FORUM SHOPPING IN CROSS-BORDER INSOLVENCY CASES

- EXAMINING THE ROLE OF COMI AND THE DESIRABILITY OF ENGLAND AND WALES AS A FORUM-

By Lili Hanna Feher

Submitted to

Central European University
Department of Legal Studies

Supervisor: Professor Tibor Tajti

Vienna, Austria

2022

Abstract

The European single market has allowed businesses to freely and with relative ease expand their presence, conduct commercial activities, and hold assets across EU Member States.[1] When such companies become insolvent, the ensuing proceedings must grapple with the problem of the presence of assets and creditors across different jurisdictions. The European Insolvency Regulation[2] was adopted to ease this process by providing a legislative framework for handling cross-border insolvency cases[3]. Importantly, the Regulation adopts the "Centre of Main Interest" (henceforth referred to as COMI) rule to determine which member state has jurisdiction over insolvency proceedings that affect creditors and assets from more than one jurisdiction. COMI is not fully defined in the Regulation itself, while some presumptions that point in favour of a specific jurisdiction are included, COMI is a concept that was largely developed and shaped by the Court of Justice of the European Union[4].

The forum of insolvency proceedings matters, because the laws that govern the proceedings are the laws of the country that has jurisdiction over the issue[5] (*i.e.*, the *lex fori*). Applicable law makes the question of jurisdiction paramount, and consequently, gives COMI its key importance. In the past, there have been numerous cases where insolvent parties have manipulated the COMI rule to their benefit, allowing them to select a more favourable jurisdiction for the insolvency proceedings to be conducted[6]. This is a phenomenon called

[1] Council Regulation (EU) 2015/848, Recital 4
[2] Council Regulation (EC) No. 1346/2000
[3] Council Regulation (EC) No. 1346/2000, Recital 2
[4] Wessels B and Kokorin I, *European Union Regulation on Insolvency Proceedings: An introductory analysis* (American Bankruptcy Institute 2018), pp. 26-28
[5] Council Regulation (EC) No. 1346/2000, Article 4 *and* Council Regulation (EU) 2015/848, Article 7
[6] Ringe W-G, "Forum Shopping under the EU Insolvency Regulation" (2008) 9 European Business Organization Law Review 579, p. 2

forum shopping, a process whereby a party to a legal action manipulates rules of jurisdiction to gain access to a forum perceived as more advantageous[7]. As a result, in 2017, certain changes were adopted by the recast European Insolvency Regulation[8] to curtail forum shopping[9].

This thesis consists of two main parts; the first half gives an overview of the content of COMI and the evolution of European insolvency law to answer the questions: *how is forum shopping executed and what are the driving factors behind it*. This entails an inquiry into the factors that make a country's insolvency regime attractive, an analysis that was in part informed by empirical information collected from insolvency practitioners. The second half examines the desirability of the jurisdiction of England and Wales, paying special attention to the effects of Brexit and advancements made by EU law in the field of restructuring. Through the case study of England and Wales, this thesis outlines the factors that make a jurisdiction appealing, and the factors that harm a forum's competitivity on an EU level. The analysis will lead to the conclusions that due to Brexit and some key changes made to EU law, England and Wales is no longer an attractive forum for insolvency proceedings for EU actors.

[7] Black HC, Nolan JR and Nolan-Haley JM, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black. 6th Ed.* (West 1990)
[8] Council Regulation (EU) 2015/848
[9] Council Regulation (EU) 2015/848, Recital 29

Table of Contents

I. Introduction

i. Introduction to the Main Concepts of this Thesis

The European Single Market has allowed businesses to freely and with relative ease expand their presence, conduct commercial activities, and hold assets across EU Member States.[10] The European economy is now more interconnected than ever, and it is common practice for a company to be registered in one state but conduct business and hold assets either primarily in another state or in various Member States[11]. When such companies become insolvent — *i.e.,* the company's liabilities exceed its value, or a company is unable to pay its debts as they fall due[12] — cross-border insolvency proceedings may be initiated. What differentiates cross-border insolvencies from domestic insolvencies is that with the former, an insolvent debtor's creditors and/or assets are located outside of the debtor's domestic jurisdiction[13]. This creates several legal complications for policy makers. Insolvency proceedings usually involve several steps: the identification of a debtor's assets, the management of such assets, avoidance of transactions — for example of fraudulent or preferential transactions[14] — liquidation of assets, and some systems provide opportunities for restructuring and other out-of-court agreements between debtors and creditors. These processes become tremendously more complicated in cross-border proceedings for both legal and practical reasons.

Despite the heavy interconnectedness of European businesses, there is no uniform European insolvency law as such. Each Member State has its own rules and procedures that concern debtors that are unable to pay. Some legal systems distinguish between categories of debtors

[10] Council Regulation (EU) 2015/848, Recital 4
[11] Council Regulation (EU) 2015/848, Recital 4
[12] Black HC, Nolan JR and Nolan-Haley JM, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black. 6th Ed.* (West 1990)
[13] Proposal for a Regulation of The European Parliament and Of The Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (Strasbourg 12.12.2012) p. 2
[14] Note for example the types of avoidable transactions under UK law, whereby transactions made at an undervalue, made fraudulently, without proper authority, or illegally, may be avoided. *See in the Insolvency Act 1986 sections 238-246*

in different ways (for example while Belgium has different bankruptcy procedures for traders and consumers, the law of Ireland has a uniform procedure[15]) and countries have varying timetables for the administrative steps taken in bankruptcy, and some jurisdictions are more liquidation-oriented than others[16]. Finally, since cross-border insolvencies concern actors from several jurisdictions, judgments made against a debtor's assets in one country must be enforceable in other jurisdictions as well.

The first European Insolvency Regulation (EIR)[17] was adopted in 2000 to address these pertinent questions posed by cross-border insolvency. Hoping to secure greater protection for creditors and introduce a more integrated, European perspective to the field of insolvency law, a directly applicable legislative framework was passed for the handling of cross-border insolvency cases[18]. Amongst other things, the Regulation provides rules that determine jurisdiction over proceedings, and it also put in place a system for the effective and fast recognition and enforcement of insolvency judgments within the EU[19]. While the Regulation represents an important step in the evolution of insolvency law within the EU, it did not erase the often-major differences between European insolvency regimes, it merely provided a framework for their co-operation. Different systems come with different priorities and benefits for the involved parties, so the applicable law in proceedings importance. This is determined by the forum of the proceedings[20].

[15] Wessels B and Kokorin I, *European Union Regulation on Insolvency Proceedings: An introductory analysis* (American Bankruptcy Institute 2018), p. 18
[16] M Bütter, Cross-Border Insolvency under English and German Law (2002) Oxford U Comparative L Forum 3 accessible at ouclf.law.ox.ac.uk
[17] Council Regulation (EC) No. 1346/2000
[18] Council Regulation (EC) No. 1346/2000, Recital 2
[19] Council Regulation (EC) No. 1346/2000, Recital 22 *and* Chapter 2
[20] Council Regulation (EC) No. 1346/2000, Article 4 *and* Council Regulation (EU) 2015/848, Article 7

The Regulation applies the "Centre of Main Interest" presumption (henceforth referred to as COMI), to determine which member state has jurisdiction over the proceedings[21]. COMI is not clearly defined in the 2000 Regulation itself, while some presumptions that point in favour of a specific jurisdiction are included[22], COMI is a concept that was largely developed and shaped by the Court of Justice of the European Union (henceforth CJEU)[23] and it is known as a concept that is flexible, and perhaps easy to manipulate[24].

As posited above, the forum of insolvency proceedings matters, because the laws that govern the proceedings are the laws of the country that has jurisdiction over the issue[25]. Applicable law makes the question of jurisdiction paramount and, consequently, gives COMI its key importance. In the past, there have been numerous cases where insolvent parties have manipulated the COMI rule to their benefit, allowing them to select a more favourable jurisdiction for the insolvency proceedings to be conducted[26]. This is a phenomenon called forum shopping, a process whereby a party to a legal action manipulates rules of jurisdiction to gain an advantage[27]. As a result, in 2017, certain changes were adopted by the now Recast European Insolvency Regulation to curtail forum shopping[28].

ii. Proposal and Methodology

[21] Council Regulation (EC) No. 1346/2000, Article 3
[22] Council Regulation (EC) No. 1346/2000, Recital 13
[23] Wessels B and Kokorin I, *European Union Regulation on Insolvency Proceedings: An introductory analysis* (American Bankruptcy Institute 2018), pp. 26-28
[24] Ringe W-G, "Forum Shopping under the EU Insolvency Regulation" (2008) 9 European Business Organization Law Review 579, p. 14
[25] Council Regulation (EC) No. 1346/2000, Article 4 *and* Council Regulation (EU) 2015/848, Article 7
[26] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (Strasbourg 12.12.2012) pp. 3-4
[27] Black HC, Nolan JR and Nolan-Haley JM, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black. 6th Ed.* (West 1990)
[28] Council Regulation (EU) 2015/848, Recitals 29, 31, 46

The aim of this thesis is to uncover and explain the driving forces behind the phenomenon of forum shopping in cross-border insolvency proceedings within the EU and build on these underlying rationales to predict the popularity of the forum of post-Brexit England and Wales. It is argued in this thesis that due to jurisdictional and practical considerations, England and Wales should no longer be regarded as an attractive insolvency forum for forum shoppers.
The legal and jurisdictional focus of this paper is that of the law of the European Union and the law of the UK[29], while occasionally references are made to individual insolvency regimes of EU Member States.

Cross-border activities and jurisdictional concerns are pertinent contemporary topics in light of the disruption caused by Brexit, while insolvency re-emerged as a major topic due to the economic disruption caused by the Covid-19 pandemic[30]. Over two years post- "Brexit Day", some consequences of the UK's exit from the EU are still unclear, and academics, practitioners and legislators are working towards filling in the gaps left in the two legal and economic systems. This paper intends to contribute to this process of working towards greater certainty, by predicting the decline of the popularity of England and Wales as a forum for insolvency, in light of the known effects of Brexit and the EU's recent legislative advancements.

