15TH ANNUAL
R3 & INSOL EUROPE
INTERNATIONAL
RESTRUCTURING
CONFERENCE

GLOBAL TURNAROUND

RETREAT OR PROGRESS IN CROSS-BORDER RESTRUCTURING?

WELCOME TO THE 15TH R3 & INSOL EUROPE INTERNATIONAL INSOLVENCY & RESTRUCTURING CONFERENCE IN LONDON. GLOBAL TURNAROUND IS PROUD, ONCE AGAIN, TO BE THE MEDIA SPONSOR FOR THE CONFERENCE.

CONFERENCE CO-CHAIR

Glen Flannery

Restructuring partner with CMS Cameron McKenna Nabarro Olswang in London

Welcome to London!

As the UK's exit from the EU approaches, conferences such as this one become more important than ever. Both R3 and INSOL Europe are committed to keeping avenues of communication as open as possible.

The theme is 'Retreat or progress in cross-border restructuring?'

Attendees will be keen to find out what the latest thinking is on how cross-border restructuring and insolvencies will be handled in the years going forward.

For instance, how will English law Schemes of Arrangement be treated in the EU post-Brexit? What will be the impact of the UK no longer being covered by the European Insolvency Regulation?

This conference aims to combine topical debate with usable technical content. I look forward to speaking to as many of you as possible.

CONFERENCE CO-CHAIR

Nico Tollenaar

Restructuring partner with RESOR in Amsterdam

Why is there still forum-shopping?

This may seem like a strange question, but both the European Insolvency Regulation and the UNCITRAL Model Law on Cross-Border Insolvencies were both specifically designed to reduce the need for it.

What are the drivers behind people's decisions to base their restructurings in the Cayman Islands, for instance?

How did Niki, the Austrian airline, decide to file for insolvency in Berlin last year instead of Austria?

And why did stakeholders in Ocean Rig use a Scheme of Arrangement in the Cayman Islands combined with a Chapter 15 in the US?

These are the kind of questions we need to debate at this conference. I look forward to speaking to you.

"London is a fascinating location for this year's conference. The UK is experiencing the impact of a retail revolution, with internet shopping on the rise and 'bricks and mortar' outlets closing by the hundred.

"It also faces the challenges presented by Brexit.

"In the following pages we present the views of some of the leading figures in the European restructuring and insolvency market."

John Willcock, Editor, Global Turnaround

A busy time for INSOL Europe

There is an added significance in attending any INSOL Europe conference in London since the UK voted to leave the EU.

The pan-European membership association has always been closely involved with the European Commission (EC), in both helping to create and to interpret the EC's insolvency measures. Not surprisingly, INSOL Europe is hard at work preparing its members for this major event.

Addressing this year's conference is Piya Mukherjee, a partner with law firm Horten in Copenhagen, Denmark, who is currently serving as INSOL Europe Vice President.

Mukherjee says: "INSOL Europe has set up a Brexit wing. One of its key tasks is to work out how to deal with the European Insolvency Regulation post-Brexit.

"In particular, if the UK is not covered by the Regulation after leaving the EU, what could be put in place to replace it?"

Then there is Central and Eastern Europe. Many former Communist countries have been working hard to develop modern insolvency regimes and adequately resourced courts, and here again INSOL Europe is keen to help. In 2017/18 INSOL Europe launched a 'High Level Course on Insolvency Law' and the first course was held in Romania last year and was a big success. The next course for 2018/19 is to be held in Cyprus.

Piya Mukherjee
Horten

"It's aimed at countries which have less experience of insolvency, and so the aim is to share expertise," said Mukherjee.

These high level courses run separate to INSOL Europe's Eastern European conferences, the most recent of which was held in Riga, Latvia on 31 May to 1 June.

Another project is to develop a local footprint for the association, she added. "We want eventually to have an INSOL Europe representative in every member country."

Tying all these strands together is essential, and to do that the body is developing a strategic plan for 2025. A report on that plan should be unveiled at INSOL Europe's annual conference in Athens, to be held on 4-7 October later this year.

For more information, go to:
www.insol-europe.org

Case law from Agrokor to Azerbaijan

Richard Fisher
South Square

Whether it's the giant Croatian agricultural combine Agrokor or the International Bank of Azerbaijan, the law relating to international restructurings is developing at a frightening pace – and Richard Fisher and his colleague Henry Philips from South Square in London will be bringing the conference up to speed on these and other recent cases.

Fisher, for instance, has been helping represent parties in the recent convening hearings for what may be the biggest English Scheme of Arrangement ever, that being the proposed Scheme to distribute the UK£7 billion surplus of the European side of Lehman Brothers, LBIE.

