

# TOUCHPOINT



THE INSOL NEWSLETTER FOR THE SMALL PRACTICE GROUP

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## Welcome from the Editor



**Pulkit Deora**

**Enterprise Chambers  
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The INSOL Small Practice Group launched “Touchpoint” in August 2019, to serve as a forum to promote relationships between members, and to enhance networking opportunities amongst the Small Practice Group. When I was entrusted with the phoenix issue of this publication, I felt that the objects had assumed an even greater degree of pertinence – as strengthening local relationships has become imperative, considering the seemingly permanent restrictions on domestic and international travel.

Given the present predicament – with the novel coronavirus effecting every person and business, in developed and emerging markets alike – and the response in a number of jurisdictions suspending adjudication of fresh insolvency petitions, the first section of articles addresses projections upon reopening businesses post the Covid crisis. While the IMF predicts the worst downturn since the Great Depression, the US Federal Reserve has established an SPV to underwrite loans to small and medium enterprises, in a bid to balance the scales. A light-touch approach to insolvency resolution, leaving the debtor effectively in possession, might prove to be a useful device in protecting jobs and small enterprises.

The second part of Touchpoint highlights the connected issue of adjudication of fresh petitions. There is an article succinctly discussing the finer points of bringing bankruptcy proceedings in the UK on the basis of a foreign judgement debt, an insightful analysis of why the present state of the law in India is ill-equipped to deal with the peculiarities of the new world order along with an alternative approach to suspension of fresh insolvency petitions, and bold case notes on the recent decision of the English High Court on a novel issue of fortification of cross-undertakings in an insolvency petition.

Regulations on cross-border insolvency almost feel like an advent of recent times, despite their promulgation by international organisations governing economic cooperation over two decades ago. The third section of articles includes excellent case notes on a welcome decision of the Cayman Grant Court emphasising the importance of co-operation between courts involved in cross-border insolvency matters, and a critical analysis of the decision of a South African court that corporate rescue was not available to external companies. A feature article on whether pre-insolvency proceedings should be recognised within cross-border insolvency law makes a well-argued case in favour.

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An article in the fourth section, on Group Insolvency, demystifies popular approaches to co-ordination, viz. protocols, special co-ordination and planning proceedings, and single IP appointments. India's Supreme Court recently delivered its first judgement on avoidance, which has gone to the heart of intra-group lending practices, and case notes in this section critically analyse the dictum in great detail.

This issue is rounded up with articles introducing a new legislation in the US on Small Business Reorganization – providing a new avenue of debt relief.

INSOL International, in its ever expanding endeavours to keep its members updated with the latest developments world-over, has commissioned technical papers on practice issues, and webinars with local experts, addressing current issues and legislative changes. There is also a very helpful compilation on the measures adopted by various countries to support distressed businesses through the Covid-19 crisis, which I recommend to you along with the articles in this issue.

I take this opportunity to thank all contributors for their articles and case notes, the members of the Editorial Committee for their invaluable input, and wish you the best of health.

## PRACTICE OF INSOLVENCY IN A POST LOCKDOWN WORLD

### TECHNICAL

#### Australia

##### **What do you do once the Gates are Opened for the 'Wolves' to Roam Free? A better Strategy for a Business Dealing with the Financial Impact of Coronavirus**

This article discusses the possible ramifications of a stimulus package and moratorium over enforcement of debt, once the status-quo is lifted. The authors suggest an alternative approach in use of voluntary administrations its fundamental features, as endorsed in a judgment of the High Court in *Mighty River International v Hughes* (2018).

[For the full article please see Madgwicks Lawyers, Business Advisory, April 2020 >](#)

#### USA

##### **Federal Reserve Board Expands \$600 Billion Main Street Lending Program for Small and Medium-Sized Businesses**

Reports on the Main Street Lending Program announced first on 9 April 2020, and changes announced on 30 April 2020, providing facilities to eligible lenders and borrowers to stimulate lending to small and medium businesses by establishing a Fed-sponsored special purpose vehicle that will purchase between 85% and 95% of participate interest in such loans.

