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FOCUS: INSOL New York

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Editors' Column

Peter Gothard
Fellow, INSOL International
Ferrier Hodgson Australia

Nicholas Segal
Freshfields Bruckhaus Deringer LLP, UK | Judge, Cayman Grand Court, Cayman Islands

A significant proportion of this edition comprises reports of the panel discussions that took place and the presentations made at the 2018 Annual Americas conference held in New York on 29 April and 1 May. These reports demonstrate the jurisdictional reach, wide range of subjects and the substantial number of issues covered during the few days of the event and that the activity levels at the conference were a perfect fit for the conference venue, described by the conference co-chairs (Marcia Goldstein of Weil, Gotshal & Manges LLP and Kevin Orr of Jones Day) as "the world's most energetic city."! The reports will give those of us who were unable to attend an overview of what was discussed and the chance to benefit from the collective expertise and experience of a top team of speakers who spoke at the conference.

I was particularly impressed by the way in which many of the sessions provided an opportunity for and then delivered a thoughtful comparative treatment of transactions, problems, approaches and outcomes. A good example is the *Insights from Westinghouse, Abengoa and Walter Energy* panel that reviewed the restructurings of three major energy companies (covering electricity generated from renewable sources, coal and nuclear plants), in Spain and the US, focussing on how the cross-border aspects of each case were dealt with in each case. Another is the *Cross-Border Collisions: Mass Disaster and Mass Tort Claims* panel which reviewed the co-ordinated Chapter 11 and CCAA proceedings of companies within the Montreal, Maine and Atlantic Railway group (following a horrendous derailment and explosion of sixty-three tanks cars loaded with crude oil) and the Chapter 11 and Japanese proceedings in the Takata case (which arose from a series of automobile airbag explosions). To fit in with and elaborate upon this discussion we also have in this issue the second instalment of the detailed analysis of the Takata case by Leonard Goldberger and Qing Lin. There will be a further and final piece to follow.

Other sessions in New York discussed and brought a global perspective to important issues in certain industry sectors (such as shipping and retail), new and developing business sectors (such as fintech and blockchain) and legal and practice issues (such as forum shopping). Law reform was also covered with a review of the work and conclusions of the ABI Commission's study of Chapter 11 reform and of recent reforms in India, Russia and the UAE.

Also of particular note was the extensive involvement of senior judges from across the world who participated in a number of panels (if I can be forgiven for commending and drawing attention to the efforts and contribution of the judges involved). Judge Drain of the SDNY and Frank Newbould, the recently retired judge from Ontario, discussed Chapter 15 and transnational cases with US implications; Lord Justice David Richards of the Court of Appeal of England and Wales, Judge Marty Glenn of the SDNY and Justice Eberhard Nietzer of the Heilbronn Bankruptcy Court in Germany joined the discussion of good forum shopping while the first two judges were joined by my colleagues from the Grand Court in Cayman, Mr Justice Raj Parker an Justice Ian Kawaley (of course also, until July, the Chief Justice of Bermuda) for the offshore meeting. This shows the engagement of the judiciary with the wider profession and continues a welcome trend which has developed over the last decade and more.

In addition, to provide a broad political perspective on recent and likely future developments, the conference heard a discussion with Ambassador (ret.) Norman Eisen on *The economic future under the Trump administration* which even by reference only to the written record appears to have been wide ranging, robust and thought provoking.

In this issue we also report the death of Professor Ian Fletcher. We all have tales to tell of Ian – of his scholarship, his decency and the huge contribution he made to our field (I remember when his first book on bankruptcy was the only serious academic text on the topic). Fuller tributes will follow but at this stage I would just like to say how sad I am at his passing and that he will be much missed.

Last but not least, we would like to thank Mourant Ozannes for their continued support as sponsor of INSOL World, and David Rubin & Partners for sponsoring the monthly electronic news updates.

Nick Segal

Nicholas Segal

President's Column

By Adam Harris
Bowmans
South Africa

Dear Friends and Colleagues,

"I love it when a plan comes together". This was a catchphrase of a popular television series, The A Team, which aired some moons ago. In virtually every episode, there was an opportunity for the cigar-smokin' Colonel to express his satisfaction at the way that a particular mission had gone, with this popular phrase.

Preparing recently for a visit to the annual conference of one of our major member associations (R3), I reflected upon the progress made in the implementation of the Task Force 2021 Strategic Plan. This has undoubtedly been both a challenging and yet productive road to travel, but one outstanding feature is that we have transitioned from the planning phase to the implementation phase in regard to so many initiatives. The goals have lifted off the pages of the strategic plan and have been transformed into our new reality, part of what we do as an organisation.

Remember that we are dealing with extensive and broad ranging goals and achievements:

- the **Judicial Training College**, which, in collaboration with the World Bank, has already delivered a training course to judicial officers in Vietnam and which has further requests for such training lined up;
- the establishment of a **legislative and regulatory colloquium** to run in parallel with the already well-established judicial and academics colloquia. An inaugural meeting took place in New York earlier this year;
- The all-new **website** is up and running and we have had almost 45 000 pages viewed over 4 weeks, some 7100 separate users visit the site, and more than 400 members who have taken advantage of the interactive capabilities of the site to update and amend their profiles online.
- The broadening of the scope of the **Board of Directors** with the appointment of Peter Sargent who represents the interests of the Smaller Practice Group, one of the most active constituencies that INSOL International is fortunate to have on board.
- Under construction at the moment is an **online, distance-learning capability**. This will allow those who wish to undertake an online education to sign-up for the modules aimed at providing the essential, fundamental range of educational topics, and in addition to allow the individual to superimpose thereon tailor-made modules in respect of a geographical region or regions.
- One of the most important goals, now in the advanced planning phase, is the establishment of a "hub" in Asia to enable us to become better attuned to the needs of our members in this fast-developing environment, and in fact the broader, international community.
- We have engaged professional assistance in regard to our utilization of social media which we know to be hugely important channels of communication. This, with a view to becoming more immediate in our ability to react and to communicate more effectively with our

members using established social media platforms. Follow us!

All of this happens alongside our top-class conferences, (New York was superb, and attended by 860 people), numerous first-rate seminars in jurisdictions as broad-ranging as Buenos Aires, Dubai, Hong Kong, the Channel Islands, Finland, Indonesia, PRC, and the delivery of our extensive and topical technical product.

It has been a gratifying endorsement of what we do to have such positive feedback from individual members and from member associations with which we have interacted. I have been fortunate to have attended a number of projects and conferences during the last few months and to interact with individuals and, collectively, with some of our member associations. Jason Baxter (for those of you who don't already know him, Jason is our COO) and I attended the R3 conference at the Vilamoura Resort, Algarve, Portugal. We enjoyed the slick presentation of interesting technical sessions, and a great social vibe. And, it gave us the opportunity to interact with the R3 members, and to gain a better sense of what the members require from INSOL International.

