INSOL International

Environmental Claims in Insolvency and the Liability of Insolvency Practitioners

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Special Report

Environmental Claims in Insolvency and the Liability of Insolvency Practitioners

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Acknowledgement

INSOL International is very pleased to publish a Special Report titled “Environmental Claims in Insolvency and the Liability of Insolvency Practitioners” prepared by offices in the Norton Rose Fulbright network, and edited by Dr David Goldman, Partner, Norton Rose Fulbright Australia.

The environmental liabilities of insolvency practitioners, their obligations in relation to compliance with environmental orders, and the impact of environmental claims on the priority of claims in insolvency is an increasingly important issue. In many jurisdictions, whether insolvency practitioners must comply with environmental orders and in what circumstances they bear financial responsibility for pollution remains largely untested and unclear.

This paper provides a comparative analysis of the state of the law with respect to insolvency and environmental liability of insolvency practitioners across a broad range of jurisdictions in Africa, Asia Pacific, Europe and North America. It looks at the key environmental protection and insolvency regimes in each jurisdiction; the requirements of compliance with clean-up or remediation orders; whether insolvency practitioners can be personally liable for a failure to comply with clean up or remedial orders; and the rights of governments as creditors and the priority of environmental claims in insolvency.

It provides extremely useful guidance on the environmental liabilities of insolvency practitioners in each jurisdiction and evidences that with the exception of the US and Canada, which have seen increasing amounts of litigation in relation to the liability of insolvency practitioners for environmental claims, the liability of insolvency practitioners remains largely untested in the majority of jurisdictions.

INSOL International sincerely thanks Dr David Goldman of Norton Rose Fulbright for leading this technical project and bringing it to a conclusion by providing this excellent Special Report.

May 2015

Environmental claims in insolvency and the liability of insolvency practitioners

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Introduction

The potential liability of insolvency practitioners for environmental orders, clean-up and remediation of land is an increasingly important issue. Environmental orders requiring investigation, remediation and clean-up of land can be both lengthy and extremely costly. In many jurisdictions, whether insolvency practitioners must comply with environmental orders and in what circumstances they bear financial responsibility for pollution or other environmental concerns is not clear. Insolvency laws often do not contemplate environmental issues, nor the liability that might be imposed upon insolvency practitioners for breaches of environmental legislation.

This report examines the state of the law with respect to insolvency and environmental liability of insolvency practitioners across a broad range of jurisdictions in Africa, Asia Pacific, Europe and North America. It also looks at the rights of governments as creditors and the priority of environmental claims in insolvency. There are obviously vast jurisdictional differences to cover when examining this topic on a regional basis, and we have, therefore, sought to provide a comparative analysis of the issues in each jurisdiction under four broad headings:

(1) the key environmental protection and insolvency regimes and the interplay between those regimes;

(2) whether the relevant environmental or insolvency laws require compliance with clean-up or remediation orders, or other preventative measures, by insolvency practitioners;

(3) whether insolvency practitioners can be personally liable for a failure to comply with clean-up or remedial orders, or preventative measures; and

(4) whether the government can recover the costs of clean-up or remediation of land from the insolvent company and the priority given to such costs.

What is evident from this comparison is that, with the exception of the US and Canada, which have seen increasing amounts of litigation in relation to the liability of insolvency practitioners for environmental claims, the liability of insolvency practitioners remains largely untested in the majority of jurisdictions. How courts and regulatory bodies will balance the dichotomy between environmental laws, which seek to ensure the protection of the environment often through the imposition of liability for remediation and clean-up on polluters, and insolvency laws, which seek to deal with the unique issues which arise upon insolvency, is in many jurisdictions yet to be seen.

We hope that this report clarifies the law and provides useful guidance for INSOL members as to the potential environmental liabilities of insolvency practitioners, their obligations in relation to compliance with environmental orders, and the impact of environmental claims on the priority of claims in insolvency.

* The views expressed in this article are the views of the author and not of INSOL International, London. The purpose of this Special Report is to provide general information of a legal nature. It does not contain a full analysis of the law nor does it constitute an opinion of any Norton Rose Fulbright entity as to the appropriateness or otherwise of the points of law discussed. You must take specific legal advice on any particular matter which concerns you.

Africa

South Africa

1. The key environmental protection and insolvency regimes that are available and the interplay between the regimes

There are 5 significant environmental protection regimes in operation in South Africa. These are:

(i) the general environmental management regime that provides overarching, generic principles in terms of which sector-specific legislation operates and is governed by the National Environmental Management Act 1998 (NEMA) and the Environment Protection Act 1989;

(ii) the water pollution regime, governed by the National Water Act 1998;

(iii) the biodiversity conservation regime, governed by the Game Theft Act 1991, the National Environment Management: Biodiversity Act 2004 and the National Environment Management: Protected Areas Act 2003;

(iv) the air pollution regime, governed by the National Environment Management: Air Quality Act 2000; and

(v) the land use and planning regime, governed by the Physical Planning Act 1991, the Subdivision of Agricultural Land Act 1970, the Less Formal Townships Establishment Act 1991, the Development Facilitation Act 1995 and the National Heritage Resources Act 1999.

The key insolvency regime in South Africa is regulated by the Insolvency Act 1936 and Chapter 6 of the Companies Act 2008. Chapter 6 of the Companies Act deals with what are called "business rescue proceedings". The business rescue practitioner assumes full management and control of a company that is financially distressed, displacing the company's board. Business rescue proceedings are like insolvency proceedings because they place the company under the control of a court appointed official following financial distress.

Except as stated below, there are no express cross-references between the insolvency and environmental protection regimes. The legislature has not enacted legislation which effectively prioritises environmental claims in situations where companies that are responsible for an environmental default are under some form of administration. Case law is also silent on this issue.

2. Relevant environmental and/or insolvency laws that require compliance with clean-up, remediation orders or other preventative measures by insolvency practitioners

Section 28(1) of the NEMA provides that every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment.

This broad language, which imposes such a duty on "every" person, may reasonably be construed to include insolvency and business rescue practitioners.

The NEMA has incorporated a "cradle to grave" principle and as a result, a person retains responsibility for their waste even if it is transferred to another person for disposal or treatment off site.

Section 28(4) states that these measures can be prescribed in the form of an order made by the Director-General of the Department of Environmental Affairs and Tourism, the Department of Mineral Resources or a provincial head of department. These authorities may direct any person who is causing, has caused or may cause significant pollution or degradation of the environment to cease any pollution causing activities or take specific measures to remedy such damage.

Further, the Minister of Environmental Affairs and Tourism, the Minister of Water Affairs and the Minister of Mineral Resources may appoint any persons in their departments or any other organ of state as environmental management inspectors (Inspectors) with a mandate prescribed by the relevant Minister to enforce environmental legislation[1]. The Inspectors may issue compliance orders to any person who breaches any environmental legislation[2]. This power is only limited by the Inspector's mandate and so may include clean-up, remedial or preventative measures. Once again, the broad language of NEMA conceivably extends to insolvency practitioners.

3. Can insolvency practitioners be personally liable for a failure to comply with clean-up, remedial orders or preventative measures?

Sections 49A(1)(e) and (f) of NEMA provide for general criminal liability for acts which degrade or detrimentally affect the environment. Section 49A(1)(p) also criminalises any failure to comply with an order made by an environmental inspector. The penalties for such an offence, which may come in the form of fines, apply to "a person" who commits the said offence. This could include companies as they are juristic persons.

This, therefore, raises the question as to when insolvency or business rescue practitioners may be held personally liable for damage caused in executing their duties with respect to the company. Business rescue practitioners may be held liable for gross negligence in the performance of their duties[3]. Thus, business rescue practitioners may be personally liable if they fail to comply with a clean-up, remedial or preventative order in the performance of their duties. An insolvency practitioner has a fiduciary duty to liquidate a particular estate in good faith[4]. Therefore, should the insolvency practitioner act fraudulently or negligently, the practitioner may be held personally liable for failing to comply with a clean-up, remedial or preventative order[5].

4. Can the government recover the costs of clean-up or remediation of land from the insolvent company? Do these costs receive priority?

The government may, under the auspices of the Minister of Environmental Affairs and Tourism, recover any expenses incurred by environmental authorities that had to take remedial action in the place of a person who caused any environmental damage[6]. This conceivably includes liquidated companies or companies under business rescue.

These costs are not preferred or secured according to any statutory or common law rule. Notably, neither environmental authorities nor private environmental damages claimants have been listed as preferential creditors in sections 96 to 102 of the Insolvency Act (the provisions of the Insolvency Act that list preferred creditors). These costs do not, therefore, receive any priority.

Zambia

1. The key environmental protection and insolvency regimes that are available and the interplay between the regimes

Generally, insolvency in Zambia is regulated under three principal pieces of legislation: the Companies Act, the Bankruptcy Act and the Preferential Claims in Bankruptcy Act. The insolvency laws make provision, among others, for factors to be taken into consideration when settling preferential debts owed to specified creditors. Environmental laws, on the other hand, generally seek to ensure effective and sustainable management of the environment through various practices required under applicable environmental laws. Existing insolvency laws do not make specific provision on how environmental claims are to be prioritised and there is no provision, for example, on how debts or claims arising under environmental laws are to be treated in the event of insolvency. Accordingly, there is no apparent interaction between insolvency and environmental law regimes in Zambia.

[1] NEMA sections 31B, BA and BB.
[2] NEMA section 31L.
[3] Companies Act s 140(3)(c)(ii).
[4] Sharrock et al *Hockly's Insolvency Law* (Juta & Co., Cape Town 2006) 8th ed. at p.238.
[5] *Kerbels Flooring and Carpeting (Pty) Ltd v Shrosbree and Another* 1994 (1) SA 655 (SE) at 657E-658F.
[6] NEMA s 28(6)(b).

2. Relevant environmental and/or insolvency laws that require compliance with clean-up, remediation orders or other preventative measures by insolvency practitioners

The Environmental Management Act 2011 (EMA) establishes Environmental Restoration Orders, Prevention Orders, Protection Orders and Compliance Orders under which the authority may impose pecuniary penalties in the event of any breach by a person against whom it is issued.

The orders can be served not only on owners, managers but also on “persons in control of the premises”. It is likely that an insolvency practitioner would constitute a person in control of premises for the period subsequent to closing of the business, and would, therefore, have to comply with any environmental orders during their appointment.

Similarly, liability for pecuniary environmental default can fall on directors, managers and “all persons in control of a business or undertaking”. An insolvency practitioner may be captured under this broad definition, and it likely that they would have to comply with any penalties, and any other obligations imposed under the EMA during their control of an entity.

3. Can insolvency practitioners be personally liable for a failure to comply with clean-up, remedial orders or preventative measures?

The EMA provides that where the offence is committed by a corporate or unincorporated body, every director or manager of such body shall be personally liable for the offence committed unless they can prove to the satisfaction of the court that the act constituting the offence was done without their knowledge, consent or connivance or that they took reasonable steps to prevent the commission of the offence. Since insolvency practitioners would effectively control the company in place of the directors and managers, this provision may apply.

4. Can the government recover the costs of clean-up or remediation of land from the insolvent company? Do these costs receive priority?

Environmental expenditure is not specifically captured by the Companies Act[7], the Bankruptcy Act[8], and the Preferential Claims in Bankruptcy Act[9] (the “Principal Acts”). In the absence of such express provision, the Principal Acts provide that all other claims when proved shall be paid *pari passu.*

The laws of Zambia do not distinguish between the government’s rights as a creditor on the one hand, and its role as a regulatory body, on the other. However, in the event that a person fails to comply with any requirement in any of the respective orders under the EMA, the Zambia Environmental Management Agency has the power to issue a cost order, which will be enforced as if it were an order of court if a person against whom it is issued does not apply to review it. The cost order, like an ordinary judgment, is evidence of indebtedness and, once proved in insolvency proceedings, will be dealt with *pari passu* with other proved debts. Only debts which have been proved are considered in the distribution of the insolvent’s assets[10].