[29] N.B.: The UK is made up of three separate legal systems (England and Wales, Northern Ireland, and Scotland). Some legislation is effective in all three legal systems, such is the case with the UK's insolvency and restructuring regime (*see for example the Corporate Insolvency and Governance Act 2020*). Each legal system has separate courts; however, decisions of the Supreme Court of the United Kingdom bind all three legal systems. This essay makes references to the UK's insolvency regime while it focuses on the jurisdiction of England and Wales. The reasons for this are the importance of London as a business hub, and the fact that English and Welsh judgments are cited in this essay. UK, and England and Wales are not, and cannot be, used interchangeably. In this thesis, UK law will refer to UK-wide legal regimes, while the law of England and Wales refers to law born out of the interaction of UK law and local jurisprudence. Finally, whenever the terms "England" or "English law" are used in this paper, they should be understood as to refer to "England and Wales" and "the laws of England and Wales".

[30] "Insolvency and Debt Overhang Following the COVID-19 Outbreak: Assessment of Risks and Policy Responses" (2020) OECD Policy Responses to Coronavirus (COVID-19)

This thesis draws on judicial, legislative, academic, and empirical sources to develop its ideas and conclusions. Empirical data was collected from insolvency practitioners active in Central Europe. Some practitioners have over 20 years of experience, and the group interviewed by this author has expertise in a wide range of European and global insolvency systems. While the practitioners interviewed by the author are well-suited to underline the key identifiers of well-functioning legal systems and provide predictions in terms of trends in forum shopping activities, the subjective and unquantifiable nature of this data must be noted. For these reasons, the thesis primarily relies on legal and academic sources, and no scientific inferences are drawn from practitioners' views alone.

iii. Structure of this Thesis

This thesis consists of two main parts; the first half enquires into the reasons behind the phenomenon of forum shopping, *i.e.,* what factors drive parties to gravitate towards one insolvency regime over another. This analysis is undertaken in two main steps. First, by giving an overview of the major developmental stages of EU law on insolvency and by explaining the European autonomous concept of COMI. The second half of this thesis illustrates the criteria that make an insolvency forum attractive through the example of England and Wales, and examines whether the forum has lost its popularity in light of Brexit and certain advancements made in the field of EU law.

II. Examining the Role of COMI - The *How* and *Why* of Forum Shopping

iv. The European Insolvency Regulations

Before substantive analysis into COMI can be undertaken, some key features of the recast[31] of the European Insolvency Regulation must be recounted. The Recast Regulation repeals[32] the 2000 Regulation[33], and it applies to insolvency proceedings initiated on or after 26 June 2017[34]. It applies to all insolvency proceedings where the debtor's COMI is situated within an EU Member State (except for Denmark which opted out of the Regulation)[35]. The birth of the Recast was to a large extent prompted by extensive and often abusive forum shopping activities observed under the old European insolvency regime[36], and the vague and overly flexible concept of COMI was identified as one of the main sources of this issue[37].

Article 3(1) of the recast Regulation provides that main insolvency proceedings must be conducted in the jurisdiction in which the debtor has its "centre of main interest". COMI is a concept that also exists in UNCITRAL Model Law[38]; however, it carries an autonomous meaning at EU law[39]. One of the main changes that the Recast implements compared to the 2000 Regulation is that it provides in its main text — in Article 3 — that a debtor's COMI shall be presumed to be the jurisdiction where that debtor regularly conducts the administration of its interests and does it in a way that is ascertainable by third parties. For companies and legal persons, that jurisdiction is presumed to be the registered office of that entity. This is different from the old regulation where although similar guidance of the meaning of COMI was offered in Recital 13, it was not an authoritative provision.

[31] Council Regulation (EU) 2015/848
[32] Council Regulation (EU) 2015/848, Article 98
[33] Council Regulation (EC) No. 1346/2000
[34] Council Regulation (EU) 2015/848, Article 84
[35] Council Regulation (EU) 2015/848 Recitals 25, 88
[36] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (Strasbourg 12.12.2012) pp. 3-4
[37] Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (Strasbourg 12.12.2012) p. 3
[38] For example, see The UNCITRAL Model Law on Cross-Border Insolvency (1997) (MLCBI), Article 26
[39] *Eurofood IFSC Ltd.* Case C-341/04 [2006] ECR I- 3813

Importantly, the Recast Regulation also introduced a 3-month "suspect period", which effectively serves to prevent forum shopping activities by displacing the "registered office" presumption in cases where the debtor has moved its registered office within 3 months before the proceedings have been initiated[40]. Due to these improvements, forum shopping has become less prevalent since the introduction of the Recast Regulation[41]. Of course, the jurisprudence of the CJEU is still at the centre of understanding the content of COMI, none the less because the Recast Regulations served to codify some key decisions of the Court[42].

v. The Meaning and Content of COMI

Since the introduction of the 2000 Insolvency Regulation, the CJEU has continued to clarify the meaning of COMI and strengthen the regime by curtailing abusive forum shopping. The *Eurofood*[43] case, although decided under the old insolvency regime, is still regarded as one of the most informative cases on the content of the COMI rule[44]. In *Eurofood,* the Court provided that COMI bears an autonomous meaning at EU law, and it stressed the presumption that a company's place of registration defined its COMI, even if — as in that case — the parent company was incorporated elsewhere. The Court also ruled that the presumption could only be rebutted if it can be shown that the administration of a debtor's interests takes place in a state other than where the company was registered — *e.g.,* as is the case with *"brass plate companies*[45]*"*.

[40] Council Regulation (EU) 2015/848, Article 3 (1)
[41] Lazić Vesna, Stuij S and Ringe WG, *Recasting the insolvency regulation: Improvements and missed opportunities* in "Insolvency Forum Shopping, Revisite," pp. 11-19 (TMC Asser Press 2020)
[42] *For example,* Article 3 codifies key aspects of the *Eurofood* (ibid) judgment, such as the "transparent and observable by third parties" standard
[43] Eurofood IFSC Ltd. Case C-341/04 [2006] ECR I- 3813
[44] Wessels B and Kokorin I, *European Union Regulation on Insolvency Proceedings: An introductory analysis* (American Bankruptcy Institute 2018), p. 26
[45] The term describes a legally constituted company that lacks substantive connection to the place of incorporation. *See* Inspire Art Case-C-167/01

Shortly after *Eurofood*, followed the case of *Daisytek*[46] which introduced two key advancements. *Daisytek* concerned the insolvency of a group of companies, the parent group of which was in England and its European branches were located in Germany and France. English proceedings for administration were filed by the main debtor with the aim to avoid liquidation as that would have led to a poorer outcome for the debtor company. French and German proceedings were also initiated based on the premise that the winding-up of subsidiaries should be separated from the English proceedings. A series of court proceedings followed whereby each national court tried to establish its own jurisdiction under the COMI rule. Finally, after a complex string of proceedings and an English administrator's intervention in Germany, the debtor's COMI was found to have been in England, a decision with which the Cour de Cassation also concurred. After *Daisytek*, the CJEU case of *Interredil*[47] confirmed the position taken by the Daisytek justices and reaffirmed that COMI should advance transparency, meaning that in their analysis, courts should look for the jurisdiction where a company administers its interest on a regular basis in a way that is identifiable by third parties. This clarification to the COMI presumption was finally codified in Article 3 (1) of the Recast Regulation.

Now that this thesis has given a brief overview of the COMI rule to illuminate the mechanics of forum shopping, it will turn to the reasons that drive debtors to engage in it.

vi. Examining the Characteristics of an Attractive Insolvency Regime

[46] In the Matter of Daisytek-ISA Limited ISA [2003] 5 WLUK 491 [2003] BCC 562 [2004] BPIR 30 [2003] C.L.Y. 2394 (16th May 2003)
[47] Interedil Srl v Fallimento Interedil Srl Case C-396/09 [2011] ECR I-09915

As it has been noted in this essay, national laws governing insolvencies vary greatly within the EU. Insolvency practitioners interviewed[48] by this author have identified some key considerations that make an insolvency regime attractive. These were the speed and efficiency of proceedings, and a regulatory "attitude" that fosters entrepreneurship and minimises bankruptcy stigma by focusing on restoring the debtor to an economically viable position as soon as possible, rather than trapping the person or legal entity in a state of insolvency[49]. In practice, these considerations can be broadly categorised in two groups, the first referring to the efficient and timely rescue of insolvent businesses, the second enumerating considerations relating to the rule of law and general considerations of fairness. The first category describes a legal regime that permits preventative restructuring and rescue of insolvent businesses, in ways that promote the time-efficient resolution of the insolvency. This can be done by systemically encouraging creditors and debtors to reach a settlement, by providing the option to impose reorganisation plans of creditors (cram down), and by setting relatively short duration terms to resolve the state of insolvency. The latter is a crucial factor considering that some countries are less efficient at resolving the administrative steps of insolvency and the process may take considerably longer in jurisdictions like Germany, compared to the UK[50]. Slower-moving systems effectively trap the debtor in an economically unviable state. As one of the author's interview subjects has put it: *"After all, insolvency is like an illness, like a [state of] clinical death from which the patient has to recover back to healthy life, not to die."*[51]. An effective insolvency system should also allow for certain debtors to maintain control over their business activities (*i.e,* debtor in possession[52]) allowing

[48] Interviews 1-7, reflecting the opinions of insolvency practitioners of varying seniority, licensed to practice in more than 6 European jurisdictions. *See the complete interviews in Appendix 1.*
[49] Interviews number 1-7, *see in Appendix 1*
[50] M Bütter, Cross-Border Insolvency under English and German Law (2002) Oxford U Comparative L Forum 3 accessible at ouclf.law.ox.ac.uk
[51] Interview number 3
[52] Debtor in possession is a US law concept that describes an arrangement whereby the management of the insolvent company is retained by the debtor and no insolvency trustee or administrator is appointed. (*see in* Black HC, Nolan JR and Nolan-Haley JM, *Black's Law Dictionary: Definitions of the Terms and Phrases of*

them to restabilise financially and become better-placed to repay creditors. Creditors' rights are of course of great importance; hence it is apposite to note that restructuring does not exclusively serve the debtors. Effective restructuring solutions allow for better preservation of assets that can then be used to repay creditors[53] — this is especially true for businesses that produce goods, since specialised equipment and raw materials or semi-complete products represent much lower value in liquidation than if the facility remains in operation.

