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Editors' Column

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In this issue we look at the latest developments in insolvency law in Africa. We take a good look at recent law reforms in Nigeria, Uganda, Liberia, Mozambique and Ghana. One of our Fellows, Nastascha Harduth, contributes an excellent piece examining the duties of directors of South Africa's' State-Owned Enterprises, specifically asking the question of whether their obligations extend not only to their Government shareholders, but to act in the best interests of all stakeholders.

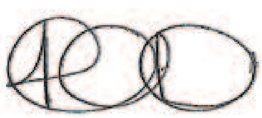
Another of our Fellows, Jasper Berkenbosch, teams up with his colleague Kay Morley to bring us an excellent article exploring the recent European Insolvency Regulation governing the restructuring of European Group Companies. Jasper and Kay examine the new role of Group Coordinator and discuss how the new regulations are likely to be used to streamline the restructuring of corporate groups across European Member States.

Lisa Schweitzer and Katherine Lynch from the US give us a run-down on the two new cases dealing with COMI shift, Ocean Rig and Oi. While these cases represent somewhat separate extremes, they do provide some important lessons for businesses considering their COMI prior to a restructure.

Finally, we have the third and final instalment from Leonard Goldberger (INSOL Fellow) & Qing Lin on the Takata saga, an extraordinarily complex global restructure managed through the US bankruptcy courts.

Thank you to all contributors for the excellent content this quarter.

On a personal note, I would like to extend my best wishes to all as we head into the Holiday Season.



Peter Gothard

President’s Column

By Adam Harris
Bowmans
South Africa

It is a perfect day in Cape Town! The view from my office window has deep shades of blue and the temperature is warming up as if summer is eventually on its way. Pity it’s a Sunday and that the balmy temperature is generated by our inconsistently efficient heating and air conditioning system, rather than the actual rays of the sun.

I am trying to complete this President’s column before I leave to join the INSOL Europe conference. The relentlessly efficient INSOL International office is chasing me as another deadline looms.

Back in Queen Street, London, (INSOL’s command central), new IT equipment is being installed and commissioned, and the INSOL International machine continues to churn out its deliverables. It never fails to amaze me how much work is in fact generated by INSOL International across so many parts of the globe. Much of this emanates from Queen Street, although this location is to be joined in the not too distant future by an Asian hub from which the organisation can keep more closely in touch with members and stakeholders in this dynamic and fast-growing region. This new hub, when established, will be the fulfilment of one of the seminal work streams of the Task Force 2021 which (you may recall) we launched in Sydney in 2017 and, I have no doubt, will add immeasurably to our reach, response, and relevance across the region.

Reflecting on the year so far, it has been challenging but rewarding. To use a phrase out of context, the year has seen both fight and flight. Fortunately, there have been more flights than fights. Substantially more, in fact. My Microsoft calendar was highly populated. As a global organisation, it is so important for us to interface with our stakeholders. It means that we cannot just be adding value in the background - we must be seen to be doing so.

First up for 2018 was the Antipodes. I attended various meetings and two G36 functions in Sydney and Melbourne to kick off the year.

Our highly successful annual regional conference in New York City was next on the agenda and we saw over 800 people attending and enjoying the learning, the social interaction and all the good things which New York has to offer.

Shortly thereafter I had the privilege of attending and participating at the World Bank Group Insolvency and Creditor/Debtor Regimes Task Force meeting in Washington, DC. Their valuable and interesting report, *“Saving Entrepreneurs, Saving Enterprises: Proposals on MSME Insolvency”* has since been published.

Jason (our COO) and I enjoyed the warm hospitality and insightful technical programme attending a successful R3 conference in Vilamoura, Portugal. Later in the year I joined the INSOL International Academics’ Colloquium which boasted both interesting and stimulating technical papers and which this year took place in London.

Not having completed this note in the occasionally climate-controlled environment of my office, it is again on my screen at the airport in Athens. I am on the return leg of the trip to the INSOL Europe annual conference in this historic city. Under the banner of “Breaking the Chains”, it was a great event combining fascinating (and sometimes out of the mainstream) content, and social interaction. It was all very well received by the record number of delegates attracted to this ancient site. Panels explored the twilight world of electronic assets, and the high-tech gurus demonstrated some of their under-cover methods of tracking assets and those who would rather not be traced. I look forward to developing another joint project with INSOL Europe, following our two highly successful events in Tel Aviv (last year), and Helsinki (earlier this year). Stockholm in Sweden has been whispered as a possible venue.

Next on my agenda, and closer to home base, is one of my favourite and most rewarding events. The Africa Roundtable project (which we present jointly with the World Bank Group), took us to Maputo, Mozambique where the theme for this year explored cross-border issues in an African context. This theme is under the spotlight as an increasing number of jurisdictions in Africa reform their insolvency laws, and as the reach of cross-border matters extends further across the globe.

In the cross-border context, I have to mention the retirement of Jenny Clift. For so long Jenny has been an unflinching spokesperson and ambassador for the implementation of the UNCITRAL Model Law. She was awarded the INSOL International Scroll of Honour (our highest accolade). The profession and all the stakeholders on the global stage are indebted to Jenny for her efforts and the results thereof, and we are privileged to have worked with her.

Although our next conference (in Singapore) is some months away, the Main Organising Committee and the Technical Committee are hard at work developing and refining the programme, the matrix of interesting and relevant speakers, and the whole experience which we will be rolling out in Singapore in April next year. In the context of future conferences, I must mention the fact that it has rained in Cape Town! I mention this not only because of my British heritage – we do enjoy a little chat about the weather now and then - but because it will be the host city for our 2020 conference.

I end off on a note of tribute and recognition. The International insolvency stage has lost another of its brightest lights. It was with sadness that we learnt of the passing of Dr Shinjiro Takagi at the age of 82. He was not only widely regarded as the doyen of the Japanese insolvency profession but also took the time to participate strongly in INSOL International programmes and was a regular attendee at, and contributor to our conferences and regional events. His focus, not only In Japan, but across the region, was on both domestic and international bankruptcy and business restructurings. The positive message is that we do hope that the bond between INSOL International and Dr Takagi's family and his fine legacy, will be maintained through his son-in-law, Shinichiro Abe, who has also been a friend and supporter of, and a valued contributor to the work which INSOL International does.

Reflecting on this note, and the scope, range, and reach of what we do, I am proud to be associated with INSOL International. We are truly global.

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Focus: African Region

Liberia's Insolvency Practice

By Eva Mappy Morgan
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Liberia has passed several pieces of legislation to set the pace for an effective credit infrastructure framework. In 1999, the Legislature enacted law to provide for the conduct of financial institutions as regulated by the Central Bank of Liberia.[1] Part V of the Act is one of early instances where Liberian law recognized and made provisions by addressing insolvency matters within financial institutions. As it relates to "rescuing" and reorganizing the entity as opposed to direct liquidation, the Act states,

> *"The Central Bank shall have the power to determine compulsory reorganization of a financial institution. In making such determination the Central Bank shall be guided by the obligation to protect the interest of depositors and creditors having regard to safeguarding the integrity and the preservation of confidence in the Liberian financial system…"*[2]

As discussions continued on issues surrounding resolving insolvency in a manner conducive to the insolvent party, the Legislature sought to address these concerns by making amendments to existing laws. In 2002, the Legislature amended the Associations Law (Business Corporations Act) by revising provisions on the Dissolution of Limited Liability Companies. Specifically, the revised provision states "Unless otherwise provided in a limited liability company, or with the written consent of all members, 120 days after the commencement of any proceeding against the members seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution or similar relief under any statue…"[3] This language indicates deliberate exchanges on creating an enabling rescue culture in the commerce environment.

Considering the narrow focus of these laws, a robust regime was needed to handle the complexities regarding debtors and creditors rights. In 2010, the Legislature enacted law creating the Liberian Commercial Code of 2010. Since passage of that law and the establishment of the Commercial Court of Liberia also in 2010, Liberia experienced an increase under the World Bank Group's Doing Business Index. Further to the passage of these two Acts, the creation of the Collateral (Movables) Registry housed at the Central Bank of Liberia also shifted the needle upward in the mentioned Doing Business Index.

This latest piece of legislation supporting the development of a viable credit lending infrastructure is the Liberia Insolvency and Restructuring Act (LIRA) of 2017. This Act is transformative within Liberia's legal system because it provides for an efficient and credible framework for the rescue of businesses and natural persons under financial distress.[4] The rescue culture, though mentioned in other Acts, is not common to the Liberian marketplace. The common trend in the Liberian market is that businesses windup, go bankrupt, without expectation of recovery. Therefore, the introduction of LIRA is significant. LIRA attempts to grow a *'Business Rescue'* culture that brings hope particularly to micro, small and medium enterprises (MSME) that are often cash-strapped and more vulnerable to insolvency.

This Act, and the Collateral Registry which encourages lending against movable assets creates the mechanisms for an efficient credit system, improves access to credit and sustains entities. Together, there is improvement in debt recovery for creditors and more opportunities to transform the economic health of MSMEs, which translates into saving jobs and advancing the general wellbeing of businesses in a challenging business environment. Prior to enactment of the LIRA, no comprehensive legal, regulatory and institutional framework existed to resolve insolvency, and to support lending against movables assets. The World Bank's 2017 Doing Business Report, ranked Liberia 174 among 190 countries as a place to do business.[5] Liberia also scored poorly on two Doing Business indicators that measure how courts resolve commercial and insolvency matters, which serve as proxies for debt recovery.[6] However, with the passage of LIRA, Liberia saw improvements in the Resolving Insolvency indicator due to the reforms prescribed in the new law. As of the 2018 Doing Business Report, while overall Liberia remained 172 among 190 countries for doing business, relative to the Resolving Insolvency indicator, Liberia jumped from 168 in 2017 to 106 in 2018.[7]

Liberia improved approximately 31.25% as it relates to

1 *See* New Financial Institution Act (1999).
2 *Id.* at Part V §50.
3 An Act Further Amending Certain Sections of the Associations Law, Title 5, As Amended of the Liber Code of Laws Revised, §14.3.4 (b) (June 19, 2002).
4 *See* Insolvency and Restructure Act, §8.3 (2017).
5 The World Bank, 2017 Doing Business Report, 14th ed. (2016)
6 *See id.*
7 The World Bank, 2018 Doing Business Report, 15th ed. (2017)

Resolving Insolvency with the passage of LIRA.[8] Yet, LIRA is not operational. Therefore, the Commercial Court continues to work closely with the World Bank Group in its final stages of implementing a three-component project to: 1. Operationalize LIRA with supporting implementing regulations, 2. Develop a court-annexed Commercial Mediation framework and 3. Develop an Electronic Case Management System to improve the Court's overall operation.

Efforts are ongoing to educate lending institutions and court users on the reforms being implemented to improve the overall credit infrastructure in Liberia. The Commercial Court continues to receive positive feedback from Commercial Banks, evidenced by noticeable improvements to resolve commercial disputes in a fast and predictable manner. With emphasis on Meditation, the Central Bank of Liberia and the Commercial Banks are hopeful that this measure will enhance confidence in lending because there's an effective alternative for recovery of non-performing loans. Banks are able to work with debtors to restructure debt and work towards viable solutions.

Despite efforts to advance the credit lending space, Liberia still faces challenges in its policy and regulatory framework. While LIRA was formally passed into law in January 2017, certain provisions are incomplete, thus stalling full implementation of the law. The Commercial Court recognizes the potential positive impact of these reforms on Liberia's lending environment and encourages relevant stakeholders to push for completion of the much-needed regulations governing the administration of insolvency.

The efforts to raise awareness among relevant court users continues to increase confidence among lending institutions that the Commercial Court is equipped to address issues surrounding Liberia's credit infrastructure.

7 The World Bank, 2018 Doing Business Report, 15th ed. (2017)
8 *Id*. at 174

An Overview of Insolvency Procedures for Banking Institutions in Mozambique

By Miguel-Angelo Almeida
Mozambican Association of Insolvency Administrators (AMAIN)

Mozambique recently saw a small commercial bank (Nosso Banco, S.A) enter liquidation, and another major commercial bank (Moza, S.A) enter administration and subsequent resolution with its creditors. The ongoing administrative chaos that ensued in both cases sheds light on the underlying legislation which until now had not been tested.

The Law on Administrative Liquidation of Financial Institutions and Credit Companies ("Liquidation Law") was enacted in 2007. While it has some specific provisions exclusive to financial institutions and credit companies it refers most of the procedural aspects to the Civil Procedure Code ("CPC"). However, sections 1122 to 1325 of the CPC, the very sections referred to in the Liquidation Law, have been revoked by the Legal Regime on Insolvency and Rescue of Commercial Entrepreneurs of 2013 ("Insolvency Regime"). To add further confusion, the Insolvency Regime expressly excludes financial institutions and finance companies from its scope of application.

There is therefore a legislative vacuum; the liquidation of commercial banks falls under the scope of the Liquidation Law which refers to the CPC insolvency section, which has been revoked and replaced by the Insolvency Regime, which in turn does not apply to commercial banks. This leaves us with two choices to close the legal loophole: either apply the CPC and ignore the revocation of its insolvency sections, or apply the Insolvency Regime and ignore the fact that the scope of application does not include financial institutions. There are solid arguments for either option but whichever one is chosen, it brings serious challenges.

If we go with the former and apply the revoked CPC insolvency section, we will be applying an obsolete liquidation procedure which is the reason it was revoked in the first place. The CPC has been amended twice, in 2005 and 2009, but the section on insolvency has remained unaltered since 1961 except for certain terminology. The CPC insolvency section is out of touch with the socio-economic reality of the country, as emphasized by the legislator in the preamble of the Insolvency Regime. The CPC insolvency and liquidation process is complex, with too many procedural steps until the creditors are finally paid. Although the Liquidation Law replaces some of the court roles with the Bank of Mozambique, the procedure's heavy and time-consuming nature remains.

It is true that the CPC and the Liquidation Law establish very short timeframes for each step and some of these steps may occur simultaneously, but it is equally true that there are too many possible steps until creditors are paid and considering the reality of the court systems, many of these timeframes cannot be observed.

Should we go for the approach of accepting the CPC as revoked and apply the Insolvency Regime, even though it expressly excludes financial institutions, we would be applying a regime that has not been designed for relatively complex entities such as commercial banks. The Insolvency Regime has been designed to determine a company's future quickly either via resuscitation (if viable) or liquidation of the business, with no consideration of the wider impact of such a decision. Both insolvency and rescue under the Insolvency Regime are creditor centric with major decisions being made by the general body of creditors and even though the judges have some administrative authority, they cannot make decisions that the majority of creditors do not agree with. This contrasts with the operation of the Liquidation Law which places

decision making control in the hands of the liquidation committee and the Mozambican Central Bank.

Besides the references to the CPC which are the root cause of the issues described above, the direct provisions of the Liquidation Law also warrant improvement. For example, while it does a good job in distinguishing the procedures for financial institutions that capture deposits and those that do not, it does treat all deposit taking financial institutions equally, even those that are systemically important. Should the Mozambican Central Bank make the bold decision of liquidating a systemically important financial institution, its liquidating procedure should be more transparent and with more checks and balances than ordinary proceedings of a non-systemic bank.

The liquidation committee under the Liquidation Law has vast powers and sets the pace of the liquidation proceedings. However, it only allows one representative from the creditors. This one representative will most likely not be able to fairly represent all the classes of creditors. For example, the interests of labour claims vary significantly from those of depositors or suppliers. This is aggravated by the fact that neither the Liquidation Law nor the CPC it refers to, provide for a clear hierarchy and classification of creditors. Therefore there should be more room for the different classes of creditors to be represented in the liquidation committee and clear ranking to safeguard the interest of all creditors.

The logical conclusion is that we need a new piece of legislation to address the liquidation of financial institutions that is adjusted to the socio-economic reality of the country. It should also be as self-sufficient as possible by refraining from referring to other inappropriate pieces of legislation to avoid any legislative vacuum.

Insolvency Law Reforms in Nigeria – Where are we Going?

By Olanipekun Orewale, Perenami Momodu, Oluwasemiloore Atewologun and Odinaka Okoye

Aelex
Nigeria

Introduction

In the Doing Business 2018 World Bank Group Flagship Report ("the DB Report"), Nigeria's Distance to Frontier (DTF) score on resolving insolvency was 30.60 on a scale of 1 - 100. In summary, the DB Report provides that the time frame for resolving insolvency is two years; the cost of resolving insolvency is 22.0% of the estate; and the recovery rate is 27.8 cents on a dollar.

Nigeria's current DTF score on resolving insolvency is a direct fallout of the legal framework governing corporate insolvency in Nigeria (i.e. the Companies and Allied Matters Act, Chapter C20 Laws of the Federation of Nigeria, 2004). This score may not offer comfort to prospective investors or serve as an incentive for foreign direct investment from economies with higher DTF scores.

The need for reform

A valid reason to explain Nigeria's DTF score on resolving insolvency would be the deficiency of Nigeria's insolvency framework in comparison to current global trends and standards. For example, the current legal framework makes no effective provisions for business rescue of financially distressed companies. The corporate insolvency options available to financially distressed companies are receivership, liquidation, and arrangement and compromise. In practice, liquidation and receivership are most common. These options are geared towards a dissolution of the company.