It has been a period of such positive growth and development for INSOL International that it seems even sadder to mention the passing of Prof Ian Fletcher. And yet there is an upbeat message, too. Ian's great legacy lives on. He was one of the cornerstones of our Academics' Group, and an unfailing supporter of INSOL. Ian had such wisdom, always delivered in his quietly understated way. He was honoured by INSOL when we presented him with a Scroll of Honour to thank him for his contributions and dedication not only to our organisation, but to the development of Insolvency globally. The Ian Fletcher Insolvency Moot competition, about to enter its third iteration, will allow us to continue to honour the memory of a true scholar, and a friend.

To again reflect, for a moment, on the key objectives and strategies which we outlined in the Strategic Plan, we realised that member services needed to evolve constantly to meet the ever-changing global and diverse audience. Interaction with the members is critically important to ensure that we meet this commitment. It's what we do, and in large measure for whose benefit we do it.

We are able to implement the recommendations of the Taskforce and to achieve these broad-ranging goals through our prudent fiscal policies, coupled with solid income from events with which people want to be associated, and – probably the most important factors - plain hard work, and being good at what we do.

When I review all that is going on, I am happy to lose the cigar, but I do know that the INSOL International team can state with proud justification, that "we love it when a Plan comes together".

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Focus: INSOL New York

29 April – 1 May 2018, New York, USA

It was our pleasure to welcome 860 delegates from 48 countries to our Annual Regional Conference in New York this spring. Our largest annual conference to date. A diverse and interactive educational program and invaluable international networking are key elements that make INSOL conferences stand out and attract high delegate numbers each year.

In addition to the main program, a number of ancillary meetings preceded the conference: the Offshore cocktail reception and meeting; the INSOL International Fellows reception and forum; Small Practice Issues meeting and dinner. Following the success of Sydney meeting, a dedicated round table for INSOL Member Associations was held again this year, providing the platform for the secretariat members to meet face to face and share knowledge and experience.

The conference program offered break out choices on both days and you will find reports on these in the following pages. The Conference was opened with a Keynote Address delivered by **David Chaves, FBI Supervisory Special Agent (Retired)** who gave the delegates a very entertaining insight into the methods used to investigate insider trading and bringing the perpetrators to justice, along with some useful tips on how to know if someone is being economic with the truth during an interview which led to some hilarious body language monitoring during the conference, especially with regard to feet!

Our thanks go to the Main Organising Committee for all their work and to the Educational Committee for putting together such a dynamic program.

We would also like to thank our sponsors for their tremendous support of the conference and INSOL International, which enables the Association to carry out its activities around the world and develop new projects and member services.

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Congratulations to Fellows of the Class of 2016 – 2017!

The successful graduates of the Global Insolvency Practice Course Class of 2016 – 2017 were presented with their INSOL Fellowship certificates at the Gala Dinner in New York by Adam Harris, INSOL President.

The following are now Fellows of INSOL International: **Simon Dickson**, Mourant Ozannes, Cayman Islands, **Liam Faulkner**, Campbells, Hong Kong, **Ian Fox**, Dentons LLP, UK, **Nastascha Harduth**, Werksmans Attorneys, South Africa, **Charles Hoebeke II**, Rehmann, USA, **Krijn Hoogenboezem**, Dentons Boekel NV, The Netherlands, **Jan Willem Huizink**, The Netherlands, **Dhananjay Kumar**, Cyril Amarchand Mangaldas, India, **Ayodele Kusamotu**, Kusamotu & Kusamotu, Nigeria, **Howard Lam**, Latham & Watkins, Hong Kong, **Shaun Langhorne**, Hogan Lovells Lee & Lee, Singapore, **Orla McCoy**, Clayton Utz, Australia, **Craig Montgomery**, Freshfields Bruckhaus Deringer LLP, UK, **Maria O'Brien**, Baker Mckenzie, Australia, **Nicolas Partouche**, Jeantet, France, **Vanessa Rudder**, Alvarez & Marsal, UK, **Mark Sinjakli**, AlixPartners LLP, UK, **Derrick Talerico**, Zolkin Talerico, USA, **Lloyd Tamlyn**, South Square, UK, **Sonya Van De Graaff**, Morrison & Foerster (UK) LLP, UK, **Nicolas Velasco Jenschke**, Superintendency of Insolvency and Entrepreneurship, Chile.

I want to be a part of it, New York, New York.

By Gerda de Ranitz
The Netherlands

"I want to wake up, in a city, that never sleeps". In my head I sang that evergreen song a dozen times, ever since my husband announced that he was going for an INSOL conference to New York. "Me too!" I shouted at him in reply. I was excited at the prospect of joining my husband in New York at the INSOL Conference. It turned out that our youngest son had a school-holiday that same week, so soon enough he shouted "me too" as well. We ended up turning the conference into a family holiday, as we have done with so many INSOL conferences in the past, like in Scottsdale, Sydney, Dubai and Vancouver which we visited with our 2 sons. For about the last 20 years now I have been able to join my husband at many INSOL Conferences in many great places, and we have enjoyed all of them, especially because of the old friends you meet again and the new friends you make.

We arrived on Saturday at the very convenient conference hotel Grand Hyatt, to get over our jet-lag on Sunday and join the Welcome Cocktail Reception, kindly sponsored by BDO, at Cipriani, just across the street from the hotel. This New York City landmark used to be – what else – a bank, and I was impressed by the immense space with projections of the New York sky-line. The amount of delicious food that was served around and at the buffet was amazing, and I was enjoying it while looking out for old friends. I was a bit disappointed in finding out just a few of them had been able to travel. A lot of women do not join their husbands at conferences anymore. Not because they wouldn't like to; I bet everybody would love walking around New York while their other half is listening to some undoubtedly very interesting speeches. No, it is because so many women now have their own career. So a lot of women I met at the conference were not there because they were joining their partner like I was, they were there to attend the conference, to work and network. But at night, with a glass of wine in one hand and a delightful *hors d'oeuvre* in the other, it was time to chat about other things, like how amazing a city New York is. I was glad to hear so many people were able to add a day or more to the conference to spend some time relaxing. But first there was more working and networking to do on Monday, while my son and I had lunch in Central Park and went up to the observation deck at the 102nd floor of the new World Trade Centre. Since Monday night was a free night, a lot of firms took the opportunity to throw a party, and we were able to visit a few. From a rooftop bar to a pub in old England style, to a steak house where we tasted the best steak in town, to a jazzy afterparty: it was amazing to see so many people from all over the world not just handing out business cards but relaxing, talking and laughing together and having a great time.

Tuesday night was the time for the traditional Gala Dinner, sponsored by AlixPartners. Less traditional were the choices of drinks that were offered at the reception before the dinner: not only white and red wine, but also a great selection of beers. So the mood was already good when we entered the gigantic empire ballroom at the Grand Hyatt. After the starter and welcome speech by the INSOL President Adam Harris, the Fellowship Awards were announced. It was heartwarming to hear a few hundred people applaud and cheer for these well-deserved awards given to this group of men and women. INSOL is such a great organization that many women want to be part of it too, and they do so very successfully, as demonstrated by Orla McCoy, First in Class. And rumor has it that INSOL International will trump the United States by appointing a woman as their next president! The only disadvantage about that is that she will not be able to join me while I explore the wonderful city of Singapore at the next INSOL Conference, but I hope there will be others who will take the opportunity to join their partner to another INSOL Conference, and maybe even make it a family-holiday. It is definitely worth it!

