



# TRI Leiden

TURNAROUND, RESCUE & INSOLVENCY

## NEWSLETTER

### The Future of EU Insolvency Law

Over the past few months we have seen some important developments in Brussels. It was in February that the Commission presented its ambitious project for the development of a Capital Markets Union ('CMU'). It aims to make capital markets better accessible, next to financing by banks. The objective is also to address some areas of law that show great divergence and/or are much debated, take for example securities law, tax treatment and also insolvency regimes. The Commission started a three-month consultation, based on a Green Paper, the outcome of which will shape an Action Plan. Click [here](#) for the EU webpage with more information on the CMU.

The other major development in Europe considers the recast of the European Insolvency Regulation ('EIR Recast'). Sooner than many of us were expecting was the pub-

lication of EIR Recast in the O.J. L 141/19 of 5 June 2015. It was announced that the EIR Recast shall enter into force, and at the same time repeal the current EIR (Regulation (EC) No 1346/2000), on 26 June 2017 (Article 92 EIR Recast). Click [here](#) for the final text of the EIR Recast.

With various projects strongly related to EU insolvency law, we have taken a keen interest in these recent developments. This newsletter will bring you fully up to date with all our projects and activities of the last few months.

#### TRI Leiden Research Team



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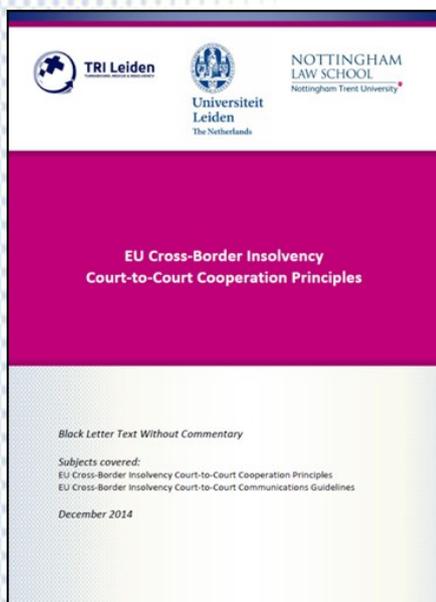
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# Cross-Border Insolvency Court-to-Court Cooperation Principles Gain Wide Support

## EU JudgeCo Project

In earlier newsletters the TRI Leiden Research Team informed on its role in creating 'EU Cross-Border Insolvency Court-to-Court Cooperation Principles'. In February 2015 this project was finalised, resulting in 26 EU Cross-Border Insolvency Court-to-Court Cooperation Principles ('EU JudgeCo Principles') and 18 EU Cross-Border Insolvency Court-to-Court Communications Guidelines ('EU JudgeCo Guidelines').



### A Sign of the Time

The EU JudgeCo Principles will strengthen efficient and effective communication between courts in EU Member States in insolvency cases with cross-border effects. The EU Cross-Border Insolvency Court-to-Court Cooperation Principles are a sign of the time, in that they promote international cooperation in the area of insolvency, achieving greater and timely coordination among countries in multinational business reorganisations or restructurings. The project was co-funded by the Civil Justice Programme of the European Union and the International Insolvency Institute (III) ([www.iiglobal.org](http://www.iiglobal.org)).

Presently, court-to-court communication between judges in insolvency matters in the EU is limited to only a few cases. In the near future judicial cooperation and communication will be a cornerstone in the efficient and effective administration of insolvency cases within the EU.

### Development of EU JudgeCo Principles and Guidelines

In a period of over two years, the EU JudgeCo Principles have been produced in collaboration with experts, including 25 judges representing just as many different countries. They have been consulted intensively. Moreover, during training and discussion sessions over 100 judges tested their use in practice, with positive results. Insolvency judges understand the challenges international business is bringing to them and the principles can significantly contribute to the architecture of European insolvency law and an efficient and trustworthy role of courts therein.

