INSOL INTERNATIONAL
News Update

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EDITOR'S NOTE

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"*Although our intellect always longs for clarity and certainty, our nature often finds uncertainty fascinating*"

- Karl Von Clausewitz

There is no doubt we live in uncertain times. Trade disputes, Brexit, the pending U.S. election, wildfires in Australia, and multiple hotspots of regional instability - all portend an uncertain economic landscape in 2020. In the Editor's experience, however, we have always lived in uncertain times. Uncertainty certainly breeds anxiety, but it can also present opportunity. Particularly for insolvency practitioners who seek to bring necessary predictability and commercial certainty to cross-border insolvencies.

In this month's edition we present a range of case updates and articles from across the globe that demonstrate how various jurisdictions are grappling with uncertainty in the cross-border insolvency context. Bermuda's bespoke approach to cross-border restructuring shows how courts can fill-in legislative gaps to create commercial certainty. A recent case decision in Hong Kong points to the growing demystification and recognition of Chinese insolvency law outside China. Similarly, the adoption of an Arrangement on Reciprocal Recognition and Enforcement of Judgments between the Courts of Hong Kong and the Courts of the Mainland in Civil and Commercial matters should provide a more comprehensive mechanism for the mutual recognition and enforcement of civil and commercial judgments between the two jurisdictions. In India, the introduction of the Insolvency and Bankruptcy Code Bill (2019) aims to overcome "critical gaps in the corporate insolvency framework".

Of course, the legislative actions of governments and judicial interpretation can have the effect of creating uncertainty, often unintentionally. In Brazil, new compliance standards predicated on an anti-corruption law have resulted in stagnation and insolvency in the construction industry. Distinct and inconsistent interpretations by the Australian, English and U.S. Courts about the criterion to asses COMI

CONTENTS

and when COMI is to be assessed under the UNCITRAL Model Law can impact a debtor seeking recognition in multiple jurisdictions, as well as create difficulties for newly adopting States.

In the Editor's own jurisdiction, this month's Highlight Article addresses the creation of uncertainty by a well-intentioned government importing vague and subjective language into a statute. As a result of recent amendments to Canada's two main insolvency statutes a duty of "good faith" has been imposed on all "interested parties" in insolvency proceedings in Canada. Good faith has not been defined in the statutes, which may leave creditors and other participants perplexed by what this new duty entails. The Highlight Article examines the new duty of good faith to shed light on what it may mean and the remedies that may be employed by the courts upon a finding that the duty has been breached, based upon previous jurisprudence in Canada, and provides a comparison to the equitable subordination principle in the United States, which is the closest analogue.

A sincere thank you to the authors who have contributed articles and case updates to this edition. They demonstrate that a broad range of jurisdictions are grappling with similar issues to provide the commercial certainty that supports trade and investment. That there are common issues to grapple with, that they cross borders, and that certainty is the best way to address these issues when they do cross borders is, of course, at the centre of the INSOL mandate. We live in uncertain times. Whether you view that statement as a blessing or a curse is a matter of perspective.

HIGHLIGHT ARTICLE

The New Duty of Good Faith in Canadian Insolvency Proceedings

Canada's two main insolvency and restructuring statutes, the Bankruptcy and Insolvency Act (BIA) and the Companies' Creditors Arrangement Act (CCAA) were recently amended to include a new duty of good faith on the part of all "interested persons" involved in an insolvency proceeding. Although requiring all participants in an insolvency proceeding to act in good faith may be a laudable objective, the statutory amendments are problematic. The amendments do not define what the duty of good faith actually entails while at the same time allow any interested person to complain to the court that the duty has been breached by another interested person. As there is not yet any reported jurisprudence interpreting the new good faith requirement under the BIA and CCAA, the author reviews some recent cases in which the courts have considered creditors' conduct in insolvency and restructuring proceedings in Canada, to assess how the duty of good faith might be interpreted and applied. In addition, the article considers how the duty might be interpreted using the U.S. principle of equitable subordination for comparison.