In addition, there are no express legal provisions prioritising claims of secured creditors above preferential payments and all other classes of creditors. Due to the limited nature of the insolvency provisions, and the uncertainties created, creditors and companies often resort to court for interpretation of legal provisions, leading to delays with resolving insolvency.

The proposed reforms - where are we going?

In recognition of the need to promote business rescue, create enabling conditions for investment and improve the ease of doing business in Nigeria, the Nigerian Senate on 15th May 2018, passed the Companies and Allied Matters Act (Repeal and Re-enactment) Bill ("the CAMA Bill"). The CAMA Bill has been presented to the second legislative house of the Nigerian National Assembly, for approval, before it can be assented to by the President.

Although the CAMA Bill has not been passed into law, it seeks to bridge the gap in the existing legal framework for corporate insolvency. The key advantage of the CAMA Bill with respect to corporate insolvency is that it prioritizes business rescue above liquidation and receivership. Therefore, in line with international best practices, the insolvency reforms have introduced corporate reorganization for financially distressed companies (or companies on the verge of financial distress) such as Company Voluntary Arrangement ("CVA") and Administration. It is expected that before liquidation or receivership is considered, options such as CVA and Administration are explored.

In a CVA, the creditors approve a debt composition or scheme of arrangement to rescue the company from its financial distress. A liquidator can also initiate a CVA to rescue the company from liquidation. Likewise, the main objective of administration is for a business rescue of a company in potential financial distress. To ensure that this objective is achieved, the insolvency reforms make adequate provisions (amongst others) for moratorium against enforcement actions by creditors during administration.

With respect to creditors' winding up, the insolvency reforms have increased the trigger debt for commencement of a creditor's winding up from N2,000 (approximately $6) to N200,000 (approximately $552). The reforms have also introduced provisions prioritising claims of secured creditors above preferential payments and all other classes of creditors. In addition, it now allows certain secured creditors to commence enforcement/sequestration or attachment of assets during liquidation.

Furthermore, the insolvency reforms now increase the period for determination of fraudulent preferences with express provisions allowing the courts to make orders restoring the company to the position the company would have been in, had it not engaged in the transaction. Where transactions are suspected to have been carried out at an under value before the onset of insolvency, a liquidator or administrator may apply to court for an order, restoring the distressed company to a position it was in, prior to engaging in the transaction. Also, during an administration, company voluntary arrangement, and or liquidation, a company may enter into contracts for supply of essential services, on certain conditions.

The reforms have also specifically defined the term "insolvency practitioner" and provided the educational and professional requirements for qualification as an insolvency practitioner.

Conclusion

Overall, the reforms will bring about positive developments in resolving insolvency since they significantly change the focus of insolvency in Nigeria from business liquidation to business rescue. This will in turn create and ensure confidence in the insolvency regime in Nigeria.

A brilliant aspect of the insolvency reforms is that it now seeks to balance out the interests of both the creditors and the company (debtor). Without the reforms, the Nigerian insolvency framework has been argued to mostly favour the creditors since they are able to initiate winding up proceedings over a nominal amount. With the reforms however, while creditors have the advantage of approving proposals during administration and CVA, the company will also take benefit from the overall business rescue.

It is anticipated that the reforms would reduce the risk of corporate insolvency and directly boost foreign investment in Nigeria. Consequently, it is expected that the CAMA Bill will improve Nigeria's ease of doing business rankings and its DTF score on resolving insolvency by the year 2019, if the CAMA Bill is passed into law.

Recommendation

Over the past decade, Nigeria has experienced a considerable amount of foreign direct and foreign portfolio investment. In view of this, it is expected that insolvency reforms should take into account provisions addressing cross-border insolvency related issues. While the CAMA Bill makes no provision for this, it is recommended that the UNCITRAL Model Law on Cross-border Insolvency should be adopted in Nigeria. If adopted, this will provide a more robust insolvency regime in Nigeria and reflect Nigeria as a country which seeks to adequately protect the interests of all stakeholders.

Corporate Rescue and Cross-border Insolvency Developments in Uganda

By Kabiito Karamagi
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Uganda

Introduction

The Insolvency Act[1] came into force in August 2011, introducing key reforms such as: the consolidation of all principal laws governing insolvency previously found in the now repealed Bankruptcy Act, the Companies Act, and the Deeds of Arrangements Act; the introduction of rescue and rehabilitation mechanisms for financially distressed debtors modelled along administration proceedings introduced by the Insolvency Act of United Kingdom; and the adoption of the UNITRAL Model Law on Cross-border Insolvency as a means of providing legislative and judicial support to foreign insolvency proceedings.

Developments in corporate rescue

Despite numerous economic challenges over the past years including the collapse of a major local Bank[2] and the high loan default rates recorded in the economic slump of 2016[3], the rescue processes remained untested before the Courts of law raising questions about the business community's confidence in their worth and relevance. The best opportunity to test the law was presented with the highly publicized corporate collapse of Uchumi and Nakumat, both big brand Kenyan retail chains operating in Uganda.

The retreat of the Uchumi's Kenyan management to Nairobi amidst allegations of fraud in the company, chaotic scenes of enforcement by judgement creditors and lien holders against the company's assets, and threats of unrest by unpaid trade creditors and employees soon attracted the intervention the Government of Uganda and the Official Receiver forcing the company to find alternative means to address the trade supplier and employee demands.

Eventually, the company petitioned Court for winding up, leaving the liquidator to deal with issues of unsettled ranked creditors and the mess of tracing assets and setting aside voidable transactions. Nakumat, which collapsed soon thereafter, appears to have taken lessons from Uchumi, attracting less dramatic scenes by significantly settling claims of its employees and trade creditors from shareholder funds before petitioning for winding up.

Although these companies did not take benefit of the rescue provisions in the Insolvency Act, their collapse emphasized the need for a structured and systematic approach to companies in financial distress and highlighted a possible crisis of confidence in the new law. The filing by Uganda Telecom Ltd and Afrimax Uganda Ltd[4] for provisional administration therefore was a major development and an opportunity to show case the corporate rescue process.

The two companies were well established and recognizable telecom brands in Uganda that struggled dismally in the tide of disruptive innovations. The Courts readily granted the interim protection orders sought, demonstrating a clear appreciation of the need for expediency in the handling of administration proceedings. Uganda Telecom Ltd subsequently went into full administration while Afrimax Uganda Ltd, which was unable to enter in an arrangement with its creditors, is now in liquidation. The divergent ending for the entities offer more to learn from giving an opportunity to grow more public confidence in the rescue process.

Developments in cross-border insolvency

Unfortunately, the Uchumi and Nakumat ghosts were to resurrect in Uganda's first test case of the UNCITRAL Model Law on Cross-border Insolvency. The case arose out of an application for recognition of foreign insolvency proceedings by a Kenyan Court appointed Administrator of Spencon Services Limited, a leading construction company in the East African region. The group company experienced business decline subsequently selling nearly all the assets of the Ugandan entity and transferring the funds abroad. Its management then took refuge in Kenya leaving large creditor claims unpaid.

The secured lenders initiated enforcement of their securities, appointing Receivers over the company and commencing criminal action against the company's directors for the fraudulent disposal of assets pledged under security. The directors in turn commenced administration proceedings in Kenya under which the Administrator sought recognition in Uganda. As the sought had a resultant effect of suspending all creditor enforcement, the secured lenders and Receivers staged stiff resistance to the application, convinced that the company's action was an attempt to protect the directors from possible prosecution. The protracted fight was concluded when a compromise under which a recognition order was granted with unfettered rights of the secured lenders and their Receivers to continue their enforcement. The terms of this compromise were reduced into a Consent Order that outlined how the Receivers and the Administrator were to coordinate their duties.

Conclusion

The Courts have recorded a couple of rescue cases since the filings by Uganda Telecom and Afrimax, a sign of increasing confidence in the rescue mechanisms in the law. Uganda may be thankful to both Uganda Telecom and Afrimax for giving the rescue process the much-needed publicity. However, the real credit goes to the messy corporate failures of Uchumi and Nakumat for offering a good lesson in the consequences of the mismanaging financially distressed companies.

1 Act 14 of 2011, Laws of Uganda
3 Bank of Uganda took over Crane Bank (U) Ltd in 2016
3 Issue 9, Bank of Uganda Financial Stability Report, June 2017 at page 22
4 HC Misc. Cause 173 of 2017 – In Re Uganda Telecom Ltd; and HC Misc. Cause 20 of 2018 – In Re Afrimax Uganda Ltd.

Effect of the Insolvency Act 2015 of Kenya on the Interests of Secured Creditors in the Conduct of Insolvency Proceedings

By George Weru
PwC
Kenya

The Insolvency Act 2015 of Kenya heralded a new dawn in Kenya's business landscape. In particular, it introduced business rescue as the primary objective of insolvency proceedings, representing a significant paradigm shift from the "fire sale" recovery-oriented legal regime it replaced.

As the dust settles on the new Insolvency Act and we start seeing it being operationalized and enforced, we seek to provide some insights on the impact of arguably the most radical component of the new Insolvency Act - the introduction of Administrations as the core resolution mechanism for addressing corporate distress situations – on the interests of secured creditors in insolvency proceedings. The introduction of Administrations will have the most impact on insolvency proceedings in the country's corporate scene due to its general applicability to most corporate distress situations. So, what does the introduction of Administrations mean for secured creditors – who are more often than not commercial lenders?

Recovery time

Under the previous insolvency regime, secured creditors often pursued receivership as the primary recovery mechanism. Receivers or Receiver Managers were appointed over insolvent debtors with a view to realizing the secured creditor's security and making a distribution to them in the shortest time possible. Often, this meant selling off the most valuable assets of a business without the statutory requirement to consider opportunities for the revival of the business. How many businesses can survive the sale of their most valuable assets?

Under the new insolvency regime, going concern business rescue is prioritized over recovery to secured creditors. The new law requires administrators to first and foremost consider business rescue as an option in the conduct of administration proceedings. It is only in the absence of realistic prospects of business rescue that an administrator can then consider sale of the business, or the realization of its assets with a view to distributing dividends to secured and preferential creditors.

What does this mean for the secured creditors? At first glance, returns to secured creditors may take longer under the new insolvency regime due to pursuing going concern business rescue as opposed to realization of securities. This might, however, turn out to be a superficial view on the provisions of the new Act.

Whereas, in theory, the old regime provided for immediate realisations of the debtors' assets, the reality was that insolvency proceedings under the old regime were highly adversarial and litigious due to the perceived insensitiveness to the interests of other stakeholders, other than the secured creditors. These proceedings often also ended up being PR nightmares for the secured creditors as they often came under heavy attack from the directors and unsecured creditors and employees of insolvent debtors. Furthermore, the subsequent delays often resulted in the deterioration of the value of the businesses and their assets. In the end, realisations often took much longer and yielded less value than envisaged by the secured creditors and their receiver managers. It is expected that under the new regime, lenders are likely to make more timely and enhanced realisations due to a reduction in the adversarial nature of insolvency proceedings as a result of the alignment of interests of different stakeholders.

Furthermore, to ensure that realisations are achieved in a timely manner, the new law prescribes timeframes within which the administrator should make proposals to creditors for achieving the objectives of the administration (70 days) and when the administration should be completed (within 12 months). These time limits can only be extended with leave of the Court. In addition, under going concern business rescue, lenders are likely to retain the debtor for future business in the longer term.

Distributions to unsecured creditors

The new Insolvency Act has also brought some changes in the distribution of proceeds. Under the previous regime, holders of floating charge debentures had exclusive priority over the distribution of the proceeds of the business or assets of an insolvent debtor after costs and the payment of preferential claims.

However, under the new Act, a portion (20%) of the net proceeds[1] from the realisation of an insolvent debtor is ring-fenced for distribution to the unsecured creditors. This provision is applicable for debentures created after the operationalization of the Insolvency Regulations of 2016 (i.e. debentures created on or after 22 March 2016).

Effectively, for all new debentures, the debenture holder will only enjoy distribution of dividends after the settlement of costs of the administration, preferential claims against the debtor and the setting aside of 20% of the remaining proceeds for distribution to the unsecured creditors – reducing the pot by 20% compared to under the old insolvency regime.

It is, however, believed that secured creditors also stand to benefit from this new provision in that value is more likely to be maximized when a business is sold as a trading going concern as compared to a shutdown operation. A trading insolvent business is only possible with the support of its unsecured/trade creditors. Under the old insolvency regime, eliciting the support of trading activities from the unsecured creditors of insolvent businesses was very difficult because they often stood to recover nothing from insolvency proceedings in respect of their pre-receivership claims. The new provision on the distribution of a 20% portion of the net realisations to unsecured creditors in insolvency proceedings remedies this situation. Therefore, despite the carve out of value for unsecured creditors, secured creditors will stand to benefit from the going concern sale of assets and associated preservation of value.

Insolvency Practitioners and their duty of care

The new Insolvency Act requires that persons appointed to the office of administrator be licensed Insolvency Practitioners ("IPs"). Therefore, unlike under the previous insolvency regime where virtually anyone could be appointed as a receiver, only licensed IPs regulated by the Official Receiver can now be appointed. Licensing of IPs ensures that those who take office as IPs are properly vetted for their experience, qualifications, and integrity. All stakeholders in insolvency proceedings will benefit from increased professionalism and will enjoy some recourse in the event of professional negligence as these matters can be escalated to the regulator of the IPs.

Furthermore, upon appointment, an administrator becomes an officer of the court and owes their duty of care to the entire body of creditors of the insolvent debtor. Under the old insolvency regime, the receiver's duty of care was to the secured creditors only – and the interests of the unsecured creditors ranked secondary to the interests of the secured creditors. Under the new Act, the administrator cannot unnecessarily take actions that benefit the secured creditors at the expense of the unsecured creditors. Whereas secured creditors lose out on the perceived benefit of this 'bias' that was previously permitted by the law, they stand to benefit the most from the mutual trust and cooperation resulting from the perception of fairness/objectivity, accountability and transparency in insolvency proceedings. Less time and resources will be expended fighting legal battles that often arose due to mistrust amongst different stakeholders in insolvency proceedings under the old regime.

Administrator's statement of proposals

The administrator is required to prepare a statement of proposals for achieving the objectives of the administration, and to present it to the entire body of creditors for consideration and approval at the first meeting of creditors of the debtor company – to be held within 70 days of the commencement of the administration. In the absence of approval by a majority (in value) of the creditors, any such proposal cannot be adopted for implementation – except by way of application to the court.

1 Net proceeds are defined as the proceeds that would have otherwise been available for distribution to the floating charge secured creditors.

This requirement enhances cooperation by stakeholders and promotes speed, transparency and certainty in the conduct of the insolvency proceedings. We expect that the involvement of the entire body of creditors in considering this and taking a decision on the administrator's proposals will result in increased cooperation in the conduct of insolvency proceedings. The creditors' decision will be reported to the court, and the subsequent implementation of the proposal will have the court's blessing. Insolvency proceedings under the old regime were often adversarial and secured creditors ended up incurring considerable additional costs in contesting various litigation matters that arose. We expect that under the new regime this trend will change for the better.

Speed and certainty of resolution of the case is enhanced because within ten weeks of the commencement of administrations, creditors of the company will have a chance to take a decision on the strategy to be adopted in respect of its insolvency proceedings. Furthermore, administrations are only prescribed to last 12 months unless an extension is granted by the court or is approved by the creditors of a company. At the lapse of 12 months and in the absence of an extension, an administration automatically comes to an end. Therefore, administrations will not drag indefinitely without good cause as was frequently the case of insolvency proceedings under the old regime.

Moratorium

Through various provisions under the new Insolvency Act, administrators can be appointed over a company by the company itself, the company's board of directors, the court or a floating charge holder (secured creditor). However, regardless of the appointing authority, the appointments have equal standing once effected in the respective manners prescribed by the law for each appointing authority.

The new Insolvency Act has introduced the concept of a moratorium in the conduct of insolvency proceedings. According to Merriam-Webster, a moratorium is "*a legally authorized period of delay in the performance of a legal obligation or the payment of a debt*". In insolvency proceedings, a moratorium has the effect of shielding an insolvent debtor from creditor actions and enforcement proceedings. A moratorium can be an interim moratorium or a full moratorium. An interim moratorium takes effect where an application has been made to court for the appointment of an administrator or notice has been given to a secured creditor on the intention to appoint an administrator and remains in effect until an appointment has been made. A full moratorium on the other hand takes effect when an appointment takes effect under any of the available appointment routes.

A moratorium has the effect of staying enforcement actions by creditors of an insolvent debtor for the duration of the administration (usually 12 months plus any extensions granted by the court). Any enforcement or litigation actions against the insolvent debtor can only be commenced or continued with the leave of the court. As highlighted above, insolvency proceedings under the old regime were often highly litigious. As a key stakeholder, secured creditors often ended up incurring significant legal costs in defending numerous unilateral and uncoordinated enforcement actions brought against insolvent companies by creditors of the companies. Moratoria enjoyed by administrations will therefore not only benefit the company itself but will also benefit its key stakeholders including the secured creditors.

Conclusion

The insolvency Act 2015 of Kenya has brought a much-needed breath of fresh air in the conduct of insolvency proceedings in the country. Whereas, at first glance, some of the reforms might seem as if they only serve to limit the control previously enjoyed by secured creditors, a deeper probe of the reforms reveals that secured creditors stand to benefit as much (if not more than) anyone else from these reforms. The key benefits include speed and certainty of resolution, inclusiveness, transparency and protection from unilateral enforcement actions because of the moratorium. It is believed that in the long run, the economy as a whole, and with it commercial lenders, will benefit from the introduction of a robust framework for resolving insolvencies.

