Day 2 - Friday 26 April 2024

13:00 pm – 14:15 pm: EU Law (Round Table)

Moderator: Dr. Emilie GHIO (University of Edinburgh)

- Francesca BURIGO (Ca' Foscari University): *The Perfect Astral Conjunction for the Success of a Secondary Virtual Proceeding*
- Kevin SILVESTRI (Universities of Kiel and Trento): *Concurrent Opening Proceedings and Recognition of their Effects under the EIR*
- Borko MIHAJLOVIC (University of Kragujevac): *What Is the "Likelihood of Insolvency"?*
- Leonardo PINTO (University of Bari): *Credit Risk and 'False Positives': The Evolution of Credit Protection in the New Business Crisis and Insolvency Code*

Francesca BURIGO (Ca' Foscari University): *The Perfect Astral Conjunction for the Success of a Secondary Virtual Proceeding*

European Regulation No. 848/2015 (so called EIR) introduced a new instrument in Article 36, codifying a practical-operational mechanism to balance the purposes of main insolvency proceeding with the interest of the local creditors of the debtor in another member State subject to the main proceeding. This tool avoids the opening of secondary insolvency proceedings in favour of synthetic or virtual proceedings, with advantages in terms of costs reductions, speed of action and valorisation of assets.

The text of the regulation, however, leaves room for some application perplexities, analysed in the paper, if one considers the individual jurisdictions involved in the proceedings, which do not always provide for an adaptation of the basic principles of domestic insolvency law to make them ductile and adaptable to the application of the concrete case.

Probably this reason contributed to disincentivising the use of an optional instrument such as the Article 36 commitment, when it did not lead to the failure of the solution proposed by the administrator of the main procedure and the consequent opening of a secondary insolvency proceeding in the second State.

In the course of 2023, a decidedly favourable conjunction of events finally led to the conclusion of an Article 36 commitment proposed by the insolvency administrator of a procedure opened in Italy and concerning a company with assets and dependencies in Romania.

The case (deeply analysed in the paper and here just briefly summarised) concerns the insolvency of a Romanian company included in a group of companies and the Italian legal system was affected as the COMI has been identified where the parent company of the insolvent one is based (Italy).

The crisis afflicted both the parent company and the subsidiary, because they were closely linked to each other in the production process: the subsidiary worked as a contractor for the parent company on the basis of the orders received from the latter and the customised projects it designed.

A first key point is an almost symbiotic management of the crises of the companies in order to preserve the value of the company and business continuity; the second one is the possibility of quickly and jointly selling with the parent company the group of companies' complex to an interested party approached before the commencement of the Italian insolvency procedures.

This once-in-a-lifetime opportunity was the result of a careful pre-bankruptcy management and of a fine negotiation work conducted by the insolvency practitioners of the Italian bankruptcy proceedings of the parent company and the subsidiary.

Notwithstanding the petition for the opening of a secondary insolvency proceeding from a local creditor, the main critical issues for the Romanian company proceeding were matching the necessary promptness in concluding the sale of the business entity with the interests of local Romanian creditors by giving a unilateral undertaking in respect of the assets located in Romania accomplishing the information duties required by Article 36 EIR and the rules for the approval of the commitment set by the Romanian insolvency law.

Due to a failed attempt to solve the crisis of the subsidiary with a preventive measure in 2022, the insolvency administrator has been involved in advance and already knew full well the situation of local creditors. All this permitted the drafting of a fitting commitment, preventing the opening of the secondary proceeding and getting the approval of a very high majority of the creditors by amount of their claim, plus a little insurance on the possible emersion of additional debts arising from an ongoing assessment of the Romanian tax authority.

The term for lodging the request of opening a secondary proceeding in Romania is expired crystallising the commitment of the Italian insolvency administrator with the Romanian creditors.

The paper focuses on the analysis of the juridical (and economical) features of the case study to demonstrate the rare astral conjunction that allowed the success of the application of a virtual insolvency proceeding under Article 36 EIR, that seems to be the first since the entry into force of the Regulation.

Kevin SILVESTRI (Universities of Kiel and Trento): *Concurrent Opening Proceedings and Recognition of their Effects under the EIR*

The phase leading to the formal opening of an insolvency proceeding is often a crucial one, both in domestic and cross-border cases. Debtors "slide" into such proceedings gradually, as, according to national laws, some of the legal effects aimed at protecting the debtor's assets, both from "inside" (debtor's divestment) and "outside" (stay of actions), and at preserving the equal treatment of creditors may stem from the filing of the petition to open the proceedings, from various judicial orders issued before the opening of the proceeding, or from the judgment formally opening the proceedings.

Yet, in the face of the fact that diversity of the laws of Members State in this respect calls for careful rules of coordination, the EIR scantily regulates the opening phase of cross-border proceedings: articles 19 and 20 grant recognition to the judgment opening the proceedings (as defined in article 2, lit. 7); article 5 gives the debtor or any creditor the right to challenge before a court the decision opening main insolvency proceedings on grounds of international jurisdiction; article 32, para. 1 grants recognition to preservation measures taken after the request for the opening of insolvency proceedings or in connection with it.

The paper aims to explore some of the numerous questions that these provisions raise when examined on the backdrop of different national procedural laws.