Adam Harris with Mont Blanc pen winner Sajeeve Deora.

Mont Blanc pen winner Jo-Ann Marais and Adam Harris

INSOL New York – Technical Sessions, Monday 30th April 2018

Insights from Westinghouse, Abengoa and Walter Energy

Review by Christel Dumont
Fellow, INSOL International
Dentons
Luxembourg

Chair: Jane Dietrich, *Fellow, INSOL International*, Cassels Brock & Blackwell LLP
Lisa Beckerman, Akin Gump Strauss Hauer & Feld LLP
Lisa Donahue, AlixPartners LLP
Óscar Franco, DLA Piper

Jane Dietrich chaired the energy filled panel on Westinghouse, Abengoa and Walter Energy, three international companies active in the energy sector, all of which went into financial turmoil and experienced major restructurings.

Each member of the panel, directly involved in those restructurings, first started by setting the scene.

In November 2015, Abengoa, a Spanish company, investing in energy and environment as owner or co-owner of projects involving the generation of electricity from renewable resources, experienced financial difficulties. Due to the type of investments made, and to new regulations in Spain, its debt became unaffordable and Abengoa had the choice between going into insolvency in Spain or negotiating a standstill with its creditors and finding an agreement to restructure its financial indebtedness through a special new proceedings in Spain at that time.

Walter Energy, headquartered in Alabama, had mines in West Virginia, producing high-quality coal and was one of the 25 largest coal producers in the US. As coal prices dramatically declined, Walter Energy's 3bn debt also became unaffordable and Chapter 11 in Alabama was the solution retained in July 2015.

Westinghouse, a subsidiary of Toshiba, was an iconic company in the nineties, similar to General Electrics, which was involved, in the construction of two nuclear plants in Georgia in around 2009, the first to be authorized in the US since the Three Mile Island accident. It however experienced massive costs and time overruns regarding the construction, partly due to changes in regulations in the wake of the Fukushima incident in 2011. Westinghouse filed voluntary petitions under Chapter 11 in March 2017.

The cross-border aspects in the three cases were highlighted by the panelists. Abengoa restructured through a Spanish proceeding similar to the UK scheme of arrangement because the process only affected financial creditors, many of whom were not in Spain, and it elected to seek recognition under Chapter 15 in the US. Whereas, the biggest issue for Walter Energy was to finance its plan of reorganization as there was little appetite from lenders to fund the plan in an environment of declining coal prices. The option was then to sell its Canadian assets and to start CCAA proceedings in Canada. The challenge for Westinghouse, which was held through a UK holdco, with a cash pooling system, was that such cash pooling stopped upon Chapter 11 filing. It then had to deal with European and Asian counterparts in order to maintain solvency with most of its assets being regulated assets and with its parent company being its only creditor with multiple claims originating from loans and guarantees.

Alongside the regulatory challenge, another key element which played a role discussed by the panelists was that of corruption, which could also have an influence, especially in the Abengoa case, where former directors are facing criminal liability in Spain.

The outcome of the three cases was then discussed by the panelists. Abengoa reached an agreement with the main banks and other banks were left with only three options: support the agreement, challenge the scheme or do nothing. As Abengoa is a big company in Spain, there was the assumption that the court would support and approve the scheme, which in the end obtained 90% of support, and was recognized under Chapter 15. Toshiba finally managed to sell Westinghouse to Brookfield Asset Management, with regulatory approval still ongoing. Similarly, main assets of Walter energy were sold and the Chapter 11 cases were converted to cases under Chapter 7 of the Bankruptcy code.

The panelists concluded with three takeaways: (1) don't underestimate regulatory impact, (2) in construction projects, there is the potential for costs overrun and (3) it comes down to commodity pricing.

The audience then engaged in a lively question and answer session about specific issues encountered in the course of the restructurings, cross-border aspects and recognition. Overall, this session was engaging for both the invaluable experience shared by the panelists and the thought-provoking video on nuclear power.

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The slow, spiralling death of retail

Review by Orla M. McCoy
Fellow, INSOL International
Clayton Utz
Australia

Chair: Ian Fredericks, Hilco Merchant Resources LLC
Gilles Benchaya, Richter Consulting, Inc.
Gayle Dickerson, KPMG
Bob Rajan, Alvarez & Marsal Europe LLP

Digital innovation in the retail space is growing at the rate of Moore's Law squared, according to D. Farrington Yates, who introduced an experienced panel of retail experts and restructuring and insolvency professionals with expertise spanning the North American, UK and mainland Europe and Australian markets.

Despite the title of this very fascinating session, the clear theme was that retail is not dead, or even dying, but it is undergoing a seismic change.

Consistent trends were evident across the regions discussed. Bricks and mortar retailers in certain sectors (e.g. specialty apparel, footwear and department stores) are struggling, with 9,000 store closures in the US, and 1700 net closures in the UK (double the average of the past 5 years) in 2017. On the other hand, smaller store, value offering or food/convenience stores are on an upward trajectory, accounting for a significant volume of the 14,000 store openings in the US over the same period. Similar trends are evident in Europe, according to Bob Rajan, though the absence of a large "shopping mall" culture has helped mainland Europe avoid the "dead mall" phenomenon afflicting the US. Bob noted that bricks and mortar retailers have made insufficient investment in innovation and technology. Australia has been slightly buffeted from the UK and US retail fallout, as Gayle Dickerson explained: only 20% of the world's top 250 retailers have a presence in Australia; online shopping represents only ~5-6% of the Australian retail market; and there has been a 30% increase in Chinese tourists to Australia. But there may be pain to come for Australia if interest rates rise as predicted, particularly given the high levels of household debt as a percentage of income.

It is not all decline however. The real seismic shift in retail is in the growth of online sales, innovation and the use of data and artificial intelligence. In the US and Europe, online sales are increasing. The three largest players in the retail sector - Amazon, Alibaba and Walmart continue to dominate. Amazon "continues to be on fire" according to Ian Fredericks: it has reported growth of US$10b over the past 5 years (c.f. US$3bn decrease in US department store sales over the same period); 50% of US households are Amazon prime members; 30% of US retail sales are conducted on Amazon; it is the second largest apparel retailer in the US, and, explaining some of the department store malaise, saw year on year growth of third party retailers using the Amazon platform increase by 41%. Like Alibaba and Walmart, technology is germane to Amazon's success.

A video of ordering via Amazon's Alexa device, delivery direct to one's home or car (using smart keys) intrigued delegates. Rumours of Amazon using predictive data to make unsolicited deliveries, which consumers may return for free or retain at a discount, moderately spooked (at least this) delegate. We were also taken on a virtual reality shopping tour of Macys, via the Alibaba platform. Much of the success of Alibaba and Walmart is owed to their innovation and the use of data, algorithms and predictive analytics to create demand.