The second category relates to concerns around the transparency and fairness of the proceedings. Practitioners interviewed by this author have expressed concerns regarding conducting proceedings in certain Member State jurisdictions. By way of example, an interviewee has noted the jurisdictions of Bulgaria and Croatia[54], where the transparency of proceedings is generally seen as low, and the cooperation of insolvency trustees is not easily secured. This category also includes considerations of fairness, practitioners have stressed the importance of striking a functional balance between the interests of debtors and creditors, keeping in mind that a heavily creditor-focused regime may result in more instances of liquidation (that ultimately often produces a poorer outcome for both interest groups) and debtor-focused regimes leave creditors exposed and often uninvolved in key decision-making[55].

In conclusion, the two central aspects to be understood about forum shopping are its mechanics and the driving forces behind it. As for the mechanics of forum shopping, it was noted that while this activity had been more prevalent under the old insolvency regime, the

American and English Jurisprudence, Ancient and Modern by Henry Campbell Black. 6th Ed. (West 1990)). The UK equivalent of debtor in possession is the grant of a moratorium period that allows while the debtor to maintain control over the assets while restructuring negotiations are underway. *See Corporate Insolvency and Corporate Governance Act 2020, chapters 1-6*

[53] V Jourová, *Early restructuring and a second chance for entrepreneurs A modern and streamlined approach to business insolvency* European Commission Fact Sheet (2019)

[54] Interview number 4

[55] Interview 2

Recast has considerably narrowed the opportunities to engage in it. This has been done by strengthening the COMI presumptions by way of incorporating them into the Regulation's main text, and by putting in place a 3-month-long "suspect period" which displaces the registered office presumption[56]. This rule blocks companies from engaging in forum shopping by re-registering their main office in their preferred jurisdiction. This section has also provided a detailed overview of the factors that make a certain insolvency regime attractive — these were characteristics that are indicative of an entrepreneur-friendly, but balanced and transparent system. It is crucial to understand what factors drive parties to engage in forum shopping not just to protect creditors' rights, but also to identify how a legal system can be improved and become more efficient and conducive to economic activities.

III. Examining England and Wales

The first half of this thesis looked at the phenomenon of forum shopping within the EU by looking into its mechanics through the COMI presumptions and examining the driving force behind it by enumerating factors that make an insolvency regime attractive. This section will take the jurisdiction of England and Wales as a case study to attach concrete examples to the considerations outlined above by the practitioners interviewed by this author. The author has opted to select England and Wales as an example since the jurisdiction has been traditionally considered very attractive for parties to insolvency[57]. Finally, the thesis will enquire into the contemporary position of England and Wales and examine whether it can still be regarded as an attractive forum or whether Brexit and other factors have harmed its competitiveness.

vii. England and Wales

[56] Council Regulation (EU) 2015/848, Article 3 (1)
[57] McCormack G, "Jurisdictional Competition and Forum Shopping in Insolvency Proceedings" (2009) 68 The Cambridge Law Journal, p. 183

For decades, the United Kingdom has been regarded as one of the most prominent business centres of the EU[58]. This is equally true in the field of insolvency. Around 2010, England and Wales was rapidly becoming the restructuring capital of the EU[59], and as it had been noted by academics and practitioners, numerous companies have been observed to shift some of their operations or relocate their registered office to the jurisdiction prior to their filing for insolvency in that country — in other words, engaging in the act of forum shopping.[60]

viii. Overview of Key Cases

The attractiveness of England and Wales is also demonstrated by some prominent CJEU cases, namely that of *Deutsche Nickel*[61]*, Schefenacker*[62] and *Hans Brochier*[63].

In *Hans Brochier*, the directors of Hans Brochier Holdings Limited voluntarily appointed English administrators over the company's assets on the basis that the company's COMI was in England. The same day, upon the company's employees' petition, a German court also appointed an insolvency administrator over the company. The English administrators who were originally under the impression that COMI was in England, decided to petition the court to make a declaration on the issue. While in the end the English Court decided that COMI was indeed in Germany, it is interesting to observe what was essentially a "race to the courthouse" by the directors and the employee petitioners alike to grab the jurisdiction that was more favourable to them, which from a debtor's perspective was England.

---

[58] *Economic Value of English Law* Report prepared for LegalUK (2021) "*The report establishes that English law is of value well beyond the legal sector. In fact, English law annually underpins hundreds of trillions of pounds of business activity nationally and internationally."*

[59] McCormack G, "Jurisdictional Competition and Forum Shopping in Insolvency Proceedings" (2009) 68 The Cambridge Law Journal, p. 183

[60] McCormack G, "Jurisdictional Competition and Forum Shopping in Insolvency Proceedings" (2009) 68 The Cambridge Law Journal, pp. 183- 187

[61] Nickel & Goeldner Spedition Case C-157/13

[62] Re Schefenacker plc, Case No. 07-11482

[63] Hans Brochier Holdings Limited (in administration) (unreported, 8 December 2006)

Note the famous *Schefenacker case* as an example for why debtors may opt for English jurisdiction. In *Schefenacker*, a German company relocated itself (at least on paper) to the UK by converting itself into a limited partnership. A UK incorporated company entered this partnership and the other partners exited so that the "partnership" assets and liabilities remained with the original company. In this case, the attractiveness of England and Wales is shown by the fact that the directors committed to converting the company into a Limited Partnership in order to successfully relocate the proceedings to England.

Deutsche Nickel is another prominent example for debtors shifting their COMI in favour of England. In that case, the company established an English parent company, to which the assets of the German subsidiary were transferred. The main incentive behind the relocation of the company's COMI was to allow for a debt for equity swap[64], a process existing at English law which permits creditors to convert their rights into equity in the company[65].

It should also be noted that the motivation for insolvent parties to relocate to England was not unilateral, the English courts also encouraged this practice by taking an expansive approach to applying the COMI presumptions. This practice can be observed from the case of Daisytek where while the COMI was ultimately decided to be in Germany, comparatively little weight was placed on the fact that the company concerned was incorporated in a different country.

ix. Factors that have made England and Wales an attractive forum in the past:

The legal system of England and Wales neatly illustrates what makes a good insolvency regime. To recap, in the previous section this thesis noted some characteristics of a good

[64] Debt-equity swap allows creditors of a company to convert their interest into ownership in the company. This way the restructured corporation is able to reduce its outstanding debt while the creditors receive something of value, namely stake in the company.

[65] Bork R, *Rescuing companies in England and Germany* (Oxford Univ Pr 2012)

system that practitioners prioritised. These were: fast and efficient resolution of insolvency, opportunities for restructuring and support for the creation of an agreement between debtor and creditors, the expertise of the courts and transparency and fairness of proceedings. These factors can all be observed in the English system.

First, practitioners interviewed by this author who have had experience with the UK's insolvency system, commend it for its speed and efficiency[66]. A swift resolution of insolvency serves debtors and creditors alike[67] and it also helps minimise the bankruptcy stigma, which helps insolvent actors try again and hopefully succeed in their next venture without being labelled as risky or imprudent actors.

Perhaps most importantly, the English insolvency regime is well-known for its leading restructuring opportunities. Prior to the implementation of the Restructuring Directive — discussed below — the opportunities for restructuring in continental Europe were scarce[68]. Most legal systems are heavily liquidation-oriented, a process by which business assets are disposed of, and corporate entities, that may often still be rehabilitated to an economically viable state, are dissolved. This rigid attitude creates higher risk for entrepreneurs and helps perpetuate the bankruptcy stigma alive[69]. The UK on the other hand put in place a restructuring system that is considered modern and entrepreneur friendly[70]. One feature of England's restructuring system that was highlighted by practitioners interviewed was the scheme of arrangement under Part 26 of the Companies Act. This section of the Act allows for creditors and debtors to agree upon a reorganisation plan which they can proceed with even in the face of dissent from creditors, by way of cramdown. The above-mentioned debt

[66] Interviews 1,2 and 7

[67] M A McGowan and D Andrews, *Insolvency Regimes and Productivity Growth: A Framework for Analysis,* Economics Department Working Papers No. 1309 (2016), abstract

[68] M A McGowan and D Andrews, *Insolvency Regimes and Productivity Growth: A Framework for Analysis,* Economics Department Working Papers No. 1309 (2016), abstract p.12

[69] *Ibid.* p. 29

[70] Armour J and Cumming D, "Bankruptcy Law and Entrepreneurship" (2008) 10 American Law and Economics Review 303, p. 36

for equity swap is also a noteworthy feature of the law of reorganisation, as it allows for creditors to convert their claims into stakes in the company. This process allows for viable companies to recover more swiftly and helps better align the interests of debtor and creditors[71].

As for expertise of courts and the rule of law, the courts of England are highly regarded by the international legal community. There is a general attitude that English courts are considered transparent, fair, and competent, and English insolvency administrators are also considered cooperative and skilled[72].

Finally, the English language is one of the most widely spoken languages both globally and within the EU. This increases the practicability and accessibility of England and Wales' legal regime, as foreign creditors may easily access information about the legal system's functioning and cost-intensive translator services may be avoided. Although it must be noted that the Netherlands has recently introduced a commercial court branch that operates in English[73], and perhaps other EU countries will follow.