First, the definition of "judgment opening insolvency proceedings" as "the decision of any court to open insolvency proceedings" is obviously circular, and neglects some instances in which such a decision is absent (such as in cases where the approval of a scheme is sought, and any other order issued by court before the approval judgment has a merely procedural content); the inclusion, in the notion, of decisions appointing an insolvency practitioner is of no help in defining the notion, and is rather problematic, since, if understood literally, could include cases in which the court appoints an IP despite not having sufficient elements to assess its jurisdiction.

Secondly, as a results of such a recognition system, which, in line with the *Eurofood* judgment, aims at "applying the recognition principle as soon as possible", the insolvency of many debtors could be, in fact, managed under a law different than that of the Member State where the COMI is, since most national laws do not stay the proceedings only on the ground that the decision opening it has been challenged in court. In this respect, article 5 does not state whether the annulment of the opening judgment has retroactive effect or not, in other words, whether the principle of mutual trust could be pushed to point of giving universal effects to a judgment handed down by a court whose jurisdiction has been successfully challenged, or whether such effects should rather give way to the effects of a judgment issued by «a court of a Member State which has jurisdiction pursuant to Article 3» (as art. 19 puts it).

Thirdly, the notion of "preservation measures" under article 32 EIR, though broad enough to include any kind of court order aimed at protecting the debtor assets, leaves out protecting effects stemming from the filing of the petition to open proceedings alone (e.g., some national laws prohibit creditors to acquire collaterals from the time the petition has been filed, namely in proceedings that do not include avoidance actions). Furthermore, the EIR does not address the issue of jurisdiction to issue preservation measures (art. 3 only deals with jurisdiction to "open insolvency proceedings"), leaving the question open, whether courts of Member States other than those of the Member State before which the opening proceeding is pending could grant preservation measures seizing jurisdiction according to national law (e.g. some national laws, as art. 35 Brussels I-bis Regulation acknowledges, allow their judges to issue preservation measures if they have to be effected in that State, regardless of the jurisdiction as to the substance of the matter).

Finally, the EIR does not address the recognition of preservation measures in aid of restructuring proceedings or frameworks that are not listed in Annex A (and that Member

States enacted mainly to comply with the Restructuring Directive). Thus, the question of the legal basis for their recognition is explored, namely whether it could be granted according to art. 2, lit a) of the Brussels I-bis Regulation; under national law; or even under art. 32 EIR, provided that such proceedings or frameworks may eventually lead to proceedings included in Annex A.

Borko MIHAJLOVIC (University of Kragujevac): *What Is the "Likelihood of Insolvency"?*

Despite legislative and academic efforts aiming to support companies to navigate through the financial distress, the companies operating in the stage of likelihood of insolvency still encounter a problem of legal uncertainty caused by the non-existence or vagueness of legal rules and standards. The lack of legal certainty primarily concerns the directors of the company, who are the main addressees of the most of existing legal rules and mechanisms. Legal uncertainty negatively affects prudent and timely managerial decision making by creating an additional risk of directors' personal liability. As a consequence of it, directors' decision making when there is a likelihood of insolvency becomes more difficult and sometimes even restrained.

Described difficulties mainly originate from the vagueness of the underlying concept of the likelihood of insolvency. Namely, the application of the specific rules and standards, existing in most of the jurisdictions, is related to the specific period when there is a likelihood of insolvency. Even though this issue has not been neglected by scientific research, a clear and precise answer when the likelihood of insolvency begins and ends does not exist. The main goal of this paper is to explore the concept of the likelihood of insolvency, and to provide more precise guidance for company directors on the timeframe of the stage of the likelihood of insolvency. This issue will be investigated in the context of the EU law, since the likelihood of insolvency presents a trigger for the application of specific directors' duties (Article 19 of EU Directive 2019/1023 on Restructuring and Insolvency), as well as for the availability of a preventive restructuring framework in the national laws of EU Member States. Additionally, this issue may become even more important in the near future, if the EU law introduces the directors' duty to file for insolvency, as envisaged in the Articles 36-37 of EU Proposal for a Directive harmonizing certain aspects of insolvency law. In that case, the border line between the application of two different mechanisms (extension of directors' duties to different stakeholders and directors' duty to file) will depend on the meaning of the concepts of likelihood of insolvency and insolvency. The objectives of this paper are aimed to be achieved by the combination of the comparative doctrinal research and accounting research.

The initial step in exploring the issue covered in this paper entails a comparative analysis of the laws from selected jurisdictions. The selected jurisdictions will be (in alphabetical order): Belgium, France, Germany, Italy, and Luxembourg. The selection of EU Member States has been made on the basis of differences in approaches and solutions about the likelihood of insolvency within the selected jurisdictions, as well as on the importance of these jurisdictions for European economy. Besides scientific reasons, the selection is partially based on practical reasons, such as the language capabilities of the author, and a possibility to establish direct and permanent communication with the scholars from selected countries. At the beginning, the author will briefly review the factors that selected jurisdictions and legal scholars use for the purpose of determining the moment that presents a "trigger" for the beginning of the stage of the likelihood of insolvency. Afterwards, the particular reference will be made to the implementation of Article 3(1) of the EU Directive on Restructuring and Insolvency, and the establishment of early warning tools which can detect circumstances that could give rise to a likelihood of insolvency.