[For the full article please see Blank Rome Publication, May 2020, \(No. 7\) >](#)

## ADJUDICATION OF FRESH PETITIONS FOR INSOLVENCY

### CASES

#### UK

#### **“Security for Costs for Security for Costs” Fortification of Cross-Undertakings in Security for Costs Applications**

*Hotel Portfolio II UK Limited (in Liquidation) & another v Ruhan & another [2020] EWHC 233 (Comm)*

This is the first reported decision where orders have been made for security against the claimant company conditional upon defendants providing cross-undertakings – owing to defendants’ questionable solvency. The Author looks at the principles underpinning fortification of cross-undertakings in English law, and considers how courts should approach setting a deadline by which any fortification must be provided.

[For the full article by Samuel Hodge, Enterprise Chambers, please click here >](#)

[Case decision >](#)

### TECHNICAL

#### UK

#### **Bankruptcy Petitions Founded on Foreign Judgments: Points to Consider**

The article discusses points for practitioners to consider when seeking to bring bankruptcy proceedings in an English court on the basis of a foreign judgment debt. Explains the means by which a foreign judgment can be registered in England and examines whether it is necessary for a foreign judgment debt to be registered before bankruptcy proceedings are initiated. Considers the recent cases of *Islandsbanki HF v Stanford [2020] EWCA Civ 480* and *State Bank of India v Mallya [2020] EWHC 96 (Ch)*.

[For the full article by Mairi Innes, Enterprise Chambers, please click here >](#)

#### India

#### **HMJ Kumar (Retd.), E. Kumar, Insolvency & Bankruptcy Code and Covid-19: The Indian Scenario**

Discusses suggestive measures to the insolvency and bankruptcy regime in India considering the present Covid-19 scenario. The present regime allows for triggering a corporate rescue process merely on an objective determination of non-payment of debt due. The authors analyse a suggestive amendment to the definition of default under the Code to exclude such non-payments which have occurred because of Covid-19, solely or dominantly. The authors also evaluate a broad-based amendment of excluding companies from the purview of the Code for a definitive period of time, which have necessarily incurred substantial loss due to Covid-19.

[For the full article by HMJ Kumar and Eshna Kumar please click here >](#)

*This article was first published by the Sunday Guardian (India) on 19 April 2020*

## CROSS-BORDER INSOLVENCY

### CASES

#### Cayman Islands

##### **Cayman Grand Court Decision Reinforces Effective Cooperation in Cross-border Disputes**

*Re Altair Asia Investments, FSD 200 of 2019 (RPJ).*

Discusses a recent Cayman Grand Court decision. In its Judgment, the court, emphasising the importance of comity and co-operation between courts involved in cross-border insolvency matters, adjourned a creditor's winding up petition in the Cayman Islands pending the decision to be made in the ongoing Hong Kong proceedings, which was anticipated at the time of the presentation of the petition in the Cayman Islands. The author welcomes the approach adopted by the courts in cases where multi-jurisdictional businesses are incorporated in offshore jurisdictions.

[For the full publication by Carey Olsen please click here >](#)

[Case decision >](#)

#### South Africa

##### **Are South African Business Rescue Proceedings Applicable to South African Registered External Companies?**

*CMC di Ravenna Societa' Cooperativa a Responsabilita' Limitata (external company incorporated in Italy) and Others v Companies and Intellectual Property Commission and Others [2019] JOL 46324 (GP)*

Discusses this decision where it was definitively decided that business rescue process for external companies operating within South Africa is not available in terms of section 129 of the 2008 Companies Act. The author deliberates the consequences of the judgement, while noting that the issues were of sufficient novelty and public interest to justify leave to appeal before the Supreme Court.