One of the most talked-about restructurings at the moment is International Bank of Azerbaijan. The particular question here is: when will foreign debt compromises be recognised?

International Bank of Azerbaijan has already restructured about 15 billion manats (US$8.8 billion) of assets so far. Much of its distressed loans have been transferred to a 'bad bank', and the Government's 95 per cent stake in the bank is being prepared for privatisation. How its restructuring is treated will create important precedents for the law relating to cross-border restructurings going forward.

As for Agrokor, the talking point is, when will foreign group proceedings be recognised?

These are typical matters for Fisher and his colleagues at South Square, the barristers' chambers in London that specialises in large and complex insolvency and restructuring matters.

Fisher regularly acts in relation to multi-jurisdictional and complex commercial disputes, and is a member of the BVI bar.

Fisher has acted in various high-profile cases in England at all levels of tribunal up to the Supreme Court, including disputes arising out of the Lehman Brothers insolvency (Waterfall I and II proceedings, and Firth Rixson), Eurosail, Snoras Bank, Federal Mogul (reinsurance recoveries) and the Servaas state immunity litigation.

He has also acted in relation to many recent UK-based insolvencies and restructurings, including Codere SA, Co-Op Bank, Deutsche Annington, Telecolumbus and Cattles.

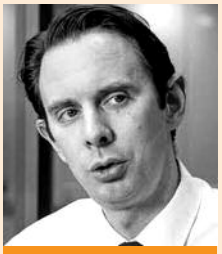
Another of his recent cases includes the Primeo/HSBC dispute in the Cayman Islands concerning Madoff feeder funds.

Chris Duffy on Cayman's big win – Ocean Rig

When you consider how many precedents the US$3.8 billion restructuring of Ocean Rig set last year, it is no wonder that people who worked on it want to talk about it.

Chris Duffy, a director with AlixPartners in London, was part of his firm's team supporting the two Joint Provisional Liquidators (JPL) of Ocean Rig, who were in turn appointed by the Cayman court.

The JPLs acted as a kind of 'honest broker' in a contentious restructuring that Duffy said was challenged all the way. The JPLs were Simon Appell of AlixPartners in London and Eleanor Fisher of Kalo in Cayman. Kalo was part of the old Zolfo Cooper network that rebranded as Kalo in the spring of 2017.



Chris Duffy
AlixPartners

> The success of the restructuring has put Cayman well and truly on the map as a cross-border venue of choice.

The fall in the oil price had condemned much of Ocean Rig's deepwater drill ships to inactivity – half a dozen were 'cold stacked'.

The deal to cut US$3.8 billion of debt involved using the Caribbean island's first-ever inward COMI-shift, from the Marshall Islands to Cayman. This also represented one of the largest amounts of debt to be COMI-shifted anywhere.

Ocean Rig also used four interconnected Schemes of Arrangement in Cayman to compromise New York law bonds, the first time such Schemes had been used on non-Cayman entities.

"We were first retained in 2016, and the JPLs were appointed in March 2017," said Duffy. "A Chapter 15 application also became necessary to protect the company from any action in the US. This gave the company breathing space to push ahead with a restructuring."

Duffy started his career at Grant Thornton, before moving to PricewaterhouseCoopers. In 2009 he joined Zolfo Cooper (now part of AlixPartners) in London. Looking back at the Ocean Rig restructuring, Duffy commented: "The Scheme process was very flexible."

"The restructuring was subject to significant challenge by certain stakeholders but, ultimately, was successful when sanctioned by the Cayman court."

There were other hurdles. For instance, at one point the well-known New York bankruptcy judge hearing the Chapter 15 application, Judge Martin Glenn, asked the applicants: "What is a Cayman JPL?"

In the end, the overwhelming support of the company, its term loan lenders and majority bondholders won the day. All eyes are now on Cayman to see if Ocean Rig's success can be repeated.

Flannery on retail restructurings, pensions problems, venue selection and more...

Together with Nico Tollenaar, Glen Flannery of CMS in London will be familiar to those who have attended previous R3/INSOL Europe cross-border restructuring conferences. The duo have been arranging them for the last 15 years.

Glen Flannery
CMS

"It's frightening how time flies," commented Flannery. "It never gets boring. Every year a whole new set of challenges and topics in the restructuring and insolvency markets come up for debate. And it's fascinating to see the range of delegates we get."

As for his own practice at CMS, Flannery commented: "We're active across the market, but the last six months has been dominated by stress in the casual dining, retail, construction and outsourcing sectors, and this looks set to continue."

