Changing Rules: Challenges for the Profession

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In a time that the global economy is in the midst of the worst financial crisis since the Great Depression and the recession continues to take its toll on European industry and commerce, it is time to focus on the professionals dealing with corporate recovery. Substantive and procedural rules, which are supportive to any corporate recovery processes, are put into effect by a variety of professional actors in the field. The most well known are insolvency practitioners listed in Annex C of the EC Insolvency Regulation (1346/2000). For twenty-six Member States to which the regulation applies, there are near-to-hundred (!) domestic names for being in charge in domestic insolvency proceedings, whatever their nature is. In European lingo, these persons act as 'liquidators'. Where the main core of the body of rules in the regulation dates from the 1980s and 1990s of last century, the name reflects the majority of available legal mechanisms in the Member States at these times, namely bankruptcy liquidation.

Since some fifteen years, however, many European countries have revised and amended their legislation on insolvency law (or bankruptcy law) to introduce more flexible proceedings aiming at reorganization and rehabilitation. Just to name a few: Germany in 1999, England in 2002 (Enterprise Act), Poland and Romania in 2003, Spain a year later, France recently ('sauvegarde'), and Belgium in April last year. It is striking to notice that even the more recent amendments to insolvency laws in several European countries continue to show substantial differences in underlying policy considerations, in structure and in content of these laws. Many countries pay respect to the US Chapter 11 procedure. The idea, however, that the Chapter 11 procedure heavily favours the debtor, who stays in control of the distressed company ('debtor-in-possession', DIP), seems quite outmoded. In the United States, increasingly, one finds a court restricting a debtor's exclusive position and appointing a trustee at the request of creditors, which is not only limited to cases of corporate governance scandals (Enron, WorldCom). Furthermore, there is an increase of protection given to specific types of creditors, which limits the powers of a debtor. The rise of distressed debt trading and the way creditors have succeeded to negotiate more favourable DIP Agreements, including provisions concerning the debtor's hiring of a chief restructuring officer (CRO), cash flow requirements, or by influencing debtor's management have altered the balance between debtor and creditors. Since some seven years, nearly half of the larger-scale Chapter 11 cases end up in asset sales (section 363 'fire sales'), recently, for example, Lehman, Chrysler, and General Motors (GM). This method is far away from a debtor's rehabilitation, which was historically the rationale of Chapter 11. In the United States, there is a serious debate going on whether Chapter 11 is dead, because in cases like Chrysler and GM, central principles such as equality in distribution and absolute priorities have been casted aside. Whilst reform bills regarding Chapter 11 are pending, a counter bill has been presented for a 'Chapter 14' for large, non-bank financial institutions perceived to be 'too big to fail'.

With all these sweeping reforms, the question forces itself upon us: are insolvency professionals equipped to act and implement the rules, according to its underlying policies? A famous saying in the English Cork report (1982) is that the success of any insolvency system is very largely dependent upon those who administer it. In Europe, insolvency practitioners can be very different animals, with a variety of cultural and professional background, and large differences in legal and disciplinary rules regarding fairness to all interests involved and accountability. They are accountants, lawyers, corporate recovery specialists, and turnaround professionals. What these substantial reforms – some of them highlighted in the issue – demonstrate is that it is at least necessary to develop a much broader expertise in matters of insolvency law, company law, or general contract law and also to develop know-how concerning such matters as financial restructuring, accounting, tax, strategy, and communication. An (insolvency) practitioner with this skill set seems the ideal candidate for the recovery of a company in the 'twilight' zone. A key point in any system should be that an insolvency practitioner is receiving the confidence and respect from all stakeholders. Without that, any system is due to fail. Therefore, changes in substantial rules, including rules or practices in pre-insolvency stages are just

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as many challenges for any practitioner to keep pace with these developments. Turbulent times with restless rules require solid and qualified professionals.

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