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Seeking clarity in distress

Anita Krizmanic, Ivana Manovelo and Jelena Zjacic of Macesic & Partners explore Croatia's evolving framework for dealing with struggling companies

IFLR: What are the main insolvency provisions under Croatian law?

Croatian law has traditionally been familiar with three insolvency tests: illiquidity, incapacity to pay and over-indebtedness. The Croatian legislature has also introduced, effective from October 1 2012, a previously non-existent restructuring law, the Pre-bankruptcy Settlement Act. The purpose of the new law is to ensure, as far as possible, the survival of the business of a debtor meeting at least one of the insolvency tests.

The Croatian courts recognise foreign bankruptcy proceedings, pre-insolvency proceedings, restructuring proceedings or any other similar proceedings (the number of the proceedings which may be recognised is not a reserved number).

The legislative framework for cross-border cooperation in insolvency proceedings is well prepared and effective. However, the practice is very rare to almost inexistent. It is expected that from July 1 2013, when Croatia is scheduled to become a new EU member state, the number of cross-border cases requesting cooperation will rise significantly.

How do these new restructuring proceedings work and what are the main goals?

There are two goals set by the new Pre-bankruptcy Settlement Act in restructuring proceedings: business turnaround of insolvent debtors, and more favourable settlement of creditors than in the bankruptcy proceedings. If the restructuring process fails, the debtor is faced with bankruptcy proceedings.

Only the debtor is authorised (and has the obligation) to file a motion for restructuring under the Pre-bankruptcy Settlement Act. Pre-bankruptcy proceedings cannot be initiated on a creditor's request. A creditor's only option, in case a debtor fails to initiate the pre-bankruptcy proceedings, is to file a request for the debtor's bankruptcy proceeding.

The parties to the restructuring proceedings are the debtor and creditors who have reported their claims. The restructuring proceeding is an administrative proceeding conducted before the Croatian Financial Agency (FINA). Two administrative bodies should be established in each proceeding: the settlement committee and the settlement trustee. If the restructuring plan is accepted and the debtor and creditors reach a pre-bankruptcy settlement agreement, the agreement is concluded before a competent commercial court, according to the debtor's registered seat.

A decision on the opening of proceedings must be immediately published on FINA's website. Simultaneously, FINA publishes a call to the creditors to report their claims in a pre-bankruptcy proceeding within 30 days.

The restructuring proceeding costs, which include administrative and court taxes, settlement trustee fees and costs and so on, should be borne by the debtor. They depend on the total value of the debtor's debts and amount up to approximately €2,000 ($2,700).

> "In restructuring proceedings, it is unclear whether one creditor may dispute another creditor's claim"

Pursuant to the current legislation, no administrative or court taxes should be paid by a creditor for participation in the restructuring proceeding. Creditors bear their own attorney (or similar) fees and costs in the restructuring proceeding.

What are the most important issues relating to the new proceedings?

There has been much criticism of the newly-adopted legislation. The biggest concerns represent legal gaps caused by drafting deficiencies of the new law. In particular, it is unclear whether one creditor may dispute another creditor's claim or whether this right is reserved for the debtor and the settlement committee only. Furthermore, it is yet to be determined what happens to the creditors whose claims have been disputed in the restructuring proceeding: do they exercise their rights in a separate court proceeding against the debtor?

In addition, many practitioners and scholars object to the somewhat controversial dualism of the restructuring process which is regulated as partly administrative and partly as a court proceeding. Precedents and possible changes to the legislation are expected to solve these initial problems.

> "The main issue relating to the Croatian bankruptcy proceeding is its effectiveness and duration"

Since the new restructuring legislation has been in force for only three months and the proceedings have just been initiated it remains to be seen how banks will react. In previous years, there have been restructuring attempts through bankruptcy proceedings; however in most cases these were unsuccessful due to slow and inert reaction of creditors and debtors. The experience is that restructuring becomes successful only if banks are proactive, react immediately and are open for dialogue with debtor's administration.

