



# INSOL INTERNATIONAL

## News Update

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### EDITOR'S NOTE

The recent IMF and World Bank downgrades for global economic growth seem to resonate through this month's edition of the INSOL monthly News Update. The US continues to battle with three of its largest trading partners which, without some good news at this month's meeting between presidents Trump and Xi Jinping, threatens to slow the world economy further. Instability in the Strait of Hormuz may well affect the oil supply chain with knock on effects to the price of crude already hitting the markets.

It is then perhaps no surprise that oil again makes this month's headline article. The *Yukos* litigation has burned for many years and this month's excellent [Highlight Article](#) highlights the need for more clarity for recognition of foreign insolvency proceedings.

Certain countries, such as the [UAE](#) and [Italy](#) are preparing and implementing ambitious new insolvency reforms. In the [USA](#), access and clarity to netting provisions has been expanded, whilst [Canada](#) has proposed to legislate to police the conduct of officers and stakeholders taking advantage of its restructuring regimes.

As always, we sweep the globe to pick up relevant and important case law updates and the Courts have been busy providing helpful and clear guidance in a number of jurisdictions. The [US Supreme Court](#) has provided consistency to the treatment of intellectual property in bankruptcy claims whilst, also in the US, the [SDNY](#) strengthened the safe harbour jurisdiction for fraudulent transfers. Meanwhile in Australia, the [New South Wales Court](#) set out some helpful and practical guidance when dealing with conflicts in group structure insolvencies. The [Hong Kong High Court](#) reviewed the need for clarity of debt when petitioning for insolvency, in a decision that will surely keep petitioning creditors in common law jurisdictions on their toes. How and who should conduct the liquidation of insolvent trusts was the subject of another decision in the long running *Z Trusts* [Jersey](#) litigation.

Finally the INSOL International Financiers' Group have provided a Special Report on the global distressed debt market and how regulation will affect its performance ['What Will Next Time Look Like?'](#). Given recent events this might be put to the test sooner rather than later.

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



**Andrew Thorp**  
**Partner**  
**Harneys, BVI**

## HIGHLIGHT ARTICLE

### **Netherlands Supreme Court in re Yukos Recognition of Foreign Bankruptcies in the Netherlands: an Awkward Cross-roads**

In a recent judgment, the Dutch Supreme Court provided important guidance on the recognition of foreign insolvencies in the Netherlands. The judgment was handed down as part of the long running 'Yukos saga'. As the Netherlands has not adopted the UNCITRAL Model Law on Cross-Border Insolvency, recognition of non-European insolvencies and their consequences has been a bumpy, largely unpaved road. This recent judgment provides some clarity, as to how recognition is possible, or what might stand in its way, and the consequences of (non)recognition.

**Rob van den Sigtenhorst, Partner**  
**Jurgen van den Heuvel, Associate**  
**Florent**  
**The Netherlands**

[Highlight Article >](#)

## THE AMERICAS

### CASES

#### USA

#### **You Can't Always Get Back What You Want: Supreme Court Rules Bankrupt Debtor May Not Cut Off Trademark Licensee's Rights**

On 20 May 2019, in *Mission Product Holdings, Inc. v Tempnology, LLC*, 587 U.S., No. 17–1657, the US Supreme Court ruled that a debtor in bankruptcy cannot use the Bankruptcy Code to cut off a licensee's rights under a license to use the debtor's trademarks. This ruling

resolves a Circuit split and brings the treatment of trademark licenses from a bankrupt debtor in line with patent and copyright licenses, which are protected statutorily by Bankruptcy Code section 365(n).

[K&L Gates Legal Insight, 28 May 2019 >](#)

[Case Decision >](#)

#### USA

#### **Debtor is a Financial Institution for Purposes of Settlement Payment Safe Harbour, Rules Southern District of New York**

On 23 April 2019, the United States District Court for the Southern District of New York, in fraudulent transfer litigation arising out of the 2007 leveraged buyout of the Tribune Company, ruled on one of the significant issues left unresolved by the US Supreme Court in its *Merit*

*Management* decision last year. In addressing the extent to which a party's status as a customer of a "financial institution" (as defined in the Bankruptcy Code) affects the applicability of Section 546(e), the district court was the first court post *Merit Management* to squarely address that question.

[Mayer Brown Legal Update, 8 May 2019 >](#)

[Case Decision >](#)

## LEGISLATION

### Canada

#### **BIA and CCAA Amendments: 2019 Federal Budget Proposes to Legislate on Good Faith Requirements, Directors' Duties and Corporate Disclosure Obligations**

On 8 April 2019, the federal government of Canada introduced Bill C 97, an Act to implement certain provisions of the Budget tabled in Parliament on 19 March 2019 and other measures, which includes proposed amendments to the Bankruptcy and Insolvency Act, as well as the Companies' Creditors Arrangement Act. The proposed amendments are detailed in this article and include good faith requirements, directors' duties and corporate disclosure obligations. It appears that the federal government considered these and other measures necessary, in the wake of certain recent high-profile restructurings which yielded controversial outcomes from the perspective of certain stakeholders, including pensioners and workers.