From the perspective of restructuring and insolvency experts these developments have had the greatest impact on retail landlords and vendors. With more vendors selling directly to consumers (including via Amazon), vacancies in leased premises are rising. The market is difficult for landlords: access to capital is down because interest rates are starting to rise, capex costs are generally fixed and at the same time rent books are underperforming. For advisors of retail landlords, proactive measures are important, including taking note of early warning signs (default, change of key team members).

The three key takeaways were (i) we are experiencing a seismic shift in retail, and it is only just beginning; (ii) bricks and mortar retailing is not dead, but will contract - $1.9bn of high yield debt falls due in 2019 and it will not all be able to be refinanced; and (iii) to survive, retailers need to invest in technology (albeit that access to capital may be difficult for some).

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Shipping insolvency – calmer seas ahead?

Review by Cosimo Borrelli
Borrelli Walsh
Hong Kong

Chair: Kah Wah Leong, Rajah & Tann Singapore LLP
Craig Cunningham, Bowmans
Professor In Hyeon Kim, Korea University School of Law
Richard Singleton, Blank Rome LLP

The Hanjin bankruptcy which commenced in South Korea in 2016 provided a good opportunity for the panel, chaired by Kah Wah Leong, to address the major differences in current approaches to distress in the world of shipping, including how best to manage tensions and differences between maritime and insolvency law and practice and a consideration of debtor and creditor friendly jurisdictions.

Richard Singleton began by navigating the audience through some of the key aspects of a typical shipping restructuring - the size of the challenge (90% of the world's trade takes place through shipping, and the Hanjin bankruptcy resulted in USD14 billion of goods, some perishable, being temporarily marooned on the high seas) and the basic concept that a ship, technically, is a legal being, which, as such, can be "arrested" under a maritime lien.

Richard moved on to looking at the current friction between Maritime Liens and Stays from a US perspective. With Hanjin, the US Bankruptcy Court quickly gave the South Korean foreign proceedings Chapter 15 recognition which, amongst other things, granted its vessels protection from arrest in the US.

The discussion then turned to the sale of a debtors' vessels in a bankruptcy with a keen focus on establishing how to ensure a vessel is genuinely free and clear of liens. The answer is – very very carefully and with the assistance of someone who knows what they are doing.

Craig Cunningham gave a fulsome explanation of the reasons behind South Africa fast becoming a strategic shipping insolvency jurisdiction including advanced creditor friendly arrest laws and a strategic physical location on the world trade route.

Craig explained that South Africa's maritime laws allow creditors to look through the corporate veil, without the fraud-based assessment typically required in an insolvency environment or pursuant to more advanced insolvency laws around the world. This piercing of the corporate veil enables the arrest of associated or sister ships, even on a de facto basis or where the original ship of the debtor is a chartered ship – a powerful tool for creditors to consider when considering where they may be able to take action.

Professor In Hyeon Kim then provided a whistlestop tour through maritime and the associated insolvency procedures and actions available in South Korea, covering the different types of arrest (prejudgement attachment versus maritime lien), the differences in obtaining recognition of foreign proceedings before and after a stay (a creditor with a lien can apply for an auction sale of the vessel rather than complying with UNCITRAL Article 20) and the benefits of selling a vessel through a Korean Court process and, in particular, the sale will be "clean", with all maritime liens removed.

Kah Wah Leong focussed on a very helpful assessment of the Singapore maritime and insolvency environment, explaining that Singapore's recent development of a relatively liberal insolvency regime with admiralty law consequentially expected to take a back seat.

He then considered the case in which the first meaningful interpretation of this new legislation was given by the Singapore Court (Zetta Jet). This was the first reported decision following Singapore's adoption of the UNCITRAL Model Law on Cross-Border Insolvency, in which the High Court of Singapore considered an application for recognition of insolvency proceedings commenced in the United States of America.

The High Court of Singapore declined to accord full recognition and only accorded the foreign representative limited recognition to the extent necessary to set aside or appeal an injunction granted earlier in the High Court of Singapore, or make related applications, and granted leave for parties to revisit the issue of wider recognition if the foreign representative succeeded in setting aside the injunction.

As Kah Wah Leong explained, the decision wasn't as conclusive as this legislation seems to imply at first a glance, giving some hope for maritime claims in the future. To quote Kah Wah Leong, "- if it was a football or soccer match in Singapore, the score would currently be Insolvency 1, Admiralty 0, with about 15 minutes left to play! It will pay for us keep a close eye on the conclusion of the second half."

By way of summary, the panel's key takeaways were unanimous across the panel - that the current differences in approach to shipping insolvency across the world create opportunities for both creditors and debtors to maximise their recoveries and that this maximisation is best exploited by considering your options early and creatively, followed by proactive decisive action. This will allow stakeholders to materially influence the outcome in a distressed environment.

Insolvency and maritime laws and practice are each large, wide ranging areas and institutions. Maritime law has obviously long been international and with the increasing globalisation of the insolvency world, especially with the adoption of the Model Law, we should expect these 2

business areas to continue to intersect and occasionally collide.

It is probably not for this author to suggest but asking these panellists to apply their wide ranging experience in the area to other jurisdictions around the world and analyse how maritime and insolvency law are interacting would be an interesting piece of work. With the help of some of the many accountants who enjoyed this presentation, it would also be interesting to see how the matters addressed are influencing the returns available to creditors in these jurisdictions.

The Empire strikes back – European jurisdiction on their way to modernize insolvency regimes

Review by Sabina Khan
Brown Rudnick
USA

Chair: Kolja von Bismarck, Sidley Austin LLP
Ruud Hermans, De Brauw Blackstone Westbroek NV
Oliver Kehren, Morgan Stanley
James H.M. Sprayregen, Kirkland & Ellis LLP;
INSOL Past President
Felicity Toube QC, South Square

The key objective of the session was to provide a general background and update on the ways in which the European insolvency regime is in the process of being modernized, with a view to creating a flexible set of pre-insolvency procedures which will hopefully give corporate entities a better chance of turnaround and avoiding insolvency, and allow European jurisdictions to become more adept at handling complex cross-border restructurings by levelling the playing field.