How do stays on payments of insolvent companies to creditors work in Croatia?

The general principle is an automatic stay on payments to creditors once the debtor becomes insolvent and throughout the insolvency period. The law prescribes exceptions to this principle, however, and allows payments that are necessary to keep the business running: for example, electricity, water supplies and other operative costs, supply

About the author

Anita Krizmanic predominately advises clients on bankruptcy and restructuring as well as transportation and insurance matters. In complex bankruptcy and restructuring she acts as a team leader for the office. She also provides counselling in commercial, corporate, financing and other related matters, mainly to international clients. Her job description includes acting as correspondent for international law firms in various international transactions, representing clients before all courts in complex disputes. She is listed as permanent correspondent for Croatia by Protection and Indemnity Clubs.

Krizmanic joined Law Offices Macesic & Partners in 2000. She is a member of the Croatian Bar Association. She is a local partner and contributor of Doing Business, a co-publication of the World Bank and the International Finance Corporation for 2009, 2010, 2011, 2012 and 2013 for resolving insolvency.

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About the author

Ivana Manovelo advises domestic and international, mostly corporate, clients on insolvency, restructuring, energy, commercial, banking, real-estate and civil matters. She co-represented a large international oil trader in a high-profile case before an international court of arbitration in a complex energy dispute. She is experienced in advising and representing international companies and domestic banks in insolvency and restructuring proceedings.

Manovelo joined Law Offices Macesic & Partners immediately after graduating law in 2006. She is a member of the Croatian Bar Association and a Court Interpreter for English appointed by the president of the County Court in Rijeka. She is a co-author of contributions on energy law issues for the Croatia chapter in International Law Office – *Energy & Natural Resources Newsletter*, *Getting the Deal Through* – Electricity Regulation and Gas Regulation, ABA Section of International Law, *The International Lawyer* and *ENR Global Report*.

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of goods, payment of VAT and other taxes, and employee's salaries. If approved by the settlement trustee in the restructuring proceeding, other payments may be performed as well; however, in no case may one creditor be put in a more favourable position than the other. The restructuring legislation is newly adopted and at this point there are no indications that it might change in the near future.

How are creditors grouped in Croatian restructuring proceedings, and what rights do they have?

Creditors are divided – based on the quality of their claims – into three groups: creditors with priority claims (employees); creditors with secured claims; and creditors with non-secured claims.

It should be noted that employees have a very interesting position in the restructuring proceeding. Namely, although their salaries are settled as priority claims, employees are not creditors in the proceeding; they do not report their claims and do not have voting rights.

For voting purposes, the creditors may be grouped into at least three categories (but there may be more if necessary): state-owned companies and public administration; financial institutions; and other creditors.

The restructuring plan is adopted if accepted by the creditors whose claims amount to more than half of total claims in each group of creditors or if accepted by the creditors whose claims amount to two-thirds of total claims, regardless of the group.

If creditors fail to report claims in the restructuring proceeding, they lose their right to collect the claim in a litigation, enforcement or administrative proceeding against the debtor. The question arises whether this applies to possible bankruptcy proceeding as well (if restructuring process fails). In our opinion, it should be interpreted that such creditors are allowed to report their claims in the bankruptcy proceeding based on the principle "everything which is not explicitly forbidden by the law is allowed".

What are the allowed financial restructuring measures?

In Croatia, financial restructuring measures include but are not limited to: postponement of payment dates, increase of share capital, instalment payments, interest decrease or write-off, loan rescheduling, providing additional security instruments, refinancing from strategic partners. Derivatives and any other measures that would achieve the restructuring goal are allowed.

How do Croatian bankruptcy proceedings work and what are the main issues?

The goal of bankruptcy proceedings is to jointly satisfy creditors' claims by sale of debtor's assets and distribution of proceeds among creditors. The exemption to the general goal is reorganisation of debtor in bankruptcy which may take place under a very limited framework, in order to regulate debtor's legal status, its relations with creditors and especially in order to preserve its business activity.

