



# INSOL INTERNATIONAL

## News Update

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### EDITOR'S NOTE

Here in New England, the splendour of autumnal foliage signals the end of languid summer days and incites young and old to celebrate the mild days - and bountiful harvest - before the landscape succumbs to winter's icy-grey grasp. Although certain vestiges of agrarian life - like the school calendar - still impact our routines, most of us here in the Northeast are relatively insulated from the natural seasons. Nonetheless, restructuring professionals are acutely tuned to business cycles, to the micro and macro-economic seasons of prosperity and distress. And so we prepare for our clients' "winter" - in part by reading another collection of insolvency-themed updates from around the globe.

This month, we commence our tour du monde with a [North American highlight article](#): a reminder from a handful of chapter 15 cases recognising Brazilian proceedings that chapter 15 is not just for protecting property in the United States - but can be used to significantly expand the scope of investigations and discovery originally commenced in foreign proceedings, especially where a debtor's stakeholders may have absconded with company property. We also consider recent developments in Delaware, including the adoption of procedures to facilitate [inter-court communications](#) in cross-border bankruptcies and a [recent decision](#) enforcing Delaware's adherence to parties' agreements - upholding anti-assignment provisions post-petition.

Heading south before we cross the Atlantic, we consider recent statutes and decisions that have upended distribution schemes. The

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If you would like to send an article for inclusion in one of our forthcoming issues please contact our Technical Officer, [Louise Jennings](#)

If you would like to introduce a new member to INSOL International please contact our Database Manager, [Tony Ashton](#)

[Cayman Grand Court](#) authorised the payment of unsecured creditors while a proprietary claim was on appeal, and [Colombia's Security Interest Law](#) has effectively created a new class of secured creditor within the statutory distribution waterfall.

Across the pond, we take an in-depth look at [Schuldschein loans](#), their rising popularity and the implications of their idiosyncrasies (e.g., lack of an agent or trustee - or majority creditor provisions) for work-outs and insolvency proceedings in various jurisdictions. Among other updates, the [Czech Supreme Court](#) clarified that a single delinquent claim may suffice to establish balance-sheet insolvency and to avoid dismissal of insolvency proceedings.

So whether you curl up with a pumpkin-spiced latte and apple-cider donuts here in New England - or head to Bondi Beach in "sunnies" for a flat white and avocado toast, enjoy the latest collection of articles from around the globe in preparation for whatever this season brings.



**David L. Lawton**  
**Morgan, Lewis & Bockius LLP**  
**USA**

## HIGHLIGHT ARTICLE

### **Getting More out of Your “Stay” in the United States: Brazilian Insolvency and the Investigative Powers of Chapter 15**

Cross-border insolvency practitioners the world over may know that chapter 15 of the U.S. Bankruptcy Code allows a foreign representative to seek recognition of a non-U.S. insolvency proceeding and, upon recognition, to benefit from an automatic stay of execution against the debtor’s assets “*within the territorial jurisdiction of the United States.*” The court may implement additional measures to protect such assets, including:

- Entrusting a foreign representative with the administration of some or all of the debtor’s assets;
- Suspending the right to transfer, encumber, or otherwise dispose of any of the debtor’s assets; and
- Granting additional relief available to a trustee, apart from avoidance powers.

However, some insolvency practitioners may not realise the full scope of additional tools available not only to protect the debtor’s identifiable U.S. assets - but also to trace and recover additional assets in the United States through the investigative powers of 11 U.S.C. § 1521(a)(4). Several

recent cases highlight the potential value of obtaining broad discovery powers in the United States through chapter 15 recognition.

**David L. Lawton**  
**David K. Shim**  
**Morgan, Lewis & Bockius LLP**  
**USA**

[Highlight Article >](#)

## THE AMERICAS

### CASES

#### Cayman Islands

##### **Liquidators Granted Sanction to Settle Creditor Claim Despite Competing Existing Proprietary Claim**

In a reasoned ruling dated 30 September 2019 in the matter of *Saad Investments Company Limited (in official liquidation)* (FSD 15 of 2010 (ASCJ)) the Chief Justice of the Grand Court of the Cayman Islands, Hon. Anthony Smellie QC has provided some welcome guidance concerning the basis on which sanction might be granted to liquidators to compromise a creditor claim when faced with a competing proprietary claim over the same assets. A further ruling of the Chief Justice in this matter dated 1 October 2019 has provided important clarification on the legal test concerning the grant of sanction for a proposed interim payment of dividends in a liquidation estate which is subject to an overarching proprietary claim. Both articles and corresponding rulings are below.

