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# ASSESSING THE “LOGIC AND LIMITS” OF COMPARING EUROPEAN UNION PRE-INSOLVENCY REGIMES TO CHAPTER 11

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INSOL International is pleased to present a new technical paper for publication, *Assessing the "Logic and Limits" of Comparing European Union Pre-Insolvency Regimes to Chapter 11*, written by Patrick J. Potter (INSOL Fellow), of Dickinson Wright PLLC.

The paper takes a novel and insightful approach in questioning the efficacy of cross-border comparative analyses of the insolvency regimes that apply in different jurisdictions. The author's particular focus in exploring this question is on the European Union's pre-insolvency regimes (PIRs) and Chapter 11 of the United States Bankruptcy Code.

The author cautions against broad-brush comparisons that seek to equate the insolvency regimes across jurisdictions simply on the basis of general similarities in some of the underlying substantive legislative provisions, without taking into account often very different policy objectives, legislative histories and commercial and economic settings that apply in those jurisdictions. The author also draws attention to systemic hurdles and other factors, such as the misapplication of data as well as missing or unknown data, which can impede reliable comparisons.

A deeper analysis of these differences may lead to a reconsideration of previous assumptions among some commentators that PIRs are more efficient than Chapter 11 simply due to the lower costs in conducting a PIR in the EU, and on the basis that the two regimes have (at least perceived) broad substantive similarities.

The author's analysis reflects that, ultimately, a conclusion that a particular jurisdiction functions as an efficient and optimal insolvency forum depends on a range of unique local social, economic, cultural and market dynamics and characteristics. Without understanding and accommodating those characteristics, most firm conclusions sought to be drawn will be logically unsound.

This paper provides a valuable contribution which policy makers, regulators and practitioners may consider.

We sincerely thank the author for his expertise, insight and time in preparing this novel paper.

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## 1. Introduction<sup>1</sup>

Globally, the last 10 years have seen unprecedented bankruptcy legislation at seemingly every level. Countries with so-called "modern" bankruptcy laws have improved them,<sup>2</sup> and countries with so-called "antiquated" bankruptcy systems have undertaken wholesale legislative efforts to modernise them.<sup>3</sup>

In the European Union (EU), these legislative efforts include the EIR and RID (each defined below). Recently, discussion of the "28<sup>th</sup> regime" – a harmonised statutory alternative to EU member state laws, including insolvency – has renewed. The Commonwealth of Puerto Rico, a United States territory, legislated a bankruptcy law for itself.<sup>4</sup> A lengthy list of non-nation entities, national subsidiaries and trade associations have contributed to these efforts and continue to do so. These legislative and other efforts to retain, if not lure, large complex financial and other restructurings are real and often intense.<sup>5</sup>

In this context, some international and cross-border insolvency experts have:

- (a) compared provisions common to EU pre-insolvency regimes (PIRs)<sup>6</sup> and Chapter 11 of the United States Bankruptcy Code,<sup>7</sup> such as those governing the automatic stay (moratorium), the debtor remaining in possession and "cram down" concepts;
- (b) observed that formal restructuring relief *must* be sought (via PIR) by EU debtors confronting imminent insolvency (or suffer liquidation) and *may* be sought (via Chapter 11) by similarly-situated United States debtors;
- (c) asserted in largely conclusory fashion that PIRs and Chapter 11 are substantively fungible;
- (d) contended that professional fees and other costs in PIR cases are materially lower than those in Chapter 11 cases; and
- (e) reasoned that, therefore, PIRs are (or should be) a viable alternative to Chapter 11.<sup>8</sup>

This paper seeks to evaluate the logic and limits of comparing PIRs with Chapter 11. To that end, the paper begins with an examination of the laws' respective legislative histories. It then turns to general principles of eligibility under PIRs and Chapter 11, followed by a discussion on the evolving and potentially useful concept of a "demise curve." Finally, the paper analyses disclosure, transparency, cost and other issues relevant to the PIR-Chapter 11 comparative discussion.

The paper concludes that the comparisons to date of PIRs and Chapter 11 are flawed and that meaningful empirical support for the "fungibility argument" does not exist. In part this is because PIRs and Chapter 11 approach corporate financial distress from materially different policy positions, even if there are shared objectives of:

- (a) financial rescue;
- (b) the uniform application of laws; and
- (c) investor confidence.

Moreover, practical application of the respective regimes does not support fungibility. Misapplication of data, as well as missing or unknown data, only undermine the fungibility argument. The paper argues that more analysis may be warranted as more cases are administered under PIRs before making any firm conclusions. As new data emerges and PIRs evolve, so too will the discussion of whether the regimes can be more fairly and meaningfully compared.

The paper does not seek to provide an assessment or opinion as to whether any insolvency regime, whether of an EU member state, the United States or any other jurisdiction, is "good" or not. Nor does the paper intend to criticise any nation's laws, or to rank, order or suggest that any specific insolvency regime is better or worse than another. It is limited to assessing the merits of comparative thinking and conclusions that have led to the fungibility argument and related contentions.