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Highlight Article >

THE AMERICAS

CASES

USA

Chapter 15 Gap Period Relief Subject to Preliminary Injunction Standard but No Adversary Proceeding Required

Unlike in cases filed under other chapters of the Bankruptcy Code, the filing of a petition for recognition of a foreign bankruptcy case under Chapter 15 does not automatically trigger a stay of actions against a debtor or its U.S. assets. Courts disagree as to the standard that should govern the issuance of provisional relief during the gap period and whether an adversary proceeding is required to obtain it. The U.S. Bankruptcy Court for the Southern District of New York recently weighed in on this issue in *In re Beechwood Re*, 2019 WL 3025283 (Bankr. S.D.N.Y. July 10, 2019).

Jones Day Insight, December 2019 >

Case Decision >

A version of this article was first published in Lexis Practice Advisor.

USA

First Circuit Finds that Funds were not Liable for Portfolio Company's Pension Fund Withdrawal Liability

On 22 November 2019, the United States Court of Appeals for the First Circuit held that two separate private equity funds managed by the same general partner / management firm were not liable for the pension fund withdrawal liability of their bankrupt portfolio company. At issue in *Scott Brass* was whether those two funds -- and potentially their investors -- were part of the debtor's control group when it withdrew from the multiemployer pension fund, such that the funds would be jointly liable for the withdrawal liability of the debtor.

Shearman & Sterling Perspectives, 19 December 2019 >

Case Decision >

ARTICLES

Bermuda

Bermuda's 'Light-Touch' Approach to Cross-Border Restructuring

Bermuda has no direct equivalent to the statutory moratorium against creditor action that applies to an insolvent English company in administration proceedings or to an American corporate reorganisation pursuant to Chapter 11 of the United States Bankruptcy Code. This legislative gap has been enthusiastically filled by the Bermuda Supreme Court's interpretation of the power to appoint liquidators or provisional liquidators under section 170 of the Companies Act 1981 as including the power to appoint

Brazil

New Brazilian Compliance Standards and Rules, the Car-Wash Operation and the Restructuring of the Brazilian Civil Construction Sector

Since 2014, the Brazilian construction industry has faced economic and financial crisis which has led some of the largest domestic economic groups to file for Court-Supervised Reorganisation. This was caused in part by the introduction of the Anti-corruption Law of 2013, which provides for the civil liability of legal entities for acts harmful to domestic or foreign governments. These payment commitments, in

provisional liquidators for restructuring purposes. This provisional liquidation jurisdiction can also be invoked to assist in the context of cross-border restructurings in circumstances where provisional liquidators are appointed on a 'light-touch' basis.

Walkers Offshore Insolvency and Restructuring, International Corporate Rescue - Special Issue, December 2019 pages 16 - 19 >

addition to the industry's stagnation, resulted in restricted credit to this sector, and, as a result, precarious cash flows for their operations. This article examines in detail these and other factors that contributed towards the crisis currently faced by the main Brazilian construction companies.

Mazzucco & Mello Article, December 2019 >

This article was first published in the INSOL International Latin America Newsletter, December 2019. Read the full Newsletter under Publications below

ASIA PACIFIC

CASES

Hong Kong

Demystifying Chinese Insolvencies – all Roads Lead to the Mainland

CEFC Shanghai International Group Limited (CEFC), a Shanghai-based investment company, is in liquidation in Mainland China, but has substantial assets in Hong Kong. The Chinese court-appointed administrators of CEFC applied to the Hong Kong court to recognise the Chinese liquidation and protect the Hong Kong assets from pending enforcement. Despite the Hong Kong court routinely recognising foreign insolvencies, this was the first application to the Hong Kong court to recognise a Mainland insolvency. One of the most notable aspects of the decision in *Re CEFC Shanghai International Group Limited*, 13 January 2020 is that in applying the legal test for recognition Mr Justice Harris sought to draw out some of the key similarities between Hong Kong and the Mainland's insolvency laws.

