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Editors' Column

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Welcome to the latest edition of INSOL World. This edition focusses on developments in the Asia Pacific region.

Key articles in this issue include an excellent summary of the challenges faced in the restructuring of the Noble Group in Hong Kong by Neil McDonald and Robert Sandes of Kirkland & Ellis and an informative piece by Jianli Song, Senior Judge of The Supreme People's Court of China, who has written an insightful piece on *Cross-Border Insolvency: A Review from Chinese Courts,* which discusses the significance of cross-border insolvency in China and the principles applied by the Chinese Court in dealing with cross-border cases.

We also take a look at the changes to the restructuring and insolvency framework in Malaysia, focussing on the introduction of corporate rescue mechanisms including corporate voluntary arrangement and judicial management.

The licencing and regulation of insolvency practitioners is a topic always near and dear to our hearts. Patrick Ang and Chew Xiang of Rajah & Tann Singapore share their perspective on new rules coming into effect in Singapore; Scott Atkins (*Fellow, INSOL International*) and Jonathon Turner of Norton Rose Fulbright Australia outline some recent experience with the registration of foreign insolvency practitioners in Australia and Scott Abel (*Fellow, INSOL International*) of Buddle Findlay, gives us an update on the status of what has been a long process to introduce a licencing framework in New Zealand.

Debby Sulaiman of Hiswara Bunjamin & Tandjung in association with Herbert Smith Freehills gives us an update on the state of Bankruptcy Law reform in Indonesia and current experience with the Indonesian bankruptcy and PKPU processes.

Looking at specialist areas of practice, we have an update on recent enhancement to trade creditor protection in Japan from Kanako Watanabe and Taro Awataguchi of Anderson Mori & Tomotsune, and an examination of the interplay between insolvency law and admiralty law in Singapore from Teri Cheng and Benjamin Foo of Drew & Napier LLC.

Australian developments feature heavily in this edition with a contribution from Orla McCoy (*Fellow, INSOL International*) and Mikhail Glavac of Clayton Utz looking at recent reforms which expand upon a liquidator's right to assign causes of action and some creative approaches to selling assets without secured creditor consent in the recent Caledon Coal case from Ben Campbell, Stephen Longley and Grant Sparks of PwC.

Australia's very laws permitting the compulsory transfer of shares as part of a restructure are becoming increasingly used in restructuring cases. Emma Ffrench-Mullen and Genevieve Sexton of Arnold Bloch Leibler examine their operation and identify some inefficiencies and improvements which should be looked at in future reforms.

In other articles, Alex Hall and Mungo Lowe (*Fellow, INSOL International*) of Maples Group, BVI / UK, report on the first appointment of "light touch" provisional liquidators in the BVI, giving the BVI restructuring tools similar to those available in a number of other offshore jurisdictions including Bermuda and the Cayman Islands.

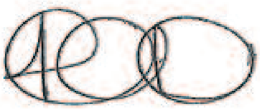
We round out the issue with an article exploring how issues that arise in Islamic financial restructurings are being dealt with in the Courts from Dr Omar Salah of De Brauw Blackstone Westbroek N.V, The Netherlands and an account by Nicholas Fox (*Fellow, INSOL International*), Peter Hayden and Christopher Levers of Mourant of how the Cayman Courts viewed the question of deferred creditors entitlement to statutory interest in a liquidation in the Maddoff case.

I would like to thank all our contributors who continue to provide such high-quality content, and to particularly acknowledge the significant contributions from our Fellows in this issue.

I would also like to thank Nick Segal of Erskine Chambers, UK and Judge of Cayman Grand Court, Cayman Islands, whose second term as the Co-Editor ended in December 2018, for his dedication and hard work. Our thanks also to Simone Fitzcharles, The Bahamas; Jeremy Garood, Carey Olsen, Channel Islands and Bob Rajan, Alvarez & Marsal, Germany, who we hope have enjoyed being part of the Editorial Board.

I welcome Mark Craggs, *Fellow, INSOL International,* Norton Rose Fulbright, UK as a new Co-Editor, as well as Hadley Chilton, FFP, BVI; Todd McGuffin, Babbé, Guernsey; Meiyen Tan, Oon & Bazul LLP, Singapore and Reinout Vriesendorp, De Brauw Blackstone Westboek / Leiden University, The Netherlands, who have joined the Editorial Board in January and have already been busy commissioning articles for this and forthcoming issues.

Finally, huge thanks to Mourant for their continued support as a sponsor of INSOL World, and David Rubin & Partners for sponsoring electronic news alerts, which keep members up to date in between the issues of INSOL World.



Peter Gothard

President's Column

By Adam Harris
Bowmans
South Africa

My research tells me that a typical internal combustion engine motor car has about 10,000 moving parts. I can't say that I have counted the parts in my own car, or that the figure particularly concerns me, generally speaking, as I expect all the parts to move towards the same place at the same time.

I have not counted INSOL International's moving parts either. What I can say is that there are many and varied work streams which are moving concurrently, and all are focused on getting the organisation to a predetermined destination.

The destination is of course already planned, and how we will get there is described in our key strategies as articulated in our Taskforce 2021 strategic plan. Remember that our vision is to be the global Association for restructuring and insolvency professionals operating in every country, influencing global restructuring and insolvency practice and policy, supported by a membership which shares a global perspective. That is of course a tall order, and requires a focus upon the many, diverse aspects of what we do.

I have been warned that the only word starting with "Br.." which I am entitled to use with impunity in this column is "Broughton", referring to our former CEO Claire Broughton, who has recently retired after decades at the helm. Claire has left an amazing legacy for which we and the global Insolvency and Restructuring space are truly indebted to her. The structure of the organisation is sound. We are well-regarded. We produce outstanding technical product. We have excellent people working hard to keep all of the parts moving. Our finances are in good shape and, with the continuation of careful management, this will enable us to implement our strategy and to achieve our vision. Started from small beginnings, Claire has been the driving force of the organisation for so long, and has allowed us to achieve so much.

Apart from our staff, we are served by a dynamic group of volunteers. Think of the Executive Committee and our Board of Directors. Think of the main organising committees, technical committees, fundraisers and finance people who serve as volunteers for our conferences, seminars and other programmes. That is apart from the panel chairs and speakers. We have people who write articles and submit papers, and who attend meetings and projects on our behalf. This is not with a view to personal gain, or even to being lauded by the profession. It is in the interests of making a difference, and contributing to achieving the elusive goal of international best practice.

I was saddened to hear of the passing of Selinda Melnick. We are featuring an obituary in this publication. One of my favourite memories of Selinda was made at the Dubai conference which was held at a resort with many waterways. Walking to my room one day one of the small boats that pottered across the canal network came towards me down the waterway. Selinda, the only passenger, was seated at the back of the boat and waved in regal fashion to her subjects on the quayside. A small wave, befitting of royalty. Like Cleopatra, we commented. It was so appropriate. She was royalty in so many aspects of her professional and private life, and we will miss her greatly.

By the time this publication reaches you I will be completing my term as President of INSOL International. I am so confident that the organisation is on the right track. We are not simply blazing across the countryside. All the roads which we travel have been planned, mapped out, debated and decided upon as being appropriate to enable us to achieve our vision and purpose.

It has been a privilege to have served the organisation for the last decade or so – on the Board, the Executive Committee, and as Vice-President and President. I have met and worked with truly remarkable people, and stand in awe of what they have been prepared to contribute to the organisation. I must thank this dedicated body of people whose persistence and dedication have allowed the organisation to achieve so much. Going forward, we are privileged to have outstanding potential leaders lined up, and my best wishes go to Julie Hertzberg and Scott Atkins, who will be taking over the roles of President and Vice-President respectively. These appointments were recommended by the Nominating Committee and were unanimously agreed to by the Board. Outstanding, quality leaders who will take the organisation forward.

I look forward to seeing you all in Singapore!

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The Ability of Insolvency Practitioners to Operate in Foreign Jurisdictions

By Scott Atkins,
Fellow, INSOL International
and
Jonathon Turner
Norton Rose Fulbright
Australia

The publication and promotion of the *UNCITRAL Model Law on Cross-Border Insolvency* (1997) (Model Law) and its subsequent adoption in 46 jurisdictions has seen a growing emphasis on harmonisation, cooperation and coordination in the international arena.

In contrast, the licensing and regulation of insolvency practitioners has remained founded upon domestic qualifications and experience and residency. This article examines the ability of insolvency practitioners to practice in foreign jurisdictions in addition to their home jurisdiction by way of comparing a number of different jurisdictions. Notwithstanding the impetus for further harmonisation and cooperation between jurisdictions, the ability of insolvency practitioners to practice in multiple jurisdictions and/or to utilise their qualifications in a foreign jurisdiction remains limited.

Australia

The Australian regulatory landscape in respect of the registration of insolvency practitioners has undergone significant change pursuant to the enactment of the *Insolvency Law Reform Act* 2016, which amended the *Corporations Act* 2001 (Cth) (Corporations Act) by inserting the Insolvency Practice Schedule (Corporations) into Schedule 2 (IPS).

Under the Corporations Act, only a registered liquidator can become a liquidator, provisional liquidator, receiver or the administrator of a company or of a deed of company arrangement.[1] Two alternative pathways are provided for registration as a liquidator.

Firstly, subsection 20-20(4) of the IPS provides that an applicant must be registered as a liquidator if they meet, in addition to other matters, the prescribed conditions in respect of qualifications, experience and abilities and they are a fit and proper person. The prescribed standard of qualifications, experience, knowledge and abilities is set out in the *Insolvency Practice Rules (Corporations)* 2016. One of the conditions for mandatory registration, as provided for in subsection 20-20(4)(i) of the IPS, is that the individual is resident in Australia or in another prescribed country. At the time of writing, there are no other prescribed countries. Accordingly, a foreign practitioner who was not resident in Australia would be unable to satisfy this criteria for mandatory registration. It is also relevant to note that the experience component specifically requires exposure to Australian bankruptcy legislation, which may be difficult to satisfy for a foreign practitioner.

Secondly, subsection 20-20(5) of the IPS provides an alternative pathway to registration in circumstances where the committee is not satisfied of certain matters, including the residency of the applicant. Under this provision, the committee may still recommend registration provided they are satisfied the applicant would be suitable to be registered as a liquidator if the applicant complied with conditions specified by the committee. In other words, a foreign practitioner who did not reside in Australia but who could satisfy the other requirements in respect of knowledge, experience and fitness could be registered as a liquidator, subject to conditions.

These provisions were recently considered in a case before the Administrative Appeals Tribunal concerning the application of an insolvency practitioner resident in Singapore.[2] It was submitted on behalf of the committee that registration of a non-resident created logistical difficulties and insurmountable concerns as to the ability of the regulator, the Australian Securities and Investments Commission (ASIC), to effectively supervise and regulate that practitioner. Ultimately, the Tribunal held that the position advanced by the committee would effectively render subsection 20-20(5) redundant. To accept that there was no condition sufficient to deal with Mr Mansfield's status as a non-resident would contradict the express terms of the legislation. Ultimately, the Tribunal imposed conditions on the registration intended to secure the availability and presence of Mr Mansfield within the jurisdiction.

The regime also enables ASIC to issue a show cause notice, which may lead to registration being suspended or cancelled, in the event that a liquidator is not resident in Australia or the liquidator no longer has the qualifications,

1 See section 532(1) and s 1-5 of the IPS.
2 See *Mansfield and A committee convened under section 20-10 of the Insolvency Practice Schedule (Corporations)* [2018] AATA 1510.

experience, knowledge and abilities prescribed.[3] Guidance provided by ASIC confirms that it will consider a practitioner not to be resident if the person has been living outside the jurisdiction for a period of more than 12 months at a time.[4] In practical terms, whether or not ASIC is minded to issue a show cause notice is likely to be dependant on the specific situation of the insolvency practitioner and the extent of the connection with Australia and the currency of that practitioner's Australian expertise. This power has the dual effect of restricting the ability of local practitioners to maintain their registration whilst working and residing in foreign jurisdictions and limiting the ability of a foreign practitioner maintaining Australian registration in the event they are a non-resident.

Singapore

Singapore's recent changes to its insolvency and restructuring regime have been widely reported and attracted significant interest. The *Insolvency, Restructuring and Dissolution Act 2018* (IRD), which was assented to on 31 October 2018, provides for minimum qualifications for eligibility to hold a licence, the framework for the grant and renewal of licenses, and a regime in respect of the control and discipline of insolvency practitioners.[5] The new regulatory regime will be administered by the Insolvency and Public Trustee's Office under the Ministry of Law.[6]

Pursuant to the new regime, an insolvency practitioner will not be able to act as a liquidator or provisional liquidator, judicial manager or receiver of a corporation unless licensed.[7] Only a 'qualified person' may hold an insolvency practitioner's licence with that term being defined as any person who: (i) is a solicitor; (ii) is a public accountant within the meaning of the *Accountants Act*; (iii) is a chartered accountant within the meaning of the *Singapore Accountancy Commission Act*; or (iv) possesses such other qualifications as the Minister may prescribe by order in the Gazette.[8] Qualifications obtained in a foreign jurisdiction may be satisfactory to fulfil the requirements provided for in these other acts thereby allowing a foreign practitioner to satisfy this definition provided that they are also able to fulfil other criteria such as experience and local law knowledge.

The proper licensing officer may refuse to grant the licence in the event the applicant is not a fit and proper person or if it is not in the public interest to grant the licence. In determining whether an applicant is a fit and proper person, any matter the officer deems relevant may be considered.[9] Importantly, there is no express residency requirement.

Hong Kong

A Court when making a winding up order may appoint a liquidator or liquidators in accordance with sections 193 and 194 of the *Companies (Winding Up and Miscellaneous Provisions) Ordinance (CWUMPO)*. Under the CWUMPO, a Court may appoint either the Official Receiver or any other fit person to be the provisional liquidator. In addition, where the Official Receiver is appointed as provisional liquidator or liquidator, it may appoint an insolvency practitioner to act in the Official Receiver's place.

The Official Receiver supervises and exercises control over liquidators[10] and maintains two contracting out schemes for compulsory winding-up cases. The first scheme is for matters concerning summary winding up cases with estimated realisable assets of not more than HK$200,000. The second scheme is for non-summary cases with estimated realisable assets exceeding HK$200,000 (Scheme A).

The requirements for insolvency practitioners to be eligible to be appointed pursuant to these schemes are provided for in rules published by the Official Receiver.[11] For example, to be eligible to participate in Scheme A, firms or appointment takers must be admitted to the Administrative Panel of Insolvency Practitioners for Court Winding-Up. Paragraph 6 of the Scheme A rules requires individuals to be a member of the Hong Kong Institute of Certified Public Accountants (HKICPA)[12], a rank of manager or above, and complete a minimum number of hours of relevant work. However, an alternative pathway to authorisation is provided in paragraph 7 in the event that this criteria cannot be satisfied. In such a case, the relevance of other professional qualifications, including overseas insolvency work, may be considered under exceptional circumstances and with strong justification. This provides an avenue for foreign insolvency practitioners although the use of this provision is likely to be relatively limited.

United Kingdom

The registration of insolvency practitioners is addressed by Part XIII of the *Insolvency Act* 1986 (UK) (IA). Section 390 of the IA identifies the qualifications required to act as an insolvency practitioner, including that the person be authorised by or a member of a relevant body (e.g. the Insolvency Practitioners Association). An applicant is also required to be a fit and proper person and meet prescribed requirements in respect of education and experience.[13]

Further detail in relation to the requirements as to education, training and experience and matters relevant to the 'fit and proper' assessment are provided for in the *Insolvency Practitioners Regulations* 2005 (Regulations).[14] Section 7(2) of the Regulations provides that an applicant must have passed the Joint Insolvency Examination or obtained a qualification in a country or territory outside of Great Britain which indicates the applicant has the knowledge and

3 See ss 40-40(1)(a) and (n) of the IPS.
4 See ASIC Regulatory Guide 258, *Registered liquidators: Registration, disciplinary action and insurance requirements*, RG 258.155.
5 Ministry of Law, Press Release, 11 September 2018, *New Omnibus Bill Introduced to Update and Strengthen Singapore's Insolvency and Debt Restructuring Laws*, [11].
6 Ibid at [12].
7 Section 48(1)(a) of IRD.
8 Section 50 of IRD.
9 Section 51(8) of IRD.
10 Section 204(1) of the CWUMPO.
11 For example, see the *Rules for Admission of Firms and Persons for Taking-up Appointment of Liquidators or Special Managers in Non-Summary Court Winding Up Cases*, available at https://www.oro.gov.hk/eng/publications/pdf/Panel%20A%20Scheme%20Rules.pdf
12 To become a member of the HKICPA, an individual must fulfil the qualification requirements for registration as a certified public accountant. Section 24 of the *Professional Accountants Ordinance* outlines the relevant requirements and provides for eligibility of members of other accountancy bodies in certain circumstances.
13 See section 391(2) of the IA.
14 See regulations 6 and 7 of the Regulations.

competence that is attested by a pass in that examination. This represents an express intention to accept practitioners that have qualifications obtained in foreign jurisdictions. Similarly, the requirements in respect of experience specifically acknowledge that appointments or experience obtained outside of the jurisdiction are acceptable provided that a minimum of 1,400 hours in the preceding two year period relates to cases under the law of any part of the United Kingdom.[15] In addition, specific provisions also apply in respect of insolvency practitioners already practising in the European Economic Area and Switzerland and who are nationals of those states.

Once registered, an authorisation continues for a maximum of three years[16] and the relevant authorising body must renew the registration unless the insolvency practitioner is unable to meet the fit and proper person requirements, unable to meet the continuing education and experience requirements or has provided inaccurate or misleading information. Importantly, there is no requirement that the practitioner remains resident within the jurisdiction and as such they are able, subject to foreign registration requirements, to avail themselves of opportunities to practice in other jurisdictions.

Canada

The Superintendent of Bankruptcy has the authority to grant licenses to licensed insolvency trustees who meet the requirements to be licensed provided for in *Directive No. 13R6, Trustee Licensing*. In addition to being of good character and reputation, insolvency practitioners are required to successfully complete the Chartered Insolvency and Restructuring Professional (CIRP) Qualification Program (CQP), the CIRP National Insolvency Exam (NIE), the Insolvency Counsellor's Qualification Course and pass an oral board of examination.

Under the terms of a Memorandum of Understanding signed October 2008 (Memorandum), between the Superintendent and the Canadian Association of Insolvency and Restructuring Professionals (CAIRP), CAIRP assumed sole responsibility for the CQP.

In order to be admitted to the CQP, CAIRP requires applicants to be ordinarily resident in Canada and fulfil relevant experience and qualification requirements. However, the Memorandum provides for an exemption to applicants who, on the recommendation of the committee, possess the relevant experience and knowledge. Any such applicant may be exempted from the CQP and afforded one opportunity to pass the NIE. In the event that they fail the NIE, they must complete the CQP before any subsequent attempt. In this respect, there is an avenue for foreign practitioners to seek to circumvent the residency requirement should they be able to satisfy the committee they have the relevant knowledge and experience.