[Dentons Insight, 7 May 2019 >](#)

### USA

#### **U.S. Federal Reserve Board Proposes Expansion of Types of Financial Institutions that Can Benefit from Netting in the Event of the Counterparty's Insolvency**

The U.S. Federal Reserve Board of Governors has proposed to expand the scope of the netting provisions contained in the Federal Deposit Insurance Corporation Improvement Act of 1991. The proposed amendment of Regulation EE (Financial Institution Netting) would amend the definition of "financial institution" and clarify (and in some cases, possibly expand) the protections of financial institutions' close-out netting rights and security agreements in case of an insolvency or resolution of the financial institution's counterparty. Such clarification and expansion are particularly meaningful in the case of foreign financial institutions or other institutions to which the U.S. Bankruptcy Code or certain other U.S. banking statutes, and the safe harbours provided thereunder, may not apply.

[Haynes and Boone Alert, 16 May 2019 >](#)

## ASIA PACIFIC

## CASES

### Australia

#### **Liquidators of a Corporate Group Dealing with both Lodging and Adjudicating Proofs of Debts Now Have Some Guidance**

The New South Wales Supreme Court decision of Justice Black on *Go Energy Group Ltd (In*

*liquidation)* [2019] NSWSC 558 is an important one for insolvency practitioners, who now have guidance on how to manage the conflicts that can arise when dealing with both lodging and adjudicating proofs of debts whilst acting as liquidator to multiple companies within a corporate group.

[Clayton Utz Insight, 30 May 2019 >](#)

[Case Decision >](#)

### Hong Kong

#### **Injunction Restraining the Presentation of Winding-up Petition**

It is well established that the Hong Kong court will grant an injunction to restrain the presentation of a winding-up petition which it considers would be an abuse of court's process.

Deputy High Court Judge Keith Yeung SC revisited this principle in *Addchance Limited v Herojoy Trading Limited* where there were two sets of inconsistent accounting documents which respectively prove and disprove the existence of the debt.

[Case Note, Kennedys, 16 May 2019 >](#)

[Case Decision >](#)

## LEGISLATION

### New Zealand

#### A Decade in the Waiting - New Insolvency Practitioners' Regime

After almost a decade of deliberation and delay, the legislation to establish a new insolvency practitioners' regime in New Zealand is on the brink of becoming law. It will provide for tighter regulation, mandatory standards and stronger protections against abuse. Areas of notable change include: a co-regulatory licensing system; a requirement to report conduct by directors or management amounting to a "serious problem", and new powers and duties for insolvency practitioners. The Bills will be phased in progressively with full implementation by the end of June 2020.

[Chapman Tripp, Brief Counsel, 12 June 2019 >](#)

## EUROPE, AFRICA & THE MIDDLE EAST

### CASES

#### Jersey

##### Insolvent Trusts: the Z Trust Cases

The Jersey Royal Court has imposed comprehensive directions to deal with an insolvent trust in the latest *Z Trust* case: [2019] JRC 069. The Court considered again the three options for the handling of an insolvent trust:

- The trustee assuming the role of "liquidating trustee" under the supervision of the Court.
- The trustee appointing an insolvency practitioner to assist the trustee with the liquidation of the trust assets.
- The Court appointing an independent insolvency practitioner in respect of each trust, reducing the trustee to a bare trustee.

[Bedell Cristin, Briefings 4 June 2019 >](#)

[Case Decision >](#)

### ARTICLES

#### Italy

##### Italy's Restructuring Market Responds to EU NPL Developments

Non-performing loans (NPLs) continue to cause both concern and opportunity in equal measure in the EU. Concern because they destabilise the banking system and slow economic growth, and opportunity because NPL portfolio sales have attracted new investors. Italy is one of these NPL-burdened states, and its banks have recently been leading the pack in selling off unwanted NPL portfolios as they scramble to comply with the European Central Bank's new regulatory regime for NPL provisioning.