It is clear that England and Wales has an attractive insolvency and restructuring system that echoes the criteria for a good legal regime enumerated by the interviewees of this author, too However, as it will be examined in the next section, there are broader structural forces that influence the attractiveness of an insolvency forum.

x. Post-Brexit England and Wales

[71] J Sime; Jukic, Anton. In: Zbornik Pravnog Fakulteta u Zagrebu, Vol. 65, Issue 3-4 (2015), pp. 505-536
[72] This attitude is also reflected in interviews number 1,2,7
[73] J Hummelen *Country Reports Updates from the Netherlands, Ukraine, Norway, Latvia, Italy* (Winter 2019)

Through a politically and legally arduous process, on 31 January 2020 the United Kingdom left the European Union. Brexit Day marked the end of the one-year-long "transitional period" that preserved the legal *status quo*. On that day, EU law in the UK split into two categories: retained EU law, and EU law that shall no longer apply in relation to the UK. The European Union (Withdrawal) Act 2018 provides a list of EU provisions that are "retained", meaning that they continue to form part of the UK's domestic law until they are revoked or modified. The list of retained law does not include the European Insolvency Recast, which means that cases initiated after 31 January 2020 will no longer be covered by the Regulation. This is a key consideration in assessing the position of post-Brexit England and Wales as an insolvency forum, because it removes several key advancements of the European insolvency regime. This means that *inter alia*, the recognition and enforcement of insolvency judgments will not be *automatic*, which may create delays and further costs for parties to the insolvency, lessening the desirability of the forum.

It is to be noted that English law has adopted the UNCITRAL Model Law on Cross-Border Insolvency, which is an instrument created to harmonise and streamline insolvency proceedings. It contains provisions for recognition and enforcement, however out of the 27 EU Member States, only 4 countries (Greece, Poland, Romania and Slovenia) have adopted the Model Law as of yet.

England and Wales is considered an attractive forum on a global scale. There have even been several instances where US debtors opted for the jurisdiction. In those cases, England has been known to assume jurisdiction over the proceedings with relative ease by using the "sufficient connection" test[74]. This has been done quite flexibly and the courts have been

[74] In the matter of Rodenstock GmbH [2011] EWHC (CHD) 1104 (Eng.) *and* In the matter of Tele Columbus

observed to assert jurisdiction over cases where the insolvent company merely had assets[75] or carried out business activities in England or when the debt instrument was governed by English law[76] and even if the restructuring negotiations took place there[77].
Examples for when English courts have been particularly lenient with asserting jurisdiction include cases where it was sufficient for the parties to amend the governing law and jurisdiction clauses in the contract[78]. In Re APCOA, while the Court warned against decisions to change the law governing the contract when the new choice of law "appears entirely alien to the parties" and issued a caveat against applying English law where the parties have no previous connection with it, it nevertheless conceded that as the law currently stands, it is a possible avenue for a jurisdictional gateway into England and Wales.

These cases suggest that forum shopping in favour of England and Wales is relatively simple, the threshold that must be satisfied is low, and the process can be sped up and simplified if companies begin incorporating clauses into their contract that provides that the liabilities or the debt instrument are covered by English law – in other words, English choice of law or choice of court agreements. What this means in practice is that more avenues are now open to the jurisdiction than under the European Insolvency Recast.

However, while forum shopping in favour of England and Wales may be simple and perhaps even simpler than under the European Insolvency Regime, it may not be a truly practicable or beneficial avenue for European parties anymore.

GmbH [2010] EWHC (Ch) 1944 (Eng.), *see also* *Re* La Seda De Barcelona SA [2010] EWHC (Ch) 1364 (Eng.).
[75] *Re* Heron International NV [1994] 1 BCLC 667 (Eng.)
[76] *Re* Rodenstock GmbH [2011] EWHC (Ch) 1104 (Eng.) *and Re* Vietnam Shipbuilding Indus. Grp. [2013] EWHC (Ch) 2476 (Eng.)
[77] A J Casey and J Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, Emory Bankruptcy Developments Journal, European Corporate Governance Institute - Law Working Paper No. 577/2021, (February 21, 2021), p.486
[78] Re APCOA Parking Holdings GmbH and others [2014] EWHC (Ch) 3849.

As it has already been noted, there are currently no EU-wide provisions for the recognition and enforcement of English insolvency decisions. It may be the case that this issue will be remedied as more European countries adopt the UNCITRAL insolvency regime, which envisages a simple system for application for recognition, however currently there are merely four countries that have adopted this instrument. Four countries out of twenty-seven Member States considerably narrows down a judgment debtor's access to quick enforcement considering the heavily interconnected nature of the EU market and the commonly observed distribution of assets amongst EU states. Furthermore, the Model Law's enforcement system is not based on the principle of mutual trust that Member States have undertaken to observe[79], therefore whether recognition and enforcement will be successful becomes considerably more unpredictable.

Another issue arises out of the lack of cooperation and lack of transparency. A key achievement of the EIR Recast is that once the COMI of a debtor is established, the main insolvency proceedings are identified, and while secondary proceedings may also be conducted, a hierarchy is established, carving out the capacities of the different administrators and courts[80]. The primary advantage of this system is that it coordinates European proceedings and allows for the effective handling of territorially distributed assets[81]. This level of cooperation is lost without the Regulation. Debtors may find it more confusing and burdensome to bring their case before UK courts if most of their assets and interests are within the European Union.

[79] Article 2 TEU
[80] REGULATION (EU) 2015/ 848 Recital 23
[81] *Ibid.*

Another important point is the gap-filling character of the EU's new restructuring regimes. Recently, an amendment to the EIR Recast and the Restructuring Directive 2021[82] were passed. Commentators have high hopes for these instruments, and these advancements have been said to revolutionise European insolvencies, implementing provisions that aim to promote entrepreneurship and reduce bankruptcy stigma[83].

The Restructuring Directive was created with the aims of putting in place a uniform preventive restructuring framework across Member States to help effectively rescue businesses[84]. The Directive is expected to modernise the heavily liquidation-oriented systems of EU Member States and offer a viable solution to the surge of insolvencies that ensued as a result of the Covid-19 pandemic. The Directive would achieve this by introducing mechanisms well-known from the UK and US systems, like allowing for debtors in possession to continue to administer their businesses and the possibility to overrule dissenting creditors (cross-class cram down)[85].

Commentators have differing views over the effectiveness of the Directive. For example, Eidenmüller viewed it as a missed opportunity[86] to truly transform the restructuring field of the EU, while others have called it a "game changer – if implemented correctly"[87]. One practitioner interviewed by this author welcomed the improvements it had made to

[82] DIRECTIVE (EU) 2019/1023
[83] https://www.schoenherr.eu/content/implementation-of-eu-restructuring-directive-room-for-policy-decisions/
[84] EU Commission, Proposal for a directive on Insolvency, Restructuring and Second Chance, Fact Sheet (22 November 2016)
[85] DIRECTIVE (EU) 2019/1023 Article 5 *and* Recital 57
[86] Eidenmüller H, "The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union" (2019) 20 European Business Organization Law Review 547 pp. 12-14
[87] https://www.schoenherr.eu/news/info-corners/restructuring-directive-info-corner/#:~:text=So%20it%20comes%20just%20in,for%20up%20to%20one%20year

Slovenia's insolvency system, remarking that it had turned it into one of the best-functioning restructuring systems in Europe[88].

Of course, one of the most attractive aspects of the UK's restructuring system is the availability of the debt-equity swap, which will not become available under the Restructuring Directive. For this reason, while the Directive should not be considered a completely gap-filling formula, it has introduced important advancements, which makes the EU's regime more competitive with the UK's. Finally, since the implementation period of the Directive has been extended to July 2022, the true significance of the Directive is yet to be seen.

To summarise, while the English restructuring and insolvency regime can still be considered an effective and attractive system, the desirability of the forum has been considerably reduced. Brexit has caused disruption to the private international law system that governs cross-border insolvencies. This means that European forum shoppers may no longer easily re-domicile their companies in England and Wales and the recognition and enforcement of judgments is no longer borderline-automatic. The cooperative features of the European Insolvency Regime that allow for main and secondary procedures to be conducted in an orderly hierarchical fashion are no longer effective in the UK, and access to information regarding existing European insolvency proceedings is not centrally available. A regime that substitutes for the harmonising and streamlining effects of the EIR Recast has not been put in place to this date and it is unpredictable whether it will be in the foreseeable future. Finally, advancements to EU law through the implementation of the restructuring directive has moved European insolvency laws towards a more modern and desirable system that offers better opportunities for the rescue of businesses.

[88] Interview number 7

IV. Conclusion

This thesis enquired into the question of what makes an attractive insolvency regime and whether England and Wales should still be considered one. This topic was explored through critically engaging with the phenomenon of strategic forum shopping, which can be considered a strong indicator of the desirability of an insolvency regime.

The thesis began by giving an overview of rationale behind the creation of a European insolvency regime and it looked at the key developmental stages of the concept of COMI, by examining selected CJEU jurisprudence. COMI played an important role in this thesis' analysis since that is the test used to determine the forum of the insolvency proceedings, and forum shopping occurs through the manipulation of this rule. After having explained the key concepts used in this paper and having given a brief overview of the European insolvency regime, the thesis focused on the characteristics of a good insolvency system.

To identify these features, the author relied on interviews conducted with practicing legal professionals specialised in the field of insolvency. The author collected information from practitioners from five Central-European countries with experience spanning over 20 European insolvency systems. These practitioners identified key considerations such as the speed, predictability and efficiency of proceedings, the availability for pre-insolvency out-of-court measures that allow for restructuring and the rescue of businesses and a legal climate that observes the rule of law.

These considerations were then taken and applied to the example of England and Wales and were found to be present in the legal system. This part was dedicated to the exploration of the

question: why England and Wales can be considered a well-functioning insolvency regime. The answer to which lies in the business-friendly attitude that allows for the rescue of businesses and restores debtors into an economically viable position within the admirably short time span of 12 months.

Finally, the thesis examined whether post-Brexit England and Wales may still be considered an attractive insolvency forum from a European perspective and arrived at the conclusion that it may not. The advantages offered by the English system are overshadowed by private international law complications such as lack of cooperation and automatic enforcement. Contemporaneous to the disadvantages created by Brexit, the European Union has made considerable advancements in the field of restructuring. While the effects of the Restructuring Directive have yet to be seen, and despite that it does not substitute for the debt-equity swap available in the UK, it introduces important pre-insolvency restructuring mechanisms that may make the EU's restructuring regime considerably more competitive.