Cayman Islands and British Virgin Islands

Pursuant to regulation 4 of the *Insolvency Practitioners' Regulations 2018* (IP Regulations), an insolvency practitioner is qualified to accept appointment by the Court as an official liquidator of any company if the person is licensed to act as an insolvency practitioner in a relevant country or is a qualified professional accountant by an approved institute and has obtained certain minimum standards of experience.[17]

Whilst the IP Regulations expressly allow for licensing of practitioners from relevant countries, they also provide that a practitioner shall not be appointed unless resident in the Cayman Islands and their firm and/or company holds a trade and business licence to carry on that business.[18] Accordingly, for a foreign practitioner to accept a sole appointment they would need to be resident in the Cayman Islands. However, the IP Regulations do provide for a non-resident foreign practitioner to be appointed jointly with a resident practitioner provided they satisfy insurance and independence requirements.[19]

In the British Virgin Islands, the Insolvency Services Division is responsible for the licensing and supervision of insolvency practitioners. The relevant rules allow for an overseas insolvency practitioner to be licensed, subject to satisfaction of the qualification and experience requirements, provided they are resident in BVI.[20] However, similar to the position in the Cayman Islands, there are provisions to enable an overseas insolvency practitioner to be appointed jointly with a BVI licensed insolvency practitioner.[21] In the BVI, foreign practitioners are required to obtain approval from the Financial Services Commission to accept a joint appointment.

Conclusion

The comparison between the regimes identified above demonstrates that, in contrast to the movement towards increased cooperation between jurisdictions and the harmonisation of insolvency regimes pursuant to the Model Law, domestic regimes in respect of the licensing and registration of insolvency practitioners remain fragmented and generally impede the ability of practitioners to utilise their skill and experience in foreign jurisdictions. This is primarily due to the importance given to residency and local qualifications and experience. Whilst these factors are naturally relevant, the increasing prominence of insolvencies of a cross-border nature warrant examination of the benefits of attracting and utilising the skills and experience of insolvency practitioners from foreign jurisdictions. There is a clear opportunity for regulators globally to debate the relative merits of a common base-level license or passport which permits practitioners to move between jurisdictions without unreasonable impediment. An early step toward this outcome is INSOL International's *Ethical Principles for Insolvency Practitioner* (Principles) published in October 2018 and developed as part of INSOL International's Taskforce Initiative Toward 2021. The concept behind the Principles being to provide a guide to best practice and minimum behavioural standards while allowing for the differing nature of legislation and insolvency practice in different jurisdictions.

15 Ibid at 7(3), (4) and (5).
16 Ibid at 10.
17 The relevant countries prescribed by the Regulations are England and Wales, Scotland, Northern Ireland, the Republic of Ireland, Australia, New Zealand and Canada.
18 See regulation 5 of the IP Regulations.
19 Ibid at 8 and O. 5, r. 1(3) of the *Companies Winding Up Rules* 2018.
20 See section 476(1)(a)(i) of the *Insolvency Act*, 2003.
21 Ibid at section 483.

Recent Enhancement in Protection of Trade Creditor Claims in Japan – Amendments to the Industrial Competitive Enhancement Act

By Kanako Watanabe and Taro Awataguchi
Anderson Mori & Tomotsune
Japan

The Industrial Competitive Enhancement Act (the "Act") was amended with effect from July 9, 2018 to enhance the protection available to trade creditor claims in judicial insolvency proceedings that are commenced following the failure of a Turnaround Alternate Dispute Resolution (ADR) (as defined herein), an out-of-court workout scheme available in Japan. This article outlines some of the key amendments to the Act.

Out-of-court workout schemes in Japan

In recent years, out-of-court workouts have gained in popularity in Japan compared to judicial insolvency proceedings like civil rehabilitation and corporate reorganization proceedings. There are several out-of-court workout schemes available in Japan, including (a) the turnaround ADR, the process of which is supervised by mediators ("Turnaround ADR"), (b) the scheme administered by the REVIC (a state-owned organization that facilitates workouts through coordination of lender activities and provision of financing to debtors), and (c) the scheme administered by the SME (Small & Medium Enterprises) Rehabilitation Support Association, a state-owned organization that facilitates workouts by advising SME debtors of their restructuring options and helping them with restructuring plans, among others.

Need for protection of trade creditor claims in judicial insolvency proceedings following failure of out-of-court workout

Under out-of-court workouts (including Turnaround ADRs), debtor companies and creditors (comprising banks and other financial creditors in most cases) reach agreement on a plan of reorganization under which debt repayment is rescheduled or discharged. In general, trade claim creditors are not involved in out-of-court workouts, which results in the value of a debtor's business being sustained during such workouts.

To get a reorganization plan approved in an out-of-court workout, a debtor company must obtain unanimous approval for the plan from the creditors involved in the plan. As this requirement may be difficult to surmount in some cases, there have been suggestions of lowering this standard. The most noteworthy alternative that has been proposed recently is the lowering of the unanimous approval requirement to a majority approval requirement. Due to a provision in the Constitution of Japan that guarantees property rights as inviolable, this proposal has been shelved for the time being.

Accordingly, an out-of-court workout would be doomed to fail even if only one creditor is against the reorganization plan. In such cases, it is not uncommon for a debtor to file for judicial insolvency proceedings, such as civil rehabilitation or corporate reorganization proceedings. This state of affairs has long been criticized by insolvency professionals for the harm it inflicts on businesses. Many critics argue that implementation of a reorganization plan in a failed workout should be permitted immediately following the relevant judicial insolvency proceedings, if all of the following conditions are met, so as to achieve a successful turnaround within a relatively short period of time:

(a) the reorganization plan conforms to the legal requirements applicable to the relevant judicial insolvency proceedings, such as the Civil Rehabilitation Act or the Corporate Reorganization Act;
(b) approval for the reorganization plan has been obtained from the majority of creditors; and
(c) the debtor has sufficiently adequate cash flow to satisfy the claims of its trade creditors without defaulting on any of its other payment obligations.

For this proposal to work, trade creditor claims have to be appropriately treated. Trade creditor claims are generally irrelevant in out-of-court workouts (including Turnout ADRs), and are usually paid in full in such workouts. However, they stand to be affected in judicial insolvency proceedings following the failure of an out-of-court workout. For this reason, and in order to obtain approval in judicial insolvency proceedings for a plan that is substantively the same as that proposed in the failed out-of-court workout (i.e., a plan that enables full satisfaction of trade creditor claims), the creditors involved in the plan should be the same as those in the failed workout.

Amendments to the Act

Given the background above, the Act was amended with effect from July 9, 2018 to provide special rules for protecting trade creditor claims in civil rehabilitation and corporate reorganization proceedings following the failure of a Turnaround ADR (the "Special Rules"). The Special Rules are intended to apply in tandem with the involvement of the Japan Association of Turnaround Professionals (the "JATP"). In summary, the Special Rules stipulate that if (a) the JATP provides confirmation that (i) the claim of a trade creditor involves a small amount and (ii) settlement of such claim is necessary to avoid significant impairment to the debtor's business ("Confirmation Claim") and (b) civil rehabilitation or corporate reorganization proceedings have been filed or commenced against the debtor following failure of a Turnaround ADR, the court will take the JATP's confirmation into account in determining the extent to which trade creditor claims should be protected. Specifically, the court will take the JATP's confirmation into account:

(i) for purposes of determining whether settlement of the Confirmed Claim is prohibited by a temporary restraining order (in cases where the court wishes to issue a temporary restraining order prohibiting payment of pre-petition debts and disposition of the debtor's assets);
(ii) for purposes of determining whether a Confirmed Claim involves a small-amount and should be settled to avoid significant impairment to the debtor's business (in cases where the debtor has filed a petition for court approval of such settlement); or
(iii) for purposes of determining whether differences between an amended Confirmed Claim and pre-commencement claims would prevent all claims from being treated equally (in cases where a rehabilitation or reorganization plan submitted to the court or approved by creditors contains amendments to the terms of a Confirmed Claim, and such amendments are different from those pertaining to other pre-commencement claims).

The amendments to the Act will result in greater protection of trade creditor claims in judicial insolvency proceedings that follow the failure of a Turnaround ADR. This is expected to contribute to successful turnarounds within relatively shorter time periods after the failure of a Turnaround ADR, and provide more certainty of the protection available to trade creditor claims. The amendments would also facilitate continuation of business dealings between debtors and trade creditors under the same conditions over the course of the Turnaround ADR, and ultimately enable debtors to more easily restructure their businesses.

A Balancing Act: The Interplay between Singapore's Insolvency and Admiralty Regimes

By Teri Cheng and Benjamin Foo
Drew & Napier LLC
Singapore

Shipping companies in distress which are considering the ideal forum for debt restructuring ordinarily have to consider if the debt restructuring regime in a particular jurisdiction would extend to protect their key assets (i.e., the vessels) from being arrested in that jurisdiction and, if possible, elsewhere in the world.

Singapore is an important global hub for the shipping industry. According to the Ministry of Transport, there are over 5,000 maritime companies, including more than 130 international shipping groups having a business presence in Singapore. The shipping industry was one industry that was adversely affected by the collapse in oil prices in 2014. Since then, several international shipping companies have filed for protection under sections 210(10) or 211B of Singapore's Companies Act ("Companies Act"). These include I.M. Skaugen, Nam Cheong Limited and EMAS Offshore Limited, just to name a few.

One of the key contributing factors to a successful restructuring of a shipping company is whether its vessels can continue to operate in the interim period without the risk of a potential arrest while a compromise is being reached or while investors deliberate over whether fresh funds should be injected. Accordingly, it is of utmost importance that the forum in which the restructuring is conducted out of affords a moratorium which is sufficiently broad to prevent vessels, which are the key assets of shipping companies, from being arrested whether in that jurisdiction or abroad.

Despite the experience which Singapore has with the debt restructuring of shipping companies, there is some tension as to whether a section 210(10) or section 211B moratorium (Singapore's debtor-in-possession regime) extends to prevent any *in rem* proceedings brought pursuant to the High Court (Admiralty Jurisdiction) Act ("Admiralty Jurisdiction Act"). Broadly, the purpose of a section 210(10) moratorium is similar to that of a section 211B moratorium, which is to allow the distressed company breathing space to facilitate its restructuring. The existing case law suggests two possible outcomes.

In the first case of *Re TPC Korea* [2010] 2 SLR 617, the applicant, TPC Korea Co Ltd ("TPC Korea"), had applied for rehabilitation in Korea under the Debtor Rehabilitation and Bankruptcy Act (which is analogous to Chapter 11 of the United States Bankruptcy Code) and sought an interim moratorium under section 210(10) of the Companies Act in respect of *inter alia* actions from being commenced against its vessels. TPC Korea had no presence or assets in Singapore other than interests in five vessels which regularly plied Singapore.

The Honourable Judicial Commissioner Phillip Pillai (as he then was) took the view that the Singapore Court had no jurisdiction to grant the section 210(10) moratorium because (a) TPC Korea had no assets in Singapore save for its interests in the five vessels which may occasionally be situated in Singapore; and (b) the effect of allowing the section 210(10) moratorium was to displace the admiralty jurisdiction conferred on the Court by the Admiralty Jurisdiction Act, which was a self-contained admiralty regime which addressed proceedings against any vessels within the Singapore Court's jurisdiction.

In the second and more recent case of *Re Taisoo Suk (as foreign representative of Hanjin Shipping Co Ltd)* [2016] 5 SLR 787, Hanjin Shipping Co Ltd ("Hanjin") had similarly applied for rehabilitation in Korea under the Debtor Rehabilitation and Bankruptcy Act and sought to apply for the Korean rehabilitation procedure to be recognised in Singapore and for a moratorium to be granted in Singapore to assist Hanjin's rehabilitation efforts. Among other things, the moratorium sought extension to cover any enforcement or execution against Hanjin's assets in Singapore, including vessels beneficially owned or chartered by Hanjin and its subsidiaries.

The Honourable Judicial Commissioner Aedit Abdullah (as he then was) departed from Pillai JC's view in *Re TPC Korea* and observed that the Admiralty Jurisdiction Act did not create a self-contained regime which was to be insulated from the general powers of the Court. Abdullah JC added that there was nothing in the Admiralty Jurisdiction Act that expressly separated arrest of ships from being subject to general processes or any existing case law that pointed that way. Abdullah JC accordingly granted Hanjin the moratorium it sought, which extended to prevent the arrest of the vessels which it beneficially owned or chartered.

The upshot of the decisions in *Re TPC Korea* and *Re Taisoo Suk* is that the issue of whether a section 210(10) or section 211B moratorium could extend to prevent an arrest of a vessel in Singapore is open.

In a note dated 20 June 2017 by the then-Senior Minister of State for Law and Finance, Ms Indranee Rajah S.C., she commented that there is currently no carve out for admiralty and maritime claims from the moratorium under Singapore's debtor-in-possession regime. This lends support to Abdullah JC's view in *Re Taisoo Suk* that a moratorium can, in appropriate cases, be extended to prevent the arrest of vessels within the jurisdiction of the Singapore Courts.

While there is much to commend about the position in *Re Taisoo Suk*, and in particular, the usefulness of such an extended moratorium which would give shipping companies the best chance of a successful restructuring, this position has not obtained universal support. The Honourable Justice Belinda Ang (writing extra-judicially) has commented that the moratorium does not apply to *in rem* proceedings against a vessel for several reasons, including that the words "proceedings…against the company" in section 211B do not encompass *in rem* proceedings, which are proceedings against the vessel and not against the company itself (see Her Honour's speech at the Maritime Law Conference 2017 (12 October 2017) at paragraph 41).

To this end, it appears that some kind of middle ground has been reached. The current Senior Minister of State for Law, Mr. Edwin Tong S.C., stated in his speech at the second reading of the new Insolvency, Restructuring and Dissolution Bill ("Insolvency Act") on 1 October 2018, that the Insolvency Act and relevant subsidiary legislation will provide for creditors to be at liberty to file an *in rem* writ against a vessel notwithstanding a section 210(10) or section 211B moratorium to preserve the limitation period. However, this creditor will have to obtain the Court's leave for the claim to proceed further than that.

This could be the happy compromise that is beneficial to both the insolvency and admiralty regimes and it remains to be seen what effect the new legislation will have on a distressed shipping company when it determines the jurisdiction in which to carry out its restructuring.

A New (Flawed) Asset Class in Australian Liquidations?: Assignment of Rights to Sue

By Orla McCoy,
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Australia

One of the recent reforms to Australian insolvency law ostensibly creates new opportunities for liquidators to realise value for causes of action, thus potentially increasing funds in the estate and expediting the conclusion of the winding up. However, while s 100-5 of the Insolvency Practice Schedule (Corporations) strives for simplicity, it gives rise to new issues that may undermine its usefulness.

Background

Nestled in a 2017 suite of reforms to the *Corporations Act* 2001 (Cth) (Corporations Act) brought about by the commencement of the *Insolvency Practice Schedule (Corporations) (IPS)* and *Insolvency Practice Rules* (2016) (IPR) is a tool which, in theory, should see causes of action which might otherwise languish due to an absence of funds be assigned to third parties, facilitating potential early recoveries and an expedited winding up of the estate. Section 100-5 of the IPS, which commenced on 1 September 2017, provides as follows:

> *100-5 - External administrator may assign right to sue under this Act*

(1) *Subject to subsections (2) and (3), an external administrator of a company may assign any right to sue that is conferred on the external administrator by this Act.*

(2) *If the external administrator's action has already begun, the external administrator cannot assign the right to sue unless the external administrator has the approval of the Court.*

(3) *Before assigning any right under subsection (1), the external administrator must give written notice to the creditors of the proposed assignment.*

(4) *If a right is assigned under this section, a reference in this Act to the external administrator in relation to the action is taken to be a reference to the person to whom the right has been assigned.*

A liquidator's power to sell claims is not new. It has long been established that a liquidator's power to *"sell or otherwise dispose of, in any manner, all or any part of the property of the company"* pursuant to s 477(2)(c) of the Corporations Act, and its predecessors, provides a statutory exception to the doctrines of 'champerty' and 'maintenance' which have traditionally prevented the assignment of causes of action to third parties (such as litigation funders). The sale of causes of action by liquidators may be an important means of realising value, particularly in relation to underfunded liquidations. The right of liquidators to assign causes of action to third parties as an exercise of the power of sale has been held to extend to statutory causes of action: see *Re Cant* (2011) 85 ACSR 31 at [14]-[21].

Prior to the introduction of section 100-5, however, certain statutory causes of action remained ineligible for assignment for procedural reasons. Perhaps the most notable example is s 588FF of the Corporations Act, which provides a cause of action in relation to voidable transactions, such as unfair preferences and uncommercial transactions. That cause of action is not assignable pursuant to s 477(2)(c) because s 588FF(1) only empowers a Court to order relief *"on the application of a company's liquidator"*. Similar reservations have been identified in relation to assignments of causes of action for breach of statutory directors' duties under ss 180-182 of the Corporations Act. That is so because the provision by which compensation can be awarded, s 1317H, only empowers the Court to order compensation to a corporation or registered scheme *"for damage suffered by the corporation or scheme"* resulting from a breach of directors' duties.

The new assignment provision

Section 100-5 reflects a light-touch approach by Parliament. So long as (i) an action has not yet begun (sub-s (2)) and (ii) the liquidator has notified creditors of the proposed assignment (sub-s (3)), the liquidator may assign *"any right to sue that is conferred on the external administrator by this Act"*. Following the assignment, any reference to the external administrator "in relation to the action" is deemed to be a reference to the assignee.

The explanatory memorandum that accompanied the *Insolvency Law Reform Bill 2015* (Cth) (ILRA Bill) (which implemented the IPS) implied that the new provision was intended to apply to all causes of action under the Corporations Act, stating that *"a practitioner would be "… empowered to assign statutory rights of action arising out of the Corporations Act that vest with the practitioner (or company) during an administration, to a third party"*.

It is unclear, however, whether this result has been achieved by the language of s 100-5. Specifically, s 100-5 is expressly limited to rights to sue *"conferred on the external administrator"*. Section 477(2)(a) empowers a liquidator of a company to *"bring or defend any legal proceeding in the name and on behalf of the company"*. It is not clear whether this amounts to a 'conferral' for the purposes of s 100-5. Accordingly, it appears arguable that s 100-5 may not apply to the types of 'company' claims that have always been assignable pursuant to s 477(2)(c), such as contractual claims.

New options for external administrators

The biggest practical change brought about by s 100-5 of the IPS is likely to be the new ability to assign s 588FF voidable transaction claims to third parties, such as litigation funders, representing a potentially useful statutory development at a time when Australia's litigation funding market is enjoying significant growth.[1] Such claims, in particular unfair preferences, are often the most significant potential source of asset recoveries available to a company in liquidation. From the litigation funder's perspective, s 100-5 of the IPS may confer greater control over such claims and enable the acquisition of such claims on attractive commercial terms. From the liquidator's perspective, s 100-5 may enable a liquidator to expedite recoveries under s 588FF, mitigating the risks of proceeding under a long-term litigation funding agreement, potentially facilitating the earlier deregistration of a company (reducing the administrative costs that drawn-out liquidation entails).

Section 100-5 may also offer more creative options to liquidators in relation to realising value for rights to sue. In appropriate circumstances, it may provide an efficient way of determining the market price for claims that would otherwise have been difficult to value, such as by competitive sale process open to all parties, including a prospective defendant. Given the potential for controversy, a prudent liquidator would seek directions from the Court, or at least approval of the committee of creditors, in respect of any sale to a prospective defendant.

Potential difficulties

The brevity of s 100-5 may also be its main limitation. The provision gives rise to a number of unanswered questions and issues.

Section 100-5(2) - Court approval of assignment of existing actions

Section 100-5(2) gives no guidance as to how the Court will exercise its discretion in deciding whether to approve the assignment of an action which is already on foot. Presumably, the Court will be called upon to make a determination of whether, in the circumstances, the proposed assignment better serves the interests of creditors compared to the liquidator continuing to prosecute the claim.

The existing case law regarding Court approval of deeds of assignment under s 477(2B) (which applies to contracts of more than three months duration entered into by a liquidator) may be instructive. In particular, courts have generally been prepared to endorse the liquidator's commercial judgment, particularly where a liquidation is unfunded.