Since the rules about the timeframe of the stage of likelihood of insolvency are scarce and/or unclear, as well as due to the fact that the likelihood of insolvency is not just a legal but also an accounting problem, the comparative legal analysis is not sufficient to achieve the objective of this paper. For that reason, the second step in this research will be the analysis of applicable accounting standards in selected jurisdictions. The main assumption of the author is that accounting science may provide for an objective and measurable trigger for the beginning and the end of the stage of the likelihood of insolvency. Firstly, the author will identify differences in accounting standards in selected jurisdictions, and especially differences in that regard between listed and non-listed companies, large companies and SMEs, group and non-group structures. Then he will determine how potential differences influence legal regulation and directors' behavior in the stage of the likelihood of insolvency. The ultimate goal is to define the likelihood of insolvency as precisely as possible in "accounting terms", and to assess the possibility of "translating" that definition in the legal terminology.

Leonardo PINTO (University of Bari): *Credit Risk and 'False Positives': The Evolution of Credit Protection in the New Business Crisis and Insolvency Code*

Over the course of the recent past, the evolution of the socio-economic context, both at a national and international level, has led to a preponderant emergence of the need to develop relations between the various economic operators. Within this context, the elaboration of correct information has assumed a central role in the management of business and in contributing to the raising of trust in the various stakeholders who, for different reasons, come in contact with the company. In this sense, there have been (and still are) numerous provisions in the field of laws, regulations and accounting, issued by the various authorities in charge at national and international level.

At the EU level, some important innovations have been made through the issuance of Directive (EU) 2019/1023 (the so-called Insolvency Directive), with which the European legislator intended to dictate common rules capable of harmonizing the domestic crisis and insolvency law of the Member States. The purpose is to strengthen the culture of recovery of the company in crisis and, consequently, 'prevention', also pursuing a reduction in the duration of preventive restructuring frameworks and insolvency proceedings.

At the national level, many of the principles contained in the Directive have been directly reflected in the new Corporate Crisis and Insolvency Code (CCII), enacted by Legislative Decree No. 14/2019.

The purpose of this paper is to focus on some of the main new elements introduced by the Code, with a particular focus on those that directly impact intermediaries and credit risk management, also considering the guidelines contained in the EBA Guidelines on the granting and monitoring of loans. The regulatory changes mark a paradigm shift in the bank-business relationship, especially for SMEs. As a result of the reform of insolvency procedures, a new idea of credit protection is gaining ground: formalized risk quantification becomes an integral part of the governance of all companies. The vital goal for the company is to put adversity that may threaten the going concern 'in check'. The vital objective for the company is to bring adversity that may threaten the going concern 'under control'. The hoped-for evolution is for the bank to take on the role of a financial partner capable of confronting the entrepreneur and identifying prospectively sustainable solutions based on real financial capacity, avoiding situations of over-indebtedness. In this respect, the management of the Bank of Italy's Central Risk Office plays an important role in the rating (or scoring) systems used by banks for assessments relating to the granting and monitoring of counterparty credit risk.

Precisely, in order to highlight the importance of the correct management of the Centrale Risks, the investigation will begin with an analysis of the consequences that may arise in the event of a 'false positive', i.e. illegitimate reporting in the Centrale Risks of the Bank of Italy: such an eventuality is capable of generating potentially deleterious effects for a company in a state of crisis, with the consequent failure of any prospects of recovery. Starting from a study of case law, the remedies currently provided by the legal system to deal with cases in which such a hypothesis occurs will be examined; in addition, the existence of new tools that can be used to neutralise *ex ante* the effects of a 'false positive' will be examined. In particular, the focus will be on the aforementioned banking regulation, which aims to prevent the emergence of new impaired loans and to ensure the soundness and stability of the entire European financial system, by addressing the shortcomings found in the procedures for granting and monitoring credit. In fact, according to the new regulations, banks are called upon to assess a client's current and future capacity, with the ultimate goal of promoting a proactive approach to monitoring credit quality, identifying deteriorating credit in good time. Essentially, the bank must focus its analysis on two key aspects: the sustainability of the debt and the future repayment capacity of the counterparty.

14:15 pm – 15:15 pm: Perspectives from the Americas

chair: Prof. Virginia TORRIE (University of Saskatchewan)

- Juan L GOLDENBERG SERRANO (Pontificia Universidad Catolica del Chile): *Theoretical and Practical Consequences of the Deviations from the UNCITRAL's Model Law on Cross-Border Insolvency: A View from the Latin American Experience*
- Alfonso NOCILLA (University of Western Ontario): *Canadian Cross-Border Insolvency Law and the Triumph of Modified Universalism: Where Do We Go from Here?*
- Maximiliano ESCOBAR (Universidad de Conception): *The Chapter 11° v/s State Aids like a Tool for Improving and Holding Air Transport Companies in Times of Crisis*

Juan L GOLDENBERG SERRANO (Pontificia Universidad Catolica de Chile): *Theoretical and Practical Consequences of the Deviations from the UNCITRAL's Model Law on Cross-Border Insolvency: A View from the Latin American Experience*

UNCITRAL's Model Law on Cross-border Insolvency (MLCBI) seeks global cooperation and uniformity to increase certainty for all stakeholders. However, its implementation across Latin American jurisdictions displays significant deviations from the proposed text that can lead to opportunistic behavior and a less use of the tools it provides.