Zimbabwe

1. The key environmental protection and insolvency regimes that are available and the interplay between the regimes

The key legislative instruments with respect to insolvency and environmental protection are the Companies Act[11], the Insolvency Act[12], the Environmental Management Act[13] (EMA), the Mines and Minerals Act[14] (MMA) and the Constitution of Zimbabwe[15].

[7] Chapter 388 of the Laws of Zambia.
[8] Chapter 82 of the Laws of Zambia.
[9] Act. No.9 of 1995.
[10] Chapter 82 of the Laws of Zambia.
[11] Chapter 24:03.
[12] Chapter 6:04.
[13] Chapter 20:27.
[14] Chapter 21:05.
[15] Constitution of Zimbabwe Amendment (No. 20), 2013.

The Companies Act incorporates most of the law relating to insolvency of individuals, which is governed by the Insolvency Act, such that it applies, *mutatis mutandis,* to companies as well[16]. The EMA, which is the primary legislative instrument that deals with the protection of the environment, prevails over any other Act or law that is inconsistent with it apart from the Constitution of Zimbabwe which is the supreme law[17]. However, for the most part, the law of insolvency does not conflict with the EMA. The MMA provides further environmental protection in the mining context. The Constitution of Zimbabwe includes the right to have the environment protected[18], which gives constitutional weight to environmental protection, as well as the right to property and interests in property[19], which gives constitutional weight to the protection of the rights of creditors in terms of insolvency principles. The courts have not yet considered how these competing rights will interact in the context of environmental protection in insolvency.

2. Relevant environmental and/or insolvency laws that require compliance with clean-up, remediation orders or other preventative measures by insolvency practitioners

In general, insolvency practitioners will only have to comply with pecuniary penalties for environmental default imposed upon an estate prior to insolvency after all the preferential claims have been satisfied. Environmental claims are not treated as preferential claims by the Insolvency Act[20] and, therefore, pecuniary penalties will constitute concurrent non-preferential claims against the estate.

If, however, an order is directed against the liquidator after insolvency proceedings have been instituted in terms of section 114 of the EMA or section 225 of the MMA, and their failure to comply attracts a criminal fine, then the liquidator must pay the fine in full. Similarly, if the environmental standards of an operation that the liquidator has taken control of drop below the minimum standards set out in the EMA (in particular with regard to air quality, motor vehicle emissions, illegal discharge of waste, or hazardous substances, illegal use or disposure of pesticides, excessive noise or littering) the liquidator will be guilty of a criminal offence.

3. Can insolvency practitioners be personally liable for a failure to comply with clean-up, remedial orders or preventative measures?

Insolvency practitioners must comply with the environmental standards outlined in the EMA when operating or closing a business. Many of the offences in the EMA hold “any person” liable for contravening them, which would include insolvency practitioners. Section 1 of the EMA also defines “owner” as including the liquidator of a company. Accordingly, environmental offences that hold the owner of a property liable will apply to insolvency practitioners. Most of the environmental defaults listed in the EMA are criminal offences, so failure to comply will make the insolvency practitioner liable to criminal prosecution[21].

4. Can the government recover the costs of clean-up or remediation of land from the insolvent company? Do these costs receive priority?

In Zimbabwe, the government is not given any general preference as a creditor, with the exception of certain taxes listed in the Insolvency Act as preferential claims.

Environmental claims are prioritised by imposing criminal liability on the liquidator in certain instances. However, no priority is given to environmental claims that arise before insolvency proceedings were instituted, and there is no order of priority stated in section 114 of the EMA or section 225 of the MMA issued against the insolvency practitioner. Such claims are concurrent non-preferential claims against the estate, which, in terms of section 109 of the Insolvency Act, will receive a share of the remaining residue of the insolvent estate after all preferential claims have been paid out in full.

[16] See ss 269 and 270 of the Companies Act.
[17] See s 3(2) of the EMA.
[18] See s 73 of the Constitution of Zimbabwe.
[19] See s 71 of the Constitution of Zimbabwe.
[20] Chapter 6:04.
[21] See for example, EMA ss 73, 114(3)(i) and (ii); MMA s 225.

Tanzania

1. The key environmental protection and insolvency regimes that are available and the interplay between the regimes

In Tanzania, insolvency is primarily dealt with in the Companies Act 2002 (Companies Act) and the Companies (Insolvency) Rules 2004.

The Environmental Management Act 2004 (EMA) regulates conduct regarding the environment and all procedures and rules that should be followed in order for the environment to be protected.

There is no real reconciliation of insolvency principles and environment public policy considerations. Environmental authorities are treated as unsecured creditors, and save for the ability to confiscate a performance bond on violation of the provisions of the EMA, have no special rights of recourse to an insolvent estate.

2. Relevant environmental and/or insolvency laws that require compliance with clean-up, remediation orders or other preventative measures by insolvency practitioners

Section 151(1) of the EMA provides that the Council may issue, on any person in respect to any matter relating to the management of the environment, a restoration order in terms of which that person is required:

- to restore the environment as near as possible to the state it was in prior to the degradation caused by that person;
- to prevent the person who is subject to the order from continuing that action causing the harm;
- to compensate others who have been harmed by the degrading act; or
- levy a charge on the person subject to the order representing a reasonable estimate of the costs required to restore the environment.

Section 141 also requires any person who undertakes an activity to comply with environmental quality standards and criteria.

The EMA does not specifically relate to circumstances of insolvency however the reference to “any person” does not preclude an insolvency practitioner from being held liable.

3. Can insolvency practitioners be personally liable for a failure to comply with clean-up, remedial orders or preventative measures?

Under section 307 of the Companies Act, if there is an environmental obligation that is required to be fulfilled by the liquidator which remains unfulfilled, the court may charge the liquidator with the consequences of any act or default which they may have done or made contrary to their duty. The Companies Act does not specifically list environmental default, but is drafted widely enough to encompass any default.

Section 228(2) requires any person who violates environmental protection standards causing any damage to the environment to pay the damages and costs of remedying the consequences. The damage can be caused or the non-compliance can occur during the operating or closing of the business. The EMA does not specifically contemplate insolvency, however, the reference to “any person” does not preclude an insolvency practitioner from being held liable.

4. Can the government recover the costs of clean-up or remediation of land from the insolvent company? Do these costs receive priority?

Similarly to Zimbabwe, the government is not given any preference as a creditor, except with respect to certain taxes listed in section 367 of the Companies Act.

Environmental authorities can, however, secure debts through economic instruments such as performance bonds. Where an environmental performance bond is required it must be deposited with the National Environmental Trust Fund as security for good environmental practice. In this manner, the environmental authority is able to become a secured creditor. To date, however, there are no bonds deposited with the National Environmental Management Council.

The EMA provides that "an environmental performance bond shall be deposited with the Director of the Environment as security for good environmental practice until its refund to the depositor".

Section 102(2) of the EMA states that the Director of Environment will not discharge an environmental performance bond deposited under section 227 until the holder fulfils the conditions of undertaking safe decommissioning, site rehabilitation and ecosystem restoration before closure of the project or undertaking. This allows the Director of Environment to retain the bond until the decommissioning and rehabilitation has taken place.

The EMA empowers the Director of Environment to confiscate the performance bond where there is a violation of the provisions of the EMA. It could be argued that a violation of the EMA as a result of insolvency would entitle the Director of the Environment to confiscate the performance bond.

In addition, the Mining Act 2010 and associated regulations impose an obligation on entities to rehabilitate the environment and under the Mining (Safety, Occupational Health and Environment Protection) Regulations 2010 mining licence holders are required to put in place an "environmental rehabilitation bond". The rehabilitation bond can be any of an escrow account deposit, capital bond, insurance guarantee bond or a bank guarantee bond.

Uganda

1. The key environmental protection and insolvency regimes that are available and the interplay between the regimes

The principal legislative instruments relating to insolvency and environmental law in Uganda are the Insolvency Act and the National Environment Act.

However, the level of interaction between the insolvency and environmental law regimes in Uganda is minimal, with the insolvency legal regime giving limited priority to environmental claims.

2. Relevant environmental and/or insolvency laws that require compliance with clean-up, remediation orders or other preventative measures by insolvency practitioners

Pecuniary penalties for environmental default are treated as debts under the Insolvency Act, and accordingly, insolvency practitioners will be required to deal with such penalties as debts. Under the Insolvency Act, a debt is defined as "a debt or liability, present or future, certain or contingent and includes an ascertained debt or liability for damages".

Under section 181(2) of the Insolvency Act, a receiver has power to perform the functions of the directors and secretary which would have accrued if the company was not under receivership. As various environmental orders and compliance with environmental standards are binding upon the company, a receiver will be required to comply with such orders.

3. Can insolvency practitioners be personally liable for a failure to comply with clean-up, remedial orders or preventative measures?

Laws such as the National Environment Act are in force and binding on all people, including insolvency practitioners. A receiver is personally liable for any contract entered into by the receiver in exercise of any of his powers, but not for the company's debts. However, this is mitigated by the fact that under the Insolvency Act, a receiver is entitled to an indemnity out of the company's property for any liability incurred personally. No personal liability is imposed upon a liquidator under the Insolvency Act.

4. Can the government recover the costs of clean-up or remediation of land from the insolvent company? Do these costs receive priority?

Environmental claims, expenditure on clean-up and remedial orders and related penalties do not have priority under section 12 of the Insolvency Act and, therefore, rank equally with other non-preferential debts under section 13. In this context, there is no distinction between the government as a creditor and regulatory body, and claims brought by the government will not be prioritised as preferred debts.

Australia

1. The key environmental protection and insolvency regimes that are available and the interplay between the regimes

Insolvency practitioners in Australia (being receivers (including receivers and managers), administrators and liquidators) are governed primarily by the Corporations Act 2001 (Corporations Act), and are also subject to other laws and duties.

Whilst regulating insolvency practitioners, the Corporations Act is silent in its treatment of the environment and the liability of insolvency practitioners in relation to environmental issues arising during the course of their appointment. The liability of insolvency practitioners for environmental claims varies from state to state, and in accordance with the nature and scope of the insolvency practitioner's appointment.

1.1 Environmental protection regime

Australian environmental law is a patchwork of federal and state legislation. Enforcement is predominantly by state officers, although local councils have some powers of enforcement under state laws. Amongst a range of state and federal legislation, the principal legislation is state based and is set out in:

- Contaminated Land Management Act 1997 (NSW) (CLM Act);
- Protection of the Environment (Operations) Act 1997 (NSW) (POEO Act);
- Environmental Protection Act 1970 (Vic) (Vic Act);
- Environmental Protection Act 1994 (Qld) (Qld Act);
- Contaminated Sites Act 2003 (WA) (CS Act);
- Environmental Protection Act 1986 (WA) (WA Act); and
- Environmental Protection Act 1997 (ACT) (ACT Act).

These Acts seek to balance a "polluter pays" approach often with a deeming system where the polluter is dead, insolvent, unable to be located or unidentifiable. In each jurisdiction, the relevant authority has wide reaching powers in relation to the issuing of orders or notices for the remediation and clean up of contaminated land and determining responsibility for contamination or environmental harm[22]. Environmental protection legislation remains, however, a relatively untested area of law in Australia.

1.2 Insolvency regime

Section 9 of the Corporations Act provides that receivers, receivers and managers, administrators and liquidators are "officers" of the corporation.

Receivers and liquidators may be appointed either in or out of court. Whilst privately appointed receivers and managers and liquidators are officers of a corporation under section 9 of the Corporations Act, court appointed receivers and liquidators are officers of the court, and assets

[22] For example, CLM Act ss 10(1), 14(1), 28(2); POEO Act ss 91(1), 96(1), 101(2), 104(1); Vic Act ss 31A, 31B, 62A and 63B; Qld Act ss 363H, s 332, 323, 326B, 358, 363A, 363M; CS Act ss 49, 50 and 51; WA Act s 65; ACT Act ss 91C, 91D and 125.

in the hands of a court appointed liquidator or receiver are considered to be in the possession of the court. It is, therefore, unlikely that liability will attach to court appointed insolvency practitioners.