1 The author wishes to thank Pillsbury Winthrop Shaw Pittman partner Dania Slim and University of Illinois Chicago Law School Professor Jason J. Kilborne for their thoughtful edits and constructive feedback on this paper. An earlier version of the paper was submitted as part of INSOL International's Global Insolvency Practice Course (GIPC) in February of 2025. The topic was partially inspired by Professor Michael Veder's excellent lecture on European Union insolvency law. In this respect, the author also wishes to thank the University of Hamburg's Reinhard Bork and INSOL Fellow Peter Declercq for their robust inquiries and testing of the conclusions reached in the paper. The author also expresses his appreciation to a number of INSOL Fellows for their support and encouragement to enrol in and successfully complete the 10-month GIPC, namely Scott Atkins, José Carles, Lucas Kortmann, Andres Martinez and Nina Mocheva. Any errors or gaps in the analysis are solely the author's.

2 For example, the United States enacted a new form of Chapter 11 for smaller businesses that technically requires no creditor support (commonly referred to as "Subchapter V"), which became effective in early 2020. See 11 U.S.C. §§ 1181-1195.

3 Professor Jason J. Kilborn has described and analysed bankruptcy legislation adopted in certain Middle Eastern and North African nations. See Jason Kilborn, "Small Business Bankruptcy Reform in the Arab World: Two Steps Forward One Step Back" (2020) 36 *Arab Law Quarterly* 1.

4 The Puerto Rico bankruptcy legislation was struck down by the United States Supreme Court in *Commonwealth of Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1838 (2016), and subsequently replaced by legislation enacted by the United States Congress and found at 48 U.S.C. § 2101 et seq. (the so-called "PROMESA").

5 See footnote 15 and accompanying text below regarding Singapore's bankruptcy initiatives. The Bahamas' new legislation, including its ongoing insolvency law reform project, was reported as "reposition[ing] the Caribbean Island as an attractive 'nearshore' jurisdiction rather than an offshore jurisdiction for companies." See "INSOL International, Bahamas: AG Announces 'Nearshore' Reforms", *Global Restructuring Review* 12 December 2024.

6 PIRs are discussed in greater detail below.

7 11 U.S.C. §§ 101-1532 (2026).

8 The components of (a) through (e) constitute what the paper refers to as the "fungibility argument." Those making the argument are referred to herein as "fungibility advocates."

## 2. Substantive discussion

### 2.1 Comparative analysis as a tool to evaluate

It has been said that:

Comparative analysis is an old mode of research [that] plays an important part in the most diverse branches of the humanities and social sciences alike [and it] seems to be more fashionable and evolving than ever.

Yet, despite its broad and inter-disciplinary use, there is typically not much attention paid to this method [and in] consequence, more often than not this method is used without due care and its results are received rather uncritically.<sup>9</sup>

Ultimately, it is critical for comparative analysis to clearly explain "why what is being compared with what, in what respect and with what aim."<sup>10</sup> After all, "comparison is hardly an end in itself but serves other objectives."<sup>11</sup>

There is nothing more central to the assessment and practice of modern law, especially in common law jurisdictions, than comparative analysis. Advocates compare prior cases (especially *stare decisis*) to argue that a case is "on all fours," warranting the same result, or conversely that it is distinguishable, necessitating a different result. Academics analyse and compare laws and judicial decisions often to educate the interested, influence future judicial decisions and impact the decisions of legislators and policy makers.

The field of international and cross-border insolvency law is demonstrably a leading source of comparative analyses. The list of publications comparing the insolvency laws of one or more countries with those of another is growing exponentially with no end in sight. Market share and competition aside, as PIRs have rolled out in practice, it was (and remains) natural for practitioners, academics and other experts to compare them to other systems, including (if not most often with) Chapter 11.

### 2.2 Market share as a motivation for comparison

As indicated in section 1 of this paper, one motive for comparative analysis and discussion is to influence "market share." Much is often at stake when the finances and operations of a large enterprise are restructured. Highly competent and well-intentioned insolvency professionals throughout the globe, including the judges before whom they appear, wish to work on high profile, well-paying and precedent-setting cases. Policy makers for any given country may persuasively argue that an enterprise largely located within its borders should be reorganised there, as opposed to a country where the enterprise's only basis for its restructuring jurisdiction is a bank account, post office box or retainer paid to a law firm.

Much has been and continues to be written on international forum shopping,<sup>12</sup> in part because of the efforts undertaken by stakeholders in certain countries to lure enterprise restructurings (or at least the high-profile, high-paying cases).

Singapore, for example, has made clear its desire to become "an international centre for debt restructuring."<sup>13</sup> As of mid-January 2026, the Singapore International Commercial Court (SICC) has hired 26 "International Judges" from outside Singapore (18 with the "First Instance Bench" and 8 with the "Appellate Bench") who include some of the most highly accomplished and respected bankruptcy and commercial judges and practitioners from their respective countries.<sup>14</sup>

Simultaneously, the charge for reforming COMI principles in ways that would enable enterprises to pursue main-proceeding restructurings in jurisdictions that purport to best suit their needs is being led (in large part) by Singapore-based insolvency professionals along with some colleagues from other countries.<sup>15</sup> Singapore is not alone, and it seems like just about everyone is in the game, including now The Bahamas.<sup>16</sup> To be clear, this is not a criticism of good faith and intellectually honest efforts by stakeholders to affect insolvency-jurisdiction market share. Rather, it is an observation of current market practices which are motivating and informing cross-border comparative analyses of insolvency systems and processes.

9 Reza Azarian, "Potentials and Limitations of Comparative Method in Social Science" (2011) 1(4) *International Journal of Humanities and Social Science* 113.