Section 100-5(3) - Notice to creditors

Section 100-5(3) does not set out any requirements with respect to the written notice that must be provided to creditors, including such basic matters as the notice period that is required to be given prior to the assignment of the claim and the content of any such notice. More fundamentally, the purpose of such notice is unclear, given that (i) the consent of creditors is not a prerequisite to any assignment and (ii) creditors have no statutory mechanism (apart from the general right to apply for orders under s 90-15 of the IPS) to prevent, reverse or vary any assignment.

Section 100-5(4) - Assignee lacks access to the books and records of the company and the investigative powers of liquidator

The assignee remains significantly hampered in their ability to 'stand in the shoes' of the liquidator. In particular, the assignee does not have the benefit of the books and records of the company, nor the investigative and information gathering powers of the liquidator. There is also an inherent tension between assignment to facilitate the early deregistration of a company (and potential destruction of books and records) and an assignee's potential need to have access to those books and records in respect of litigation which survives the company's deregistration.

Section 588FF only contemplates orders made in favour of the company

Perhaps the most significant lacuna is the lack of any consequential amendments to ss 588FF or 1017H to facilitate assignments under s 100-5. Section 588FF(1) stipulates the orders the Court may make about voidable transactions. It does not empower the Court to make an order benefitting any person other than the company. The assignee would therefore require agreement from the liquidator that the future benefit of any order made in favour of the company under s 588FF will be transferred to the assignee. Because such an agreement will almost invariably be of more than three months duration, it will require the approval of the Court or the committee of creditors, or a resolution of the creditors, pursuant to s 477(2B) in order to be effective, and will require the company to remain extant until the conclusion of the litigation in order to effect or perfect that assignment. As with the tension identified above in relation to access to records, this requirement impedes the prospects of an early conclusion of the winding up.

1 Data compiled by the Australian Law Reform Commission for the Class Action Proceedings and Third-party Litigation Funders (85) discussion paper (23 May 2018) indicates that there are now approximately 25 litigation funders currently active in the Australian market.

Conclusion

The difficulties and issues outlined above belie the procedural simplicity that s 100-5 is clearly aimed at delivering. This constitutes a missed opportunity to give liquidators the option of selling to an assignee, who assumes the administrative burden and risk of pursuing the cause of action, freeing the liquidator to expeditiously declare a final dividend (if possible) and bring about the deregistration of the company.

Moreover, it is uncertain whether s 100-5 applies to rights to sue conferred on the company (as opposed to the external administrator), which the liquidator can exercise on behalf of the company pursuant to s 477(2)(c), possibly leading to a unwelcome situation in which there are two parallel regimes that a liquidator must consider when assigning causes of action under the Corporations Act.

Given these uncertainties, the potential new source of revenue or realisation which such assignments might have presented for a liquidator, remains elusive.

The Scheme of Arrangement and Corporate Rescue Framework in Malaysia

By Lee Shih
Skrine
Malaysia

Malaysia ushered in wide-ranging corporate law reforms through the enactment of the Companies Act 2016 (“Act”). In particular, the Act introduced changes to the restructuring and insolvency framework. I focus on the improvements made to the scheme of arrangement provisions and the introduction of the corporate rescue mechanisms: corporate voluntary arrangement and judicial management.

Schemes of arrangement

The scheme of arrangement provisions in Malaysia are similar in some respects to the English and Singapore law provisions.

The scheme of arrangement requires approval of 75% in value of the creditors at each of the creditors’ meetings which is subject to approval from the court. There is also the option for the debtor company to apply for a moratorium via a restraining order.

The following enhancements have been made under the Act:

Additional safeguard of independent assessment

There is an additional safeguard where the Court can appoint an approved liquidator to assess the viability of a proposed scheme to table a report at the meeting(s) of creditors.

Extension of the restraining order

The maximum duration of the restraining order is now capped at twelve months. The Court may grant the initial restraining order for a period of not more than three months. The period may be extended for not more than nine months if the prescribed requirements are met.

Restraining order will not extend to regulators

It has also now been made clear that a restraining order will not apply to any proceeding taken by the Registrar of Companies or the Securities Commission Malaysia. It is not clear if this would extend to restraining delisting proceedings taken by the Stock Exchange against a publicly listed company. In the past, there have been conflicting decisions at first instance on this issue.

Corporate voluntary arrangement

The corporate voluntary arrangement (“CVA”) is modeled after the corresponding provisions of the UK Insolvency Act. The CVA is a procedure which allows a company to put up a proposal to its creditors for a voluntary arrangement. The implementation of the proposal is supervised by an independent insolvency practitioner. There is minimal Court intervention in the process.

Excluded companies

The CVA is limited to only private limited companies. One further key exclusion is that a company which has a charge over its property or any of its undertaking also cannot be placed into CVA. The exclusion of this last group of companies may significantly reduce the efficacy of the CVA as a restructuring option.

Moratorium and required majority to approve the proposal

The CVA provides for a moratorium for 28 days. With creditors’ consent, the moratorium may be extended up to a maximum period of 60 days.

At the company’s meeting of members, a simple majority is required to approve the proposed CVA. However, at the creditors’ meeting, the required majority is 75% of the total value of the creditors present and voting. With such approval, the CVA takes effect and binds all creditors.

Judicial management

The judicial management mechanism, modeled after the Singapore provisions, provides a further option to rehabilitate a financially distressed company. It allows a company or its creditors to apply for an order to place the management of a company in the hands of an insolvency practitioner. A moratorium would give the company temporary respite from legal proceedings by its creditors. The moratorium applies automatically from the filing until the disposal of the judicial management application and also while the judicial management order is in force.

Excluded companies

The judicial management scheme cannot apply to a company which is a licensed institution, or an operator of a designated payment system regulated under the laws enforced by the Central Bank of Malaysia or a company which is subject to the Capital Markets and Services Act 2007. For the latter category, it appears that this would exclude all publicly listed companies. A debenture holder would also be able to veto a judicial management application.

Maximum duration of a judicial management order

The judicial management order shall, unless discharged, remain in force for 6 months and may be extended on the application of the judicial manager for another 6 months.

Approval of judicial manager's proposal

For a judicial manager's proposal to be approved by creditors it must have the required present and voting who hold 75% in value of the claims which have been accepted by the judicial manager. Once approved by the required majority, the proposal binds all creditors of the company, whether or not they had voted in favour of the proposal. For a judicial manager's proposal to be approved by creditors, it must have the required 75% in value of the claims (which have been accepted by the judicial manager).

Current trends

Schemes of arrangement are still frequently used in Malaysia. In particular, both corporate rescue mechanisms cannot be applied to publicly listed companies. Listed companies in the oil and gas space, such as *Perisai Petroleum* and *Barakah Offshore Petroleum* are both in the midst of a proposed scheme of arrangement. Over the course of the last nine months or so, there have been more than 10 applications for judicial management with only several resulting in a judicial management order being granted. *Scomi Engineering* and *Scomi Transit Projects Brazil* are the most notable companies that have been placed under judicial management. CVA has not been popular in Malaysia with only one company having applied for CVA.

Conclusion

The Act introduced many changes to revamp and strengthen the corporate rehabilitation framework in Malaysia with Companies now having more options in this area which traditionally have only been available to companies in foreign jurisdictions such as the United Kingdom and Singapore.

Bankruptcy Law Reform in Indonesia: A (Realistic?) Hope for Change

By Debby Sulaiman
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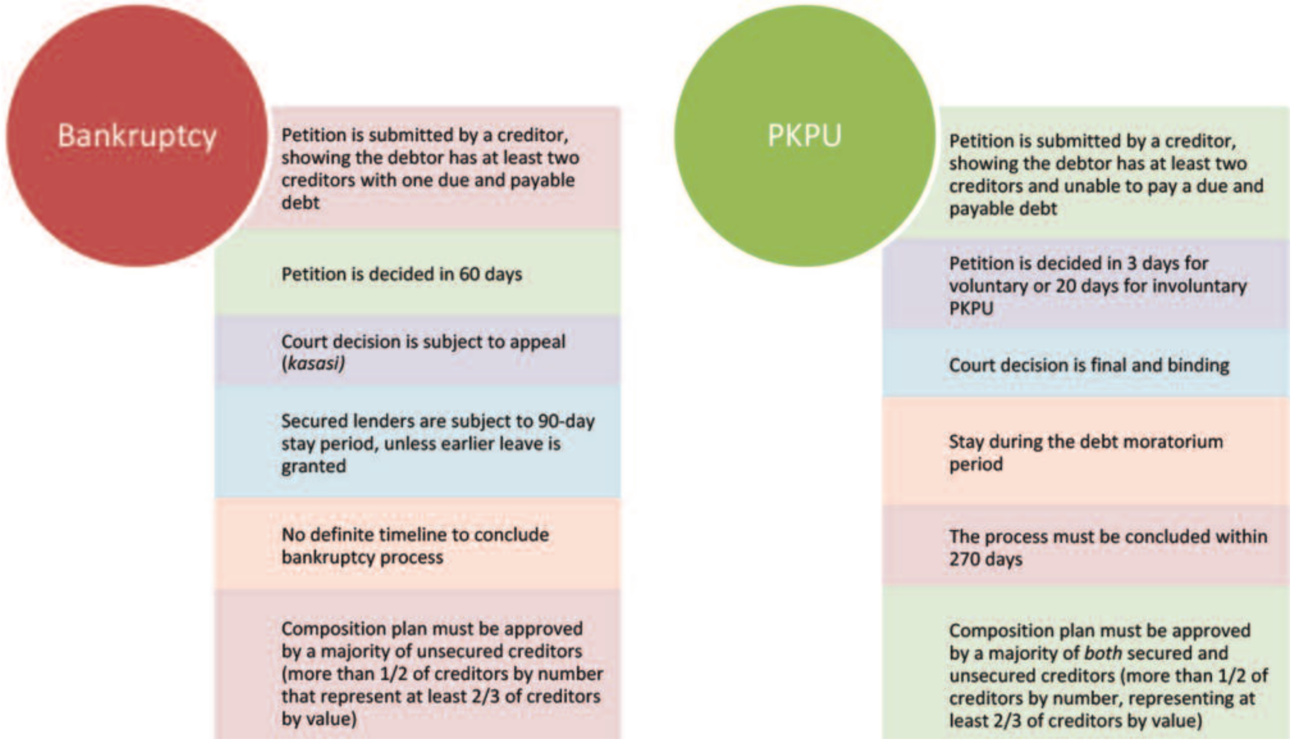
The discussion to reform the current Bankruptcy Law started some time ago but was only formally done when the committee-in-charge was established in 2017 by the incumbent President Joko Widodo. The initial reasons for the proposed reformation of the Law were because of the criticisms around enforcement, lack of clarity of the provisions, and accountability – the usual suspects. It was only later that it was also argued that the current Bankruptcy Law is considered "pro-creditor" and hence changes must be made. The Academic Paper has been completed by the committee at the end of 2018; and that while the draft law is yet available, there are some changes noted in the Paper that will affect (offshore) lenders' position in Indonesia.

The beginning

The World Bank placed Indonesia in 72nd place among 190 countries in its 2018 Ease of Doing Business Report; reflecting a rapid rise from 106th in 2016, and 91st in 2017. In contrast, foreign direct investment into the country contracted 12.9 per cent in the second quarter compared to the same period last year, which may well be due to an upcoming presidential election in 2019. Regardless, the general view in the market is that the economy is still steadily moving forward.

The two topics covered in the 2018 Ease of Doing Business Report that are most attractive for business are contract enforcement and resolving insolvency. The Report ranked Indonesia 145th and 38th respectively in these two categories, both slightly up on the previous year's report. However, as to whether the Report reflects the actual challenges foreign lenders face in enforcing contracts against Indonesian debtors – whether through the usual breach of contract or tortious claim, enforcing security for a loan, or pursuing bankruptcy or moratorium applications – opinions will differ.

The current Indonesian Bankruptcy Law was enacted in 2004 with the objective to provide support to the business society in resolving their disputes in a better manner: fairly, quickly, transparently, and effectively. The Law has quite successfully provided a quicker process when compared to the usual dispute resolution forum via civil/commercial litigation. However, the remaining three objectives remain a



challenge. As a quick background, the Law provides two alternative procedures to debtor and creditor: bankruptcy and debt moratorium (Penundaan Kewajiban Pembayaran Utang – "PKPU"). There are differences between the two, although more similarities in principle *(see the chart above)*.

The feedback from those who have gone through Indonesian bankruptcy and/or PKPU process are generally along these themes: uncertainty and inconsistency in the decisions and approach, transparency of the process and accountability of the stakeholders. This type of feedback is not only experienced by foreign creditors but also by local creditors, contrary to many beliefs that usually linked this to the "anti-foreign sensitivity".

The reform – worth to wait?

The recently completed 2018 Academic Paper highlights sixteen key issues for the draft law; several of which are very interesting to note:

- Minimum of two creditors with two due and payable debt;
- Creditor petitioner should also have a minimum value of claim, which will take into account inflation rate;
- Four months to start and complete enforcement process for secured creditors;
- PKPU can only be submitted by debtor;
- Automatic stay period as of the registration of the petition, not on the date of the decision;
- Establishment of Supervisory Board of Receivers;
- Cross-border insolvency.

The Academic Paper imposes higher thresholds to submit a bankruptcy/PKPU petition. The Paper, however, does not address in detail how the minimum value of claim will be regulated further. It is only noted that the minimum value will likely not be determined in figure but rather "the economical value" by taking into consideration the inflation rate.

Another interesting note in the Paper is the idea of an automatic stay that commences as soon as the bankruptcy/PKPU petition is registered with the court. The challenge would be to ensure that the online publication system of the court is reliable and updated real time. If this is applied based on the current infrastructure, it will be a major challenge in situations such as a transaction when there is bankruptcy/PKPU petition made against a seller – which could potentially give the basis for the invalidation of the transaction.

The Paper mentions cross-border insolvency, which is a welcomed idea despite it not discussing in detail how the cross-border insolvency will be articulated in the draft law. It will be interesting to learn how this will be applied without reciprocal agreement with other countries.

The other concerning issue is the removal of creditors' right to file for PKPU. This will be detrimental to lenders that will be left with two options: filing bankruptcy or enforcing securities for secured lenders. For the first option, a bankruptcy petition can be "out-moved" by submitting a PKPU petition by the debtor. Under the current Law, PKPU petition by a debtor trumps a bankruptcy petition. It will be interesting to see whether the draft law will, and if so how, address this issue. For the second option, enforcement of securities can also be frustrated with the filing of a satellite legal lawsuit by arguing on, e.g. the validity of the underlying agreement or grounds for enforcement. Neither of the options would give lenders a meaningful solution.

In conclusion, a general reformation of the law and court system are critical to the success of the new law. A robust court system is urgently needed to not only give equal access for justice seekers but also to allow efficient enforcement of contracts. Hopes are high for a newly elected government but the pessimists' views remain.

Modernising Insolvency in Myanmar: Opportunities and Challenges

By Scott Atkins,
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Overview

Myanmar is often seen as a land of mysteries. The Southeast Asian nation of 53 million people is strategically located between the two economic giants of China and India and has just emerged from five decades of military rule. The government led by Aung San Suu Kyi, which took office in 2016 after winning a landslide election, is facing tremendous pressures from the international community on the ongoing humanitarian crisis in northern Rakhine State. This has negatively impacted the inflows of foreign direct investments to Myanmar.

Amid a challenging global environment, the Myanmar government is reforming the economy, which had been centrally planned for decades, to a market economy. Among its package of commercial law reforms, insolvency has been identified as an area of key priority by both the Myanmar government and the Asian Development Bank (ADB) to improve the economic environment in Myanmar. Norton Rose Fulbright (NRF) Sydney Office has been engaged by the ADB to draft a new insolvency law, the Myanmar Debtors Rehabilitation Bill.

Changing economic circumstances

Myanmar has for some time restricted lending to the form of 'English mortgage' of land with duration limited to one year. Access to credit is extremely limited and people resort to informal lending markets for financing needs. However, the Central Bank has recently allowed banks to lend according to their own credit management plan and grant loans of up to three years in duration.

Myanmar banks are also now able to accommodate basic necessities in international trade, such as issuing letters of credit or bank guarantees without requiring full cash deposits. Myanmar had shut its door to foreign banks in the past but the Central Bank has gradually allowed foreign banks to enter the Myanmar market. International lenders with branches in Myanmar are now permitted to serve both domestic and foreign companies in Myanmar. Personal credit, in the form of credit cards and home mortgages, has also become increasingly common in Myanmar. With these significant reforms in banking and financial sectors, the once closed Myanmar economy is ready to embark on expansion based on sustainable credit growth.

Existing insolvency regimes

The recently repealed Burma Companies Act 1914, was a colonial-era statute that contained unreformed 19th century provisions for winding up and receivership, and "corporate rescue" was confined to schemes of arrangement. These provisions were incapable of accommodating the needs of a modern economy. They are particularly unsuited to addressing the needs of Myanmar's small businesses: the backbone of the economy.

Personal insolvency is currently governed by Rangoon Insolvency Act 1910 and Burma Insolvency Act 1920, which might similarly be described as colonial anachronisms.

Despite their British origin and Myanmar's common law tradition, these corporate and personal bankruptcy regimes were hardly ever used. There are no reported judgments in respect of Myanmar's existing insolvency laws in the past 50 years.

Insolvency law in Myanmar has been in need of urgent reform.

The Myanmar Debtors Rehabilitation Bill

The Myanmar Debtors Rehabilitation Bill (Bill) is intended to strengthen and modernise legal and institutional frameworks for insolvency and restructuring regimes in Myanmar.

Being aware of the undesirable effects of wholesale transplantation of foreign law, many specific needs of the Myanmar economy are addressed in the Bill. While the Bill has incorporated the best global practices in both corporate and personal insolvency regimes, it also retains some flexibility to adjust to Myanmar's unique cultural and economic environment. The winding up provisions in the Myanmar Companies Law 2017, as well as the Rangoon Insolvency Act and Burma Insolvency Act, are to be repealed upon enactment of the Bill. Provisions on corporate and personal insolvency and restructuring are to be included in the new law.

Introducing corporate rescue

Governments across the world have increasingly recognised benefits associated with insolvency regimes that focus on corporate rehabilitation and value-preservation rather than punishment and stigmatisation. The Bill will, for the first time, introduced to Myanmar the concept of corporate rehabilitation. The rehabilitation process in Part V of the Bill has been carefully crafted to deal with the current business environment in Myanmar. However, it also has the capacity to facilitate increasingly complex rehabilitations as Myanmar's economy develops and the use of complex corporate structures and investment vehicles become more common. The Bill enables an independent rehabilitation manager to take control of the management of the debtor company during the rehabilitation process. This concept has never existed in Myanmar. Most importantly, the Bill imposes a strict timeline for approval and implementation of a rehabilitation plan. If rehabilitation is not feasible (or not supported by creditors), there is a conversion mechanism for the company to enter into liquidation. These provisions are vital in ensuring that the rehabilitation process is not caught by red tape and administrative delays which are common features in Myanmar. The availability of corporate rehabilitation will greatly assist Myanmar to expand its booming manufacturing sector where the disruption to supply chains due to insolvency can be costly and undesirable.

MSME specific insolvencies

The Bill also recognises the important role of Micro, Small and Medium Enterprises (MSMEs) in the Myanmar economy. The Bill contains provisions for dealing with the insolvency of both incorporated and unincorporated MSMEs in Part VI.