Receivers can be appointed over some or all of the property of the corporation. The appointment is typically out of court under a company charge or mortgage, the terms of which dictate the nature and scope of the appointment.

Section 419 of the Corporations Act provides that a receiver will be personally liable for debts incurred during the course of the receivership. In most circumstances, however, receivers will request and receive an indemnity from their appointor at the time of the appointment, and as such, the receiver will be indemnified by their appointor for any environmental liabilities arising during the receivership, provided that their actions were within the scope of their authority.

Voluntary administrators are appointed under Part 5.3A of the Corporations Act. Upon the appointment of a voluntary administrator, the directors' powers are suspended[23], and the administrator takes control of the corporation as the corporation's agent[24].

Section 443D of the Corporations Act provides that the administrator will be indemnified from the corporation's assets. It is less likely, although still possible, that a voluntary administrator will seek an indemnity from the appointor, and be indemnified by the appointer for any environmental liabilities arising during their appointment.

Similarly to a voluntary administrator, a liquidator appointed out of court through a voluntary winding up is carrying out a statutory function, and is appointed to the corporation, not to the property. It is unlikely that a liquidator will be indemnified by the appointor for environmental liabilities arising during their appointment, although they are in some instances indemnified by the appointor for their remuneration.

2. Relevant environmental and/or insolvency laws that require compliance with clean-up, remediation orders or other preventative measures

In all instances, the relevant state legislation creates numerous offences and imposes pecuniary penalties on persons causing pollution, contamination or environmental harm, or persons who fail to comply with clean up or other relevant notices.

2.1 Liability of insolvency practitioners as a "person responsible for contamination" or environmental harm

Generally, each Act aims to impute liability for contamination, firstly, and where possible, on the person who has "principle responsibility for the contamination of the land[25]" or the person "responsible for contamination[26]". In most instances, the relevant authority stipulates categories or creates a "hierarchy" of persons who may constitute a "person responsible for contamination" or an "appropriate person[27]".

The meanings of "persons responsible for contamination" and "principal responsibility for the contamination of the land" are sufficiently broad to encompass an insolvency practitioner. Accordingly, an insolvency practitioner may, in various circumstances, be liable for contamination or issued with notices under each state Act. This is on the basis that ssection 9 of the Corporations Act has the effect that an insolvency practitioner is an officer of the corporation and that, upon appointment, they will usually assume responsibility and control of the corporation in lieu of the directors. This is particularly likely to be the case where an insolvency practitioner continues to trade the business of the company following their appointment.

In Victoria, Queensland and the ACT, insolvency practitioners may be issued with a notice for contamination occurring both prior to and during their appointment.

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[23] s 437C of the Corporations Act
[24] s 437B of the Corporations Act
[25] ACT Act s 91I.
[26] CLM Act s 6.
[27] See, for example, CLM Act ss 13(2) and 13(3).

In New South Wales, an insolvency practitioner may be issued with a preliminary investigation order or management order, as the "person who caused or contributed to the contamination" or as "occupier" where they "knew or ought reasonably to have known that contamination of the land would occur and the person failed to take reasonable steps to prevent contamination".

In Western Australia, an insolvency practitioner may be a "person responsible for contamination" or, where they are an occupier and change or propose to change the use of the land, the change of which requires the land to be remediated[28].

2.2 Liability of insolvency practitioners as "occupier"

The definition of occupier is broad and would likely capture insolvency practitioners, particularly where a practitioner has assumed the day to day control of the property through their appointment. Given that insolvency practitioners are officers of the corporation, and upon appointment, usually assume responsibility and control of the corporation in lieu of the directors, they will, in many instances constitute the person in "control" or "in charge" of the premises, and under each Act will, therefore, be exposed to liability for environmental contamination.

The ACT is the only state or territory in which liability does not attach (for assessment and remediation orders) to occupiers, but to the lessee or notional lessee of the land. An insolvency practitioner in the ACT will, therefore, only be liable where they are the lessee (as agent of the company which is the lessee) or the person who has principle responsibility for contamination of the land.

In Victoria and in NSW under the POEO Act, and Western Australia (under both the CS Act and WA Act) liability may attach to insolvency practitioners, as occupier, for contamination occurring prior to and during their appointment, although liability may be limited where someone else caused the contamination[29].

In NSW under the CLM Act, and under the QLD Act, insolvency practitioners may arguably only be liable as occupiers for contamination occurring during their appointment[30].

The QLD Act provides that liability will not attach to insolvency practitioners, as occupiers, for contamination occurring prior to their appointment, but to the person who, at the time of the incident, was the owner, occupier, or person in control of a contaminant[31]. Accordingly, insolvency practitioners cannot be required to comply with clean-up notices for contamination which occurred prior to their appointment. However, where a cleanup notice is issued to a corporation and it fails to comply, an executive officer may become a "prescribed person" for the purpose of the Act[32]. It is likely that an insolvency practitioner falls within this definition and may be issued with a clean-up notice where the corporation has failed to comply. This could potentially include contamination occurring both prior to and during their appointment.

3. Can insolvency practitioners be personally liable for a failure to comply with clean-up, remedial orders or preventative measures?

To date, the issue of whether insolvency practitioners are liable for environmental issues relating to the insolvent corporation has not been considered by Australian courts. Various provisions exist in each State, however, which impute liability to the executive officers, persons "concerned in the management of the corporation" or directors in the event that the corporation has committed an offence, with various defences applying for example, where the executive officer has exercised due diligence.

In New South Wales, Victoria, Queensland and the ACT, it is likely that an insolvency practitioner will be a person "concerned in the management" or "executive officer" where applicable[33] as the insolvency practitioner is an officer of the corporation under section 9 of the Corporations Act. The risk will be highlighted if the insolvency practitioner has been appointed

[28] CS Act ss 25 and 26.
[29] See CS Act s 42.
[30] CLM Act s 6.
[31] Qld Act S 363G(b)(i).
[32] Qld Act s 363G(c)(ii).
[33] POEO Act s 169; Vic Act s 66B; Qld Act s 493; ACT Act s 147.

over all of the assets of the corporation as it will be more easily found that the practitioner is concerned in the management of the corporation.

In *Inspector Benbow v Robert Michael Scales* [2002] NSW CIMC 184, a receiver and manager was successfully prosecuted for a breach of occupational health and safety legislation on the basis that the receiver constituted a person "concerned in the management of the corporation". Given this, and depending on the scope of the insolvency practitioner's appointment, an insolvency practitioner can be personally liable for any offence which the corporation commits. Receivers and receivers and managers will in most instances, however, be indemnified by the appointor.

In addition to providing that a person concerned in the management of the corporation commits the same offence as the corporation, in New South Wales, under section 63 of the CLM Act, the Land and Environment Court may order a director or person concerned in the management of the corporation at the time a management order was made, and where there is reason to believe that the company was wound up as part of a scheme to avoid compliance with that order, to comply with the order at the person's own expense. Substantially similar provisions exist in sections 91P and 91Q of the ACT Act in relation to assessment and remediation orders.

Further, in Western Australia, section 28 of the CS Act provides that where the person responsible is a body corporate which is insolvent, or which would become insolvent if it took action to remediate the site, each person who was a "director" at the relevant time may become a person responsible for the remediation. "Director" under the CS Act is given the same meaning as in the Corporations Act rather than persons "concerned in the management of the corporation[34]". While there is a risk that an insolvency practitioner could be deemed a "shadow director[35]" it will only be in very limited circumstances that liability will attach to an insolvency practitioner under section 28 for offences attributable to the corporation.

4. Can the government recover the costs of clean-up or remediation of land from the insolvent company? Do these costs receive priority?

No special priority is accorded to environmental claims against a corporation in receivership, administration, liquidation or other form of insolvency. However, section 556 of the Corporations Act provides that administrative expenses are entitled to first priority of payment, if they were properly incurred by a liquidator or administrator in preserving or realising the property of the corporation or carrying on the corporation's business. The Corporations Act does not distinguish between a government's rights as a creditor and their role as a regulatory body.

Environmental expenses, such as where a government agency has expended money to clean up an insolvent corporation's land, could be considered an administrative expense and therefore, a government agency may become a creditor. The Court's treatment of these environmental expenses as administrative expenses is not unlikely, based on the fact that the administrative expense priority is not a term of art and can include a wide range of matters.

In all state legislation, a regime is created whereby an authority may comply with any notice which has not been complied with by the person on whom the notice was served[36]. In such circumstances, the authority may seek to recover its costs of complying with the notice from either the person on whom the order was served, or the owner or occupier of the land[37]. As a result, irrespective of the actions taken by the insolvency practitioner or the company, there is potential for the authority to take action to remediate the property in the absence of compliance with any order made by the authority, and recover its costs.

In New South Wales and Victoria, such costs can constitute a charge on the land, which will have priority over every other charge or encumbrance to which the land was subject immediately before it was registered, including a mortgage[38]. In Victoria, if the charge continues to exist for at least 12 months and an amount is still owing under the charge, the authority may

[34] Under section 9 of the Corporations Act, the office of director under the Corporations Act can be filled either by appointment and registration with the Australian Securities and Investments Commission, or implied by conduct as a so-called "de facto director".
[35] See *Buzzle Operations Pty Ltd (In Liq) v Apple Computer Australia Pty Ltd* [2010] NSWSC 233.
[36] CLM Act s 30 (person on who the notice was served or the owner); Vic Act s 62(1) (person who caused the contamination or the occupier); CS Act s 55 and ACT Act s 91K (in relation to assessment and remediation orders).
[37] CLM Act s 35; Vic Act s 62(2), CS Act s 55, CS Act s 55; WA Act s 99Y and ACT Act s 160.
[38] CLM Act s 40; Victorian Act s 62(2).

serve a notice of intention to sell the property, and the charge ranks first in priority to other registered encumbrances (sections 62(10) and (12)).

In New South Wales and the ACT, if the authority carries out the requirements of an order in respect of land disclaimed (by a liquidator or trustee in Bankruptcy) as onerous property in the course of proceedings for winding up or bankruptcy, the authority may recover the costs of carrying out the order together with interest and all associated administrative or other costs and expenses incurred, in priority to any holder of a security over the land[39].

There are no provisions in Queensland which allow for the creation of a charge of the land or have the effect of altering the priority of claims. In Queensland, section 363N of the Qld Act allows the administering authority to issue a cost recovery notice to the recipient of a clean-up notice, if the recipient fails to comply with the clean-up notice, or a prescribed person for a contamination incident where an authorised person or contractor took the action in an emergency situation under section 467. The cost recovery notice may claim an amount for costs and expenses reasonably incurred in taking action, and in monitoring compliance by the recipient of the clean-up notice.

Canada

1. The key environmental protection and insolvency regimes that are available and the interplay between the regimes

In Canada, the corporate insolvency regime is broadly governed by two separate statutes, being the Companies' Creditors Arrangement Act[40] (CCAA) and the Bankruptcy and Insolvency Act[41] (BIA). This legislation[42] addresses the issue of the potential environmental liability of an insolvent or bankrupt debtor and the trustee, receiver or monitor that is appointed in respect of the debtor, as the case may be.

2. Relevant environmental and/or insolvency laws that require compliance with clean-up, remediation orders or other preventative measures by insolvency practitioners

Under section 11.02 of the CCAA, a court from which an insolvent debtor seeks creditor protection may make an order staying proceedings and the enforcement of rights against that debtor.

In order for an order by a regulatory body (including an environmental regulatory body) to be a "claim" and subject to the CCAA proceedings, the following requirements must be met: (1) there must be a debt, a liability or an obligation to a creditor; (2) the debt, liability or obligation must be incurred before the debtor becomes bankrupt or insolvent; and (3) it must be possible to attach a monetary value to the debt, liability or obligation. This framework was then used to elaborate a test for determining if a remediation order is regulatory in nature or a provable claim.