10 Idem at 116 (quoting Kocka and Jurgen, "The Use of Comparative History" in *Societies Made up of History: Essays in Historiography, Intellectual History, Professionalizations, Historical Social Theory and Proto-Industrialization* (edited by Ragner Björk & Karl Molin, Stockholm, 1996), pages 197-209.

11 Ibid.

12 Patrick J. Potter, "Foreign Enterprise Chapter 11s: The More Things Change, The More They Stay the Same", 2024/25 *International Insolvency & Restructuring Report* (2024) 63 (analysing data demonstrating the largely increasing and sustained level of Chapter 11 use, particularly since 2020, by "foreign enterprises", each with billions of dollars in assets and liabilities, with COMIs outside the United States).

13 Anthony J. Casey and Joshua C. Macey, "Bankruptcy Shopping: Domestic Venue Races and Global Forum Wars" (2021) 37 *Emory Bankruptcy Developments Journal* 463, 468.

14 See the SICC's overview, available at: <https://www.judiciary.gov.sg/singapore-international-commercial-court/who-we-are/judges>

15 Aurelio Gurrea-Martinez, "The Implementation of the Model Law on Cross-Border Insolvency: International Divergences and Challenges Ahead" (2024) 21(3) *International Corporate Rescue* 149 (the Professor argues that use of COMI to determine where a debtor's foreign main proceeding should occur (for the purpose of obtaining recognition elsewhere) is flawed). See also the 14 September 2023 letter from Professors Anthony J. Casey (University of Chicago), Aurelio Gurrea-Martinez (Singapore Management University) and Robert Rasmussen (University of Southern California) to the Secretariat of UNCITRAL Working Group V, and the article by the same authors, "Towards a New Approach for the Choice of Insolvency Forum", *Singapore Global Restructuring Initiative Blog*, 15 September 2023, available at: <http://ccla.smu.edu.sg/sgri/blog/2023/09/15/towards-new-approach-choice-insolvency-forum>.

16 See footnote 5 above.

## 2.3 European Union legal developments

While not likely by legislative design or intent, developments in the EU may be adding to the already intense competition to lure desirable enterprise restructurings. These developments include: (i) the European Insolvency Regulation or "EIR" (Council Regulation (EC) 1346/2000 and Regulation (EU) 2015/848);<sup>17</sup> and (ii) the so-called EU Restructuring and Insolvency Directive 2019/2023 (RID).<sup>18</sup>

Generally, the former instrument (EIR) prescribes the framework that EU member states (save for opt-out Denmark) must adhere to for insolvency-related judgments rendered by an authority in a member state to be automatically recognised and enforceable in other EU member states.<sup>19</sup>

The latter instrument (RID) requires EU member states to enact laws governing "pre-insolvency" restructuring regimes (PIRs).<sup>20</sup> EU members that have so far enacted PIRs include the Netherlands (WHOA),<sup>21</sup> Germany (StaRUG)<sup>22</sup> and France (mandat ad hoc and conciliation).<sup>23</sup>

Distressed (or prospectively distressed) enterprises and their creditors are increasingly using PIR procedures and securing court approval of their restructurings. Examples under the Dutch WHOA include McDermott International Holdings B.V. and its affiliate Lealand Finance Company B.V., both Dutch incorporated. Examples under the German StaRUG include Varta and European Science Property Group.

## 2.4 Comparing legislative intent

A logical first place in the comparative analysis of laws is to evaluate and compare their policy objectives, as reflected in the legislative history.

### 2.4.1 EU legislative history

The RID's legislative history (from which PIRs are in part derived) reveals that the EU Commission was focused on improving the consistent treatment of insolvency-related proceedings to enhance investor confidence and thereby benefit the entire EU. Statements reflecting this policy objective include:

- a significant percentage of firms and related jobs could be saved if preventive procedures exist in all member states where they have establishments, assets or creditors;
- in several member states debtors cannot restructure debts with their creditors before they are actually insolvent or if they do, they face very strict or expensive access conditions;
- the availability of timely preventative restructuring procedures would ensure that action is taken before companies default on their loans;
- insolvency matters are [a] deterrent for cross-border expansion and investment; and
- many investors mention uncertainty over insolvency rules or the risk of lengthy insolvency procedures in another country as a main reason for not investing or entering into a business relationship outside their own country.<sup>24</sup>

In sum, the ultimate objective in the EU appears to have been member state uniformity to improve cross-border investor confidence in the entire EU. Yet the Commission recognised that harmonising bankruptcy proceedings for debtors confronting deeper forms of insolvency was too monumental a task.<sup>25</sup> It appears the Commission therefore legislated to obtain as much as it could, which was limited to a directive on pre-insolvency proceedings.

17 For the sake of simplicity, both Regulation (EC) 1346/2000 and Regulation (EU) 2015/848 will be referred to herein as the "EIR." See Robert van Galen, *An Introduction to European Insolvency Law* (2021) Wolters Kluwer, Deventer (van Galen) at 11.

18 Omar Salah, and Bob Wessels, "How is The Dutch WHOA Doing?" (2024) 21(5) *International Corporate Rescue* 273 (Salah and Wessels).

19 van Galen at 11-43.