[Click here to download the EU JudgeCo Principles \(including Guidelines\)](#)

### Bringing the EU JudgeCo in Practice

Evidently, the proof will be in the concrete use in practice of the EU JudgeCo Principles. This may soon be the case, the [EIR Recast](#) contains a mandatory duty for courts to cooperate in cross-border insolvency cases. The EU JudgeCo Principles will then certainly serve as a significant guide. The text is published on [www.tri-leiden.eu](http://www.tri-leiden.eu). The text and its accompanying commentary will be published in a book, see: Bob Wessels (ed.), EU Cross-Border Insolvency Court-to-Court Cooperation Principles, The Hague, Eleven International Publishing, 2015. The JudgeCo Principles and Guidelines have been translated into Spanish, see: *Revista de derecho concursal y paraconcursal (RcP) 2015/23* (a very laudable action Javier Martínez Rosado, Profesor Titular de Derecho Mercantil, Universidad Complutense de Madrid (soon available [here](#))).

For the semi-final text of the statement, please visit the [TRI Leiden website](#).

## Entrepreneurship in a Turbulent World

Recently a new book was published by professor Jan Adriaanse and Erik in 't Groen. This well received Dutch book relates to entrepreneurs and their relationship with Intensive Care departments at the bank. It is titled (translated in English): 'Entrepreneurship in a Turbulent World. The Survival Guide for Entrepreneurs in Intensive Care at their Bank'. For more information see: [www.zwaarweeronder nemen.nl](http://www.zwaarweeronder nemen.nl).



## Furthering Business Rescue

### Successful Conference on National Approaches to Businesses in Distress



On 19 and 20 March, the reporters of the ELI Project on Rescue of Business in Insolvency Law (Prof. Bob Wessels Prof. Stephan Madaus, Halle-Wittenberg, Ass. Prof. Kristin van Zwieten, Oxford) chaired a conference to present the preliminary results of this project. The project, initiated by the European Law Institute, aims at designing (elements of) an appropriate legal enabling framework, which includes certain statutory procedures that encourage parties to negotiate solutions in a situation of business distress. National Correspondents present were experts from a selected group of 14 different European countries, each of which represents a different approach to insolvency law.

#### Reports on National Business Rescue Laws

National Correspondents (a selected group of 26 experts from 14 jurisdictions) have presented their respective national inventory reports and normative reports. These served as the starting point for discussions during the conference. Some topics that have been covered in those inventory and normative reports include: governance and supervision of in-court and out-of-court rescue, special protection for financing a rescue, treatment of executory contracts, ranking of creditors, avoidance powers, restructuring plans, special arrangements for SMEs, and the position of liquidators and directors.

Members of the Advisory Committee (AC) and of the ELI Members Consultative Committee (MCC) as well as an expert from the European Commission' staff from Brussels (as Observer) attended the (non-public) conference. The conference provided a great opportunity to give feedback on the progress of the project at this early stage and suggestions on further steps in the coming months.

#### Workshops

On the second day of the conference, some specific issues for a legal enabling framework for business rescue in Europe were discussed more closely in four subject-specific workshops: (1) restructuring under formal procedures; (2) restructuring outside formal procedures; (3) sales on a going-concern basis; and (4) reform options in Europe.

#### Future Discussions

From 2-4 September 2015 the ELI Annual Conference and General Assembly will take place in Vienna. During the Annual Conference two sessions will be devoted to the project on Business Rescue. A plenary session will take place on Friday 4 September, where besides the Reporters also prof. Paul Oberhammer (Dean, University of Vienna) and Stephen Taylor (Partner, Insonomy) will take part in the panel. Later that afternoon, a workshop (so called 'MCC Meeting') will be organized on more specific issues related to the Business Rescue Project. For more information see ELI's latest [newsletter](#) and their [website](#).

***You are kindly invited to be present at ELI's Annual Conference and we look forward to see you at our sessions.***

## Persons involved in TRI Leiden and its research



#### Melissa Vanmeenen

Melissa Vanmeenen is Professor of Insolvency Law and Commercial Law at the University of Antwerp. She has been actively involved in the European Law Institute's ('ELI') project on Business Rescue for which she, together with Dr. Roel Fransis, prepared an extensive study of how the Belgian law facilitates the rescue of distressed businesses.