The Supreme Court in the case of *Newfoundland and Labrador v AbitibiBowater* articulated the following test for determining whether the environmental obligations of a debtor are stayed while insolvency proceedings are ongoing:

> *"In the context of an environmental order, this means that there must be sufficient indications that the regulatory body that triggered the enforcement mechanism will ultimately perform remediation work and assert a monetary claim to have its costs reimbursed. If there is sufficient certainty in this regard, the court will conclude that the order can be subjected to the insolvency process[43]".*

This is known as the "sufficiently certain" test. A Canadian court applying the sufficiently certain test would consider the following principles when adjudicating at the intersection of environmental and insolvency law:

[39] CLM Act s 37; ACT Act s 91L.
[40] RSC, 1985, c C-36.
[41] RSC, 1985, c B-3.
[42] Generally the CCAA is used in larger corporate reorganisation while the BIA is suited to smaller reorganisation or liquidation.
[43] *Newfoundland and Labrador v AbitibiBowater Inc.* 2012 SCC 67 at para 36.

(i) Re-organisation does not permit a debtor to disregard environmental protection rules and does not grant it a license to pollute;

(ii) The Supreme Court of Canada has emphasised the importance of the "single proceeding model" of insolvency, which is aimed at ensuring that a single forum, i.e. the insolvency proceeding, is where most claims against a debtor should be addressed, unless there is a specific legislative exception;

(iii) Insolvency legislation has been drafted to create a priority for an environmental regulator's orders in certain circumstances only. If the legislation had intended for a CCAA debtor to always satisfy all remediation costs, it would have granted the regulator a priority *vis-à-vis* all of the debtor's assets, not only the contaminated and certain related property;

(iv) Fairness mandates the inclusion of as many creditors as possible to participate in the insolvency process in order to share in the proceeds;

(v) In order to determine how the action of a regulatory body regarding a CCAA debtor should be assessed, the court must look at the substance of a regulatory order, not its form. In particular, a regulator is not permitted to issue orders with a view to improving its position relative to other creditors in a manner that is inconsistent with insolvency priorities. In short, the "polluter pays" principle cannot be relied on by a regulator to make third-party creditors bear the cost of remediation through a depletion of the debtor's assets; and

(vi) Where an order made by a regulator creates a monetary obligation on a CCAA debtor, either because it creates a debt owing to the regulator or is likely to create such a debt, the order amounts to a claim provable in insolvency and must be subject to the claims resolution process[44].

While this test creates a framework for analysis, there has been limited judicial consideration of the decision underlying this test. As such, the effect it will have in application is largely undetermined. That said, in the case of *Re Northstar Aerospace Inc.*[45], the Ontario Court of Appeal has recently found that where the regulator had commenced the remediation work at issue, it was sufficiently certain that the regulator would continue to do the work in circumstances where the bankrupt debtor had abandoned the land[46].

Similarly in the case of *Re Nortel Networks Corporation*[47] the Court of Appeal held that it was sufficiently certain that land subject to a remediation order that had been or was likely to be abandoned by the debtor would be remediated by the environmental regulator[48].

The result is that the costs of remediating land that a CCAA debtor owned and had not been able to dispose of, and certain land that a CCAA debtor continued to own, but did not operate on (as it was undergoing a liquidating insolvency), could become provable claims in their respective CCAA proceedings.

Further, the Court of Appeal in *Re Nortel* concluded that where it was not sufficiently certain that remediation orders, would be completed by the regulator, these were not provable claims and were, therefore, outside the scope of the CCAA regime. That is, remediation orders that the Court determined the regulator was not likely to fulfil itself were not compromisable claims within the debtors' CCAA proceedings.

Certain questions regarding the interaction between environmental and insolvency law in Canada are currently unanswered. These include:

- the general interaction between the stay power of a CCAA court with respect to orders by a regulatory body that are not monetary in nature but that are also not aimed at regulating the current activity of the CCAA debtor;

[44] *AbitibiBowater supra* at paras 2, 19, 33, 35 and 82-84.
[45] Northstar Aerospace Inc. (Re), 2013 ONCA 600 [Northstar]
[46] Northstar at paras 17-19.
[47] Nortel Networks Corporation (Re), 2013 ONCA 599 [Nortel]
[48] Nortel at para 41.

- the policy underlying the regulatory exception to a CCAA stay, including whether the regulatory exception applies to orders to remedy historical contamination that does not pose a current threat or risk of migration;
- whether the BIA and CCAA regimes should treat the issue of environmental obligations differently, notwithstanding the importance of harmonising the insolvency regime in Canada; and
- what weight a court should give to the effect a regulatory order will have on an insolvency proceeding when determining whether or not the order should be stayed.

At this time, the treatment of environmental claims in Canadian insolvency proceedings remains a subject of much debate and continued consideration. As in the recent Supreme Court decision of *AbitibiBowater* (referred to earlier), clarity regarding its implications and application may be achieved as courts continue to address individual disputes that arise at the “untidy intersection” between environmental and insolvency law.

3. Can insolvency practitioners be personally liable for a failure to comply with clean-up, remedial orders or preventative measures?

Generally, no, unless the condition arose or the damage occurred as a result of the practitioner’s gross negligence or wilful misconduct.

Section 11.8 of the CCAA provides that:

(3) Notwithstanding anything in any federal or provincial law, a monitor is not personally liable in that position for any environmental condition that arose or environmental damage that occurred –

(a) prior to the monitor's appointment; or

(b) after the monitor's appointment unless it is established that the condition arose or the damage occurred as a result of the monitor's gross negligence or wilful misconduct.

Section 14.06 of the BIA establishes a similar provision with respect to trustees.

4. Can the government recover the costs of clean-up or remediation of land from the insolvent company? Do these costs receive priority?

Section 11.8 of the CCAA provides that any claim by the Crown or a province against a debtor company in respect of which proceedings have been commenced under the CCAA for costs of remedying any environmental condition or environmental damage affecting real property of the company, is secured by a charge on the real property and on any other real property of the company that is contiguous thereto and that is related to the activity that caused the environmental condition or environmental damage. The charge ranks above any other claim, right or charge against the property.

A similar provision exists under the BIA (section 14.06(7)) in relation to trustees.

In the context of receiverships, the standard template receivership orders in the various provinces contain language that is consistent with the BIA and the CCAA. These receivership orders will in most cases specifically state that their provisions do not derogate from the protection afforded to the receiver by section 14.06 of the BIA, any other applicable legislation, or the common law.

China

1. The key environmental protection and insolvency regimes that are available and the interplay between the regimes

The Chinese insolvency regime remains largely undeveloped. The PRC Enterprise Bankruptcy Law (Bankruptcy Law), which took effect on 1 June 2007, established general bankruptcy

proceedings in China. Various judicial interpretations issued by the PRC Supreme People's Court supplement the Bankruptcy Law.

The PRC Environment Protection Law, promulgated in 1989, provides high level principles on environment protection with a focus on administrative measures. In addition, the PRC Tort Law (with effect from July 2010) sets out very brief principles with regard to civil claims of environmental damages based on tort.

2. Relevant environmental and/or insolvency laws that require compliance with clean-up, remediation orders or other preventative measures

A Chinese company or its creditors may apply for bankruptcy proceedings before a PRC court which has jurisdiction. If the court accepts such application, it will appoint an administrator, amongst other functions, to take over the management of the company and to liquidate the Company's assets/debts during the bankruptcy process.

Generally speaking, the following procedures may apply when a company enters into bankruptcy proceedings before a PRC court:

- re-organisation;
- settlement; or
- bankrupt liquidation.

An insolvency practitioner may have different compliance obligations under the respective schemes.

2.1 Re-organisation

During the course of re-organisation, the company is able to continue its business operations under the management or supervision of the administrator. In the absence of explicit provisions in the applicable laws and regulations, it is likely that the company would be required to comply with the statutory environmental requirements (for example, settling necessary environmental protection related expenditures) during the course of re-organisation although its other creditors remain unpaid. However, environmental liabilities arising out of any claim of tort (Environmental Tort Liabilities) e.g. civil claims of environmental damages, which were incurred prior to the bankruptcy proceedings should not be compensated during the course of re-organisation.

If the company is still insolvent after re-organisation, it would then enter into a bankrupt liquidation proceeding.

2.2 Settlement

A settlement proposal/agreement needs to be voted on and approved by creditors and approved by the court. Generally speaking, the settlement proposal will set out the ways in which the unsecured creditors (including parties who have existing claims of Environmental Tort Liabilities against the company) may be repaid. As the company will continue to operate, the orthodox view is that the company should settle necessary environmental protection related expenditures that may arise during the course of settlement, although this is not entirely clear in the laws and regulations.

If the settlement agreement fails to be passed/approved or if the company fails to fully perform the settlement agreement, bankrupt liquidation proceedings will become applicable.

2.3 Liquidation

Upon commencement of liquidation, an insolvent Chinese company must cease business operations. In the absence of any clear guidance given by applicable laws and regulations, the orthodox view is that the company should not incur any further expenditure even for satisfying environmental protection requirements during the course of bankrupt liquidation unless it is for the purpose of maintaining the value of its assets.

3. Can insolvency practitioners be personally liable for a failure to comply with clean-up, remedial orders or preventative measures?

According to the Bankruptcy Law, the administrator has fiduciary duties to the company and the creditors and must perform those duties with due diligence. If the administrator fails to do so, that administrator may be subject to penalties imposed by the court. If the administrator's failure in performing its duties causes any losses to the company, creditors or any third parties, the administrator may be held liable for such losses.

4. Can the government recover the costs of clean-up or remediation of land from the insolvent company? Do these costs receive priority?

If the company enters into bankrupt liquidation, according to the Bankruptcy Law, it must repay its unsecured debts in the following sequence:

(1) liquidation costs;

(2) community liabilities;

(3) employees' wages, subsidies, pension, medical insurance and other compensation;

(4) social insurance contributions (except for the pension and medical insurance) of employees and outstanding taxes; and

(5) ordinary debts.

Debts which are secured by any assets of the company will be repaid from such security assets.

According to a judicial interpretation promulgated by the PRC Supreme People's Court in 2002, penalties, fines and other charges imposed by any administrative or judicial authorities are not regarded as bankruptcy credits. Administrative and judicial penalties, fines and charges will, therefore, fall after "ordinary debts" as far as priority order is concerned. In contrast, Environment Tort Liabilities arising prior to the bankruptcy proceedings will fall within the category of "ordinary debts".

Based on general principles, environmental claims may be prioritised in the following circumstances:

(1) liquidation costs

As defined in the Bankruptcy Law, "expenses for management, disposal and allocation of the company's assets" are categorised as liquidation costs. Environmental protection related expenditures incurred during the course of bankrupt liquidation may be regarded as expenses falling within this category and in such circumstances, would be deemed liquidation costs. However, since it is not expressly provided under PRC law, the decision would, therefore, largely depend on the court's discretion on a case by case basis.

(2) community liabilities

If the company's assets cause any other parties' losses and/or damages or cause the company to incur civil liabilities (e.g. Environmental Tort Liabilities) after the commencement of bankruptcy proceedings, such liabilities may be regarded as community liabilities.

Under the Bankruptcy Law, liquidation costs and community liabilities can be repaid from the existing assets of the company from time to time during the bankruptcy process. Liquidation costs rank in priority over community liabilities.

European Union (EU)

1. The key environmental protection and insolvency regimes that are available and the interplay between the regimes

The environmental regimes in operation across Europe are similar to those in England insofar as they all reflect the minimum requirements imposed at the EU level by various directives on environmental matters[49].

The primary EU directive on environmental matters is Directive 2004/35/EC on Environmental Liability with Regard to the Prevention and Remediation of Environmental Damage (ELD). The ELD is aimed at the prevention and remediation of environmental damage and is based on the "polluter pays" principle. It aims to ensure that the burden of paying for the prevention and remediation of damage is borne by the polluter, not the taxpayer. It does not specifically consider how this principle might be realised if the polluter is insolvent.

2. Relevant environmental and/or insolvency laws that require compliance with clean-up, remediation orders or other preventative measures by insolvency practitioners

The ELD provides that "operators" of "occupational activities" which cause "environmental damage" bear the costs of remediating that damage. "Environmental damage" and "occupational activity" are defined broadly under the ELD to encompass, respectively, damage to protected species, natural habitats, land and water, and any activity carried out in the course of an economic activity, whether for profit or otherwise. An "operator" is defined as a person who operates or controls the occupational activity or to whom decisive economic power over the technical functioning of such an activity has been delegated, including the holder of a permit or authorisation for such an activity. It has not yet been considered whether an insolvency practitioner may fall within the definition of operator set out in the ELD.