[Ashurst, RSSG Thought of the Month, 4 June 2019 >](#)

### UAE

#### DIFC's Reformed Insolvency Laws Now In Force

The Dubai International Financial Centre (DIFC) proposals to significantly modify and update its insolvency regime, as reported in our November 2018 News Update, have now been enacted and came into effect on 13 June 2019. In summary, the DIFC has now:

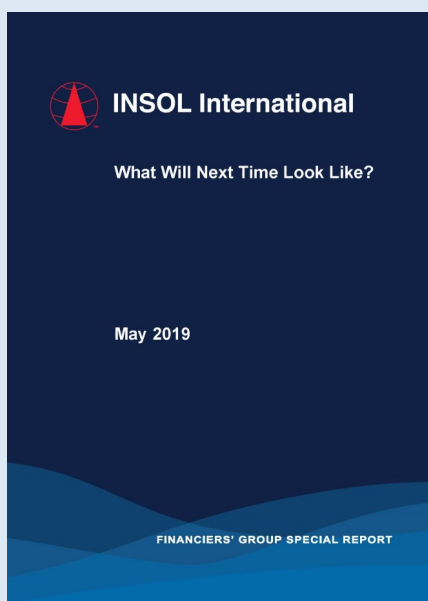
- introduced a new rehabilitation plan. This will be a debtor-in-possession process allowing a debtor to effect a compromise with its secured and unsecured creditors;
- introduced a new administration process accessible in rehabilitation where there is evidence of mismanagement or misconduct;
- enhanced its rules on voluntary and compulsory winding up which include more detail on wrongful trading provisions and adding an offence of misconduct in the course of winding up;
- incorporated the UNCITRAL Model Law on Cross-Border Insolvency (with certain modifications to cater for DIFC specific requirements); and
- enhanced its provisions in relation to the enforcement of financial collateral.

The law is in substance the same as the text issued in the October proposals – with minor changes simply reflecting drafting or clarification points. The changes stand alongside the introduction of a scheme of arrangement in November 2018, as reported in our January 2019 News Update. For both articles please see below.

[Freshfields Bruckhaus Deringer LLP, DIFC to Up Its Game Yet Again, November 2018 >](#)

[Freshfields Bruckhaus Deringer LLP, DIFC Introduces Schemes of Arrangement, December 2018 >](#)

## Publications



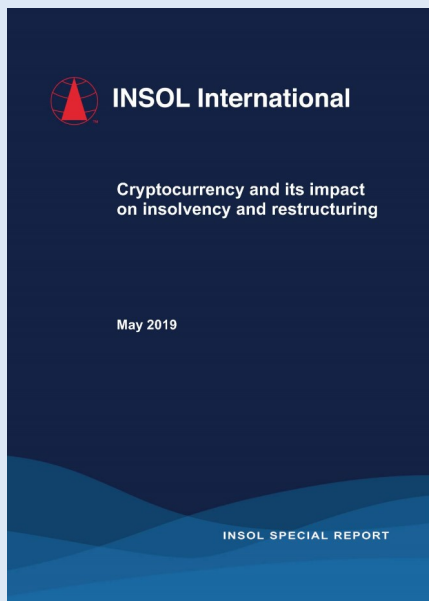
#### INSOL International Financiers' Group Special Report - What Will Next Time Look Like?

The INSOL International Financiers' Group, which includes representatives from different financial institutions, debt providers and professional advisors from around the world devised this technical project to consider the impact of certain changes that have taken place since 2007 in financial institution regulation in relation to capital requirements and impairment recognition. The project invited comment from a number of different market participants on how these changes may affect the ability of banks to hold distressed debt; the increasing role in the market of alternative investors; the effect of this on the restructuring process (including the effect on debtors) and the behaviour of those credit and financial institutions in the next downturn as a result.

This report includes responses from individuals from different types of institutions in the credit markets along with relevant professional firms.

INSOL International sincerely thanks the contributors for providing their valuable input in responding to the questions and Stephen Foster of Hogan Lovells, UK for leading the project

and for facilitating the compilation of a range of interesting views and reactions from different market participants in relation to a topic that our members will no doubt find extremely interesting.



## **Cryptocurrency and its Impact on Insolvency and Restructuring**

Following on from the very successful sessions on cryptocurrency at the INSOL Singapore annual conference at the beginning of April 2019, we are pleased to provide our members with a Special Report titled “Cryptocurrency and its impact on insolvency and restructuring”, by Rick Chesley and Malithi Fernando of DLA Piper.

In this Special Report the authors look at a variety of issues relating to cryptocurrencies, starting with the most basic description of cryptocurrency, blockchain and initial coin offerings (ICOs). This is followed by a discussion of the legal characterisation of cryptocurrencies (also from the point of view of various jurisdictions) and a

discussion on whether or not security rights may be taken over cryptocurrencies. The report then looks at cryptocurrencies in the context of insolvency and restructuring, concluding with a forward-looking discussion on the regulation of cryptocurrencies.

INSOL International would like to thank Rick Chesley, Malithi Fernando and the whole DLA Piper team for this very timely and interesting paper on cryptocurrency and its impact on insolvency and restructuring.