A decision on opening of bankruptcy proceedings must be announced on the court's notice board on the same day the court passes its decision on the debtor's bankruptcy. It must also be published in the Official Gazette of the Republic of Croatia.

Under the Croatian Bankruptcy Act, both the debtor and its creditors are authorised to file a motion for bankruptcy.

The parties to a bankruptcy proceedings are the creditors and debtor. The bodies involved in a bankruptcy proceeding are the bankruptcy judge, the bankruptcy trustee, the creditor's assembly and the creditor's committee (the latter not being obligatory). The bankruptcy proceeding is conducted exclusively before the competent Commercial Court. Competence is determined on the ground of the debtor's registered seat. Considering the main purpose and goal of the bankruptcy proceeding is to satisfy creditors' claims, the court administration does not need to balance the interests of creditors and debtors. This comes into question only if reorganisation in bankruptcy takes place, to which creditors have consented.

The estimated bankruptcy proceeding costs by type and amount are as follows:

- Court costs: up to €5,000;
- Attorney's fees and costs: between €10,000 and €15,000; this depends on the number and the value of dispute of pending litigations that attorneys handle for the bankruptcy debtor and other legal services required in the bankruptcy proceedings;
- Bankruptcy trustee fees: up to €40,000;
- Members of the creditors' committee fees and costs: subject to Court's order: approximately between €5,000 and €15,000; and
- Other bankruptcy proceeding costs provided by law, for example 5% property transfer taxes (amount depends of the property value).

The main issue relating to the Croatian

About the author

Jelena Zjacic regularly advises on M&A deals and is experienced in conducting due diligence for clients. Her second main area of work is banking and finance where she has successfully handled many ship finance and infrastructure finance deals. She has also been focusing on insolvency and restructuring law, which forms an important part of her advisory work in restructuring deals and debts collection matters for both domestic and international clients.

Zjacic started her legal training with the Municipal Court in Rijeka and then joined Law Offices Macesic & Partners in 2004. She is a member of the Croatian Bar Association and International Bar Association, as well as a licensed Court Interpreter for English. She is author and co-author of a number of contributions and reviews for the International Lawyer of ABA's Section of International Law.

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bankruptcy proceeding is its effectiveness and duration. The acute problems in practice are improvement and effectiveness of the bankruptcy proceeding as well as requests to reduce its costs. The goal is to eliminate legal problems that slow the bankruptcy process by implementing new solutions that will ensure the conditions for achieving the efficiency of bankruptcy proceedings, while preserving legal certainty and the rule of law.

How do stays work in the case of bankruptcy?

Stays on payments of bankrupt companies to creditors are automatic. Payments to creditors may begin only after the general examination hearing has been held. Payments are made as cash enters the estate. Creditors of lower priority are not participating in partial distributions. Distributions are made by a bankruptcy trustee, having obtained prior consent from the creditors' committee, if established, or the bankruptcy judge.

Can you give an overview of creditors' priorities and rights in Croatian bankruptcy proceedings?

Secured creditors tend to have payment priority but just on secured property. According to their claims, the creditors are classified into priorities (ranks), as follows.

"From July 2013, when Croatia is scheduled to become an EU member state, the number of cross-border cases requesting cooperation will rise significantly"

Claims of higher priority, which are:

1. Claims consisting of employees' salaries (earned until bankruptcy), severance pay ascertained by law, and compensation of damages due from work injuries or professional illness
2. All other claims against a debtor, except those specifically classified in lower priorities

Claims of lower priority, which are:

1. Interests on bankruptcy creditors' claims starting from the day of bankruptcy proceedings opening
2. Costs incurred by creditors in bankruptcy proceedings
3. Monetary fines for criminal acts or misdemeanours as well as related costs
4. Claims demanding a free performance by a debtor
5. Claims for loan repayment, where such loan was given by a debtor's shareholder and used for substituting debtor's share capital, or similar claims

Voting rights are granted to creditors that have reported their claims and where such claims have been recognised by the bankruptcy trustee.