Limited Life Companies, Unlimited Directors' Exposure

By Gilbert Noël
LX Legal
Mauritius

The Companies Act 2001 and the Insolvency Act 2009 of Mauritius are largely inspired from the legislation in New Zealand. However, unlike in New Zealand, the legislation in Mauritius provides for Limited Life Companies. The Companies Act 2001 embraced the regime, which aimed to satisfy mainly United States Investors so that this type of company may be attractive from a US tax perspective. Various private equity funds in Mauritius, especially those investing in India and Africa, have been structured as Limited Life entities. The restructuring and insolvency practitioners around the world should watch this clock. Several collective investment schemes (funds) were invested prior to the 2008 financial crisis for a lifetime of 10 years; and a large number of them are illiquid. The global business companies in Mauritius represent a capital of about USD 560 Billion. There are about one thousand funds with about USD 80 Billion under administration.

The Companies Act 2001 did not provide for worse case scenarios. Thus, the constitutive documents and private placement memorandum of existing Limited life Companies have been prepared with the bullish assumption that the end of life will comprise only of redemption and distribution to shareholders. According to section 290 of the Companies Act 2001, a Limited Life Company shall be dissolved when the period fixed for duration expires; when the shareholders pass a special resolution or the happening of a specific event as provided for in the constitution. Upon the expiration date, an administrator may be appointed and does not necessarily have to be a qualified insolvency practitioner. Assuming there are calm waters, the administrator can be appointed by the company.

Under Section 102 of the Insolvency Act 2009, the Bankruptcy Division of the Supreme Court may be petitioned to wind up the company where the period fixed for duration has expired or upon occurrence of an event specified in the constitution. The petitioner may be the company, a shareholder, director, creditor or the Financial Services Commission. The Bankruptcy Division of the Supreme Court holds wide discretion upon presentation of a petition. It may make a winding up order, dismiss the petition or adjourn the hearing conditionally or unconditionally.

The Bankruptcy Division of the Supreme Court also holds the power, before making a winding up order, to appoint a provisional liquidator. The Court must be satisfied that the company is unable to pay its debts, or that any of the property available to pay debts is at risk or may be removed from Mauritius.

The live issues are well illustrated by the IREO Investment Funds. It is one of the largest group of funds ever raised in Mauritius for investment in India, with over USD 1.6 billion in capital raised from global investors. Some prominent investors in the funds have recently gone public and have raised the alert as to what may represent the most substantial regulatory failure in Mauritius in case the authorities remain inactive.

About two years ago, the substantial investors of the Ireo Funds successfully petitioned the Bankruptcy Division, Supreme Court of Mauritius, for the appointment of a provisional liquidator. This result should have brought the matter to another level and under the control of the provisional liquidator. The more so as Section 105(2) of the Insolvency Act states that *"Where a winding up order has been made or a provisional liquidator has been appointed, no action or proceedings shall be proceeded with or commenced against the company except – (a) by leave of the Court; and (b) on such terms as the Courts thinks appropriate."*

However, the directors have, without leave of Court, appealed directly to the Court of Civil Appeal instead of the Supreme Court. That is because appealing to the Court of Civil Appeal operates as an automatic stay. Now, this matter is pending before the Court of Civil Appeal and allows time to the directors, who believe they have gained time.

The directors of the expired fund have gone one step further. They have, after filing the appeal, passed a resolution to appoint another liquidator in lieu and stead of the Court appointed provisional liquidator. They have then presented the argument that the Court appointed provisional liquidator is now *functus officio*. This is now a premiere for the relevant Court in Mauritius and probably an unseen approach for any jurisdiction where similar funds operate.

The board members may argue that in accordance with long standing case law such as Re Union Accident Insurance Co Ltd [1972] WLR 640, the directors retain residual powers which include the power to instruct lawyers to oppose a petition for winding up a company, and also to act in interlocutory proceedings to discharge a provisional liquidator. The established case law does not however refer to limited life companies. Likewise, in *Re Rick Wilson Pty Ltd & Company Pty Ltd* (1982) 1 ACLC

566[1], the Court held that a director has a residual power to defend winding up proceedings notwithstanding the appointment of a provisional liquidator.

Such residual power/s, however, appear to have been excluded by specific statute in Mauritius whereby: (i) Section 105 (2) of the Insolvency Act which states clearly that no action or proceeding shall commence without leave of Court and (ii) section 154(1)(b) of the Insolvency Act states in no uncertain terms that with effect from the commencement of liquidation of a company, i.e. as from the valid appointment of a liquidator, the directors remain in office but cease to have powers, functions and duties other than those specifically permitted under the Insolvency Act. Directors acting in contravention of the above two cited sections of the Insolvency Act of Mauritius run the risk of being in breach of the specific provision/s under the said Act. As already stated, however, such an issue has never been raised, tried, tested or considered before the Supreme Court of Mauritius.

The other question is whether the board members of a company whose lifetime has expired may pass a resolution to appoint an alternative liquidator. The Companies Act states clearly that *"a limited life company shall be dissolved when the period fixed for the duration of the company expires"*. It can therefore be argued whether the corporate personality remains after the life expiry and the administrator or liquidator will only attend to the administrative liquidation and distribution of assets and proceeds, if any.

Although the issues are cross-border and would be of interest to various jurisdictions, the legal background in Mauritius cannot be neglected and this is for the following reasons:

i. Most Limited Life Funds pre-date the 2008 global financial crisis. Therefore, the constitutive documents, such as the private placement memorandum, are quite bullish and do not provide for worse case scenarios;

ii. The investors are not represented at board level and the so-called independent directors are loyal to the manager of the Fund;

iii. The arbitration provisions and urgent legal remedies in the constitutive documents are usually insufficient;

iv. The regulator in Mauritius and relevant Courts have not faced precedents in the matter and therefore do not appreciate the urgency of the matter and depth of exposure to the investors and also to the jurisdiction.

Most of the limited life funds have opted for an extension of life of about two years. There is usually no difficulty between the shareholders and the directors to agree on the first extension. The directors should pull all their weight to ensure that the entity is restructured, and the documentation reconsidered in the best interest of the company and the shareholders.

It is an obligation on the part of directors to operate on a full and frank disclosure to the shareholder investors whose funds are usually locked up in the assets of real estate projects. Therefore, the basic principle that the director's position *"is analogous to that of a trustee"* becomes even more relevant in the circumstances. If the directors cannot demonstrate that they have honoured their fiduciary obligation they may potentially face substantial personal and unlimited exposure.

Limited life funds may end up being the unseen sleeping volcano which is about to erupt in the Mauritius financial environment and with potentially highly contagious effects.

1 https://iknow.cch.com.au/document/atagUio388412sl10557260/supreme-court-of-new-south-wales-08-november-1982-re-rick-wilson-company-pty-ltd-

A New Insolvency Law for Cape Verde: A Brief Introduction to the Changes and Challenges

By Suleina Delgado
Ministry of Justice and Labour
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Prior to 2016, insolvency in Cape Verde was regulated by the Code of Civil Procedure. During the pre-independence era – taking into account the social, economic and legal constraints of the time – Portuguese legislation was ordered to apply to Cape Verde through Ordinance n.º 19.035 of July 30th 1962.

Although the Code of Civil Procedure has undergone numerous amendments since 1962 and the subsequent independence of Cape Verde in 1975, the articles that touched on matters of insolvency were not altered or updated until 2016, when Cape Verde's first Insolvency and Recovery Code was introduced. Clearly, many changes in global insolvency law had taken place between 1962 and 2016 and Cape Verde's insolvency provisions contained in the Code of Civil Procedure were severely antiquated and no longer fit for purpose.

In order to address this, the Insolvency and Recovery Code was passed into law on 28 January 2016 by Law nº 116/VIII/2016 and published in the official gazette on 22 March 2016. The law came into operation on 1 September 2016.

While it is not possible to set out all the changes that the Insolvency and Recovery Code will bring about to the field of insolvency in Cape Verde, this brief article aims to shed light on some of the changes and challenges faced by the introduction of the new law.

The new Code replaces the term "bankruptcy" with "insolvency", thereby helping to remove the stigma associated with the term "bankrupt". Culturally, one of the biggest obstacles to the past use of bankruptcy

RICHARD TURTON AWARD 2018

Richard Turton had a unique role in the formation and management of INSOL Europe, INSOL International, The Insolvency Practitioners Association and R3, the Association of Business Recovery Professionals in the UK. In recognition of his achievements, the four organisations jointly created an award in his memory. The Richard Turton Award is an annual award providing an educational opportunity for a qualifying participant to attend the annual INSOL Europe Congress and have a technical paper published.

In recognition of those aspects in which Richard had a special interest, the award for 2018 was open to applicants who fulfilled all of the following:

- Work in and are a national of a developing or emerging nation;
- Work in or be actively studying insolvency law & practice;
- Be under 35 years of age at the date of the application;
- Have sufficient command of spoken English to benefit from the conference technical programme;
- Agree to the conditions below.

Applicants for the award were invited to write a short statement detailing why they should be chosen. A panel representing the four associations adjudicated the applications. The panel members are as follows: Robert van Galen – INSOL Europe, Neil Cooper – INSOL International, Patricia Godfrey – R3 and Maurice Moses – IPA. The committee received outstanding applications for this year's award and it was a very close run decision. We are delighted that the award has attracted such enthusiasm and response from the younger members of the profession and know that Richard would also be extremely pleased that there had been such interest.

The committee is delighted to announce that the winner for this year's award is **Yutong Zhang** from China. Yutong is a visiting researcher of University of California, Los Angeles, School of Law, and prior to that he was a PhD candidate at China University of Political Science and Law. Currently Yutong is practicing insolvency and turnaround at JD Finance. He will be writing a paper on "*Blockchain: A Chance for Turnaround Procedure Modernization*", which will be published in summary in one or more of the Member Associations' journals and in full on their websites.

As part of the award, Yutong was invited to attend the INSOL Europe Congress on 6-7 October 2018 in Athens, Greece. We would like to congratulate Yutong on his excellent application and also thank all the candidates who applied for the award this year.

The details of the Turton Award and papers of the previous winners can be found at https://www.insol.org/turton-award.

Sponsored by:

INSOL Europe · INSOL International · Insolvency Practitioners Association · R3 Association of Business Recovery Professionals – Rescue Recovery Renewal proceedings in Cape Verde has been the fear of being identified as a "bankrupt person or company". The stigma attaching to bankruptcy is one of the main reasons why there are so few cases of insolvency in the Cape Verde courts, which of course does not imply that there are no individuals or companies experiencing great financial difficulties. It is the stigma of insolvency that prevents debtors in financial distress from entering insolvency or being subjected to a recovery process. It should therefore be clear that one of the main goals of the new legislation is to ensure a break with the psychological barriers that prevent companies and individuals from seeking help and showing, among other things, that insolvency in a dynamic and competitive market is not necessarily a bad thing.

Another important objective that the Government has set for itself, is to inform stakeholders of the new legislation and the changes it brings about, demonstrating that this modern legal instrument can help to not only to clean up the market of companies that should be liquidated, but also to enable viable but financially distressed companies to reorganise themselves with quick, efficient and professional help. This will have a positive impact on the already well-functioning Cape-Verdean market.

The Code brings many new features to the field of insolvency when compared to previous legislation. In addition to introducing tax benefits, it also takes advantage of existing structures, such as mediation, which makes the process less expensive. One of the most important characteristics of the new law is that it promotes the principle of speed of procedure and enhances confidence in the negotiation abilities of the parties involved.

The new law encourages companies to assess their financial situation and to select an option that is best suited to their circumstances. For example, if a company is struggling to meet its financial obligations but is still financially and economically viable, the company should opt for a Recovery Process, including the Extrajudicial Recovery Process if it does not wish to restructure through the courts. If the financial and economic outlook of the company is so dire that it is deemed to be terminal, it should opt for an Insolvency Procedure.

The Code also introduces the concept of a trustee, which comes in various guises as an interim administrator, a recovery administrator, an insolvency administrator and a fiduciary. In addition, the Code introduces the concept of a creditors' committee and highlights the fact that this body is responsible for supervising the activities of the administrator, to collaborate and to request, under the terms of the Code, the intervention of the court (or the assembly of creditors) to safeguard the interests of creditors.

The exoneration from remaining liability for the debtor (a discharge) is another innovation of the Code. It allows the debtor to be partially or completely released from outstanding debts (that have not been satisfied during the insolvency process) after a specific period of time and upon fulfilling certain obligations. The discharge provision is a privilege that benefits the debtor by providing him or her with the motivation for rapid reintegration into the economic arena.

These are profound and important changes, but they will only be effective and achieve their purpose if all stakeholders are made aware of them. In this regard, dissemination actions have been carried out throughout the Cape Verdean territory in order to try and make the new legislation as effective as possible. At the beginning of 2018, the Ministry of Justice and Labour organised a conference / training session on the Code, targeting mainly businesspersons, lawyers and magistrates, and later launched a publication on insolvency through one of the most widely read newspapers in the country.

In addition to the above, other steps are also being taken to leverage this issue in Cape Verde. Besides its importance for the internal market, one of the priorities announced by the Government of Cape Verde is to place the country in the top 50 of the Doing Business rankings (World Bank Group) and the Global Competitiveness Report (World Economic Forum), taking remedial steps in relation to taxation, financing, the functioning of public machinery and justice.

Can Directors of State-owned Companies be Held to Account by the South African Public?

By Nastascha Harduth
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South African President Ramaphosa admitted in his state of the nation address that state-owned enterprises "are experiencing severe financial, operational and governance challenges". He continued to promise in his state of the nation address that the government would "intervene decisively to stabilise and revitalise state-owned enterprises".

With the South African Government being the sole shareholder of state-owned companies (SOCs), the duty of directors to act in the best interest of the company has traditionally been to maximise profits for the company's shareholders, i.e. the Government. Over time, however, public opinion has dictated that a variety of other stakeholders' interests should also be recognised.

So, can the directors of these companies be held personally liable by the South African public as ultimate stakeholders? And, what exactly are the duties of directors of SOCs?

The second question must be considered, before the first can be answered.

In this regard, principle 16 in King IV provides that *'In the execution of its governance role and responsibilities, the governing body should adopt a stakeholder-inclusive approach that balances the needs, interests and expectations of material stakeholders in the best interests of the organisation over time'.*

The stakeholder inclusive approach advocated by King IV is that:

> *'Directors owe their fiduciary duties to the company and to the company alone as the company is a separate legal entity from the moment it is registered until it is deregistered ... The company is represented by several interests and these include the interests of shareholders, employees, consumers, the community and the environment. Thus, requiring of directors to act in good faith in the interest of 'the company' cannot nowadays mean anything other than a blend of all these interests, but first and foremost they must act in the best interest of the company as a separate legal entity ... An interest that may be primary at one particular point of time in the company's existence, may well become secondary at a later stage.'*

This approach in King IV seems to echo emerging case law on corporate governance.

For example, in Minister of Water Affairs and Forestry v Stilfontein Gold Mining Co Ltd 2006 5 SA 333 (W), the court referred to a previous King Report by testing directors' conduct against the requirements in that Report, and found that by not complying with the principles embedded in the King reports, directors may be in breach of their duty of care and skill.

Also, in the case of *Mthimunye-Bakoro v Petroleum Oil and Gas Corporation of South Africa (SOC) Limited [2015] JOL 33744* corporate governance was defined as *'... the animating idea of which is to ensure net gains in wealth for shareholders, protect the legitimate concerns of other stakeholders and improve efficiency, organisational performance and resource allocation.'*

We must, of course, also consider the South African Companies Act 71 of 2008. Section 5(1) of this Act states that the Act must be interpreted in such a way that gives best effect to the purposes listed in section 7. Section 7(d) specifically provides that directors have to manage a company in such a manner that promotes both economic and social benefits, and 7(k) provides for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders.

Therefore, it is incumbent on directors to not only act in the best interests of the company's shareholder (Government), but also in the best interest of all its stakeholders. And, in failing to act in the best interest of both shareholders and other stakeholders alike, personal liability for losses and/or damages incurred by stakeholders may follow. For example, if wages are lost because a business had to shut down due to electricity cuts, it would be necessary to ascertain what caused those electricity cuts and if the lost wages are a direct result of decisions taken by the power utility at board level (this is the tricky and expensive part for a claimant). And, of course, if there are enough employees who have lost wages, then a class action may also follow.

However, the burning question is whether or not any one or group of stakeholders have suffered enough harm as a *direct* result of the directors' failure to act with due care and skill; that would justify the time and expense of travelling down this very rocky road.

Given the state of South Africa's SOCs, it seems more likely than ever before.

Alternative Dispute Resolution at the Companies Tribunal of South Africa and its Potential Application to Insolvency

By Peter Veldhuizen and Katherine Timoney
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Mediation and arbitration - introduction

Mediation is where an independent facilitator assists the parties to reach a mutually acceptable solution to their dispute. A mediator will often assist the parties to identify the outstanding issues, evaluate priorities, agree areas of compromise and suggest potential solutions.

Arbitration is where dispute is submitted, by agreement between the parties, to one or more arbitrators who will hear representations from both sides and make a binding decision on the dispute. This process is similar to a court hearing, while effectively being a private dispute resolution procedure.