[Walkers Bulletin, 2 October 2019 >](#)

[Case Decision, 30 September 2019 >](#)

[Walkers Bulletin, 4 October 2019 >](#)

[Case Decision, 1 October 2019 >](#)

#### USA

##### **No Right, No Power, No Claim: Anti-Assignment Provision Voids Claim Trader's Proof of Claim**

On September 11, 2019, the Delaware district court affirmed the bankruptcy court's decision to expunge a proof of claim filed by a claims trader in the Woodbridge Group of Companies, LLC bankruptcy case. The court's holding was based on three primary legal conclusions: (1) the anti-assignment provisions in the underlying loan agreements and promissory notes were enforceable under Delaware law; (2) the debtors' pre-petition breach of the loan agreements did not bar the debtors from relying on the anti-assignment provisions; and (3) the Uniform Commercial Code did not render the anti-assignment provisions unenforceable. This decision could have a major impact on the claims trading business and should be closely examined and analysed by claims traders.

[Squire Patton Boggs, eSQUIRE Global Crossings, 8 October 2019 >](#)

[Case Decision >](#)

### ARTICLES

#### Colombia

##### **Secured Creditors and Colombia's Insolvency Proceedings**

#### USA

##### **Delaware Bankruptcy Court Adopts Interim Modalities for Court Communication in Cross-Border Bankruptcies**

Law 1676 of 2013 (Secured Interest Law), which came into effect in Colombia in 2014, has substantially affected the legal scope of creditors' rights in the context of insolvency proceedings (reorganisation and liquidation). In particular, the law has potentially created a new type of creditor: the secured creditor, which has rights that differ from those creditors included in the creditor hierarchy in the Civil Code and the Corporate Insolvency Law. This article considers: (i) the existence, or not, of a new creditor type; (ii) the compatibility of that possible new type of creditor with the current system of creditors hierarchy, and (iii) the specific rights of that new creditor, should there be one, in creditors' arrangement proceedings.

[DLA Piper, Global Insight Issue 30, September 2019 >](#)

The U.S. Bankruptcy Court for the District of Delaware had recently adopted, on an interim basis, the Modalities of Court-to-Court Communication, which were developed by the Judicial Insolvency Network to "*apply to direct communications (written or oral) between courts in specific cases of cross-border proceedings relating to insolvency or adjustment of debt opened in more than one jurisdiction*". It is anticipated that other courts will do so as well in the near term.

[Jones Day, Business Restructuring Review, September - October 2019 >](#)

[Modalities of Court-to-Court Communication >](#)

## ASIA PACIFIC

### CASES

#### Australia

##### **New Insolvency Inquiry Misses the Mark**

On 10 October 2019, the Small Business and Family Enterprise Ombudsman launched an inquiry into the insolvency industry with the purpose of determining whether the current system will "achieve the best possible outcome for small and family businesses in financial trouble." This article details what the inquiry will examine including how the insolvency of a small or family business may lead to bankruptcy for the owners; and how the established framework impacts the practices and fees of insolvency practitioners, however, it also notes how it fails to target certain key issues, such as the work of unregulated pre-insolvency advisors who can contribute to the practice of Phoenixing.

[Ian Dorey, Partner and James Thompson, Lawyer, K&L Gates, Alert, 14 October 2019 >](#)

### ARTICLES

#### Australia

##### **Practical Issues of Private International Law Arising in Cross-Border Insolvencies - An Australian Law Perspective**

This year saw the tenth anniversary of the commencement of the Cross-Border Insolvency Act 2008 (Cth) (CBI Act) in Australia, by which the UNCITRAL Model Law on Cross-Border Insolvency (Model Law) became part of the domestic law in Australia; and the adoption by UNCITRAL of the Model Law on the Recognition and Enforcement of Insolvency-Related Judgments. This article explores, from an Australian law perspective: some of the practical issues (of private international law) faced by different players in a cross-border insolvency; and which issues have emerged, or have become increasingly common, over the last ten years.

[Clayton Utz, From Red to Black, September 2019 >](#)

## CASES

## Czech Republic

**Ground-Breaking Czech Supreme Court Decision on Balance-Sheet Insolvency**

The definition of insolvency is a key element of the insolvency law. It opens the gate for tools that enable creditors to safeguard their rights vis-à-vis their debtors. The Czech Supreme Court has recently published a ground-breaking decision which addresses a crucial aspect of balance-sheet insolvency ruling that in order to establish balance-sheet insolvency, it suffices that the petitioner has one past due claim so that all other claims do not necessarily have to be mature. As this case note, points out, many other issues, however, still remain unresolved.