The use of the corporate structure in Myanmar is not as widespread as in other economies and there is a very poor understanding of the concept of separate legal personality. Therefore, access to Part VI has been defined with reference to business debt, whether or not the business entity is incorporated. The new law will provide a simplified and less expensive rescue and rehabilitation regime, where the proprietor of the business remains in control under the general oversight of a rehabilitation advisor, who will assist with the preparation of a rehabilitation plan within strict timelines.

In the event that winding up becomes necessary, the key focus of MSME specific insolvencies will be on the expedited distribution of available assets. Unless creditors consent and provide funding, a liquidator will have no obligation to investigate the affairs of the company or pursue the recovery of preferential or uncommercial transactions. However, creditors will have recourse to judicial review if they are dissatisfied. Severe delays in dispute resolution has always been a concern for investors and the new law, through imposition of precise deadlines, will provide temporal certainty for creditors and other stakeholders in insolvent MSMEs.

Focus on timeliness

The Bill aims to deliver quick, inexpensive and efficient insolvency regimes. With strict timelines, elimination of unnecessary procedures and minimal automatic involvement of courts, the Bill aims to address and overcome investors' concerns about court delays and bureaucratic red tape. It is anticipated that the Bill will streamline insolvency procedures, and support and strengthen the development of commercial law in Myanmar. There will, of course, be a right to engage the supervisory jurisdiction of the court where there is non-compliance with the law.

Model Law on Cross-Border Insolvency

Successful integration of Myanmar's economy into the global economy requires significant commitments from its government beyond domestic law reforms. Both NRF and ADB believe that the adoption of the UNCITRAL Model Law on Cross-Border Insolvency would make Myanmar a more attractive investment destination. The Bill includes adoption of the Model Law, and it is a matter for parliament to decide whether to adopt this aspect of the Bill.

Capacity building

A legal regime can only be as effective as the capacity of its major participants. The process of capacity building with Myanmar's judiciary and insolvency profession is of considerable importance.

Capacity building has been a strong element of the ADB's work on this project. This has extended to government, the business community and NGOs. NRF partners Scott Atkins and John Martin, along with internationally prominent retired commercial judges, recently conducted a judicial colloquium held in Myanmar's capital Naypyitaw to assist with capacity development in relation to the Bill.

With the new law, Myanmar also needs a profession of insolvency practitioners. Currently, only a handful of older members of the accounting and legal professions have any experience in insolvency beyond uncontested voluntary windings up, due to the scant use of existing insolvency regimes. Work is being undertaken with legal and accounting professional associations to achieve the goal of establishing a thriving profession of insolvency practitioners in Myanmar, upon which the proper function of the new law depends.

The Bill is currently before the Myanmar Parliament. ADB and its team of experts have on several occasions engaged with parliamentarians to ensure that the concepts embodied in the Bill are understood, and any queries are properly addressed.

Final thoughts

Myanmar's Constitution provides for a market economy, and the functioning of a market economy requires sound commercial law regimes. The Myanmar Debtors Rehabilitation Bill provides for quick, inexpensive and effective insolvency processes, and will provide an alternative to the existing use of informal channels of debt recovery. The insolvency and corporate rehabilitation regimes created by the new law will directly contribute to the expansion of the economy through better access to finance and lower cost of credit. Economic prosperity and improved living standards will, in turn, assist in resolving difficult social and political issues facing Myanmar society and promote the 'rule of law'.

Administratively Cumbersome and Fraught with Delay: Australia Needs to Reform Section 444GA Transfers

By Emma Ffrench-Mullen
and
Genevieve Sexton
Arnold Bloch Leibler
Australia

Voluntary administrators and investors have long recognised the advantages of share sales over asset sales in reviving distressed companies. In Australia, not only is it possible to sell downstream assets or shares of a distressed holding company, but in certain circumstances, a deed administrator may also sell the holding company itself, requiring shareholders in the distressed company to transfer their shares for nil consideration.[1]

The process is known as a "section 444GA transfer" and is intended to provide an efficient means for effecting restructure.[2]

In recent years, s 444GA transfers have become increasingly popular in the restructure of distressed listed companies, and were central to the recent high-profile restructures of Ten Network, Palladin Energy and the Oroton Group.

However, it has become increasingly clear that s 444GA transfers are inefficient, and the process for obtaining judicial and regulatory approval generates unnecessary cost, delay and uncertainty for stakeholders. It is time for the system to change.

This article will examine the main sources of cost and delay in effecting a transfer, and how that cost and delay could be avoided by implementing some simple reforms.

Key requirements of s444GA transfers: No unfair prejudice to members

In Australia, where a company's shareholders have not consented to the transfer – a common occurrence when a company is listed or otherwise widely held - deed administrators must apply to the Court for leave to transfer the shares.[3]

Shareholders and creditors of the company, the Australian Securities and Investments Commission (ASIC), or any other interested person can oppose the application.[4] The Court may only grant leave if it is satisfied that the transfer would not unfairly prejudice the interests of shareholders.[5] In practice, deed administrators must show that the company's shares have no residual economic value to shareholders. This requires deed administrators to demonstrate by expert valuation evidence that, in the event of the company's liquidation (as the most likely alternative to the completion of the DOCA and the compulsory transfer), shareholders would be unlikely to receive a distribution.[6]

Given that s 444GA transfers are typically sought as a last-resort attempt to save an insolvent company, whilst this evidence is usually available, obtaining these expert reports involves significant expense and delay.

To date, the courts have yet to make a finding of unfair prejudice, which suggests that where deed administrators have already determined a company to be insolvent in their report to creditors, the process should be streamlined. An independent expert should only be required to report on a liquidation counterfactual where a party has objected to the application.

Operation of takeover provisions

The most significant inefficiency arises not from s 444GA itself, but from the operation of statutory takeover provisions. Section 606 of the Corporations Act prohibits any person from acquiring shares in a public company or large private company that would result in that person's, or any other person's, voting power in the company exceeding 20%.

Deed administrators must seek a technical exemption from ASIC in respect of a proposed s 444GA transfer.[7] ASIC has exempted every s 444GA transfer to date, implicitly recognising that the rationale of the takeover prohibition does not apply to share acquisitions pursuant to a DOCA.[8] Exemptions are ordinarily made conditional on the grant of leave by the Court pursuant to s 444GA.[9]

Notwithstanding that this is a court-governed process, ASIC exemption applications must be supported by expert evidence valuing the shares to be transferred. ASIC requires valuations to be conducted on two bases: going concern and liquidation.[10]

Where a company is insolvent and liquidation is the only probable alternative to the restructure by compulsory transfer, a going concern valuation has little relevance or utility. For this reason, courts only consider valuations on a liquidation basis in determining leave applications under

1 *Corporations Act 2001* (Cth), s 444GA ("Corporations Act").

2 Explanatory Memorandum, Corporations Amendment (Insolvency) Bill 2007 (Cth), [7.54]-[7.56]. See also Corporations Act, s 435A. Section 444GA also reflects the fact that many prospective purchasers are unwilling to enter into share sales of distressed companies if they are required to share future equity gains with existing shareholders.

3 Corporations Act, s 444GA(1).

4 Corporations Act, s 444GA(2).

5 Corporations Act, 2 444GA(3).

6 *Weaver In Their Capacity as Joint and Several Deed Administrators of Midwest Vanadium Pty Ltd v Noble Resources Ltd* (2010) 41 WAR 301, 314 [79]-[80]; *Re Nexus Energy Ltd* (2014) 105 ACSR 246, 253-4 [22]-[23], 258-62 [39]-[49], [106] 279 (*"Nexus"*); *Re Ten Network Holdings* (2017) 123 ACSR 253, 264-6 [33]-[39] ("Ten Network"); *Re Paladin Energy Limited (subject to Deed of Company Arrangement)* [2018] NSWSC 11, [27]-[35] (*"Paladin"*); *Re OrotonGroup Limited* [2018] NSWSC 1213, [37]-[42] (*"Oroton"*).

7 Corporations Act, 655A; Australian Securities and Investments Commission, *Regulatory Guide 51: Applications for Relief* (December 2009), 51.6, 51.20-51.22.

8 See *Re Pasminco Ltd (admin apptd)* (2002) 41 ACSR 511. Although the decision concerned the granting of a s 655A exemption to a proposed share issue under a DOCA rather than a s 444GA transfer, the Takeovers Panel concludes that s 606 has little to no relevance to share acquisitions pursuant to a DOCA.

9 See, eg, *Ten Network*, 258 [14]; *Paladin*, [12].

10 Australian Investments and Securities Commission, Regulatory Guide 111: Content of Expert Reports (March 2011), 111.8-111.15.

s 444GA.[11] Deed administrators must therefore incur the cost of obtaining a "going concern" valuation with no apparent function, in addition to the cost and delay of making the exemption application.

The exemption requirement creates additional uncertainty for stakeholders in circumstances where ASIC has no published policy on the granting of exemptions for s 444GA transfers and may depart from its previous decisions.

Reform is clearly needed. At a minimum, the evidential requirements to obtain judicial and ASIC approval should be streamlined, and the creation of a statutory exemption from s 606 for s 444GA transfers should also be implemented.

Position of third party security interests

Yet another source of uncertainty is the effect of a compulsory transfer on third party security interests held over company shares – specifically, whether those interests survive the transfer and can be asserted against the transferee.

In Australia, we have a personal properties securities regime whereby security over personal property (including shares) must be registered.

The *Personal Property Securities Act* 2009 (Cth) (PPSA) provides that where a security is registered, "continuation principles" apply such that the interest of the security holder cannot be extinguished other than in specified circumstances. The regulations then expressly exempt some transfers (including transfers pursuant to schemes of arrangement) from the continuation principles, but they do not expressly exempt s 444GA transfers.[12]

There are strong arguments from first principles to support the proposition that a transfer pursuant to s 444GA occurs free from third party security interests over the company shares, whether they are registered or not. Nevertheless, for clarity, the PPSA should be amended to expressly include s 444GA transfers in the types of compulsory acquisitions exempted from the continuation presumptions.

Conclusion

Section 444GA transfers will continue to play an important role in effecting the restructures of companies in voluntary administration. However, reform is essential to ensure that that they fulfil their central purpose; that is, to encourage corporate rescue and to provide an efficient mechanism for doing so.

11 See, eg, *Nexus Energy*, 258-9 [40]-[42]; *Ten Network*, 269 [52]; *Paladin*, [7]; *Oroton*, [28].
12 *Personal Property Securities Regulations 2010* (Cth), reg 7.1.

Noble – A Truly Global Restructuring

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At 10:00 a.m. on 20 December 2018, the last document on the Noble restructuring closing checklist was exchanged. The closing checklist ran to over 250 items on 45 pages (not counting the hundreds of ancillary items which flowed from this). The length of this document gives one a small insight into the complexity of this global restructuring. The company survived incredible challenges over an 18 month period. Its successful emergence from such a complex restructuring is testament to the robustness of its business, the resilience of its management and employees, and the support of its many creditors. This short article outlines how the restructuring unfolded.

In May 2017, Noble approached its lenders to discuss its inability to repay a USD $2 billion borrowing base facility that was maturing on 23 June 2017. It had an overall debt profile of over USD $6 billion including a revolving credit facility ("RCF"), three series of bonds, two borrowing base facilities, and subordinated perpetual capital securities. The company was also about to announce a USD $130 million loss for the first quarter of 2017.

How did it get into this position? A volatile commodities market which led to systemic losses from a number of US based businesses. This combined with a hostile short-seller's report from Iceberg Research (an enterprise controlled by a former Noble employee) to create a perfect storm. Trade financiers lost confidence and withdrew support which was crucial to a trading business such as Noble. Once this support was gone the cards fell quickly and the company had to approach its creditors for support.

The challenges faced by the company at this point included:

- a fragmented creditor base: creditors holding RCF debt who seemed intent on seeking preferential treatment based on the earlier maturity of their debt;
- continuing market volatility and persistent losses.
- the company's desire to not allow its existing shareholders to be wiped out;
- an aggressive, activist shareholder in Goldilocks which implemented a well-organised campaign to destabilise the company;
- a hyper-sensitive Singapore Stock Exchange ("SGX") that required full disclosure in what rapidly became a public fishbowl;
- a lack of restructuring tools in various jurisdictions - no restructuring regime in HK; Chapter 11 not available due to the desire to preserve value for old equity; "light touch" provisional liquidators somewhat untested for a company of this scale and complexity;
- incredibly nervous management, employees, customers and suppliers;
- a rapidly diminishing base of trade finance which was required to underpin normal operations;

- and finally, a hostile corporate regulator whose actions at the end of the restructuring process (after the sanction of the English and Bermuda schemes) nearly killed the company.

How was the restructuring achieved?

At the outset, Noble appointed a new Chairman, Paul Brough, to chaperone the restructuring process. Brough is very well known in Hong Kong where he was a senior partner of KPMG; one of the liquidators of Lehman Brothers in Asia; and the former CEO of the restructured Sino-Forest Group which was taken over by creditors after its collapse. Brough is from northern England. He is direct and strong willed. He was charged with implementing the restructuring. It proved to be no easy task, but he was the right person for the job.

The restructuring plan in outline seemed straightforward: sell assets that were causing the most significant losses; concentrate the business on its core Asian coal franchise; re-cut the capital structure with a debt for equity swap and issue sustainable new debt; and most importantly, maintain liquidity through this process with sufficient trade finance. The idea was to do this consensually and out of court. The implementation of this plan proved to be anything but straightforward.

Who were the players?

Noble is a global commodities trader with businesses covering hard commodities, freight and LNG, and prior to the sale of the relevant businesses, agricultural commodities, gas & power and oil liquids. At its peak, Noble's market capitalisation was more than USD $10 billion.

The board was ably led by Paul Brough but supported by a number of experienced business professionals, including Fraser Pearce, Tim Isaacs, Andrew Herd, Wayne Porritt, David Yeow, David Eldon and Christopher Pratt.

Management was led by CEO Will Randall and CFO Paul Jackaman.

Richard Elman was the founder, former Chairman and remained the largest shareholder of the company with approximately 18% of its shares.

Noble's key creditors included the following:

- the trade finance lenders, which originally included ING, Société Générale, DBS and Rabobank, but at the time the restructuring closed comprised ING and Deutsche Bank;
- the borrowing base lenders - Noble had two so-called borrowing base loans of up to USD $1 billion and USD $2 billion. These were at immediate risk of defaulting. They were, in effect, secured, so the priority was to manage them whilst a plan was worked up, assets sold and they could be repaid without action being taken;
- the lenders under Noble's RCF - the banks that held this debt quickly sold to distressed debt traders. The new owners of this debt immediately took the stance that given the fact that this debt was maturing ahead of the majority of Noble's bond debt, it should be given priority to Noble's bondholders. The company resisted this given its financial situation;
- the bondholders - represented ultimately by an ad hoc group including Taconic, Varde and Owl Creek. They became the driving force on behalf of the creditors;
- the holders of Noble's perpetual capital securities (the "Perps"), which were contractually subordinated to Noble's other debts noted above. In the company's view, holders of the Perps were "out of the money", but ultimately became organised under Value Partners and Pinpoint, which gave them the potential to destabilise the process in a similar manner to that which Goldilocks did.

How was the restructuring implemented?

The first step was to bring much needed stability into the group. The company was bleeding cash. Many of its long term trade finance providers had pulled out - leaving the company with dangerously low levels of liquidity. To respond to this the US gas & power and oil liquids businesses were sold. It is fair to say that the terms of the sales were not perfect. The sales closed in difficult conditions and with the company under enormous pressure. Still, the creation of liquidity provided the company with a war chest to implement what would be a long and complex restructuring. The company would not have survived without the sale proceeds.

The RCF lenders and bondholders finally came together in December 2017 to form a single ad hoc group. This gave the impetus for discussions to kick off in earnest.

The discussions focused on a number of key matters:

- the new equity ratios and future corporate governance requirements;
- the provision of existing and new trade finance and the terms of such trade finance, including fees and recovery enhancement payable to providers of such finance;
- the restructuring of Noble's existing debt obligations into a new sustainable capital structure;
- the separation of Noble's businesses between "Asset Co" and "Trading Co";
- the retention and compensation arrangements for management; and
- the entitlement of holders of the Perps.

Term Sheet and Restructuring Support Agreement

The initial discussions with the ad hoc group resulted in a term sheet being agreed on 29 January 2018 and culminated in the company signing a restructuring support agreement ("RSA") with its creditors on 14 March 2018.

The key terms of the original RSA were as follows:

- all of the assets of the company would be transferred to a new company, "New Noble", which would be owned 70% by creditors, 20% by management and 10% by existing shareholders;
- the provision of a new USD $700 million new trade finance facility;
- the reduction of Noble's existing debt to approximately USD $1.7 billion;
- the separation of Noble's businesses between "Asset Co" and "Trading Co"; and
- an exchange offer for the Perps whereby holders would be able to exchange their Perps for new securities to be issued by New Noble.

Given that the debt for equity swap component of the deal would require the approval of shareholders pursuant to the SGX listing rules, the RSA envisaged that if shareholders voted against the deal, it might nevertheless be implemented through an administration process in the UK. For this purpose, it was necessary for Noble Group Limited (the issuer of the bonds and the borrower of the RCF) to move its centre of main interests ("COMI") from Hong Kong to the UK, which required extensive planning and implementation.

Goldilocks

Goldilocks is an Abu Dhabi based fund which describes itself as taking a "constructive activist" approach to its investments. It became an approximately 8% shareholder of the company during mid-2017. What had been a slow burning exchange of different views became a very public fight culminating in Goldilocks suing the company, members of the board and all of the members of the ad hoc group. The fight was incredibly destabilising. Ultimately, cool heads thankfully prevailed and a compromise was reached over tea in Dubai, which ultimately saw the allocation of equity to shareholders increased to 20% and the allocation to management decreased to 10%. With this fire extinguished the restructuring could move forward.

The Circular and the Schemes

As noted above, given the transfer of assets to New Noble, shareholder approval was required under the SGX listing rules. The process of drafting the circular, receiving approval from the SGX to launch the circular and holding a meeting of shareholders to pass the relevant resolutions took around 4 months and was a heavily scrutinised process. Ultimately the transfer was approved by over 99% of shareholders who voted.

Schemes of arrangement were then launched in both the UK (to where the company's COMI had been moved) and Bermuda, its place of incorporation, in order for the company's creditors to vote upon the restructuring.

Although the schemes were easily passed by creditors at the meetings held to vote on them, the schemes came under the microscope of Mr Justice Snowden in the English High Court.

The issues examined included the composition of the classes of creditors constituted to vote on the schemes; the scheme process and timetable; third party releases and the fees payable to creditors. A separate note on the schemes has been published in an INSOL International news alert dated 17 January 2019.

It is fair to say that the schemes pushed boundaries in a number of areas and practitioners will need to take real care in the future in respect of a number of issues raised by Mr. Justice Snowden.

The final sting in the tail

The schemes were sanctioned in England and Bermuda on 13 November 2018 and 14 November 2018 respectively. It was expected that closing of the restructuring would occur shortly thereafter.

On 20 November 2018, Noble's offices in Singapore were raided by the Commercial Affairs Department of the Singapore Police Force, the Monetary Authority of Singapore and Singapore's Accounting and Corporate Regulatory Authority. The result of these raids was that the SGX would not, despite 99% approval by shareholders and furious lobbying from both the company and its creditors, approve the transfer of the listing to New Noble. This was nearly a mortal blow to the restructuring.

Time had run out. With few alternatives on the table, an urgent application was made to the Supreme Court in Bermuda to appoint so-called "light touch" provisional liquidators to implement a restructuring that had been almost unanimously approved by its economic stakeholders but rejected by the SGX in Singapore. Thankfully, the court made the orders - with John McKenna being appointed on 14 December 2018. The restructuring closed on 20 December 2018.