Another theme in Flannery's practice is pensions-related restructuring. Last year, he led the restructuring of Hoover Limited, solving a UK£500 million legacy pension scheme issue.

"Also, in our live cross-border cases, we're spending time contingency planning for Brexit," he said.

Retail and Company Voluntary Arrangements (CVA)

The challenges in retail have been well documented. "It's a perfect storm," said Flannery.

"Old business models built around physical store presence have struggled to adapt to the almighty growth in online retail. UK retailers are also grappling with Brexit."

> "It's been a 'double whammy'. Consumer confidence has been knocked, while exchange rate movements have pushed up the cost of goods manufactured overseas."

"The costs issue has been compounded by minimum wage inflation and business rate increases," said Flannery.

In the UK, the tool of choice for tackling the property issue has been the Company Voluntary Arrangement (CVA).

This mechanism under the Insolvency Act has been used by numerous commercial tenants this year to compromise lease obligations at unprofitable store locations. Examples include the UK side of Toys R Us, New Look and Carpetright. On Toys R Us, Flannery advised the UK pension scheme.

"In the vast majority of cases to date creditors have backed the debtor's proposals, because it's better than the administration or liquidation alternative," said Flannery.

"But this isn't a cure for all ills. The better CVAs are surrounded by a robust and well executed financial and operational turnaround plan."

> "In the conference we will hear which tools are being used to deal with similar issues in other jurisdictions."

Construction and outsourcing

The start of the year in the UK was dominated by the controversial collapse of Carillion, which left over 700 construction and servicing contracts needing new partners.

This in turn generated work for restructuring advisers. Flannery and his team at CMS have been advising a number of impacted counterparties.

Carillion had to be put into compulsory liquidation, instead of the traditional administration or voluntary liquidation route, because of funding and risk issues.

The liquidator is a civil servant from the government's Official Receiver's office, but the majority of the liquidation work has been subcontracted to 'special managers' from private practice who have been winding down the group's affairs in an administration-like fashion.

In contrast to almost all other compulsory liquidations, with government support, some trading continued for a period post-appointment to avoid undue disruption to vital public services that had been outsourced to Carillion.

Flannery commented:

> "As the dust settles, questions are being asked about whether we need a special administration regime for this type of challenge in the future."

"We already have special administration regimes for major utility providers, and we will soon have one for registered providers of social housing," he added.

Choosing a venue for cross-border restructurings

Having been the architect of the first large pan-European group COMI filing under the European Insolvency Regulation, Flannery has strong views on the potential impact of Brexit.

The model constructed in Flannery's Crisscross/Dynegy case in 2003 to anchor the whole European group's insolvency proceedings in the UK set the precedent for a string of similar filings. These included Collins & Aikman and Nortel, as well as another of Flannery's cases, the Low Cost Travel Group.

The CMS partner said: "In our cross-border cases, we're investing more time than ever assessing and selecting the optimum restructuring venue, before filing."

> "We cannot ignore the very real risk that Brexit may occur without arrangements to replace the reciprocal recognition rules currently in place under the European Insolvency and Judgements Regulations."

"If this occurs, it will weaken the case for anchoring pan-European group insolvency cases in the UK and using English Schemes of Arrangement for foreign companies, although it won't necessarily be fatal because there are some fall back tools," said Flannery.

He concluded that today's conference has plenty to get its teeth into.

> "In the conference we will discuss the increasing prevalence of venue selection and migration in cases, not just in Europe, but in the US, Caribbean and Asia."

Links with **INSOL Europe** have never been so important, says R3 president

Stuart Frith
Stephenson Harwood

Stuart Frith has just taken over as this year's President of R3, the UK's insolvency trade body. Frith heads up the insolvency and restructuring practice at Stephenson Harwood, having started his career in this area in 1984. He is also a past President of the UK's Insolvency Lawyers Association (ILA).

The R3 president is looking forward to addressing the joint conference with INSOL Europe.

"Reaching out to our colleagues in INSOL Europe is so important. Swapping expertise and building contacts are central to our profession," said Frith.

"I look forward to seeing you at the conference and discussing the many issues, challenges and opportunities that confront us in our professional lives as well as meeting as many of you as I can."

Frith paid tribute to his predecessor, Adrian Hyde, for all the hard work he has put in over the last year: "His year in office has provided a valuable template for me to follow.

"Adrian has been a loud and clear voice for our profession with the UK Government, politicians, press, and other stakeholders. I am looking forward to picking up where he left off," said Frith.

Frith has witnessed first hand the evolution of the UK's insolvency profession, having been a member of R3 and its predecessors for nearly 30 years. During that time he has served on its personal insolvency and general technical committees as well as on the policy group and the council.