Creditors with their claims challenged might have a voting right, but only if they have obtained the consent of both the bankruptcy trustee and the other creditors to exercising their right.

A code for Europe

Dr Daniel Staehelin is president of INSOL Europe, a pan-European professional association for restructuring and insolvency specialists. He works as an attorney and notary public at Kellerhals Anwälte Attorneys at Law and is an honorary professor at the University of Basel in Switzerland. He sat down with IFLR to share his thoughts on the state of cross-border insolvency proceedings in Europe

Could you briefly describe the state of European insolvency proceedings today, and developments expected over the next year?

The main point is that each European state still has its own legal system, and Europe is divided between civil law states and common law states.

There's not a pan-European insolvency proceeding, but developments tend to facilitate restructuring instead of liquidation.

There is a trend toward trying to keep the company operating, specifically in Germany and France. There is also a discussion about unifying European insolvency and restructuring law, but this is still a long shot. The main problems are that there are different privileges in each country: for example the privilege of labour. Each country tends to favour its own privileged entity during insolvency proceedings. France, for example, passed a special law that widens safeguard measures in response to the insolvency of Petroplus, a company based in Switzerland with a branch in France.

What impact has the European Regulation on Insolvency Proceedings had on cross-border restructuring plans?

It has had a really big effect. It was the first successful attempt to force states to recognise insolvency and restructuring decrees from other countries. In many jurisdictions governing law was based in territorialism and you had to introduce a proceeding in every country for the implementation of a restructuring plan. Now you can introduce a proceeding only in the country where the centre of main interest is situated and the decrees and judgments of any EU member-state have to be recognised by all other member-states. It's really helpful. Some countries like England and France had already recognised foreign insolvency decrees, but other ones did not, and now proceedings are unified by the regulation.

So is a pan-European insolvency code needed?

Yes, because if you have one economic market then you also need one insolvency code.

In which European jurisdictions do lawyers face the most challenges reaching in-court and out-of-court restructuring agreements? What advice would you give them?

> "If you have one economic market then you also need one insolvency code"

Dr Daniel Staehelin is president of Insol Europe

> "Austerity measures should not be confused with implementation of good governance"

It's not my job to blame any country. I would say that several countries do not have a restructuring tradition. For example, England has more of a restructuring approach, but traditions differ from country to country.

Companies have shifted their centre of main interests to England in order to open a restructuring proceeding there. There is a large discussion going on now on whether such forum shopping should be prohibited. It's easier to get a restructuring plan confirmed in England than in some other countries.

What complications arise during financial institution restructurings?

The challenge is that banking is not constrained to Europe. Banks are operating worldwide. We need worldwide regulation so restructuring in one country may be effective in other countries outside of the EU. We are at the beginning of the discussion on that issue.

How is banking reform expected to impact bank restructuring plans?

One point is the question of too-big-to-fail. This is one we discussed recently in Switzerland after the bailout of UBS. We realised during the banking crisis that we could not let one of our major banks go into bankruptcy because it would have meant the collapse of our whole economic system. That is now problematic because bankruptcy is a punishment for being too hazardous. Now these banks can do what they want and never fall into bankruptcy and that gives wrong signals to the managers of large banks.

What pan-European efforts are being made to end too-big-to-fail?

There is discussion in the eurozone on the creation of a whole European supervisory system called the single supervisory mechanism (or SSM) to prevent banking crises. [Under the plans,] a new body will be instituted with a seat in Frankfurt. The European body will supervise the large banks which are relevant for the system. It is certainly a step in the right direction even if it will not end the problem of too-big-to fail, because failure can always happen in a free market system. The only solution to ending the problem of too-big-to fail completely would be to divide big banks into smaller entities, but this would have other negative impacts on the market.

