



Discussion paper

IMPACT OF THE FINANCIAL CRISIS

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Impact of the financial crisis *

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1. Introduction¹

The major thrust of insolvency reform across many jurisdictions over the last twenty years has been the development of legislation to both facilitate and promote business reorganizations. From Europe to Asia to the Pacific the notion of corporate rescue has found favour with policy makers, politicians and practitioners². Much of the development in this area no doubt stems from the analysis of Chapter 11 in the Bankruptcy Code 1978 (US) and the recommendation of the Cork Report in the UK as regards development of a more suitable regime in that country.³ Even in the United States of America and Canada there have been developments in legislative provisions dealing with rescue. Policy bodies such as UNCITRAL and the World Bank consider such a notion as part of an effective insolvency regime.⁴

However the recent financial crisis has raised a specific problem associated with rescue regimes. Any regime which involves rescue requires a degree of support from the commercial environment. That is, the continuation of a business in the shadow of insolvency will probably require additional funding and at the very least require existing creditors to postpone and/or compromise their claims. Even where the legislation provides for a moratorium on creditor claims, there is usually a framework in which liquidation can be considered an alternative. The rescue regimes may therefore be severely tested in situations where there is a general economic downturn such as the world has experienced in the last two years.

Somewhat paradoxically it can be that just when rescue is needed the most, the practical reality may be that businesses will not be saved if there is insufficient support available either by way of additional credit or because other creditors are so financially stressed themselves that they are unable or unwilling to support any potential rescue.⁵

This research is aimed at evaluating the impact of the Global Financial Crisis on the opportunities for rescue. In order to evaluate this impact we have sought the views of insolvency practitioners and others involved in the insolvency process. As far as we have been able to investigate, no empirical research has been performed using the aggregate know-how of the professionals involved in the rescue business internationally. Therefore, we undertook a survey of insolvency professionals across the world on behalf of INSOL International, the international association of restructuring, insolvency

¹ The authors gratefully wish to acknowledge the energetic support of Ms. Tina McGorman from INSOL International's office in London and the valuable comments received from Mr. Bob Sanderson (former INSOL President) and Mr. Adam Harris (INSOL Board member).

² See for example Franken S 'Creditor and Debtor Oriented Corporate Bankruptcy Regimes Revisited' (2004) 5 *European Business Organization Law Review*, pp. 645-676 at 645 where it is stated that 'Within the European Union (EU), many Member States have either promulgated or are still in the process of considering the introduction of procedures designed to facilitate business reorganization.'; also Parry R and Zhang H., 'China's new Rescue Laws: Perspectives and Principles' (2008) 8 *Journal of Corporate Law Studies* 113; Anderson C and Morrison D 'The Impact of Changes to the Australian Corporate Rescue Regime' (2007) 15 *Insolvency Law Journal* 243; Taylor L., 'Reform of Corporate Insolvency Law: the companies Amendment Act 2006(NZ) (2007) 15 *Insolvency Law Journal* 136.

³ The Cork Report in the United Kingdom appears to have influenced the significant development of a "rescue culture" in Commonwealth countries such as Australia in particular.

⁴ UNCITRAL Legislative Guide on Insolvency Law 2004,

http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/2004Guide.html accessed January 20, 2010. The World Bank *Principles for Effective Insolvency and Creditor Rights Systems (Revised) 2005* at p 6 Available online at <http://www.worldbank.org/ifa/FINAL-ICRPrinciples-March2009.pdf> accessed December 21, 2009.

⁵ See for example Stapleton S, *Bankruptcy and Restructuring Chapter 11 Strategies 2009: Top Lawyers on Trends and Key Strategies for the Upcoming Year. What Does the Current Financial Crisis Portend for Bankruptcy Reorganizations?*, WL 531544 Aspatore 1(2009).

& bankruptcy professionals.⁶ The survey results will assist in gaining an understanding of how the prevailing economic conditions may affect outcomes or at least the perceptions about the operation of rescue regimes.

2. Research questions and methodology

The credit crunch has been seen by some as an obstacle to the access to financial facilities for rescuing financially troubled businesses. Our primary research question in this study is to explore, in the international context, the impact of the crisis on the possibilities for rescue. Objective data on rescue is difficult to obtain. Even where it is available there is real difficulty in making any comparison across jurisdictions so that its comparability can be questionable. Therefore the strategy that we adopted is to address the outstanding questions through the perceptions of experienced insolvency professionals. This was undertaken by way of a survey of all members of INSOL to whom we sent a series of questions by way of email. On November 6, 2009 (with reminders sent on November 18 and 23, 2009) the membership base of INSOL International was contacted with a request for completing an on-line questionnaire.⁷ From the approximately 9300 members we received 562 complete responses which make a response rate of 6%.⁸ To determine the characteristics of our respondents, we asked for their experience in years in practice [*question 1*], their present domicile of practice [*question 2*] and the number of recent cases involved in [*question 5*].

The survey has specifically focussed on the idea that the financial crisis has severely diminished credit facilities for businesses in financial difficulty despite the fact that political pressure and public opinion would try to save such ailing businesses in order to preserve employment.⁹ The current legislative insolvency arrangements involve a mix of rescue and liquidation. It could be expected that no matter what the general financial conditions in an economy are, there will be some entities that are unable to be saved and there will be some that can be salvaged. However in between these positions there will be entities that might be saved with financial support but may fail without it. In situations where credit is tight even for businesses that are not insolvent it is likely that there will be little support for insolvent entities when economic conditions turn down. An initial question raised in the survey was how important rescue was as a part of the practical insolvency regime in various jurisdictions world-wide. The survey asked whether rescue was the primary goal of insolvency proceedings in the relevant jurisdictions of the respondents and whether such goal changed due to the financial crisis [*questions 3 & 4*]. Where rescue has been indicated, the survey also sought to find out the reasons

⁶ See www.insol.org. During the VIIIth quadrennial INSOL World Conference in Vancouver in June 2009, INSOL International, approached certain members of INSOL Internationals' Academics' Group to discuss the possibilities of using the INSOL members as a source of information for both scientific research and policy reasons. Ian Fletcher, chairman of the Academics' Group, together with Colin Anderson, Adam Harris and Reinout Vriesendorp to set up a pioneer working group for investigating and elaborating this proposition. Generous support from INSOL International has been provided especially by Tina McGorman.

⁷ See Appendix (Table 11).

⁸ The response rate may be relatively low but it can be argued that the specialist nature of the group being surveyed does not lead to bias in the results: see Leslie L., 'Are high response rates essential to valid surveys?' (1972) 1 *Social Science Research* 323. Moreover, it should be noted that this response rate could be considered normal and adequate with respect to on-line surveys amongst a widely differentiated group of active and non-active members.

⁹ The aim of preservation of employment indirectly and businesses more specifically is widely recognised as a goal of rescue provisions: see for example *Insolvency Act 1986 (UK)* Schedule B1 para 3; *Corporations Act 2001 (Cth)* s 435A; in the context of Chapter 11 in the United States see Lubben S 'Systemic Risk & Chapter 11' *Temple Law Review Symposium Paper*, Unpublished available at <http://ssrn.com/abstract=1399015at> pages 11-16.

(other than seeking the highest return to creditors) for pursuing that goal [*question 6*] and to investigate the sustainability of the rescue over time [*question 7*]. Subsequently, we returned to the initial question as to whether and if so, why it has become more difficult to obtain adequate credit facilities to rescue viable business since the beginning of the financial crisis [*questions 8 & 9*].