South African Company Law and the establishment of the Tribunal

The "new" Companies Act 71 of 2008 specifically had as one of its aims the facilitation of growth of the South African economy through the simplification and streamlining of the existing legislation and procedures. The Act also introduced some new innovations, one of which is the Companies Tribunal.

The Companies Tribunal was established to adjudicate in relation to any application made to it in terms of the Act and assist in the voluntary resolution of disputes.

It is required by the Act that the Members of the Companies Tribunal must have suitable qualifications and experience in economics, law, commerce, industry or public affairs and any panel adjudicating a matter must have at least one member who has suitable legal qualifications and experience.

Alternative dispute resolution at the Tribunal

If a matter is referred to the Tribunal for alternative dispute resolution, the referring party fills in Form 132.1. This is a simple, one-page document that allows the complainant to specify the section of the Act which has been breached and the conduct that has resulted in the breach. The complainant can also select whether they are applying for mediation, conciliation or arbitration.

If the complainant has requested mediation, the Tribunal will, on receipt of Form 132.1, appoint a qualified commercial mediator to mediate the dispute. If the complainant requests arbitration, they will need to follow the normal High Court rules by filing founding, answering and replying affidavits. The parties can then agree whether the matter should be arbitrated solely on the affidavits filed or formally argued before the arbitrator. Depending on the complexity of the matter, the Tribunal will appoint a panel of either one or three presiding officers to arbitrate the matter.

The Tribunal's services, which include the hiring of a venue and the fee of the arbitrator or mediator, are currently free of charge. In the court system, semi-urgent matters have a waiting period of approximately three months and a matter can take three to four years to reach trial. By comparison, matters heard at the Tribunal typically reach a resolution within 25 working days for alternate dispute resolution and 80 working days for adjudication.

These services can be particularly useful in the contexts of Insolvency and Business Rescue, particularly because South Africa does not have specialised bankruptcy courts.

Insolvency

With regards to insolvency, mediation and arbitration can be usefully applied to disputes between insolvent entities and third parties or in the application of insolvency related remedies, such as claims against directors and claims to set aside dispositions. This will allow matters to be brought to resolution much quicker than going through the overburdened court system and ensure that costs are limited for everyone involved.

Although liquidators are professionals with their own set of skills, mediation and arbitration brings in a mediator with specialised training in negotiating corporate solutions for parties with widely disparate viewpoints. This allows them to facilitate negotiations between different groups such as shareholders, directors, different categories of creditors and financiers and to search for new and creative solutions for the disputes between them.[1]

1 https://www.cedr.com/articles/?item=Mediation-and-insolvency

Another aspect to consider here is the usefulness of mediation in resolving disputes in cross-border insolvencies where judicial co-operation and transnational litigation can be complicated, time-consuming and expensive.

Business Rescue

Business Rescue is another innovation of the "new" Act, which allows for the temporary supervision by a Business Rescue Practitioner of a company that is financially distressed. The Practitioner aims to facilitate the company's rehabilitation through a temporary moratorium on creditors' claims against the company and the development and implementation of a Business Rescue Plan. The Plan effectively restructures the company's affairs to maximise the likelihood of the company being able to trade out of Business Rescue or, if this is not possible, to yield better results for creditors and shareholders if the company is ultimately liquidated.

The process of Business Rescue is another area in which the principles of alternative dispute resolution could be used very effectively. Good communication in Business Rescue is very important, and so a mediator would have a very useful role to play in relation to disputes between creditors and the Business Rescue Practitioner, such as disputes relating to the content of the Business Rescue Plan and the decisions taken by the Practitioner on creditors' claims.

One of the practical problems with the provisions relating to Business Rescue in the Act is that actions or requirements are prescribed in the legislation, but there are often no sanctions or penalties if the requirements are not met. For example, within ten business days of being appointed, the Practitioner must organise meetings with both the creditors and employees of the company. Similarly, the Practitioner is required to publish the Business Rescue Plan within twenty five business days of his appointment and any extensions should be approved by the court or a majority of creditors. There is no penalty listed in either of these sections if the Practitioner fails to comply timeously. The lack of sanction or penalty means that there is little legislative incentive for the Practitioner to be proactive about finalising the process. The Tribunal could play an important role in ensuring that these requirements are complied with, which would create an incentive for Practitioners.

The Tribunal, in their capacity as mediators, could provide out-of-the-box solutions to assist those parties in the resolution of their disputes which could prevent unnecessary court action.

In a situation where the ultimate goal is to see the company return to profitable trading, mediators are also useful tools in preserving the working relationships between the parties, which could otherwise be damaged by lengthy adversarial court processes. Mediation and arbitration also has the added advantage, as set out above, of saving or limiting the legal costs and time delays involved in the standard court process. In the context of Business Rescue this is particularly important, as time and money are both in short supply while the Practitioner is trying to develop and then implement the Business Rescue Plan.

Conclusion

There are many disputes in the context of insolvency law and the Business Rescue process which could benefit from the involvement of a skilled and well-trained mediator who can find creative solutions and engaging effectively with the various interested parties. The innovation of the South African Companies Tribunal provides a more efficient process, both in terms of time and money, for the resolution of disputes using alternate dispute resolution in this context.

Time for the Next Half Century Leap – Highlights of Ghana's New Corporate Insolvency Bill, 2018

By Felix Addo
President, Ghana Association of Restructuring and Insolvency Advisors (GARIA)

The World Bank Group (WB) Flagship Report: Doing Business 2018, ranks Ghana at the 36th and 158th in descending order for Africa and globally, respectively, on the *Resolving Insolvency* indicator - one of the eleven indicators evaluated for the overall jurisdiction ranking[i]. Ghana's overall ranking is 120th out of the 190 participating jurisdictions on the 2018 league table. With regard to the 54 African countries evaluated, Ghana comes in at number 12 (Mauritius is number one in Africa). These unenviable standings, needless to say, are not reflective of a positive enabling business climate for a country which seeks to be the preferred location for foreign direct investments in Africa by 2020!

The situation however has not always been that challenging. Perhaps, a bit of historical context may be informative.

Historical context

On attainment of independence in 1957 from the United Kingdom, Ghana's business laws were embodied primarily in the 1907 Companies Ordinance which was itself based on an earlier 1857 Ordinance. In 1963 two key pieces of legislation were passed to guide companies and corporate insolvencies. These were the Companies Code (Act 179) and the Bodies Corporate (Official Liquidation) Act 180. These Acts, which were drafted under Professor L.C. B. Gower, then Cassel Professor of Commercial Law at the London School of Economics (London University), were hailed at that time as cutting edge progressive pieces of legislation within the United Kingdom and the Commonwealth.

The Companies Act 179 has, among others, provisions for scheme of arrangements, private (voluntary) liquidations, receiverships and managers while the Bodies Corporate Insolvency Act 180 focuses on public, i.e., official liquidation.

GARIA's mandate

Some fifty years on, the world has changed quite dramatically and in the globalized, internet-enabled world of today, the need to update the business laws has become self-evident. Under a mandate from the Attorney General and Minister of Justice, the Ghana Association of Restructuring and Insolvency Advisors (GARIA) has been playing the lead role in crafting a modern, fit for purpose, draft Corporate Insolvency Bill (CI), with appropriate inputs from stakeholder groups including the business community, the World Bank and other financial institutions, insolvency practitioners, and contemporary business thinking and best practice from jurisdictions including Australia, Mauritius, New Zealand, United Kingdom, and the United States of America.

New provisions

The draft CI bill, which is presently in final drafting stages with the Attorney General's Office, excludes the Banking and Specialised Deposit Taking Institutions, Insurance companies and Personal Insolvency which are covered under separate legislation. In addition, there is no insolvency legislation proposed for metropolitan, municipal and district assemblies which are governmental entities.

The draft CI bill seeks to, among others: promote private enterprise; improve the present corporate governance regime for corporate bodies generally as well as during insolvency proceedings; provide a framework for restructuring viable but temporarily distressed businesses while closing and transferring assets of failed businesses; and facilitate access to timely, efficient and impartial insolvency proceedings.

The highlights of the bill include: the introduction of restructuring and administration provisions as means of resolving insolvency with comprehensive processes which place the creditors at the centre of proceedings; introduction of an insolvency test to determine when a company is in distress; and streamlined ranking of claims and distributions of dividends to various creditor classes.

The CI bill also calls for an establishment of an Insolvency Services Division under a proposed stand-alone Registrar of Companies with a robust regulatory framework with sanctions for Insolvency Practitioners and directors for insolvent trading and other breaches.

In addition, the bill has innovative financing provisions which include the introduction of post-commencement financing for distressed companies and 'ring-fencing' of netting agreements for qualified financial contracts.

Cross-border provisions

Lastly, there is a provision for cross-border insolvency processes using the UNICTRAL Model Law. This particular provision among others would go a long way to facilitate resolving insolvency in multi-jurisdictional situations. A case in point is the situation with the winding up of Ghana Airways (in liquidation). The Official liquidator has had to bring proceedings relating to this failed company in sixteen jurisdictions not only in West Africa but in Europe and the USA involving expensive litigation and procurement of related professional services. If Ghana were a signatory to the UNCITRAL Model Law, it would have resulted in significant cost and time savings. Thirteen years on, the liquidation is still running!

Next steps

After several attempts to secure passage of the laws the new timetable for the passage of the bills is pretty aggressive, given the urgency of the task to bring our business laws into modern times to enhance the ease of doing business. The Companies Bill has already had its First Reading in Parliament. It is expected that Cabinet will approve the CI Bill by end of October or early November to enable the CI bill to be laid in Parliament by end of this year. Overall target date for passage of both bills is March 2019 to allow for operationalising them by the middle of next year.

[i] World Bank Group: Doing Business 2018

UNCITRAL Model Law on the Recognition and Enforcement of Insolvency-related Judgments

By Jenny Clift,
Principal Legal Officer,
Office of Legal Affairs,
United Nations,
and
Neil Cooper,
INSOL Past President

The Model Law on Cross-Border Insolvency with which all readers will be familiar was designed with simple objectives, which may be summarized as follows – to provide access to foreign courts; recognition of insolvency proceedings commenced in other jurisdictions and relief for insolvency office holders seeking to deal with assets that were in other jurisdictions at the time of the insolvency and to provide a basis for court to court cooperation. As part of this Model Law, there were safeguards built in in the form of exempted proceedings (such as financial institutions); public policy protection; and safeguards for "local creditors". This Model Law has been adopted in 44 States (46 jurisdictions) and several other States are currently considering adding it to their statute books.

The Model Law was in some respects but one strand of what became known as "the Golden Thread" of cross-border cooperation and assistance developed in the 1990s and early millennium. That thread was, to some, reduced in its scope by the English Supreme Court decision in Rubin[1]. Whatever the decision in that case, it drew attention to the potential limitations of the existing ML, and UNCITRAL's Working Group V started deliberations on what further guidance it was appropriate to give to nations in the field on cross-border cooperation. It is important to state straight away that the WG was not trying to "correct" or "deal with" Rubin in any way: several nations were quick to point out that the Rubin case may have been dealt with differently in their Supreme Courts.

On 2 July 2018, UNCITRAL finalized and adopted the UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments (MLIJ) and its Guide to Enactment. Designed to provide States with a simple, straightforward and harmonized procedure for recognition and enforcement of insolvency-related judgments, the Model Law complements the UNCITRAL Model Law on Cross-Border Insolvency (MLCBI) to further assist the conduct of cross-border insolvency proceedings. The decision adopting the Model Law encourages States to consider enacting the Model Law when revising or adopting legislation on insolvency. The MLIJ is accompanied by a Guide to Enactment designed to provide background and explanatory information on the text, its interpretation and application.

Work on this topic was taken up for several reasons. In addition to the uncertainty noted above with respect to the interpretation of articles 7 and 21 of the MLCBI in terms of providing the necessary authority for such recognition and enforcement as a form of relief available on recognition of a foreign insolvency proceeding, there are few international instruments dealing with the recognition and enforcement of judgments generally and those that do exist exclude from their scope matters relating to insolvency and thus recognition and enforcement of insolvency-related judgments.[2]

An insolvency-related judgment is defined in the MLIJ as one that arises "as a consequence of or is materially associated with an insolvency proceeding" (whether or not that proceeding has closed), and was issued on or after the commencement of the insolvency proceeding. It does not include a judgment commencing an insolvency proceeding, which would be covered by the MLCBI, but some of the orders made at the time of commencement, such as appointment of the insolvency representative, would fall within the definition. The MLIJ departs from definitions of insolvency-related judgments that might exist under international or regional law in order to avoid importing into the interpretation of the text the jurisprudence relating to those definitions.

Article 3 deals with the relationship of the model law to treaties that might address the same subject matter, stipulating that where there is a treaty in force for the enacting State that concerns the recognition and enforcement of civil and commercial judgments and that treaty applies to an insolvency-related judgment, the treaty will prevail.

The provisions of the MLIJ address the procedure for applying for recognition and enforcement, including the availability of provisional relief, grounds for refusal, effect and enforceability of an insolvency-related judgment, effect of review in the originating State on recognition and enforcement, equivalent effect and severability. Recognition of a judgment can be sought directly by way of an application under article 11 or as part of a defence to a claim or as incidental to another question already before the court.

Grounds for refusal include those of a more general nature as specified in articles 7 (public policy) and 9 (legal effect in the originating State), as well as the more specific grounds of article 14. The public policy ground for refusal of recognition under article 7, consistent with the same provision in the MLCBI, should be interpreted restrictively

1 Rubin v. Eurofinance S.A. [2012] UKSC 46 24 October 2012
2 For example, the draft convention on recognition and enforcement of judgments currently being developed by the Hague Conference on Private International Law excludes judgments relating to "insolvency, composition, resolution of financial institutions and analogous matters". An explanation of the exclusion is provided in the draft Explanatory Report of the Judgments Project, available in Prel. Doc. No 1 A of March 2018 on the HccH website at: https://www.hcch.net/en/governance/council-on-general-affairs.

and is intended to be invoked under exceptional circumstances concerning matters of fundamental importance for the enacting State.

Under article 14, recognition and enforcement of a judgment may be refused if (a) certain requirements with respect to notification of the party against whom the judgment was issued were not satisfied; (b) the judgment was obtained by fraud; (c) there is inconsistency between the judgment and certain earlier judgments; (d) it would interfere with the administration of insolvency proceedings; (e) if the judgment materially affects the rights of creditors and the interests of creditors and other interested persons were not adequately protected in the originating proceeding; and (f) the originating court cannot demonstrate that it exercised jurisdiction on one of the bases specified in the article.

The MLIJ leaves it to the enacting State to determine the effect a judgement will have in that State following recognition; it could be either the same effect as it has in the originating State or the effect it would have had, had it been issued in the enacting State. Where the relief provided in the judgment is not available under the law of the enacting State, the MLIJ provides that as far as possible, it should be adapted to relief that is the equivalent of, but does not exceed, the effect of the relief under the law of the originating State. Additionally, if only part of a judgment is capable of recognition and enforcement in the enacting State, the MLIJ permits that part to be severed.

Another issue addressed by the MLIJ concerns its relationship to the MLCBI and, in particular, its possible limitation to recognition and enforcement of judgments issued in main and non-main proceedings. Although potentially most relevant for States having already enacted the MLCBI, the guide to enactment indicates that other States may also choose to enact that limitation. Where the MLCBI or the limitation has been enacted, the MLIJ includes an exception. This would allow a judgment relating to the recovery of assets of the debtor to be enforced, notwithstanding the existence of those assets in a jurisdiction whose insolvency proceeding would not be capable of recognition under the MLCBI (i.e. it is neither a main nor a non-main jurisdiction), provided certain conditions are met.

It is to be hoped that all States, both those that have already enacted the MLCBI and those that have not, will give favourable consideration to enacting the MLIJ to further streamline the conduct of cross-border insolvency proceedings.

The Takata Saga: Roadside Assistance for a Global Car Crash

(Part 3 of 3)

By Leonard P. Goldberger, Esquire,
Fellow, INSOL International,
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and

Qing Lin, Esquire[1],
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This is the final part of our 3-part article about Takata Corporation and its affiliates ("Takata"), and how an explosion of one of its automotive airbags in Switzerland eventually led to its extraordinarily complex, multi-billion dollar, global restructuring in a United States bankruptcy court.

Part I of the article [Second Qtr. 2018] described how its massive global product liability crisis precipitated the insolvency of Takata, a Japanese company that was one of the world's leading automotive safety parts suppliers. Part II [Third Qtr. 2018] discussed how and why its successful US bankruptcy case became the focus of its global restructuring, and eventually led to its acquisition by a Chinese automotive company. This Part III will provide our thoughts on some of the lessons learned from this case, and how they are likely to resonate throughout cross-border insolvency practice in the years to come.