What do you think is the best way for the EU and its member states to deal with the sovereign debt crisis? What does this mean for lawyers?

As an insolvency lawyer, I would say we have to make a cut and restructure these debts, but we do not have an official framework for restructuring state debt, so maybe we should create such a framework. Suggestions are being discussed on several levels.

The official policy is that we cannot let Greece go bust because the cost of a bankrupt Greece would be higher than the cost of bailing them out.

What are your thoughts on the use of austerity measures as a condition of sovereign bail-outs?

I'm a lawyer, not an economist. There are good arguments for both spending- and saving-motivated policies.

In Switzerland we introduced a special principle in our constitution in 2003 that limits spending at the federal level. Public spending is limited according to a mathematic formula which is based on the economic cycle. This was really helpful in the last years. It's one of the reasons why our public finances are very healthy.

So the answer to your question is that the state should spend in bad times and save in good times but the spending should not be higher than the saving in an economic circle in order to maintain public debts at a fixed level. Rising public debts without limits means living at the cost of the future generation.

However, states which did not save in good times cannot avoid austerity measures in order to find a balance.

Lastly, austerity measures should not be confused with implementation of good governance. The latter is required also in a spending phase.

How does Switzerland's insolvency regime compare to others you have encountered?

We have a speciality in our country in which we have public bankruptcy offices that use administrators as trustees. This has shown to be very helpful because the main bankruptcies are consumer bankruptcies or those of little companies handled better by a public official than a private attorney.

In Switzerland there usually is not a private trustee appointed; it only happens in large cases. Creditors may appoint a private liquidator, but as it costs more it's only a good solution in larger cases.

We have tried to reform Swiss bankruptcy to introduce more restructurings like Chapter 11. I was a member of the expert group which introduced that proposal and it was brought to parliament and the first chamber declined our proposition. The left side of the parties were against it because they say everything in a bankruptcy case should go to labour, while the right side said the law should not force creditors to give up their positions.

The second chamber has approved the reform. Now it seems that our amendment is underway and that the first chamber will reconsider its position. I think the amendment will pass. The position was a classical unholy alliance between the left wing and right wing who were against it with different arguments. That made me laugh. Both were wrong.

The amendment would make bankruptcies in Switzerland more like Chapter 11 bankruptcies in the US, but not as far as to ignore the importance of liquidation. If you make restructuring too easy, it will become more complicated for companies to receive credit from banks because banks will be fearful of not being paid back.

We also think that maybe the US went too far. It is too easy to restructure in the US. Liquidation is important. If there are too many businesses in the economy, then some of them must disappear, and this is only possible through liquidation.

What are your goals as president of Insol Europe?

The first goal is to deliver good conferences with interesting content and good networking opportunities. Then we should continue to serve as a platform for our different wings (academics, judicial, lenders, turnaround, anti-fraud, Eastern Europe, and regulators).

Finally, I am trying to involve more members and attract more members from countries that are underrepresented in our association. We can only be a pan-European organisation if all European states are represented equally.

INSOL Europe is an organisation of professionals specialising in insolvency, bankruptcy and business reconstruction & recovery.

Holding international and regional events throughout Europe, we make networking easy for our members and help the exchange of professional experience across borders.

With over 1,100 members across 46 countries made up of lawyers, accountants, judges, regulators, academics and bankers, INSOL Europe makes a significant contribution to the work of European and international official bodies on insolvency, bankruptcy and business recovery.

Find out more about how to become a member, our events, sponsorship opportunities and more at **www.insol-europe.org** or contact **CarolineTaylor@insol-europe.org**.

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A united front

Gordon Stewart is president of INSOL International (2011-2013), and a partner and head of the global restructuring group at Allen & Overy in London. He has also served as INSOL vice-president, sat on its board, and acted as the first lawyer president of the Association of Business Recovery Professionals (R3).

What role is INSOL playing in protecting international insolvency frameworks from the long-term challenges that may be posed by the current absence of cross-border insolvency regimes in major emerging economies?