By using this method of on-line questioning of a global professionally involved population, we have accessed an important source of information; however, we must qualify our findings in two respects. First, the nature of the questions and the wide variety of jurisdictions of the respondents result in a set of responses on a highly aggregate level. Detailed comparable results cannot be retrieved from the data set obtained. There is a danger that the factors of influence in a particular jurisdiction will be idiosyncratic so that attempting to draw a broad conclusion will be misleading. We argue however that the nature of the questions asked has minimised this risk. Second, as with all survey data, the responses reflect the reality as observed and perceived by the insolvency professionals, based on their own skills and experiences and their professional judgement. Their responses are undoubtedly influenced and coloured by their training, biases and beliefs. At the same time it must be recognised that the professionals that we surveyed are at the forefront of the response to insolvency. Accordingly it is their beliefs that will significantly influence or perhaps determine how a particular entity responds to insolvency. Consequently we would argue that in many ways it is their action that creates the reality of the response to the financial crisis.

In the next paragraph (§ 3) we first describe our sample of respondents based on their answers to questions 1, 2 and 5. The subsequent paragraph (§ 4) deals with the results of the survey on the questions we posed with regard to the impact of the financial crisis. In this respect we have noted that an overwhelming majority (strongly) agreed with the statement that the credit crunch had a negative impact on the prospects of restructuring (questions 8 & 9). We also asked the respondents whether or not they had observed a change in attitude towards the preference of rescue over liquidation as a result of the financial crisis (questions 3 & 4). To the extent rescue of the business has been the primary goal of the restructuring process, the respondents were asked for the reasons (question 6). Finally, we describe the sustainability of a rescue where we distinguish between short and long term survival (question 7). We conclude the results of the survey in the last paragraph (§ 5) where we also present some recommendations for further research.

3. Characteristics of the respondents by geography, legal system and professional experience

In total the survey collected 562 respondents from INSOL members from 56 countries. This group was analysed as to their origin per country/continent, legal system and their professional experience.

a. Geographical origin of the respondents

As can be seen in Table 1 of the Appendix, the distribution is unequal – 439 (almost 80%) of the respondents come from 10 countries, reflected in Table 1 below. This resembles to some extent the nature of membership of INSOL International.

Table 1: Distribution by 10 mostly mentioned countries (n=439)

	Country	Responses	Percent
1	United Kingdom	95	16,90
2	Australia	89	15,84
3	Canada	66	11,74
4	Netherlands	52	9,25
5	United States	37	6,58
6	New Zealand	31	5,52
7	Hong Kong	29	5,16
8	South Africa	16	2,85
9	Germany	12	2,14
10	India	12	2,14

After controlling for continent¹⁰ we see that 38% of the respondents reside in Europe, 22% in Australia/Oceania, 19% in North America, 11% in Asia, 5% in Africa and 4% in South America. The representation whilst uneven does encompass countries representing several of the important economies in terms of economic activity.

b. Legal system of the respondents

We have utilised the classification of the legal systems from the JuriGlobe project of University of Ottawa.¹¹ Most of the responses come from countries with a common law legal system. This trend is apparent from Table 11 (see Appendix) – apparently the respondents from the UK, Australia, Canada, New Zealand and the US dominate the dataset. Every fourth respondent practices law in a country which is described as civil law (the classification does not distinguish between Napoleonic and German trends within the civil law). Some 15% of the respondents originate in jurisdictions defined as mixed.

An alternative way to classify legal regimes with respect to insolvency is to evaluate whether the particular regime is more favourable to debtors or to creditors. It is not within the scope of this paper to develop or debate the criteria surrounding how insolvency regimes may be classified on the basis.¹² In order to provide some insight we adopt the classification of Philip Wood.¹³ He uses five criteria to assess to what extent the rescue of a financially troubled business affects the interests of

¹⁰ Classification from <http://www.worldatlas.com/cntycont.htm>.

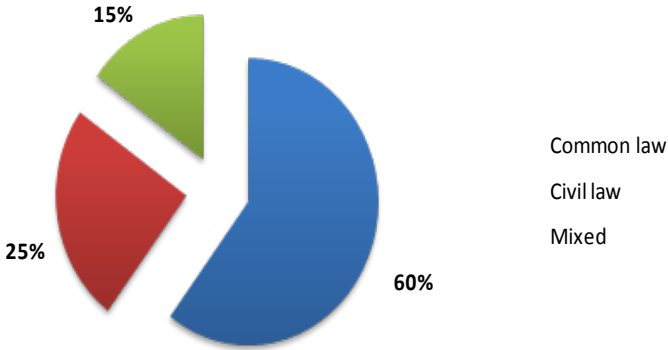
¹¹ <http://www.juriglobe.ca/eng/syst-demo/index-alpha.php>.

¹² We recognise the limitations in attempting to make such classifications which are inevitably somewhat arbitrary but note that questions of appropriate bankruptcy policy are key economic issues in any economy: see for example Bickerdyke I., Lattimore R., and Madge A., *Business Failure and Change: An Australian Perspective* Productivity Commission Staff Research Paper, Canberra 2000 available at <http://www.pc.gov.au/research/staffresearch/bfacaap/bfacaap.pdf>; White M 'The costs of corporate bankruptcy: A U.S. – European comparison', in Bhandari, J.S. and Weiss, L.A. (eds), *Corporate Bankruptcy*, Cambridge University Press, pp. 467–500

¹³ Wood Ph., *Maps of World Financial Law*, 6th edition, 2007, Sweet & Maxwell, London, p. 149, figure 43

the creditors. We use a simple system of scoring and aggregation to come to an ultimate index to rank a legal system on this basis.¹⁴

Figure 1: Responses by Legal System



c. Professional experience of the respondents

Most of the respondents in the survey report significant experience in the field of insolvency law. Almost 61% of all respondents have worked for more than fifteen years as insolvency practitioners. Experience between five and fifteen years have another 30% of those who completed the survey. Less than 10% have relatively little experience with less than five years in practice.

Tables 2 and 3 provide further insight into the level of professional experience of the respondents.

Table 2: Specialization in insolvency law in the 10 best represented countries (n=439; cell values are percentages)

	0	0-4 years	5-9 years	10-15 years	> 15 years
Australia	1	1	7	15	76
Canada	3	3	11	14	70
Germany	0	8	17	25	50
Hong Kong	0	24	21	14	41
India	8	8	25	25	33
Netherlands	2	2	27	8	62
New Zealand	3	26	16	19	36
South Africa	0	0	38	6	56
United Kingdom	4	1	8	10	77
United States	3	3	14	14	68

There are small differences in the extent of specialization by type of legal system. On average the respondents from the common law countries have slightly more experience than their counterparts

¹⁴ Apart from the subjective boundaries of such a scoring, an additional limitation is that Wood’s the classification covers only 13 countries (for details on the scoring and distribution of the scores see Appendix Table 14).

in the civil law countries. Those, who practice in jurisdictions with mixed systems, tend to have a little less experience in the field of insolvency.

Table 3: Specialization in insolvency law by legal system (n=552¹⁵)

	N/A	0-4 years	5-9 years	10-15 years	> 15 years	Total
Common law	9	14	35	45	230	333
	2,7%	4,2%	10,5%	13,5%	69,1%	100,0%
Civil law	3	8	31	20	73	135
	2,2%	5,9%	23,0%	14,8%	54,1%	100,0%
Mixed	2	11	21	17	33	84
	2,4%	13,1%	25,0%	20,2%	39,3%	100,0%

Table 4 shows the approximate number of insolvency cases taken by the respondents since 2004. Additional break down of the results by country is available in Table 5. When interpreting the data one should be careful not to make extensive inferences about the experience levels of the insolvency practitioners in the corresponding countries. Again this may be reflective of the fact that INSOL International's membership consists of experienced professionals.