Only four nations in the region—Mexico (2000), Colombia (2006), Chile (2014), and Brazil (2020)— have enacted the MLCBI. But, despite integrating its interpretative rule (article 6), these countries' adaptations introduce important complexities. Considering that the purpose of this provision is that local judges mimic an (inexistent) international court for consistent application, yet this falters when states deviate the terms of recognition, cooperation, and coordination.

For instance, Mexico replaced the "public policy exception" by the "breach of internal bankruptcy regulation and the fundamental principles of the Mexican law", while Chile eliminated the adverb "manifestly". Notably, Mexico omitted any reference to the regulation' s objectives, as referred in the MLCBI's preamble, while Colombia excluded the idea of facilitating the rescue of businesses, and Brazil added one tied to an efficient and optimal liquidation.

Mexico introduced a reciprocity standard and the requirement to initiate a local insolvency proceeding upon the recognition of a foreign one, while Colombia did similarly for agencies of foreign companies, and some Chilean case law has required the indication of the local proceeding that would be initiated afterwards by the foreign representative.

Further discrepancies arise in the specifics. Colombia changed the definition of "establishment" without reference to "human means and goods or services". Brazil and Chile introduced unique rules for the ranking of claims, submitting them to the *lex fori concursus*. Brazil addressed fraudulent COMI-shifting based on article 3 of the European Regulation, while Chile and Colombia dropped the presumption of insolvency upon recognizing a foreign main proceeding.

These amendments challenge the "modified universalism" endorsed by the MLCBI, requiring a closer examination of the interpretative rule and a reviewed consideration of the application of its substantive and procedural principles. This means that, when a deviation is found, the court cannot elude considering the parliamentary debate and other local rules and principles that may explain or illustrate the amendment.

Some practical consequences arise from these different approaches, explaining the partial use or the avoidance of their enforcement due to uncertainties, as can be demonstrated by the decisions taken in 2020's large Latin American airline insolvency cases under Chapter 11 of the U.S. Bankruptcy Code.

Latam Airlines pursued recognition of its foreign proceeding in Chile and Colombia, challenging the COMI presumption. No such request was made in Brazil despite its later MLCBI adoption. However, the airline refrained from seeking plan homologation in the recognizing courts. Doubts around the "public policy exception" in Chile possibly hindered this step, particularly concerning potential effects on shareholders' rights, as part of the plan diluted them due the loss of value of the initial equity. The question was whether there was an illegal expropriation of rights as, in the same scenario, Chilean law would have required the shareholders' consent for such dilution.

In the Avianca case, no recognition was sought in Colombia, leading to creditors enforcing claims out of the U.S., despite filing their claims in the American proceeding and submitting to the jurisdiction of their court. Avianca then filed a motion seeking an order to impose sanctions on the foreign creditors due to the risk of "double recovery" and the contempt of the court's order. This situation could have been mitigated if the proceeding, plan, and debt discharge were recognized in the respective jurisdictions.

Aeromexico chose not to seek recognition in Mexico either, as local insolvency laws required a time-consuming local proceeding and the company needed quick access to DIP financing in the United States. This approach is not flawless as it does not address all cooperation and coordination issues, a deficiency that is particularly relevant when local creditors might exert pressure before local courts. In the case of Aeromexico, labor claims and union benefits posed a significant challenge, as the U.S. court linked the case's progression to their approval.

In conclusion, the variations in the adoption of the MLCBI among Latin American countries introduce complexities that challenge the model law's envisioned uniformity. They do not only thwart the "modified universalism" approach, but also create practical issues in cross-border cases. Achieving consistency in the application of international insolvency principles in this diverse landscape then requires a deeper exploration of the interpretative rules and the conscience of the effects of these variations by local lawmakers and courts.

Alfonso NOCILLA (University of Western Ontario): *Canadian Cross-Border Insolvency Law and the Triumph of Modified Universalism: Where Do We Go from Here?*

This paper critically examines the implementation of the *Model Law on Cross-Border Insolvency*[1] (Model Law) in Canada, with emphasis on courts' interpretation and application of the concept of modified universalism. Central to the modified universalist approach is the principle of comity, according to which one nation recognizes the "legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens".[2] From an historical perspective, it was not a foregone conclusion that modified universalism would become the dominant approach in Canadian cross-border insolvency law. On the contrary, prior to 2009, Canadian courts and commentators had raised concerns about the enforcement of foreign insolvency orders in Canada and the potential challenges for the

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[1] United Nations Commission on International Trade Law, *UNCITRAL Model Law on Cross-Border Insolvency with Guide to Enactment and Interpretation* <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/1997-model-law-insol-2013-guide-enactment-e.pdf>.