This is not an emerging markets issue, *per se*. If you look across Europe you'll find hardly any countries have adopted the UNCITRAL Model Law on Cross-Border Insolvency. That's disappointing to see. Within the EU we have the European Insolvency Regulation but the world is much, much more than Europe.

In truth, it's a strange miscellany of countries that have adopted UNCITRAL. If all the mature economies had it, it would be rather easier to persuade the BRIC [Brazil, Russia, India, China] countries that there are international standards they ought to meet.

Indeed, as part of its involvement in the Professional Services Taskforce (PSFT) reporting to the G20, INSOL has recommended that the G20 throw their weight behind the adoption of the Model Law.

I do think that there is a widespread failure to grasp how important insolvency is. Indeed, I believe insolvency and restructuring professionals should more actively promote the importance of getting national insolvency proceedings right. 'Lack of legislative time' is too easy an answer for governments.

Where a company gets into difficulty, the business, if it is still intact, is either in the hands of the unlucky, the incompetent or the fraudulent. If, of course, it's the latter two the business should be transferred to someone new who can make better use of it.

But otherwise, there should be a rescue regime in place to give the unlucky a second chance. And countries should have laws that enable that to happen, while preserving value and keeping intact the business and its employment.

National *liquidation* laws are equally important. Think how much money was tied up in Lehman Brothers and MF Global; you need good systems to get that money back out to the creditors so that it can be invested. Chapter 11 in the US and administration in the UK came out of those cases pretty well.

People make quite a fuss about forum shopping. It is presented as a bad thing. But I believe if you have a majority group of creditors who have put together a fair restructuring with the debtor, they should be capable of implementing that against the will of the minority. Certainly, provided the deal is fair, the majority shouldn't be held to ransom by minority views.

If you are in a jurisdiction that doesn't enable you to do that, it seems silly not to put yourself in a jurisdiction where you are capable of delivering a deal. I see it as a marketplace for systems of law and courts. People will go where the services are provided. The

"I was intrigued by the use in the General Motors and Chrysler cases of sales under Section 363 of the Code"

answer – and this is what INSOL seeks to do – is to bring everybody's laws and courts up to best-in-class standard. But until that happens, it seems to me that not only is it not wrong but it would also be foolish not to go where a business can be rescued in the most efficient manner.

How do you expect insolvency regimes to develop given the different and varied economic and regulatory models in these new and emerging countries?

INSOL works hard to encourage the development of emerging market restructuring and insolvency regimes, with four major initiatives ongoing in this area. We're a member of the Forum for Insolvency Reform in the Middle East and North Africa (the FIRM) and the Forum for Asian Insolvency Reform (FAIR). We also have an annual seminar in South America, which rotates around countries in that jurisdiction, and an African Roundtable in operation since 2010 – both of which are proving increasingly popular.

Our involvement in this capacity in these regions has left me deeply encouraged by the widespread desire for reform.

INSOL tries to demonstrate what is best-in-class for a range of options and not to simply bang the drum for pro-creditor, or pro-debtor or pro-civil or pro-common law. We want to make clear you don't need to reinvent the wheel but you can instead take advantage of the bits of other more-established regimes that you think are right for you.

The UAE's impending reforms, for example, are said to be a mix of aspects of the UK, US, and French insolvency regimes best suited to the jurisdiction. That's encouraging to hear and we look forward to seeing the finished product.

I think we will observe a continued move towards emerging economies improving their laws in this way. And that in turn will open markets for the profession. Once people realise the value of what can be provided by good laws used by experienced professionals, they will in turn want those services provided by the profession in their locality.

Local insolvency laws often lack adequate provisions to facilitate, where warranted, the co-ordination of multiple insolvency proceedings. Ideally one would have a global version of the European Insolvency Regulation. UNCITRAL is a good start but is modest in its ambitions and scope and this has been demonstrated by some recent decisions. Even the common law has not been able to wave a magic wand to cause the gaps to be filled. Chapter 15 in the US (the successor to the admirable section 304 of the Bankruptcy Code) is useful in many cases with a US connection but that is not a global solution.