3. Can insolvency practitioners be personally liable for a failure to comply with clean-up, remedial orders or preventative measures?

The ELD does not impose criminal liability (such as imprisonment and/or fines) on operators for environmental damage, but requires an operator to take preventive or restorative action, as appropriate. When no such action is taken, a regulator may itself perform any necessary work and recover the cost of that work from an operator. In certain circumstances, the regulator may take security over property to ensure the recovery of such costs.

The ELD recommends that Member States require operators to give financial security to cover their responsibilities under the ELD. Enactment of such a requirement has been varied across Europe: for example, England does not require such financial security (save in the case of landfill, which is required by a separate EU directive).

4. Can the government recover the costs of clean-up or remediation of land from the insolvent company? Do these costs receive priority?

No specific priority is afforded to environmental claims in insolvency under the ELD or otherwise as a matter of EU law.

Hong Kong

1. The key environmental protection and insolvency regimes that are available and the interplay between the regimes

Hong Kong's insolvency regime is primarily set out in the Companies (Winding up and Miscellaneous Provisions) Ordinance (*Cap 32)* (CWO), Companies (Winding up) Rules *(Cap. 32H)* and some provisions of the Bankruptcy Ordinance *(Cap 6)* (BO) (and the related Bankruptcy Rules).

Hong Kong's insolvency regime emphasises realisation of assets for the benefit of creditors rather than rescue and rehabilitation of companies. Insolvency practitioners are ordinarily

[49] An individual State may impose more stringent requirements, beyond those prescribed by a directive.

appointed as liquidators upon the making of a winding up order in compulsory liquidations of insolvent companies. There are only some measures, such as provisional liquidation and schemes of arrangement, which can be helpful in restructuring an insolvent company in Hong Kong. Accordingly, as a general rule liquidators do not normally take charge of the ongoing business or operations of a company in liquidation for long periods and exposure to liability arising from environmental legislation is not a significant concern or feature of Hong Kong's insolvency landscape. A liquidator would never be held personally liable for the pre - appointment acts of the company (and its directors).

In addition to compulsory liquidations, an insolvency practitioner may be appointed:

- as a provisional liquidator prior to a winding up order being made with broadly similar powers as liquidators (but with an emphasis on preserving assets); and

- as liquidator pursuant to a creditor's voluntary winding up (ie at the request of a director when a company is insolvent) or a member's voluntary winding up (at the instigation of a company's directors and shareholders when a company is solvent).

Hong Kong does not have a general statute dealing with environmental protection. The main statutes governing environmental protections are the:

- Air Pollution Control Ordinance *(Cap 311);*
- Water Pollution Control Ordinance *(Cap 358);*
- Noise Control Ordinance *(Cap 400);* and
- Waste Disposal Ordinance *(Cap 354)**;***

There is also specific legislation[50] concerning control of hazardous chemicals, marine pollution/dumping at sea, ozone protection and product eco-responsibility.

2. Relevant environmental and/or insolvency laws that require compliance with clean-up, remediation orders or other preventative measures

Enforcement of environmental law is carried out principally by the following means:

- Statutory offences;
- Abatement Notices;
- Licences and permits;
- Criminal liability; and
- Taking remedial or preventive measures.

The Environmental Protection Department (EPD) is the sole authority responsible for issuing permits and licences and is the main authority responsible for the enforcement of environmental legislation in Hong Kong. Along with its duties of inspection, licensing and responding to complaints, the EPD is in charge of prosecuting offenders who have contravened the various ordinances relating to environmental laws in Hong Kong. It can carry out clean-ups and recover costs from offenders.

3. Can insolvency practitioners be personally liable for a failure to comply with clean-up, remedial orders or preventative measures?

Liquidators are officers of the Court and are generally accountable to the Court[51] for their actions with respect to any alleged wrong-doing or complaints concerning conduct.

[50] Hazardous Chemicals Control Ordinance (*Cap 595*) (HCO), Ozone Layer Protection Ordinance (*Cap 403*), Product Eco-Responsibility Ordinance (*Cap 603*).
[51] Section 200(5).

Liquidators do not generally incur personal liability with respect to windings up save for some rare exceptions, such as fraud and breach of duty[52]. The general rule is that the expenses of a winding up, including a liquidator's remuneration and any costs properly incurred in preserving, realising or getting in assets, are payable as a priority out of the assets of a company[53].

One of the few instances where personal liability of a liquidator has been considered is in the context of costs of litigation instigated or brought about by a liquidator's actions. The established principle in Hong Kong is that in the absence of bad faith and gross negligence, liquidators are not personally liable for the costs of litigation[54]. This principle should (although there has not been a case on the issue) extend to proceedings and resulting penalties which arise under environmental legislation in the course of liquidators carrying out their supervisory function and duties with respect to an insolvent company in liquidation.

It would, however, be incumbent upon liquidators to comply with abatement notices issued by the EPD (or other relevant authority) in the course of a liquidation, and failure to do so may result in prosecution. As officers of the Court, liquidators have a duty to comply with the laws of Hong Kong, including environmental legislation. Where such a duty might conflict with the interests of creditors, it would be open to a liquidator to seek the approval of the Court with respect to any proposed course of action.

There is little authority in this area of the law and there are no recorded cases where a liquidator has been held personally liable for environmental penalties and costs.

4. Can the government recover the costs of clean-up or remediation of land from the insolvent company? Do these costs receive priority?

Liquidators are obliged to distribute the proceeds from assets realised to the creditors in the following strict order of priority:

(1) secured creditors;

(2) liquidation costs (which include liquidator's fees, costs of winding up petitions and costs of realisations) [55];

(3) preferential creditors[56] (which include employees' claims, statutory debts owed to the Hong Kong SAR Government and tax claims);

(4) floating charge holders;

(5) unsecured creditors; and (if any sums remain)

(6) shareholders of the company.

Penalties and costs arising from environmental legislation can be incurred at two different junctures with respect to the liquidation of an insolvent company:

(1) prior to a winding up order; and

(2) after a winding up order.

If the penalties and costs are incurred by the management of the company prior to liquidation the general rule is that such penalties and costs are not provable debts in the liquidation. In this regard section 34(3A) of BO states that "a debt owing to the Government in respect of a fine or monetary penalty imposed under an Ordinance shall not be provable in bankruptcy". This provision of the BO applies to insolvent companies under section 264 of the CWO. As companies in liquidation do not as a rule survive the liquidation process, debts such as statutory penalties which are not provable are effectively extinguished once a liquidation is completed (in contrast to bankrupt individuals who may later be found to be still liable for statutory penalties).

[52] Sections 276(1) and 168G(1)(b).
[53] Rule 179(1) Companies Winding Up Rules (Cap. 32H)
[54] *Luk Ngai Ling v Lau Siu Hung* (The joint and several liquidator of Tsz wan Shan Limited) [2010] HKEC 1188
[55] Section 256.
[56] Section 265 .

If the environmental penalties and costs imposed are as a result of the liquidation and incurred during the liquidators' running of the company (i.e. after the company goes into liquidation and they are incurred by/or under the liquidators during liquidation), these may form part of the "liquidation costs" (referred to above under Order of Payment) on the basis that they are recoverable costs and expenses incurred by the liquidators in the course of the liquidation. If this were the case it is to be noted that environmental penalties and costs imposed accordingly would rank in priority over "preferential creditors". The Court holds the function of supervising and assessing liquidation costs and expenses and recoverability of the same from the assets of an insolvent company.

Singapore

1. The key environmental protection and insolvency regimes that are available and the interplay between the regimes

1.1 Environmental protection regime in Singapore

The principal pieces of legislation relating to environmental laws include the Environmental Protection and Management Act (Cap. 94A) (EPMA) and the Prevention of Pollution of the Sea Act (Cap. 243) (PPSA). The main environmental regulatory body in Singapore is the National Environment Agency (NEA). The NEA has the power to investigate breaches of environmental protection laws, as well as to commence civil proceedings against anyone who contravenes the environmental laws in Singapore.

The EPMA is the main statute governing environmental protection in Singapore. The subsidiary legislation of the EPMA provides for more detailed regulations concerning the different types of pollution, including the pollution of land, air, inland water and the sea. Under the EPMA, the Director-General of Environmental Protection of the NEA (Director-General) has the discretion to issue compliance directions to persons who contravene the EPMA, including clean up notices, remediation notices and notices to require preventative measures to be taken relating to environmental pollution control.

The PPSA brings into force in Singapore the International Convention for the Prevention of Pollution from Ships 1973 as modified and added to by the Protocol of 1978, and other international agreements relating to the prevention, reduction and control of pollution of the sea and pollution from ships.

1.2 Insolvency regime in Singapore

Singapore's insolvency laws in relation to companies are mainly set out in the Companies Act (Cap. 50) (Companies Act).

The Companies Act provides for two types of insolvency procedures, the liquidation and rehabilitative procedures.

(1) Liquidation procedures

Part X of the Companies Act governs the liquidation or winding up of a company. Section 247 of the Companies Act provides that the winding up of a company may be either by order of the court (compulsory winding up) or voluntarily.

Under section 254 of the Companies Act, the court may order a company to be wound up on the ground of insolvency if the company is unable to pay its debts and the court considers that it is just and equitable to do so.

Pursuant to section 255 of the Companies Act, a winding up is voluntary if the members of a company pass a resolution to initiate the winding up of the company. According to section 293 of the Companies Act, a prerequisite of a members' voluntary winding up is that a statutory declaration of solvency needs to be given by the directors of the company.

A company may undergo a creditors' voluntary winding up pursuant to section 296 of the Companies Act if the company is probably but not certainly solvent so that the directors cannot conscientiously make the declaration of solvency for a voluntary members' winding

up[57]. Under section 296(1) of the Companies Act, a meeting of creditors must be called after the meeting of shareholders during which the creditors would decide if the company should undergo a creditors' voluntary winding up and, if so, elect a liquidator to proceed with a creditors' voluntary winding up.

In either the compulsory or voluntary winding up, if the company's assets are to be realised, it is typically done by a liquidator. If there is no appointment of a liquidator or a vacancy in the appointment, the Official Receiver will be the liquidator[58].

(2) Rehabilitative procedures

If an insolvent company is to continue operating, it may do so through a scheme of arrangement (which requires agreement amongst a substantial proportion of creditors) or through a judicial management.

Typically, where judicial management is ordered, an independent auditor would be appointed by the court to take over the running of the company and existing management might be removed. A company that operates under judicial management would effectively have a moratorium on its winding up and legal proceedings or execution of judgments against the company cannot be commenced or continued without prior leave of court.

For schemes of arrangement, the creditors have more flexibility and may choose to keep the existing management, and might do so to minimise disruption. Although there is no moratorium on actions against the company, this might be agreed upon as part of the scheme of arrangement.

Save as considered below, the environmental protection regime discussed above does not expressly consider its relationship with insolvency law. For the purposes of the discussion on Singapore law in sections 2 and 3 below, "insolvency practitioners" comprises judicial managers, liquidators and the Official Receiver.

2. Relevant environmental and/or insolvency laws that require compliance with clean-up, remediation orders or other preventative measures by insolvency practitioners

The EPMA and PPSA do not expressly require that insolvency practitioners comply with clean up, remediation orders or preventative measures. However, the persons falling within the ambit of the EPMA and PPSA include insolvency practitioners.

In section 2 of the EPMA, an "occupier" is defined, in relation to any premises, as the person in occupation of the premises or having the charge, management or control thereof.

An "owner" is defined in section 2 of the EPMA as, in relation to any premises, the person for the time being receiving the rent of the premises, whether on his own account or as agent or trustee or as receiver, or who would receive the rent if the premises were let to a tenant.