[2] *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077, citing *Hilton v Guyot*, 159 US 113 (1895) 163-164.

principles of sovereignty and the rule of law.[3] Furthermore, Canada's version of the public policy exception in Article 6 of the Model Law omits the adverb "manifestly" from the term "manifestly contrary to", suggesting that Parliament intended to give courts a wider basis for refusing to recognize foreign orders than the Model Law contemplates. Despite the foregoing, the paper shows that Canadian courts have embraced the Model Law enthusiastically since 2009 and have interpreted the public policy exception narrowly in practice.[4]

The paper begins with a discussion of the law on the recognition of foreign insolvency orders in Canada prior to the adoption of the Model Law. It considers the evolution of the common law in this area and the addition of the first cross-border provisions to Canada's two principal insolvency statutes, the *Bankruptcy and Insolvency Act*[5] (BIA) and the *Companies' Creditors Arrangement Act*[6] (CCAA), in 1997.[7] It then examines Canada's adoption of the Model Law via amendments to the BIA and the CCAA in 2009, arguing that the jurisprudence since that time has developed a particular, stronger version of modified universalism that is distinct from earlier approaches. At the same time, the concept of modified universalism remains underexamined and undertheorized. The upshot of this analysis is that while modified universalism is clearly here to stay, the concept requires further parsing so as to remain coherent and useful. As this discussion raises issues that are by no means unique to Canadian law,[8] it may also inform broader debates in international insolvency law regarding the meaning and role of modified universalism.

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[3] See *Singer Sewing Machine Co of Canada Ltd (Re) (Trustee of)*, 2000 ABQB 116 at para 26: "Comity does not require me to recognize a chapter 11 order over a Canadian company… Who the shareholders are is irrelevant and who the creditors are is irrelevant. Under Alberta law neither gives an American bankruptcy court jurisdiction over Singer Canada." See also Stephanie Ben-Ishai & Thomas GW Telfer, *Bankruptcy and Insolvency Law in Canada: Cases, Materials, and Problems* (Toronto: Irwin Law, 2019) at 772 (noting the "narrow approach that Canadian courts historically took" to recognizing foreign judgments).

[4] See: *In the Matter of Voyager Digital Ltd*, 2022 ONSC 4553 at para 13 (noting the "preferred "modified universalism" approach that is propounded in much of the Canadian jurisprudence"); *MtGox Co Ltd (Re)*, 2014 ONSC 5811 at para 11 ("[t]here is increasingly a move towards what has been called modified universalism"); and Jane Dietrich & Michelle Pickett, "Stranger Things: Recent Developments In Recognition Proceedings" (2023) 12 J Insol Inst Can 155. The Canadian approach is consistent with other jurisdictions that kept the term "manifestly contrary" unchanged, see for example § 1506 of US Bankruptcy Code, 11 USC 101, *et seq*. The provision "requires a narrow reading": see *In re Fairfield Sentry Ltd.*, 714 F.3d 127, 139 (2d Cir. 2013); and Melissa A Garza, "When is Cross-Border Insolvency Recognition Manifestly Contrary to Public Policy" (2015) 38 Fordham Int'l LJ 1587.

[5] RSC 1985, c B-3.

[6] RSC 1985, c C-36.

[7] An Act to establish the *Wage Earner Protection Program Act*, to amend the *Bankruptcy and Insolvency Act* and the *Companies' Creditors Arrangement Act* and to make consequential Amendments to other Acts, SC 2005, c 47; and An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, SC 2007, c 36. The Model Law replaced Part XIII of the BIA and section 18.6 of the CCAA, which had been introduced in 1997. Prior to 1997, Canadian insolvency legislation did not contain any cross-border provisions, such that cross-border issues had to be resolved using common law conflict of laws rules: see Jacob Ziegel, "Canada-United States Cross-Border Insolvency Relations and the UNCITRAL Model Law" (2007) 32:3 Brook J Int'l L 1041 at 1042.

[8] See: Irit Mevorach, *The Future of Cross-Border Insolvency: Overcoming Biases and Closing Gaps* (Oxford: OUP, 2018) at 48 ("modified universalism is still generally recognized as merely a broad principle or trend"); Adrian Walters, "Modified Universalisms & The Role of Local Legal Culture in the Making of Cross-Border Insolvency Law" (2019) 93 Am Bankr LJ 47 at 109 ("differences in implementation and reception of the Model Law reveal different understandings of modified universalism", which may "undermine the practical utility of modified universalism as a source of guidance for judges"). But see also, more recently, Irit Mevorach & Adrian Walters, "The Characterization of Pre-insolvency Proceedings in Private International Law" (2020) 21 EBOLR 855 at 860 (suggesting that modified universalism is "sufficiently flexible that it can evolve" to respond to new challenges).

Maximiliano ESCOBAR (Universidad de Conception): *The Chapter 11° v/s State Aids like a Tool for Improving and Holding Air Transport Companies in Times of Crisis*

The impact of the health crisis on the aviation industry is unprecedented. Since the WHO declared the pandemic, the different measures adopted by the States, such as confinement, quarantines, distancing measures and travel restrictions, have been reflected in the nearly absolute paralysis of tourism during some of the stages, or in its drastic reduction in others. It has also affected mobility in general, and as we will see, air transport in most of its aspects.

According to data provided by IATA, 2020 was the worst year for the airline industry. Global demand contracted by 65.9% year-on-year, and international travel by 75.9%. Total industry revenue fell 69%. The global passenger load factor fell to 65.1% in 2020, compared to 82.5% in 2019. The drop in air travelers marked historical lows since the data record, around 1950[9].

The altered economic landscape and airline industry practices have prompted States to try providing support to affected companies. State support has been considered necessary and unavoidable. Some of these aids are excluded from the control system imposed by the competition regulations, but others must be subject to the prior notification that is imposed in general and that has also been applied, since the seventies, to the aeronautical sector. On the other hand, the competition regulations themselves have been affected, even temporarily, since an attempt has been made to make the system more flexible in order to facilitate the use of much-needed support measures as much as possible.