Freshfields Bruckhaus Deringer Blog Post, 14 January 2020>

Case Decision>

Hong Kong

The Interplay Between Insolvency and Arbitration Proceedings in Hong Kong

The Hong Kong Companies Court has changed the approach in which winding up proceedings are handled when the alleged debt is the subject of an arbitration agreement in the case of *Lasmos Limited v Southwest Pacific Bauxite (HK) Limited* [2018] HKCFI 426. This article explores the interplay between insolvency and arbitration proceedings in Hong Kong by reference to two recent bankruptcy cases, *Sit Kwong Lam v Petrolimex Singapore Pte. Ltd* [2019] HKCA 1220 (1 November 2019) and *But Ka Chon v Interactive Brokers LLC* [2019] 5 HKC 238 (2 August 2019) in which the Court of Appeal made obiter comments on the *Lasmos* approach.

Stephenson Harwood Insight, 9 January 2020>

***But Ka Chon* Case Decision >**

***Sit Kwong Lam* Case Decision >**

LEGISLATION

Hong Kong

Recognition and Enforcement of Court Judgments Between Hong Kong and China: A Review of the 2019 Arrangement

On 18 January 2019, Hong Kong and China signed the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region (2019 Arrangement). When it comes into operation (no date has yet been announced), the 2019 Arrangement will establish a more comprehensive mechanism for the mutual recognition and enforcement of court judgments between the two jurisdictions, and it will supersede the previous arrangement signed in 2016, which was far more limited in scope. This article discusses the rationale for such arrangements between Hong Kong and China and the key elements of the 2019 Arrangement.

K&L Gates Legal Insight, 19 December 2019>

India

IBC Second Amendment Bill, 2019: Finishing Touches to the Indian Restructuring Landscape

In the three years since the enactment of the Insolvency and Bankruptcy Code, 2016 (IBC), many areas in the insolvency resolution process have required judicial and legislative intervention to enable the process to achieve the desired results. The introduction of the Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019, by the Government, is a step aimed to help overcome such '*critical gaps in the corporate insolvency framework*'. There is no statutory protection under the IBC for the superior ranking of priority debt obtained during an out-of-court restructuring. To address this, the Bill proposes to expand the definition of 'interim finance' to include '*such other debt as may be notified.*' This article analyses this and other key features of the Bill.

Cyril Amarchand Mangaldas Insolvency and Bankruptcy Blog, 18 December 2019 >

Insolvency and Bankruptcy Code (Second Amendment) Bill, 2019 >

Articles

Australia

A *Saad* Compromise? Different Interpretations of the Model Law Promoting Inconsistency in a Law Meant to Remove it

The UNCITRAL Model Law on Cross-Border Insolvency 1997 (Model Law) seeks to address complexities caused where insolvencies cross borders, while leaving substantive insolvency laws of each country largely unaltered. However, as jurisdictions continue to adopt and interpret the Model Law, inconsistencies in its application are coming to light. The focus of this article is on the distinct interpretations by Australian, English and US Courts in two primary areas of the Model Law: the criterion when determining a company's 'Centre of Main Interests' (COMI); and the question of when the COMI is assessed.

DLA Piper, Restructuring Global Insight - Issue 31, December 2019 >

EUROPE, AFRICA & THE MIDDLE EAST

CASES

United Kingdom

High Court Upholds Strike Out of Claim Based on Allegation a Financial Institution Breached Fiduciary Duties as a Shadow Director of its Customer

In a recent decision the High Court has held that a financial institution which is alleged to have been a shadow director of its customer will not be liable for breach of fiduciary duty unless the breach is linked to an instruction or direction given by the institution: *Standish & Ors v The Royal Bank of Scotland plc & Anor* [2019] EWHC 3116 (Ch). The decision will be of particular interest to financial institutions involved in turnarounds, restructurings and the exercise of control, management or similar rights arising upon default under facility agreements.

Herbert Smith Freehills Banking Litigation Notes, 18 December 2019 >

Case Decision >

LEGISLATION

United Arab Emirates

Bankruptcy Law Amendment

Following on from the recent introduction of the Personal Bankruptcy Law, Federal Law No 23 of 2019, has been issued amending Law No 9 of 2016 (the Corporate Bankruptcy Law). The amendment to the Corporate Bankruptcy Law became effective from the day following its publication, meaning it is effective now. This article summarises the material changes to the Corporate Bankruptcy Law.