Pursuant to sections 227G and 227I of the CA, a judicial manager falls within the definitions of "occupier" and "owner" as set out in the EPMA as the judicial manager is likely to have the charge, management or control of the company's property.

The relevant parts of sections 227G and 227I of the CA state that:

"227G (1) On the making of a judicial management order, the judicial manager shall take into his custody or under his control all the property to which the company is or appears to be entitled.

(2) During the period for which a judicial management order is in force, all powers conferred and duties imposed on the directors by this Act or by the memorandum or articles of association of the company shall be exercised and performed by the judicial manager and not by the directors; but nothing in this subsection shall require the judicial manager to call any meetings of the company."

[57] Andrew Chan (General Editor), *Law and Practice of Corporate Insolvency* (2005, updated: Issue 8 – October 2013), VI[5]-[50]
[58] S 263 of the Companies Act (Cap. 50)

227I (1) The judicial manager of a company —

(a) shall be deemed to be the agent of the company;"

Hence a judicial manager, as the person having the control of all premises and also the person for the time being receiving the rent of the premises as agent of the company, is an "occupier" and an "owner".

Pursuant to section 269 of the CA, a liquidator similarly may fall within the definition of "occupier" as set out in the EPMA, as a liquidator would have the charge, management or control of the company's property. A liquidator is likely to fall within the definition of "owner" as set out in the EPMA if the Singapore courts grant to the liquidator a vesting order under section 269(2) of the CA. A vesting order has the effect of vesting the property of the company in the liquidator, and the liquidator would be entitled to deal with the property as owner.

The relevant parts of section 269 of the CA state that:

"269 (1) Where a winding up order has been made or a provisional liquidator has been appointed, the liquidator or provisional liquidator shall take into his custody or under his control all the property and things in action to which the company is or appears to be entitled.

(2) The Court may, on the application of the liquidator, by order direct that all or any part of the property of whatever description belonging to the company or held by trustees on its behalf shall vest in the liquidator and thereupon the property to which the order relates shall vest accordingly and the liquidator may, after giving such indemnity, if any, as the Court directs, bring or defend any action or other legal proceeding which relates to that property or which it is necessary to bring or defend for the purpose of effectually winding up the company and recovering its property."

Reading section 269(1) of the Companies Act with section 2 of the EPMA, a liquidator, as the person having the charge, management or control of the company's property, is an "occupier". Under section 269(2) of the Companies Act read with section 2 of the EPMA, a liquidator with a vesting order may be an "owner".

An "officer" of a body corporate as defined in section 4 of the CA includes a liquidator of a company appointed in a voluntary winding up. This is relevant to the interpretation of section 71 of the EPMA, which expressly states that officers of a body corporate may be held liable for an offence under the Act.

A liquidator of a company appointed in a voluntary winding up may be criminally liable for the company's failure to comply with clean up, remediation orders or preventative measures. This is discussed below.

2.1 Air Pollution Control – Part IV of EPMA

Section 10 of the EPMA provides that the occupier of any industrial or trade premises shall maintain any fuel burning equipment and any air pollution control equipment installed in or on the premises in an efficient condition, and ensure that any air pollution control equipment installed in or on the premises is working in a proper and efficient manner whenever the industrial plant or fuel burning equipment is being used.

Section 11 of the EPMA prohibits any owner or occupier of any industrial or trade premises from causing, permitting or allowing the emission of dark smoke from a chimney of, or used in connection with, those premises.

Section 12 of the EPMA provides that any owner or occupier of any industrial or trade premises who conducts any trade or industrial process, or operates any fuel burning equipment or industrial plant in or on the premises in such manner as to cause, permit or allow the emission of air impurities in excess of the standard concentration or rate of emission prescribed in respect of that industry, process, fuel burning equipment or industrial plant shall be guilty of an offence. Where any such standard has not been so prescribed, it shall be the duty of the owner or

occupier of any industrial or trade premises to conduct any trade or industrial process or operate any fuel burning equipment or industrial plant in or on the premises by the best practicable means available as may be necessary to prevent or minimise air pollution.

Any owner or occupier who fails to comply with sections 10 to 12 of the EPMA shall be guilty of an offence and shall be liable on the first conviction to a fine not exceeding S$20,000 and, in the case of a continuing offence, to a further fine not exceeding S$1,000 for every day or part thereof during which the offence continues after conviction.

Section 13 of the EPMA provides that the Director-General may require occupiers and owners of industrial or trade premises to carry out various works to address the emission or likely emission of air impurities.

2.2 Water Pollution Control – Part V of EPMA

Section 15(1) of the EPMA provides that it is an offence to discharge or cause or permit to be discharged any trade effluent, oil, chemical, sewage or other polluting matters into any drain or land without a written permission from the Director-General.

Any person who is guilty of an offence under section 15(1) shall be liable on the first conviction to a fine not exceeding S$20,000 and, in the case of a continuing offence, to a further fine not exceeding S$1,000 for every day or part thereof during which the offence continues after conviction.

Section 16 of the EPMA provides that the occupier of any premises shall treat any trade effluent discharged therefrom in such manner as may be prescribed before such trade effluent is discharged into any drain or land in pursuance of a written permission granted under section 15. In addition, a person using, working or operating any plant for the purpose of treating any trade effluent shall use, work or operate and maintain such plant in such manner as the Director-General may require.

Any person who fails to comply with section 16 shall be guilty of an offence and shall be liable on the first conviction to a fine not exceeding S$20,000 or to imprisonment for a term not exceeding 3 months or to both and, in the case of a continuing offence, to a further fine not exceeding S$1,000 for every day or part thereof during which the offence continues after conviction.

Section 17 of the EPMA provides that any person who discharges or causes or permits to be discharged any toxic substance or hazardous substance into any inland water so as to be likely to cause pollution of the environment shall be guilty of an offence and shall be liable on the first conviction to a fine not exceeding S$50,000 or to imprisonment for a term not exceeding 12 months or to both.

Section 18 of the EPMA provides that the Director-General may require any person who has discharged or caused or permitted to be discharged or spilled any toxic substance, trade effluent, oil, chemical, sewage, hazardous substance or polluting matters onto any land or into any drain or the sea, to remove and clean up such toxic substance, trade effluent, oil, chemical, sewage, hazardous substance or polluting matters within a specified time.

Any person who fails to comply with section 18 of the EPMA shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S$50,000.

Section 19 of the EPMA provides that the Director-General may require any person who effects, permits or carries out any activity related to the storage or transportation of toxic substance or any other polluting matters to carry out measures to prevent water pollution. For example, to use containers, tanks, tank containers or road tankers that are constructed to meet stipulated standards and with approved materials; and to carry out specific tests on equipment, tanks or any other related facilities and to submit the results of these tests.

Any person who fails to comply with section 19 shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S$20,000.

2.3 Hazardous Substances Control – Part VII of EPMA

Part I of the Second Schedule of the EPMA sets out a list of hazardous substances, which include ammonium chlorate, carbon tetrafluoride and nicotine sulphate.

Section 22 of the EPMA provides that it is an offence to import, manufacture, possess for sale, sell or offer for sale any hazardous substance unless he holds a licence granted by the Director-General for such a purpose.

Any person who is guilty of an offence under section 22 shall be liable on conviction to a fine not exceeding S$50,000 or to imprisonment for a term not exceeding 2 years or to both and, in the case of a continuing offence, to a further fine not exceeding S$2,000 for every day or part thereof during which the offence continues after conviction.

Section 24 of the EPMA provides that every agent of a person storing, using or otherwise dealing with any hazardous substance has to do so in such a manner as not to cause pollution to the environment.

Any person who is guilty of an offence under section 24 shall be liable on conviction to a fine not exceeding S$50,000 or to imprisonment for a term not exceeding 2 years or to both and, in the case of a continuing offence, to a further fine not exceeding S$2,000 for every day or part thereof during which the offence continues after conviction.

Section 25 of the EPMA provides that the Director-General has the powers to require owners and occupiers to remove hazardous substances from their premises.

Any person who fails to comply with section 25 of the EPMA shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S$50,000.

Section 26 of the EPMA provides that the Director-General has the powers to require owners and occupiers to carry out impact analysis studies in relation to all possible potential hazards. Any person who fails to comply with any notice under section 26 of the EPMA shall be guilty of an offence and shall be liable on conviction to a fine not exceeding S$20,000.

3. Can insolvency practitioners be personally liable for a failure to comply with clean-up, remedial orders or preventative measures?

A liquidator of a company appointed in a voluntary winding up may be criminally liable for the company's failure to comply with clean up, remediation orders or preventative measures.

Section 71 of the EPMA expressly states that officers of a body corporate may be held liable for an offence under the Act. As discussed under question 2 above, section 4 of the CA defines an officer of a body corporate to include a liquidator of a company appointed in a voluntary winding up.

The relevant parts of section 71 of the EPMA provide that:

"71 (1) Where an offence under this Act committed by a body corporate is proved -

(a) to have been committed with the consent or connivance of an officer; or

(b) to be attributable to any act or default on his part,

the officer as well as the body corporate shall be guilty of the offence and shall be liable to be proceeded against and punished accordingly."

4. Can the government recover the costs of clean-up or remediation of land from the insolvent company? Do these costs receive priority?

The government can recover the costs of clean-up or remediation from the insolvent company under the EPMA, and these costs could receive priority if the insolvent company is the owner of the premises in question.

The EPMA envisages certain specific situations where the Director-General may recover from the offending company the costs of executing the notices or orders issued by the Director-General:

(1) Where the offending company fails to comply with the notice or order within the time specified in the notice or order. (Section 41 EPMA)

(2) Where the offending company appeals against a notice or order and the Director-General carries out the work under the notice or order in the meantime, the Director-General is entitled to recover the costs of such work if the offending party's appeal is unsuccessful or abandoned. (Section 42 EPMA)

(3) Where there is an emergency and the Director-General considers it necessary, he may direct the immediate execution of any work authorised under the EPMA which in his opinion is necessary to prevent injury or danger to public health or serious pollution of the environment. In this instance, the expenses are recoverable from the owner of the premises where the emergency originated. (Section 46 EPMA)

4.1 Section 41 EPMA – Default in compliance with notice or order

Under section 41 of the EPMA, where a person on whom a notice or order under the EPMA is served fails to comply with the notice or order within the time specified in the notice or order, the Director-General or any authorised officer may exercise the power of entry provided by section 47 of the EPMA to enter the premises and execute the works specified in the notice or order.

Any expenses reasonably incurred by the Director-General may be recovered from the person in default.

4.2 Section 42 EPMA – Appeal against notice or order

Under section 42 of the EPMA, where a person on whom a notice or order referred to above is served is aggrieved by the notice or order, he may, within 14 days from the date of service of the notice or order and in the prescribed form and manner, appeal to the Minister.

If the appeal is successful, the Director-General shall, if he carries out the work, pay the costs and expenses of the work and any damages sustained by the appellant by reason of the work. However, if the appeal is dismissed or abandoned, the Director-General may, if he carries out the work, recover the costs and expenses of the work from the appellant.

4.3 Section 46 EPMA – Cases of emergency

Under section 46 of the EPMA, the Director-General may direct the immediate execution of any work or the doing of any act being any work or act authorised under the EPMA which is necessary to prevent injury or danger to public health or serious pollution of the environment in the case of an emergency.

Any expenses reasonably incurred by the Director-General may be recovered from the person whose act or omission resulted in the emergency or the owner of the premises where the emergency originated.

4.4 Section 51 EPMA - Magistrate's Court or District Court determines compensation, damages, fees, costs, expenses

Under section 51 of the EPMA, in all cases where compensation, damages, fees, costs or expenses are to be paid except as otherwise provided, the amount and, if necessary, the apportionment of the amount and any question of liability shall, in case of dispute, or failure to pay, be summarily ascertained and determined by a Magistrate's Court or, if the amount claimed exceeds the Magistrate's Court limit, by a District Court.

4.5 Section 53 EPMA – Recovery of costs and expenses payable by owners

If the person in question is the owner of the premises, section 53 of the EPMA provides that all sums in respect of costs and expenses incurred by the NEA in connection with the execution of any work which are under the EPMA recoverable from an owner of any premises shall, subject and without prejudice to any other rights of the NEA, be a first charge on the premises in respect of which the costs and expenses were incurred.

