Cross-border restructuring: At a crossroads in the wake of Brexit?

Chris Laughton reports from the 16th joint conference between R3 and INSOL Europe which took place on 11 July 2019 in London

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THE ENGLISH SCHEME IS TO BE AUGMENTED BY CORPORATE INSOLVENCY REFORMS NOT DISSIMILAR TO THE EU DIRECTIVE

However Brexit evolves – something that remains impossible to predict – cross-border restructuring and insolvency in and between the UK and European countries will continue to develop. The question is, what will that development look like?

The EU Harmonisation Directive, which came into force on 16 July 2019, requires Member State implementation within two years and is assumed in this report not to have any direct effect in the UK as a result of Brexit. A significant part of the Directive's focus is pre-insolvency procedures. As well as outlining the Directive (sufficiently explored elsewhere to not need repeating in this report) Jennifer Marshall and Nico Tollenaar debated pre-insolvency procedures by comparing the English Scheme of Arrangement and the new Dutch Scheme.

The English Scheme is to be augmented, when necessary, by corporate insolvency reforms not dissimilar to the EU Directive provisions, including for example a stand-alone moratorium. The Dutch Scheme is yet to be tested in practice. Although skilled practitioners in the respective jurisdictions will develop the constructive use of these tools, they may remain the preserve of the larger and more complex cases that will bear the implementation costs. A straw poll suggested that delegates found the Dutch Scheme marginally more attractive.

New legal landscape

John Willcock of Global Turnaround chaired a panel that discussed the new legal landscape for NPLs. Amo Chalal set the scene with statistics about the size and development of the NPL markets. European NPL transactions are likely to exceed €200 billion in 2019, as they did in 2018; NPLs account for some €750 billion on banks' balance sheets in Europe and are up to 45% of loans in Greece; the most popular assets involved are commercial real estate (especially in the UK, Ireland and Spain), followed by SMEs in Southern Europe; major sellers include UK Asset Resolution, NAMA, Santander and Unicredit; and major buyers include Cerberus, Blackstone and Lone Star. Antonio Payan Martins saw banks now being able, after years of "zombie restructurings", to offload NPLs as underlying asset markets improve. This trend will continue as the EC seeks to harmonise and encourage NPL deals. A new Directive is anticipated in 2021 to achieve this through focus on a framework for acquisition of NPLs, credit servicing provisions and regulation of collateral enforcement. Richard Tett concluded that the direction of travel is for NPLs to come off bank balance sheets, de-risking the banks and freeing up capital flows and lending. The acquiring funds will deal actively, rather than leaving the NPLs as zombies as they had been on banks' balance sheets. Although most will be worked out or dealt, there will be an increase in restructuring.

Agrokor

Christiaan Zijderveld led the discussion of a case study of *Agrokor*. In 2017 Alastair Beveridge, INSOL Europe's President, was appointed CRO of the largest business in Croatia. Agrokor was the backbone of the Croatian food industry and, with revenues of over €6 billion representing some 13% of the country's GDP, it was too big to fail, especially at the beginning of the tourist season. To provide a mechanism for the restructuring, the Croatian government introduced an Extraordinary Administration Act almost overnight. In addition to a local extraordinary administrator and a restructuring team from Alix Partners, Houlihan Lokey (financial) and Kirkland & Ellis (legal) were fundamental to the success of the restructuring. The challenges included an almost complete lack of cash, no management structure and significant political and media interest. Within 15 months, over 80% creditor support was gained for a plan that saw an average

return of 50% to creditors (including 100% for local micro suppliers).

Gibbs

Felicity Toube QC and Riz Mokal gave a legal update which began by considering the Gibbs principle whereby in English law, based on a Court of Appeal decision dating from 1890, a foreign liquidation only discharges foreign law debts. In 2017 the Azeri insolvency proceedings of the International Bank of Azerbaijan were recognised in England under the Cross-Border Insolvency Regulations ("CBIR"), which implement the UNCITRAL Model Law. The English Court of Appeal confirmed that the resulting moratorium ended when the main proceedings ended. Extending the moratorium indefinitely to overcome the Gibbs principle was not permitted and the Supreme Court has refused permission to appeal.

In a related vein, the use of Irish schemes of arrangement to restructure New York law-governed debt was explored in the context of *Ballantyne Re plc*. In another transatlantic case, *Videology Limited*, US Chapter 11 proceedings were recognised in England not as main proceedings but as non-main proceedings under the CBIR; the English court nevertheless granted an extensive moratorium in the interests of creditors.