Table 4: How often have you advised and assisted business in financial trouble since 2004? (n=562)

	Percent
No answer	3,8
0-20	29,7
21-50	26,8
51-100	17,9
101-200	10,1
> 200	11,6
Total	100

Table 5: How often have you advised and assisted business in financial trouble since 2004 by the 10 best represented countries? (n=439; cell values are percentages)

	N/A	0-20	21-50	51-100	101-200	> 200
Australia	0	27	42	18	8	5
Canada	0	59	21	7	10	3
Germany	0	37	33	21	8	2
Hong Kong	3	16	21	17	14	30
India	5	25	21	26	11	12
Netherlands	6	44	38	13	0	0
New Zealand	7	26	23	19	10	16
South Africa	8	8	17	17	25	25
United Kingdom	8	42	17	8	8	17
United States	11	38	24	19	3	5

¹⁵ See note 22 Appendix Table 12 on the unclarity concerning 10 respondents from Afghanistan.

4. Restructuring: the impact of the Credit Crunch

One of the important requirements for recovering businesses is the access to finance.¹⁶ Successful restructuring is dependent on two factors – meeting the liquidity needs and obtainment of postpetition financing. Metaphorically Westbrook and Gottlieb put the relationship between access to financial facilities and restructuring as: “Liquidity is the lifeblood of reorganization”.¹⁷ The major purpose of reorganization is to protect viable but distressed companies and thus to realize the interests of the concerned parties through healing of the business entity. In order to continue its business operations and pay debts as they come due, a company in restructuring often needs to secure substantial amounts of additional liquidity and capital. In times of financial crisis and credit crunch the difficult goal to convince the lenders in the viability of the distressed company becomes even harder if not impossible. Stephen C. Stapleton¹⁸ outlines several reasons for the drainage of financial facilities which used to help distressed companies before 2007. As most significant are depicted 1) the deleveraging of hedge funds, which were the main sources of investment in large insolvency cases under the US Chapter 11 and 2) the increased costs of capital. In result “more companies that file for bankruptcy shutting down simply because they cannot obtain the financing necessary to operate during their reorganization.”¹⁹

a. *Since the beginning of the financial crisis, it has been much more difficult to obtain adequate credit facilities to rescue viable financially troubled businesses; if so, what are the reasons? (questions 8 & 9)*

How do the respondents of our survey see the impact of the credit crunch on the prospects for restructuring? Conventional wisdom would suggest that financially troubled businesses have had their ability to access additional credit negatively impacted by the financial crisis of 2008-and 2009. This view is firmly supported from the data in Table 6. Less than 3% of all respondents disagreed with the statement and only 7% were neutral about it. With such an overwhelming agreement with the statement, one cannot anticipate differences by professional experience of the respondent, country, legal system or continent.

Table 6: It is more difficult now to obtain financial facilities to rescue viable business (n=562)

	Percent
Strongly agree	39,9
Agree	44,8
Neutral	7,1
Disagree	2,7
Strongly disagree	,2
Don't know	2,0

¹⁶ For example Platt suggests it is one of the three fundamental requirements for a successful turnaround: Platt *Principles of Corporate Renewal* (2nd ed., University of Michigan Press, 2004) at 140.

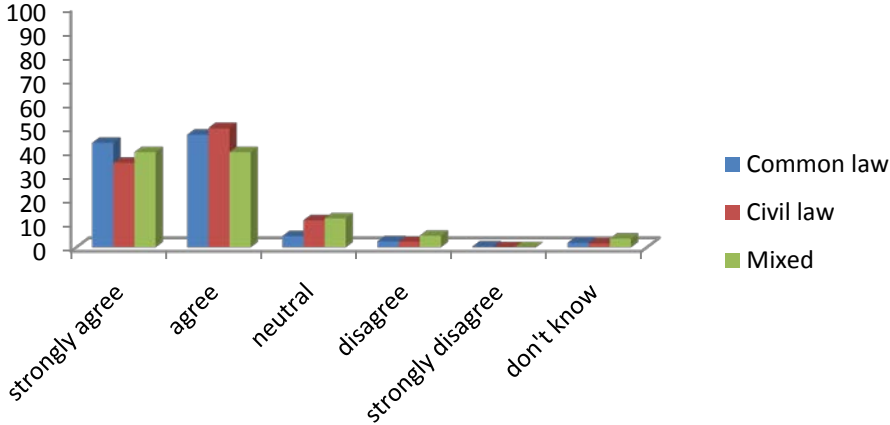
¹⁷ Westbrook J & Gottlieb L, *Reorganizations, Exemption of Financial Assets*, 27 American Bankruptcy Institute Journal 10(2009).

¹⁸ Stapleton S, *Bankruptcy and Restructuring Chapter 11 Strategies 2009: Top Lawyers on Trends and Key Strategies for the Upcoming Year. What Does the Current Financial Crisis Portend for Bankruptcy Reorganizations?*, WL 531544 Aspatore 1(2009).

¹⁹ Stapleton S, *Bankruptcy and Restructuring Chapter 11 Strategies 2009: Top Lawyers on Trends and Key Strategies for the Upcoming Year. What Does the Current Financial Crisis Portend for Bankruptcy Reorganizations?*, WL 531544 Aspatore 1(2009), § 7.

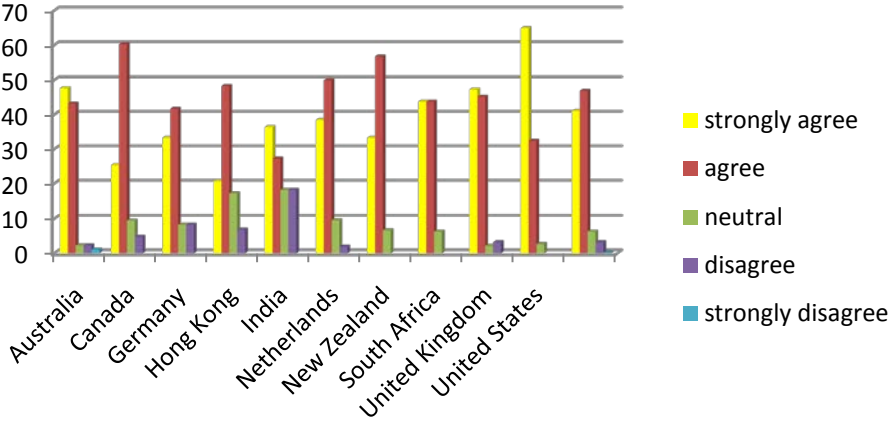
In Figure 2 we see that the agreement to the statement is not conditioned on the type of legal system. Insolvency practitioners from countries with common law, civil law or mixed legal systems largely agree that the credit crunch significantly reduced the availability of financial resources needed to rescue and stabilize troubled business.

Figure 2: It is more difficult now to obtain financial facilities to rescue viable business (by legal system; n=562)



Further on, we look at the relationship between the financial crisis and the access to financial resources for rescuing viable companies at national level. Due to data constraints we limit our observations to the 10 countries with most respondents. As Figure 3 indicates there is some variability but the general trend holds – the interviewed insolvency practitioners share the view that the credit crunch has limited the possibilities for obtaining financial resources for rescuing troubled debtors. Variations could be sought in two directions. First, the respondents in some countries are more willing to choose the option *strongly agree* to the statement that the financial crisis and the related lack of capital impacts negatively restructuring as a goal of the insolvency proceedings. Notably the respondents from the US seem to be hugely convinced that the statement is true (65% strongly agree). By comparison, their Canadian colleagues favour the option ‘agree’ (60%). It is difficult to draw any conclusion from these distributions but that the respondents from all of the analyzed countries agree with the statement although in different degree. However, one could argue that there appears to be some correlation between the degree of decline of the financial system (US and UK) as compared to the ability to have access to funds. A second direction for exploring the data in Figure 3 is to look for countries in which there is a visible disagreement or at least neutrality towards the statement. A particularly notable exception is India where about 36% of the respondents are neutral or disagree that after the credit crunch financial facilities are more difficult to obtain for the purpose of rescue. This coincides with the relatively small impact of the crisis in India.