[For the article by Dr Eric Levenstein, Werksmans Attorneys, South Africa please click here >](#)

[Case decision >](#)

### TECHNICAL

#### EU

##### **The Characterization of Pre-insolvency Proceedings in Private International Law**

Discusses the question whether pre-insolvency proceedings should qualify as proceedings related to insolvency for the purpose of private international law characterization.

The article throws light on various 'light touch' financial restructuring techniques in the form of so-called pre-insolvency proceedings that inhabit a space on the spectrum of insolvency and restructuring law, somewhere between a pure contractual workout, the domain of contract law, and a formal insolvency or rehabilitation proceeding, the domain of insolvency law. This author argues that we should be wary of excluding pre-insolvency proceedings from cross-border insolvency law, and international insolvency instruments should adjust to the peculiarities of preinsolvency proceedings to address concerns about inclusivity and accommodate preinsolvency proceedings adequately.

[For this article please see European Business Organization Law Review, February 2020 >](#)

## GROUP INSOLVENCY

### CASES

#### India

##### **Secured Lending after the Jaypee Case**

Discusses a recent supreme court judgment in the case of Jaypee Infratech Limited that has set alarm bells ringing amongst lenders who have given loans based on third-party security. In this case, Jaypee Infratech Limited had provided security to lenders of its holding company. When Jaypee went into insolvency resolution process, such security was set aside by the supreme court as a preferential transaction. Even more problematic, at least for secured lenders, is the supreme court holding that the holding company's lenders do not qualify as financial creditors of Jaypee on the basis of security provided to them, thus denying them a seat in Jaypee's committee of creditors.

[For the article by Pooja Mahajan, Chandhiok & Mahajan, please click here >](#)

[Case decision >](#)

### TECHINICAL

#### International

##### **Conflicts of Interest, Intra-Group Financing and Procedural Coordination of Group Insolvencies**

Discusses how in the context of group distress the risks arising from conflicts of interest can be controlled and mitigated, while ensuring efficient cross-border cooperation and communication to the maximum extent possible. It analyses three cutting-edge coordination mechanisms, namely (a) cross-border insolvency agreements or protocols, (b) special (group coordination and planning) proceedings and (c) the appointment of a single insolvency practitioner. The author concludes that both the likelihood and significance of conflicts of interest correlate with the degree of procedural coordination. Therefore, conflict mitigation tools and strategies need to be tailor-made and targeted at a specific level and coordination mechanism.

[For the full article see International Insolvency Review, 2020, vol. 1 p. 29; <https://doi.org/10.1002/iir.1370> >](#)

## LEGISLATION

### TECHNICAL

#### USA

##### **United States' Small Business Reorganization Act: Timely Legislation Makes Chapter 11 More Attractive for Small Businesses**

Introduces the Small Business Reorganization Act of 2019 which became effective on 22 February 2020, providing a new avenue of debt relief for small businesses in the United States. The authors discuss the fundamental features of the scheme, including the effect of the Coronavirus Aid, Relief, and Economic Security Act whereby the debt limit for SBRA debtors was increased from the \$2,725,625 to \$7,500,000 for cases filed on or after 27 March 2020. The authors opine that the looser requirements, along with the ability to streamline a Chapter 11 case from over a year to just a few short months, drastically decrease the potential costs of a Chapter 11 on the debtor.

[For the full article by Mairo J.S., Fellow, INSOL International and Mazza C.P., Porzio, Bromberg & Newman, PC, please click here >](#)

## WEBINAR SERIES



To view the full programme of INSOL International webinars, as well as recordings of past webinars, please [click here](#).

## RECENT PUBLICATIONS



### INSOL International

Reforms in selected EU Member States in light of the Directive on preventive restructuring frameworks

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INSOL SPECIAL REPORT



INSOL International



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## GLOBAL GUIDE: MEASURES ADOPTED TO SUPPORT BUSINESSES THROUGH THE COVID-19 CRISIS

Last updated and published on 15 June 2020.

All of the INSOL Technical Publications, including the Small Practice Technical Paper Series are available for members to view in our [technical library](#).

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