Postscript

A restructuring of this complexity does not happen without the efforts of many. Noble was an incredibly resilient business. Its resilience came from a dedicated board which was exceptionally led by Paul Brough; a management team that was led by Will Randall and Paul Jackaman which never knew when to quit; its many creditors and shareholders who supported the restructuring; and ultimately its customers and suppliers who were prepared to give it the time it needed to get back on its feet despite the many challenges it experienced on a daily basis.

Cross-Border Insolvency: A Review from Chinese Courts

By Jianli Song

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Global economic integration and trade liberalization have made cross-border trading and investment increasingly normalized. More and more enterprises are facing the problem of cross-border claims and debts. With the accelerating pace of capital-export of Chinese enterprises, cross-border insolvency has inevitably become an important part of Chinese judicial practice like in other jurisdictions. This article outlines the challenges and positions of cross-border issues under Chinese law and steps that have been taken towards achieving cross-border co-operation between jurisdictions.

Significance of cross-border insolvency in China

After 2010, due to its serious overcapacity in domestic industries as well as unfavorable factors such as anti-dumping and anti-subsidy measures implemented by the United States and European Union, a number of Chinese large-scale enterprises in the solar industry have entered into involuntary bankruptcy proceedings. In *Topint* case[1], Debtors'[2] assets in the United States were brought into China's reorganization proceedings. The Debtors then filed a petition for recognition of the Chinese proceeding[3] in the United States Bankruptcy Court for the District of New Jersey which was approved pursuant to Title 11 of

1 Zhejiang Topoint Photovoltaic Co., Ltd v. H2 Contracting, LLC, Case No. 14-24549. The United States Bankruptcy Court for the District of New Jersey.
2 The Debtors include Zhejiang Photovoltaic Co., Ltd. (Case No. 14-24549), Zhejiang Jiutai New Energy Co., Ltd. (14-24555), Zhejiang Yutai Solar Materials Co., Ltd. (14-24557), and Zhejiang Winsolar Photoelectric Materials Co., Ltd. (14-24559).
3 The Haining District court in Zhejiang province in China issued a decision to authorize the Debtors as bankruptcy administrator in this case to seek judicial cooperation and bankruptcy protection relief in the United States bankruptcy court.

the United States Bankruptcy Code, Chapter 15. This is the first time that United States courts have recognized China's insolvency proceedings.

Due to the downturn in the global shipping industry and resulting financial crisis, a large number of shipping enterprises went bankrupt. Hanjin Shipping Co., Ltd. ("Hanjing Shipping") was South Korea's largest container line and one of the world's top ten container carriers in terms of capacity. In April 2016, Hanjin Shipping applied to its creditors for debt restructuring.[4] On August 31, 2016, Hanjin Shipping filed for receivership at the Seoul Central District Court in South Korea and requested to freeze its assets for the benefit of creditors[5]. In a matter of weeks after establishing its receivership, Hanjin Shipping's global presence and dominance in its industry withered away. On February 17, 2017, Hanjin Shipping was declared bankrupt by the Seoul Central District Court with an order to liquidate[6]. The order was the official announcement and beginning of the world's largest shipping insolvency case. In the creditor's registration, Hanjin Shipping identified 2999 companies as creditors, including 228 Chinese companies. Among them, both China COSCO Shipping Corporation Limited ("COSCO")[7] and SINOTRANS Shipping Limited ("SINOTRANS")[8] had long-term business dealings with Hanjin Shipping, and were closely linked by mutual credit and debt arrangements. COSCO became the most affected Chinese creditor identified by Hanjin Shipping's insolvency[9] documents. It is not an over statement that the Hanjing Shipping insolvency was a crisis and has had significant impacts on Chinese creditors.

Necessity for international cooperation in cross-border Insolvency

China has not yet adopted the Model Law on Cross-Border Insolvency published by the United Nations Commission on International Trade Law ("UNCITRAL Model Law").[10] Recognition of foreign proceedings in Chinese courts is a unilateral issue and does not bear international obligations. Therefore, whether to apply the principle of comity for foreign proceedings in Chinese courts depends on how the Chinese judiciary interprets the comity issue.

In the *Hanjin Shipping* case, although Hanjin Shipping held many properties and assets in China, the administrator of Hanjin Shipping did not seek recognition of the South Korean insolvency determination in a Chinese court. One of the reasons might be that creditors were concerned about judicial action, given the uncertainty of cross-border insolvency legislation and judicial practice in China. In fact, both COSCO and SINOTRANS reluctantly accepted the recognition of South Korean proceedings and expressly indicated that, if the South Korean proceeding was recognized in Chinese courts, it would undermine Chinese State-owned enterprises' interests to explain their inaction as creditors.

The *Hanjin Shipping* case stands in contrast to the *Topint* case, where the United States Bankruptcy Court quickly recognized the Chinese court's insolvency proceedings and allowed the debtor's foreign assets to be incorporated into Chinese reorganization proceedings.

Challenges arise when a company enters insolvency or bankruptcy proceedings in one jurisdiction and subsequent restructuring or liquidation involves assets and creditors in another jurisdiction. In such a situation, the courts and legal system in each jurisdiction confront a dilemma: Do they just concern themselves with the assets and creditors in their jurisdiction and ignore the assets and creditors in other jurisdictions, or do they recognize the assets and creditors in other jurisdictions and treat them as part of a single or universal process for restructuring or liquidating the company?

Each approach has its perceived advantages and disadvantages. One advantage of the first approach, known as the territorial approach, is that the assets in the relevant jurisdiction are used to repay local creditors in priority to foreign creditors and the local creditors do not need to worry about foreign creditors or what might happen in other jurisdictions. A disadvantage of this approach is that it unfairly discriminates against foreign creditors and may jeopardize a restructuring of the company in the best interests of all the creditors.

One advantage of the second approach, known as the universal approach, is that all creditors are treated equally and participate in a single proceeding, which is likely to be more efficient and cost-effective than having multiple proceedings in different jurisdictions. A disadvantage of this approach is that creditors in one jurisdiction may be prevented from taking unilateral action to recover debts in their own jurisdiction and may face unfamiliar laws and procedures in another jurisdiction.

In the interconnected world of cross-border trading and investment, a Chinese court not recognizing foreign judicial insolvency proceedings would benefit local Chinese debtors' immediate interests, but would impact the broader Chinese cross-border trading and investment national interests by resulting in relevant Chinese proceedings being rejected by other jurisdictions. With substantial increase of cross-border insolvency cases, more and more Chinese insolvency proceedings will seek recognition in other jurisdictions. Hence, the system of judicial cooperation established in Chinese courts for cross-border insolvency cases will benefit both Chinese creditors and debtors engaged in international trade and finance which is especially significant for reorganization and continuance of Chinese companies caught up with insolvency issues in foreign jurisdictions. It is generally accepted that the second approach is better as it produces better outcomes for all parties. Therefore, strengthening coordination with other judicial authorities and creating a positive, friendly system for cross-border insolvency will promote trading and economic cooperation between China and other regions.

Principles for dealing with cross-border insolvency in Chinese courts

Although Article 5 of Chinese Enterprise Insolvency Law[11] carried out a principled provision for cross-border insolvency, this procedural rule has lagged behind the reality in judicial practice. Article 5 of Chinese Enterprise Insolvency Law provides that:

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4 Nam, In-soo, "Hanjin Shipping Asks Creditor to Restructure Debt", The Wall Street Journal. See website: https://www.wsj.com/articles/hanjin-shipping-asks-creditor-to-restructure-debt-1461582330, (lasted visited Nov 26 2017).

5 Joyce Lee, Se Young Lee, "Hanjin Shipping files for receivership, as ports turn away its vessels". Reuters. See website: https://www.reuters.com/article/us-hanjin-shipping-debt/hanjin-shipping-files-for-receivership-as-ports-turn-away-its-vessels-idUSKCN11603N. (lasted visited Nov 26 2017).

6 Nam, In-Soo (February 16, 2017), Hanjin Shipping Is Declared Bankrupt. The Wall Street Journal. See Website: https://www.wsj.com/articles/hanjin-shipping-is-declared-bankrupt-1487296151. (lasted visited Nov 27 2017).

7 China COSCO Shipping Corporation Limited also referred to as the China COSCO Shipping Group or China COSCO Shipping, is a Chinese business conglomerate and state-owned enterprise headquartered in Shanghai. The group is engaged in a variety of business sectors, with a focus on integrated logistics, shipping, finance services, and equipment manufacturing.

8 Sinotrans Shipping Limited (SEHK: 368) is one of the largest shipping companies in China. It is engaged in vessel time chartering, shipping service and fleet management. It is parented by Sinotrans Group and headquartered in Hong Kong.

9 COSCO and its affiliated companies preliminary made a total assessment of 3.108 billion RMB on the entire claims of the Hanjin Shipping. 15 of COSCO and its subsidiaries declared claims to the South Korean courts, totaling about 2.06 billion RMB of the claims.

10 UNCITRAL Model Law on Cross-Border Insolvency (1997), see website: http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model.html. (lasted visited Nov 27 2017).

11 Enterprise Insolvency Law of the People's Republic of China, See English version: http://en.pkulaw.cn/Display.aspx?lib=law&Cgid=78895. (lasted visited Nov 27 2017).

"The procedures for bankruptcy which have been initiated according to the present Law shall have binding force over the assets of the relevant debtor beyond the territory of the People's Republic of China.

Where any legally effective judgment or ruling made by a foreign court involves any debtor's assets within the territory of the People's Republic of China and if the debtor applies with or requests the people's court to confirm or enforce it, the people's court shall, according to the relevant international treaties that China has concluded or acceded to or according to the principles of reciprocity, conduct an examination thereon and, when believing that it does not violate the basic principles of the laws of the People's Republic of China, does not damage the sovereignty, safety or social public interests of the state, does not damage the legitimate rights and interests of the debtors within the territory of the People's Republic of China, grant confirmation and permission for enforcement."

Currently filing an application for recognition of a Chinese proceeding in foreign court is based only on bilateral treaties or the laws of foreign countries. If this application cannot be recognized in other jurisdictions, Chinese creditors' interests or debtors' legitimate rights will inevitably be affected adversely.

To strengthen and facilitate cooperation in cross-border insolvency proceedings, it is necessary to incorporate the UNCTRAL Model Law into the Chinese legal framework for insolvency affairs, thereby improving the impartiality and efficiency on rules of cross-border insolvency in China. Such application is essential to recognition of Chinese debtor and creditor interests in foreign jurisdictions.

A. *Basic Principles of handling cross-border Insolvency*
   In cross-border insolvency cases, it is significant to adhere to the principle of universalism to facilitate the judicial cooperation between different jurisdictions. The adoption of the principle of universalism in Chinese legal system indicates that China carries out the obligations and responsibilities on rules of cross-border insolvency. To promote mutual judicial cooperation, Chinese courts need to focus on the balance to be achieved by international juridical cooperation administering local creditors' or debtors' interests regardless, whether current or long-term, without prejudice to China's public policy.

B. *Clear jurisdictional rules on governing foreign proceedings*
   Jurisdictional determination in Chinese courts is a prerequisite for handling cross-border insolvency cases. At the request for recognition of foreign proceedings, a Chinese court would consider debtor's assets in China linked foreign proceedings' substantive connections with China. This significant connection is the basis for Chinese courts to exercise jurisdiction and avoid forum shopping exposure.

C. *Clear principle of examination on foreign proceedings*
   The continuing expansion of international trade and investment will inevitably lead to an increasing number of cross-border insolvencies. Often, national insolvency laws do not keep pace with these demands and are inadequate to deal effectively with cases of a cross-border nature. Conflicts between respective national laws can result in the dissipation of assets and loss of a potential opportunity to rescue a viable business[12]. Therefore, the orderly progress in insolvency proceedings would benefit all creditors and debtors if conditions of recognition of foreign proceedings could be clearly defined in Chinese courts.

Although reciprocity is not a requirement of the UNCTRAL Model Law, the reciprocity requirement has been imposed *de jure or de facto* by Chinese Insolvency Law[13]. According to Provision 6 of the *Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the 'Belt and Road' by People's Courts*[14], it is necessary to make the requirements of reciprocity more liberal based on the intent of international judicial cooperation or promised judicial assistance given by other countries. Chinese courts may grant reciprocity first to other countries without the request of precedent of recognizing Chinese proceedings. However, in the case of violating the principles of Chinese law, national sovereignty, security and public interests in China, the foreign proceedings would be refused on basis of violation of Chinese public policy[15].

Additionally, protecting creditors' legitimate interests in cross-border insolvency should be limited on the review of foreign proceedings consistent with the UNCTRAL Model Law, for instance, access to local courts, recognition of a foreign proceeding and relief, communication and cooperation and concurrent proceedings. However, differences in the asset share between Chinese and foreign creditors in foreign proceedings should not be a basis for declining recognition of foreign proceedings in Chinese courts.

The Supreme Court of Singapore has launched Judicial Insolvency Network known as "JIN" constituted by 8 members from different jurisdictions.[16] In October 2016, JIN produced guidelines for consideration in the insolvency and trade disputes of those jurisdictions. The guidelines address key aspects of communication and cooperation among courts, insolvency representatives and other parties involved in cross-border insolvency proceedings. The purpose is to facilitate communication and cooperation, including providing for joint hearings, promoting fairness and efficiency in cross-border insolvency.[17] For China to participate in JIN and apply those guidelines, it would be necessary to establish a cooperative cross-border insolvency system in compliance with the UNCTRAL Model Law. It would be beneficial to the predictability of foreign creditors and debtors on how and when to safeguard the legitimate rights in Chinese courts not only when Chinese judgments are submitted for foreign judicial recognition, but equally, when foreign judgments benefiting Chinese creditors and debtors are brought home for implementation in China.

The very nature of the global economic integration and trade liberalization have made it essential that cross-border trading and investment be increasingly normalized because such integration and liberalization means by definition that the roles of creditor and debtor cannot be legislatively predetermined. Surprisingly in any international dispute, Chinese parties may be involved regardless of jurisdiction and unpredictably whether as creditors or debtors.

12 Look Chan Ho (General Editor): Cross-Border Insolvency: A Commentary on the UNCITRAL Model Law. (2006). Published by Globe Law & Business. P7.

13 Art 5 of Enterprise Insolvency Law of the People's Republic of China.

14 The SPC Several Opinions of the Supreme People's Court on Providing Judicial Services and Safeguards for the Construction of the "Belt and Road" by People's Courts, issued on 16 June 2015, English version, see website: http://en.pkulaw.cn/display.aspx?cgid=251003&lib=law, (lasted visited on 28 Nov 2017).

15 Art 5 of Enterprise Insolvency Law of the People's Republic of China.

16 Kyriaki Karadelis (19 October 2016): Judicial Insolvency Network drafts cross-border cooperation guidelines, see website: http://globalrestructuringreview.com/article/1069592/judicial-insolvency-network-drafts-cross-border-cooperation-guidelines. (last visited 28 Nov 2017).

17 The Supreme Court of Singapore (October 12, 2016), Business BIV. See website: http://www.businessbvi.com/business/legal/item/1542-judicial-insolvency-network-discusses-guidelines-for-cross-border-insolvency-matters. last visited 28 Nov 2017).

Insolvency Professionals under the Omnibus Insolvency

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With the passing of the Insolvency, Restructuring and Dissolution Act 2018 (IRDA) in October 2018, Singapore is reaching the final stages of a decade-long process to update and reform its bankruptcy and corporate insolvency regimes. The piecemeal amendments over the years have been collated and tidied; and the often-archaic language has been given a modern buff and shine. It is in many respects a masterpiece of clarity and its drafters deserve great credit.

While the major reforms have justifiably taken the share of attention, one important and sometimes overlooked focus of the IRDA has been to buttress the regulation of insolvency professionals. Defalcations have fortunately been few and far between; but the drafters have clearly appreciated that modernisation does not entail slack regulation. To the contrary – the law needs to evolve to keep up with new ways of undertaking corrupt business.

The headline reform in this respect has been the introduction of licensing rules for insolvency practitioners, set out in sections 47 to 60 of the IRDA. It replaces the existing system by which approved liquidators are gazetted under section 9 of the Companies Act and introduces a complete suite of licensing, investigative, disciplinary and appeals processes. The licensing officer is now given statutory powers to investigate license holders and issue written directions where a contravention has been found. Provisions have been drafted to criminalise various acts and omissions, including a catchall provision by which the licensing officer is empowered to levy a fine or suspend or revoke the license of a misbehaving insolvency professional who had breached the IRDA but not otherwise committed an offence.

These developments will be much welcomed by the community. Insolvency professionals are already subject in varying degrees to the oversight of the Court, creditors, Official Receiver and the Accounting and Corporate Regulatory Authority. Yet insolvency practice is highly specialised and involves unique challenges. Liquidators and judicial managers control significant and valuable assets of the insolvent company. The opportunities for misfeasance are correspondingly wide. At the same time, as was recently noted by Chief Justice Sundaresh Menon, speaking extra-judicially:[1]

> *"Insolvency law and practice is, at its core, about the endeavour to recycle capital, usually in difficult circumstances. It entails the effective deployment of legal tools, human ingenuity, and sound business judgment in the mission to maximise the prospects of business recovery, and, when this is not possible, of maximising the realisation of value."*

Any insolvency regime must therefore facilitate the professional to maximise recovery for businesses, and if not possible, value for creditors. It is for this good reason that insolvency professionals (in particular judicial managers) are and should be permitted considerable latitude in continuing the business of the company, and where this is impractical or impossible, to exercise their best commercial judgment realise what they can of the company's assets within the confines of the law for the benefit of creditors.

One significant focus in recent years has been to facilitate the raising of funds to pursue an insolvent company's causes of action. For solvent companies, the cost and uncertainty of litigation often deters even strong cases from being brought. For insolvent companies, the understandable reluctance to stake the company's limited resources on chancy litigation poses an even higher barrier. The estate costs rule[2] is a further deterrent for insolvency professionals.

Third-party funding is therefore touted as a win-win solution. The insolvent company is not required to put its funds at risk, but if the action is brought successfully would be able to realise some value for creditors. The path to third-party funding has been smoothed in recent years by a number of decisions of the High Court. In *Re Vanguard Energy Pte Ltd* [2015] 4 SLR 597 the Singapore High Court clarified that a liquidator could permissibly sell the company's causes of action or even the proceeds of such causes of action without offending the doctrine of champerty. This case was followed by *Solvadis*

1 Keynote address at the 18th Annual Conference of the International Insolvency Institute 2018 in New York, 25 September 2018
2 See *Ho Wing On Christopher and others v ECRC Land Pte Ltd* (in liquidation) [2006] 4 SLR(R) 817 at [9]

Commodity Chemicals Gmbh v Affert Resources Pte Ltd [2018] 5 SLR 1337 and *Re Fan Kow Hin* [2018] SGHC 257 ((in the bankruptcy context). It is safe to say that third party funding for insolvent companies has become an established practice.

What the IRDA will change is to require a liquidator to obtain the prior authorisation of the Court or the Committee of Inspection before either bringing proceedings on behalf of the company or assigning the proceeds of his statutory causes of action. Further, any assignment of proceeds must be done in accordance with regulations which remain to be promulgated. (A judicial manager will however be empowered to do all these things without requiring authorisation from the Court or creditors.)