V. Bibliography

Legislation

Companies Act 2006

Corporate Insolvency and Corporate Governance Act 2020

Council Regulation (EC) No. 1346/2000

Council Regulation (EU) No. 2015/848

Directive (EU) 2019/1023

Insolvency Act 1986

Treaty on European Union

Court Cases

Eurofood *IFSC Ltd.* Case C-341/04 [2006] ECR I- 3813

Hans Brochier Holdings Limited (in administration) (unreported, 8 December 2006)

Inspire Art Case-C-167/01

Interedil Srl v Fallimento Interedil Srl Case C-396/09 [2011] ECR I-09915

In the Matter of Daisytek-ISA Limited ISA [2003] 5 WLUK 491 [2003] BCC 562 [2004] BPIR 30 [2003] C.L.Y. 2394 (16th May 2003)

In the matter of Tele Columbus GmbH [2010] EWHC (Ch) 1944 (Eng.)

Nickel & Goeldner Spedition Case C-157/13

Re APCOA Parking Holdings GmbH and others [2014] EWHC (Ch) 3849.

Re Heron International NV [1994] 1 BCLC 667 (Eng.)

Re La Seda De Barcelona SA [2010] EWHC (Ch) 1364 (Eng.).

Re Noble Gr p. Ltd [2018] EWHC (Ch) 3092 (Eng.)

Re Rodenstock GmbH [2011] EWHC (Ch) 1104 (Eng.)

Re Schefenacker plc, Case No. 07-11482

Re Vietnam Shipbuilding Indus. Grp. [2013] EWHC (Ch) 2476 (Eng.)

Academic sources

A Kaczor, *Moving a Company's Comi to Achieve a Restructuring: Factors for Consideration* Amicus Curiae (2011)

A J Casey and J Macey, *Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars*, Emory Bankruptcy Developments Journal, European Corporate Governance Institute - Law Working Paper No. 577/2021, (February 21, 2021).

Commentary on the European Insolvency Regulation Reinhard Bork and Kristin Van Zwieten

Eidenmüller H, *The Rise and Fall of Regulatory Competition in Corporate Insolvency Law in the European Union* (2019) 20 European Business Organization Law Review 547

J Sime; Jukic, Anton. In: *Zbornik Pravnog Fakulteta u Zagrebu*, Vol. 65, Issue 3-4 (2015)

Kern in *McCormack, Gerard, Andrew Keay, Sarah Brown: European Insolvency Law. Reform and Harmonization*, Cheltenham, UK Northampton, MA, USA: Edward Elgar 2017. XVI, 487 s." (2018) 82 Rabels Zeitschrift für ausländisches und internationales Privatrecht 511

L. LoPucki in *The Case for Cooperative Terntonahty in International Bankruptcy* (2000) 98 Michigan Law Review 2216

Mark Arnold, *Truth or Illusion; COMI Migration and Forum Shopping under the EU Insolvency Regulation* (2013) 14 Bus L Int'l 245

M Bütter, *Cross-Border Insolvency under English and German Law* (2002) Oxford U Comparative L Forum

McCormack G and Bork R, *Security Rights and the European Insolvency Regulation* (Intersentia 2017)

Ringe W-G, "Forum Shopping under the EU Insolvency Regulation" (2008) 9 European Business Organization Law Review 579

Wessels B and Kokorin I, *European Union Regulation on Insolvency Proceedings: An introductory analysis* (American Bankruptcy Institute 2018)

X Kler *COMI Comity: International Standardization of COMI Factors Needed to Avoid Inconsistent Application Within Cross-Border Insolvency Cases,* American University Washington College of Law (2018)

Reports

Economic Value of English Law Report prepared for LegalUK (2021)

Hummelen *Country Reports Updates from the Netherlands, Ukraine, Norway, Latvia, Italy* (Winter 2019)

R3 Association of Business Recovery Insolvency Forum Shopping Report (July 2015)

Other Resources

Black HC, Nolan JR and Nolan-Haley JM, *Black's Law Dictionary: Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black.* 6th Ed. (West 1990)

EU Commission, Proposal for a directive on Insolvency, Restructuring and Second Chance, Fact Sheet (22 November 2016)

M A McGowan and D Andrews, *Insolvency Regimes and Productivity Growth: A Framework for Analysis*, Economics Department Working Papers No. 1309 (2016)

Presentation by Claudio Ceradini, Brussles 12 May 2017 at Strategy Legal Tax Conference

Proposal for a Regulation of The European Parliament and Of The Council amending Council Regulation (EC) No 1346/2000 on insolvency proceedings (Strasbourg 12.12.2012)

V Jourová, *Early restructuring and a second chance for entrepreneurs A modern and streamlined approach to business insolvency* European Commission Fact Sheet (2019)

https://www.bakermckenzie.com/en/insight/publications/2022/05/new-european-restructuring-schemes-update-may-2022

https://www.schoenherr.eu/content/implementation-of-eu-restructuring-directive-room-for-policy-decisions/

https://www.herbertsmithfreehills.com/latest-thinking/part-26a-restructuring-plans-most-significant-change-in-20-years#:~:text=Part%2026A%20of%20the%20Companies,in%20the%20%22relevant%20alternative%22.

https://cms.law/en/int/expert-guides/cms-expert-guide-to-restructuring-and-insolvency-law/united-kingdom

https://www.iflr.com/article/b1lsq9843c6xw7/dtek-shifts-high-yield-restructuring-options

https://www.mercerhole.co.uk/insights/the-european-insolvency-regulation-in-the-uk-after-brexit/

https://www.lexology.com/library/detail.aspx?g=a8161843-80b4-40ca-b46a-bd584c3f071e

VI. Annex: Collection of Interviews

These interviews were conducted by the author with insolvency practitioners in the Central-European region. The interviews are anonymised.

Interview 1

N.B.: this is a translation prepared by the author; the original language text can be found below.

Introductory note:

This is an interview I am conducting as part of my master's thesis research on the topic of the European insolvency regime and cross-border insolvency. Specifically, I would like to explore the question: what makes a national insolvency regime attractive to debtors. To aid my research, I would like to hear from practitioners who are willing to share their practical experience with me. I am mostly interested in collecting empirical information, the interview need not be constrained to objective data.

Finally, the interview is anonymous and the information that will inform my thesis will be anonymised. No identifiable data will be displayed in my final deliverables, the only information that I would make available would be the country of practice and level of experience/seniority.

The interview will be loosely structured, please feel free to share whatever you may find relevant to the topics we are about to discuss.

1. What is your area of practice?

   Insolvency, litigation, real estate law.

2. How long have you been working in this field for?

   25 years.

3. Have you ever worked with cross-border insolvency cases?
   N.B.: *This interview uses the UNCITRAL Model Law definition for* ***cross-border insolvency****: "a cross-border insolvency is one where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place"*

   Yes, I have attended numerous conferences on this topic, and I have participated (in a legal advisory capacity) in several proceedings. The latter usually involved the liquidation of some entities of international corporate groups. In my work, I represent, on a daily basis, foreign creditors in proceedings against Hungarian debtors. I also help Hungarian creditors assert their interests in proceedings against foreign debtors.

   a. If yes —> was it under the old European Insolvency Regulation or under the Recast regime (the latter applies to cases commencing on or after 26 June 2017)?

      Most [proceedings] took place under the old regime but of course we had cases under the new [regime] as well.

   b. How was the forum for the proceedings identified/was the COMI rule applied?
      Fortunately, in the cases we have encountered, there was no disagreement over the presumption that the registered office of the debtor coincided with their COMI. Of course, cases are known to us where attempts have been made to change the debtor's COMI - in the hope of securing advantages. However, the judicial proceedings that are concerned with these cases are of such complexity and so many factors are examined, that transferring COMI from a place where the debtor has transparently conducted its business in the past, to another jurisdiction, is *near- impossible*[89]. As most important factors [in the determination of COMI] I would identify – besides the place where the company's central administration takes place – the location of the tools of production, the inventory, the [residential] location of most employees, and I would also examine the tax residence of the debtor – these are all factors that cannot be changed overnight. Of course, there will be corporate entities of

[89] Inferred from context.

such structural and operational simplicity where this (*meaning relocation of COMI*) will be less complicated, but in general it is the registered office that indicated the place of COMI as long as this presumption is not rebutted (for example by transferring a corporation's registered office 6-12 months prior to the initiation of a liquidation procedure. There are also examples for systems where the legislator does not even tolerate domestic [forum shopping] and for a period of time, the courts of the (domestic) jurisdiction where the company was previously incorporated will remain competent over the proceedings.

c. Any comments/observations re COMI

It can be considered a rule that protects the creditor. As long as the creditor shows that the debtor is administering his business at a place other than where the debtor's registered office is, the creditor can initiate insolvency proceedings in the jurisdiction where the debtor likely keeps his valuable assets (*meaning where his actual COMI is*). Furthermore, the debtor may not [look for] a legal system that offers better contractual terms or where the rules protecting the creditor are weaker, than the legal system where his COMI is based. In summary, it blocks forum shopping.

4. Could you name the European insolvency regimes that you have been introduced to or have interacted with? (e.g.: Austrian, Hungarian etc….)

Besides my [current] job, for 13 years I was the head of the bankruptcy and reorganisation practice group of an international organisation called [redacted to maintain anonymity]. The organisation has circa 30 000 members, from 625 advisory firms, from 126 countries. During my time with the organisation, I had the opportunity to attend training sessions and conferences together with practitioners from all European and several international jurisdictions which gave me insight into several insolvency regimes. My experience with foreign legal systems was also broadened when I worked on cases together with some of these professionals. We also prepared publications for our clients outlining the key information about several foreign insolvency regimes. I found it very illuminating and useful to observe how one legal mechanism is applied differently across legal systems and to uncover the legislative intention behind the differing perspectives.

5. What makes a good insolvency/ restructuring regime in your opinion?
   The speed, predictability and effectiveness of the proceedings, and ultimately perhaps one of the most important factors is the possibility to compel the opening and conduct of these proceedings.
6. Could you rank these factors by importance?
   a. Expertise of the courts
   b. Availability of reputable insolvency practitioners
   c. Speed of proceedings
   d. Opportunities for restructuring
   e. Opportunities and support (legal and otherwise) for arriving at out of court agreements between creditors and debtor
   f. Something else (please specify)

   I apologise, I cannot not rank them, the presence of all these factors is equally necessary. In a rebellious spirit, I would put all of them in first place.
7. What is (or are) the most functional/appealing insolvency restructuring regime(s) within Europe?