20 Salah and Wessels ("Directive 2019/1023 obligates EU member states to introduce a scheme for a pre-insolvency arrangement procedure"). See also Irit Mevorach and Adrian Walters, "The Characterisation of Pre-Insolvency Proceedings in Private International Law" (2020) 21 *European Business Organisation Law Review* 855 (Mevorach and Walters) at 856 ("Policymakers, especially in the European Union, have responded to market developments by embarking on an aggressive new phase of corporate rescue oriented legislative endeavour that focuses on so-called pre-insolvency or preventative insolvency proceedings").

21 The Private Composition Plan Confirmation Act (the "Wet homologatie onderhands akkoord", or WHOA) entered into force on 1 January 2021.

22 The German Corporation Stabilisation and Restructuring Act (StaRUG) entered into force on 1 January 2021.

23 Celine Domenget Morin and Bruno Pousset, "France Overview," *Global Restructuring Review*, 13 March 2017 (Morin and Pousset). The authors indicate that solvency is required for mandate ad hoc and that conciliation, involving greater supervision, requires the debtor to have been insolvent for 45 or fewer days.

24 EU Commission, Proposal for a Directive of the European Parliament and of the Council on preventative restructuring frameworks, second change and measures to increase the efficiency of restructuring, insolvency, and discharge procedures COM (2016) 723 final - 2016/0359 (Commission Proposal) at 2-4. Please note that the version of the Commission Proposal the author relies on (and thus the page numbers referenced) is located at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0723>.

25 dem at 6 ("the current diversity in member states' legal systems over insolvency proceedings seems too large to bridge given the numerous links between insolvency law and connected areas of national law, such as tax, employment and social security law").

## 2.4.2 United States constitutional and legislative history

Article I, section 8, clause 4 of the United States Constitution (the so-called Bankruptcy Clause) grants the United States Congress (as opposed to state legislatures) the power to establish "uniform laws on the subject of bankruptcies throughout the United States." Unlike EU member states, each of which legislates its own distinct insolvency and bankruptcy laws, states and territories in the United States cannot enact wholesale legislation that is duplicative of the Bankruptcy Code.<sup>26</sup>

And, while there was not much debate recorded on the topic prior to the 17 September 1787 signing of the United States Constitution, the Bankruptcy Clause necessarily was intended to promote uniformity among the states and promote confidence, all consistent with the policy objectives articulated by the Commission in the EU (see above).<sup>27</sup>

Indeed, James Madison, a contributor to the United States Constitution (who would later become the country's fourth president) wrote that the Bankruptcy Clause's purpose was to promote "harmony and proper intercourse among the states."<sup>28</sup> Equally important was that the laws enacted under the Bankruptcy Clause would govern debtors confronting severe and deep forms of insolvency.<sup>29</sup>

At this juncture, it is fair to say that both sets of lawmakers (i.e. the 21<sup>st</sup> century EU Commission and the 18<sup>th</sup> century United States Constitution drafters) wanted uniformity for their respective member states, in part to facilitate commerce among such states. The shared objectives, however, are not surprising, as uniformity and consistency are hallmarks of effective commercial laws. However, additional investigation into the legislative history is required because Chapter 11 (against which PIRs are compared) was not enacted until the late 20<sup>th</sup> century.

In 1978, the United States Congress first legislated Chapter 11 into existence in the present Bankruptcy Code. This was the fifth bankruptcy law of the United States, with the prior four having been referred to as a "Bankruptcy Act."<sup>30</sup> While the legislative history is chock-full of statements regarding the bankruptcy bill's purpose, they are largely consistent with one another. For example, it is stated that:

The major purpose of this bill [for the Bankruptcy Code] is the modernization of the bankruptcy laws. The substantive law of bankruptcy and the current bankruptcy system were designed in 1898, and underwent the last significant overhaul in 1938, nearly 40 years ago. Since that time there have been vast changes in the law of debtor-creditor relations ... There has been a steady growth in the number of bankruptcies, both consumer and the more complicated business reorganization cases, over the last 20 years, and this steady growth has led to great stresses and strains in the bankruptcy system.<sup>31</sup>

With respect to Chapter 11 specifically, the legislative history reflects that:

- the record of the Senate hearings on S. 266 and the House hearings on H.R. 8200 is replete with evidence of the failure of the reorganization provisions of the existing Bankruptcy Act to meet the needs of **insolvent** corporations in today's business environment. Chapter X was designed to impose rigid and formalized procedures upon the reorganization and, although designed to protect public creditors, has often worked to the detriment of such creditors;<sup>32</sup>
- the negative results from Chapter X have resulted from the stilted procedures, under which management is always ousted and replaced by an independent trustee, the courts and the Securities Exchange Commission examine the plan of reorganization in great detail, no matter how long that takes, and the court values the business, a time consuming and inherently uncertain procedure;<sup>33</sup>
- the primary problem posed by Chapter X is delay ... Over and over again, it is demonstrated that corporations which must avail themselves of the provisions of the Bankruptcy Act suffer appreciable deterioration if they are caught in a Chapter X proceeding for any substantial period of time;<sup>34</sup> and
- in this context, the new Chapter 11 deletes the archaic rules contained in certain chapters of present law ... [that] served to frustrate and delay effective reorganization ... Chapter 11 thus represents a much needed revision of reorganization laws.<sup>35</sup>

<sup>26</sup> *Commonwealth of Puerto Rico v. Franklin California Tax-Free Trust* (see above at footnote 4). While beyond the scope of this article, different states in the United States do legislate procedures used by debtors and creditors to address enterprise insolvency, including those governing receiverships and assignment for the benefit of creditors. Similarly, most if not all states also have various forms of legislation governing the avoidance of various transfers by insolvent enterprises, including fraudulent transfers, preferential transfers and distributions to equity holders.