In a wholly European matter, the English courts declined jurisdiction in *Lady Moon SPV SRL*'s claim against a London-based fund manager in relation to the winding-up of a collective investment undertaking; the claim fell within the insolvency exception to the Recast Brussels Judgments Regulation, but the Italian courts were a more appropriate forum. Other cases mentioned were the English High Court's decision that a German tax authority claim in MF Global should be determined in the German fiscal courts, but that other claims from Deutsche Bank should be dealt with within the administration in the normal way; and the annulment of a German dentist's fraudulent "COMI-shift" bankruptcy.

Steinhoff

The day's second case study was *Steinhoff*, presented by Rob Lewis, James Lewin and Richard Hodgson. With €19 billion turnover and 600 entities in 30 countries the *Steinhoff* restructuring was even larger and more international than that of *Agrokor* and was yet to be finalised. Stabilising the conglomerate group that was in imminent danger of collapse was the first priority. Austrian intermediate holding companies were a particular problem for those trying to identify procedures to use in order to support the restructuring. Not only was there a risk that the Austrian directors would file for insolvency in the event of over-indebtedness, but if a Chapter 11 route was followed for the group as a whole, the worldwide stay

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COMPETITION IS CLEARLY DEVELOPING FOR THE ENGLISH AND US COURTS IN THE ARENA OF INTERNATIONAL COMMERCIAL PROCEEDINGS

might not have been effective in Austria: many of the potential issues were untested in Austria. Support letters were obtained from key creditors to avoid over-indebtedness and a Lock-Up Agreement was entered into to limit creditors' recourse and impose standstill obligations. These steps allowed a going concern prognosis, which was another requirement to avoid precipitate filing.

A quick Chapter 11 pre-pack of the US business, and an English scheme with Chapter 15 recognition for the US holdco were featured in the restructuring. Finally there were English CVAs, after COMI-shifts to English establishments from Austria for two of the principal intermediate companies. The CVAs have been agreed since the conference.

Commercial courts

In the final session a panel of judges discussed International Commercial Courts and their operation in Ireland, the Netherlands, France and Germany.

In Ireland the Commercial Court was established in 2004 as part of the High Court and can deal, *inter alia*, with Schemes and Examinership applications; there is a high rate of appeals but this is ameliorated by a panel for commercial cases and an increasing number of Court of Appeal judges; 160 cases were opened and 120 resolved in 2018; there are 300-400 cases in the system and there have been more Schemes and cross-border mergers through the Irish Commercial Court since the UK referendum in June 2016.

The Netherlands Commercial Court opened in 2019 as a chamber of the Amsterdam District Court and Court of Appeal; its hearings and decisions are in English, there are few appeals and summary decisions are common; insolvency proceedings are opened in the "normal" courts; parties have to agree to be heard in the Commercial Court; there are costs of €15,000 per party at first instance and there have been 3 cases this year.

In France the Commercial Court at first instance has lay judges, who are usually international General Counsel and are elected annually by the chambers of commerce, with professional judges sitting in the Court of Appeal; English is used except, for constitutional reasons, by French advocates; insolvency proceedings can be opened and use of the Commercial Court is by agreement of the parties; the court fee is only €35; there are 50 cases per year and currently there are 33 cases pending at the Court of Appeal; and the French Commercial Court is seen as a centre for civil law dispute resolution, rather than as competition for arbitration or common law courts.

In Germany, the Chamber for International Commercial Disputes opened in 2018 at the District Court in Frankfurt with two lay judges and one professional judge and a Court of Appeal is expected to be established when case numbers require it; if agreed by the parties, hearings are in English and although decisions are currently in German, a move to English is anticipated; the Chamber does not open insolvency cases; there has been one case so far but some 50 per year could be accommodated.

Competition is clearly developing for the English and US courts in the arena of international commercial proceedings, but arbitration may also prove increasingly popular in international commercial dispute resolution.

Enthusiastic networking

Other features of the day were the enthusiastic networking and the engagement of delegates throughout the day, Sebastiaan van den Berg's and Morgan Bowen's able chairing of the conference and – not least – Marcel Groenewegen's reminder, as Vice President, of the benefits of membership of INSOL Europe, explaining the work and reach of the association and encouraging delegates who were not already members to join us.

Future developments

So what will the development of European cross-border restructuring look like? The harmonisation trend will definitely continue and as jurisdictions introduce new or revised procedures, particularly pre-insolvency, they are likely to refine the implementation of common themes. Skilled professionals throughout Europe will apply the tools available to them innovatively (as evidenced by case law developments), which will add value to the restructuring and insolvency matters in which they are involved. That there will be plenty of opportunity for international restructuring is demonstrated by the growth of NPL transactions as banks continue to de-risk. The internationalist trend is echoed in the courts and demonstrated in the case studies, which delegate feedback indicated were the most popular part of the conference. ■