[Within the EU] I would specifically note the German, Dutch, English and Irish systems. But outside of Europe we must talk about the USA, as a country that has extensive and serious historical experience and "know-how" in the field of insolvency law.

8. Do you have any experience with the UK's insolvency regime?
   yes
   a. If yes- do you feel like there is a fundamental difference between common law and civil law insolvency systems?
      i. If yes- what is it in your experience?
         Most importantly I would highlight that [in common law systems] there are regulatory procedures for the preparation of out-of-court arrangements and their most speedy acceptance. This idea is only now reaching Europe through the Restructuring Directive and even so it does not produce these results.

   b. Could you please note some positives and/or negatives about the insolvency regime?

It is a positive aspect that the parties may make [restructuring] arrangements more easily and faster than in other countries.

c. As a practitioner, do you feel like Brexit has made the UK as a forum for insolvency proceedings less desirable?
   Absolutely
   i. Please explain why- note the factors that influenced your view
   Shifting the seat of corporations [to the UK] has become much more complicated, thus forum shopping is harder to achieve for both legal entities and natural persons.

9. Have you ever encountered forum shopping (witnessed it, during your years as a trainee/junior/practitioner etc.)
   yes
   a. If yes- What was the target jurisdiction? The countries I listed for your previous question [Germany, Netherlands, England, Ireland] and "exotic" countries
   b. In your view, why was that jurisdiction favoured? Same as above, [the availability and ease of achieving out-of-court settlements] and the lack of substantive protection of creditors or the underdevelopment of such laws.

<u>Interview 1 – original</u>

Általános Tudnivalók:

A CEU mersterszakos hallgatója vagyok, nemzetközi gazdasgái jogot tanulok. A szakdolgozatomat az európai csődjogi rendszerről írom, ezen belül kifejezetten az a kérdés érdekel, hogy mi tesz egy nemzeti csődjogi rendszert kedvezővé, vonzóvá egy eladósodott személy/cég számára.

Amennyiben bármelyik kérdésre nem szeretne választ adni, vagy eszébe jutott valami más amit relevánsnak tart és szívesen megosztaná velem, akkor kérem jelezze. Ez egy lazán strukturált interjú, a kutatásom szempontjából nem fontos hogy szigorúan az előre összegyűjtött kérdéseim alapján haladjunk.

Az interjú anonim, önről és a többi interjú alanyról semmilyen személyes információt nem fogok feltüntetni a szakdolgozatomban.

Kérdések:

1. Mi az ön szakterülete?
   csődjog, perjog, ingatlanjog
2. Mennyi ideje foglalkozik ezzel a területtel?
   25 éve
3. Találkozott-e szakmai tapasztalatai során határon átnyúló fizetésképtelenségi eljárással?
   Igen, számos szakmai előadáson vettem részt ebben a témában és volt alkalmam több ilyen eljárásban is részt venni. Ez utóbbiak jellemzően valamilyen nemzetközi cégcsoport egyes társaságainak a felszámolását érintették. Munkám során napi rendszerességgel képviselek magyar adósokkal szemben külföldi hitelezőket és segítünk ugyanakkor magyar vállalatokat a külföldi adósaik elleni felszámolási eljárásokban igényt érvényesíteni.
   (A határon átnyúló fizetésképtelenség a kutatásom szempontjából a UNCITRAL Modelltörvény meghatározását követi, melyben úgy van definiálva mint olyan eljárás melyben az adós személynek/cégnek több mint egy országban van vagyona, vagy egy vagy több hitelező nem abban az országban lakik amelyben az eljárás zajlik.

Amennyiben igen:

   a. Az eljárás a „régi" fizetésképtelenségi eljárásról szóló EU-s rendelet alapján zajlott, vagy a 2017 június 26-án hatályba lépett újabb EU-s rendelet alapján?
      a legtöbb a régi alapján történt, de az új alapján is természetesen
   b. Mi alapján határozták meg az eljárás helyszínét (*forum*)? Illetve, alkalmazták-e a „fő érdekeltségek központja" (COMI) szabályt?
      Az általunk ismert ügyekben szerencsére nem volt abból vita, hogy az adós székhelye egybe esik-e a létérdekének központjával. Természetesen ismerünk próbálkozásokat ennek önkényes és előnyösebb elbírálást/feltételrendszert elérni kívánó megváltoztatására is, de az emiatt kialakuló bírósági viták, azért kellően összetettek ahhoz és jónéhány szempontot vizsgálnak ennek során ahhoz, hogy egy korábban hosszú időn keresztül központi ügyintézési helynek tekintett lokációt hirtelen egy másikra lehessen változtatni. A legfontosabb szempontok között említeném, a központi ügyintézés hely mellett, a termelő

eszközök, készletek, munkavállalók többségének a fizikai elhelyezkedését, de utalnék az adós adóalanyiságának a megítélésére is, mivel ezek mind olyan szempontok és tények, amelyek egyik napról a másikra drasztikus módon nem változtathatóak meg. Természetesen lehetnek olyan egyszerűbb szervezettel, működési feltételekkel rendelkező cégek is, amelyeknél ez nem ennyire bonyolult, de összességében általában a bejegyzett székhelyt vélelmezik a fő érdekeltségek központjának mindaddig, amíg tényekkel ennek az ellenkezője nem igazolható (pl. a felszámolási eljárás megkezdését megelőző 6-12 hónapon belüli székhelyáthelyezés). Látunk arra is példát, hogy országon belül sem tolerálja a jogalkotó az ilyet és az eljárás lefolytatására még meghatározott ideig a korábbi székhely szerinti bíróság lesz (marad) illetékes).

c. Van bármi megjegyzése, észrevétele, (egyéb) tapasztalata a „fő érdekeltségek központja" (COMI) szabály kapcsán?
   Hitelezőt védő szabálynak tekinthető, hiszen amennyiben a hitelező bizonyítja, hogy a székhelytől eltérő helyen folytat az adós ténylegesen vállalkozási tevékenységet, ott indíthat fizetésképtelenségi eljárást, ahol nagy valószínűséggel az adós értékesíthető vagyontárgyai is találhatóak, továbbá az adós nem kereshet a világon belül más olyan jogrendszereket, ahol a pl az egyezség kötési feltételek, vagy egyéb hitelezői érdekeket védő szabályok sokkal enyhébbek, mint pl. az adós addigi működése során a fő érdekeltségek központjának tekinthető országban. Összegezve, gátolja a forum shoping-ot.

4. Kérem nevezze meg azokat az európai csődjogi rendszereket melyeket megismert munkája során
   Napi munkám mellett a 126 országból 625 tanácsadó céget és közel 30 ezer munkavállalót tömörítő [az anonimitás megőrzése érdekében nincs feltüntetve] nevű nemzetközi szervezet csődjogi és reorganizációs munkacsoportjának voltam 13 évig a vezetője, így alkalmam nyílt minden európai és számos azon kívüli ország szakembereivel közösen folytatott képzéseken, konferenciákon, de közösen ellátott ügyek révén is bepillantást nyerni sok-sok más jogrendszeren belül működő fizetésképtelenségi eljárásokba, amelyekről az ügyfeleink számára a legfontosabb ismérveket felsorakoztató összefoglaló kiadványokat is készítettünk. Nagyon tanulságosnak és hasznosnak találtam egy-egy jogintézménynek eltérő

jogrendszereken belül történő alkalmazását és a szabályozási eltérések mögött meghúzódó jogalkotói megfontolásoknak is a megismerését.

5. Az ön véleménye szerint mitől lesz vonzó, jól működő egy ország csődjogi rendszere?
   Az eljárás gyorsasága, kiszámíthatósága, hatékonysága, végső soron a kikényszeríthetősége talán az egyik legfontosabb szempont. Fontos, hogy mind az adósok, mind a hitelezők a lehető leggyorsabban kaphassanak jogvédelmet, továbbá az, hogy a fókusz alapvetően a bajba jutott vállalkozások, de akár magánszemélyek gazdasági helyzetének a helyreállítására irányuljon és ne csak a fizetésképtelenségi helyzetbe került személyek és ügyek futószalagon történő bürokratikus befejezésére kerüljön sor inkább később, mint hamarabb. A szerkezetátalakítási irányelv azt gondolom, hogy egy jó lépés ebbe az irányba.
6. Kérem állítsa fontossági sorrendbe az alábbi tényezőket!
   a. A bíróság szakértelme
   b. Hozzáférés kimagasló/ismert csődjoggal foglalkozó szakemberekhez
   c. Az eljárás gyorsasága, hatékonysága
   d. Lehetőség hatékony restrukturálásra
   e. Lehetőség, illetve a jogrendszer támogatása, bíróságon kívüli megállapodás kötésére adós és hitelező között.
   f. Egy listán nem szereplő szempont

   Elnézést kérek, de ezt nem tudom teljesíteni, mert ezekre mind egyformán szükség van. Renitens módon mindegyiket megosztott első helyre tenném.! :)
7. Melyik (vagy melyek) a legjobban működő vagy legvonzóbb európai csődjogi rendszer(ek)?
   Ezek közül a német, holland, angol és ír csődjogot emelném ki. De Európán kívülről az USA-t muszáj megemlíteni, mint olyan országot, amelyn nagyon komoly történeti tapasztalatokkal és know-how-val bír a csődjogi szabályozás terén.
8. Van bármely tapasztalata az Egyesült Királyság csődjogi rendszerével?
   Amennyiben igen:
   Igen.
   a. Úgy érzi van jelentős különbség az angolszász és a kontinentális jogrendszerek között a fizetésképtelenségi eljárások szempontjából?
      i. Amennyiben igen, kérem fejtse ki ön szerint miben mutatnak meg ezek a különbségek! A legfontosabbként az emelném ki, hogy szabályozott

eljárásrend van egy csődegyezség bíróságon kívüli előkészítésére és annak a lehető leggyorsabb jóváhagyatására. Ez a fajta megközelítés még csak most érkezik meg Európába a szerkezetátalakítási irányelvvel és még így sem éri el ezt a fajta hatást.

b. Kérem soroljon fel pár pozitívumot és/vagy negatívumot az Egyesült Királyság csődjogi rendszeréről! Pozitívum hogy könyebben, gyorsabban teljesíthető feltételek vannak az egyezségkötésre, mint sok más országban.
c. Mit gondol a Brexit hatására kevésbé lett vonzó az Egyesült Királyság mint csődeljárási *forum*?
   Mindenképpen.
   i. Kérem emelje ki a tényezőket amelyek alapján véleményt alkotott az előző kérdésben!
      A vállalkozások székhelyáthelyezése komplikáltabbá, a forum shoping ezért nehezebbé válik mind a jogi, mind a magán személyek számára.