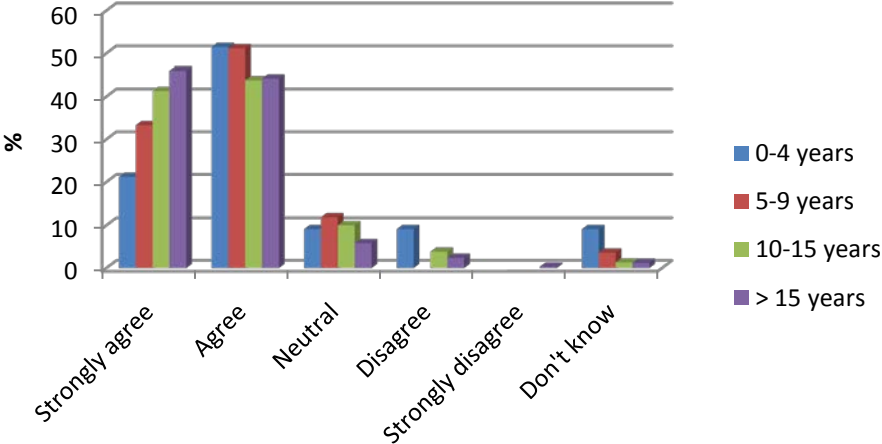
Figure 3: It is more difficult now to obtain financial facilities to rescue viable business (by country; n=439)



There is no correlation between the estimated index of creditor-friendliness and the perceived access to financial facilities for rescuing financially troubled business after the financial crisis of 2008. This suggests that the factor is unrelated to the type of insolvency regime that exists in the jurisdiction. The implications are that financial assistance to troubled companies would appear to be determined more by general economic conditions than by the type of insolvency regime available. This is not an unexpected finding – the barriers to obtaining financial facilities do not originate in the insolvency system and have very little to do with its philosophical grounds.

Figure 4 shows to the relationship between the professional experience of the respondent and his or her agreement with the statement. More experienced respondents tend to agree more that it is more difficult now to obtain financial facilities to rescue viable business.

Figure 4: It is more difficult now to obtain financial facilities to rescue viable business (by professional experience; n=562)



We specifically asked for the reasons why there has been a reluctance to provide adequate financing to businesses in financial distress. Almost 300 respondents provided insight why according to their specific knowledge of cases it has become more difficult to obtain such financing facilities. Table 7 demonstrates the various reasons by percentage.

It is interesting to see that according to the respondents the most important reason for the decrease in credit availability has been the change in bank policy as to its willingness to lend money. While credit was abundant in the period 2004-2007, it became a very scarce commodity after 2007. Even clients in good standing have had difficulty in obtaining additional funding for financially solid projects. This group is faced with banks that are orientating themselves in view of rapidly changing market conditions. As long as the prospects remain unclear, the banks are unwilling to fund viable distressed businesses. It seems also political, public and regulatory attention to the role of the banks initiating the financial crisis, has led them to tighten their lending policy. In addition to the unwillingness of financial institutions to support business in financial difficulties, 40% of the respondents who gave specific reasons noted that also the unavailability of credit appears to be a major hurdle for them to attract fresh money for restructuring: almost 25% mentioned the decrease of the credit market as an important reason. 17% had the opinion that the unavailability of credit was a result of financial problems of the existing provider of credit itself.

Table 7: Reasons why it has become more difficult now to obtain financial facilities to rescue viable business (n=297)

Reason	Percent
Choice of the banks to restrict its credit facilities to prime debtors	30
Banks are nervous about market conditions and prospects	25
Lack of financing opportunities; restriction of number of financial investors/banks	23
Banks have financial problems themselves	17
Political or regulatory restrictions	5

The responses on the question from Table 7 could be grouped analytically into two large categories. We could call the first category objective because it attributes the cut of financing for rescue to environmental factors. “Less money is available” is the most often explanation of the shrink of financial facilities needed for rescue. Some of the respondents elaborate on the changed structure of the supply market of distress finance: “... hedge funds disappeared, credit markets (e.g. securitization) closed for most of the period“. Yet another theme of the objectivist view is the change in the national and international regulations (specifically the Basel II Framework) which imposed tough restrictions to the lending industry. The process of bailing out (a respondent refers to the process as “nationalization”) of the main lenders in the US and the withdrawal of major funding packages from the market is an example of country-specific environmental reason for the evaporation of funding for distressed businesses.

There is a wide spread agreement that the financial crisis creates structural impediments for rescuing viable business. However, the interviewed insolvency professionals are far from concluding that it is all about the crisis. The strategies and behaviour of the banks is the second outstanding category identified by the respondents. There is a clear partition in the attitudes towards the role of the banks. The majority of the interviewed tend to view critically the pre- and post- decisions of the bankers. “Banks themselves were in trouble and have become much more prudent in funding companies.” This is a frequent implication – the banks were overexposed to risk and the current practices are just the return of the pendulum. In that regard a respondent recommends “a total reversal of credit profiling to 1980s/90s prudence.”

Related reason is the acute risk aversion of the banks. In a more astute language it was put as “Banks have become very shy.” However, there is a negative sentiment in this statement. The banks are not only risk averse but rely upon “unregulated credit scores and credit scoring techniques” instead looking for sound advice from accountants and insolvency practitioners. At the next level of criticism, some of the respondents question the capacity and willingness of the bankers to understand the business of their clients. “Bank professionals are protecting themselves against public opinion and are not trained business people/entrepreneurs.” “I have found that they are reluctant to know their customers or understand their businesses”. Bureaucracy attitudes of bankers towards the needs of the business are tones from the same stream of criticism. An interesting comment goes against some insolvency practitioners who opt for taking “the easy route and advise the banks to enforce their security”. More general comments about the failing of the banks to respond properly point to their inability to react adequately to the financial crisis: “The banks have not been equipped to deal with the crisis”.

There are also exonerating views on the role of the banks as it comes to the lack of financial facilities required for rescue. Many respondents comment on the pressure on the banks to shift from security based to profitability lending. As many businesses find themselves in trouble and the asset values plummeting the banks are under strenuous pressure against extending credit to risky businesses. “Banks are overcautious, they insist on massive security which a client, who is already distressed, cannot provide.” Experience with failure in funding the restructuring of bankrupt companies is another powerful frame of reference. Finally, another reason for the banks to limit the amount of credit to troubled business can be found in the new regulatory requirements.

b. Based on your general knowledge and experience, indicate on the scale below your opinion of the following statement for the period 2004-2007 resp. mid-2007 until now: “In practice, in most cases the rescue rather than the liquidation of businesses in financial trouble in your country has been the primary goal of the insolvency proceedings”? (questions 3 & 4)

More interesting is the question about the role of the financial crisis on the restructuring of financially troubled business. Two contradictory hypotheses are plausible: 1) in time of limited access to financial facilities, restructuring is a desirable but difficult to accomplish goal and 2) due to the restrained access to resources, creditors are wary about the recovery of their debts through winding up. In the survey, we asked the respondents about their view on the desirability of restructuring *before* and *after* the start financial crisis in mid-2007. Figure 5 shows that there are negligible differences in the perceived intention to rescue the troubled business before and after the financial crisis. Apparently the credit crunch did not change notably the perceived importance of rescue as the desired outcome of insolvency proceedings as far as the professionals surveyed were concerned.

Figure 5: In practice, in most cases the rescue rather than the liquidation of businesses in financial trouble in your country has been the primary goal of the insolvency proceedings (n=562)?