# SAVE THE DATE INSOL Cape Town

INSOL International Annual Conference  
15 – 17 March 2020  
Cape Town International Convention Centre



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## Channel Islands One Day Seminar



Thursday 20 June 2019  
Guernsey

We look forward to seeing all those registered to attend the Channel Islands seminar in Guernsey tomorrow. The date for our 2020 Channel Islands seminar will be announced very soon.

We would like to thank the sponsors of our Seminar:

Platinum Sponsors: Bedell Cristin  
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## P.R.China One Day Seminars



Beijing: Monday 14 October 2019  
Shanghai: Wednesday 16 October 2019

INSOL International will be running its annual P. R. China seminars this year in Beijing on Monday 14 October and in Shanghai on Wednesday 16 October 2019!

Please save these dates as the Seminar Co-Chairs and the Main Organising Committee prepare a fascinating programme on the key issues in cross-border restructuring and Asian insolvency, concerning both P. R. China and the region at large.

As two of the most iconic cities in P. R. China, we hope that you will be able to join us in

Carey Olsen

For further information and details of sponsorship opportunities for 2020, please contact [Penny Robertson](#)

October for a rewarding professional experience, and the opportunity to explore this vibrant country, which provides both tradition and modernity in equal measure.

We would like to thank the sponsors of our seminar:

Platinum Sponsor: Fangda Partners

Gold Sponsor: Campbells

Please contact [Zeenat Edah-Tally](#) for further information and sponsorship opportunities.

## Hong Kong One Day Seminar



Friday 18 October 2019  
Hong Kong

### Early Booking Deadline: 31 July 2019

After a hugely successful inaugural seminar in 2018, INSOL International will be running its second annual Hong Kong Seminar on Friday 18th October 2019.

Hong Kong is the perfect fusion of when East meets West, with an iconic skyline and incredible views throughout. Come experience the city's world class cuisine and breath-taking landscapes with us this October!

The Chairs and Main Organising Committee have prepared a dynamic technical programme which will culminate with a cocktail reception at Liberty Exchange, located in the heart of Central Hong Kong.

Please contact [Danielle Timmons](#) for information on remaining sponsorship opportunities.

We would like to thank the sponsors of our Seminar:

Platinum Sponsors: Briscoe Wong  
Carey Olsen  
Lipman Karas  
Tanner De Witt

## Tokyo One Day Seminar



Thursday 7 November 2019  
Tokyo

### Early Booking Deadline: 26 July 2019

Registrations are now open for the INSOL International Tokyo One Day Seminar, taking place for the second time in Japan.

The overarching theme will be '*Further Development in Asian Insolvency and Cross-Border Restructuring*'. It is anticipated that this will be a well-attended seminar. The full programme and registration details are available on our website now.

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.

We would like to thank the sponsors of our Seminar:

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KPMG FAS Co., Ltd.

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Coffee Break Sponsor: Nishimura & Asahi  
Lunch Sponsor: EY

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

## Africa Round Table Open Forum



22 November 2019  
Swakopmund, Namibia

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 10<sup>th</sup> 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"*.

Thank you to our sponsors:

Main Sponsors: DLA Piper  
PwC  
Gold Sponsor: ASO Capital  
Dinner Sponsor: Grant Thornton

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!

Please contact [Danielle Timmons](#) for information on remaining sponsorship opportunities.

We would like to thank the sponsors of our Seminar:

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Asociación Uruguaya de Asesores en Insolvencia y Reestructuraciones Empresariales

Association of Business Recovery Professionals - R3

Association of Restructuring and Insolvency Experts (Channel Islands)

Australian Restructuring, Insolvency and Turnaround Association

Bankruptcy Law and Restructuring Research Centre, China University of Politics and Law

Business Recovery and Insolvency Practitioners Association of Nigeria

Business Recovery and Insolvency Practitioners Association of Sri Lanka

Business Recovery Professionals (Mauritius) Ltd

Canadian Association of Insolvency and Restructuring Professionals

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Especialistas de Concursos Mercantiles de Mexico

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Instituto Iberoamericano de Derecho Concursal - Capitulo Colombiano

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International Women's Insolvency and Restructuring Confederation

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Recovery and Insolvency Specialists Association (Cayman) Ltd

REFOR-CGE, Register of Insolvency Practitioners within "Consejo General de Economistas, CGE"

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Restructuring and Insolvency Specialists Association of Bermuda

Restructuring Insolvency & Turnaround Association of New Zealand

South African Restructuring and Insolvency Practitioners Association

Turnaround Management Association (INSOL Special Interest Group)

Turnaround Management Association Brasil (TMA Brasil)



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