1. **The US bankruptcy system worked, and worked well.** As lawyers practicing in the US, our bias is obvious. That being said, nothing succeeds like success. Not only was the US bankruptcy court (Hon. Brendan L. Shannon, sitting in the District of Delaware) well-equipped to handle a global case of this magnitude and complexity, but the necessary jurisprudential infrastructure was already in place. This included, among other things, the ability to sell assets free and clear of claims and the authority to issue so-called channeling injunctions pursuant to a plan of reorganization. Moreover, the willingness of the US bankruptcy court to engage with insolvency courts in Japan and Canada through cross-border protocols provided the mechanism for a cooperative jurisdictional net necessary to accommodate the complex global transaction and effectuate the Plan. Importantly, the US bankruptcy court responded with alacrity to critical, time-sensitive pressures by confirming the Plan only 241 days after the case was filed. This is not to suggest that other countries' insolvency courts might not be equally capable (or, possibly, even better) at administering a similarly complex case with global implications. The lesson for future cases of similar breadth and complexity, however, is that *Takata* provided a roadmap for how an insolvency court could manage a case with such geographically

1 The opinions expressed are solely their own and do not represent those of either their law firms or their clients.

diverse assets that had to be promptly administered in the face of overwhelming sets of competing, world-wide creditor claims.

2. **Bankruptcy functions as a global marketplace of last resort.** This is not exactly news; however, the lesson was writ large in *Takata*, and reflects commercial reality in this age of globalized supply chains. Recall just what was sold out of the bankruptcy case: Takata's worldwide assets unrelated to the defective PSAN Inflators, consisting of more than 50 manufacturing plants in over 20 countries on 5 continents. Indeed, only by promptly monetizing Takata's withering assets could as much value have been preserved for the benefit of creditors. Under such extraordinary legal, financial and governmental regulatory (civil, as well as criminal) stress, it was clear that traditional markets simply could not have accommodated the range of transactions necessary to effectively monetize Takata's assets. And certainly not in sufficient time or amount to satisfy the press of its various creditors' claims. As the global, pre-bankruptcy sale effort ultimately proved futile for obvious reasons, bankruptcy offered a unique alternative marketplace in which to transact the sale of a significant global asset package, albeit at some discount to reflect the distress, but with enough assurance in the integrity of the process and efficacy of post-sale protections against successor liability. As such, using a rules-based approach, an insolvency court functioned as a synthetic marketplace of last resort by insuring a level of procedural integrity and providing the confidence necessary for a Chinese automotive parts company to bet \$1.58 billion that Takata's global assets could be strategically integrated into its existing business in a commercially reasonable manner. As globalized commerce becomes even more interwoven, other businesses with cross-border operations will invariably find themselves facing enterprise-threatening liabilities. In such instances, their management and professional advisors will likely also realize that, despite their best efforts, effecting a financial restructuring through a one-dimensional, privately negotiated sale will just not be feasible. As confidence in cooperative global insolvency systems (hopefully) increases following cases like *Takata*, financially-distressed businesses and their creditors will likely come to rely on bankruptcy as a global marketplace of last resort that can transcend the inherent limitations of more traditional markets and localized legal systems. This will likely also attract more geographically diverse investors, thus increasing the pool of global capital available to create liquidity in a more mature and efficient bankruptcy marketplace.

3. **The cleansing power of a "free and clear" bankruptcy sale preserved value for the benefit of creditors.** Again, this is not necessarily a new lesson as much as a reminder of old wisdom. Early on, it became apparent to Takata's major stakeholders that its intractably complex problems could never be comprehensively resolved through traditional (*i.e.*, non-bankruptcy) litigation, or its evaporating going concern value preserved through a traditional marketplace. Indeed, preservation of asset value required a market solution by which new capital could be injected in order to create liquidity, but necessarily without the massive overhang of successor liability that would burden any such new investors. But in order for an orderly market to function, investors need certainty and finality – and the bankruptcy process served Takata's creditors well by providing both. The ability to cleanse assets acquired through a bankruptcy sale from a wide range of present and future claims – from purely monetary trade claims, to massive unresolved private tort litigation, to governmental enforcement actions around the world – created conditions by which market forces could function and fair value could be offered without substantial discounts demanded by any rational investor in order to hedge against such extraordinary, open-ended risks. Moreover, the certainty of a "free and clear" sale was reinforced by the finality provided by the bankruptcy court's retention of the power to enforce (as necessary) the Plan-related injunctions. This provided the necessary assurances that dedicated pools of assets would be allocated to specified creditor groups, thus underwriting the new investor's confidence that it would be effectively insulated from successor liability in continuing to operate Takata's global business. The ability of distressed sellers to efficiently deliver globalized asset packages and supply chains as going concerns – free and clear of present, as well as future, claims – should attract future global investors willing to pay prices that more closely reflect a fair going concern value. In this respect, insolvency courts administering future cases like *Takata* will be able to fulfill a basic function of providing the necessary conditions of certainty and finality in order to provide liquidity, and maximize value, for the benefit of creditors.

So there you have it. While we can't claim that we have the ability to see around corners, we can predict with some measure of confidence that there will be future cases that will look a lot like *Takata*. All of this may become especially pertinent if a wave of cross-border insolvencies follows major global supply chain dislocations caused by governmental policy-driven tariffs and trade wars. (You know who we're talking about.) Moreover, at the intersection of cross-border insolvency and distressed investing, the availability of insolvency courts (either standing alone or under cooperative cross-border protocols with other countries' courts) to provide a rules-based marketplace for the acquisition of distressed global assets creates a mechanism for liquidity and the re-cycling of global capital. If all of this could be reduced to a road sign, it might say "Interesting Times Ahead." See you on the road to bankruptcy court – wherever.

INSOL Singapore 2 – 4 April 2019

Marina Bay Sands Expo and Convention Centre - Singapore

Registration Now Open – Early Bird Deadline 14 January 2019

All members should have received a copy of the registration brochure for INSOL Singapore in the post. It is also available online at www.insol.org. We encourage you to register early to ensure your place at the conference. We have a limited number of hotel rooms at the Marina Bay Sands hotel which are available on a first come first served basis.

A word of thanks to our main sponsors: Borrelli Walsh, Lipman Karas, Norton Rose Fulbright and RSM. The Conference opens with the Welcome Cocktail Reception kindly sponsored by BDO which takes place at the Marina Bay Sands Expo and Convention Centre. This provides a beautiful, spacious setting to meet friends and colleagues from around the world. The reception runs from 6.00pm-9.00pm allowing delegates to meet up and if they wish, go on to dinner after the reception and sample the night life that Singapore offers.

We have a very exciting technical programme which is preceded by a number of Ancillary Meetings.

The 13th Joint INSOL International /UNICITRAL /World Bank Group Multinational Judicial Colloquium on Insolvency will take place on Monday 1st and Tuesday 2nd April. These Colloquia bring together judges and judicial officials from around the world to consider a wide range of insolvency-related issues. The Colloquium has always had great support and we would expect at least 80 judges from more than 50 nations to attend.

Also on the 1st and 2nd April the INSOL Academics' Group will be holding its 21st Colloquium. The Colloquium is an excellent opportunity to discuss and debate papers presented by leading professors and emerging academics from around the world. Practitioners are also encouraged to attend and engage with this highly interactive group.

An Offshore Ancillary Meeting will take place on Tuesday 2nd April sponsored by Carey Olsen, with Higgs & Johnson sponsoring breakfast, Walkers sponsoring the lunch and KRyS Global sponsoring the coffee breaks.

Details of the programme can be found in the registration brochure and online.

The INSOL International Fellows are hosting a reception for Fellows on the Monday evening (1st April) sponsored by Schiebe und Collegen, followed by a half day programme on Tuesday morning (2nd April).

There will be a Small Practice Issues meeting on the afternoon of Tuesday 2nd April. A drinks reception for this group will be held in the evening of the 3rd April. For information on these events please contact Heather Callow at **heather@insol.ision.co.uk**.

We will also hold the 2nd Legislative and Regulatory Colloquium. Hosted by the Insolvency Office on 4th April 2019, legislators and regulators will be invited to attend in person and also by video link. Participation is by invitation only. For further information please contact Penny Robertson at **pennyr@insol.ision.co.uk**

The Conference programme runs through Wednesday and Thursday and offers breakout choices on both days covering topics including *"The impact of outbound Chinese investment for restructuring"*, *"Developments in the resolution of distressed banks"*, *"The future of Asian offshore restructuring"*, and *"The ramifications of disruption for restructuring"*. Furthermore, the conference will include workshops covering Blockchain and Cryptocurrency. A wide range of topics suggested by our members which we think offers a topical, interesting and diverse program with subjects of interest to everyone.

In the evening of Wednesday 3rd April there is a Younger Members' Reception sponsored by Goodmans LLP.

The Conference will conclude with a Closing Cocktail Reception on the evening of Thursday 4th April sponsored by AlixPartners LLP.

We look forward to seeing you in Singapore in 2019.

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To Shift or Not to Shift: Recent Lessons in COMI Manipulation

By Lisa Schweitzer and Katherine Lynch
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Two recent cases shed new light on the extent to which it is permissible for a company in financial distress to intentionally shift its "center of main interests" or "COMI" for strategic reasons related to its restructuring. US courts have demonstrated a willingness to recognize foreign restructurings as foreign main proceedings under Chapter 15 even when they occur in jurisdictions other than where the company is incorporated; however, the courts will scrutinize whether a COMI shift actually has occurred, and also consider the parties' motivation and whether the COMI manipulation actually furthers a restructuring.

Background

A debtor's COMI is integral for determining whether a foreign restructuring proceeding is a "foreign main proceeding" for purposes of Chapter 15. Although there is a rebuttable presumption that the proper COMI is the debtor's place of incorporation, courts have discretion to consider other factors such as the physical locations of the debtor's operations, assets and management. COMI is determined at the time of filing the Chapter 15 petition, but courts also may consider actions taken prior to the Chapter 15 filing when COMI manipulation is alleged.

Ocean Rig[1]

The Ocean Rig group consists of several holding companies and subsidiaries that own and operate a fleet of deepwater oil drilling rigs. The Ocean Rig group companies were originally registered as non-resident domestic corporations in the Republic of the Marshall Islands ("RMI"), while the group's business is primarily conducted on the high seas. Following a downturn in the oil and gas industry, the Ocean Rig group needed to restructure its debt to avoid defaulting on its obligations, but was constrained by the fact that, under RMI law, liquidation was the only viable option.

To avoid liquidation and with the support of the majority of their creditors, in April 2016 the Ocean Rig holding companies (the "Ocean Rig Debtors") took steps to migrate their operations to the Cayman Islands and also registered there as foreign companies, which allowed them to restructure under Cayman Islands law. Those steps included obtaining office space and moving company officers to the Cayman Islands, holding meetings and directing operations from the Cayman Islands, and issuing public notices regarding the move. After initiating provisional liquidation proceedings in the Cayman Court, the Ocean Rig Debtors each filed a Chapter 15 petition in the Bankruptcy Court for the US District Court for the Southern District of New York seeking to recognize the Cayman proceedings as foreign main proceedings, which required the court to find the Ocean Rig Debtors' COMI was based in the Cayman Islands, rather than the RMI.

The Chapter 15 court engaged in a two-pronged analysis to determine the proper COMI. First, the court evaluated the evidence in the record in order to determine whether the Ocean Rig Debtors' COMI had actually shifted to the Cayman Islands. The court concluded in the affirmative, finding it significant that (among other facts) for months prior to filing of the Chapter 15 petition, the Ocean Rig Debtors had offices, board meetings, directors, bank accounts, assets and restructuring activities in the Cayman Islands. Furthermore, the Ocean Rig Debtors had never previously maintained offices in or conducted operations from the RMI, hence there were no other feasible COMIs.

Second, the court considered the motivations underlying the COMI manipulation. It concluded that the actions taken in furtherance of the COMI shift were permissible because they "were not taken in bad faith." Rather, shifting the companies' COMI to a country that had an established insolvency process — where the RMI did not —"offered them the best opportunity for successful restructuring and survival under difficult conditions."

Ocean Rig thus teaches that courts likely will accept and approve intentional COMI shifts undertaken before the foreign proceeding was commenced that are intended "to maximize value for [a debtor's] creditors and preserve their assets."

1 *In re Ocean Rig UDW Inc.*, 570 B.R. 687 (Bankr. S.D.N.Y. 2017).

Oi[2]

The Oi Group is a telecom group of companies with a parent incorporated in Brazil, and substantial operations and employees in Brazil. The parent's affiliates include the financing subsidiaries Oi Brasil Holdings Coöperatief U.A. ("Coop") and Portugal Telecom International Finance B.V., both incorporated in the Netherlands. In June 2016, following a long period of financial distress, several affiliates, including the Brazilian parent and the Dutch financing subsidiaries, commenced Brazilian reorganization proceedings. The Brazilian debtors obtained recognition of those proceedings as foreign main proceedings under Chapter 15 in July 2016 (the "Brazilian Recognition Order"). Shortly thereafter, certain creditors with claims against Coop initiated involuntary Dutch bankruptcy proceedings for Coop and supported further Netherlands proceedings that led to the appointment of a Dutch Trustee and ultimately a Dutch bankruptcy proceeding. The Dutch Trustee, supported by those creditors, filed a competing Chapter 15 petition to reverse the Brazilian Recognition Order for Coop and have the Dutch bankruptcy proceeding recognized as Coop's foreign main proceeding instead.

The court needed to determine both the proper legal standard for evaluating whether Coop's COMI had shifted to the Netherlands, and whether that standard was met. First, because Brazil had already been recognized as Coop's COMI, the court declined to engage in a *de novo* consideration of the proper COMI for Coop as of the date of the later Chapter 15 petition, and instead considered whether grounds existed to overturn the prior Brazilian Recognition Order under Bankruptcy Code Section 1517(d), which gives the court discretion to modify a prior recognition order if "the grounds for granting it were fully or partially lacking or have ceased to exist." Second, applying that standard, the court rejected the creditors' contention that the court had been misled or missing information regarding Coop's ties to the Netherlands when it previously determined that Brazil was Coop's COMI, and also rejected the argument that the Dutch bankruptcy proceeding – which found the Netherlands to be Coop's COMI for European Insolvency Regulation purposes – was sufficient in itself to shift Coop's COMI to the Netherlands under the Chapter 15 standard. While acknowledging that the actions of foreign liquidators may impact the COMI analysis, the court concluded that the commencement of the Dutch proceedings was not sufficient to shift Coop's COMI, particularly because Coop was a special purpose financing company with limited operations in the Netherlands – its "nerve center and headquarters [were] clearly located in Brazil."

Finally, although the court's prior conclusions were sufficient in themselves to justify denying the request to overturn the Brazilian Recognition Order, the court articulated a separate, independent justification for denying the request. Although most COMI manipulation cases focus on the debtor's actions, the court concluded as a matter of first impression that it was appropriate to consider the motivations of the *creditors* that actively pursued the Netherlands insolvency proceedings. Notably, those creditors had participated in the initial Chapter 15 proceeding and had not objected to the recognition of the Brazilian proceeding as a foreign main proceeding at that time. The court concluded that the creditors' later behavior in actively pursuing a COMI shift for Coop was motivated by a desire to frustrate recognition of the Brazilian plan for Coop and its affiliates that substantively consolidated the Oi affiliates and eliminated guarantees that would permit the creditors to "double dip" into estate recoveries. The Court found that the creditors' actions weaponized Chapter 15 and were "at odds with many of the goals of Chapter 15," including the maximization of assets for creditors and the furtherance of corporate rescues. Accordingly, that behavior independently justified the court's refusal to overturn the Brazilian Recognition Order.

Takeaways

In both the *Ocean Rig* and *Oi* cases, the courts placed weight both on the timing of the COMI manipulation and on the motivations of the parties pushing for the shift. In many ways these cases are at separate extremes—on the one hand, an actual physical shift in operations away from a jurisdiction without a robust restructuring law, taken with the approval of the majority of creditors and completed prior to the filing of a Chapter 15 petition; on the other hand, a tactical move by a small group of creditors after the COMI had already been determined and Chapter 15 relief had been granted for a foreign proceeding with established laws. Taken together, however, the cases provide several lessons for a business considering COMI manipulation:

- The COMI shift should occur prior to filing a Chapter 15 petition as a subsequent shift will face higher scrutiny.
- A COMI shift should consist of more than just registering in a new jurisdiction, as physical presence is an important consideration.
- While not dispositive, the support of a majority of creditors and the absence of a viable restructuring in other jurisdictions will help support a COMI shift taken prior to filing the foreign proceeding.
- Courts may consider whether the COMI shift was done in good faith to maximize value for all creditors or motivated by other strategic purposes.
- Courts will be skeptical of attempts to manipulate COMI after the filing of the Chapter 15 petition and shifts taken for overtly tactical reasons that do not benefit the company as a whole or its ability to reorganize.

Future cases will no doubt explore and provide additional clarity on the acceptable bounds of intentional COMI manipulation that will be recognized by US courts in Chapter 15 cases.

2 *In re Oi Brasil Holdings Cooperatief U.A.*, 578 B.R. 169 (Bankr. S.D.N.Y. 2017), *reconsideration denied*, 582 B.R. 358 (Bankr. S.D.N.Y. 2018). Cleary Gottlieb represented the steering committee of an ad hoc group of bondholders that supported the Oi Group in this litigation. The decision remains subject to a pending appeal.

Fellow of INSOL International

International Association of Restructuring, Insolvency & Bankruptcy Professionals

Recast European Insolvency Regulation: Where is the Group Coordinator? New Framework for the Restructuring of European Group Companies

By Jasper Berkenbosch
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On 26 June 2017, the Recast European Insolvency Regulation came into force (Regulation (EU) 2015/848, the "Regulation") introducing new legislation for the restructuring of European group companies. Chapter V of the Regulation includes more than 20 new articles (namely, art. 56 - art. 77) which are directly applicable in all European Member States (excluding Denmark), including a new framework for the coordination of group insolvency proceedings ("Group Coordination Proceedings"). The principal objective of Group Coordination Proceedings is to promote the possibility of an effective group restructuring by providing for the appointment of a European group coordinator ("Group Coordinator"), who is tasked with, amongst other things, proposing and implementing a group coordination plan where two or more companies in the same European group need to be restructured.