I would like everybody's game to be upped. And I would like everybody to accept that universality not territoriality is the way to go. We should recognise that the world is cross-border and a party in country X doing business in country Y knows – or should realise – that they may have to claim in a foreign insolvency and not their local procedure. Universalism avoids having multiple insolvencies.

How do you expect the proposed reform of Europe's insolvency regulation (EIR) to impact implementation of English-law schemes of arrangement and by extension London's future as a financial centre/ issuer of debt?

I think the EIR works pretty well, and I'm pleased with the light-touch changes proposed recently.

Policymakers suggest reducing secondary proceedings – that was a terroritorialist protection, which was rarely required or beneficial. The restrictions on their use is, therefore, welcome.

> **"London's future as a financial centre is less based on schemes of arrangement and more the strength of the UK's courts and laws"**

Gordon Stewart is president of INSOL International

The suggestions made about court-to-court and insolvency practitioner to insolvency practitioner communication are also, I believe, good.

There were a number of radical proposals submitted in the consultation regarding CoMI [centre of main interests] and the ability to shift CoMI. These do not seem to have found favour: I think that people should be entitled to move CoMI, providing they are observing the rules. Frankly, you risk damaging a business rescue if a company is limited to its place of registration, which may be in a country that doesn't have the necessary laws in place. Of course, the end-goal is for every country to possess a good law and to deliver the certainty in the courts that people want.

I don't think the EIR proposals will negatively affect implementation of English-law schemes of arrangement. Policymakers have stipulated you can include pre-insolvency or non-insolvency procedures in the schedules but there's no obligation to do so. I would be surprised if the UK government put English schemes in because at the moment it is relatively easy to get before the English courts. The test is whether you have a sufficient English connection and that can be provided by the finance documents being under English law. That approach is much less restrictive than the CoMI test, which a scheme would have to pass if put in the schedule.

I also believe London's future as a financial centre is less based on schemes of arrangement and more the strength of the UK's courts and laws. That is to say, London's future will be protected by its good courts and good laws. That's the result of hundreds of years of investment by the UK.

That said, I have been left disappointed by the recent UK Supreme Court decision in *Rubin* and *New Cap*, in which the Court took a step back from Lord Hoffmann's pioneering judgments which sought to demonstrate the vigour and flexibility of the English common law. The Court identified limitations on the extent to which it could recognise foreign insolvency clawback judgments and said that to go further required treaties and legislation.

I thought that was unfortunate. Although I understood the point intellectually, I thought it was good that common law was taking the lead in showing the world the direction in which we might go. I was disappointed because it was a judgment leaning somewhat towards territorialism rather than universalism. One of the great attributes of the common law is that it can adapt to evolving markets and needs. Of course, the Supreme Court didn't say that wasn't possible, just that they felt there were limits in these circumstances. But there were a number of us that felt the common law provisions were sufficiently flexible to be more accommodating than the Court felt able to be.

Do you think Basel III will achieve its stated objectives?

The aim of this regulation is, of course, to make all the banks safer so there is less material risk of systemic collapse.

Basel III does seem to introduce an awful lot of regulation. It means that just at a time when banks are trying to restore their balance sheets and cope with a depressed market, they are also having to hire huge numbers of regulatory specialists to deal with this new regulatory load. One can see politically why this has happened but one wonders whether smarter regulation rather than more regulation might be the better move.

As it stands, Basel III leaves financial institutions with two options: either they raise more capital or they lend less. The latter eventuality would be unfortunate.

But it should also make holding distressed debt more expensive, which may make banks more inclined to divest themselves of those loans or more prepared for full-blooded restructurings.

Another angle is that, if banks get rid of the debt and it's in the hands of someone more entrepreneurial with access to different sources of funds, then real restructurings will become more likely. And then you will find lawyers and financial advisers again doing their job of finding imaginative ways to deliver restructurings with businesses liberated and encouraged as a result. It won't necessarily all be gloom or doom.