As the European Commission has stablished[10], a company receiving government support may gain a distortive advantage over its competitors. Therefore, Article 107 TFEU generally prohibits State aid unless exceptionally justified. Notwithstanding the indicated, to purpose of the sanitary crisis the Commission has adopts a Temporary Framework to enable Member States to further support the economy in the COVID-19 outbreak[11].

In the Latin American context, the solution adopted had been different. The world-famous Chapter 11, which regulates the reorganization procedure for companies in financial difficulty in the United States, is one of the most important insolvency laws in the world. The relevance of that country's economy, the legal and financial sophistication of its corporate restructuring practices and the strong focus on rescuing companies in difficulty are some of the reasons that explain the influence that this chapter has had in multiple latitudes, including Chile.

One of the questions that arises after the decision of Avianca and LATAM is: why have they preferred to restructure in the United States and not in some Latin American jurisdiction? The answer is based, especially, on the benefits of Chapter 11 and on the successful experience of other foreign companies that have sought refuge in it (in the case of Avianca this is its second Chapter 11 and, in our country, Edelnor in 2002 and the operators of the

[9] IATA, Document n° 6, "2020 Historic fall in demand for air travel, February 3, 2021.
[10] https://ec.europa.eu/competition-policy/state-aid/state-aid-overview_en
[11]chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://ec.europa.eu/competition/state_aid/what_is_new/sa_covid19_temporary-framework.pdf

Transantiago Alsacia & Express in 2014 opted for a similar strategy). Thus, briefly, the most relevant benefits are the following: access to specialized justice; the debtor maintains the administration (as a general rule); access to fresh money; rejection of contracts in progress; access to more developed financial and legal restructuring practices; international cooperation.

In this way, and according to it, it seems that the restructuring process under Chapter 11 presents various advantages for debtors such as Avianca or LATAM, who will be able to pursue the reorganization of their liabilities while enjoying the relevant protection granted by US legislation and practices, being This is an attractive forum to learn about these complex procedures.

For us, it is vitally important to make some decisions about it, to go to the aid of one of the sectors more affected by the crisis, and which is fundamental in our economies. In fact, the Transport sector and its industry is one of the issues that each day becomes more important and more points give for discussion within the development agenda in emerging economies.

In this paper we propose going to analyze the means used in Latin America, especially in Chile about LATAM's Chapter 11, to help transport companies and to contrast its reality with the one of those countries that have successfully achieved holding the air transport industry.

15:15 pm – 15:30 pm: Coffee Break

15:30 pm – 16:15 pm: Round Table on Local Entities in Financial Distress

Moderator: Prof. Laura COORDES (Sandra Day O'Connor College of Law, Arizona State University)

- Simona GHERGHINA (University of Bucharest) and Mihai BAESU (University of Bucharest): *An Elusive Topic in Insolvency Proceedings: The Effectiveness of Municipal Guarantees*
- Geo QUINOT (University of Stellenbosch): *Municipalities in Financial Distress: An Environmental, Social and Governance Critique*
- Neil SMYTH (Mills & Reeve): *Can "bankrupt" councils even be made bankrupt?*
- Eric SCORSONE (University of Virginia): *Fiscal Decline and Recovery of the Motor City*

Simona GHERGHINA (University of Bucharest) and Mihai BAESU (University of Bucharest): *An Elusive Topic in Insolvency Proceedings: The Effectiveness of Municipal Guarantees*

The sovereign debt crisis of the late 2000s brought into light the crucial importance of having in place a clear, predictable and, more importantly, a strict legal framework governing the public debt obligations. The international community naturally pays more attention to the aim of strengthening the legal framework applicable to public debt obligations of central public authorities; however, another dimension of public debt may prove to be of similar relevance, namely the rules governing the public debt obligations of the decentralised (local) public authorities. In this respect, the Romanian public finance legislation draws a clear distinction between the governmental public debt obligations and the local public debt obligations. The Romanian public finance system is therefore based on the principle that the central government is not liable for the public debt of local authorities. This principle further enabled the enactment of specific regulations concerning the financial crisis and insolvency of municipalities.

Within such financial crisis and/or insolvency proceedings, the guarantees issued by the municipality in distress are also subjected to another set of rules, derived from and part of the web of rules allowing municipalities to undertake public debt obligations. Such public local guarantees may be issued by municipalities either as collateral for their own loan repayment obligations or as personal guarantees for a limited range of debtors controlled by the municipality, in both cases subject to several limitations. The interplay between the rules governing the financial crisis/insolvency proceedings and those applicable to guarantees issued by the municipalities subjected to such proceedings leaves room for multiple questions concerning the prevailing rules, the order of precedence of creditors, the implications of creditor's failure to timely enforce the guarantees, the limits of the local authorities' powers in making decisions for the administration of available funds, etc. The proposed contribution will outline these questions and strive to identify the most effective legal solutions.