At the time of writing, no Group Coordination Proceedings have as yet been commenced. This may, in part, reflect the current economic climate and the relatively low rates of corporate failures. Further, over time, market practice has evolved in favour of a more centralised approach to insolvency proceedings pursuant to which the centre of main interest of all group companies is, where possible, located in one Member State. Many successful group restructurings are also currently achieved on an *ad hoc* basis without the need for a formal coordination framework. This is typically done in the context of a balance sheet restructuring, where the commencement of local insolvency proceedings can often be avoided. However, in circumstances where an operational restructuring is required, the Regulation now provides a compelling and powerful framework for use at a group-wide level.

In addition to Group Coordination Proceedings, Chapter V of the Regulation introduces several other tools to facilitate better cooperation and communication where separate insolvency proceedings have been opened in respect of companies in the same group. Insolvency Practitioners ("IPs") and courts are, for instance, obliged to share information relevant to different sets of proceedings and to consider the coordination of the administration and supervision of the affairs of the relevant debtor[1]. And the framework is not without teeth. For example, both IPs and an appointed Group Coordinator[2] have the power to intervene in pending insolvency proceedings in foreign jurisdictions relating to group companies by applying for a stay of up to 6 months of those proceedings.

In short, Chapter V of the Regulation is intended to: (i) minimise the opportunity for local IPs to "go solo", jeopardising synergy and group interests; and (ii) promote, wherever possible, a coordinated approach to group insolvency proceedings in circumstances where the overall return to creditors will be enhanced.

In addition to providing new instruments to maintain synergy value, the Regulation will likely present financial and legal advisers throughout the EU with new opportunities and roles in pan-European restructurings. These are summarised in further detail below.

Group Coordination proceedings

A request for the opening of Group Coordination Proceedings can be filed with any European court that has commenced an insolvency proceeding for one of the group companies[3]. In practice, we anticipate that the IP appointed to the parent company or relevant group entity facilitating the restructuring will in most circumstances be best placed to request the commencement of Group Coordination Proceedings. The request should include

1 Articles 56 and 57
2 Articles 60 and 72
3 Article 61(1)

inter alia: (i) an explanation as to why Group Coordination Proceedings are feasible[4], (ii) evidence that no creditors of any group member expected to participate in the Group Coordination Proceedings is likely to be financially disadvantaged by its inclusion in such proceedings[5]; (iii) an outline of the estimated costs of the Group Coordination Proceeding[6]; and (iv) the identity of the proposed Group Coordinator.

Once appointed, the Group Coordinator is required to prepare a group coordination plan setting out his or her proposal for a group restructuring plan which may include proposals as to: (i) how to manage the group's business pending the commencement of insolvency proceedings and execution of the restructuring plan; (ii) improving the financial viability of the group; and (iii) the resolution of intra-group disputes, including in respect of inter-company claims and claw back actions[7].

The availability of Group Coordination Proceedings provides a compelling framework within which an effective pan-European restructuring may be achieved. No longer will local IPs be able to simply refuse to cooperate because there is no legal requirement or financial incentive for them to do so. In light of the Regulation, local IPs will be required to take a different approach – they must consider if a group solution can be achieved and explain the basis for their decision if they consider it to be unfeasible to both the Group Coordinator and their relevant regulatory body[8].

Despite the above, the requirement to cooperate is not absolute. An IP is not, for instance, compelled to consider a group solution or to otherwise cooperate where such cooperation would conflict with local laws or compromise the interests of local creditors[9]. It is not difficult to see how these widely-drafted exceptions run the risk of abuse. Nationally focused IPs of insolvent group companies may use these carve-outs to argue that group coordination and cooperation is not appropriate in the relevant circumstances. However, where a comprehensive group restructuring plan has been proposed which clearly demonstrates the overall financial benefit to the group and each participating company in particular, it will, in our view, be challenging for a local IP to refuse to cooperate.

DIP proceedings

Another interesting and useful feature of the Regulation is that all rights and obligations regarding Group Coordination Proceedings apply equally to debtor-in-possession proceedings ("DIP Proceedings")[10]. This means that where a company has opened qualifying DIP Proceedings, the directors of the relevant company will not only be required to comply with the provisions set out in the Regulation applicable to group companies, but also (and perhaps more importantly) they will be permitted to participate in insolvency proceedings relating to companies in the same group, including the decision as to who should be appointed as the IP of another member of the group[11]. In practice, therefore, it will be possible for directors to open DIP Proceedings and to coordinate a group restructuring plan in the appropriate circumstances.

Who is the Group Coordinator?

The Group Coordinator can be any person who is licensed to act as an IP in any Member State[12]. It is not necessary that the relevant IP is licensed specifically in the Member State in which one group member's insolvency proceedings is opened. The Group Coordinator therefore could, for instance, be a Dutch lawyer (qualified to act as an IP) or a UK IP, both of whom are permitted to act as an IP as a matter of local law, even if the respective group entities over which they are appointed are, for example, Polish, Austrian and Italian.

The proposed Group Coordinator should be independent. In other words, he or she should not already be appointed to act as an IP to any group company or be otherwise conflicted (e.g. legal advisor to group or creditors, financial advisor or chief restructuring officer to the group)[13].

Where two or more Insolvency Proceedings have been opened in respect of members of the same group of companies, any IP (or directors in DIP Proceedings) can apply to court in their respective Member State, to appoint a Group Coordinator.

In practice, the role of the Group Coordinator is likely to be determined on a case-by-case basis. In certain circumstances, an IP might feel discouraged from exploring the possibility of appointing a Group Coordinator. For example, there may be a concern that the Group Coordinator may effectively carry out the roles of local IPs and financial advisors, therefore marginalising their function. Additionally, the Group Coordinator's fees are paid proportionally from the estates of those group companies involved[14]. In reality, however, we envisage that many restructurings are likely to be prepared well in advance by the incumbent professionals appointed at an early stage to consider all restructuring options and to implement the preferred restructuring strategy. In many circumstances therefore, the role of the Group Coordinator could be more

6 Article 61(3)(d)
7 Article 72
8 Article 56(2) and 70(2)
9 Article 56(1)
10 The relevant DIP Proceeding must be a proceeding set out in Annex A to the Regulation
11 Article 76
12 Article 71(1)
13 Article 71(2)
14 Article 77

limited and may, for instance, focus on execution of the group restructuring plan and resolution of intra-group disputes.

In our view, the mere prospect of having a Group Coordinator appointed may in itself inspire IPs to create their own Group Coordination Plan, whereby, on an *ad hoc* basis, there is greater cooperation between officeholders and the potential to divide amongst themselves certain tasks that would otherwise be attributed to a Group Coordinator.

The race to court

The Regulation provides that once a Member State has opened Group Coordination Proceedings, such proceedings will have priority and no other Member State shall have jurisdiction to open alternative Group Coordination Proceedings[15]. This could result in a race to court where multiple insolvency proceedings have been commenced in respect of group companies. In order to help mitigate this risk, the Regulation provides that where at least two-thirds of all IPs appointed in respect of a group have agreed in writing that one Member State is the most appropriate jurisdiction in which to open Group Coordination Proceedings, the courts of that Member State shall have exclusive jurisdiction to open the relevant Group Coordination Proceedings. The agreement between IPs as to jurisdiction will certainly help to manage the risk of a race to court. However, these provisions do not eliminate such risk and therefore where a group insolvency has occurred or is otherwise anticipated, IPs should consider at the earliest opportunity if Group Coordination Proceedings are a viable prospect. If they do not do so without proper justification, they run the risk of a competing IP seizing the initiative in a jurisdiction which may not provide the same outcome as would otherwise have been available.

New roles and responsibilities

As outlined above, the framework for Group Coordination Proceedings introduces new roles for IPs, financial and legal advisors. Any IP qualified to act as such in any Member State has the right to be appointed as a Group Coordinator throughout the EU. The scope and role of the Group Coordinator has been broadly defined and could have a significant impact on the landscape for the restructuring of group companies in Europe. Financial and legal advisors will need to identify and consider the opportunity for a group proceeding at the earliest opportunity with increased scope to pursue more creative and ambitious pan-European solutions than were previously possible.

In the years to come, we look forward to seeing how often this framework will be applied in practice, and whether the extensive proposals set out in the Regulation will actually have their intended effect. We all await the first appointment of a Group Coordinator.

15 Article 62

SMALL PRACTICE FEATURE*

Cryptocurrency in Russian Bankruptcy Cases

By Pavel Novikov and Andrey Bogdanov
Baker & McKenzie
Russia

The statutory regulation of cryptocurrency in Russia is yet to be made compatible with the current operations and mechanisms for creating and transferring digital assets.

In 2014 the Central Bank of Russia warned potential users about the absence of legislative control over virtual currency. The Central Bank stressed the fact that transactions with cryptocurrency are based on speculative premises and thus involve a substantial risk of depreciation and financial losses.[1] It was also mentioned that due to the anonymity of cryptocurrency issuance, users may become unintentionally involved in illegal activities such as money laundering and terrorism financing.

1 Information of the Central Bank of Russia dated 27 January 2014 on the usage of "virtual currency," "bitcoin" in particular, in commercial transactions. The full text is available in Russian at: URL <https://www.cbr.ru/press/PR/?file=27012014_1825052.htm>.

* If you would like to contribute an article for inclusion in a forthcoming issue under the Small Practice Feature, please contact Jelena Wenlock at **jelena@insol.ision.co.uk**.

This message was later reinforced by the Central Bank in 2017 when, despite admitting the increasing interest in cryptocurrencies in Russia, it pointed out that the circulation and the use of cryptocurrencies as well as any financial instruments nominated or associated therewith poses legal and technological risks.[2]

In 2018 the President of Russia instructed the government to determine the definition and status of cryptocurrency, as well as to introduce relevant registry and taxation systems.[3] As a result of the said orders, on 20 March 2018 a draft Law on Digital Financial Assets was introduced to the State Duma.[4] It contains regulations of the mining process, defines the pecuniary status of cryptocurrency, crypto wallets and tokens. So far, the draft is still being negotiated in parliament.

Cryptocurrency in bankruptcy

Before the introduction of the draft Law on Digital Financial Assets, the status of cryptocurrency was unclear and, therefore, from a practical standpoint, it has been debated whether cryptocurrency may be included in a bankruptcy estate.

In a recent case of individual insolvency, a financial administrator sought to include the debtor's crypto wallet in the bankruptcy estate. According to the documents publicly available on the Court file, the financial administrator considered cryptocurrency to have a high pecuniary value and, thus, the exclusion of the debtor's crypto wallet would violate creditors' rights (see case # 40-124668/17-71-160, Arbitrazh [State Commercial] Court of Moscow).

The trial court dismissed the financial administrator's claim. The court concluded that cryptocurrency appeared to be mere symbols, which unlike the usual means of exchange, "appear literally from the Internet." The trial court found it difficult to determine whether cryptocurrency was an asset or only information on decentralized servers. Having concluded that transactions with cryptocurrency are anonymous and decentralized the court was unable to determine that the debtor himself was the legal owner of the crypto wallet at hand. The court referred to the abovementioned position of the Central Bank and stated that due to the lack of statutory regulation and the indefinite status of cryptocurrency, the court was unable to treat cryptocurrency as part of the bankruptcy estate.

The financial administrator filed an appeal. On 15 May 2018 the court of appeal set aside the ruling of the trial court and included the crypto wallet in the bankruptcy estate. The appellate court obliged the debtor to provide the financial administrator with the relevant access key (password).

According to the reasoning of the appellate court, cryptocurrency should be regarded as an object of civil rights on the basis of a broad interpretation of the scope of the Civil Code of Russia and, hence, should be considered a pecuniary asset. The appellate court decided that since the debtor himself was freely able to use, possess and dispose of the crypto wallet, he should as a matter of law be treated as being the owner (or the equivalent of the owner) thereof. Notably, the appellate court stressed the fact that any asset of certain economic value should be included in the bankruptcy estate unless otherwise directly provided for by the bankruptcy law. In this context, the appellate court concluded that the approach taken by the trial court deprived bankruptcy creditors of the right to have their claims satisfied in full.

In another case, an individual debtor filed a bankruptcy petition seeking relief from debts incurred due to unsuccessful mining operations of cryptocurrencies. However, the court refused to declare bankruptcy and to commence the sale of assets procedure. The court concluded that the debtor, acting in bad faith, deliberately increased the amount of outstanding loan obligations by being involved in operations with cryptocurrencies, official usage of which as a means of exchange is prohibited in Russia (see case # 70-15360/2015, Arbitrazh [State Commercial] Court for Tyumen Oblast). The appellate court reversed the decision indicating the lack of evidence of the bad faith of the debtor.

In yet another case, a financial administrator of an individual debtor filed a motion with the trial court to obtain documents required to evaluate the debtor's financial state. The financial administrator requested information on transactions with digital assets, such as bitcoins and litecoins. The court granted the motion and obliged the debtor to provide the financial administrator with the requested documents (see case # 13-15648/2015, Arbitrazh [State Commercial] Court for Volgograd Oblast).[5]

Practical conclusions

Before the introduction of the draft Law on Digital Financial Assets, the courts struggled with the legal analysis and treatment, and sometimes even denied the pecuniary status, of cryptocurrency. However, since bitcoins, tokens and other cryptocurrencies are likely to be designated as digital assets under the new law, it should follow that the courts will treat such assets as a part of a bankruptcy estate.

Despite this development, the forthcoming enactment of the new law will require changes to be made to the Russian Bankruptcy Law and the Law on Enforcement Proceedings as the procedure for disposing of and dealing with digital assets is unclear and in need of clarification. As Russian law is yet to determine the specifics of the pecuniary status of cryptocurrency, the acquisition of or investment in the latter may still involve risks for both the creditors and the debtors.

2 Information of the Central Bank of Russia dated 4 September 2017 on the usage of private digital currency (cryptocurrency). The full text is available in Russian at: URL <https://www.cbr.ru/press/pr/?file=04092017_183512if2017-09-04T18_31_05.htm>.
3 The list of orders of the President of Russia dated 21 October 2017. The full text is available in Russian at: URL <http://kremlin.ru/acts/assignments/orders/copy/55899>.
4 The full text of the draft law is available in Russian at: URL <http://sozd.parlament.gov.ru/bill/419059-7>.
5 For the relevant approach see also case # 13-3814/2016, Arbitrazh [State Commercial] Court for Volgograd Oblast.

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International Association of Restructuring, Insolvency & Bankruptcy Professionals

INSOL International is pleased to announce the ninth graduating class of the Global Insolvency Practice Course. The successful participants are now formally recognised as a *Fellow, INSOL International* and will be awarded their certificates during INSOL Singapore.

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Roger Elford	Charles Russell Speechlys LLP	UK
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Ferdinand Hengst	De Brauw Blackstone Westbroek	The Netherlands
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Noel McCoy	Norton Rose Fulbright	Australia
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The Global Insolvency Practice Course is the pre-eminent advanced educational qualification focusing on international insolvency.

Laura Hall, Allen & Overy LLP, USA will be in receipt of The Stephen Adamson Award, In association with Redress Solutions PLC. This is awarded to the first in class in memory of Stephen Adamson, kindly supported by Redress Solutions where Stephen was Chairman from 2007. First and foremost, Redress is honouring Stephen's memory in a manner that reflects his connection as a Past President of INSOL International.

Nicoleta Mirela Nastasie, Bucharest Tribunal, Romania was awarded The Professor Ronald W Harmer Bursary. The award enables a judge from an emerging country to participate on the Global Insolvency Practice Course. The bursary named after Professor Ronald W Harmer Bursary marks the enormous contribution made by Ron to academic learning in international and comparative insolvency law.

Testimonials

Laura Hall, Allen & Overy, Fellow, INSOL International Class of 2017 /2018:
INSOL's GIPC broadened my knowledge of global insolvency regimes and experience negotiating with professionals of diverse backgrounds. The opportunity for professional and personal connections is the most rewarding aspect of the program.

Nicoleta Mirela Nastasie, Bucharest Tribunal, Fellow, INSOL International Class of 2017 /2018:
I was given the opportunity to be part of the INSOL International Global Insolvency Practice Course 2017-2018, through Ronald W. Harmer Bursary.

The Course is amazing because of the intensity of learning activities, complexity of issues analyzed and information provided, the extraordinary performances of trainers and speakers, but there a professional can find something more important: an environment encouraging people to become friends beyond possible boundaries between professions, different backgrounds and traditions.

Communications through informal mechanisms provided by the Global Insolvency Practice Course, in the attempt to develop a community of professionals connected around the world into the idea of being "Fellow INSOL International", along with the principles and the proposals promoted by INSOL International through Strategic review of INSOL International - Taskforce 2021, they are ones of the most important programs and projects in the field of international insolvency.

As a judge dealing with insolvency cases and passionate about the domain, this experience gives me the courage to increase my effort not just for developing my own skills and enlarging my personal knowledge but also for trying to bring professionals from Romania and (why not) from South-East Europe closer to international insolvency community.