A "charge" as defined in section 4 of the CA includes a mortgage and any agreement to give or execute a charge or mortgage whether upon demand or otherwise.

The NEA, as the holder of the first charge, can be paid before the unsecured creditors in the event of a liquidation.

United Kingdom

1. The key environmental protection and insolvency regimes that are available and the interplay between the regimes

There are 3 significant environmental protection regimes in operation in the UK. These are the:

(1) contaminated land regime, governed by Part 2A of the Environmental Protection Act 1990 (EPA);

(2) environmental permitting regime, governed by Environmental Permitting (England and Wales) Regulations 2010 (EP Regulations); and

(3) water pollution regime, governed by the Water Resources Act 1991 (WRA).

Save as noted below, none of these regimes expressly considers its relationship with insolvency law.

2. Relevant environmental and/or insolvency laws that require compliance with clean-up, remediation orders or other preventative measures by insolvency practitioners

2.1 Contaminated Land Regime - Part 2A, EPA

Section 78E of the EPA provides that where an "enforcing authority" uncovers "contaminated land", it is under a duty to serve on each "appropriate person" a "remediation notice", requiring remediation of the land in question within a particular period.

Section 78F sets out who is an "appropriate person". It provides that any person who caused or knowingly permitted the substances by reason of which the land in question is contaminated to be in such land (Class A Person) is an appropriate person.

If, after reasonable enquiry, no Class A Person can be found, the owner or occupier for the time being of the contaminated land in question becomes an appropriate person (Class B Person). Where a person fails to comply with a remediation notice, an enforcing authority can itself carry out the remediation works the subject of that notice and recover the costs of doing so from the person on whom the notice was served[59].

Persons acting as insolvency practitioners are expressly excluded from:

(a) personal liability for the remediation of contaminated land under Part 2A of the EPA, provided that the remediation is not required as a result of some act or omission they have unreasonably committed or allowed[60] (i.e. that their unreasonable actions have not caused the contamination); and

[59] EPA s78N.

[60] EPA s78X(3) and (4).

(b) criminal liability for failing to comply with a remediation notice, unless they are personally liable to comply with the notice[61].

2.2 Environmental Permitting Regime - EP Regulations

In order to operate a "regulated facility", unless exempt, a person must have an "environmental permit" (EP)[62]. A regulated facility is one which involves the recovery or disposal of waste (for example, landfill), the discharge of effluent or noxious matter into water, radioactive substances, mining or any number of other activities which may have an impact on the environment.
Only an "operator" can apply for an EP. Regulation 7 defines an operator as the person who has control over the operation of the regulated facility. An insolvency practitioner may conceivably be an operator[63].

If an operator of a regulated facility contravenes the terms of its EP, the relevant regulator may, under rule 36, serve the operator with an "enforcement notice", requiring it to take steps to remedy the contravention in a set time period. In certain circumstances, the regulator may also suspend or revoke the EP, in whole or in part, by serving the operator with a suspension or revocation notice in accordance with rules 22 and 37, respectively.

It is an offence for a person to:

(a) operate a regulated facility without a permit;

(b) knowingly cause or permit such operation;

(c) fail to comply with or contravene EP conditions; or

(d) fail to comply with or contravene an enforcement or suspension notice[64].

Offences are punishable by a fine and/or imprisonment. Regulation 41 provides that where an offence is committed by a body corporate, officers of that body corporate may also be liable to a fine and/or imprisonment, if the offence was:

(a) attributable to their negligence; or

(b) committed with their consent or connivance.

In *Re Celtic Extraction Ltd* [1999], the Court considered whether a liquidator could disclaim a waste management licence (WML)[65] issued under the EPA on the basis that it was "onerous property", notwithstanding that the EPA made no provision for termination in this way. Such disclaimer would have the effect of releasing the debtor company from the performance of its obligations under the WML, including closure and aftercare. The Court held the liquidator could disclaim a WML. Case law has subsequently assumed that EPs can also be disclaimed.
Specific provisions apply to landfill, in accordance with the EC Landfill Directive[66]. An EP for landfill will only be granted where an operator has given adequate financial security to discharge the obligations arising from a landfill EP, including all aftercare requirements for at least 30 years after the landfill is closed[67]. In practice, this means that the landfill and insolvency regimes will rarely conflict because funds will have been appropriated pre - insolvency to satisfy environmental liabilities. The same does not apply for other activities requiring an EP.

2.3 Water Pollution Regime - WRA

In the event that any poisonous, noxious or polluting matter or any waste matter has entered or may enter any "controlled waters", or there is a threat of harm to such waters, section 161A of the WRA provides that the "appropriate agency" can serve a "works notice" on any "responsible person", requiring them to prevent or remediate the water pollution.

[61] EPA s78M.
[62] EP Regulations r 12.
[63] Lightman & Moss, "The Law of Administrators and Receivers" (2013) (Fifth Edition) at 26-006, p684.
[64] EP Regulations r 38.
[65] WMLs have now been superseded by EPs.
[66] Directive 99/31/EC, article 20(1).
[67] EP Regulations r 35(2)(d) and para 5, schedule 10.

A responsible person is defined as any person who has caused or knowingly permitted:

(a) polluting matter to be present in controlled waters, or at a place from which it was likely to enter controlled waters[68]; or

(b) harm to be caused to controlled waters, or a source of potential harm, which is likely to cause actual harm, to exist[69].

It is an offence to fail to comply with a works notice. Offences are punishable by a fine and/or imprisonment[70]. As with the EP regime, where an offence is committed by a body corporate, section 217 provides that officers or persons purporting to act in an official capacity may also be liable to a fine and/or imprisonment if the offence was:

(a) attributable to their negligence; or

(b) committed with their consent or connivance.

Section 217(3) further provides that where an offence committed by a body corporate is attributable to the actions of a third party, that third party may also be liable.

3. Can insolvency practitioners be personally liable for a failure to comply with clean-up, remedial orders or preventative measures?

The contaminated land regime expressly excludes insolvency practitioners from the list of persons who – subject to a reasonableness test – might conceivably bear personal liability for the remediation of contaminated land. Outside this framework, insolvency practitioners may indeed bear personal liability for environmental damage occasioned by reason of their acts or omissions in office. For example, an insolvency practitioner may be personally liable for damage caused by the continuing operation of a business insofar as (1) the business is continuing under the direction of the insolvency practitioner, and (2) the insolvency practitioner knew its continuation would or could have such an effect. Similarly, an insolvency practitioner may be liable for failing to cause the company to which he or she is appointed to comply with the terms of its EPs, enforcement notices or works notices. Where the imposition of personal liability is contingent on the knowledge of an insolvency practitioner, either actual or constructive knowledge will suffice.

To avoid such liability and subject to the restrictions imposed by the Insolvency Act 1986, an insolvency practitioner may disclaim any EP or burdensome land held by the company as onerous property. Such disclaimer will have the effect of terminating any obligations of the company thereunder.

4. Can the government recover the costs of clean-up or remediation of land from the insolvent company? Do these costs receive priority?

In certain circumstances, for example in cases of imminent danger or where appropriate persons have failed to comply with a remediation notice, an enforcing authority may itself carry out remediation works on contaminated land[71].

An enforcing authority, subject to its discretionary application of hardship criteria, is entitled to recover its costs of carrying out remediation works from appropriate persons under section 78P of the EPA. Under the Environmental Permitting Regime, where the operation of a regulated facility involves a risk of serious pollution, the regulator may in certain circumstances, itself take steps to remove that risk. Under rule 57 it may recover its costs of taking such steps from the operator.

Similarly, under the Water Pollution Regime, if a works notice is not complied with, an appropriate agency in certain circumstances can take steps to prevent or remediate water

[68] WRA s 161.
[69] WRA s 161ZA.
[70] WRA s 161D.
[71] EPA s 78N.

pollution itself. It may then recover the costs of doing so from a responsible person under section 161ZC(2).

No special priority is accorded to environmental claims against a company in administration, liquidation or any other form of insolvency. Such claims typically fall into the category of general unsecured claims, although in the event a Class A person is the owner of the land in question, the enforcing authority may enhance its chances of recovery by imposing a charge on the land, as security for the costs of remediation works once complete (see for example section 78P(4) EPA). Such charges may conceivably fall foul of anti-avoidance provisions in the Insolvency Act if created in the lead-up to insolvency.

The law does not distinguish between a government's rights as a creditor and its role as a regulatory body.

United States of America

1. The key environmental protection and insolvency regimes that are available and the interplay between the regimes

The principle legislation with respect to insolvency in the US is the Bankruptcy Code[72], which strives to provide the honest debtor with a fresh start by fixing and then discharging the debtor's pre-petition liabilities. The major federal and state environmental laws, in particular the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)[73] and the Resource Conservation and Recovery Act (RCRA)[74], seek to extend liability for environmental claims by imposing strict and far reaching liability on those responsible, even indirectly, for disposal of hazardous substances.

2. Relevant environmental and/or insolvency laws that require compliance with clean-up, remediation orders or other preventative measures by insolvency practitioners

Much of the conflict between the Bankruptcy Code and environmental laws arises in the context of litigation under CERCLA. CERCLA imposes liability on any "owner or operator" who owned or operated the facility at issue at the time of disposal of any hazardous substances[75].

The statute defines "owner or operator" as: "(i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar reasons to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand[76]. Similarly, "person" includes an "Individual, firm, corporation, association, partnership … commercial entity"[77].

Pursuant to CERCLA, the government can compel potentially responsible parties (PRPs)[78] to investigate and remediate contaminated sites, or it may elect to clean up the site and then sue the PRPs for reimbursement of its response costs[79]. Any parties sued by the government are generally jointly and severally liable for the response costs, subject to the apportionment or contribution claims brought against other PRPs[80].

[72] 11 U.S.C. §§ 101-1532.
[73] 42 U.S.C. §§ 9601-9675.
[74] 42 U.S.C. §§ 6901-6992k.
[75] 42 U.S.C. § 9601(20)(A).
[76] 42 U.S.C. § 9601(20)(A).
[77] *Id.* at § 9601.
[78] The United States Environmental Protection Agency (EPA) defines PRP as "[a]n individual or company (e.g., an owner, operator, transporter, or generator of hazardous waste) that is potentially responsible for the contamination problems at a Superfund site. Whenever possible, EPA requires PRPs to clean up hazardous waste sites they have contaminated." United States Environmental Protection Agency, http://www.epa.gov/superfund/programs/reforms/glossary.htm#p (last visited July 17, 2014).
[79] Milissa A. Murray & Sandra Franco, Environmental Aspects of Real Estate and Commercial Transactions (James B. Witkin ed., 4th ed. 2011) (citing 42 U.S.C. § 9606).
[80] *Id.*

3. Can insolvency practitioners be personally liable for a failure to comply with clean-up, remedial orders or preventative measures?

Federal bankruptcy law does not specifically exempt insolvency practitioners from liabilities associated with the failure to comply with clean up, remedial orders or preventative measures to the extent such individuals meet the requirements set forth below. Indeed, because CERCLA defines "person" to include an "individual, firm, corporation, association, partnership … commercial entity…[81]" state and federal agencies have pursued environmental liability claims against parent corporations and individuals, even where no direct control over the subsidiary exists and without first piercing the corporate veil. A number of courts have held that parent corporations and "corporate officers may be individually liable for hazardous waste clean-up under CERCLA … without first piercing the corporate veil" and without direct participation in the operations of the polluting entity[82]. However, the Supreme Court provided some clarity around this point in *United States v. Bestfoods*, where the Court recognised the sanctity of respecting corporate formalities, and then required the piercing of the corporate veil before derivative liability of a parent corporation could attach[83].

In relation to direct liability, however, it is not enough that a corporate defendant actively participated in and exercised control over the general affairs of the subsidiary for liability to attach[84]. If a corporate parent exercised control over the regulation of the polluting facility itself, it may be held directly liable in its own right as an operator[85]. To be directly liable, the corporate parent must "manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations[86]".