The evolution of the US economy has required continual adaptation of their insolvency systems. Do the statutes in place today achieve their objectives?

There is a full-scale review of Chapter 11 currently underway, led by the ABI [American Bankruptcy Institute]. INSOL has been asked to work with them on certain recommendations relating to cross-border reform.

Even so, I think a lot of what happens under the US Chapter 11 system has been well thought out. The worldwide stay, for example, has proved very useful. The way that the executory contracts can't be terminated solely on the ground of counterparty bankruptcy is a good thing too. This is so whether or not you think insolvency practitioners should be in charge in the event of insolvency as opposed to leaving the debtor in possession.

Chapter 11's ability to eliminate out-of-the-money stakeholders is very clear and efficient too. And that is admirable. In the UK, we often have to move the subsidiaries across into a new vehicle and leave behind the out-of-the-money creditors and shareholders. We've developed the pre-pack concept to assist, so we've got a perfectly adequate workaround. But take a step back and the Chapter 11 ability to eliminate out-of-the-money stakeholders is more efficient and therefore more attractive. On the other hand, Chapter 11 can be expensive if every single committee has to have financial and legal advisors all paid out of the estate.

I was intrigued by the use in the General Motors and Chrysler cases of sales under Section 363 of the Code. From a UK viewpoint, with our pre-packs, it's hard to see what's controversial about the need to sell quickly businesses that are too big or fragile to afford uncertainty. After all, the best way to achieve value from a business is a sale at best price quickly. There are critics who object that this rather offends against the philosophy of Chapter 11 with its full investigation, dissemination of information and input from the various committees. I should not attempt to swim in these deep waters. But I suspect we might start to see more 363 sales as a cheaper way of protecting business and preserving value.

At the moment, there is not a lot of insolvency work in the US and there hasn't been for a while. That may be partly due to historically, extraordinarily low interest rates. Across Europe too, there are a lot of companies surviving in these somewhat depressed times because their interest burden is so low.

There are banks too that are concerned about their balance sheets, and hence unwilling to take the pain of a haircut on a full-blooded restructuring. This has prompted

more use of so-called 'amends and extends' whereby the maturity of the debt is pushed out and the covenants are altered. I expect this trend to continue to an extent.

How can we change the old maxim that corporate groups live globally but die nationally?

Many have looked long and hard at corporate groups, and nobody as yet has come up with a simple solution that would always work and is not potentially unfair to some stakeholders. If a fair solution were to be found it would obviously be a very good thing.

But until then, and absent all group companies having the same CoMI, we have to accept the fact that different companies are going to have different regimes, and different creditors will have different legitimate expectations as to what the outcome will be under local law. That would be less fraught if all the regimes were of an equal standard and the courts were equally responsive but until then I fear we are just going to have to grapple with the problems thrown at us.

Where are we headed in terms of bank crisis resolution?

"I have been left disappointed by the recent UK Supreme Court decision in *Rubin* and *New Cap*"

Bank resolution is a huge project. The ideal would be to have in place complete recognition and enforcement resolution procedures flowing from the CoMI of the bank. But the truth is banks are just so politically important that it is going to be hard to achieve. Certainly, the politicians in one jurisdiction can be forgiven for being a bit reluctant to cede total control over the fate of a bank branch to somebody in a different country without adequate safeguards in place. Those will have to be negotiated.

It is hoped that in due course all the national regulatory authorities relevant to any particular institution will know how that financial institution is made up, and have a checklist in place as to what would need to be done over a weekend if a problem were to surface on a Friday – so a solution blueprint, if you like. That is an admirable goal, but I think we have to accept it will take years to achieve. However, that is no reason not to try. We have to accept that bank resolution is crucial. INSOL through the PSTF has recommended this to the G20 as a focus although I rather suspect we are not the only ones!