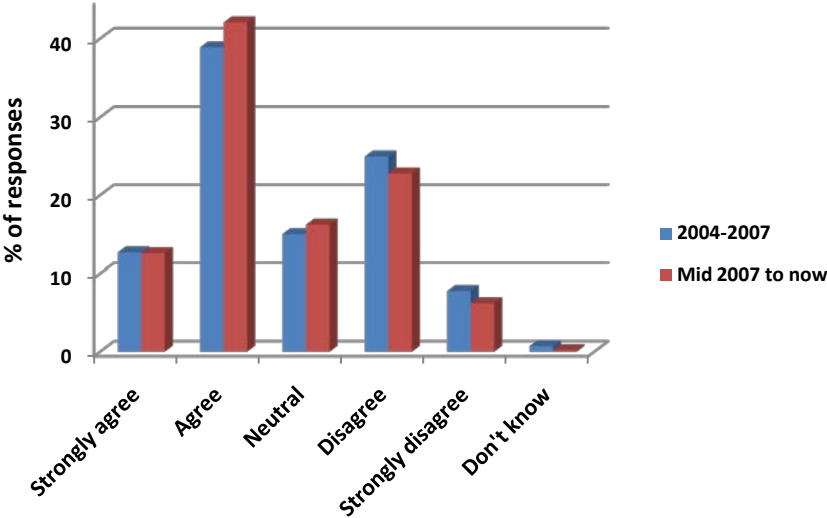


Table 8 shows how the respondents from the 10 countries with most respondents assess the role of rescue before and after the financial crisis. In the second and the third column are the mean scores of the questions that asked respectively about the periods 2004-2007 and after 2007. Lower values indicate agreement whereas high values speak of disagreement. For instance if the value for 2004-2007 is 2 and for the next period is 3, the interpretation should be that rescue in the first period has been more desirable. In the last column of the table we see the direction of the difference – a positive sign (+) which means that on average the respondents from the particular country thought that after the crisis rescue was a more sought after outcome of insolvency proceedings. A negative sign (-) indicates the opposite – after 2007 the importance of rescue as a primary goal was declining.

In all of the 10 countries there is a difference in the mean scores of the two periods. This difference, however, could be due to sampling error and/or the subjective character of the measuring scale (from strongly agree to strongly disagree). In order to check the robustness of the differences we performed statistical analysis²⁰ which indicates which pairs could be ‘trusted’ and which not. For the rows of Table highlighted in grey we cannot be reasonably certain that the difference is not due to sampling or measurement error. In the remaining four rows (Australia, Hong Kong, New Zealand and the US) the difference is negative. This means that the interviewed insolvency professionals think that after 2007 rescue is losing to certain degree its importance of a primary goal of the insolvency proceedings.

²⁰ Wilcoxon Signed Ranked Test.

Table 8: In practice, in most cases the rescue rather than the liquidation of businesses in financial trouble in your country has been the primary goal of the insolvency proceedings (n=439)?

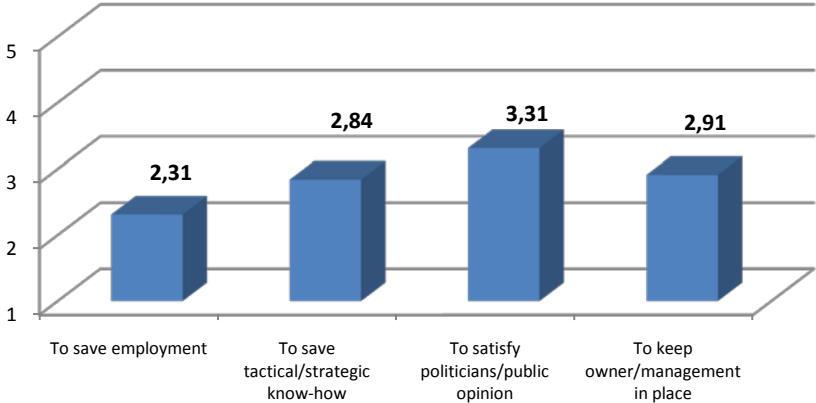
	Pre-crisis	Post-crisis	Difference
Australia	2,85	2,5	-
Canada	2,14	2,38	+
Germany	2,42	2,08	-
Hong Kong	3,28	3,07	-
India	2,33	2	-
Netherlands	3,52	3,44	-
New Zealand	3,45	3,13	-
South Africa	3,81	3,44	-
United Kingdom	2,35	2,36	+
United States	2,42	2,08	-

The data shown in Table 8 could be used for a different type of analysis. It could reveal the general attitude towards the place of rescue in the hierarchy of intended goals of the insolvency law. In some countries (i.e. US, UK, India, Canada and Australia) there is a prevalent feeling among the insolvency practitioners that the principle goal of the insolvency law is to provide business rescue. Respondents from other countries (i.e. Netherlands, Hong Kong and to some extent South Africa) are more sceptical about the possibility of rescuing the troubled debtor.

c. Based on your specific knowledge of cases and experience, were the following reasons significant to the rescue of the businesses, apart from seeking the highest return to creditors? (question 6)

After reviewing the general perceptions about rescue it is tempting to look at the specific reasons that drive the insolvency procedure towards preference of restructuring to liquidation. In our questionnaire we specified four possible options for rescuing a business – 1) to save employment; 2) to save tactical/strategic know-how; 3) to satisfy politicians/public opinion and 4) to keep “owner”/management in place. Figure 6 suggests that saving employment is the most compelling reason for rescuing troubled businesses. Saving tactical and strategic knowledge is the second most influential motivation for avoidance of liquidation. Almost at the same level the respondents place the motivation to keep the “owner” or management of the insolvent entity. Clearly, the political motivation is not really seen as the major driver towards business rescue.

Figure 6: Reasons for rescue (1=strongly agree; 2=agree; 3=neutral; 4= disagree; 5=strongly disagree; n=562)



Do the results differ by legal system or continent? Figure 7 suggests evidence that the differences among the legal systems are marginal. In all three, the major reason for rescuing financially troubled business is to save employment. If there are differences, we can argue that these are small in absolute numbers and not really significant in terms of explanatory power. For instance, in the countries with mixed legal systems, the compliance with non-legal or business arguments such as politics or public opinion plays more pronounced role. It is not a surprising finding – the GDP per capita of the countries with mixed legal system (represented in our sample) is 6 times lower than that of the common law countries and 5 times lower than civil law countries. Of course, economic development alone cannot explain well the role of the extra-legal factors in the insolvency procedures. However, one possible explanation is that countries that are less developed economically may also tend to have weaker institutions that undergird the rule of law.

Figure 7: Reasons for rescue by legal system (1=strongly agree; 2=agree; 3=neutral; 4= disagree; 5=strongly disagree; n=562)