The proposed new EU Directive is essentially aiming to harmonise restructuring, insolvency and discharge procedures across all Member States, in particular it will introduce a *preventative* restructuring framework, with key features to potentially include, *inter alia*, as follows:

- Access to preventative tools which allow the restructuring of debts and businesses, thereby potentially avoiding insolvency, and such tools, to the extent possible, be available out-of-court either by debtors, or by creditors with the debtor's support.
- Debtor in possession options whereby debtors accessing preventative restructuring procedures can remain either totally or partially in control of their assets and the day-to-day operation of the business. Further appointment of insolvency / restructuring practitioner may not be mandatory in each case.
- Moratorium with respect to enforcement action to the extent necessary to support the restructuring plan and may potentially encompass all types of creditors (including secured and preferential). Scope and period of any automatic stays to be determined. This is aimed to improve chances of negotiations with creditors.
- Requirement to submit restructuring plan containing certain information (e.g. business valuation, identities and classes of affected parties and terms of the plan).
- Cross-class cram-down which allow judicial or administrative authorities, in certain circumstances, to sanction restructuring plans which have not been approved by each and every class of affected parties, and bind one or more dissenting classes.
- Safe harbor for restructuring related transactions and new or interim financing whereby such transactions can be protected (and therefore encouraged), in particular, such transactions will not be declared void, voidable or unenforceable as an act detrimental to the general body of creditors in subsequent insolvency procedures, unless such transactions have been carried out fraudulently or in bad faith. Grantor of new or interim financing may also have the right to receive payment with priority in the event of insolvency.

The proposed Directive contains a mixture of obligatory (e.g. preventive restructuring regime, DIP option, moratorium) and mandatory (e.g. scope and term of moratorium, debt/equity swaps, super seniority for rescue debt financing) measures. The Directive is anticipated to be adopted within 12 months, with implementation to follow within 2 years thereafter.

Various European insolvency regimes currently offer "soft-touch" features which allow distressed corporates to restructure, for example, English CVAs and schemes of arrangement, French *Sauvegarde* / *Mandat Ad'hoc,* and the Spanish, *Homologacion judicial* (the Spanish "scheme"). In the context of complex European cross-border restructurings, creditors tend to rely on schemes of arrangements or CVAs. Unlike the latter, EU-wide recognition and enforcement of the former (scheme of arrangement) which may be viewed as a more corporate tool than an insolvency tool, is disputed creating a level of legal uncertainty.

The proposed new Directive is generally expected to promote and support a "rescue" culture as opposed to wind-down, by giving debtors a more robust and flexible toolbox with which to facilitate turnaround, and narrow the gap between domestic insolvency laws of Member States and bring more legal certainty as to recovery. With companies increasingly having a cross border dimension, the new Directive is also intended to support trade and investment by allowing investors to better assess credit risk, promote financial integration and potentially lower the cost of obtaining credit. Overall, it is anticipated that these measures will improve the EU's competitiveness on a global platform.

The ABI commission to study the reform of Chapter 11 – four years later

Review by James Bromley
Cleary Gottlieb Steen & Hamilton LLP
USA

Chair: James Bromley, Cleary Gottlieb Steen & Hamilton LLP
Carlyn Taylor, FTI Consulting, Inc.
Albert Togut, Togut, Segal & Segal LLP

On April 30, 2018, the INSOL Americas Annual Regional Conference featured a panel on developments in the four years since the 2014 publication of the American Bankruptcy Institute's Report of the Commission to Study the Reform of Chapter 11.

The panel began with a quick review of the historical background. In particular, the panel focused on the progression of modern federal bankruptcy law in the United States, noting that the governing statute was revised substantially in 1898, 1938 and 1978, at forty year intervals. Given that the current bankruptcy code was adopted in 1978 and that substantial economic events had occurred, including the recession of the early 1990s, the dot-com bust of the early 2000s and the financial crisis of 2008-09, in 2012 the ABI determined that it was time to review Chapter 11 to determine whether there was a need for another legislative overhaul.

To accomplish its task, the Commission had to be organized. It was comprised of 22 commissioners, with 18 topical advisory committees and a total 130 members. After nearly two years of deliberations and drafting, the Commission's report was delivered near the end of 2014. The panel reported on the key overarching observations, including the strength and adaptability of the 1978 Code, its role in promoting the movement toward the adoption of rehabilitation regimes around the world, and the need for fine-tuning in certain areas.

On the last point, the panel discussed the key themes raised by the Commission as reducing barriers to entry, advocating for greater certainty in the Chapter 11 process, enhancing and improving the timing of exits from Chapter 11, and creating an alternative restructuring scheme for small and medium-sized enterprises (SMEs).

The panel then narrowed its presentation to three main elements of the Commission's report – (a) the concept of an "Estate Neutral," a proposal for the potential for the appointment of a new independent party in Chapter 11 cases; (b) the potential addition of a new Section 363(x) to the Bankruptcy Code to address concerns related to expedited sales of substantially all of a debtor's assets; and (c) the proposed framework for addressing SMEs.

On the Estate Neutral, the panel debated whether the Chapter 11 system needs (and if so, would benefit from), the addition of another official party. In particular, the panel dug into the fluctuating roles served by the debtor in possession, official committees (whether of unsecured creditors or equity holders), ad hoc committees, examiners and even occasionally trustees. Notwithstanding the heartfelt arguments on both sides of the issue, the audience, when polled, were decidedly in favor of the Estate Neutral.

The genesis of Section 363(x) came from the extraordinarily fast sale processes that characterized the Lehman Brothers, General Motors and Chrysler Chapter 11 proceedings. In each of those cases, substantially all of the assets of a major business in a very short period of time, within weeks of the commencement of the relevant cases. The proposed Section 363(x) would require a 60 day moratorium absent "extraordinary circumstances," a higher standard of proof for the business rationale and higher notice requirements. After vigorous debate, the audience voted substantially in favor of the proposed enhancements.

Finally, the panel addressed the fact that Chapter 11, while working well for larger enterprises, often leads to liquidation for small and medium-sized enterprises. While there is a current fast track option under Chapter 11 for businesses with assets worth less than $2 million, the Commission proposed increasing the standard to $10 million, which should capture in excess of 85% of SMEs. The Commission also proposes that for SMEs that there be no automatic appointment of an official creditors committee, no exclusivity period for the filing of a plan, a requirement that a plan be filed within 60 days and allow prepetition equity to receive new equity if impaired classes approve. Once again, the audience voted strongly in favor of the Commission's proposals.

Insolvency legislation marches forward

Review by Tim Kentish
Lipman Karas
Hong Kong

Chair: Stefan Smyth, PwC
Amarjit Singh Chandhiok
Timothy Stubbs, Dentons
Guy Wall, Grant Thornton

In this session the audience was provided with an overview of recent developments and reforms of insolvency law in three jurisdictions, India, Russia and the UAE.

Amarjit Singh Chandhiok discussed reforms in India introduced by the Insolvency and Bankruptcy Code, which became effective in December 2016. The Code introduced for the first time a comprehensive national insolvency scheme focussed on restructuring and reviving companies rather than liquidation. For corporate insolvency, the Code provides for a process where (a) creditors or the company itself can file for insolvency with

the National Company Law Tribunal; (b) the tribunal appoints an insolvency professional to the company, who then has 180 days to draft a resolution plan for the company; (c) the resolution plan is then considered by the tribunal and creditors and either approved or rejected leading to liquidation.

Mr Chandhiok noted that since December 2016, around 3,000 cases had been filed, and of those accepted, around 74% ended in liquidation and 26% in a successful restructuring. Uncertain issues arising under the new legislation continue to be addressed, either by Court decisions or amendments to the legislation. An area of particular ongoing interest is how the Courts will deal with the balancing act between competing interests in assessing whether resolution plans are in the interests of all stakeholders.