Previously Melissa worked as a lawyer at the Brussels bar. As a fellow of the Research Foundation Flanders she wrote her doctoral thesis at the K.U. Leuven (2006). Her research addresses national and international Insolvency law. During the last 8 years she has been focussing on insolvency prevention and reorganisation procedures.

Professor Vanmeenen is the author of numerous publications in the field of insolvency law, and is also a member of the editorial board of several journals.



**Dr. Steffen Koch**

Dr. Steffen Koch works as an insolvency practitioner since 1992 and is a partner at hww hermann wienberg wilhelm, a law and consulting firm which is focussed upon insolvency administration, operational turnaround and a market leader in Germany. He has been involved in several major insolvencies in Germany and has a broad experience in this field of practice.

In 2005 Steffen founded the seamless international network of insolvency practitioners called "hww insolvency cooperation partners" with members presently covering 23 countries in Europe, Asia, North and South America, Africa and Australia.

In 2008 he became Co-Chair of the Turnaround Wing of INSOL Europe and in 2014 Vice President of INSOL Europe. He is also officer of the IBA IS section and member of various committees of ABI and INSOL International.

## Proposals to Reform Chapter 11 U.S. Bankruptcy Code

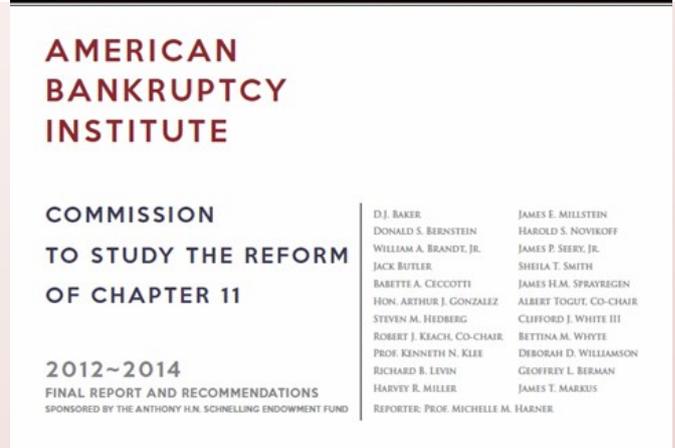
The U.S. Chapter 11 procedure is both in practice and conceptually the most important insolvency procedure worldwide. Many countries look at Chapter 11 for inspiration in revising their own insolvency laws, such as Germany, France, Spain, Japan, Australia and China. The U.S. Bankruptcy Code dates from 1978 and after more than thirty years of experience under Chapter 11, many U.S. practitioners and commentators agree it is time for reform; not just a make-over, but a fundamental rethinking of its structure, aims and purposes.

### Sky-High Ambitions for the ABI Commission

In 2012 a Commission from the American Bankruptcy Institute ('ABI') was established to study the utility of Chapter 11 of the U.S. Bankruptcy Code. The Commission's study process has been designed to explore the new environment in which financially distressed companies operate and to determine what is and what is not working as effectively as possible. The ambitions of the revision project are sky-high. In the words of the ABI Commission co-chair: *'The charge of the commission is nothing less than the study of the need for comprehensive Chapter 11 reform, by which we mean consideration of starting from scratch and re-inventing the statute.'* See: [http://business-finance-restructuring.weil.com/wp-content/uploads/2013/06/Opening\\_Remarks.Keach-and-Togut.pdf](http://business-finance-restructuring.weil.com/wp-content/uploads/2013/06/Opening_Remarks.Keach-and-Togut.pdf).

### Final Report

In December ABI issued 'breaking news' for the restructuring and insolvency community in the USA when it presented its voluminous (396 pages) 'Final Report and Recommendations'. See for a link to the full report, titled '2012-2014 Final Report and Recommendations'. It contains 241 recommendations and 1225 footnotes. The report itself only has the status



of recommendation, and is not a draft legislative bill. It is the intention however, that the ABI report will form the basis for legislative changes. Because of its iconic stature and global influence, it is worthwhile for Europe and the rest of the world to understand the changes that are being proposed. Also since it would make little sense to try to catch up with the U.S. and end up in a place where the U.S. no longer wants to be.