<sup>27</sup> Constitution Annotated Analysis and Interpretation of the U.S. Constitution ArtI.S8.C4.2.2 Historical Background on Bankruptcy Clause, available at: [https://constitution.congress.gov/browse/essay/artI-S8-C4-2-1/ALDE\\_00013180/](https://constitution.congress.gov/browse/essay/artI-S8-C4-2-1/ALDE_00013180/).

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.* (discussion regarding laws addressing financial insolvency so deep as to result in imprisonment and even death).

<sup>30</sup> Kenneth N. Klee, "Legislative History of the New Bankruptcy Law" (1979) 28(4) *DePaul Law Review* 941.

<sup>31</sup> 124 Cong. Rec. S14719 (daily ed. Sept. 7, 1978) (remarks of Sen. DeConcini).

<sup>32</sup> 124 Cong. Rec. S17417 (daily ed. Oct. 6, 1978) (bolding supplied).

<sup>33</sup> *Idem* at S17418.

<sup>34</sup> *Ibid.*

<sup>35</sup> *Idem* at S17417.

For better or worse, a fair reading of this legislative history is that, after almost 180 years of bankruptcy laws that dealt with bankrupts (regardless of the severity of insolvency), the Bankruptcy Code and Chapter 11 were drafted to improve upon pre-existing laws designed to *respond* to insolvencies and bankruptcies rather than to necessarily *prevent* them.

## 2.5 Aspects of the substantive laws

The fungibility argument is based in part on the contention that PIRs were partially influenced by Chapter 11.<sup>36</sup> No doubt, PIRs include some combination of certain restructuring tools found in Chapter 11, notably the debtor remaining in possession concept, some form of automatic stay and a "cramdown" mechanism to address dissenting (or non-participating) creditors.

Except for fees and costs (discussed below), however, fungibility advocates do not emphasise important differences between PIRs and Chapter 11 – differences that underscore that the regimes are neither fungible nor likely threats to meaningfully replace one another.

Probably the most significant difference between PIRs and Chapter 11 is the degree to which the debtor may be suffering from financial distress and yet remain eligible for debtor-in-possession style restructuring.

As between the two systems, Chapter 11 may be more easily described in that there is no financial distress or other insolvency-measured eligibility requirement in the Bankruptcy Code for debtors who voluntarily file for Chapter 11.<sup>37</sup> While some commentators emphasise that a solvent debtor is Chapter 11-eligible<sup>38</sup> (a true statement), the reality is that solvent debtor Chapter 11 cases are rare and the number of Chapter 11 cases filed by debtors suffering from balance sheet insolvency, cash flow insolvency, or both, is very high.

The vast majority of Chapter 11 debtors also tend to be in default under multiple contractual arrangements, have stopped timely (and otherwise) payment of a meaningful number of creditors and find it challenging, if not impossible, to pay all debts as they fall due.

For better or worse, Chapter 11 eligibility can accommodate the solvent (or slightly insolvent) debtor as well as the woefully (and seemingly financially unredeemable) debtor. At times, Chapter 11 can even accommodate debtors that are administratively insolvent. Examples of successful and unsuccessful Chapter 11 reorganisations exist at both ends of the solvency-insolvency spectrum.

Understanding and stating the rules around solvency-related eligibility for PIRs is more complicated, in part because the rules are legislated and applied on a member-by-member state basis.<sup>39</sup> Even if feasible, pinpointing with exactitude the level of financial suffering a debtor must not exceed to remain eligible for each (or any) PIR is beyond the scope of this article. While over-simplistic, the subject procedures are called "pre-insolvency" for a reason, suggesting that eligible debtors are either solvent or at least not too insolvent, while at the same time anticipating *future* insolvency or illiquidity.

At least on paper, the PIRs for member states seem consistent in this regard. For example, the Dutch WHOA "entrance test" has two elements: (i) the debtor is still able to meet its current obligations, and (ii) there is a realistic prospect of averting future insolvency if its debts are restructured.<sup>40</sup>

Similarly, in Germany, balance-sheet insolvent and illiquid debtors must pursue court-supervised insolvency proceedings as opposed to restructuring pursuant to the out-of-court StaRUG procedures. The same appears to be true in France, where mandat ad hoc or conciliation may be initiated before the debtor is in default or reaches a state of illiquidity. While one might quibble about whether a debtor suffering from modest insolvency may be eligible for a PIR<sup>41</sup> (as a practical matter and despite what the statutes say), there is no evidence that a debtor that is severely or woefully insolvent and has materially defaulted on its undisputed debts will enjoy the same treatment.

36 Mevorach and Walters at 858 footnote 12 (the Professors cite "the outsized influence of the United States on the Bretton-Woods institutions," and assert that Chapter 11 "has been particularly influential in the [PIR crafting] process").