Orla McCoy, Clayton Utz, Fellow, INSOL International Class of 2016 / 2017:
"I wholeheartedly recommend the INSOL International Global Insolvency Practice Course to anyone who is interested in genuinely deepening their knowledge and experience of cross-border insolvency and, in particular, to understand better the opportunities, challenges and solutions offered by different regimes in other jurisdictions. The course provides an unparalleled opportunity (and privilege) to work with and learn from exceptional practitioners from multiple jurisdictions and, in doing so, to develop fantastic relationships both within your cohort and amongst the Fellows network more broadly. The content and structure of the course also forces you to develop a much more profound understanding of the insolvency regimes of other (key) jurisdictions than you would have the opportunity to develop on any conventional cross-border insolvency matter. My cohort were phenomenal and I thoroughly enjoyed the course."

For further testimonials and information please visit www.insol.org/gpic/ or contact Heather Callow – **heather@insol.ision.co.uk**

OBITUARY

Dr. Shinjiro Takagi

Of Counsel of Kasumigaseki International Law Office;
Executive Senior Advisor of Frontier Management Inc.

Dr. Shinjiro Takagi was a truly multi-faceted insolvency expert. As a judge, he had provided the Judicial Colloquiums with an invaluable insight into the little known or understood Japanese court system. As a government advisor, he took the INSOL Principles for Multi-Creditor Workouts and adapted them for Japan as part of the recovery from the Asian Financial Crisis. He was a regular participant at FAIR, always keen to learn and willing to share his knowledge. He was active to the end and only a week before his passing was lamenting the loss of other thought leaders of the age.

Dr. Takagi had asked that on his passing, the following CV be distributed to organizations he was involved with.

The Honorable Professor Doctor Shinjiro Takagi was Japan's preeminent insolvency expert in the areas of domestic and international bankruptcy and business revitalization. Judge Takagi focused his practice on bankruptcy, insolvency, business reorganization, and disputes, not only in Japan but also in the Asian Region.

From 2007 to 2016, he served as adviser to Nomura Securities Co., Ltd. on numerous Japanese and domestic matters. He is well-known for his work as the chair of the Industrial Revitalization Corporation of Japan (IRCJ), an organization created by the Japanese government with a budget of more than $1 billion to accelerate restructuring of key corporations to stimulate recovery in the Japanese economy. Leading the IRCJ, he reorganized many corporations, including Mitsui Mining, Daiei, Kanebo, and Daikyo.

Admitted to the Japanese Bar in 1963, he engaged in private practice for more than 25 years before his appointment in 1988 as a judge. He heard insolvency, civil, commercial, and other business-related cases at the Tokyo District Court and move to the Yamagata and Niigata District Courts, when he served as president and chief judge. Once he returned to Tokyo, he was appointed justice to the Tokyo High Court (Court of Appeal). He was the first Bengoshi lawyer to become a judge in Japan.

Resuming private practice in 2000, he reorganized Kyoei Insurance (now The Gibraltar Life Insurance) successfully as a court-appointed trustee. Kyoei was the largest insolvency by debt owed in Japan.

In 2001, he chaired the committee to formulate Informal Out of Court of Business Reorganization Workout Guidelines to revitalize business corporation groups, which was organized by the Japanese Bankers Association (JBA), the Japan Business Federation, and other relevant organizations. Using the Guidelines, he reorganized many large business corporations, such as Hazama Construction, Nippon Yakin Industry, Hakodate Dockyard, Iwataya Department Store, and Toyo Shutter.

From 2013 to 2017, he has also served as the chair of the Operating Commission for Personal Debt Restructuring Workout, an organization that was created by the JBA with the Financial Service Agency (Japanese Government) to assist victims whose homes were destroyed by the Tohoku tsunami and earthquake. Based on his proposal, the Business Reorganization ADR (Alternative Dispute Resolution, BRADR) was created by the Industrial Competitive Power Strengthen Law in 2007, and Judge Takagi became chair in 2008 of the Selection Committee of Professionals who preside over the BRADR.

Judge Takagi also taught as a professor at Chuo University Law School from 2003 to 2006.

AWARDS

Recipient, Founder's Award by International Insolvency Institute (2016); Recipient, Founder's Award by Alix Partners (2016); Recipient, Order of the Rising Sun, Gold and Silver Star bestowed by Japan's Emperor (2007); Recipient, Outstanding Service and Contribution Award to International Insolvency by International Insolvency Institute (2005).

AFFILIATIONS

The East Asian Association of Insolvency & Restructuring, Founder & First President (2013); International Insolvency Institute, Board of Governors (2005 – 2015); Japanese Federation of Insolvency Practitioners (JFIP), President (2003 – 2007), Honorary Chair (2008 –); Education Center for Restructuring Advisors, President (2003); Japanese Association of Turnaround Professionals, Founder and Advisor (2003 –); National Network of Bankruptcy Lawyers, President (2002), Advisor (2003 –); Japanese Association for Business Recovery, President (2002), Advisor (2003 –); Tokyo Bar Association, Chair, Insolvency Committee (1986); Japanese Federation of Bar Association, Auditor (1985); Tokyo Bar Association, Auditor (1984); International Bar Association, Insolvency Section (late 1980s-); INSOL International (late 1980s-); American Bankruptcy Institute (early 1990s-); American College of Bankruptcy (1999-).

INSOL International Channel Islands One Day Seminar, 3 July 2018

Report by Jeremy Garrood

Carey Olsen

Channel Islands

On 3 July 2018, Tim Le Cornu, *Fellow, INSOL International,* KRyS Global and I had the pleasure to chair the 5th Annual INSOL International Channel Islands One Day Seminar in Jersey, CI. We were joined by over 150 delegates from the Channels Islands, the Caribbean, United Kingdom and the United States for a day of informative and insightful discussions. The event at the Radisson Hotel is St Helier was hosted by INSOL International and the Channel Island's Association of Restructuring and Insolvency Experts (ARIES).

Insolvency professionals operating in and across the offshore jurisdictions, must respond quickly and effectively to changing circumstances and the sometimes-contradictory priorities emanating from the many jurisdictions they serve. The overarching theme to this years' seminar was change. Our panel sessions looked to examine whether and how the demands from consumers of insolvency services across all aspects of our industry were changing, and how we as insolvency professionals can recognise and react to those changing demands.

Evolution or revolution

Our opening session was led by Jamie Boynton, Grant Thornton, with panellists Nigel Sanders, Ogie, John Verrill, Norton Rose and Hon. Elizabeth Stong, US Bankruptcy Court, NYC.

To start the ball rolling point the panel outlined their assessments of the motivators of change; the fallout from the 2008 global financial crisis, the demise of territorial boundaries in business and the ever onwards march of technology in business and at home.

The framework for change identified by the panel was seen as deriving from a number of discrete sources; modernising legislation such as the comprehensive redraft of the Guernsey companies law, oblique change mechanisms such as the Security Interest (Jersey) Law 2012 which sought carve out secured lending from the sphere of insolvency, the *Jervic* decision on strict interpretation of priority provisions in the US and of course, the political, in the form of Brexit.

The panel recognised that there had been a modest move away from contentious insolvency processes but also recognised that the costs of non-contentious processes in the form of Schemes of Arrangement and Chapter 11 were becoming a concern to corporates and creditors alike. It was even suggested that costs might promote the Dutch Schemes of Arrangement process regardless of what happened with Brexit.

In any event, the practitioners and judiciary on the panel and some vocal delegates in the room, were all broadly of the opinion that evolutionary change was nothing new in the insolvency business but that the speed of change appeared to be accelerating and the principle beneficiaries of that change would be those in the secured lending business rather than the general creditor.

Locking the stable door, before the horse has bolted

Tom Smith QC of South Square introduced a panel comprising Roy Bailey from EY in Cayman, Alasdair Davidson from Bedell Cristin in the Channel Islands and Elizabeth Elliott from Stephenson Harwood in the UK, and together they reviewed the powers and procedures available to creditors when target assets were in jeopardy. To illustrate their discussion the Panel used a structure chart reflecting a typical layered investment fund structure, containing Jersey/Guernsey limited partnerships, a Cayman fund company and a UK corporate Investment Manager.

It might be fair to suggest that there was something of a competition between the various champions of their jurisdiction as to who might be better placed to assist Tom Smith QC, taking the role of the advisor to the aggrieved party, but it certainly clear that each of the jurisdictions had a mechanism in place to address the prospect of asset jeopardy at each level of the structure.

Eventually a consensus emerged that that the appointment of Caymanian provisional liquidators was the choice for urgent first instance protection, in the expectation that those appointments would be recognised in the Channel Islands, and that protective orders would be available locally from the Royal Courts of the Bailiwicks. The availability of freezing orders was identified as an agile tool available to gate crash the activities of the Investment Manager, and again the ability to export the orders to other jurisdictions was important.

By the end of the session it was clear that all the jurisdictions had mechanisms available to assist the wronged creditor; the choice of remedy depended not only on the ability to employ those mechanisms in their home jurisdictions, but also the ability to export them and employ their full force extra-territorially.

The keynote speaker

As part of the wider discussion of change we had the benefit of a presentation from the writer and broadcaster Rear Admiral Chris Parry (CBE). Chris is a former Royal Navy officer who provides strategic forecasts and risk analysis in respect of some of the most challenging and complex aspects of contemporary global geopolitics.

The relationship between geopolitics and commerce and the restructuring & insolvency industry that services it, was clearly drawn by Chris in the context of his analysis of medium to long term cultural and societal developments. He suggested that the familiar systems of free trade and liberal democracy face significant competition from a number of sources; the expansion of Chinese economic influence as seen with the "Belt and Road Initiative", climate change, mass migration and the re-emergence of "Great Power" ambition at the expense of supra-national co-operation.

In Chris' opinion, the impact on trade, business organisations and the primacy of the rule of law from all these factors was bound to be significant, and the impact on the global flow of capital which is integral to the global trading systems in which we operate was, he thought, likely to be of particularly significance.

Where does Brexit take us

Immediately after lunch Howard Morris, Morrison & Foerster and Barry Cahir, *Fellow, INSOL International,* Beachamps discussed how the then current view of Brexit might impact on the insolvency business, their outlook possibly tainted or informed by the views of our keynote speaker.

Howard and Barry identified some of the clear and obvious potential impacts of a no-deal Brexit, noting the impact on the UK economy, and the loss of the EU Insolvency Regulation. The general feeling was that any form of Brexit would be detrimental to the EU in general but the Republic of Ireland in particular but would also be generally detrimental to the competitiveness of the UK as a trade friendly international jurisdiction.

The extent to which the EU insolvency mechanism might be replaced by domestic legislation was at the time unclear and that remains the case, and the picture is no brighter when considering the ever-shortening period of time available for the UK government to legislate. It was however clear to both Howard and Barry, that Brexit was being seen as an opportunity for other jurisdictions, such as the Republic of Ireland and the Netherlands, to take insolvency work away from the UK Courts and practitioners.

Understanding tomorrow's building blocks

Essential to any analysis of change in the business of insolvency is an understanding of the changes to the structures that practitioners will encounter from day to day. Structures become ever more multi-layered and complex, and the introduction of alternatives to the simple limited liability company add an extra layer of complication.

James Willmott, a partner in Carey Olsen's corporate team, who spends his days building complex international structures gave Ben Jones, *Fellow, INSOL International* from BCLP and Ken Krys from KRyS Global a whistle-stop tour of these alternative structures under the watchful eye of Charlotte Møller, *Fellow, INSOL International* from Reed Smith LLP.

James outlined the nature of Limited Partnerships, Limited Liability Companies and Protected Cell companies, explained how they operated and took us through the rationale for their use. Ben and Ken then outlined their own personal experiences of liquidating complex structures, in the Caribbean and in the UK. And their conclusion? While the structures change, once you have a clear understanding of where the value sits, the restructuring and insolvency processes we already have, are up to the job or tackling these modern vehicles.

Is regulation on the front foot?

In the final session Rebecca Stubbs QC from Maitland Chambers posed a simple question which was familiar to the majority of delegates working in the offshore jurisdictions; are the regulators of financial services industries sufficiently active and vigorous to protect the interests of corporate entities involved in the financial sector and retail investors alike.

On an initial poll there was little support in the room for regulators to be given additional powers.

The context for the debate was the collapse of the Guernsey domiciled Providence Investment Funds PCC Limited and the then outstanding criminal charges against the promotors in Jersey. Andy Wood from Deloitte, Simon Gould from Mourant and Todd McGuffin from Babbé all presented their arguments as to whether the powers and duties that are placed on the regulators in the Channel Islands and elsewhere were too onerous, too light or just right.

When Rebecca Stubbs called the debate to an end and asked the delegates to restate their preference it is fair to say that the delegates had not overly changed their minds, but they were by then all familiar with the perceived flaws in the regulators' duties, particularly in the face of what some might characterise as Nelsonian ignorance.

Networking

The seminar concluded at the L'Horizon Hotel for drinks on the terrace overlooking the beautiful St Brelade's Bay which looked delightful in the evening sun and dinner for the delegates in the ornate ballroom.

The dinner was unusual as it coincided with the England v. Columbia Round of 16 match in the 2018 FIFA World Cup. No surprise then that the conversation over dinner was punctuated from time to time by the sounds of joy and disappointment as an increasing number of diners watched the match on mobile telephones propped up against the coffee cups amid ever increasing tension.

As history will record, England won the day, but in a potentially unique moment at an INSOL One Day Seminar, a member of the non-UK judiciary was joyfully swept up in the mayhem of the England penalty shoot-out victory, despite later admitting they had limited understanding of what a penalty shoot-out was, or why it was a surprise that England had won.

We would like to extend our thanks to all who attended, and to the sponsors of this seminar: **Platinum Sponsors:** Bedell Cristin, Grant Thornton and LDM Global; **Breakfast Sponsor:** South Square; **Coffee Break Sponsor:** KRyS Global; **Lunch Sponsor:** Ogier; and **Dinner Sponsors:** BDO and Carey Olsen.

INSOL Academics' Colloquium, 11-13 July, London, UK

Report by Professor Rosalind Mason

Queensland University of Technology, Australia
Chair, INSOL International Academics' Group

In 2018, the INSOL Academics' Colloquium was once again held as a stand-alone event in London at the beginning of the northern hemisphere summer and during the mid-year break for many universities north and south of the equator.

Held in BMA House, Tavistock Square, the Colloquium began with a reception on Wednesday 11th July. As this happened to coincide with the World Cup Semi-final soccer match between England and Croatia, INSOL judiciously arranged for a television screen to enable registrants not only to renew old acquaintances and to meet new colleagues but also to keep an eye on the scoreboard.

The next morning, the Colloquium was opened by the President of INSOL International, Adam Harris, and Professor Rosalind Mason, Chair of the Academics' Group. In her opening remarks, Rosalind read from an email from the founding Chair, Emeritus Professor Ian Fletcher. In tendering his apologies, Ian extended to the members of the Academics' Group "a fond farewell and best wishes for the future." Ian passed away a few weeks later and members of the Academics' Group mourn the passing of this intellectual giant and respected colleague and friend.

The scholars and practitioners attending from 18 countries, near and far, were then treated to an interesting morning on developments in pre-insolvency practice and on regulation and insolvency and restructuring law reforms in general. Professor Stephan Madaus (Martin Luther University Halle-Wittenberg) led with a discussion of the trend of legislators to add restructuring procedures to traditional liquidation and composition insolvency law frameworks. While recognising the common economic function of both insolvency and restructuring proceedings (debt cancellation for non-performing loans), he highlighted the different ways by which liquidations and restructurings achieve their purpose. He cogently argued for doctrinal clarity, proposing a distinction between the statutory response of insolvency law to a common pool problem and the contractual approach to restructuring proceedings in conjunction with judicial assistance.

Subsequent speakers focused on pre-insolvency practice. Professor Annika Wolf (University of Applied Science Emden/Leer) presented on 'Early Warning signs – requirements for preventive restructurings'. Annika defined early warning signs as laid out by the 2016 EC Proposal for a Directive on preventive restructuring frameworks and confirmed the approach with analyses of data collected in seven European Member States. Eugenio Vaccari (City, University London) addressed the new 'Alert Procedure' in Italy, discussing pre-packs in the UK and whether the new Italian procedure was an example of cross-fertilisation or a legal transplant.

This was followed by a joint presentation by Professor Peter Walton and Dr Lézelle Jacobs (both from University of Wolverhampton) and Chris Umfreville (Aston University) on their extensive empirical study of Creditor Voluntary Administrations (CVAs) in the UK undertaken for R3. The researchers considered the reasons for the 'success' and 'failure' of CVAs, and the outcomes where CVAs fail, examining more than 500 CVA cases commenced in 2013 and consulting with various stakeholders.

Next, speakers addressed developments in Asia. Professor Gerard McCormack (University of Leeds) presented a paper written jointly with Professor WAN Wai Yee (Singapore Management University) assessing challenges and opportunities presented by the new "US Chapter 11 transplant" in Singapore. Dr Zinian Zhang (University of Leeds) examined cross-border corporate reorganizations in China and Professor Casey Watters (Nottingham University Business School China) spoke to a joint paper with Professor JIN Chun (Doshisha University) on restructuring insolvent foreign shipping companies under Chinese law.