[Case Note, Havel & Partners, October 2019 >](#)

## UK

**High Court finds in favour of Lehman administrator in respect of US \$7 million trade error and implies term into otherwise “unworkable” debt security trade agreement**

A recent High Court decision has found that it was necessary to imply a term into an otherwise unworkable debt security trade agreement: *Lehman Brothers International (Europe) (In Administration) v Exotix Partners LLP* [2019] EWHC 2380 (Ch). The approach of the court towards implying terms into a contract is highly restrictive and implied terms are particularly unusual in the securities market, so this decision will likely be of interest to financial institutions.

[Herbert Smith Freehills, Banking Litigation Notes, 23 September 2019 >](#)

[Case Decision >](#)

## CASES

## UK

**CVAs – Retail’s Flexible Friendship Continues**

On 19 September 2019, Justice Norris handed down judgment in the challenge brought by six landlords against the Debenhams Retail Limited company voluntary arrangement (CVA) which was approved by 94.71% of Debenhams’ unsecured creditors on 9 May 2019. The challenge been watched with significant interest, particularly by the landlord community, which has for some time expressed increasing concerns regarding the use of CVAs as a mechanism to commute leasehold liabilities while other unsecured creditors’ rights remain unaffected. Justice Norris’ decision provide welcome clarification on a number of key issues concerning the treatment of leases in retail CVAs.

[Hogan Lovells, 5 Minute Workout, 20 September 2019 >](#)

[Case Decision >](#)

## ARTICLES

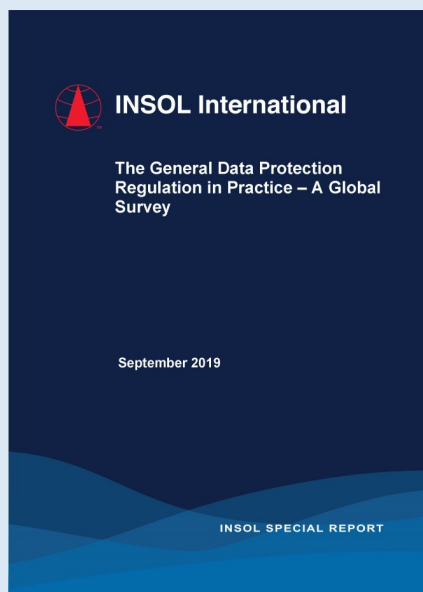
## UK

**Schuldschein Loans in Cross-Border Restructurings**

The term "*Schuldscheindarlehen*" literally means "a loan evidenced by a certificate of indebtedness". However this is not a strict legal requirement for a Schuldschein loan and most Schuldschein loans today are issued on an uncertificated basis. Schuldschein loans are no longer the sole preserve of German Mittelstand borrowers, and have started to play an increasingly prominent role in cross-border restructurings. This note examines some of the key issues that all parties will need to be aware of in relation to a restructuring involving Schuldschein loans.

[Clifford Chance Briefing, 18 September 2019 >](#)

## Publications



### INSOL International Special Report - The General Data Protection Regulation (GDPR) in Practice - A Global Survey

The European Union's GDPR came into force on 25 May 2018. The GDPR has impacted on restructuring and insolvency cases both within the EU and Worldwide. The provisions of the GDPR do not exempt companies in formal insolvency proceedings thus requiring these companies to deal with compliance matters at a time of financial distress.

This paper provides a good overview of the new GDPR provisions that apply to insolvent companies and their office holders and explores the effectiveness of GDPR in the EU and non-EU countries. As part of the research that was done to write this report, INSOL carried out a survey to collate views from its members as to awareness of the

GDPR, levels of compliance, extent of regime changes and the extra-territorial effect. Readers will see that the responses are varied and interesting.

INSOL International sincerely thanks Ben Jones and Sophie Taylor for their continued interest and efforts over several months to formulate the survey questions, analyse the responses and write this excellent report.



## CONFERENCES & SEMINARS



### INSOL Cape Town

Sunday 15 March – Tuesday 17 March 2020

High level technical content, outstanding networking opportunities and an exceptional conference destination.  
It can only be INSOL Cape Town.