37 Chapter 9 (which governs municipality bankruptcies), unlike Chapter 11, expressly requires debtor insolvency. See 11 U.S.C. § 109(c)(3). The United States Congress therefore knew how to condition eligibility for filing bankruptcy and as a matter of statutory construction, its failure to include insolvency as a voluntary Chapter 11 condition means it likely did not intend to do so. That said, for decades courts have insisted that debtors must file for Chapter 11 in "good faith," a concept that has evolved to the point where some might argue that a debtor not suffering from sufficient financial distress is unable to satisfy the good faith standard. See *Caroline Corp. v. Miller*, 64 F.2d 693 (4th Cir. 1989) (chapter 11 filing not in good faith if filed with subjective bad faith and with objective futility); *NMSBPCSLDHB, L.P. v Integrated Telecom Express, Inc.*, 384 F.3d 108 (3rd Cir. 2004) (cash flush debtor filing Chapter 11 solely to reduce real estate lease debt not filed in good faith); *LTL Mgmt. v. Those Parties Listed on Appendix A to the Complaint*, 64 F.4th 84 (3rd Cir. 2023) (Chapter 11 filed to address mass tort liabilities dismissed as not being in good faith because debtor was not sufficiently financially distressed); *In re Aeero Technologies, LLC.*, 2023 WL 3938436 (Bankr. S.D. Ind. June 9, 2023) (same).

38 Mevorach and Walters at 863 (firms can access Chapter 11 "without having to establish that they are factually insolvent") and 865 ("Chapter 11 is at root a pre-insolvency proceeding," a statement with which the author respectfully disagrees).

39 Bork, "Pre-Insolvency Frameworks: Developments in the European Union" (2024) 33 *International Insolvency Review* 12-13 (describing the challenge of uniformly developing and applying a pre-insolvency (i.e. likelihood of insolvency) eligibility standard).

40 Sala and Wessels at 275 (italics supplied).

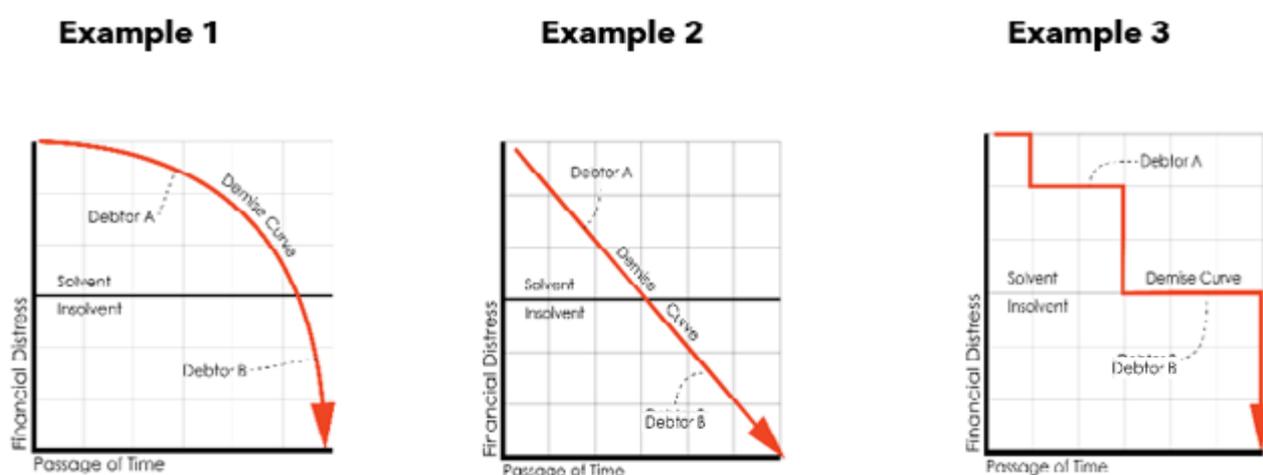
41 Indeed, it appears that debtors that have been insolvent for 45 days or less are eligible for the more-heavily supervised Conciliation procedure: see Morin and Pousset.

## 2.6 Enter the demise curve

The significance of the preceding discussion may be aided by the concept of a debtor's "demise curve." In early 2020, Professors Mevorach and Walters introduced the term to contemporary insolvency academic literature.<sup>42</sup> In 2023, the "demise curve" is reintroduced as a "model" (referenced more than 30 times) by Professors Sarah Patterson and Adrian Waters.<sup>43</sup>

While the articles do not define "demise curve" or provide any parameters, the demise curve concept is useful to the present task of assessing comparativeness and fungibility. Indeed, a unique fact-based historical demise curve will exist for every company encountering financial distress. That crisis-curve, where an x-axis represents passage of time and the downward (arrowed) y-axis represents increasing financial deterioration, could take any form.

Recognising that a debtor will not know with certainty its future path on its demise curve, non-exclusive examples follow:



The benefit of conceptualising a demise curve introduces much needed fact-based discipline to the comparativeness and fungibility analysis. Regardless of which of the three examples (or others) one might use, comparing the results for Debtor A under a PIR to those for Debtor B pursuing Chapter 11 does not aid an argument that PIRs and Chapter 11 are interchangeable.

First, Debtor B's financial distress is too severe for a PIR's eligibility (except perhaps in the third example). Moreover, comparing the results and costs of Debtor B's Chapter 11 in each of the three examples (where financial distress and the restructuring lift is greater) to those of each Debtor A's PIR proceeding is unhelpful.