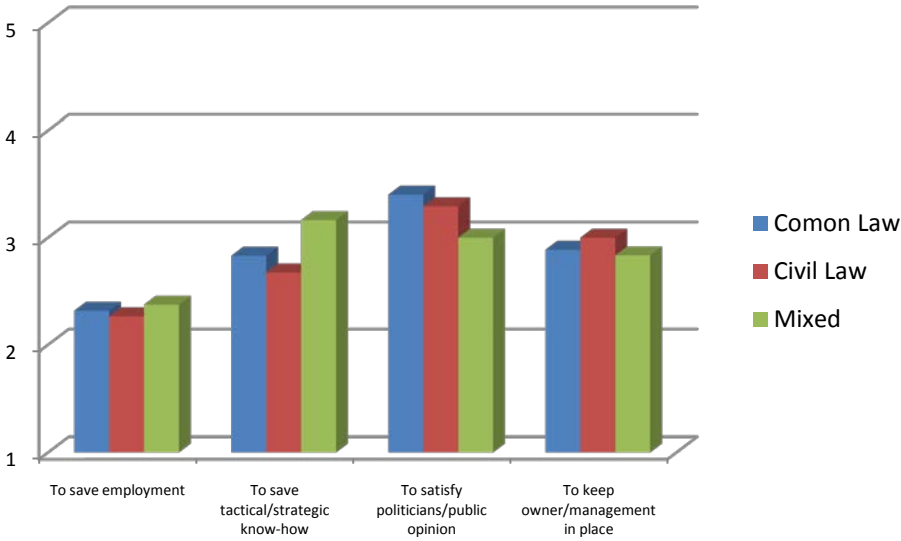
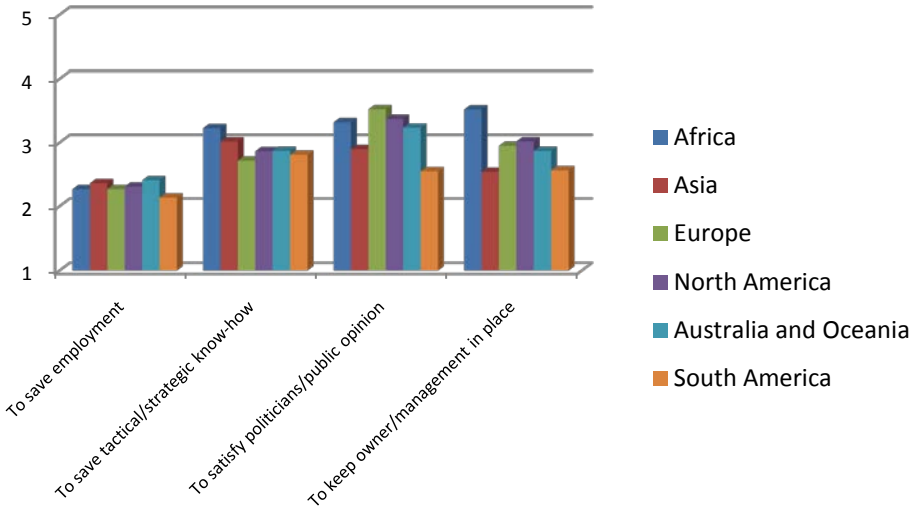


Figure 8 demonstrates the distribution of reasons for rescue by continent. Apparently, even if the data has been broken by this criterion, employment is the most persuasive reason for preferring

rescue to liquidation. More significant variation is evident by continent when considering the political and owner/managerial reasons. The respondents from South America are more willing to think that rescue is appealing for political and public opinion reasons. On the other hand, this reason is less salient in the European countries. Another noteworthy difference is that the insolvency professionals from Africa are significantly less likely to think that the reason for rescue is to keep the “owner” or management in place.

Figure 8: Reasons for rescue by continent (1=strongly agree; 2=agree; 3=neutral; 4= disagree; 5=strongly disagree; n=562)



d. Based on your specific knowledge of cases, the rescue of businesses (either in whole or in part) has been mostly successful (i.e. that the business substantially survived its own financial difficulties) in the following year and/or also after a couple of years? (question 7)

After reviewing the use of rescue and the main motivators behind it, we surveyed the practitioners about its sustainability. With two questions we asked the respondents about their perceptions on the viability of rescue in the longer and shorter term. Table 9 shows that in fact in shorter term and longer term success of rescue is seen in somewhat similar way.

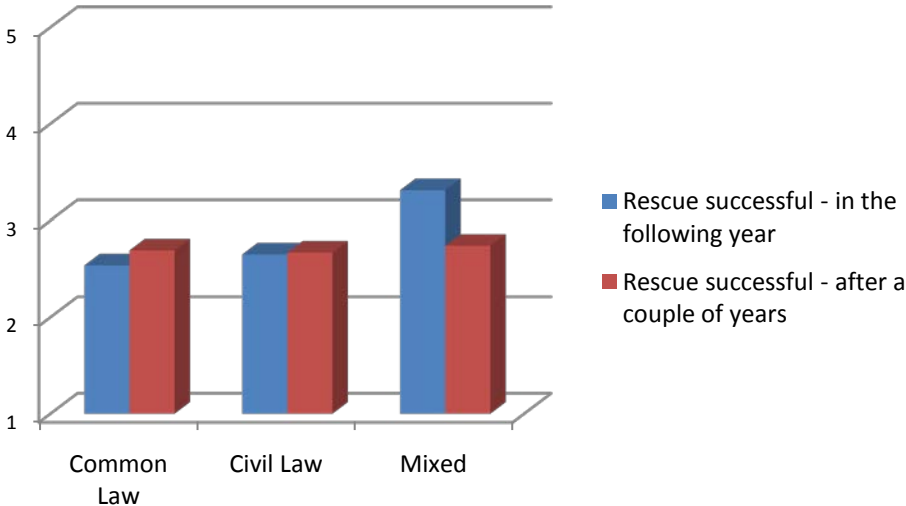
Table 9: Viability of rescue over time (n=562); cell values are percentages

	Rescue successful - in the following year	Rescue successful - after a couple of years
Strongly agree	7,65	4,90
Agree	43,14	45,29
Neutral	22,94	23,53
Disagree	21,18	18,24
Strongly disagree	2,55	3,73
Don't know	2,55	4,31

Breaking down the responses by legal system reveals some variance. In civil law and common law countries the respondents do not see a difference in the success of rescue in shorter or longer term.

A somewhat different picture emerges in the groups of countries, which legal systems are described as of mixed character. As figure 9 demonstrates, rescue in the short term in these systems has been seen as less successful than the long term. Apparently, in the mixed legal systems, the rescue appears to be more sustainable than in de in the common law jurisdictions.

Figure 9: Viability of rescue by legal system (1=strongly agree; 2=agree; 3=neutral; 4= disagree; 5=strongly disagree; n=562)



In addition we looked at the distribution of the perceived viability of rescue in the 10 most represented countries. The general finding that there are no significant differences between the shorter and the longer term holds at this level. However, a closer inspection reveals that in some countries the respondents agreed more with the first statement (rescue is successful in the following year) than with the second (rescue is successful after a couple of years). Examples of such countries are Germany, Canada, United Kingdom and the US. Long term viability seems more applicable in Australia, New Zealand, Hong Kong, South Africa and India.

Table 10: Viability of rescue in 10 best represented countries (1=strongly agree; 2=agree; 3=neutral; 4= disagree; 5=strongly disagree; n=439)

	Rescue successful - in the following year	Rescue successful - after a couple of years	Sustainable rescue over time?
United Kingdom	2,38	2,63	-
Australia	2,71	2,67	+
Canada	2,39	2,69	-
Netherlands	2,63	2,63	o
United States	2,29	2,68	-
New Zealand	2,96	2,85	+
Hong Kong	3,19	2,92	+
South Africa	3,33	3,08	+
Germany	1,92	2,73	-
India	3,75	2,45	+

5. Conclusions

The vast majority of the interviewed insolvency professionals agree that the credit crisis that commenced in 2007 stifled the access of distressed business to financial facilities so needed for successful restructuring. This accord holds across legal systems, continents, countries or professional experience of the respondents. The implication is clear: the financial crisis retrenched the access to financial facilities and thus impacted negatively the prospects for preventing or even ending the bankruptcy procedure with reorganization instead of winding up of the estate assets. Several reasons have been pointed out by the insolvency professionals. First, there is the objective decrease of cheap and liquid financial resources. The traditional funders of distressed business – banks and hedge funds – are in financial troubles themselves and apply more selective and cautious risk management rules. Furthermore, the banks nowadays operate under more rigid public policies and the political and public expectations are for prudence and restraint. Financing of restructuring may be high risk and on the one hand, the insolvency professionals see in their practices that the banks do not welcome this risk. On the other hand, they also think that the banks are overly risk averse and eager to show constraint. Some of the respondents even think that as the bankers failed to recognize the symptoms of the credit crunch, they nowadays have become short-sighted to recognize the long term interests of their clients. It should be noted that this study did not investigate the practices of business restructuring outside the bankruptcy proceedings. For a better assessment of the role of the lenders (banks) in the current practices of restricting credit availability, we suggest that further research explore the informal restructuring, its outcomes and (dis)advantages.