9. Találkozott valaha a *forum shopping* jelenségével? (Akár közvetetten, esetleg még gyakornokként)
   Igen.

   Amennyiben igen:

   a. Mi volt a célország? Az előző kérdésedre felsorolt országok [Németország, Hollandia, Anglia, Írország] illetve „egzotikus” országok
   b. Ön szerint miért azt a bizonyos országot tartották kedvezőnek? Amiket az előbb felsoroltam és a hitelezővédelmi szabályok hiánya, vagy jelentős kidolgozatlansága.

Interview 2

N.B.: this is a translation prepared by the author; the original language text can be found below.

1. What is your area of expertise?
   Hungarian and international insolvency law, litigation, arbitration
2. How long have you been working in this field for?
   15 years
3. Have you ever worked with cross-border insolvency cases? yes
   a. If yes —> was it under the old European Insolvency Regulation or under the Recast regime (the latter applies to cases commencing on or after 26 June 2017)? Both
   b. How was the forum for the proceedings identified/was the COMI rule applied? This [exercise] is usually just a formal reference to Article 3 (1) of the European Insolvency Regulation
   c. Any comments/observations re COMI
      Based on the old case law (Eurofood, Interedil) and the presumption in Article 3 (1) of the EIR recast, in most cases COMI coincides with the registered office, so even without [debating this point], the court usually comes to the right conclusion [meaning that the registered office usually matches the place where the debtor primarily administers his/her business]. [This question] more commonly comes up from the debtor's perspective -usually only theoretically- as a defence contesting the court's jurisdiction
4. Could you name the European insolvency regimes that you have been introduced to or have interacted with? (e.g.: Austrian, Hungarian etc….)
   Hungarian, English, German, Spanish
5. What makes a good insolvency/ restructuring regime in your opinion?
   In my experience it is foremost the speedy conduct of the proceedings. This is a key consideration for both reorganisation and liquidation proceedings.
6. Could you rank these factors by importance?
   a. Expertise of the courts [2]
   b. Availability of reputable insolvency practitioners [2]
   c. Speed of proceedings [1]
   d. Opportunities for restructuring [1]

e. Opportunities and support (legal and otherwise) for arriving at out of court agreements between creditors and debtor [1]
f. Something else (please specify): one factor that was not on this list is the efficiency of liquidation-type proceedings: protection of assets, "going concern"

7. What is (or are) the most functional/appealing insolvency restructuring regime(s) within Europe? English, Spanish
8. Do you have any experience with the UK's insolvency regime?
    a. Could you please note some positives and/or negatives about the insolvency regime? Positive aspects are the availability of pre-pack arrangements, the scheme of arrangements based on the Companies Act (noteworthy for its flexibility), and the expertise of the courts
    b. As a practitioner, do you feel like Brexit has made the UK as a forum for insolvency proceedings less desirable? yes
        i. Please explain why- note the factors that influenced your view Existing the EU's private international law system makes the recognition and enforcement of insolvency proceedings (e.g.: under Part 26A Companies Act) and corporate restructuring schemes very uncertain in EU Member States.
9. Have you ever encountered forum shopping (witnessed it, during your years as a trainee/junior/practitioner etc.) yes
    a. If yes- What was the target jurisdiction? In favour of Spain
    b. In your view, why was that jurisdiction favoured? [Because it has a procedure available for] conducting coordinated insolvency proceedings against a group of companies.

Interview 2 – Original

1. Mi az ön szakterülete? Magyar és nemzetközi fizetésképtelenségi jog, litigáció, arbitráció
2. Mennyi ideje foglalkozik ezzel a területtel? 15 év
3. Találkozott-e szakmai tapasztalatai során határon átnyúló fizetésképtelenségi eljárással? Igen

Amennyiben igen:

a. Az eljárás a „régi” fizetésképtelenségi eljárásról szóló EU-s rendelet alapján zajlott, vagy a 2017 június 26-án hatályba lépett újabb EU-s rendelet alapján? Is-is.
b. Mi alapján határozták meg az eljárás helyszínét (*forum*)? Illetve, alkalmazták-e a „fő érdekeltségek központja” (COMI) szabályt? Általában csupán formális utalás az EIR 3. cikk (1) bekezdésre.
c. Van bármi megjegyzése, észrevétele, (egyéb) tapasztalata a „fő érdekeltségek központja” (COMI) szabály kapcsán? A régi EIR esetjoga (Eurofood, Interedil) és az új EIR 3. cikk (1) bekezdésében foglalt vélelem alapján a COMI az esetek döntő többségében megegyezik a székhellyel, így a bíróságok bizonyítás nélkül is helyes eredményre jutnak általában. Inkább adósi oldalról szokott felmerülni – sokszor csak elméleti szinten – a joghatósági védekezés.

4. Kérem nevezze meg azokat az európai csődjogi rendszereket melyeket megismert munkája során! Magyar, angol, német, spanyol.
5. Az ön véleménye szerint mitől lesz vonzó, jól működő egy ország csődjogi rendszere? Tapasztalatom szerint elsődleges szempont a gyorsaság. Ez mind reorganizációs típusú eljárásoknál , mind pedig a likvidációs típusú eljárásoknál kulcskérdés.
6. Kérem állítsa fontossági sorrendbe az alábbi tényezőket! Szerintem mindegyik nagyon fontos
    a. A bíróság szakértelme 2
    b. Hozzáférés kimagasló/ismert csődjoggal foglalkozó szakemberekhez 2
    c. Az eljárás gyorsasága, hatékonysága 1
    d. Lehetőség hatékony restrukturálásra 1
    e. Lehetőség, illetve a jogrendszer támogatása, bíróságon kívüli megállapodás kötésére adós és hitelező között. 1
    f. Egy listán nem szereplő szempont Lényeges a likvidációs típusú eljárások hatékonysága is: asset-ek védelme, going concern értékesítés
7. Melyik (vagy melyek) a legjobban mőködő vagy legvonzóbb európai csődjogi rendszer(ek)? Angol, spanyol
8. Van bármely tapasztalata az Egyesült Királyság csődjogi rendszerével?
   Amennyiben igen:

a. Úgy érzi van jelentős különbség az angolszász és a kontinentális jogrendszerek között a fizetésképtelenségi eljárások szempontjából?
    i. Amennyiben igen, kérem fejtse ki ön szerint miben mutatoknak meg ezek a különbségek!
b. Kérem soroljon fel pár pozitívumot és/vagy negatívumot az Egyesült Királyság csődjogi rendszeréről! pozitív: pre-pack, a társasági jogi alapú scheme of arrangement lehetősége (rugalmasság), bíróságok felkészültsége
c. Mit gondol a Brexit hatására kevésbé lett vonzó az Egyesült Királyság mint csődeljárási *forum*? igen
    i. Kérem emelje ki a tényezőket amelyek alapján véleményt alkotott az előző kérdésben! Az uniós nemzetközi magánjogi rendszerből való kiszorulás jelentősen bizonytalanná teszi mind a fizetésképtelenségi jellegű eljárások (pl. Part 26A companies Act), mind a társasági jogi jellegű scheme-ek elismerését az EU-tagállamokban.

9. Találkozott valaha a *forum shopping* jelenségével? (Akár közvetetten, esetleg még gyakornokként)

   Amennyiben igen:

   a. Mi volt a célország? Spanyolo.
   b. Ön szerint miért azt a bizonyos országot tartották kedvezőnek? társaságcsoport elleni koordinált fizetésképtelenségi eljárás.

Interview 3

1. What is your area of expertise? My area of practice includes corporate law, mergers and acquisitions, insolvency, intellectual property and GDPR.
2. How long have you been working in this field for?
   I have been working in these areas of law for almost 3 years.
3. Have you ever worked with cross-border insolvency cases?
   I have not dealt with cross-border insolvency cases. however, I have represented creditors, foreign legal entities, in insolvency proceedings in Romania, but they had companies established in Romania, according to Romanian law, even if they were part of a group of European companies.

4. Could you name the European insolvency regimes that you have been introduced to or have interacted with? (e.g.: Austrian, Hungarian etc….) Romanian
5. What makes a good insolvency/ restructuring regime in your opinion? A good restructuring/insolvency regime succeeds in satisfying both the creditors and the debtor. This is utopian. However, a good legal regime succeeds in bringing the debtor company back into the commercial circuit without harming the creditors too much. A good legal system allows the debtor company to exploit opportunities in other fields of activity than the one in which it was active before entering insolvency. A good insolvency system allows creditors to recover at least part of their debts. A good insolvency system is fair, with clear rules, fast and efficient and without hidden interests.