### Global Input

In the light of the inspiration drawn by other countries from Chapter 11 and the increasing international environment of insolvency law, the ABI Commission

also sought feedback from across the globe with foreign experiences with reorganization laws, often inspired by Chapter 11. After the establishment of an advisory committee structure, in January 2013 the ABI Commission also formed an international working group consisting of leading practitioners and academics from thirteen different countries. Prof. Bob Wessels and Rolef de Weijs, University of Amsterdam, acted as organizing members of the International working group.

The international working group has been studying targeted questions posed by the Commission and the advisory committees to provide a comparative analysis of the relevant issues. From mid-2013 until mid-2014, the International working group has prepared national reports on seven questions (with several sub questions), being:

1. The role of administrators and monitors;
2. Creditors' or stakeholders' committees;
3. Financing options for insolvency companies;
4. The treatment of IP licenses in insolvency;

5. The use of surcharges in sales;
6. Claims Trading, and
7. Plan issues: Presenting, Voting, Plan Variations & Allocation Rules.

The organising members themselves conclude that - given the ambitious goals the ABI Commission set itself - all in all the recommendations of the Final Report very much remain within the existing structure of the current Chapter 11. There is no new procedure starting from scratch. Most interesting and novel, in our eyes, are the following four issues: (i) introduction of an 'estate neutral', (ii) introduction of significant restrictions on 363 sales referring of the phenomenon of selling all of the assets akin to a pre-pack sale, (iii) the implementation of distributing to an otherwise out of the money class of the option redemption value, and (iv) the introduction of an equity retention plan for shareholders of an SME. See Bob Wessels and Rolef de Weijs, Proposed Recommendations for the Reform of Chapter 11 U.S. Bankruptcy Code, in: *Ondernemingsrecht 2015/37 (2015-060)*, pp. 210-221.

## Insolvency Protocols Project

During international training sessions for judges on the JudgeCo project by the end of 2014, the TRI Leiden research team received several questions on the meaning of a protocol within the framework of international insolvencies. It appeared to be an obscure phenomenon. The TRI Leiden research team promised to conduct a study on the subject with disclosure of materials and other relevant studies on the TRI-Leiden website. The 'Leiden-protocol project' was born.

In various sources, for example INSOL Europe's *European Communication & Cooperation Guidelines for Cross-Border Insolvency* (2007), the American Law Institute and the International Insolvency Institute publication: *Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases* (2012), the 2015 text of the EIR Recast, and both the Leiden Law School IOH Project and the JudgeCo Project, we find referrals to 'agreements and protocols'. Over the past few months, our intern, Fabian van de Ven, has made a survey of digital literature concerning protocols he came across during his research. In another database, he collected all protocols he found on the internet.

Database of Protocols: [click here](#).

Overview of literature on Protocols: will be made available soon.

At present, Fabian is doing research on the essential content of protocols. The results of this study will be published later on our website. We request all readers of our website to comment on Fabian's findings, in order to complete and update the databases. If you have any new protocols or other information which you want to share with other international insolvency adepts, please send your information to [info@tri-leiden.eu](mailto:info@tri-leiden.eu).



# Guidelines for Turnaround and Restructuring Professionals

## *Turnaround Wing Project: first phase has been concluded*

Over the past few months, numerous people have contributed to the Turnaround Wing Project to design 'guidelines for out-of-court turnaround professionals'. Early April, Leiden Law School (LLS) presented the first draft of Report I, which is based on the reports of several country experts on the legal position of turnaround professionals in their countries and an analysis of a number of international documents. This report contains a review of issues and topics which can possibly be covered by a system of Guidelines for Restructuring and Turnaround Professionals.

On the first draft of Report I a majority of the Review & Advisory Group members commented. Thanks to their comments the final draft, to be found on [www.tri-leiden.eu](http://www.tri-leiden.eu) and presented to the INSOL Europe Executive early May 2015, forms a firm basis to enter the second phase. In this phase LLS and the Turnaround Wing will formulate the Guidelines. The first public draft of the Guidelines will shortly be made available on our website. We are currently awaiting comments of the members of the Turnaround Wing of INSOL Europe.