Even in the times of easy access to cheap credit, restructuring has been a relatively rare and uncertain event. Although the insolvency professionals are unanimous that now it has become difficult to find post-petition funding, there is no agreement how this impacts the chances of restructuring. The research shows the professionals from some countries think that rescue is less desirable as an outcome of the bankruptcy proceedings now. Others are in favour of the opposite opinion – restructuring is more attractive outcome in the times of financial crisis. Yet, respondents from other countries do not see significant impact of the crises on the desirability of restructuring. This division could be explained with structural differences in the way that the financial crisis emerged and developed in the studied countries. Another factor could be the role of insolvency and namely of rescue in the business environment in the particular jurisdictions.

The research also shed light on the reasons for rescue as they are seen by the insolvency professionals. Saving employment has been specified as the most persuasive motive for restructuring distressed business. This finding is not surprising – we are witnessing massive efforts on behalf of some governments to save jobs. These efforts, however, are usually targeted at big corporations with many employees. It would be interesting to control in further research for the size of the bankrupt entities. Small and medium sized companies are less often rescued through restructuring and perhaps there are other reasons and motives to do so. This analysis could be extended in further research also to the viability of the rescue. We found that there is no clear trend when the rescue becomes success or failure – in the year following the decision of the bankruptcy court or in the next couple of years. It is likely that the different insolvency system nurture different outcomes. Or it could be that viability of rescue is dependent on the characteristics of the debtor, on its creditor or on a combination of all these factors. More targeted research could enrich the results of the current survey and delve further into the practice of rescue as perceived by insolvency professionals.

Appendix

Table 11: Questionnaire



INSOL SURVEY 2009

Dear INSOL member,

The board of INSOL International kindly requests you to take a small amount of your time to answer the questions of the following survey. The survey will be most effective if you respond to the questions no later than November 23, 2009.

INSOL International - Academics' Group

INSOL SURVEY 2009

Since the current financial crisis began to emerge in the second half of 2007, there has been commentary that the financing available to troubled businesses, both during and after a restructuring has been constrained or the product of different motivations, and that this has given rise to differences between the position taken by banks and other financiers and that taken by governments, politicians, media and the general public with respect to the availability of funds for restructuring and rescuing businesses. INSOL International is conducting a short survey on this subject in order to clarify current professional opinion on this matter so that we can inform relevant parties accordingly. The board of INSOL International encourages its members to contribute to the survey below which has been set up in close cooperation with INSOL International's Academics' Group. This survey has been designed to take up no more than five minutes of your time. The outcome will be communicated to important decision makers, such as governments, policymakers, financiers and to business communities around the world, as well as directly to members of INSOL International. Thank you for your input. There are 11 questions in this survey.

1. How many years have you been working in insolvency practice?

- 0-4 years
- 4-9 years
- 10-14 years
- 15 years and more
- no answer

[Please indicate the aggregate number of years that you have been involved in insolvency matters as a lawyer, accountant, judge, regulator, academic or otherwise.]

2. Where do you practice insolvency law?

[Check the country that you consider your 'home' country with respect to your activities in insolvency law.]

3. Based on your general knowledge and experience, indicate on the scale below your opinion of the following statement for the period 2004-2007: *In practice, in most cases the rescue rather than the liquidation of businesses in financial trouble in your country has been the primary goal of the insolvency proceedings.*

Choose one of the following answers:

- strongly agree
- agree
- neutral
- disagree
- strongly disagree
- don't know
- no answer

4. Based on your general knowledge and experience, indicate on the scale below your opinion of the following statement for the period mid-2007 until now: *In practice, in most cases the rescue rather than the liquidation of businesses in financial trouble in your country has been the primary goal of the insolvency proceedings.*

Choose one of the following answers:

- strongly agree
- agree
- neutral
- disagree
- strongly disagree
- don't know
- no answer

[Questions 3 and 4 are meant to investigate whether a shift has occurred in the main focus of insolvency proceedings in your jurisdiction: has the emphasis shifted from liquidation to rescue? With these questions INSOL wishes to find out if the economic crisis did influence those goals in the last two years compared to the period 2004-2007.]

5. How often (approx.) have you advised and assisted businesses in financial trouble since 2004?

- 0-20
- 21-50
- 51-100
- 101-200
- > 200

[Please indicate the number of times that you have been involved (as trustee, administrator, receiver, lawyer, accountant, judge, advisor, turnaround manager etc.) in insolvency cases during the last 5 years.]

6. Based on your specific knowledge of cases and experience, were the following reasons significant to the rescue of the businesses, apart from seeking the highest return to creditors?

Choose out of the following answers:

to save employment:

- strongly agree
- agree
- neutral
- disagree
- strongly disagree
- don't know
- no answer

to save tactical/strategic know-how:

- strongly agree
- agree
- neutral
- disagree
- strongly disagree
- don't know
- no answer

to satisfy politicians/public opinion:

- strongly agree
- agree
- neutral
- disagree
- strongly disagree
- don't know
- no answer

to keep "owner"/management in place:

- strongly agree
- agree
- neutral
- disagree
- strongly disagree
- don't know
- no answer

other:

[It is recognised that the main reason for rescuing a business is usually stated in terms of obtaining the best returns for creditors. Please indicate what you consider to be the reasons that played a significant role in the attempts to rescue the business, apart from seeking the highest return to creditors. Was it aimed at rescuing (local, regional or national) employment, retaining valuable (tactical/strategic) know-how, prevention of (local, regional or national) societal unrest or distress, due to pressure from politicians, governmental agencies etc. and public opinion (media) or desire of equityholders ('owners') or management to protect their respective positions? If you consider other reasons important, please indicate such reasons in question 10 below.]

7. Based on your specific knowledge of cases, the rescue of businesses (either in whole or in part) has been mostly successful (i.e. that the business substantially survived its own financial difficulties):

Choose out of the following answers:

in the following year:

- strongly agree
- agree
- neutral
- disagree
- strongly disagree
- don't know
- no answer

after a couple of years:

- strongly agree
- agree
- neutral
- disagree
- strongly disagree
- don't know
- no answer

[Please indicate your agreement or otherwise as to the viability of the rescued business in the shorter and longer term. Where rescue has been attempted, to what extent do you consider the rescue was sustainable in the next year and then also the years thereafter. If in most of your cases the rescue has been successful in one or either period, please indicate so as ((strong) agreement; if not, please indicate (strong) disagreement.]

8. Since the beginning of the financial crisis, it has been much more difficult to obtain adequate credit facilities to rescue viable financially troubled businesses.

Choose one of the following answers:

- strongly agree
- agree
- neutral
- disagree
- strongly disagree
- don't know
- no answer

[This question is meant to find out whether you have experienced a shift in position by banks and other financiers to provide adequate credit facilities during the last year compared to the period 2004-2007.]

9. If you (strongly) agreed with the previous question, please indicate the reason(s) why there has been a reluctance to provide adequate financing to businesses in financial distress.

[With this question we would like to find out why it is difficult to obtain adequate financing for businesses in financial distress in your jurisdiction. Is it because there is no adequate legal environment for incentives to provide the availability of credit? Or is there a lack of distress asset financiers in your market? Are there any other reasons?]

10. Do you have any other relevant information on this topic you would like to share with INSOL International in connection with this survey by INSOL International Academics' Group?

[With this question you can inform INSOL about other issues from your practice and jurisdiction that may be worthwhile to become known to our researchers. In this connection you may wish to elaborate on question 6 to the extent you referred to the option 'Other'.]

11. What topics would you like to be surveyed by INSOL International Academics' Group next time?

[Please do not hesitate to help us in this respect with comments, suggestions etc.]

Thank you for your cooperation. Your help by responding to this survey is greatly appreciated. As soon as possible afterwards, you will be informed about the results of the survey and the follow-up.

