of



The Academics presented their own perspective on hot topics of the day

the shift in emphasis to pre-insolvency, as seen recently in Singapore and the EU, on classic reorganisation mechanisms.

Continuing the focus on topical issues in insolvency law, the second session, presided over by Professor Jessica Schmidt (Bayreuth), covered the themes of director's liability and the role of the debtor-in-possession ("DIP"). Based on a comparative study of British, Dutch and German regulation on director's liability, Michelle van Haren (Radboud University) explained how existing regulation in those Member States corresponds to the content and purpose of the Directive. Particular attention was paid to Article 19 on the duties of directors faced with a likelihood of insolvency and how the Directive might have an impact on future judgments on director's liability. Following this, Gert-Jan Boon (Leiden) posed some cogent questions on the purpose and role of the debtor-in-possession ("DIP") in EU Law, looking at both the EIR and the Directive. Attention was drawn to the failed attempt by

the EU legislator to align the roles of the DIP and the insolvency practitioner in the EIR, but the argument was also put that the Directive provides more normative guidelines for the role and aims of DIPs.

The day's proceedings ended with the annual lecture sponsored by Edwin Coe, renamed this year the Gabriel Moss Memorial Lecture. It was given by Professor Ignacio Tirado (General Secretary of UNIDROIT), who sparked off a debate on the protection of creditors' rights within the framework of the Directive. Attention was drawn to the vagueness of the final version of the Directive, making it possible for Member States to choose between different standards, and, particularly, to the highly topical choice between the absolute and relative priority rules ("APR" and "RPR"), described by Professor Tirado as a choice between the "hard to get, easy to implement" way, or the "easier to get/hard to implement" way. He underlined that "The APR is a tenet, an



DR. JENNIFER GANT
YANIL Chair (2015-2019);
Post-doctoral Researcher,
UC Cork School of Law, Ireland



PAUL OMAR
INSOL Europe
Technical Research Officer



Surbhi Kapur and Animesh Khandelwal explored the importance of resolution of financial distress

underlying principle, which does not exist in the system beyond a very confined realm”. In conclusion, it was mentioned that the difference between the two different standards in reality was not that great. In the end, judges will have the last word!

The Second Day

The second day again dawned grey, but spirits were high. The first session, devoted to presentations from members of the YANIL group, featured papers focusing on the conference theme of preventive restructuring. Chaired by Jen Gant (Post-Doctoral Researcher, JCOERE Project, UC Cork), the day was opened by Ilya Kokorin (Leiden) discussing intra-group financial support in insolvency with the aim of finding the balance between group interests and the protection of creditors’ rights. Then, Minke Reijneveld (Radboud University) outlined the impact and effects of obligations under the GDPR on insolvency practitioners in the handling of personal data.

The second session of the day, curated by Professor Rolof de Weijts (Amsterdam; Houthoff Buruma), was on the theme of affecting and protecting creditors. Giulia Ballerini (Bocconi) offered a perspective on how the cross-class cram-down in the Directive requires the application of a fairness standard. The argument was made that a model utilising the APR as a default protection rule, but with the possibility of clearly justified alterations subject to court supervision, was desirable. This was followed by a joint paper by Judge Flavius-Iancu Motu (Cluj Court) and Andreea Deli-

Diaconescu (National Institute for Insolvency Practitioner Training, Romania) on new and interim financing under the Directive and the utility of trade credit.

The post-lunch session facilitated by Luigi Lai (National Information Processing Institute, Poland) opened with Professor Reinout Vriesendorp and Gert-Jan Boon (Leiden) exploring the role of mediation within the international insolvency law framework. Reference was made to arguments at European level surrounding the proposals for minimum standards for mediators and a common definition for the role. Professor Reinout Vriesendorp outlined the scope of the research project beginning with a census of international instruments and moving to the development of a questionnaire bringing challenges for the collection of reliable data from the countries being surveyed.

Continuing the theme of actors in insolvency, Surbhi Kapur and Animesh Khandelwal (Insolvency and Bankruptcy Board of India) explored how the importance of resolution of financial distress has stimulated reference to insolvency practitioner regulation in the Directive. Translating regulatory issues to the Indian context, especially given the relatively recent introduction of the radically new Insolvency and Bankruptcy Code 2016, the presentation highlighted the development over the past few years of regulation governing practitioner conduct, as well as appointment and remuneration. The session concluded with views on the judicial role in restructuring and insolvency matters revealed by

the JCOERE Project coordinated by Professor Irene Lynch Fannon and Jen Gant (UC Cork), reporting on a survey of procedures in Member States, either extant or being developed in light of the Directive, and noting issues of concern to policy makers and commentators that also arose in the Directive.

Concluding the day’s substantive proceedings, the Edwin Coe Practitioners’ Forum, chaired by Florian Bruder (DLA Piper Munich), opened with Vincent van Hoof (Radboud Nijmegen) outlining the scope of the stay in the Directive and its effect on debtors and their contracting partners. Anticipating the transposition of the Directive, a survey of the position in some Member States revealed how contractual frameworks might have difficulty adapting the text in the face of differing approaches to security. Responding to the outline, Simeon Gilchrist (Edwin Coe LLP) and Tomáš Richter (Charles University; Clifford Chance Prague) pointed out issues of concern in how the Directive approached the stay framework. A controversial suggestion was that the Directive constituted a backdoor harmonisation of insolvency law with many of the provisions it sets out, including the definition of and framework for the stay.

Drawing proceedings to a close, Professor Veder gave his farewell speech, his time in the Chair having come to an end. Thanking participants, speakers and panel chairs alike, Professor Veder added his appreciation for the continued support of Edwin Coe through their sponsorship. Mention was also made of changes in personnel for both YANIL, the new Chair being Gert-Jan Boon, and within the Academic Forum, with a new Chair and Secretary in the persons of Tomáš Richter and Line Herman Langkjaer. With an envoi from Tomáš Richter, delegates departed Copenhagen with the prospects of continuing discussion in Sorrento next year. ■

“As a Ph.D. student and a young academic, being involved as a speaker in the Academic Forum Annual Conference was of immense value for me.

Measuring myself with academics and practitioners with much more experience than I have, pushed me to go beyond my limits and to work harder, so that I could feel a bit “closer” to their level of knowledge and expertise. Despite only being at the beginning of my academic career, the seniors carefully listened to my ideas, valued my opinions and related to me as a peer. This was a very rewarding feeling and I was extremely grateful for the insights and suggestions they provided. Challenges such as the ones I faced during the conference have made me grow more confident in my capabilities and opportunities to achieve my academic goals.”

Giulia Ballerini, PhD Candidate, Bocconi University, Italy



More photos can be viewed at www.insol-europe.org/gallery/copenhagen-photos-academic