He currently sits as a deputy judge in the business and property courts at the Rolls Building in London, dealing with cases in the companies and insolvency list.

> "My experiences inform the three principal issues I propose to address during my year in office," said Frith.

"First, with my legal background, it will (I hope) come as no surprise to hear that I want to shine some light on the way the insolvency and restructuring framework and the UK justice system work together.

"The courts have a significant impact on how the profession gets on with its job, and issues like access to justice and judicial expertise have an obvious and important influence on how we conduct our professional lives," said Frith. "I want to make sure the profession has a chance to get its views across on developments in this area."

Secondly, R3 has been working on a strategic review this year. "This is a really exciting project which will help set R3's direction for the next decade or more."

Thirdly, Frith stressed he wanted to use his time as president to look at the R3 membership itself, particularly in terms of diversity.

"I fervently believe that it is really important that R3 reflects and represents everyone across our profession, whether you're looking at background, professional experience, gender or sexual orientation, and that our profession reflects the diversity of the businesses and individuals we work with.

"I want to see younger members of our profession, in particular, be given more opportunities to get involved and to have their say," concluded Frith.

Pre-packs and Schemes go Dutch

Nico Tollenaar,
Resor

Nico Tollenaar is well-known to previous attendees of these conferences as being both an architect and promoter of new, progressive corporate restructuring legislation. Current Dutch reforms fall into two categories; pre-packaged insolvencies and schemes.

Dutch pre-packs

The Dutch Government is currently promoting two Bills that are relevant for the Dutch and international restructuring practice. The first, the Continuity of Enterprises Act I, is intended to facilitate and provide a statutory basis for UK-style pre-packs.

This Bill has already been passed by the Dutch Parliament and is currently pending in the Senate.

Tollenaar said: "The Act became somewhat controversial and was adjourned in the Senate following the decision of the European Court of Justice in the Smallsteps case handed down in June last year (C-126/16).

"Under Dutch law TUPE does not apply in the event of bankruptcy. The decision of the ECJ in Smallsteps suggests that TUPE does apply in the Netherlands in the event of a business sale in bankruptcy if prepared and executed as a pre-pack."

Following this decision, commentators questioned whether the Bill had any added value as the applicability of TUPE would chill interest of potential buyers and stifle any possible transaction.

The ruling of the European Court caused the Belgian Government to withdraw a similar legislative initiative. The Dutch Government, however, still sees benefit in the Bill notwithstanding the Smallsteps judgment and has requested the Senate to resume the adoption process. Tollenaar said:

"The hope is that the Bill will enter into force on 1 January 2019."

The Dutch Scheme

The second draft Bill is titled 'Act on the Confirmation of a Private Plan' and seeks to introduce a scheme-like instrument in the Netherlands.

Tollenaar said: "Following the overwhelmingly positive responses received in a consultation process that closed in December last year, the Dutch Government is currently making final tweaks to the draft bill.

"The expectation is that the Bill will be submitted to Parliament after the summer."

Given the wide support, the legislative process is expected to be relatively smooth. It is hoped that the Bill will enter into force on 1 July next year.

The contemplated instrument is similar to the UK Scheme with a few notable differences, such as a faster and more streamlined process. There is no convening hearing, for instance, and there are no creditors meetings.

The Dutch Scheme will also include a cross-class cram down mechanism, and certain associated measures such as a temporary stay upon request, as well as the ability to shed onerous contracts and to preserve valuable contracts by invalidating ipso facto clauses.

Swift and efficient process

The proposed Dutch Scheme is designed to be as swift and efficient as possible, not least so that small and medium-sized businesses will be able to use it.

As with the US Chapter 11, the debtor remains in possession. The process takes place outside of formal proceedings, and unlike a Chapter 11, the debtor does not have to go to court at entry.

Creditors can request the appointment of an independent court expert, who will be entitled to propose a plan on behalf of the creditors, so long as it can reasonably be assumed that the debtor will no longer be able to pay its debts as they fall due.

Unlike an English Scheme, a Dutch Scheme does not require a convening hearing.

Prior court approval of a disclosure statement is not required, and there is no need for creditors meetings. Voting on the plan takes place at least eight days after the plan has been proposed, although for larger cases this period may be longer.

Creditors can vote electronically, and a confirmation hearing takes place within two weeks after the vote. The confirmation decision is handed down 'as soon as possible' after that. There is no appeal mechanism. One of the main appeals of the new Scheme is that the entire formal process can be completed from beginning to end within four to five weeks.