Al Tamimi & Co Banking & Finance Legal Update, 17 December 2019 >

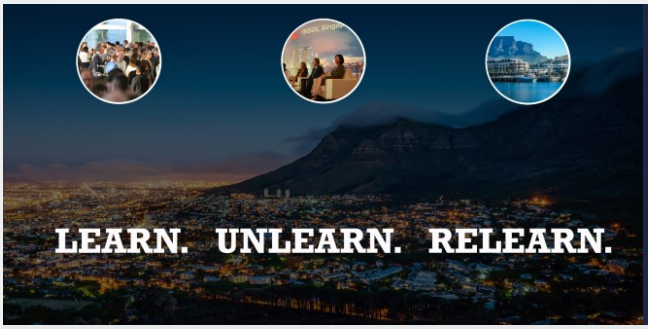
Publications

In December 2019, INSOL International was very pleased to publish the inaugural issue of our Latin America Newsletter. The Latin America Committee spearheaded this project to create a forum through which practitioners in the region can address the unique, albeit diverse, legal and financial topics that are common across its many countries.

This first edition was edited by Rafael Klotz, Gordon Brothers and contains original articles specifically commissioned tackling a range of topics, including updates on insolvency and pension-reform in Brazil, practical application of the insolvency laws in Argentina and a general overview of the unique nature of distressed investments in Latin America. We would like to sincerely thank the Editor and authors for their excellent contributions to this first edition.

The Latin America Newsletter will be published bi-annually, if you or someone you know would like to participate in future editions or to provide topics or ideas for future articles please contact our Technical Officer, Louise Jennings.

CONFERENCES & SEMINARS



INSOL Cape Town

Sunday 15 March – Tuesday 17 March 2020

At INSOL Cape Town the chosen theme 'Learn. Unlearn. Relearn.' reflects the need to evolve and develop in current market conditions. Take advantage of a stellar technical programme featuring sessions on Brexit, the Neuroscience of Leadership, Crisis Communication, and Learning from Failure - in which CEOs will retell their stories.
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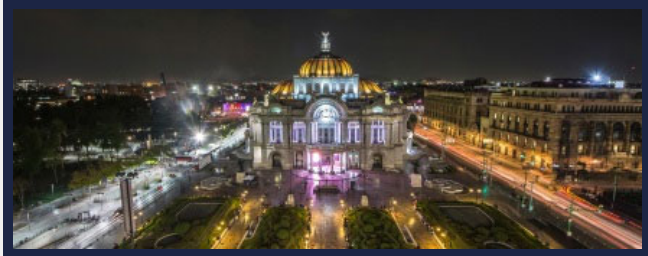

13 February 2020
Hyatt Regency, Mexico City,
Mexico

REGISTRATIONS ARE OPEN

Early Booking Deadline: 31 January 2020

Click here to view the programme and register.

Please contact Danielle Timmons for further information.

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We look forward to seeing you in Mexico City!

Tel Aviv One Day Seminar

4 May 2020
Tel Aviv Hilton,
Israel

REGISTRATIONS ARE OPEN

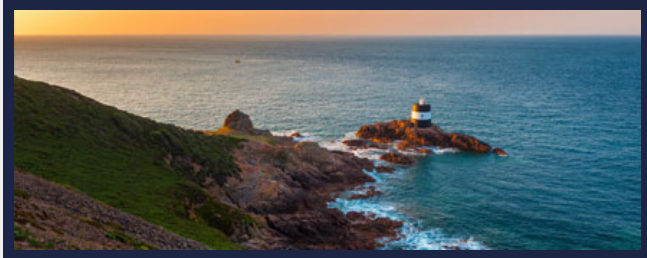
Early Booking Deadline: 23 March 2020

Click here to view the programme and register.

Please contact Danielle Timmons for further information.

We look forward to seeing you in Tel Aviv!

Channel Islands One Day Seminar



17 June 2020
Radisson Blu Waterfront Hotel
St Helier, Jersey

SAVE THE DATE

Early Booking Deadline: 24 April 2020

Click here to view the programme and register.

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Association of Business Recovery Professionals - R3

Association of Restructuring and Insolvency Experts (Channel Islands)

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Business Recovery and Insolvency Practitioners Association of Nigeria

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