On behalf of INSOL International Academics' Group

Professor Reinout D. Vriesendorp

Tilburg Law School

[Homepage INSOL International](#)

Table 12: Distribution of respondents by country

	Country	Responses	Percent
1	United Kingdom *)	95	16,90
2	Australia *)	89	15,84
3	Canada	66	11,74
4	Netherlands	52	9,25
5	United States *)	37	6,58
6	New Zealand *)	31	5,52
7	Hong Kong	29	5,16
8	South Africa *)	16	2,85
9	Germany	12	2,14
10	India	12	2,14
11	Afghanistan ²¹	10	1,78
12	Nigeria	9	1,60
13	Argentina	7	1,25
14	Brazil	7	1,25
15	France	7	1,25
16	Cayman Islands	5	0,89
17	Ireland	5	0,89
18	Romania *)	5	0,89
19	Italy	4	0,71
20	Poland *)	4	0,71
21	Sweden	4	0,71
22	Hungary	3	0,53
23	Korea Republic of *)	3	0,53
24	Singapore	3	0,53
25	Virgin Islands British *)	3	0,53
26	Austria	2	0,36
27	Bermuda	2	0,36
28	China	2	0,36
29	Denmark	2	0,36
30	Malaysia	2	0,36
31	Portugal	2	0,36
32	Russian Federation	2	0,36
33	Serbia *)	2	0,36
34	Spain	2	0,36

²¹ It is highly unlikely that 10 questionnaires have been completed by INSOL members residing in Afghanistan. In the field of quantitative research it is well known that when the question is difficult or time-consuming to answer or there are too many questions, some respondents select the first possible option even if not true. In our list of more than 200 countries, Afghanistan was the first and easiest choice. Perhaps some of the respondents preferred not to indicate the country where they practice or teach law. It is also possible that these are pure technical errors. Regardless of the reason, we will dismiss the 10 “Afghan” responses from the analysis where it is linked to a jurisdiction, as it is not possible to connect them to particular jurisdiction. Consequently, we base our findings in those cases on a sample n=552.

35	Switzerland	2	0,36
36	Thailand	2	0,36
37	United Arab Emirates	2	0,36
38	Uruguay	2	0,36
39	Azerbaijan	1	0,18
40	Belgium	1	0,18
41	Bhutan	1	0,18
42	Bosnia and Herzegovina	1	0,18
43	Czech Republic	1	0,18
44	Estonia	1	0,18
45	Finland	1	0,18
46	Japan *)	1	0,18
47	Kenya	1	0,18
48	Luxembourg	1	0,18
49	Mauritius *)	1	0,18
50	Mexico *)	1	0,18
51	Nepal	1	0,18
52	Peru	1	0,18
53	Qatar	1	0,18
54	Slovenia *)	1	0,18
55	Uzbekistan	1	0,18
56	Venezuela	1	0,18
Total		562	100,00

***) These countries have adopted and incorporated to some extent in their legislation the UNCITRAL Model Law on Cross-border Insolvency (1997).**

Table 13: Distribution by legal system

Common Law		Civil Law		Mixed	
United Kingdom	Common Law	Netherlands	Civil Law	Hong Kong	Mixed
Australia	Common Law	Germany	Civil Law	South Africa	Mixed
Canada	Common Law	Argentina	Civil Law	India	Mixed
United States	Common Law	Brazil	Civil Law	Nigeria	Mixed
New Zealand	Common Law	France	Civil Law	Korea Republic of	Mixed
Cayman Islands	Common Law	Romania	Civil Law	Singapore	Mixed
Ireland	Common Law	Italy	Civil Law	China	Mixed
Virgin Islands British	Common Law	Poland	Civil Law	Malaysia	Mixed
Bermuda	Common Law	Sweden	Civil Law	United Arab Emirates	Mixed
		Hungary	Civil Law	Bhutan	Mixed
		Austria	Civil Law	Japan	Mixed
		Denmark	Civil Law	Kenya	Mixed
		Portugal	Civil Law	Mauritius	Mixed
		Russian Federation	Civil Law	Nepal	Mixed
		Serbia	Civil Law	Qatar	Mixed
		Spain	Civil Law		
		Switzerland	Civil Law		
		Thailand	Civil Law		
		Uruguay	Civil Law		
		Azerbaijan	Civil Law		
		Belgium	Civil Law		
		Bosnia and Herzegovina	Civil Law		
		Czech Republic	Civil Law		
		Estonia	Civil Law		
		Finland	Civil Law		
		Luxembourg	Civil Law		
		Mexico	Civil Law		
		Peru	Civil Law		
		Slovenia	Civil Law		
		Uzbekistan	Civil Law		
		Venezuela Bolivarian Republic	Civil Law		

Computation of index of creditor-friendliness of rescue

Philip Wood assesses how rescue in 13 jurisdictions affects the interests of the creditors on five indicators: impact on security, freeze on set-off, freeze on conflict cancelation, creditor control and director liability. Four levels of creditor-friendliness are used to rate the indicators - major impact , can be problems, points to watch, usually OK. We give one point for each level of the indicator in the

following order: major impact - 1, can be problems - 2, points to watch - 3, usually OK - 4. Thus a maximum creditor friendly procedure will score 20 points (5*4) and a minimum is 5 points (5*1). Because some of the countries are assessed on less than 5 indicators we use proportion (percentage) of the actual score and the total maximum score.

Philip Wood assesses in his Maps of World Financial Law England as distinct jurisdiction. In our study we use UK as unit of analysis. Therefore the score of the table below is only a partial and perhaps misleading indicator for the UK.

Table 14: Indicator of creditor-friendliness of rescue

Country	Aggregated Score
Australia	95
Belgium	50
Canada	75
England	90
France	30
Germany	90
Italy	62,5
Japan	95
Netherlands	95
Poland	70
Singapore	95
Spain	75
US	65

Table 15: Attitudes towards rescue by the 10 best represented countries

		2004-2007	2007-now
Australia	Strongly agree	10,1	17,0
	Agree	38,2	45,5
	Neutral	18,0	12,5
	Disagree	23,6	20,5
	Strongly disagree	10,1	4,5
Canada	Strongly agree	23,4	12,3
	Agree	46,9	53,8
	Neutral	20,3	16,9
	Disagree	6,3	16,9
	Strongly disagree	1,6	
	Don't know	1,6	
Germany	Strongly agree	33,3	41,7
	Agree	16,7	25,0
	Neutral	25,0	16,7
	Disagree	25,0	16,7

Hong Kong	Strongly agree	3,4	3,4
	Agree	24,1	31,0
	Neutral	17,2	24,1
	Disagree	51,7	37,9
	Strongly disagree	3,4	3,4
India	Strongly agree	33,3	45,5
	Agree	33,3	27,3
	Neutral	8,3	18,2
	Disagree	16,7	
	Strongly disagree	8,3	9,1
Netherlands	Strongly agree	1,9	1,9
	Agree	19,2	19,2
	Neutral	19,2	26,9
	Disagree	44,2	36,5
	Strongly disagree	15,4	15,4
New Zealand	Agree	29,0	45,2
	Neutral	9,7	12,9
	Disagree	48,4	25,8
	Strongly disagree	12,9	16,1
South Africa	Agree	18,8	31,3
	Neutral	12,5	12,5
	Disagree	37,5	37,5
	Strongly disagree	31,3	18,8
United Kingdom	Strongly agree	12,6	12,6
	Agree	54,7	54,7
	Neutral	17,9	16,8
	Disagree	11,6	12,6
	Strongly disagree	2,1	2,1
	Don't know	1,1	1,1
United States	Strongly agree	27,0	16,2
	Agree	51,4	27,0
	Neutral	2,7	18,9
	Disagree	8,1	24,3
	Strongly disagree	8,1	13,5
	Don't know	2,7	