The key take-away in relation to India was overwhelmingly positive, with new Code having been embraced and driving a change to a rescue and resolution culture.

Tim Stubbs provided insights into the development of bankruptcy law in Russia. At present, bankruptcy in Russia is generally regarded as a last resort that almost inevitably leads to liquidation, as the legal tools do not exist for the Court process to facilitate restructuring. A new restructuring bill was introduced to the Duma in 2017 that remains under consideration by the parliament. If passed, the restructuring bill would provide for judicially supervised restructuring for the first time.

Mr Stubbs also addressed recent reforms to Russian bankruptcy law that expanded the categories of individual who might be held vicariously liable for an insolvent company's debts to include shadow or *defacto* directors who exercise significant control over the company, in addition to directors, senior management and shareholders. The vicarious liability regime enables recovery of the company's debts from the controlling individual where their conduct has caused harm to the company in bad faith, causing loss to creditors.

The key takeaway in relation to Russia is that the infrastructure for dealing with insolvency is improving, but the introduction of reform to encourage corporate rescues is still required.

Finally, Guy Wall provided an update on recent developments in the UAE, where its new bankruptcy law became effective in December 2016. The new law repealed the former insolvency regime and applies broadly, but not universally, to companies in the UAE (i.e. it does not apply to DIFC and ADGM companies, which have their own bankruptcy codes). The reforms introduce a Court led process leading to restructuring or liquidation, in a country where restructuring has historically been resolved through consensual negotiation. A key limitation of the new regime however is that it does not apply to secured creditors.

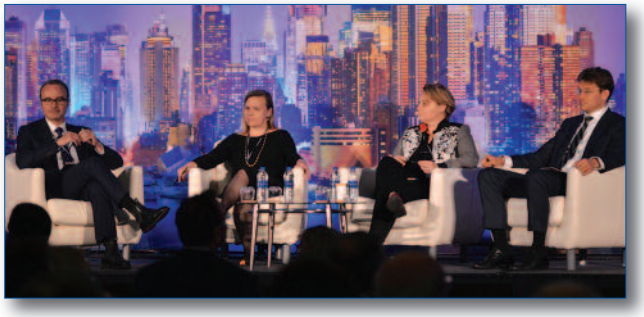
The reforms also introduced changes to UAE criminal law that remove some of the criminal risk to insolvency in the UAE, in particular (a) the removal of "bankruptcy by default", where a trader would face imprisonment if a bankruptcy was not commenced with 30 days of being unable to pay debts, which discouraged bankruptcy filing; and (b) abolition of criminal charges for bouncing cheques, which given the common use of post-dated cheques in commercial transactions in the UAE, created a significant incentive for debtors to skip town rather than deal with insolvency.

Mr Wall noted however that the new law has seen very little use to date, with only six cases filed. The broader acceptance and use of the new law will take time, as it represents a significant cultural change from a regime where insolvency carried criminal sanctions.

Overall though, the key take-away was that the reforms were an important step forward.

Fintech, blockchain, cryptocurrency, cloud: something new under the sun?

Review by Lee Pascoe
Fellow, INSOL International
Norton Rose Fulbright
Australia



Chair: Scott Farrell, King & Wood Mallesons
Angela Angelovska-Wilson, Digital Asset Holdings LLC
Leanne Kemp, Everledger
Nicolaes Tollenaar, *Fellow, INSOL International,* RESOR N.V.

With blockchain and bitcoin the topics of the moment it was unsurprising that the session attracted a considerable number of delegates.

From the outset the panel, comprising speakers equal in experience in law and technology, recognised that the delegates were keen to know what this would all mean for insolvency professionals. One of INSOL's fellows, Nico Tollenaar, took the lead in attempting to bridge the gap between the technological content and the impact that may be felt practically in the industries that delegates practised within.

The panel took their time to guide the audience through blockchain and smart contracts in a manner that was readily understandable and pertinent to the needs of those assembled.

For much of the audience the fundamentals of blockchain were not new but what was new was the impact that blockchain may have on industries in which insolvency professionals are engaged. Each speaker explored the general benefits of the blockchain for financial industries including the new levels of trust available as a consequence of being able to establish a true audit trail for transactions. For insolvency professionals, the potential of utilising such technology to identify and provide access to a single pool of assets, to achieve a co-ordinated approach, in a cross-border restructuring or liquidation of an enterprise is overwhelmingly clear.

However, the concept of tracing of assets on a blockchain, seemed entirely inconsistent with the audience's understanding of the perceived anonymity of blockchain transactions. Clearly, insolvency professionals require means to identify parties to transactions for asset identification, realisation and recovery. The panel assured delegates that, with some computational difficulty, there were possibilities around identifying participants in blockchain transactions. The upshot being that future appointments may see insolvency professionals relying heavily on IT specialists when attempting to identify, realise and/or recover assets on a blockchain.

Detailed consideration was also given to the lesser known but fundamentally important development of smart contract technology. Not wanting to exaggerate the current status of the technology, the panel outlined some of the limitations evident at this stage of its development including smart contracts not being recognised in traditional legal systems and the human restraints around smart contracts being only as 'smart' as the programmers writing them.

Notwithstanding the infancy of the technology, delegates were clearly interested in the impact that a smart contract could have on restructuring a company in financial distress if the smart contract was able to automatically initiate enforcement action, or a contractual stay, following satisfaction of predetermined conditions.

The time available to address such a broad new area only afforded a cursory glance at cryptocurrencies and their impact on the insolvency industry. The predominant discussion being around the new asset class that may become necessary to accommodate cryptocurrencies. In addition, delegates needed to be aware of the necessary future debate around the legal issues of cryptocurrency in insolvency including ownership of the new asset class, the rights of creditors and inclusion of such assets in an insolvent estate.

The panel wrapped up with some encouraging words to appease any apprehension that the audience may have been feeling about the rapid pace with which the new technologies were advancing. In simple terms, it seems we all need to get to know the basics and know that there are many powerful tools coming our way. Consider that the new technology is just a new language to be mastered that can be integrated into the current way that our clients, and ourselves, think and operate and understand that the development of blockchain is simply the reimagining of basic business transactions and a new era of creativity in financial markets.

Latin American turmoil – what to expect? How to prepare?

Chair: Marcelo Carpenter, Sergio Bermudes Law Office
Timothy B. DeSieno, Morgan, Lewis & Bockius LLP
Fernando Hernández, Marval O'Farrell & Mairal
Jorge Sepúlveda, Bufete Garcia Jimeno S.C.

The past few years have seen political and economic turbulence for much of Latin America. In the face of this complex regional reality, what are the prospects for investment in Latin America? How can investors and advisors effectively prepare for potential turbulence and adverse events?