The afternoon sessions focused on cross-border insolvency. Professor Irene Lynch Fannon (University College Cork) and Professor Reinout Vriesendorp (Leiden University), acknowledging their co-author Gregory Minne (University of Luxembourg), provided an interesting analysis of the role of directors in cross-border insolvency events in select EU countries, moving from the background context in relation such jurisdictions, exploring likely scenarios involving group structures and considering possible

consequences and disruptive outcomes.

Next, Professor Roman Tomasic (University of South Australia) presented on 'Insolvency Law and Debt on the Silk Road: A New Frontier for Cross-border Insolvency?', addressing the potentially transformative effect of China's One Belt One Road (BRI) programme on the emerging body of international commercial law affecting over seventy countries that have signed up for the BRI.

Professor Paula Moffatt (Nottingham Trent University) reflected upon some of the lessons that can be learned from the insolvency of Lehman Brothers ten years on, focusing specifically on the conflicts of laws issues that may arise in the context of intermediated securities and on the connected but more general issue of bank resolution. The first day's final paper by Dr Irit Ronen-Mevorach (University of Nottingham) provided an extensive analysis of way in which the ongoing work of UNCITRAL contributes to the strengthening of modified universalism, while also highlighting remaining gaps in international instruments.

After the Group's brief business meeting, registrants adjourned to Le Café du Marche in the heart of Smithfield to enjoy a collegial gathering over rustic French fare.

The second day commenced with an insightful analysis by Professor Sarah Paterson (London School of Economics) of the recent rise in covenant lite lending. This proved to be an interesting juxtaposition of papers with the following presentation by Associate Professor Virginia Torrie (University of Manitoba) being on foreign debt capital and restructuring practices in Canada during The Great Depression.

Donna McKenzie Skene (University of Aberdeen) and Dr David Burdette (INSOL International) presented a report on a project investigating the role of creditors in insolvency proceedings, with a comparative analysis based upon a survey completed by colleagues from jurisdictions around the globe. An interesting discussion followed with registrants from countries not represented in the report offering to provide additional information to extend its coverage.

The perennial topic of issues regarding insolvency practitioners attracted papers by Dr John Wood (University of Central Lancashire) - on the use of discretion in insolvency proceedings; by Dr Robin Bowley (University of Technology Sydney) - on recent developments in regulating the insolvency profession in Australia, the UK, Ireland and New Zealand; and by Professor Christopher Symes (University of Adelaide) - on a liquidator's power to disclaim property owned by an insolvent company in the context of environmental laws that may require them to make good claims for environmental damage caused before their appointment.

The afternoon's personal insolvency panel began with a discussion of potential lessons from Kenya for alternatives to bankruptcy in South Africa by Zingapi Mabe (University of South Africa). Next, Dr Katharina Möser (Birmingham Law School) examined the Scottish Debt Arrangement Scheme as a reform template for England and Wales. Dr Joseph Spooner (London School of economics) presented on moral hazard and bankruptcy as insurance against risks of debt economy. This session concluded with an entertaining presentation by Dr Michael Quilter (Macquarie University) on bankruptcy and the creative mind, highlighting writers and artists who have used imagery drawing upon their own or others' experience of bankruptcy.

The final session of the Colloquium was on regional developments in Europe, perhaps predictably both papers addressed aspects of Brexit. A presentation that attracted much interest was an examination of the impact of a 'no deal' scenario on recognition of UK insolvency proceedings post-Brexit presented by Professor Irene Lynch Fannon (University College Cork) and Chris Umfreville (Aston University) on behalf of a team of researchers. The Colloquium concluded with Dr Jenny Gant (Nottingham Trent University) addressing Britain and Brexit from the perspective of the potential impact of Brexit on the social policy aspects of insolvency in the UK, focusing on a forecast of the future of employment protection during corporate insolvency.

Once again participants commented on the high standard of papers and the collegial exchange of ideas. Yet it is not only the presenters who contribute to the dynamics of a successful Colloquium. As one participant noted, *"It was particularly good to have engagement with practitioners and to hear from jurisdictions around the globe who were in the audience."*

The 2019 Academics' Colloquium will take place prior to the INSOL Singapore Annual Conference on 1-2 April 2019. It promises to be another dynamic and stimulating meeting. The details of the programme and registration is now available at **https://www.insol.org/events**.

INSOL International Jakarta One Day Seminar, 13 September 2018[1]

Report by Geoff Simms, Seminar Chair

Fellow, INSOL International

AJCapital Advisory
Indonesia

INSOL International ran its second One Day Seminar in Jakarta on 13 September 2018 at the Fairmont Hotel.

The leading theme of the programme was the importance of a liquid and appropriately regulated secondary market for bank NPLs, whilst examining the structural and commercial impediments to its development.

A keynote speech was prepared by the Indonesian Monetary Authority ("OJK"). The key take-away was the support of the Monetary Authority for a well-developed and appropriately regulated secondary market for NPLs.

Session 1: The state of the Indonesian non-performing loan market. What are the countering views?

Chair: Nick Moller (Asian Development Bank).
Speakers: Aritonang Parulian (University of Indonesia Law School),
Daven Patel (Altus Capital, Philippines),
Ricardo Simanjuntak (Ricardo Simanjuntak & Partners, Indonesia),
Agus Subroto (Supreme Court of Indonesia).

The first panel tackled a number of critical questions concerning the importance of an active NPL market and the need for an appropriate supporting regulatory framework.

It would be in the best interests of the Indonesian financial sector to have an active NPL market. Reference was made to Thailand, Philippines, and Malaysia, all of whom established policy frameworks for NPL sales during the Asian Financial Crisis ("AFC"). As a result, not only were banks able to move NPLs off balance sheet, but it also created an environment where troubled companies could be recapitalised and turned around more effectively.

Indonesia has no specified regulatory framework for NPL sales, and market participants need to look broadly to the civil code, tax and other regulations for guidance. However, comfort should be taken from recent Supreme Court decisions supporting NPL purchases.

Another issue is the question of Burden of Proof. The lack of clear guidance on this at critical junctures can stall an insolvency process or see it move in an unanticipated direction. This is compounded by law number 48 (2009) which places no obligation on the court to ask for additional documents or evidence before deciding.

It was agreed that a regulatory framework provided by OJK would help. This would require balance and should not lead to an overprotective or overregulated market.
Some issues require more consideration. For example, in bankruptcy the rights to proceeds from liquidation of assets, even if those assets are secured, are prioritised firstly to the Indonesian tax authorities and secondly to the debtor's employees.

Session 2: Why not a secondary market for NPLs?

Chair: Nawal Nely (EY, Indonesia).
Speakers: Billy Anugerah (SC Lowy, Hong Kong),
Kong Chi-Nang (Deloitte, Singapore),
Jimmy Ng (CCA, Malaysia),
Andreas Rimkus (International Finance Corporation).

The panellists discussed (a) the current state of secondary NPL market in Indonesia; (b) challenges faced by buyers and sellers; and (c) next steps to be undertaken by all relevant stakeholders to ensure a liquid, transparent and efficient secondary NPL market in Indonesia.

The size of the NPL problem in Indonesia, while not at the level during the AFC, might be far worse than the current official records if IFRS 9 is implemented.

Overall expectations towards an active NPL market are fairly high, as are price expectations, particularly for SOE banks, but in the absence of a sufficiently developed ecosystem a price discovery problem arises.

For SOE banks, where a large portion of NPLs reside, there are additional issues. NPL sales by these banks, given current regulations specific to state owned institutions, are virtually impossible even if price discovery can be resolved.

One solution to this problem is the Chinese approach. China created a number of AMCs with a clear framework and processes for the sale of NPLs by SOE Banks to the AMCs, and the onward sales of NPLs from the AMC's into the market.

Along with price discovery is the question of the pricing gap; the differing expectations of seller and the buyer. The panel considered the main driver for this gap to be the degree of motivation by banks to sell. It was also agreed that the motivation to sell was heavily influenced by the regulator.

The panel also took the view that motivation to sell would increase if banks were fully valuing the carrying cost of their NPLs. It was thought that many ignore work out costs and negative carry which can be substantial.

Session 3: Cross-border restructurings

Co-Chair: Ashok Kumar (BlackOak LLC, Singapore),
Co-Chair: Geoff Simms (AJCapital Advisory, Indonesia).
Speakers: Joel Hogarth (Reliance Capital Management, Indonesia),
Monisha Kamdar (Raiffeisen Bank International AG, Singapore),
Jason Kardachi (Borrelli Walsh, Singapore).

The third panel shifted the focus away from the NPL market and discussed the adequacy of Indonesia's Insolvency Regime, from a cross-border perspective, relative to solutions found in foreign jurisdictions.

Most panellists agreed that the Indonesian Insolvency law suspension of payment process ("PKPU") can be effective when used appropriately. Berlian Laju Tanker was presented as an example.

[1] Full report can be viewed online at https://www.insol.org/library/opendownload/872

Discussions on the new Singapore Insolvency provisions highlighted the adoption of the UNCITRAL Model Law and the move to a debtor driven rescue culture. With these changes, Singapore is looking to enhance its attractiveness as a regional debt restructuring jurisdiction and an alternative to proceedings in either the UK or the US.

It was argued that the recognition of the UNCITRAL Model Law would make a case like Berlian Laju Tanker and the recognition of the PKPU proceeding easier.

It was noted that Indonesian debtors have had significant success in Singapore with offshore bond restructurings, and the expectation was that this would continue, given the new cram down provisions. It was also agreed that there was little in the new provisions to benefit creditors given the question of enforcement.

Regarding the Indonesian law, the panellists stated they would like to see resolution of: (1) procedural elements that make it so difficult for foreigners to file claims; (2) the lack of accountability for decisions by the administrator; and (3) the lack of clarity over treatment of secured creditors not registered as a participant in a PKPU.

Session 4: Need for a change in the insolvency law or simply implementing regulations?

Chair: Robert Schmitz (Fulcrum Advisory Asia Pte Ltd, Singapore).
Speakers: Ibrahim Assegaf (Assegaf, Hamzah & Partners, Indonesia),
Tahirah Ara (Withers Khattar Wong, Singapore),
Mike Carl (SSEK, Indonesia).
Andi F. Simangunsong (AFS Partnership, Indonesia).

This panel took the question of creating liquidity in the NPL market back to protection of rights and enforcement fundamentals. They noted that the World Bank recently ranked Indonesia 172 out of 192 for enforcement. This begged the question whether or not it is driven by the insolvency regime or the enforcement regulations and processes.

Current drafts of revisions to the insolvency law includes a provision that a PKPU may only be filled by a debtor. Elements of the judiciary believe that creditors are abusing current provisions. It was argued that if an issue of abuse is taking place then what is needed is a clear standard of enforcement and not a change in the law.

The panellists highlighted the strategic nature of the administrator and the rights to nominate him or her. One option proposed was for the administrator be picked randomly or jointly.

The question of follow on PKPUs was raised. United Airlines was given as an example of a company that required five Chapter 11 processes to effectively turn itself around. The current law does not address this. Yet some practitioners would argue strongly that a follow on PKPU is not allowed under the law.

The variability in the detail of court approved restructuring plans was also criticised. For example, Bumi Resources put forward a very detailed plan while other plans can be very shallow and almost impossible to implement. It was questioned if this should be regulated.

There is also the question of enforcement of security. The PKPU process has become a debtor favoured process, because the reality of enforcement of security is so difficult, and it is very easy to frustrate an enforcement proceeding by filing frivolous lawsuits.

It was agreed that the law cannot address everything and that it may be better to manage legal process and implementation through supreme court circulars.

The panel highlighted the lack of soft infrastructure as a critical issue. For example, there are no case commentaries explaining decisions which, combined with the practice of circulating judges out of the commercial court every 3 to 5 years, creates an ongoing loss of knowledge and experience.

Session 5: Analysis of the key questions and themes from the programme

Chair: Timur Sukirno (HHP Law Firm, Indonesia).
Speakers: all of the aforementioned panel chairs.

Finally, the fifth panel was tasked with identifying what they believed to be key take-aways from the preceding panels. These included:

Agreement that the NPL market needs a supporting regulatory framework, notwithstanding the fact that problems and contradictions with enforcement and the interpretation of the law does hold market development back.

Reaffirmation of the need for an active and liquid NPL market, given the benefits it can provide to both buyers and sellers as well as the added stability it can bring to the financial system

A proposal to deal with SOE bank NPL governance issues through price discovery mechanisms and AMC structures.
NPLs do not trade because of motivational issues. The solution needs to be a combination of change in mindsets, ecosystem and regulations. One example is for banks to implement a comprehensive framework for valuing and pricing NPL, including work out costs and negative carry costs.

A lawyer normally says 'make a change in the law and you change the world', but from today's discussion this may not be so. There were many other options offered up other than simply changing the law, including dealing with issues of weak, soft infrastructure.

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:** AJCapital Advisory | Assegaf Hamzah & Partners; **Coffee Break Sponsor:** FTI Consulting; **Lunch Sponsor:** Deloitte and **Gold Sponsor:** HHP Law Firm.

INSOL International Dubai One Day Seminar, 3 October 2018

Report by Robin Abraham

Clifford Chance LLP
UAE

INSOL International held its first One Day Seminar in the Middle East at the Ritz Carlton in Dubai International Financial Centre on 3rd October 2018. The highly successful seminar was run in partnership with the Government of Dubai's Economic Department (DED) and was co-chaired by Robin Abraham from Clifford Chance and Ahmed al Hajri from the DED. Attendees from the regional restructuring community were joined by participants who had travelled from Europe and Asia.

Managing balance sheet challenges for financial institutions

The day opened with a discussion on challenges facing banks in the Middle East and how they account for and manage distressed credits. Amongst a wide range of topics covered, the panelists discussed early warning systems in institutions that allowed turnaround teams to get involved in distressed credits before situations deteriorated further and the impact of IFRS changes on banks. Hani Bishara from EY chaired the panel and was joined on the stage by Hamed Farzadi from Emirates NBD, Asad Ahmed from Alvarez &Marsal and Brian Little from Al Rajhi Bank in Saudi Arabia.

Offshore challenges

Sophie Kassam from Walkers' Dubai office chaired the next panel. Cases such as Arcapita and Abraaj have bought attention to how offshore insolvency regimes can be used in some Middle Eastern restructurings where a nexus can be found and these topics were debated by the panel comprising Matthew Wilde from PwC Dubai, Ian Mann, Fellow, INSOL International, from Harneys Hong Kong and Ryan Beckwith from Freshfields Bruckhaus Deringer London.

Keynote address: The positive impact of the UAE's bankruptcy legislation since its enactment

Ahmed al Hajri from the DED introduced the keynote speaker,

Mr Ahmed Adel Atta, Chair of the Board of Directors of the Association of Legal Advisers in Egypt. Mr Atta gave spresentation on the introduction of the UAE Bankruptcy Law. Whilst highlighting some key provisions of the law, Mr Atta noted how the law was drafted in a manner that allowed for flexibility for judges to sanction debtors' proposals for restructuring and how this was likely to be helpful in facilitating turnarounds. It was noted that a rigid statutory framework could be unhelpful in complex situations.

Law reform – what developments have occurred over the year

Aside from the UAE, there have been a plethora of new insolvency laws across the Middle East with new laws implemented or close to being implemented in Egypt, Bahrain, Saudi Arabia and the Dubai International Financial Centre. A panel of lawyers comprising Adrian Cohen from Clifford Chance London, Nadim Bardawil from BSA Dubai and Barry Cosgrove from K&L Gates London discussed the changes in the legal landscape, including policy drivers behind the new laws, and also the likelihood of the laws being used in practice. The panel also discussed issues around recognition by Middle East courts of foreign proceedings. Reem Al Sayegh from Linklaters' Dubai office chaired the session.

Alternative restructuring in the region

David Stark from Deloitte's Dubai office led the final session of the day. Mo Farzadi from PwC Dubai, Stjepan Buljevich from Abu Dhabi Commercial Bank and James Iremonger from DLA Piper Dubai completed a lively panel discussion looking at how solutions for Middle East restructurings are increasingly looking beyond the traditional "amend and extend" route, with more innovative structures being explored including debt for equity swaps.

INSOL International would like to thank the following sponsors for their support of the Dubai seminar:
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Conference Diary

December 2018				
29 Nov – 1 Dec	TMA Leadership Conference	Chicago, IL	TMA	www.turnaround.org
6-8	ABI Winter Leadership Conference	Scottsdale, AZ	ABI	www.abi.org
January 2019				
7-9	ABI / RISA Caribbean Insolvency Symposium	Grand Cayman	ABI/RISA	www.abi.org
February 2019				
6-8	TMA Distressed Investing Conference	Las Vegas, NV	TMA	www.turnaround.org
April 2019				
1-2	INSOL Singapore Academics' Colloquium			
2	INSOL Singapore Offshore Ancillary Meeting			
2-4	INSOL Singapore Annual Regional Conference	Singapore	INSOL International	www.insol.org
May 2019				
22	INSOL International Stockholm One Day Seminar	Stockholm, Sweden	INSOL International	www.insol.org
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
September 2019				
26-29	INSOL Europe Annual Congress	Copenhagen, Denmark	INSOL Europe	www.insol-europe.org
November 2019				
7	INSOL International Tokyo One Day Seminar	Tokyo, Japan	INSOL International	www.insol.org
December 2019				
5	INSOL International Bahamas One Day Seminar	The Bahamas	INSOL International	www.insol.org

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