These are welcome changes, in two important respects. Firstly, it is now statutorily provided that a liquidator may assign the proceeds of his statutory causes of actions to a funder. A distinction is traditionally drawn between a company's causes of action, which may be sold or assigned as the company's property, and a liquidator's causes of action (such as proceedings to void transactions as unfair preferences) which are personal to the liquidator and cannot be assigned. The IRDA preserves that position, but now permits the monetisation of such claims by allowing the assignment of the proceeds.

Secondly, it is stated that such assignment may take place only in line with regulations, and even then, only with leave of Court or the Committee of Inspection. None of these requirements are in the existing regime. Responsible liquidators typically do seek Court or creditor approval. This is because of the manifold opportunities for abuse or mischief. One may well imagine funding arrangements that provide for unscrupulous liquidators and funders to collude to cream off the bulk of the gains from litigation, with little or no ultimate benefit to creditors, for instance, by "mis-pricing" the sale of the cause of action. It is heartening to note that there will be regulations promulgated which, it is anticipated, will likely require liquidators to provide proper disclosure of the assignment and funding process.

It remains to be seen if the IRDA will kickstart litigation funding in the insolvency context in Singapore, but the amendments to the existing regime are a bright, but cautious start, and show that the drafters are alive to the potentials for misuse.

Apart from the regulations for assignment of proceeds, all the other assorted rules and regulations remain to be gazetted as subsidiary legislation. Insolvency professionals will know how important these can be to their daily practice, and it is hoped (with confidence, on the basis of the IRDA) that the rules to be promulgated will be commercial, practical and clear.

Caledon Coal – A Creative Solution to Selling Assets without Secured Creditor Consents in Australia[1]

By Ben Campbell, Stephen Longley and Grant Sparks
PwC
Australia

The recent sale of underground coal mine assets in Queensland, Australia by Liquidators from PwC demonstrates the challenges of dealing with security interests of 'state-owned' lenders, and a creative solution for Australian insolvency practitioners to deal with assets without obtaining secured creditor releases.

The situation arose in the Caledon Coal Group's liquidation where secured creditors with secured debts of approximately US$200 million withheld their consents to a sale of the Group's business and assets due to their concerns regarding the recoverability of guarantees from the ultimate shareholder, a Chinese state-owned investment fund. The assets subject of the proposed sale included interests in a coal mine, and associated plant and equipment. Consequently, the Liquidators were faced with losing a transaction which would have resulted in a significant shortfall to employee creditors, significant job losses, a larger shortfall to secured creditors, and eventual closure and remediation of the mine site. The only other alternative was to disclaim the mining assets due to the significant cost of care and maintenance of approximately US$1 million per month.

The sale was progressed after an application to Court where Orders were granted allowing the Liquidators to sell assets free of the relevant security interests held by the secured creditors. This creative solution deviates from the commonly held view that title to secured property cannot be provided without the consent of secured creditors.

The successful sale of the Group's assets resulted in:
- Full return to employee creditors;
- Continued employment for retained employees;
- A materially better return to secured creditors;
- Continued operation of the mine, including ongoing economic benefits for the local community and region.

Background
In 2011, the assets were acquired by Guangdong Rising Assets Management Co., Ltd (GRAM), an investment fund owned by one of China's largest provinces. The Group operated an underground mine, Cook Colliery, located in Queensland's Bowen Basin, under a sublease arrangement with the international miner Glencore. Under the sublease arrangement, the Group had the right to mine, process and sell coal from the mine.

From 2011 to 2017, GRAM invested and/or arranged funding of approximately $2 billion for the Group, most of which was provided either directly or indirectly by a group of Chinese banks, including Bank of China and China Development Bank who ultimately held security over the assets subject of the sale in addition to guarantees from GRAM. The funding was largely utilised for capital expenditure and losses associated with operational issues, and significant take-or-pay obligations for rail and port capacity.

In March 2017, the Group's mine experienced a water inundation event which rendered it inoperable and caused the Group to immediately cease production whilst it undertook a review to assess the damage and its impact on the Group's viability.

On 12 May 2017, the Group's directors resolved to appoint Stephen Longley, Grant Sparks and Martin Ford from PwC as Administrators. The appointment of Administrators crystallised claims against the Group totalling approximately US$3 billion.

Sale process
Following their appointment, the Administrators worked with management, staff and relevant stakeholders to implement a plan to transition the mine to care and maintenance, whilst they assessed options for the Group, and undertook a campaign for either a recapitalisation or sale of the business.

Following a comprehensive sale campaign, the Administrators received a number of proposals to either recapitalise, and/or acquire the Group's business and assets. However, none of the proposals received were capable of acceptance, and all were highly conditional and required at least several months to complete. This was further complicated by the significant cash burn and limited funding available to allow the Administrators to operate the mine for an extended period whilst they sought to complete a transaction.

The Administrators continued to liaise extensively with interested parties regarding the conditions of their offers, as well as with other key stakeholders which were required to consent to any transaction and/or would be adversely impacted by a sale or recapitalisation transaction of that did not proceed. These included Secured Creditors, GRAM, Glencore, employees and their representative unions, and representatives of the governmental Fair Entitlements

1 A version of this article was first published by the Australia Insolvency Journal.

Guarantee scheme. The Administrators also continued to liaise extensively with GRAM regarding its interest in putting forward a restructuring proposal. However, the Administrators did not receive any restructuring proposals which were capable of acceptance and therefore convened a second meeting of creditors, where creditors voted to place the Group into liquidation.

Following engagement with the various interested parties and stakeholders, the Liquidators determined that the only proposal with any reasonable prospect of being implemented was from Bounty Mining Ltd (Bounty) to acquire the business and operating assets of the Group. Important factors which influenced the Liquidators' assessment were:

1. The Bounty proposal was the only transaction which Glencore as holder of the mining leases would consent to; and
2. The Liquidators had negotiated funding assistance from Glencore which was conditional on the Bounty proposal being accepted.

Consequently, the Liquidators executed a funding deed with Glencore and an asset sale agreement with Bounty, both of which were conditional on consents to the Bounty sale from the Secured Creditors.

Competing interests of "state-owned" stakeholders

Without the proposed sale to Bounty and related funding from Glencore, the most likely position would have involved the Liquidators disclaiming the mining sublease and associated assets due to the significant ongoing costs associated with operating the mine. This option would have resulted in a significant shortfall to employee creditors, job losses, a total shortfall to secured creditors, closure of the mine and an adverse impact on the local community. This allowed the Liquidators to present a compelling case to support their recommendation for the Secured Creditors to consent to the Bounty sale as quickly as possible. As a result, the Secured Creditors indicated their support towards the sale to Bounty but advised that formal consents were subject to their respective internal processes. Importantly, the secured creditors had been provided with significant information from the Administrators/Liquidators during the course of the matter to assist with their decision.

Over the next two months, the Liquidators further engaged extensively with the Secured Creditors as they worked through their internal processes to provide formal consents to the Bounty sale, and also for GRAM as guarantor. This included responding to queries regarding detailed reports and analysis the Liquidators had previously provided on the proposed transaction and alternatives. The Liquidators also engaged a peer firm to undertake a review of the sale process to confirm it meets the widely accepted practices for Administrators/ Liquidators in Australia. Throughout this process, the Liquidators received regular feedback from the Secured Creditors' advisors indicating that their approval processes were progressing positively.

GRAM had also written to the Liquidators to advise that it did not agree with the proposed sale to Bounty as GRAM believed the sale did not represent value for its investment (approximately US$1.5 billion), however it also did not agree with the Liquidators proposal to disclaim the mine sublease in the event a sale to Bounty could not be pursued.

Despite the benefits to all stakeholders from the Bounty sale, the Secured Creditors advised they were not prepared to consent to the sale and provide a release of their security as GRAM had now indicated it would challenge the Secured Creditors' ability to call on any guarantees for US$200 million if they consented to the sale.

The court application

When the Secured Creditors confirmed they could not consent to the sale, the Liquidators and their legal advisors commenced an application to Court which sought to achieve a sale of the assets to Bounty without the consent of the Secured Creditors or, if Orders were not provided allowing the sale to proceed without Secured Creditors' consents, then the Liquidators were justified in disclaiming the mining sublease arrangements.

The Orders to sell the assets without the consent of the Secured Creditors were made under a seldom used section of the Properties Law Act, a State based legislation which covers property law in Queensland, Australia.

The application that the assets be sold without consent and release of the secured creditors was supported by the following key issues:

1. The Liquidators had conducted a comprehensive sale campaign which had resulted in the proposed sale to Bounty, and had been reviewed by a peer firm which found the sale process to have been conducted in accordance with generally accepted practices.
2. The sale to Bounty represented the highest possible return to creditors of the Caledon Coal Group, which included secured creditors and employees.
3. The Liquidators had obtained the support of Glencore towards the proposed transaction, including the assistance of funding for site costs from the time the secured creditors consented until completion of the sale to Bounty.
4. The Secured Creditors had indicated they supported the sale, and had only declined to provide their formal consents due to the risk of a claim by GRAM that by providing such consent will prejudice their rights under the guarantee.
5. The Liquidators had limited funding available to meet costs. The significant costs associated with the care and maintenance for the mine which was ending the funds available to pay the entitlements of employees.
6. Importantly and no doubt critically, the application was not opposed by any stakeholders.

The matter was heard in the Supreme Court of Queensland where Orders were granted that the assets be sold to Bounty and free of any security interests held by the Secured Creditors. The Liquidators completed the sale to Bounty in December 2017 with employees receiving their full entitlements prior to Christmas.

New Zealand: Regulation of Insolvency Practitioners – Insolvency Practitioners Bill 2010

By Scott Abel
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Currently there are relatively few restrictions on who may practice in New Zealand as a liquidator, receiver, administrator or insolvency trustee. It may come as a surprise to many, but non-New Zealand citizens, provided they are over 18 years of age and not otherwise conflicted, are lawfully entitled to accept insolvency assignments in New Zealand. That will soon change with the recent reporting back of the Insolvency Practitioners Bill 2010 from Select Committee.

When first introduced in April 2010, the Bill provided for a negative licensing system whereby the Registrar of Companies would have the power to restrict or prohibit persons from taking insolvency engagements. The Bill was further reviewed by the Commerce Committee in 2011 and the proposed negative licensing regime was dispensed with in favour of establishing a formal register of insolvency practitioners.

The Bill process stagnated for the next 7 years. In the meantime, an Insolvency Review Working Group was established in 2015, with its first report in July 2016 recommending that a co-regulatory model be adopted. Subsequently, in June 2018 the Minister of Commerce and Consumer Affairs released Supplementary Order Paper No 45 to the Bill (the "SOP") which proposed further significant changes to the Bill. Submissions were invited on the SOP and, following further consultation, the Bill was eventually reported back from Select Committee in December 2018.

The Committee endorsed the co-regulatory licensing framework for insolvency practitioners proposed in the SOP. Insolvency practitioners will be required to be licensed by an accredited body (which will be primarily responsible for supervising conduct and investigating complaints) and will be subject to independent oversight by the Registrar of Companies. Obtaining a licence will require compliance with certain prescribed minimum standards and ongoing competence requirements, as well as fulfilling 'fit and proper person' criteria. Solvent liquidations may be undertaken by members of a recognised professional body (such as Chartered Accountants Australia and New Zealand ("CAANZ"), or the New Zealand Law Society) without having to be licensed insolvency practitioners. The Registrar will maintain a publicly accessible online register of licensed insolvency practitioners under the regime.

The licensing framework will co-exist with an industry accreditation regime introduced in 2017/2018 by CAANZ and the Restructuring & Insolvency Turnaround Association New Zealand. Members of those organisations who are accredited to accept insolvency appointments in New Zealand are subject under that regime to a code of conduct, disciplinary process and ongoing competency requirements.

The requirement to be licensed under the new framework in the Bill will also apply to any overseas practitioner taking an appointment as an administrator, an insolvent liquidator, a receiver or an insolvency trustee under New Zealand law. Practitioners from Australia (and, over time, other recognised jurisdictions) will be treated as provisionally licensed in New Zealand for 10 working days following their appointment, within which time they must apply to be licensed or otherwise resign the appointment.

The Bill also includes a number of further technical and substantive changes to reporting and conduct matters for insolvency practitioners, many of which were recommended by the Insolvency Review Working Group in the two reports it issued. In addition, the Bill also includes the following further changes:

- a new duty for insolvency practitioners to report to the relevant authorities any "serious problems" they identify during the course of their appointment, in particular where there may have been "negligence, default or breach of duty or trust in relation to the company";
- a new category of "voidable dispositions" which may be avoided by a liquidator, in relation to any disposition of a company's assets outside the "ordinary course of business" of the company which occurs after a liquidation application has been made to Court; and
- a requirement for administrators and liquidators to exclude the votes of related party creditors in determining the outcome of voting at creditors' meetings. Related creditors can seek a court order that their vote be taken into account.

The requirement to be licensed under the new co-regulatory framework will only apply to in relation to new insolvency appointments occurring after the commencement date for the Bill, once enacted. There will be a brief transitional period following the commencement date during which insolvency practitioners who are already accredited by a recognised accredited body to take insolvency appointments will be treated as holding a transitional licence, and given time to apply for and obtain a licence under the new regime.

Having been reported back from Select Committee, the Bill will now be referred for debate in Parliament followed by a final third reading and vote (at which stage it is unlikely that further significant changes to the Bill will occur), which at the time of writing is anticipated to occur during March.

Restructuring Islamic Finance Transactions

By Dr. Omar Salah[1]
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Introduction

In the past decade, the Islamic finance market witnessed various defaults leading to the first restructurings in this multi-trillion dollar industry. Due to structural differences between Islamic finance and conventional finance, there are additional complexities when a borrower is in distress and restructures its Islamic finance transactions compared to the restructuring of conventional finance transactions. In this article, I will discuss the issues that arise in Islamic financial restructurings. I will discuss how courts have dealt therewith in some notable debt restructuring cases in different jurisdictions.

Islamic law considerations in Islamic financial restructurings

Shariah-compliance in Islamic finance transactions

When entering into Islamic finance transactions due consideration needs to be given to compliance with Islamic law.[2] Shariah Supervisory Boards, however, have provided diverging interpretations of Islamic law (depending on the school of Islamic law to which they adhere). Consequently, there may be a risk that breach of Islamic law is used as a reason to force creditors into debt restructurings.

Dana Gas sukuk restructuring

This risk materialized in the Dana Gas sukuk restructuring. On 13 June 2017, Dana Gas PJSC (Dana Gas) announced that its outstanding USD 700 million sukuk were no longer Shariah-compliant and, therefore, unlawful and unenforceable under UAE law. It, therefore, deemed a restructuring of its sukuk necessary. What followed, was a litigation-driven restructuring process with sukuk holders in the UAE, the UK and the BVI.

Dana Gas commenced legal proceedings in the UAE to seek a declaration on the lawfulness of its sukuk. In addition, it commenced legal proceedings in, and was granted injunctions from, the UAE, the UK and the BVI courts. The injunctions restrained any legal action from sukuk holders against the company pending the outcome of the UAE court's decision on the lawfulness of its sukuk.[3] In the meanwhile, the English court ruled that under English law the sukuk documentation was valid and enforceable.

Eventually, Dana Gas and its sukuk holders agreed on a consensual restructuring,[4] as part whereof new sukuk

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2 In this article, I will use the terms 'Shariah', 'Shariah law' and 'Islamic law' interchangeably.
3 O. Salah, 'Restructuring Sukuk financing', *Islamic Finance News, Special Report*, 8 November 2017, p. 25-26.
4 Dana Gas, "Dana Gas shareholders support US$700 million consensual Sukuk restructuring", *Dana Gas Press Release*, Sharjah, UAE: 21 June 2018, see http://www.danagas.com/en-us/Investors/20180621%20Dana%20Gas%20Sukuk_Shareholder_AGMApproval-En.pdf (last visited on 4 March 2019).

were issued.[5] However, the case illustrated that sukuk issuers can use non-compliance with Shariah as a reason to commence debt restructuring.

Restructuring of TID

Earlier, similar arguments had been put forward in the case of *The Investment Dar Company KSCC v. Blom Developments Bank SAL*.[6] Blom Developments Bank SAL (Blom) had entered into a wakala agreement with The Investment Dar Company KSCC (TID). When TID failed to pay its obligations under the wakala, Blom brought a summary judgment application before the English court. TID argued that the agreement was *ultra vires*: under its objects clause in its articles, TID was only allowed to enter into Shariah-compliant agreements and it argued that this agreement was not Shariah-compliant. The English court confirmed that TID had made an arguable case (which was the low threshold to overturn the summary judgement) and referred the matter for trial. However, it stated that the trial court should approach the case with some circumspection due to the approval of the transaction by a Shariah Supervisory Board. TID was in financial distress back then, but it was eventually placed under the protection of the Kuwaiti Financial Stability Law and the case went no further.

The two cases illustrate the tension between Islamic law and the governing law of the Islamic finance transaction documents, i.e. in practice often English law. Before these restructurings, the English court had already ruled on the question what law governs Islamic finance transactions in two other cases.

Discussions on governing law in Islamic financial restructurings

Symphony Gems: default under Murabaha Facility

In *Islamic Investment Co. of the Gulf (Bahamas) Ltd. v. Symphony Gems N.V. and Others*,[7] Islamic Investment Co. of the Gulf (Bahamas) Ltd. and Symphony Gems N.V. had entered into a murabaha agreement and when the latter defaulted on its obligations thereunder, it argued that the murabaha was not Shariah-compliant. The recitals of the murabaha stipulated that the parties wished to deal under the agreement in accordance with Shariah law, while English law was the governing law of the agreement. The English court decided that the agreement was not governed by Shariah law, but by English law. It would, therefore, construe it according to its terms as an English law contract.

Beximco Pharmaceuticals: Shariah Law and English Law as governing law?

In *Beximco Pharmaceuticals Ltd. and others v. Shamil Bank of Bahrain E.C.*,[8], two companies of the Beximco group had entered into two murabaha agreements with Shamil Bank of Bahrain E.C. which were later restructured as ijarah-based agreements. When the Beximco companies defaulted on their obligations under the agreements, Shamil Bank made claims before the English courts. The Beximco companies argued that on a true construction of the governing law clause, the agreements were only enforceable if they were valid and enforceable under both Shariah law and English law. The English court ruled that English law governed the agreements and not Shariah law, because the latter is a non-state body of law. The English court also ruled that Shariah law was not incorporated by reference (i.e. as contractual terms) into the agreements, because Shariah law was not sufficiently identified specific 'black letter' provision of a foreign law or an international code or set of rules.

The above cases illustrate that the English courts look at English law governed Islamic finance contracts as English law contracts and generally do not consider Shariah law arguments.