Our analysis is therefore aimed at understanding and defining the legal contour of the effectiveness of municipal guarantees during the insolvency proceedings. A specific issue arises from the limited pool of public revenues that may be used for the settlement of payment obligations of municipalities in distress, as the Romanian law restricts all payments under municipal guarantees to a specific type of revenues of local budgets. However, such revenues- usually prove to be the sole source that may reasonably fund most of the outstanding payment obligations, as most of the other revenues are transferred to local budgets exclusively for specific payments. Moreover, the scarcity of available resources for the discharge of outstanding payment obligations during the insolvency procedures may be further stressed by the rule allowing permanent budgetary authorization for public debt payments.

Considering the above, the main questions this contribution aims to answer are focused on the legal regime of the order of preference of creditors, both secured and unsecured, as it may be construed as an interplay between the special rules concerning municipal guarantees, the special rules for municipal insolvency and the general rules applicable to guarantees.

Besides the solutions to be proposed in our contribution, the analysis may be useful as a comparative tool for other legal systems confronted with similar difficulties, especially for those legal systems whereby the municipalities are authorised to rely on public debt in order to finance their public investments.

Geo QUINOT (University of Stellenbosch): *Municipalities in Financial Distress: An Environmental, Social and Governance Critique*

The treatment of local public entities or municipalities in distress is a largely unexplored area of law. The rules regulating these processes are often unaffected by the influence of legal principles developed in areas such as bankruptcy and restructuring law. Yet the insolvency of a municipality has a huge economic, social and political impact on local, regional, and national stakeholders. Rules governing treatment of municipalities in distress are often influenced by principles from constitutional and administrative law in contrast with private entities in distress.

As municipalities cannot be liquidated, their crises present unique opportunities to address triggering factors and lay the foundations for their long-term “renaissance”. A recent comparative study for INSOL International, led by Eugenio Vaccari, Laura N Coordes and Yseult Marique, that compared the treatment of local public entities in financial distress in 19 jurisdictions, found significant differences in how various systems approach municipalities in distress. The study also highlighted the failure of many of these regulatory frameworks in promoting long-term solutions to address the causes of municipal distress in a sustainable way.

South Africa (which was one of the systems included in the INSOL study) is a useful jurisdiction to study municipalities in distress from a law-in-context approach. On the one hand, South African law contains an extensive, dedicated regulatory and administrative framework dealing with public finance management of municipalities, including specific rules on financial problems. This regime, existing largely parallel to insolvency law is one of the most comprehensive, dedicated sets of rules on municipalities in distress globally. On the other hand, financial distress of South African municipalities is a very common factual phenomenon. The South African National Treasury’s *2021 State of Local Government Finances and Financial Management Report* indicated that most municipalities’ financial situation deteriorated in the preceding five years. In 2015/16, 37.7% of municipalities were in financial distress, which grew to 64% in 2020/21. The report showed that 38 municipalities (15% of all municipalities) were under intervention in 2021 due to governance failures. This included Mangaung, one of the eight metropolitan municipalities in the country and the capital city of one of the nine provinces (the Free State). It is accordingly evident that the extensive regulatory regime focused on municipal financial distress is not effective with far-reaching environmental, social and governance implications.

Neil SMYTH (Mills & Reeve): *Can “bankrupt” councils even be made bankrupt?*

There has been much press coverage in the UK over the last couple of years about local authorities going “bankrupt”.

However, what is behind these stories and are they actually technically correct – can these organisations actually go bust.

Neil Smyth will talk about the various economic factors that are contributing to financial distress for UK councils, including increased demand on services and reduced funding.

These are estimated to result in a £4bn funding shortfall for authorities over the next two years, according to a recent Government report.

Neil will also talk about the relevant processes where an authority is in financial difficulty and whether authorities can actually go into insolvency processes in the UK.

Like many things in the media, the reality is not necessarily as it seems!

16:15 pm – 16:45 pm: The Edward Elgar Quiz

- Dr. Eugenio VACCARI (Insolvency Law Academy), Dr. Francesca BURIGO (III NextGen), Mr. Vasile ROTARU (INSOL Europe), Dr. Charles HO WANG MAK (INSOL ERA)

16:45 pm – 17:45 pm: ADR and Insolvency

chair: Prof. Annika WOLF (University of Emden Leer)

- Kenneth GHARTEY (Royal Holloway, University of London): *Arbitration in Aid of the Universalist Enterprise in Cross-Border Insolvencies*
- Orhan E KONURALP (Kirklareli University): *The (Un)availability of Alternative Dispute Resolution in Bankruptcy under Turkish Law*
- Jo LONG (Hunan University) and Rebecca PARRY (Nottingham Trent University): *Arbitration in Cross-border Insolvency Proceedings: The Chinese Perspective*

Kenneth GHARTEY (Royal Holloway, University of London): *Arbitration in Aid of the Universalist Enterprise in Cross-Border Insolvencies*

Universalism is frequently deprecated as an 'unattainable', 'politically infeasible' model of cross-border insolvency co-operation. In its purest from, this 'one law, one court' ideal, advocates that in the regulation of the effect of insolvencies which have multinational dimensions, one court and one applicable law should regulate all aspects of the procedure and substance of the proceedings for resolution or liquidation of the entities involved. Theoretically, universalism will eliminate potential conflicts relating to the applicable law and differences in creditor priority regime, preference laws, anti-avoidance regimes, national judicial attitudes and other matters of public policy between the different jurisdictions which interact in the cross-border insolvency process.