This time we take our unrivalled technical programme to South Africa, where a who's who of senior insolvency and restructuring professionals and industry experts will share their expertise and experiences.



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### Tokyo One Day Seminar



Thursday 7 November 2019  
Tokyo

#### Booking Deadline: 18 October 2019

Registrations are open for the INSOL International Tokyo One Day Seminar, taking place for the second time in Japan. The Main Organising Committee have put together an engaging and interesting programme with the overarching theme being '*Further Development in Asian Insolvency and Cross-Border Restructuring*'.

As the capital of Japan, Tokyo mixes modern skyscrapers and neon signs with its traditional culture, including museums, theatres and historic shrines. Whether you want to shop in the famous Harajuku district, visit the Imperial Palace, take a stroll along Tokyo bay or sample Japan's unique cuisine, there is plenty to explore during your visit.

### Africa Round Table Open Forum



22 November 2019  
Swakopmund, Namibia

#### Booking Deadline: 25 October 2019

INSOL International and the World Bank are delighted to announce the date of the next Africa Round Table (ART) Open Forum on insolvency reform, to be held on 22 November 2019 at the Swakopmund Hotel and Entertainment Centre, Swakopmund, Namibia. As we are celebrating the 10th anniversary of the Africa Round Table initiative, the theme for this year's event is "*Celebrating a decade of Insolvency Reform in Africa and anticipating what lies ahead*".

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For further information please contact [Zeenat Edah-Tally](#)

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For further information please contact [Penny Robertson](#)

### Bahamas Offshore One Day Seminar



Thursday 5 December 2019  
Nassau, The Bahamas

**Early booking deadline: 15 October 2019**

INSOL International and RISA are hosting a joint One Day Seminar in Nassau, The Bahamas on Thursday 5th December 2019.

Come join us in the luxurious Bahamas, where the stunning scenery and culinary delights can't be beat!

The seminar chairs and Main Organising Committee have prepared an engaging educational programme featuring both offshore and cross-border topics.

We would like to thank the sponsors of our Seminar:

Platinum Sponsors: EY  
Lennox Paton

### New Delhi One Day Seminar



17 January 2020  
New Delhi, India

**Early booking deadline: 22 November 2019**

Following on from the success of the Indian seminar in 2016, INSOL International is delighted to announce that registrations for the seminar in New Delhi on Friday 17 January 2020 are open! Register now to book your place at this exciting seminar!

The Main Organising Committee are putting together an inspiring technical programme, which is set to look at local issues in India as well as international cross-border restructuring developments and hot topics.

As the capital of India, New Delhi is a cosmopolitan and multi-cultural city with a fantastic mixing pot of celebrations and history. Combine your visit to this wonderful location with a trip to historical monuments such as the Red Fort, as well as indulging in delicious food and



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enjoying walks through the lush gardens and  
parks located in this bustling, fast paced city that  
is sure to excite the senses!

We would like to thank our generous sponsors of  
the seminar:

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Associates

For further information and details on  
sponsorship opportunities, please contact  
[Zeenat Edah-Tally](#)

### Mexico City One Day Seminar



13 February 2020  
Mexico City, Mexico

#### Early Booking Deadline: 6 January 2020

INSOL International is hosting its next Latin  
America seminar in Mexico City!

Mexico City is not one to be missed! Visit its  
neighbourhoods flooded with art nouveau and  
art deco, enjoy its cuisine and lose yourself in  
the streets of the city with the most museums  
in the world.

The seminar chairs and Main Organising  
Committee are busy preparing an engaging  
educational program! Please contact [Danielle  
Timmons](#) for further information.

We would like to thank our generous sponsors  
of the seminar:

Platinum Sponsor: DSI Consulting

We look forward to seeing you in Mexico City!

### Tel Aviv One Day Seminar



4 May 2020  
Tel Aviv, Israel

#### Early Booking Deadline: 23 March 2020

INSOL International is hosting its second one  
day seminar in Tel Aviv!

Labelled the 'Mediterranean Capital of Cool' by  
the New York Times, Tel Aviv is one of the most  
vibrant cities in the world! Combining sandy  
Mediterranean beaches with world-class  
nightlife, Tel Aviv has a buzzing cultural scene,  
incredible food and UNESCO recognised  
architecture.

The seminar chairs and Main Organising  
Committee are busy preparing an engaging  
technical programme. Please contact [Danielle  
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We look forward to seeing you in Tel Aviv!

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