Underlying assets in Islamic financial restructurings

Complexity of underlying assets

Another complexity in Islamic financial restructurings relates to the requirement for underlying assets in Islamic financings. According to Islamic law, (i) *riba* (interest) is prohibited and (ii) *gharar* (contractual uncertainty) needs to be avoided as much as possible. Following from the prohibition on *riba*, Islamic law requires an underlying tangible asset in financial transactions.[9] Consequently, there are often additional discussions in Islamic financial restructurings on the value of underlying assets, availability of other unencumbered assets to be used for rescue financing, and restrictions in an asset disposal programme (e.g. in case of an asset deal in an accelerated M&A).[10]

East Cameron Partners: true sale in Sukuk restructuring under US Chapter 11

In the restructuring of sukuk financing, there could also be debate on the 'true sale' of the underlying assets, i.e. on whether the originator has transferred the underlying assets to the special purpose vehicle (SPV) that issued the sukuk. This was tested by the US court in the insolvency proceeding of East Cameron Partners, L.P. (ECP). ECP issued a sukuk in 2006, but defaulted on payments thereunder. In 2008, ECP filed for a Chapter 11 proceeding under the US Bankruptcy Code. The US court ruled that there had been a 'true sale' of the underlying assets from the originator to the SPV and upheld the Islamic finance structure. Eventually, the sukuk holders incorporated a new SPV through which they bought the entire business from the originator.[11]

Nakheel Sukuk restructuring in the UAE

Another notable sukuk restructuring was that of Nakheel. On 25 November 2009, Nakheel requested a restructuring of USD 26 billion in debt and the Islamic finance market feared delay in repayment of its USD 4 billion sukuk. Upon review of the sukuk documentation, sukuk holders realized that there was legal uncertainty on the enforcement of the rights of mortgages, among other reasons due to lack of transfer of any form of ownership in the structure.[12] However, Abu Dhabi granted Dubai a USD 10 billion loan and the sukuk was repaid in full upon maturity without the need for litigation. Later, as part of its refinancing, Nakheel issued a new sukuk with various innovative features that illustrated the creative possibilities in sukuk refinancing.[13]

Conclusion

In this contribution, I discussed some complexities of Islamic financial restructurings. In addition to the considerations that deserve attention in most restructurings, when restructuring Islamic finance transactions particular concerns may arise regarding (i) breach of Islamic law, (ii) discussions on the governing law of, and (iii) the asset-based nature of, these transactions. While different courts across the globe have shed light on how they treat some of these matters, due care needs to be given to these complications when restructuring Islamic finance transactions.

5 Dana Gas, "Dana Gas Successfully Completes Sukuk Refinance", *Dana Gas Press Release*, Sharjah, UAE: 14 August 2018, see http://www.danagas.com/en-us/Investors/Sukuk.pdf (last visited on 4 March 2019).

6 *The Investment Dar Company KSCC v. Blom Developments Bank SAL*, [2009] EWHC 3545 (Ch).

7 *Islamic Investment Co of the Gulf (Bahamas) Ltd v Symphony Gems NV*, [2002] WL 346969.

8 *Beximco Pharmaceuticals Ltd. and others v. Shamil Bank of Bahrain E.C.*, [2004], EWCA Civ 19.

9 See O. Salah, *Sukuk Structures: Legal Engineering Under Dutch Law*, Eleven International Publishing: 2014, Chapter 2.

10 For more on this, see INSOL International's Guide to Islamic Finance, Chapter 7.

11 In *Re: East Cameron Partners, 31 March 2010, United States Bankruptcy Court, Western District of Louisiana, Lafayette Division, 31 March 2010, 08-51207.*

12 In case of Nakheel, there were also other concerns, e.g. regarding the outstanding guarantees and the enforcement of foreign judgments in the UAE. For more on the Nakheel sukuk, see O. Salah, "Dubai Debt Crisis: A Legal Analysis of the Nakheel Sukuk", *Berkeley Journal of International Law*, Spring Issue 2010, pp. 19-32.

13 This was the first sukuk whereby the consideration for the acquisition of the sukuk certificates was the cancellation of debt claims. For more on the structure of this so-called trade creditor sukuk, see INSOL International's Guide to Islamic Finance, Chapter 11.

“Light Touch” Restructuring Provisional Liquidators Appointed for the First Time in the BVI[1]

By Alex Hall Taylor and Mungo Lowe, *Fellow, INSOL International*

Maples Group
BVI / UK[2]

In December 2018 the BVI High Court, Commercial Division, in a first for the jurisdiction, appointed “light-touch” restructuring joint provisional liquidators (“RPLs”) to BVI incorporated companies for the purpose of enabling the companies to pursue a debt restructuring. This is a marked departure from the traditionally held view that under the existing BVI legislation, provisional liquidators could only be appointed in the BVI as an interim measure to protect company assets that might be in jeopardy pending the hearing of the winding up petition.

This is an important development in BVI law, giving the BVI restructuring tools similar to a number of other offshore jurisdictions, including Bermuda and the Cayman Islands, and thereby making it a more attractive restructuring jurisdiction. Notably RPLs can be used in support of foreign restructuring proceedings (as was the case here – with the restructuring being driven from Brazil) or to drive the restructuring from the BVI.

The companies that formed the subject matter of the recent applications form part of one of the world’s leading oil and gas drilling groups that is operationally centred in Brazil (the “Group”). The Group contracts out a fleet of offshore drilling vessels to a number of clients, the main one being Petrobras, Brazil’s semi-public multinational oil and gas group. The Group’s principal assets, against which most Group debt is secured, are held through a series of BVI registered companies. Faced with an industry-wide downturn and the expiry of long-term charter and service contracts for many of its rigs and drillships, increasing the risk of default on debt and capital obligations, the Group has engaged in the consensual restructuring of more than US$1 billion of secured and unsecured debt.

The restructuring process involved first seeking the protection of court-supervised restructuring (*recuperaçao judicial* or “RJ”) in the First Business Court of Rio de Janeiro, Brazil and then the commencement of ancillary proceedings in the US for protection under Chapter 15 of the Bankruptcy Code seeking recognition of the RJ as the foreign main proceeding. Once both proceedings were on foot, separate applications were filed by six BVI-registered Group entities for the appointment of “light touch” joint provisional liquidators in the BVI.

The provisional liquidators are “light touch” in the sense that the companies remain under the day-to-day control of existing management albeit subject to the oversight and monitoring of the provisional liquidators. An order made under section 174 of the Insolvency Act – which grants the Court a discretionary power to stay or restrain proceedings – and a restructuring protocol supportive of the RJ, agreed between key stakeholders (including secured and unsecured creditors) and approved by the Court, protect the companies from actions by individual creditors. The applications were made to and granted by Justice Neville Adderley in the BVI Commercial Court in December 2018 and the Judge handed down the judgment setting out his reasons on 5 February 2019. These were the first successful applications of this type before the BVI Courts.

The success of the applications confirms the availability of “light touch” provisional liquidations in support of restructuring processes in the BVI, in line with established practice in the Cayman Islands, Bermuda and elsewhere. This can be seen as a positive development for a host of reasons:

1. It improves the efficiency and effectiveness of cross-border proceedings relating to insolvency or debt adjustment in more than one jurisdiction.

2. It reflects the BVI Court’s commitment to the Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (which were adopted by the BVI Courts in May 2017).

3. It has assisted a potentially distressed but economically viable group in securing a restructuring which is likely to result in more favourable returns for creditors than liquidation.

4. It affords the flexible, but supervised, continuing operation of the Group, including debt restructuring, whilst securing protection against rogue or predatory creditor action and the potentially devastating consequences thereof (although secured creditors remain able to enforce).

Against this backdrop, the decision can be welcomed as an important development in the BVI jurisdiction and its participation in future cross-border restructurings involving interests in or held in the BVI.

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1 This article is intended to provide only general information. It does not purport to be comprehensive or to render legal advice.

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Mungo Lowe is an associate in the Maples Group's London office. He advises on offshore corporate and commercial litigation including shareholder disputes, asset tracing, corporate investigations, contractual claims and enforcement of security. As a Fellow of INSOL International he has particular expertise in cross-border insolvency and restructuring.

A Point of Interest

By
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Fellow, INSOL International,
Peter Hayden and Christopher Levers
Mourant
Cayman Islands

The litigation arising out of the collapse of Bernard Madoff L Madoff Investment Securities LLC (BLMIS) has involved a number of novel issues with which the Cayman Courts have had to grapple. The most recent of these issues concerned the entitlement of deferred creditors (ie those creditors whose claims are subordinated pursuant to statute) to statutory interest in a liquidation; with the Grand Court of the Cayman Islands confirming that, in solvent liquidations, statutory interest is payable on the claims of deferred creditors.

This issue does not appear to have been addressed in any reported decision in the United Kingdom or the wider commonwealth. Accordingly, in light of the similarities between the Cayman and United Kingdom statutory regimes governing the payment of statutory interest, the decision of the Grand Court in *In the Matter of Herald Fund SPC (in official liquidation)* (unreported, 27 August 2018) may provide helpful guidance on the issue to practitioners in other commonwealth jurisdictions.

Background

Primeo Fund (in official liquidation) (Primeo) was an indirect investor in BLMIS through its investment in Herald Fund SPC (in official liquidation) (Herald).

Prior to Bernard Madoff's confession and the resulting collapse of BLMIS, a number of investors (the Redemption Creditors), including Primeo, submitted redemption requests to Herald for redemption dates on or before 1 December 2008. Herald accepted those requests with the result that the shares of the Redemption Creditors' were redeemed, according to Herald's Articles of Association, on 1 December 2008. As a result of Madoff's confession, Herald suspended payment of redemption proceeds and the Redemption Creditors were never paid.

Herald disputed the creditor status of the Redemption Creditors. However, as reported in INSOL World, Q4 2017, the Judicial Committee of the Privy Council in *Pearson v Primeo* [2017] UKPC 19, ultimately determined that the Redemption Creditors ranked as creditors in Herald's liquidation but, as a result of the application of section 49(g) of the Cayman Companies Law, their claims were subordinated to the claims of ordinary, unsecured creditors.

Herald paid the outstanding redemption proceeds to the Redemption Creditors satisfying their principal claims but disputed their entitlement to statutory interest on those sums.

Entitlement to statutory interest

Section 149 of the Companies Law (the Law) provides that, in a winding up, interest is payable on any debt proved in that winding up subject to there being a surplus remaining after the payment of the debts so proved.

Primeo, as the representative party for the Redemption Creditors, contended that they were entitled to statutory interest, particularly where their creditor claims had already been paid in the liquidation.

Herald disagreed, arguing that, as a result of the statutory waterfall approved by the Privy Council in *Pearson v Primeo*, the deferred creditor claims of the Redemption Creditors' claims were subordinated not only to the principal claims of Herald's ordinary, unsecured creditors, but also to any and all claims for statutory interest. Moreover, Herald also argued that, as the claims of the Redemption Creditors had not gone through a formal proof of debt process, those debts had not been proved and therefore did not attract statutory interest.

The Court's decision

The Court rejected Herald's arguments. It found that the statutory waterfall relied upon by Herald had not been formulated with the interest claims of deferred creditors in mind. In doing so, it repeated the salutary warning of Lord Neuberger in *Lehman Brothers International (Europe) (in administration)* [2017] UKSC 38 that "waterfalls" should not be *treated as some sort of quasi-statutory statement of immutable legal principle* but are simply a generalised summary complied to meet the needs of a particular case.

Instead, it accepted that the legislative position under Cayman law was essentially the same as that under English law and, consistent with the dicta of Lord Neuberger in *Lehman Brothers International (Europe) (in administration)* (supra), the statutory interest provisions in Cayman should be treated as a complete code with a creditor's entitlement to interest being governed solely by those provisions.

In circumstances where the clear policy behind that code was to compensate creditors who cannot claim interest on a contractual basis for the delay in being paid their money, it found that this policy applied equally to deferred creditors as it did to ordinary creditors on the basis that the *commercial prejudice which they suffer, in this regard, is indistinguishable.* Accordingly, the starting assumption must be that all creditors qualify for interest, including deferred creditors.

Further, and contrary to the arguments made by Herald, this starting assumption was not displaced by the fact that the deferred creditors' claims were subordinated pursuant to section 49(g) of the Law. It found that section 49(g) of the Law, which is in the same terms as section 74(2)(f) of the Insolvency Act 1986, provides that, in the event of competition between a member/former member and an ordinary creditor, the debt of the member/former member is deemed not to be capable of being proved.

This was not the position in Herald's liquidation, which was solvent. Instead, as the claims of both the ordinary creditors and the deferred creditors would be paid in full, including their respective claims to statutory interest, there was no competition between ordinary and deferred creditors. The Court considered that section 49(g) of the Law, whose application depended upon competition between those classes, did not disturb the Redemption Creditors' *prima facie* entitlement to statutory interest. This entitlement was, however, subject to being proved in the liquidation.

In addressing this issue of proof, the Court found Herald's argument that a formal proof of debt process was required to be unpersuasive. The fundamental goal of the insolvency code is to reduce the costs of the liquidation process and maximise returns to stakeholders, and the concept of "proving" must be understood against that background. The Court preferred a broad, pragmatic approach which permitted a liquidator to recognise a debt without it having to be formally proved through a proof of debt process. The debt could be established through whatever legally recognised process a liquidator deems appropriate.

There could therefore be no question that the Redemption Creditors had proved for their debts as Herald had already admitted and paid the principal claims of the Redemption Creditors in full. In the circumstances, the Court held that the Redemption Creditors' debts had been proved and that statutory interest is therefore payable pursuant to section 149(2) of the Law.

Conclusion

The Court's confirmation of a deferred creditor's entitlement to statutory interest in a solvent liquidation is welcome, albeit unsurprising. As noted, there was no good policy reason for depriving a creditor of interest where there was a sufficient surplus to discharge all of its other liabilities. As noted by the Court in *obiter*, the less certain outcome for deferred creditors may be where interest is claimed in an insolvent liquidation because section 49(g) of the Law may then apply. However, how it would apply is an open question to be resolved another day.

INSOL International
Small Practice Issues Group

The INSOL Small Practice group is a self-selecting group within the INSOL community. The aim of the group is to give small practitioners a voice, to share experiences and to be able to network with other like-minded practitioners around the world. Whether you are from a smaller practice, part of a small department in a bigger firm, or deal with smaller cases and want to be part of the small practitioner community, you are welcome to join the group.

An important aspect of the Small Practice Group's work is the sourcing and publication of technical information of particular relevance to the small practitioner. The last 12 months has been very productive with the publication of the following Special Reports:

- Restructuring Options for MSMEs and Proposals for Reform published in May 2018 contains 10 country chapters detailing the different approaches to restructuring and turnarounds in the MSME sector including any barriers (legal and / or financial) which make the restructuring process prohibitive for use by MSMEs; and recommendations / proposals for reform.
- Financing the Rescue Process – A Comparative Analysis of the Financing Regimes in Australia, Canada, South Africa, United Kingdom and United States of America by Dr Eric Levenstein, Director, Werksmans Attorneys, South Africa, was published in October 2018. This comparative study provides an overview of post commencement finance principles in the jurisdictions concerned and outlines the international guidelines available in respect of the need for and manner in which post-commencement finance should be made available to financially distressed companies.

In addition, six papers covering Uganda, Hong Kong, Brazil, Japan, Czech Republic and France have been published under the Small Practice Technical Paper series. This series consists of two sets of papers based on standard templates developed by the INSOL Technical Research Committee and the Small Practice Issues Committee. One set of papers covers a *Collection of Practical Issues Important to Small Practitioners* and the other covers *Consumer Debt Issues*. Further papers are planned under this series for 2019 along with a new Small Practice Newsletter.

All of these technical publications are available for members to view in our technical library at **www.insol.org/library**. In addition to our technical projects, we have a quarterly Small Practice feature article in INSOL World.

If you are interested in contributing to any of our technical projects or writing an article for INSOL World please contact INSOL's Technical Research Officer, Louise Jennings at **louise@insol.ision.co.uk**.

The Small Practice Issues Committee holds an annual open meeting for small practitioners attending the INSOL annual conference to facilitate networking prior to the start of the conference and to discuss matters important to small practices. Following the success of the last two programmes in Sydney and New York, the Small Practice meeting takes place in Singapore during the afternoon of Tuesday 2 April 2019. The technical programme includes a guest speaker – **Marketing strategy: get yourself noticed!** and a panel discussion – **This land is my land…. realization of real estate abroad**. This meeting is an excellent opportunity to gain relevant technical knowledge and meet with colleagues from all over the world.

A Small Practice networking drinks reception takes place on Wednesday 3 April 2019. For further information please contact **heather@insol.ision.co.uk**

In Memorium: Selinda Melnik (1951-2018)

By R. Craig Martin, *Fellow, INSOL International*
DLA Piper LLP
USA

On the morning of Monday, 19 November 2018, Selinda Melnik, surrounded by her family, passed away after a long battle with cancer. I found out that afternoon by e-mail while on a conference call. It was a deep blow as we had just exchanged e-mails to set up lunch so we could catch up; Selinda had responded, saying she missed us all and that she would love to catch up, perhaps later in the month.

When I posted the news of Selinda's death on Linkedin.com, the notes flooded in from around the world and eventually over 30,000 people viewed the post on Selinda's passing. So, I know many members of INSOL were long-time friends with Selinda, as many of you wrote me personal notes of condolence, for which I am grateful.

This Memorium will present the side of Selinda from the views of a work colleague and law partner since several memorium's have already been written.[1] From those we learn of her career, about how she founded IWIRC, which now gives an annual award named after her, and we learn of her scholarly endeavors as Selinda wrote numerous articles and chapter inserts on cross-border insolvency. She was a pioneering advocate for the rights of women in the profession and a thought-leader on cross-border insolvency.

Selinda was a cross-border pioneer, who had a long and steady career working on many of the largest and most significant cross-border cases. As for INSOL, Selinda attended events as an early member and supporter and worked with INSOL leaders in law reform efforts, mostly in her capacity as an officer of IBA and IWIRC. Based on her expertise, she even trained judges on cross-border topics and more than one judge has let me know they had Selinda on speed-dial for anytime they had a tough cross-border issue. Selinda was always willing to help anyone on cross-border matters and never demanded credit when she did. In short, Selinda was involved in most aspects of cross-border insolvency for the last 30 years both in leading roles and behind the scenes in ways many did not know about.

It was for that reason in 2006 that I reached out to her firm to see if I might be able to work with her and be more exposed to cross-border cases and to learn from working on cases with her. I did learn, but not in an expected way. Selinda didn't just want me to work on cases with her, she wanted to help develop my career. She frequently sent articles and cases from all over the world that dealt with any aspect of cross-border insolvency law, urging me to read as much as possible. We never wrote an article together because Selinda would find opportunities to write an article and pass it along, so I could have my own by-lines. In short, Selinda didn't want me to work for her, she wanted me to be her colleague with an independent career.

Selinda was thoughtful – when I made partner she sent me a Toy Story Figure of Woody the Cowboy with a personal note that said, "Congratulations Pahdnah!". Selinda was fun, she was caring, and she looked for ways to help people. During many of the years when we worked together, Selinda's mother was ill with Alzheimer's and Selinda took care of her in a way that presented daily challenges. But she did not complain. She would have a smile and a cute story about her mother most days. She loved and cared for her mother but carried on professionally as if nothing was wrong.

Selinda was a unique person, she was a professional who became your friend and her intellectual curiosity shone bright in both aspects. You could talk with her about sports, politics, and religion just as easily as you could talk to her about cross-border insolvency cases. Always knowledgeable and informed on almost every topic, you wondered when she had the time. Her passing is a great loss to the insolvency community, but if you were lucky to have known her, you were blessed with a true friend. I'm glad I had the chance to learn from her for a decade and am grateful for who she was – herself. Selinda, rest in peace, my friend, colleague, and law partner.

1 See Global Restructuring Review, *Selinda Melnik*: 1951-2018 (27 Nov. 2018); IWIRC Connection, *In Memorium – A special Tribute to Selinda Melnik* (Vol. 4, No. 4, Fall/Winter 2018) at 4-6

INSOL International PRC One Day Seminars, 30 October and 1 November 2018

Report by Professor Li Shuguang, BLRRC;
Helena Huang, King & Wood Mallesons
and Andrew Koo, EY
Seminars Co-Chairs

The 2018 INSOL PRC One Day Seminars on Cross-Border Insolvency and Restructuring were held on 30th October and 1st November in Beijing and Shanghai.