*Bernard Santen, Senior Researcher, Leiden law School*

## Publications

H.G. Parsa, Jean-Pierre I. van der Rest, Scott R. Smith, Rahul A. Parsa & Milos Bujisic, 'Why restaurants fail? Part IV: The Relationship between Restaurant Failures and Demographic Factors', *Cornell Hospitality Quarterly*, 2015, 56(1), p. 80-90.

[Available at: <http://cqx.sagepub.com/content/56/1/80.full.pdf>]

B.P.A. Santen & J.A.A. Adriaanse, May 2015, Principles And Guidelines For Out-Of-Court Turnaround Professionals, Report I: An Analysis of International and National Sources as a Basis for the Design of Principles and Guidelines for Out-Of-Court Turnaround Professionals.

[Available at: [www.TRI-Leiden.eu](http://www.TRI-Leiden.eu)]

B.P.A. Santen & R. van Hoof, 'Het belangenconflict van de faillissementscurator', in: B.F. Assink, K.F. Haak, J.M. de Jongh, M.J. Kroeze en A.J.P. Schild (eds), *De toekomst van het ondernemingsrecht – Het ondernemingsrecht van de toekomst*, Opstellen voor Prof. mr. L. Timmerman, Wolters Kluwer 2015.

B.P.A. Santen & A. de Bos, 'The Effects of Legal Measures to Empower Supervisory Directors: Evidence from a Financial Distress Perspective', *Journal of Management and Strategy*, 2015, Vol 6, No 1 p. 45-61.

[Available at: <http://www.sciedu.ca/journal/index.php/jms/issue/view/307>]

B.P.A. Santen en S.E. Castaño Ortiz, 'Na HR 6 juni 2014: Een hernieuwd pleidooi voor rechterlijke facilitering van de voorlopige crediteurencommissie', *Tijdschrift voor Insolventierecht*, 2015 (8), p. 51-54.

[Available at: <http://www.tri-leiden.eu/publications>]

B. Wessels, 'Contracting Out of Secondary Insolvency Proceedings: The Main Liquidator's Undertaking in the Meaning of Article 18 in the Proposal to Amend the EU Insolvency Regulation', *9 Brooklyn Journal of Corporate, Financial & Commercial Law*, Fall 2014, number 1, pp. 63 – 110.

[Available at: <http://bobwessels.nl/2015/05/2015-06-doc1-the-main-insolvency-practitioners-undertaking/>]

B. Wessels, 'Book review: Donald S. Bernstein (ed.), The International Insolvency Review', *International Insolvency Law Review*, 1/2015, p. 41-42.

B. Wessels, 'Book review: Ian F. Fletcher, The Law of Insolvency, 4<sup>th</sup> ed., with 2<sup>nd</sup> Cumulative Supplement', *International Corporate and Commercial Law Review*, 2015, Issue 2, p. 72.

B. Wessels, 'EU Courts Can Rely on Soft Law Principles for Cooperation in International Insolvency Cases', *6 International Insolvency Law Review*, 2015/2, p. 145-160.

B. Wessels, 'Grensoverschrijdende samenwerking tussen rechters in faillissementszaken', *Weekblad voor Privaatrecht, Notariaat en Registratie (WPNR)*, 11 April 2015, nr. 7058, p. 331-332.

B. Wessels, 'Harmonisation of Requirements for Insolvency Holders on a European Level', in: *Festschrift für Bruno M. Kübler zum 70. Geburtstag*, München: Verlag C.H. Beck oHG 2015, p. 757-771.

[Available at: <http://bobwessels.nl/2015/05/2015-05-doc3/>]

B. Wessels & R.J. de Weijs, 'Proposed Recommendations for the Reform of Chapter 11 U.S. Bankruptcy Code', *Ondernemingsrecht* 2015/37, p. 210-221.

[Available at: <http://bobwessels.nl/2015/04/2015-04-doc7-article-on-reform-of-chapter-11/>]

For publications of TRI Leiden, see also: <http://www.tri-leiden.eu/publications/>.

Visit us also at: [www.tri-leiden.eu](http://www.tri-leiden.eu)



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