Speakers from Mexico, Brazil, Argentina and the US (with experience in Venezuela) shared their experience dealing with real international insolvency cases and highlighted some of the problems practitioners face in those jurisdictions, such as: corporate debt restructurings – how are they proceeding? What are the successes and failures; cross-border cases – what are the issues and the solutions; how have international creditors been treated in high-profile cases such as Oi, Odebrecht Oil and Gás, OAS, Sociedad Comercial del Plata S.A., Telecom Argentina S.A., Cablevisión S.A., and Oceanografía, S.A. de C.V. among others.

The panel also discussed the latest developments in the restructuring legislation and major recent cases in Venezuela, Brazil, Mexico and Argentina, as well as the impact of the Government involvement in restructuring deal-making.

INSOL New York – Technical Sessions, Tuesday 1st May 2018

The darker side of IP – hacking, data breaches and your next restructuring engagement

Review by Hans Klopper
BDO
South Africa

Farrington Yates and Samir Jain

Address by: Samir C. Jain, Jones Day

In his captivating address, Mr Samir C. Jain demonstrated that data, intellectual property and digital assets are critical and that cyber theft and damage to systems may cause financial distress.

Mr Jain educated us on understanding cyber risks and how to respond to cyber incidents such as theft of client details, personal information, ransomware and programs that may take over systems and could block a business in return for a ransom to regain access. Hacking and economic espionage cost the USA some $400 billion in 2015.

Devices are increasingly connected to the internet and may become "weaponised" for use in attacks. Attacks will become pernicious and the cyber threat will get worse before it gets better. Terrorists may conceivably engage in cyber-attacks such as taking over motor vehicles or opening a dam.

Attacks on data integrity in banks may not be theft, but by flipping digits on stock trades and balances which may lead to a loss of confidence in that institution.

Attackers view the return on investment for this to be high and as people see that attacks are successful and that the chance for punishment is low it may encourage others to get involved.

Networks know no geographic borders and we need to improve international coordination. International agreements about intellectual property are in place, mainly between America and China, and designed with the digital age in mind. Legislation allows for bilateral treaties that enable countries to go directly to a company for information such as the UK who may, possibly, go to Google or Facebook directly. Data localisation provides that if a company is going to have data about a country's citizens this country may want the data to be stored in it in contrast with the aim of the internet to have information move freely across borders!

Like for all risks, plans to mitigate cyber risks should be in place as data breaches and cyber-attacks may have multiple impacts on organisations. Mr Jain's referred to a case where a company had a vulnerability discovered in its systems. The information was shared with a hedge fund who made profit by making it public and legally shorting the company's stock. The vulnerable company was impacted upon on various levels with huge reputational issues and operational impact.

In assessing cyber risks, the first step is appreciating the risks being a function of three areas namely threats, vulnerability and impact. The threats are the harm to be caused and criminals out there targeting us. The vulnerabilities are potential attacks on systems like old software and email systems. The impact is that as even healthy organisations cannot protect everything equally they must recognise the "crown jewels" that would really matter if stolen. For distressed companies risk assessment and understanding on what the impact would be is crucial. Cyber risks are no longer a technical but a business and governance issue.

Companies rely on vendors with access to customer data and systems. Vendors' vulnerabilities will become yours and, with their access to your systems or data, control of this is critical to mitigate a cyber risk. Obtaining insurance cover for cyber risks is prevalent these days.

Cyber incident response plans are necessary and some of the priorities and goals are to kick out intruders, restore operations, investigate and establish the scope of the incident. It is important to communicate properly internally and externally with customers, the public and law enforcement agencies. In multi-jurisdictional breaches involving multiple countries, there are laws to be juggled across countries. It is then really a crisis management situation and a significant cyber breach will cause regulatory investigations and litigation. Companies need to reduce the potential for litigation and employees must guide against breaches. A company facing financial distress may have risks that may be more pressing than cyber risks though. In some cases, cyber breaches may be the cause of financial distress and where IP data systems are critical to the business, the trustees need to secure those assets.

The key take-aways from Mr Jain's address are to understand the ground rules, what it is that you need to protect, understand the competing, legal and regulatory requirements and the importance of proactive communication.

To conclude, cyber risks should be on the radar of any insolvency practitioner and Mr Jain confirmed that customer information is vital and that data is the "new oil" or "new gold" in the economy to be "locked down" for its subsequent sale.

Chapter 15 and transnational cases with US implications

Review by Farid Assaf
Fellow, INSOL International
Barrister at Law, Banco Chambers
Australia

Chair: Richard Pedone, *Fellow, INSOL International*, Nixon Peabody LLP
The Hon. Robert D. Drain, US Bankruptcy Court for the Southern District of New York
Caroline Moran, Maples and Calder
The Hon. Frank J.C. Newbould QC, Thornton Grout Finnigan LLP

On Tuesday 1 May 2018 I attended a panel discussion entitled 'Chapter 15: Transnational Cases with US Implications' at INSOL New York. The speakers were the Honorable Robert D Drain, judge of the United States Bankruptcy Court for the Southern District of New York; the Honourable Frank J C Newbould, QC, former judge of the Ontario Superior Court of Justice; and Maples and Calder partner Caroline Moran. The panel was chaired by INSOL Fellow Richard Pedone of Nixon Peabody.

Judge Drain has been a judge of the US Bankruptcy Court since 2002. In that capacity, his Honor has sat on notable Chapter 11 cases such as Loral, Delphi, Coudert Brothers, and Reader's Digest. He has also presided over ancillary or plenary cases such as Satellites Mexicanas, Parmalat S. p. A. and SphinX with the latter case involving a learned discussion of Chapter 15: (see *Re SPhinX, Ltd,* 351 BR 103). Mr Newbould was a judge of the Ontario Superior Court of Justice from 2006 to 2017. He was Team Leader of the Toronto Commercial List for the last four years of his time on the bench. Some of Mr Newbould's more notable decisions include that in *Re MtGox Co Ltd* (2014) 122 OR (3d) 465 dealing with cross-border insolvency aspects of the infamous MtGox bitcoin exchange and *Re Nortel Networks Corp* [2014] OJ No 5852. Caroline Moran is a Chambers Global ranked partner at Maples and Calder currently based in Cayman Islands.

One of the central topics of the panel's discussion was the public policy exception to Chapter 15 recognition applications found in Section 1506. The section allows courts to 'refuse to take an action governed by this chapter if the action would be manifestly contrary to the public policy of the United States'. The panel explained how cases involving the public policy exception are rare (both in the US and Canada) and raise difficult questions about the scope of precisely what is the 'public policy' of a state. All panelists agreed that courts in the US and Canada would very rarely utilise the public policy exception in a recognition application given the sacrosanct principle of comity which underscores the Model Law. Caroline Moran observed that while Cayman Islands has not adopted the Model Law and while there is no express public policy exception in Cayman Islands legislation the statutory language suggested a public policy 'exception' did exist.