The seminars were held in partnership with the Bankruptcy Law and Restructuring Research Center, China University of Political Science and Law (BLRRC – CUPL) – China. A number of senior executives from INSOL International, both past and present, participated in the seminars including: Professor Li Shuguang, the China Chapter Chairman and former INSOL Board Director, Scott Atkins, *Fellow, INSOL International*, INSOL Executive Committee Member and James H.M Sprayregen, INSOL Past President.

The Organising Committee together with Professor Li Shuguang worked hard to extend the seminar to a full day programme (previously a half day). As a result, we were able to invite more speakers from around the globe to attend. In fact, we had speakers from seven countries and areas including: Australia, Cayman Islands, China, Hong Kong, India, Singapore and the United States. They provided members and the audience with an update on the latest developments in bankruptcy and restructuring regimes and the commercial landscape of the distressed markets across the globe.

During the Beijing seminar, we were also honoured to be visited by senior judges from The Supreme People's Court of The People's Republic of China. Judge Liu gave us a quick introduction on the internal policy towards the application of the Enterprise Bankruptcy Law to resolve zombie and seriously distressed companies in China.

Judge Fu of the second Civil Court of The Supreme People's Court, the key court administering the Chinese bankruptcy cases, also attended the seminar in the afternoon. Her attendance gave the audience a lovely surprise.

Judge Liu and Judge Fu's attendance provided strong encouragement to the audience and the Organising Committee as regards the healthy development of the bankruptcy and restructuring market in China.

A stimulating and balanced programme was put together by our Organising Committee involving 15 elite speakers covering four sessions:

1. **Regional Update**
2. **Challenges and resolutions of group insolvency and restructuring procedures**
3. **China – a year in review**
4. **Maximising value in portfolio disposals**

In session 1, the speakers, Scott Atkins from Norton Rose Fulbright, Sripatham Venkatasubramanian Ramkumar from EY, Chai Ridgers from Harneys, James Sprayregen from Kirkland & Ellis and Meiyen Tan, Oon and Bazul provided an update on a number of jurisdictions including India, Hong Kong, Singapore, Malaysia and Australia. The introduction of the new bankruptcy law in India, which led to a large volume of bankruptcy and restructuring cases, gave us a good insight into how the change in legislation would impact the economy of the developing country. The speakers also touched briefly on the trade war between China and the United States and its impact on the global market.

During the second session, led by Sam Tai from Borrelli Walsh, Chen Jianbin from Zhuoxin Law Firm, Zhou Ping from Debtwire and Jeffrey Wang from BDA Partners introduced Investment and Financing Structures and Early Warning Symptoms and Insolvency and Reconstruction Options, Challenges and Resolutions. The speakers debated on the cross-border challenges between Hong Kong and the mainland of China and how foreign creditors rights could be addressed under the Chinese local regime.

A focal point of our One Day Seminar has always been the panel led by Professor Li Shuguang, which focused on the current situation of the Chinese economy, highlighting the policy trends of Chinese Bankruptcy Law Implementation and an outlook on the future of Chinese Bankruptcy Law. YE Bingkun from Xiamen Intermediate Court, Hao Zhaohui from King & Wood Mallesons and Zheng Zhibin from Dentons also joined this session to give their insights. The key takeaway included the determination of the Chinese authorities to implement the system to transfer civil cases from "Enforcement Procedure to Bankruptcy Procedure". We may also expect the rollout of the revision of the Chinese Enterprise Bankruptcy Law soon and a stronger push in China for the cooperation of cross-border bankruptcy.

Last but not least, Richard Woodworth from Allen & Overy led a panel on portfolio disposals in China, inviting his colleague Jane Jiang and Ted Osborn from PwC to provide their insights. This included discussions on the support of The Supreme People's Court of The People's Republic of China and the improvement made on Chinese information construction, etc.

After a full day of fruitful discussions, Professor Li Shuguang gave some final remarks highlighting the key issues emerging from the panels. He acknowledged how much work had gone into the programme and appreciated the comprehensive cutting-edge information provided. The current problems and challenges faced by the industry were discussed in depth and became a key takeaway from the seminar.

A big thank you to our hard working Organising Committee - Kwun Yee Cheung, Baker McKenzie; Gao Yang, Fangda

Partners; Helena Huang, King & Wood Mallesons; Rosalie Lui, KPMG; Andrew Koo, EY; Professor Li Shuguang, Bankruptcy Law and Restructuring Research Centre, China University of Political Science and Law; Kevin Song, Borrelli Walsh and Richard Woodworth, Allen & Overy - who helped put together an international programme with highly experienced speakers who travelled all the way to Beijing and Shanghai to support the event.

Once again, we could not have run a successful seminar without the strong support from our partners, the Bankruptcy Law and Restructuring Research Centre, China University of Political Science and Law and the HKICPA; and our long-term sponsors: EY, King & Wood Mallesons, Fangda Partners, Mourant and Zolfo Cooper. A big thank you to our strong and loyal supporters.

INSOL International Hong Kong One Day Seminar, 7 November 2018

Report by Tiffany Wong,
KPMG, Hong Kong
and
Maria O'Brien, *Fellow, INSOL International*
Baker McKenzie, Australia
Seminar Co-Chairs

INSOL International ran its first one-day Seminar in Hong Kong on 7 November 2018. Support for this inaugural seminar was very strong, with 195 delegates in attendance, made up of local, regional and global attendees. As a result of the success of this event, INSOL International is proposing to hold an annual one-day seminar in Hong Kong, with the next one confirmed for 18 October 2019.

Session 1: PRC restructuring - what's happening?

Chair: Tiffany Wong (KPMG, Hong Kong).
Speakers: Howard Lam (Fellow, INSOL International, Latham & Watkins, Hong Kong),
Alan Tang (ShineWing, Hong Kong),
Judge YE Bingkun (Xianmen Intermediate People's Court, Fujian Province PRC)

Eleven years on since the promulgation of the PRC Enterprise Bankruptcy Law ("PRC Bankruptcy Law") in 2007, there has been significant development in law and practice in how insolvent companies are restructured or liquidated in the PRC. The panel covered the major developments and their implications especially given the fact that the number of bankruptcy filing has increased significantly over the past few years as a result of the supply side reform policy pushed by the central government in order to curb further investments into inefficient zombie state-owned enterprises. During the discussion, the panellists shared their perspectives in relation to the establishment of bankruptcy courts and the online platform where information about applications filed under the PRC Bankruptcy Law and communication made by the bankruptcy administrator can be made available to the public. The PRC Bankruptcy Law has attracted increasing interest from overseas stakeholders due to the rapid rise of the ranking of the PRC in the Doing Business indicators of the World Bank, particularly in relation to the one on resolving insolvency.

Session 2: The Indian Insolvency and Bankruptcy Code (IBC): a new nirvana for distressed investors?

Chair: Damien Coles (Kirkland & Ellis, Hong Kong).
Speakers: Ashutosh Agarwala (Duff & Phelps, India),
Sarit Chopra (Bain Capital, Hong Kong),
Piyush Mishra (AZB Partners, India)

The panel brought a very practical perspective to bear on the challenges for foreign capital providers in exploiting the opportunities arising from the IBC, including:

- how foreign funds have structured their investments and operations to accommodate the Indian regulatory regime;
- the effect of section 29A of the IBC, designed to prevent promoters of companies' subject to the IBC from taking back control of the companies through the IBC process, and its operation in practice;
- the impact of litigious challenges to bids and the role of the NCLT;
- possible future modifications to the IBC regime to further improve its effectiveness.

Session 3: China banks - how painful is the deleveraging campaign going to be?

Keynote address by Jason Bedford (UBS, Hong Kong)

Jason's very informed and thought-provoking presentation looked at the increasingly proactive regulation of non-performing loans in China, including the changes to loan recognition rules that will lead to increasing NPL recognition, and an enforcement focus on the shadow lending sector.

Jason identified the major risks to the Chinese banking sector as including:

- asset quality deterioration, underpinned by a weaker macro environment and domestic property market activity;
- regulatory risk related to banks' capital, liquidity and off-balance sheet activity;
- deterioration of funding structure and balance sheet liquidity positions, driven by potential loan rollover and asset duration lengthening;
- medium-term interest rate liberalisation and the consequent pressure on bank profitability.

Session 4: Cross-border insolvencies involving Asia, the US and relevant offshore jurisdictions - a practical look at EMAS and China fisheries

Chair: Ian de Witt (Tanner de Witt, Hong Kong). Speakers: William Brandt (Development Specialists, Inc, USA), Ian Mann (Fellow, INSOL International, Harneys, Hong Kong), Smitha Menon (WongPartnership, Singapore)

This particularly robust panel was characterised by firm views and the healthy rivalry between the insolvency professions in Hong Kong and Singapore.

A central theme was whether recourse to the US Bankruptcy Code by Asian debtors leads to abuses, and the relative merits of the laws of each of Hong Kong, Singapore and the Cayman Islands to deal with Asian cross-border restructurings with offshore aspects.

What clearly emerged from the panel is that the choice of jurisdiction in cross-border restructurings is a dynamic and ever evolving issue. The merits of legislative changes from "creditor-friendly" to more "debtor-friendly" in some jurisdictions will continue to be the subject of fierce debate.

Session 5: Hong Kong - what is happening and where to from here?

Chair: Jason Karas (Lipman Karas, Hong Kong). Speakers: Michael Chan (Borrelli Walsh, Hong Kong), Teresa Cheng (Department of Justice Hong Kong Special Administrative Region Government), Phyllis McKenna (Official Receiver, Hong Kong), Eddie Middleton (Fellow, INSOL International, Houlihan Lokey, Hong Kong)

The fifth panel was a true highlight of the seminar, including due to the attendance of Teresa Cheng, Hong Kong's Secretary for Justice, speaking of her firm commitment to the introduction of a Corporate Rescue Procedure (CRP) into the Hong Kong Parliament in 2019. Other highlights of Ms Cheng's presentation were the foreshadowing of a raft of other proposed insolvency reforms in Hong Kong, including covering cross-border insolvency, arrangements between Hong Kong and the Mainland on cross-border insolvency, and potential reforms in relation to schemes of arrangement.

Ms Cheng was followed by Hong Kong's Official Receiver, Phyllis McKenna, who provided more detail on the suite of proposed new HK restructuring and insolvency laws, including CPR regime, the insolvent trading prohibition that will form part of the new regime and the cross-border insolvency law based on the UNCITRAL Model Law.

The remainder of the panel consisted of an informative and practical discussion between Michael Chan, Eddie Middleton and Ms McKenna as to the likely impact of the proposed CRP regime.

The panel also discussed outstanding issues which remain to be resolved in order to facilitate the introduction of the CRP regime including, in particular, the treatment of employee entitlements and the role of secured creditors in the process.

INSOL International would like to thank the Main Organising Committee for their hard work, and the enthusiastic participation of all the speakers and delegates.

We would also like to thank all of our sponsors for their generous support of the event: *Platinum Sponsors* Carey Olsen, Conyers Dill & Pearman, Lipman Karas and Tanner De Witt; *Coffee Break Sponsor* Campbells; *Lunch Sponsor* Zolfo Cooper and *Cocktail Reception Sponsor* Harneys.

INSOL International / World Bank Africa Round Table, 25 - 26 October 2018

Report by Adam Harris,
President, INSOL International
Bowmans,
South Africa
and
David Burdette,
Senior Technical Research Officer, INSOL International

The ninth INSOL International / World Bank Africa Round Table (ART) event was held in Maputo, Mozambique on 25 and 26 October 2018. The theme for ART 2018 was "Multinational Insolvencies in an African Context". Consequently, the topics focused on issues surrounding the theory and practice of cross-border insolvency in Africa.

Day 1

The programme kicked off with a welcome address by Mr Justice Alastair Norris (Royal Courts of Justice, UK), providing an overview of the concepts, principles and theories relating to cross-border insolvency. Judge Norris's address covered everything from territorialism to universalism, concluding with an explanation of modified universalism, the approach taken by the UNCITRAL Model Law on Cross-Border Insolvency.

The Deputy Minister of Industry and Commerce in Mozambique, the Hon Julio Pio, presented the keynote address at ART 2018. The Hon Deputy Minister reiterated that the Mozambican Government is committed to its strategic goals of developing efficient insolvency systems in line with best practice principles in regard to the Doing Business indicators in order to encourage investment and entrepreneurship. In his address, the Hon Deputy Minister also referred to the possibility of introducing fast-tracked insolvency procedures, limiting the involvement of the courts and the protection of employees in insolvency proceedings.

The keynote address was followed by the annual peer-to-peer session (moderated by Adam Harris, President, INSOL International and Bowmans, South Africa), where the focus was on African jurisdictions that have adopted the UNCITRAL Model Law. Speakers from Kenya, Mozambique, Nigeria, Uganda and Zimbabwe were asked to speak and delegates were informed that Mozambique and Nigeria have not adopted the Model Law, Uganda and Zimbabwe have adopted the Model Law – but with a reciprocity requirement built in – and Kenya has adopted the Model Law without the requirement of reciprocity (as the Model Law was intended to be adopted).

After a well-earned coffee break, Professor André Boraine (University of Pretoria, South Africa) moderated a panel looking at the development, origins and context of the Model Law. After André had set the scene with some illustrative examples of the issues accompanying cross-border insolvency situations, Jenny Clift (UNCITRAL Working Group V Secretariat) provided a summary of the origins of the UNCITRAL Model Law and took delegates through the main aspects of the text of the Model Law. Jo-Anne Marais (Barak Fund Management, South Africa) provided an explanation as to why countries should care about adopting the Model Law, explaining how risk assessment is built into a creditor or investor's pricing and that if countries are serious about foreign direct investment, which leads to economic growth, one needs to have certainty and predictability in the system; the UNCITRAL Model law greatly assists in providing this certainty. Victoria Weyulu (Office of the Attorney General, Namibia) addressed the issue of reciprocity, where countries will only recognise insolvency proceedings in another State if they would receive the same reciprocal treatment from that other State, and Mustapher Ntale (Uganda Registration Services Bureau) addressed the policy issues at play when deciding whether or not to adopt the Model Law and discussed how the courts in Uganda had dealt with the issue of reciprocity.

After a well-deserved lunch break, delegates were then divided into groups in order to participate in a case study dealing with recognition and relief under the Model Law. The case study was designed and led by Chris Parker (DLA Piper, UK) and was ably assisted by Stefan Smythe and Alison Timme (PwC, South Africa). The case study was a lively event, stretching into the late afternoon.

Day 1 concluded with a distinguished panel of judges, moderated by Mr Justice Alastair Norris (Royal Courts of Justice, UK), looking at co-operation and co-ordination under the Model Law. Serving on the panel were the Hon Justice Ibrahim Buba (Federal High Court, Nigeria), Justice Maria de Fatima Fonseca (Commercial Section, City Court of Maputo, Mozambique) and Justice Lydia Mugambe (High Court of Uganda). From this session it was clear that there are still relatively few cross-border insolvency cases appearing before the domestic courts of the jurisdictions covered, although these do seem to be increasing. The issues surrounding co-operation and co-ordination do not appear to be any different from the issues experienced in other jurisdictions, although the panel did seem to intimate that they were open to both co-ordination and co-operation in cross-border cases, provided that due process is followed based on a principled approach.

The end of Day 1 was followed by a cocktail reception and dinner, kindly sponsored by Grant Thornton.

Day 2

After the introductions welcoming everyone back, Antonia Menezes (*Fellow, INSOL International*, The World Bank Group) gave a brief overview of what had taken place on Day 1 in the session titled "Bridging the Gap". This was a useful summary for persons who had not attended Day 1.

The first full session of Day 2 dealt with "Insolvency Practitioners in a Cross-Border Context" and was ably moderated by Amaechi Nsofor (Grant Thornton, UK). Providing context to the ensuing discussion, Lézelle Jacobs (University of Wolverhampton, UK) provided delegates with a useful explanation of the ethical obligations and fiduciary duties of insolvency practitioners. This was followed by Prabha Chinien (Registrar of Companies, Mauritius) introducing the International Association of Insolvency Regulators' newly adopted set of principles titled "The Regulatory Regime for Insolvency Practitioners: The IAIR Principles". Bulisa Mbano (Grant Thornton, Zimbabwe) explained the new legislation dealing with the regulation of insolvency practitioners in Zimbabwe, and Alison Timme (PwC, South Africa) provided insights from the point of view of a practitioner. This session was one of the liveliest sessions of ART event, generating quite a heated discussion amongst the panellists and entertaining delegates prior to the coffee break.

In a fascinating session titled "Cross-Border Case Law", moderated by Peter Declerq (*Fellow, INSOL International*, DCQ Legal, UK) and ably assisted by Kabiito Karamagi, (*Fellow, INSOL International*, Ligomarc Advocates, Uganda), Craig Martin (*Fellow, INSOL International*, DLA Piper, USA) and Joyce Mbui (Bowmans, Kenya), this panel focussed on important case law interpreting some of the more important provisions of the Model Law.

The final two sessions of the day dealt with "Available Options for Dealing with Cross-Border Insolvency in Africa". During these two sessions, moderated by Amaechi Nsofor (Grant Thornton, UK), Nastascha Harduth (*Fellow, INSOL International*, Werksmans Attorneys, South Africa) and Okorie Kalu (*Fellow, INSOL International*, Punuka Attorneys and Solicitors, Nigeria) presented live applications for recognition and relief based on a fact pattern to judges from Nigeria (Hon Justice Ibrahim Buba), Mozambique (Justice Maria de Fatima Fonseca) and South Africa (Acting Judge Matthew Klein). The purpose of this exercise was to illustrate the various options for recognition and relief under not only the Model Law but also under the common law and on the basis of existing treaties in the region. This session not only provided delegates with examples of alternatives to recognition and relief in cross-border insolvency cases, but also demonstrated how such applications work in practice. The panel of judges kindly provided their judgments on the applications immediately after they had been heard.

The two-day programme at ART 2018 demonstrated how far the ART initiative has developed over the past nine years. We look forward to the 10th anniversary of the ART initiative, which will be celebrated in Swakopmund, Namibia in late November 2019.

Conference Diary

May 2019				
2-5	CLLA National Convention	Orlando, FL	CLLA	www.clla.org
22	INSOL International / INSOL Europe Stockholm One Day Joint Seminar	Stockholm, Sweden	INSOL International	www.insol.org
22	ABI Bankruptcy Conference	New York, NY	ABI	www.abi.org
22-24	R3 Annual Conference	Northumberland, UK	R3	www.r3.org.uk
June 2019				
6-7	INSOL Europe Eastern European Committee Conference	Ljubljana, Slovenia	INSOL Europe	www.insol-europe.org
20	INSOL International Channel Islands One Day Seminar	Guernsey	INSOL International	www.insol.org
August 2019				
13-15	CAIRP Annual Conference	Quebec City. QC	CAIRP	www.cairp.ca
September2019				
25-27	TMA Annual Conference	Cleveland, OH	TMA	www.turnaround.org
26-29	INSOL Europe Annual Congress	Copenhagen, Denmark	INSOL Europe	www.insol-europe.org
October 2019				
17-18	NAFER Annual Conference	Scottsdale, AZ	NAFER	www.nafer.org
18	INSOL International Hong Kong One Day Seminar	Hong Kong	INSOL International	www.insol.org
November 2019				
7	INSOL International Tokyo One Day Seminar	Tokyo, Japan	INSOL International	www.insol.org
14-15	SARIPA Annual Conference	KwaZulu-Natal, SA	SARIPA	www.saripa.co.za
22	INSOL International / World Bank Group Africa Round Table Open Forum	Swakopmund, Namibia	INSOL International	www.insol.org
December 2019				
5	INSOL International / RISA Offshore One Day Joint Seminar	The Bahamas	INSOL International	www.insol.org

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