Second, while Debtor A is eligible for Chapter 11 in each of the three examples, the results and costs almost certainly would not be the same as those for each of the corresponding Debtors Bs. Indeed, despite a forecast of financial distress, it is plausible that Debtor A could achieve a successful and equally or lower cost restructuring outside of Chapter 11.

In sum, the only comparison in each example that might lend some legitimacy to a fungibility conclusion is one where the results for (and costs to) Debtor A under a PIR are compared to the results for (and costs to) the typical Debtor A in the United States (which in many if not most instances will not be in Chapter 11). In theory, this analysis could be undertaken with each debtor pursuing a formal process.

A legitimate (though non-fungibility) inquiry might also occur by comparing the costs and results of a Debtor A restructuring pursuant to a process under the system in one country versus accomplishing the same Debtor A restructuring outside a formal process in another country. This is because, particularly in the United States, a large volume of higher quality financial distress (meaning lower financial distress severity) is restructured outside of Chapter 11, particularly for debtors of the financial ilk that would be eligible for a PIR.

<sup>42</sup> Mevorach and Walters at 857 (indicating that the demise curve tracks the "corporate life cycle"). At their footnote 7 the authors cite a 2014 piece written by A Sutton and R. Sechim (dealing with pension valuation issues rather than insolvency-regime issues) for the proposition that the demise curve is a "accounting" term.

<sup>43</sup> Sarah Paterson and Adrian Walters, "Chapter 11's Inclusivity Problem" (2023) 55 *Arizona State Law Journal* 1227. Professors Paterson and Walters appear to argue that it is "high time" for the United States to legislate some form of restructuring instrument that is like the PIR model. While financial distress should be confronted in a prudent and measured fashion as soon as reasonably possible, it is unlikely that United States investors and executives, many of whom refuse to ever file for bankruptcy (or are extremely reluctant to do so), will change their minds or course of action because a "light-touch" bankruptcy filing could occur earlier rather than later, even if the procedures are "confidential." Filing for bankruptcy remains a serious matter for United States business owners, and for the foreseeable future, out-of-court workouts will likely continue to be the preferred course of action for restructuring higher-quality (i.e. less distressed) companies.

## 2.7 Impediments and other factors affecting comparativeness

Systemic and other impediments make it incrementally more difficult to perform the analysis in section 2.6.

First, easily accessible public data regarding the details of restructurings, successful or not, involving pre-insolvent debtors that are still paying their debts in the two markets (the EU and the United States) does not exist for these higher quality restructurings. Whether such a restructuring can occur and if so, for how much, must be understood by a debtor before it is lured to a formal proceeding, whether it is a PIR or Chapter 11.

Second, research issues exist in assessing restructuring success. PIR proceedings are generally not public, other than written decisions (which rarely tell the full story). For example, apparently most WHOA debtors in the Netherlands opt for the confidential option (despite the adverse impact on automatic recognition). This means that, while affected parties are generally entitled to information, the rest of the world is not, including academics and others who are often tasked with undertaking serious comparative analysis. Comparing the results of a restructuring that occurs with a high level of transparency with a restructuring that occurs without much (if any) transparency, and reaching a meaningful conclusion, is difficult to convincingly accomplish.

Third, issues exist with assessing and comparing restructuring costs. Comparing the fees and costs of a restructuring makes sense, in the first instance, only where the debtors subject to the comparison are found at or near the same place on their respective demise curves.

As an example of a weighty or wasteful Chapter 11 expense that does not exist for PIRs, some point to the potential appointment of perceptively disruptive unsecured creditors' committees (UCCs) and their often substantial professional fees, which are borne by the debtor's bankruptcy estate, and the reality that the unsecured creditors are often partially if not completely "out of the money." However, setting aside that UCCs are not appointed in all (if even most) Chapter 11 cases, the premise for the argument is misguided. Most debtors that file Chapter 11 where a UCC is appointed to protect unpaid and vulnerable unsecured creditors will not be PIR eligible due to defaults and excessive insolvency. In the rarer instance where the Chapter 11 debtor would be solvent and thus PIR eligible, an UCC (if even appointed) should not be materially active (and therefore not as expensive) because the unsecured creditors will be paid in full.

Further, just as the detailed restructuring results of a PIR are not public, the costs of a PIR, including the fees of the restructuring professionals, are also apparently not routinely subject to public transparency and meaningful analysis. One cannot simply log on to the electronic dockets in the major PIR cases to review financial reports, professional fee statements and the like. Simply put, conclusory statements comparing the costs and fees for a PIR to those of Chapter 11 (even for debtors of the same financial-distress ilk) cannot be easily tested and confirmed.

Equally noteworthy is that an enterprise with affiliated entities in different EU member states is, at least theoretically, susceptible to multiple proceedings. Under the EIR, COMI (the premise for automatic judgment recognition and enforceability throughout the EU) is determined on an entity-by-entity basis,<sup>44</sup> and could result in a multi-national business seeking relief in multiple EU member states, which presumably would multiply and increase restructuring costs. The same is true with respect to "local proceedings" (separate from main or plenary proceedings) which can be opened in any EU country where the debtor has an "establishment."<sup>45</sup> Time will tell whether the EU framework will result in a greater number of multiple proceedings being filed for essentially a single business enterprise because it has affiliates, assets and establishments in multiple EU member states.

