# Report on the MCC Meeting for the ELI Project on Business Rescue

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The first meeting of the Members Consultative Committee ('MCC') for the European Law Institute ('ELI') project on the Rescue of Business in Insolvency Law took place during ELI's Projects Conference in Zagreb (Croatia), on 26 September 2014. During an interactive session professor Bob Wessels (Project Reporter) and participants discussed issues pertaining directly to the rescue of distressed businesses. At this MCC meeting professor Tatjana Josipović (University of Zagreb) was elected chair.

Bob Wessels shortly highlighted the phases of the project. National Correspondents ('NC's') are currently preparing inventory reports on national insolvency laws. These are due by the end of November 2014. Subsequently a conference will take place on 19 and 20 March in Vienna to discuss the most notable issues with regard to national insolvency laws. This will provide the basis for the Reporters (professors Stephan Madaus, Bob Wessels and associated professor Kristin van Zwieten) to prepare a legislative guide and (if justified) a legislative proposal. Information regarding the Vienna conference will be distributed mid-November.

A substantive discussion on the Business Rescue project focused on three issues; 1) core elements of a business rescue framework, 2) influence of a business rescue perspective on governance by the court and by liquidators, and 3) the preference for either an in-court or out-of-court work-out.

**1. Core Elements of a Business Rescue Framework**

Kristin van Zwieten proposed six core principles for preventive frameworks, derived from the Commission's Recommendation on a New approach for business failure and insolvency (of March 2014):

1) Such frameworks can be entered into when there is the likelihood of insolvency;
2) There is minimised court involvement;
3) Debtor-in-possession is possible;
4) Creditors can be ordered by a court to stay their actions;
5) A restructuring plan can be imposed, also on (a small group of) dissenting creditors ('cram-down'); and
6) New finance is granted certain protection.

In discussion with the participants it appeared that it is very important to a have a well-functioning court system (which is both responsive and transparent) and a high standard of practice at the bar. The involvement of courts was considered very relevant in order to ensure that arrangements do not unjustly deprive creditors of their rights. Also, the current disparities across Europe on criteria for classes and mandatory majorities are considered a serious issue.

Besides, a common problem with preventive frameworks by listed companies is the non-disclosure of information on a proceeding. Listed companies are usually obliged to share information on proceedings with the market. Providing a solid security for new finance is regarded a challenge. More generally it was observed that with the rising emphasis on business rescue a shift is taking place from contractualism to a more holistic perspective of the company where also external interests are taken into account. It was suggested that it can also be seen more broadly as a departure not from contractualism but from the protection of the benefits of ones' property.

Terms can be interpreted very differently across Europe, to that end a Glossary of Terms & Expressions is being prepared to provide for adequate definitions.

**2. Influence of a Business Rescue Perspective on Governance by the Court and by Liquidators**

Subsequently it was discussed what effects an increased focus on business rescue proceedings brings for professions such as judges and liquidators. This relates especially to out-of-court proceedings,

though court affirmation of rescue plans will remain necessary to assure fairness of the plan and involvement of those bound by it. Bob Wessels discussed the development of 'EU Cross-Border Court-to-Court Insolvency Cooperation and Communication Guidelines and Principles' ('JudgeCo Principles and Guidelines') which aim to promote better coordination of cross-border insolvency proceedings by judges. Especially when confronted with cross-border group companies, which the revised European Insolvency Regulation promotes to reorganise, judges are required to cooperate closely.

Several issues were mentioned with regard to courts. Language may cause a hurdle for judges in cross-border communication. Also, it was questioned if courts are currently well equipped to deal with larger cross-border insolvency cases and at the same time whether judges have the skills to review the viability of companies, their financial statements, or reorganisation plans. It was discussed whether larger cases should be dealt with by a specialised court, the largest cases are, however, not always the most complex ones.

**3. In-Court versus Out-of-Court Work-Outs**

The third topic relates to out-of-court and in-court work-outs. The USA Chapter 11 proceeding formally promotes out-of-court work-outs as parties need to pursue a private negotiated solution first. However, in practice it is not taken into account when a USA Chapter 11 proceeding is opened, still it remains interesting how out-of-court negotiations can be promoted. Also, can a stay be imposed in the out-of-court phase on creditors involved in the negotiations?

It was subsequently questioned how new finance should be protected, should the law provide these claims with a super priority? If the ranking of creditors can change shortly before insolvency, it may create uncertainty among creditors. Furthermore, should certain claims be excluded from the super priority for new finance? This could relate to certain fees and salary for employees. It was suggested to have more flexible instruments to deal with distressed companies then to have a whole array of instruments. It was also suggested to keep in mind the role of state agencies on facilitating the rescue of a company, both in-court and out-of-court, this includes for example financial supervisory authorities.

Bob Wessels concluded this interactive first MCC meeting by noting that developing soft law is a process which needs to be taken step-by-step. It is with this approach that the Reporters will be able to tailor the outcomes to reflect the willingness of the interested parties in improving business rescue of distressed companies in Europe.

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***More Information on the Business Rescue Project***

For more information on the project visit: www.europeanlawinstitute.eu/projects/current-projects-contd/article/instrument-on-rescue-of-business-in-insolvency-law.

***Become a Member of the MCC***

All members of the ELI are welcome to participate in the project through the MCC. The Reporters aim to take a deliberate participative approach in developing the project outcomes. The involvement of the MCC members is organised as follows:

- Contribute to an open-minded debate to ensure that aspects of the project which may provide difficulties of transposition into the legal culture of a Member State can be addressed;
- Provide certain contacts to European/national representatives in the insolvency field;
- Provide comments on Reporters' draft texts; and
- Alert Reporters to national or regional (scientific) events in which ELI Business Rescue project can be discussed and be available as a speaker.

To become a member of the MCC, please register via: businessrecue@europeanlawinstitute.eu.