

Hindsight bias in insolvency law: foresight in retrospect

The inaugural address of Reinout Vriesendorp as Professor of Insolvency Law at Leiden University: “[**]it happens; then and now” was the setting for a mini-seminar in Leiden about the underestimated effects of *hindsight bias* in insolvency cases . After a general introduction, a number of speakers from abroad spoke about specifics in their respective jurisdictions to an audience of about 25 practitioners and academics.

Introducing the subject, Ruud Hermans (De Brauw Blackstone Westbroek, Amsterdam) indicated how hindsight bias affects the proper judgement of people, as demonstrated in numerous social science experiments. Although professionals, like judges, are aware that they always judge on occurrences and happenings while they know the outcome, those experiments prove, time after time, that it is very hard and almost impossible to avoid. Techniques that may help are debiasing strategies, such as using very structured work processes, checking on alternative scenarios that could have led to the same outcome, or investigating more favourable hypothetical outcomes of the same event. Another alternative is to adapt procedural or substantive rules, using *ex ante* standards, increasing the liability threshold like the US business judgement rule and/or increase the burden of proof.

David Burdette (Nottingham Trent University), Daniel Weiss (Hengeler Mueller), Joeri Vananroye (KU Leuven/Quinz) and Giorgio Corno (Studio Corno Avvocati) addressed the topic from their respective jurisdictional backgrounds (David also replaced Sarah Paterson (London School of Economics/Slaughter & May)). In their presentations and subsequent discussions, they indicated the various legal instruments prone to invoking the risk of hindsight bias by courts in matters concerning directors' liability, directors' disqualification and impeachable transactions (fraudulent conveyances, preference law). They provided various examples and approaches about mitigating the risks of hindsight bias. Also, certain defences against actions by trustees (and subsequent judgments by courts) to hold directors etc. liable for the negative outcome of the insolvency that – with hindsight – could have been foreseen, were debated.

During the drinks and dinner afterwards, it appeared that the theme of 'hindsight bias' and possible unjustified outcome of court decisions is a topic that deserves further attention by the insolvency practice and research by academia.