These points regarding multi-jurisdictional proceedings and associated costs are not academic. For example, *McDermott Group* is an often-cited restructuring that occurred under the Dutch WHOA with related filings in England under the Companies Act 2006 and the United States under Chapter 15 by certain McDermott Group affiliates.

In its 27 February 2024 judgment, the High Court of Justice spoke to the professional fees incurred to accomplish the restructuring. Justice Green, writing for the Court, stated:

I have one more thing to say at the outset, which has troubled me throughout. I was horrified to discover that the Plan Company had spent around US \$150 million on professional fees in negotiating with its secured creditors from December 2022 and then putting forward the Plan and taking it to this hearing. That is an enormous sum of money, even taking into account of the fact that it includes the costs of the supporting creditors as well ... I think all I can say is that I hope there can be a better way to do these financial restructurings because costs of that magnitude could be a barrier to the sort of restructuring that Part 26A was meant to encourage.<sup>46</sup>

This paper takes no position on the fees incurred in the *McDermott* cases, and presumes the good faith and accuracy of the restructuring professionals involved. Substantive results in any proceeding aside, the point (for this paper) is simply that an across-the-board contention that costs and professional fees for a restructuring under a

<sup>44</sup> van Galen at 36.

<sup>45</sup> *Idem* at 24, 28.

<sup>46</sup> *In the Matter of CB&I JK Ltd and In the Matter of the Companies Act 2006* (2024) EWHC CR-2023-005266 (Ch) at page 6 ¶119.

PIR that requires roll-out, recognition and enforcement in other countries could very well be as costly as, or more costly than, pursuing Chapter 11.

A final point on restructuring costs and professional fees is worth mentioning. There is a perception that the hourly rates of restructuring professionals in the United States are materially higher than the rates charged by restructuring professionals in other countries, including EU members.<sup>47</sup> Even assuming there is a material difference between the rates of United States and EU restructuring professionals, as Justice Green's comments substantiate, rates are not a function of the plenary procedures pursued by the company in financial distress (there the Dutch WHOA). Rates, and therefore total fees, are a function of capitalism and free market principles, including that the senior executives of mega and multinational businesses do not want to be second-guessed on their professional selections (regardless of the cost). The procedures, whether a PIR, Chapter 11 or otherwise, are not to blame for rates (though if task tallies are materially different between the regimes, that could lead to higher overall fees).

### 3. Conclusion

Looking at another nation's laws (including those governing insolvency) and comparing those laws to one's own is sensible, whether the purpose is to improve one's own laws (and the results achieved) or to capture a greater share of high-quality, precedent-setting and impactful restructurings. Pairing each client situation with the best-fitting regime and the highest-quality professionals and adjudicators to accomplish the best and most effective results under the circumstances should always be the objective. And high-quality comparative analysis is important to these endeavours.

This paper examines the merits of comparing PIRs with Chapter 11, the conclusions and assertions that they are largely fungible and that, all things being equal, Chapter 11 is more expensive. The analysis provided in this paper does not support these conclusions.

First, the respective legislative histories establish that the two types of regimes were designed to address different types of debtors. PIRs seek to address pre-insolvent debtors to prevent deeper insolvency and illiquidity, whereas Chapter 11 addresses debtors across the entire spectrum, from solvent debtors to deeply insolvent ones.

Second, the regimes as written are consistent with their respective legislative histories. PIRs are written to accommodate the pre-insolvent (though anticipatorily challenged) debtor, but not the more deeply insolvent debtor. Chapter 11 can accommodate the same ilk of debtor (whether it typically does or not), but is more often used by debtors that are typically not PIR eligible.

Third, use of the demise curve interjects discipline to the comparative analysis and demonstrates the need for comparing like samples if one is arguing that the samples are the same and can lead to the same results (save the restructuring fees). Comparing a solvent debtor's restructuring with an insolvent debtor's restructuring is inappropriate, unhelpful and potentially counterproductive. In the first instance, debtors of the same financial ilk (solvent or insolvent) should be compared to assess the results and costs of their respective restructurings. To date, that does not appear to have effectively occurred in the literature.

Fourth, systemic hurdles and other factors impede or detract from quality and reliable comparisons. Setting aside policy reasons, the same level of transparency in each system does not exist. One cannot assess an assertion about the results in two supposedly similar cases or their costs without reviewing the entire case. Unnuanced and untethered cost assumptions cannot be relied on. Moreover, the available evidence on costs for one of the largest cross-border restructurings under a PIR seemingly undermines the "PIR is cheaper" contention. Finally, restructuring professional rates are not a function of regimes, but the marketplace.

EIRs and Chapter 11 will continue to evolve. "Regime 28" may become a reality. As statutory, case law and restructuring developments continue to evolve, stakeholders in the international and cross-border insolvency community will inevitably continue to engage in comparative analyses of different regimes. Sensibly, they should. However, as Professor Azarian teaches, readers and listeners of their work and arguments should have their critical thinking caps on to best evaluate the quality of analysis undertaken, rather than simply assume that, because a comparison was undertaken, it must be accurate.

<sup>47</sup> While the United States hourly rates garnering public attention are likely in "mega cases," substantially lower hourly rates are used in most Chapter 11 cases (the spread for comparable professionals within the United States easily exceeding \$1,000 per hour), it is assumed for sake of argument that there could be a not-insignificant rate differential between United States bankruptcy professionals and their non-United States counterparts.



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