Bestfoods did not specifically address individual liability under CERCLA, which left the courts below the task of creating their own standards to address direct liability of individual corporate officers, with somewhat differing results. The United States Court of Appeals for the Fourth Circuit held that operator liability may be imposed where the party merely had the *authority to control* the facility[87]. Therefore, where the individual possessed the authority to abate the damage caused by the disposal of the hazardous substance, but declined to exercise such authority, liability under CERCLA can attach to that individual[88].

The United States Court of Appeals for the Sixth Circuit (Sixth Circuit), on the other hand, has held that "an officer [must] be *actively involved* in the arrangements for disposal before individual liability may be imposed[89]". Therefore, the Sixth Circuit held that the individual shareholder "could only be liable if Ohio law permitted piercing the corporate veil or if he had 'intimate participation' in the arrangement for disposal[90]". Similarly, the United States Court of Appeals for the Third Circuit (Third Circuit) and United States Court of Appeals for the Seventh Circuit (Seventh Circuit) adopted a standard requiring that the individual have "actual participation and control" over the corporation's decisions relating to the disposal of the waste[91]. In *Arst v. Pipefitters Welfare Education Fund*, the Seventh Circuit held a corporation's president and vice president personally liable where those individuals exerted direct management control over the handling of PCB - filled transformer and directed and controlled the employee who cut the transformer open and spilled the hazardous materials onto the ground[92].

To the extent that an insolvency practitioner is both a corporate officer of the debtor and was actively involved in or had the authority to control the arrangement for disposal of the hazardous material, that insolvency practitioner could be held personally liable for those actions under the standards outlined above. For example, a court-appointed trustee, a chief restructuring officer or similar appointee by the Bankruptcy Court could face potential individual liability if these individuals actively participated in the contamination. Without a practitioner’s role in actively

[81] *Id.* at § 9601.
[82] *Joslyn Corp. v. T.L. James & Co., Inc.*, 696 F.Supp. 222, (W.D. La. 1988) (citing *State of New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985); *United States v. Ward*, 618 F.Supp. 884 (F.D. N.C. 1985); *United States v. Conservation Chemical Co.*, 619 F.Supp. 162 (W.D. Mo. 1985); *United States v. Mottolo*, 605 F.Supp. 898 (D.N.H. 1985() (other citations omitted).
[83] *United States v. Bestfoods*, 524 U.S. 51 (1998).
[84] *Id.* at 67-68.
[85] *Id.*
[86] *Id.* at 66-67.
[87] *See Nurad, Inc. v. William E. Hooper & Sons Co.*, 966 F.2d 837 (4th Cir. 1992).
[88] *Id.* at 842.
[89] *Carter Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840, 846-47 (6th Cir. 1999) (emphasis added).
[90] *Aero-Motive Co. v. Becker*, No. 1:99-CV-384, 2001 WL 1699194 at *4 (W.D. Mich., Dec. 6, 2001) (quoting *Carter Jones*, 166 F.3d at 846).
[91] *Tonolli Corp.*, 4 F.3d at 1222.
[92] *Sidney S. Arst v. Pipefitters Welfare Educ. Fund*, 25 F.3d 417 (7th Cir. 1994)

participating or controlling the acts that led to the contamination, however, these individuals are unlikely to face any individual liability. Accordingly, under any of the various standards, it is clear that direct liability of individual corporate officers of the debtor, whether or not such officer is also an insolvency practitioner, is an available remedy to the EPA under CERCLA to repair the environmental damage caused by the debtor.

4. Can the government recover the costs of clean-up or remediation of land from the insolvent company? Do these costs receive priority?

Environmental claims in bankruptcy include both statutory claims for remediation of environmentally contaminated property under federal law, such as CERCLA, and state environmental statutes. Additional liabilities can be imposed pursuant to common law property damage claims and from contract obligations for sales of property or assets of a company with environmental liabilities attached to those sales. How these claims are ultimately treated in a bankruptcy proceeding, however, depends, in part, on when such claims arise.

The Bankruptcy Code identifies and collates all claims and interests owed by the debtor prior to the petition date. The Bankruptcy Code broadly defines the term "claim" as "(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured[93]". Whether or not such claims are paid in full depends on the relative priority of the individual claim (as provided by the Bankruptcy Code[94] and determined by the Bankruptcy Court), and the corresponding financial condition of the debtor[95].

The Bankruptcy Code affords the highest priority to administrative claims[96], which include most post-petition dealings with the debtor, as well as liabilities of the debtor incurred during the operation of the bankruptcy case prior to confirmation. Next in priority are those pre-petition claims held by unsecured creditors (with varying levels of priority depending on the nature of the unsecured claim), followed last by pre-petition claims held by equity interests[97].

Environmental claims can obtain priority administrative status depending on the timing and nature of the claims. Claims for CERCLA response costs incurred post-petition, for example, even those incurred as a result of the debtor's pre-petition activities, may be entitled to administrative priority to the extent such costs were made necessary by conditions that posed imminent and identifiable harm to the environment and public health[98]. The EPA and various state agencies also hold the ability, under certain circumstances, to transform their unsecured claim for remediation costs to a secured claim. For example, under CERCLA, the EPA may file a lien against the contaminated property for removal or remediation costs[99]. While the lien automatically attaches against the debtor's contaminated property once a PRP has been notified or upon the incurrence of any removal or remediation costs, the lien is not perfected (and therefore potentially subject to subsequent avoidance in the bankruptcy proceedings) until the EPA files the lien in the applicable state's real property records[100].

4.1 Discharge of environmental claims

In the chapter 11 reorganisation context, the debtor may discharge certain claims that arose prior to confirmation of the debtor's plan of reorganisation, but after the filing of the chapter 11 case[101]. A chapter 7 proceeding, on the other hand, only allows the debtor to discharge certain claims that arose pre-petition[102].

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[93] 11 U.S.C. § 101(5).
[94] *See* 11 U.S.C. § 507.
[95] Ultimate recovery on a particular claim also greatly depends upon whether the debtor continues to operate in the confines of a chapter 11 proceeding, or whether the debtor has ceased operations and faces liquidation pursuant to a chapter 7 proceeding.
[96] *See id.*; 11 U.S.C. § 726.
[97] *See id.*
[98] Mary W. Koks, Environmental Claims in Bankruptcy, Mealey's Environmental Litigation Conference at 22 (April 2005) (citing *In re Smith-Douglass, Inc.*, 856 F.2d 12 (4th Cir. 1988); *In re Nat'l Gypsum Co.*, 139 B.R. 397 (Bankr. N.D. Tex. 1992); *Matter of Kent Holland Die Casting & Plating, Inc.*, 125 B.R. 493 (Bankr. W.D. Mich. 1991)).
[99] 42 U.S.C. § 9607(1).
[100] *See id.* at §9607(1)(3).
[101] *See* 11 U.S.C. § 1141(d)(1)(A).
[102] *See* 11 U.S.C. § 727(b).

In *United States v. LTV Corp. (In re Chateaugay Corp.)* (Chateaugay), the United States Court of Appeals for the Second Circuit (Second Circuit) held that response costs claimed by the EPA were dischargeable where the release of the hazard giving rise to such claims occurred pre-petition:

> *"The relationship between environmental regulating agencies and those subject to regulation provides sufficient "contemplation" of contingencies to bring most ultimately maturing payment obligations based on pre-petition conduct within the definition of "claims". True, EPA does not yet know the full extent of the hazardous waste removal costs that it may one day incur and seek to impose on LTV, and it does not yet even know the location of all sites at which such wastes may yet be found. But the location of these sites, the determination of their coverage by CERCLA, and the incurring of response costs by EPA are all steps that may fairly be viewed, in the regulatory context, as rendering EPA's claim "contingent," rather than as placing it outside the Code's definition of "claim*[103]".

Chateaugay has been criticised, however, for using a definition of claim that encompassed costs that could not fairly have been contemplated by the EPA or the debtor pre-petition[104]. To correct these perceived shortcomings, courts have developed certain factors to be considered when determining whether to limit the discharge of claims resulting from pre-petition conduct to situations in which response costs had been "fairly contemplated" by the debtor and the creditor on or before the petition date, including knowledge by the parties of a site in which a PRP may be liable, listing of the site on the National Priorities List, notification by the EPA of a PRP liability, commencement of an investigation and cleanup activities, and incurrence of response costs[105].

4.2 Injunctions and other remediation orders in bankruptcy

Whether or not an injunction issued by the EPA or other state agency compelling the debtor to clean up the pollution is enforceable in bankruptcy depends upon whether the injunction issued can be converted to a money judgment. If not, courts hold that the injunction is not a "right to payment" within the statutory definition of "claim" under existing case law and therefore, regardless of the timing of the claim, is not dischargeable[106]. Accordingly, at least in the Second Circuit, these claims will survive against the debtor or reorganised debtor as if the bankruptcy had not occurred[107]. On the other hand, where the environmental liability can be converted to a money judgment or some other form of a right to payment, it is properly classified as a "claim" in the bankruptcy proceeding and dischargeable[108]. While most injunctions fall on the "non-claim" side of the line, most clean-up orders also require the removal of contaminated soil or cessation of activities causing such contamination[109]. Where the agency has the option and ability to do the remediation work itself and subsequently sue the corporation for such costs, those obligations will constitute a claim that is subject to discharge in bankruptcy[110].

Not all judicial circuits in the United States (being divided into different geographical areas) apply this same approach, however. In the Sixth Circuit, unless the debtor can comply with the injunction without expending any funds, such an injunction will give rise to a dischargeable claim[111]. Conversely, in the Third Circuit, an injunction issued to prevent future harm does not give rise to a dischargeable claim even in the event that such injunction requires the debtor to expend funds to comply with the injunction[112].

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[103] *United States v. LTV Corp. (In re Chateaugay Corp.),* 944 F.2d 997 (2nd Cir. 1991).
[104] Milissa A. Murray & Sandra Franco, Environmental Aspects of Real Estate and Commercial Transactions (James B. Witkin ed., 4th ed. 2011) (citing *In re Nat'l Gypsum Co.*, 139 B.R. 397, 407 (Bankr. N.D. Tex. 1992) ("Despite the distinction drawn in Chateaugay … under the terms of CERCLA, there exists no meaningful distinction between debtor's conduct and the release or threatened release resulting from this conduct. The only meaningful distinction that can be made regarding CERCLA claims in bankruptcy is one that distinguishes between costs associated with pre-petition conduct resulting in a release or threat of release that could have been "fairly" contemplated* by the parties; and those that could not have been "fairly" contemplated by the parties ".) footnotes omitted)).
[105] *Id.*
[106] Milissa A. Murray & Sandra Franco, Environmental Aspects of Real Estate and Commercial Transactions (James B. Witkin ed., 4th ed. 2011) (citing 42 U.S.C. § 9606); *Ohio v. Kovacs*, 469 U.S. 274 (1985); *In re Chateaugay Corp,* 944 F.2d at 1005.
[107] *Id.*
[108] *Id.*
[109] *In re Chateaugay Corp.*, 944 F.2d at 1008.
[110] *Id.*
[111] *United States v. Whizco, Inc.*, 841 F.2d 147, 150-51 (6th Cir. 1988) ("to the extent that fulfilling his obligation to reclaim the site would force the defendant to spend money, the obligation was a liability on a claim as defined by the Bankruptcy Code … to the extent that the defendant can comply with the Secretary's orders without spending any money his bankruptcy did not discharge his obligation to comply with the orders … to the extent that he can personally act he is not discharged.")
[112] *Penn Terra Ltd. v. Dept. of Envtl. Res.*, 733 F.2d 267, 269 (3d Cir. 1984).

Importantly, even if no injunction exists, the debtor must nonetheless continue to observe and comply with all environmental laws of the jurisdiction in which the property is situated during the pendency of the bankruptcy case, as if no bankruptcy had occurred[113].

[113] 28 U.S.C. § 959(b); *Matter of H.L.S. Energy Co., Inc.*, 151 F.3d 434, 438 (5th Cir. 1998).

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