Even for its critics, universalism is acknowledged as an 'ideal'. An ideal which will however not be attained for political reasons and recognised differences in national public policy towards different aspects of the insolvency process. The leading alternatives to universalism (territorialism, modified universalism, co-operative territoriality), however leave practitioners and courts with frequently deciding, not so easily, which laws potentially apply to different parts of the cross-border insolvency process with attendant difficulties.

This presentation makes the argument that the arbitration of all aspects of the cross-border Insolvency process represents the road to this desirable ideal of 'universalism'. It can employ the neutrality, flexibility and speed advantages of international arbitration which have made it so popular in international commercial dispute resolution. To succeed in aid of the universalist enterprise in arbitration, however, arbitration must overcome national level obstacles to the arbitrability of insolvency disputes, current unjustified attitudes to arbitration as an appropriate dispute resolution method for (cross-border) insolvency disputes and must also maintain procedural guarantees for justice as closely as national legal forums currently provide in cross -border Insolvency cases.

Orhan E KONURALP (Kirklareli University): *The (Un)availability of Alternative Dispute Resolution in Bankruptcy under Turkish Law*

In the last decade, alternative dispute resolution methods have been promoted more than ever in Türkiye. As a part of this policy, lawmakers make mediation mandatory for certain kind of disputes that includes commercial claims. As a result of this regulation, parties of a commercial claim must apply to a mediator and need to prove that no agreement was reached.

On the other hand, arbitration has a wide range of application among the civil disputes, especially in commercial cases. Because of the heavy workload of the state courts, it may take years to have a decision even from the first instant court. Thus, many commercial agreements include arbitration clauses. Development of the institutional arbitration, like Istanbul Arbitration Centre, makes arbitration available and affordable for many.

Despite these facts, any of these ADR methods is not applicable in bankruptcy proceedings. As a result of this fact, the creditor, debtor, or trustee cannot apply for ADR. All bankruptcy procedure should be conducted by state institutes like commercial court and bankruptcy office. The main reason lies under the legal nature of the bankruptcy lawsuit.

Under Turkish law, bankruptcy procedure is accepted as a part of civil law, with many exceptional circumstances. For example, civil law claims depend on the parties will, if creditor want, s/he claims, if s/he does not want, no one can force her or him to claim. Similarly, civil court decisions are binding only for the parties, they do not have a direct effect on third parties. However, these examples are not valid for bankruptcy cases as bankruptcy decision of a commercial court is binding for every creditor and debtor of the bankrupt one. In addition, enforcement of the bankruptcy decision does not depend on the will of the creditor. As a result of these facts, bankruptcy proceedings cannot get benefit of general ADR methods provided by the Turkish law.

Beside the fact that the unavailability of the classic ADR method in bankruptcy proceeding, Code of Enforcement and Bankruptcy provides composition agreement to both debtor and creditors. However, composition procedure cannot be described as an alternative dispute resolution method as the whole procedure depends on the decision of the court and requires very strict procedures that cannot be changed by the parties. It is an alternative of bankruptcy and gives a chance to debtor to restructure its financial status with an agreement with all creditors.

It is not possible to accept that composition procedure is in favour neither of debtor nor creditors. It is not in favour of creditors, because they are not entitled to get their claims during the composition procedure. It is not in favour of the debtor, because debtor performs all commercial activity under the supervision of the trustee and any failure in financial restructuring would be resulted in bankruptcy. In addition, the length of the composition procedure is another major concern, especially for the high inflation era. The main aim of this study is to examine the composition procedure under Turkish law and make a critical analysis of the legal nature of the bankruptcy lawsuit in order to assess the possible availability of the classic ADR methods.

Yingxiang (Jo) LONG (Hunan University) and Rebecca PARRY (Nottingham Trent University): *Arbitration in Cross-border Insolvency Proceedings: The Chinese Perspective*

It is increasingly noticeable that arbitration can play an important role in the global context of insolvency and restructuring law, particularly where existing cross border insolvency frameworks are lacking. Arbitration can, for example, enable relitigation of points across jurisdictions to be averted and specialist expertise employed in complex financial cases. Enforcement of arbitral awards, based on the New York Convention can be easier than obtaining enforcement of insolvency judgments based on private international law. Nonetheless, insolvency proceedings and arbitration proceedings conflict in nature, with the former a collective proceeding and the latter based on individual autonomy and not all points are arbitrable. It is not surprising therefore that the acceptance of arbitration in cross-border insolvency proceedings varies from country to country. China, while not a member state of the UNCITRAL Model Law on Cross-Border Insolvency, is emerging as an active player in international insolvencies and its likely approaches are an area of interest. This paper will examine Chinese insolvency regulations and analyse cross-border cases relevant to China to understand the stance of China on the effectiveness of arbitration proceedings and awards in cross-border insolvency cases. By scrutinizing the evolving landscape of Chinese involvement in international insolvencies, this article aims to contribute valuable perspectives on the evolving intersections between national regulations, international practices, and the role of arbitration in mitigating complexities within cross-border insolvency scenarios.

17:45 pm – 18:00 pm: Closing Remarks

- Dr. Eugenio VACCARI (Royal Holloway, University of London)

18:30 pm – 22:00 pm: self-funded dinner at The Packhorse

- Egham Hill, Egham TW20 0BQ