6. Could you rank these factors by importance? [instead of ranking, the interviewee wanted to assess these factors individually]
   a. Expertise of the courts. **Important:** you can't have an effective system without well-prepared courts. Unfortunately, in Romania, judges improve their insolvency skills more in practice because law faculties have very few courses on insolvency and in the National Institute of Magistracy (the state body that trains future magistrates) insolvency is a marginalized subject.
   b. Availability of reputable insolvency practitioners. I**mportant:** It is important to have well-trained insolvency practitioners, not necessarily reputable ones. reputation is a subjective matter. Quality matters.

c. Speed of proceedings **Important**: In Romania the insolvency procedure is a procedure in which everything is carried out quickly. Deadlines are very short compared to other branches of law. However, more important than speed is quality.

d. Opportunities for restructuring **The most important aspect:** After all, insolvency is like an illness, like a clinical death from which the patient has to recover back to healthy life, not to die. Restructuring an insolvent company is the biggest chance the law offers to companies with very high debts. Restructuring an insolvent company is a complex process involving debtor company, creditors, lawyers, insolvency practitioners and the court. Restructuring is carried out on the basis of a reorganisation plan. The reorganisation plan is a compromise agreement between the debtor company and its creditors.

e. Opportunities and support (legal and otherwise) for arriving at out of court agreements between creditors and debtor **Important:** The best is when the creditors and the debtor company reach an amicable agreement. For this agreement it is necessary that both parties to compromise and understand that every insolvent company affects the national economic and civil circuit, therefore it affects all citizens to a certain extent, which is why insolvent companies must be helped.

f. Something else (please specify) N/A

7. What is (or are) the most functional/appealing insolvency restructuring regime(s) within Europe? I don't have much information about insolvency in other countries. I know that the Romanian system is French-inspired, as is almost all of Romanian law. I can't say that the Romanian insolvency system could be the most functional.
8. Do you have any experience with the UK's insolvency regime? Unfortunately, not.
    a. As a practitioner, do you feel like Brexit has made the UK as a forum for insolvency proceedings less desirable? I think so.
        i. Please explain why- note the factors that influenced your view I believe that Brexit has totally affected the jurisdictional relations between the U.K. and the rest of the countries in Europe. Not having any contact with insolvency proceedings in the U.K., I cannot comment specifically on the issues that have changed after Brexit, but I believe that overall, legal cooperation has been hampered.

Interview 4

1. What is your area of practice?
   Insolvency and restructuring and banking and finance for national and international companies
2. How long have you been working in this field for?
   5 year (4 years as associate + 1 year as attorney)
3. Have you ever worked with cross-border insolvency cases?
   a. If yes —> was it under the old European Insolvency Regulation or under the Recast regime (the latter applies to cases commencing on or after 26 June 2017)?
      Yes. I have worked with both regimes (i.e. old and new EIR) in cross-border insolvency cases.
   b. How was the forum for the proceedings identified/was the COMI rule applied?
      The forum was identified by applying the COMI rule.
   c. Any comments/observations re COMI
      No, as the COMI was clearly identifiable in the cases I worked so far.
4. Could you name the European insolvency regimes that you have been introduced to or have interacted with? (e.g.: Austrian, Hungarian etc….)
   Austria, Croatian, Bulgarian, German
5. What makes a good insolvency/ restructuring regime in your opinion?
   Good quality of legislation and established case law, which both enables legal advisors and debtors to, more or less precisely, assess the likely implications the insolvency proceedings will have on the debtor and its assets and to what extent insolvency proceedings can be influenced - meaning: to what extent an appointed insolvency receiver will be checked by the insolvency court and how freely the insolvency receiver can administer and/or liquidate the debtor's assets.
6. Could you rank these factors by importance?
   a. Expertise of the courts

High [2]

b. Availability of reputable insolvency practitioners
   very high [1]
c. Speed of proceedings
   medium to high f4]
d. Opportunities for restructuring
   depends on the case / high [3]
e. Opportunities and support (legal and otherwise) for arriving at out of court agreements between creditors and debtor
   depends on the case / medium [5]
f. Something else (please specify)
   Recognition of insolvency proceedings in other jurisdictions:
   - Due to EIR within EU rather low (because of automatic recognition)
   - cross-border outside EU high, depending on the specific case, i.e. in which jurisdiction the debtor's main assets are located

7. What is (or are) the most functional/appealing insolvency restructuring regime(s) within Europe?
   Only from hearsay (and mainly from debtor's perspective): United Kingdom, Netherlands
8. Do you have any experience with the UK's insolvency regime?
   No, not personally.
9. Have you ever encountered forum shopping (witnessed it, during your years as a trainee/junior/practitioner etc.)
   a. If yes- What was the target jurisdiction?
      Yes, the Netherlands
   b. In your view, why was that jurisdiction favoured?
      Pre-restructuring directive implementation the Netherlands offered quick out-of-court restructuring with legal effect for all the debtor's creditors

Interview 5

1. What is your area of practice?
   Banking and finance and capital markets
2. How long have you been working in this field for?
   For 15 years
3. Have you ever worked with cross-border insolvency cases?
   Cross-border insolvency proceeding per se, never. Cross-border restructuring, yes. The latter is not a court-controlled proceedings it is purely based on the parties' agreement.
4. Could you name the European insolvency regimes that you have been introduced to or have interacted with? (e.g.: Austrian, Hungarian etc….)
   Austrian, German, Hungarian.
5. What makes a good insolvency/ restructuring regime in your opinion? Creditor control, expedite proceeding, aim is to get the debtor back on track, efficient decision-making procedures.
6. Could you rank these factors by importance?
   a. Expertise of the courts 4
   b. Availability of reputable insolvency practitioners 5
   c. Speed of proceedings 1
   d. Opportunities for restructuring 2
   e. Opportunities and support (legal and otherwise) for arriving at out of court agreements between creditors and debtor 3
   f. Something else (please specify) N/A
7. What is (or are) the most functional/appealing insolvency restructuring regime(s) within Europe? The German insolvency regime seemed to me the most functional.
8. Do you have any experience with the UK's insolvency regime? No.
9. Have you ever encountered forum shopping (witnessed it, during your years as a trainee/junior/practitioner etc.) Never.

Interview 6

1. What is your area of practice?
   Banking and finance.
2. How long have you been working in this field for?
   I have been working in this field for almost 2 years.
3. Have you ever worked with cross-border insolvency cases?
   No, I have never worked with such case.
4. Could you name the European insolvency regimes that you have been introduced to or have interacted with? (e.g.: Austrian, Hungarian etc….)
   Polish Bankruptcy Law
5. What makes a good insolvency/ restructuring regime in your opinion?
   From my point of view, the most important is a balance between the rights of debtors and creditors. However, it is essential to take measures to reduce the risk of bankruptcy and to reduce the costs of it. A good regime should streamline proceedings and expand the possibilities for restructuring, with an emphasis on preventing the winding-up and maintaining the operation of a company that is experiencing financial difficulties and preserving its activities.
6. Could you rank these factors by importance?
   a. Expertise of the courts 3
   b. Availability of reputable insolvency practitioners 5
   c. Speed of proceedings 2
   d. Opportunities for restructuring 1
   e. Opportunities and support (legal and otherwise) for arriving at out of court agreements between creditors and debtor 4
   f. Something else (please specify) N/A
7. What is (or are) the most functional/appealing insolvency restructuring regime(s) within Europe?
   Ireland is the most appealing insolvency restructuring regime for debtors.
8. Do you have any experience with the UK's insolvency regime?
   No, I don't have.
9. Have you ever encountered forum shopping (witnessed it, during your years as a trainee/junior/practitioner etc.)
   No, I haven't encountered.

Interview 7

1. What is your area of practice?
   Corporate finance, restructuring, M&A
2. How long have you been working in this field for?
   13 years (9 years in restructuring & finance)
3. Have you ever worked with cross-border insolvency cases?
   Yes
   a. If yes —> was it under the old European insolvency regulation or under the recast regime (the latter applies to cases commencing on or after 26 June 2017)?
      Recast regime
   b. How was the forum for the proceedings identified/was the COMI rule applied?
      The forum was applied based on the place of initiation of insolvency proceedings; the affected parties did not dispute this (based on the notion that the COMI should be regarded as being located elsewhere)
   c. Any comments/observations re COMI
      N/A
4. Could you name the European insolvency regimes that you have been introduced to or have interacted with? (e.g.: Austrian, Hungarian etc….)
   Slovenian, Croatian, Austrian
5. What makes a good insolvency/ restructuring regime in your opinion?
   Pre-insolvency (preventive restructuring phase): effective ability to achieve temporary standstill without consent of all affected lenders; possibility of 'cram-down' in relation to the restructuring agreement (restructuring agreement is confirmed by majority and applies to all affected lenders); ability to only affect financial creditors (enabling continued dealing with trade creditors); statutory protection (super seniority) of bridge financing
   Post-insolvency (insolvent reorganisation): ability to enable different treatment of different creditor classes (financial vs trade creditors) but with cross-class cram-down possibility; ability for lenders to control the reorganisation proceedings; protection of liquidity financing provided during restructuring.

6. Could you rank these factors by importance? Some of these are equally important in my view (reflected in ranking)
    a. Expertise of the courts 3
    b. Availability of reputable insolvency practitioners 2
    c. Speed of proceedings 2
    d. Opportunities for restructuring 3
    e. Opportunities and support (legal and otherwise) for arriving at out of court agreements between creditors and debtor 1
    f. Something else (please specify)
7. What is (or are) the most functional/appealing insolvency restructuring regime(s) within Europe? Amongst the regimes I am familiar with, the Slovenian regime (having adopted the preventive restructuring toolbox already in 2013) is fairly modern and has proven effective in practice (with a notable downside that insolvent reorganization proceedings still take too long to complete).
8. Do you have any experience with the UK's insolvency regime? Limited

I believe that the UK system places greater reliance on courts (which are more sophisticated compared to their continental counterparts) – resulting in a more flexible and speedier restructuring regime. Also, I do not believe that an equivalent to the UK scheme of arrangement is available on the continent (I understand that Poland has something similar in place though).

    a. As a practitioner, do you feel like Brexit has made the UK as a forum for insolvency proceedings less desirable? Somewhat, yes. I believe the attractiveness of [the] UK as a forum shopping destination has declined as a result of Brexit – mostly as a result of question marks over enforceability (in the EU) of schemes/decisions adopted in the UK/by UK authorities

9. Have you ever encountered forum shopping (witnessed it, during your years as a trainee/junior/practitioner etc.) Yes (pre-Brexit)
    a. If yes- what was the target jurisdiction? UK
    b. In your view, why was that jurisdiction favoured? Scheme of arrangement