Not only did the panel examine previous cases involving Chapter 15 but also looked forward to try and ascertain some judicial trends. Judge Drain made the point that there is a current trend towards certainty and predictability in Chapter 15 recognition applications referring in particular to Judge Martin Glenn's recent decision in Ocean Rig. Judge Drain also observed that there is now a significant body of Chapter 15 jurisprudence which provides a solid foundation for future Chapter 15 applications. Judge Newbould pointed out that as part of this trend towards certainty and predictability, judicial officers from around the world have recently been taking steps to enhance communication and co-operation amongst courts. For example, in October 2016, eleven insolvency judges from eight jurisdictions met in Singapore to establish the Judicial Insolvency Network (JIN) and recommended a number of guidelines for judicial communication and co-operation. Those guidelines have been adopted in Delaware, Singapore and Australia, amongst other jurisdictions.

In short, the panel discussion provided an unparalleled opportunity for practitioners to be given an insight into some of the practical aspects of a relatively rare aspect of recognition applications from highly experienced and knowledgeable panel members not only from the perspective of the United States but also Canada and Cayman Islands.

The Good, the Bad and the Brexit

Review by Barry Cahir
Fellow, INSOL International
BEAUCHAMPS
Ireland

Chair: Kenneth Baird, Freshfields Bruckhaus Deringer LLP
The Hon. Mr Justice Frank Clarke, Chief Justice of Ireland, Supreme Court of Ireland
Richard Fleming, Alvarez & Marsal Europe LLP
Stephen J Taylor, Isonomy Limited

In the context of the challenges for the UK, we were reminded that it was the UK's flexible approach to the European Insolvency Regulation which was at the root of it becoming a powerhouse of European restructurings. It was also suggested that the UK's dexterity with the European Insolvency Regulation provoked changes in EU national insolvency laws, to compete or catch up.

Among the other challenges Brexit presents for the UK is how to retain its position as the centre for European restructuring while other jurisdictions identify and pursue the opportunity presented. There was a discussion about the roles of the US and Singapore as key influencers in shaping the evolving global restructuring market. The panel had a careful look at what recognition of insolvency proceedings means in practice, going forward. This was looked at from the perspective of the Pre-Pack as an international tool, group insolvency proceedings and in-bound recognition.

It was no surprise that this session considered in some detail the impact of Brexit on Schemes of Arrangement. It was noted that schemes and scheme jurisdiction will not be greatly affected by Brexit but that schemes coupled with an Administration Pre Pack following a COMI Shift may be less attractive because of the uncertainty of end recognition. Solutions include the UK signing up to the Lugano Convention or Hague Convention on choice of court agreements but these approaches have their nuances.

In terms of challengers, Mr Justice Clarke outlined the menu of options available in Ireland, including schemes and examinership (which is close to Chapter 11). In response to a question about judicial predictability, he highlighted the benefits of an English-speaking Common Law jurisdiction which was likely to take into account UK precedents on identical statutory provisions. Malta was discussed as a possible "Singapore of Europe".

Stephen Taylor identified the opportunity for UK practitioners acting as group co-ordinators for European insolvency proceedings pursuant to the recast European Insolvency Regulations. It remains to be seen how this role will evolve given that there has not yet been any case involving a group co-ordinator under the Recast Insolvency regulation.

There was a lively discussion on the impact of the EU Commission's proposals for a directive on preventative restructuring frameworks. The key question posed was who among the remaining 27 EU jurisdictions will be brave enough to embrace the challenge and how far will they go. The alternative to the emergence of a European lead could be that Brexit will hand the initiative back to US Chapter 11.

The final segment of this session involved a case study to assess options before and after Brexit. This involved a discussion around the limitations of the relief available under the UK's implementation of the UNCITRAL Model Law and the impact of the ruling in Gibbs. In the post-Brexit analysis, the key discussion point was trying to decide which European jurisdiction was best to lead the process and the relevance of US Chapters 11 and 15 in that context.

Overall this was a sober and detailed analysis of Brexit and a sensible analysis of some alternatives. There was a consensus that there is a particular challenge at the moment given that it is not clear whether the European Insolvency Regulation, or any variation thereof, will continue to apply between the UK and EU. The political process is currently frustrating efforts to predict the future of the UK's role as a global restructuring hub.

Good forum shopping in a changing world: which jurisdiction should you choose?

Review by Bryan A. Tannenbaum
RSM
Canada

Chair: Jennifer Marshall, Allen & Overy LLP
The Hon. Martin Glenn, US Bankruptcy Court for the Southern District of New York
The Rt. Hon. Lord Justice David Richards, Court of Appeal of England and Wales
Sushil Nair, Drew & Napier LLC
Mr. Justice Eberhard Nietzer, Heilbronn Insolvency Court

With the world in a constant state of flux and the increased frequency of cross-border proceedings, this distinguished panel engaged in an interactive panel discussion based on the Poseidon Group (a bunker fuel vendor) case study, with business dealings/operations in the US, UK, Europe and Singapore. The case study considered, among other

things, a US parent having fully-funded bonds under US indenture and a borrowing base in the US, New York law guarantee of bonds, English law bank debt and the conversion of senior debt to equity.

The first part of the discussion centered on jurisdiction to commence an insolvency proceeding and whether or not, in this case, the UK courts could sanction proceedings for a US company and would it exercise discretion. The discussion referenced using an English scheme of arrangement versus US Chapter 11. It was noted that it was necessary to show the business connection to the UK and could the UK Courts be satisfied that it would be effective to achieving the contemplated result. As there was a connection to the UK due to the financing arrangements, it was determined that there was a sufficient connection. Given that it was a US Company, the UK courts would also require expert opinion on the facts of the case that would justify a shift of main interest from Delaware to the UK, including an explanation about the terms of the bonds to see if it was permissible for them to be moved or changed.

If the proceedings were brought in Germany, filing for territorial proceedings would require there to be assets in Germany. The effectiveness of such proceedings would depend on the extent of security interests and the position of local creditors It would not be as easy as having a scheme of arrangement (in this case where there was no connection to Germany). Interestingly it was noted, however, that if the centre of main interest was in Germany there could be criminal liability for directors if they failed to act in accordance with German law as to directors' duties.

If it was determined that the company carried on business in Singapore through its subsidiaries with significant assets located there, there would be no difficulties in filing proceedings. The Singapore Courts would, however, want to know that the bonds could be dealt with and that it was not a futile effort.

The discussion then centered on whether or not a US court would recognize UK proceedings for a US company which was determined not to be uncommon. Reference was made to the recent *Avanti Communications Group* case where Judge Glenn found that enforcement of the non-consensual third-party releases contained in a restructuring plan formulated under the laws of the UK was appropriate. This ruling signaled that comity and co-operation with foreign courts of law will be given due consideration by US bankruptcy courts considering the recognition and enforcement of restructuring schemes under Chapter 15 of the Bankruptcy Code.

In the context of the "worse case" assumption scenario regarding Brexit, it was noted that the German creditors with eyes on the assets located in Germany would not be affected by and there would be no recognition of the scheme under EU or German law as the purpose of the scheme is to satisfy creditors who are party to the arrangement and therefore creditors could attach in Germany. It was noted that in Germany, there was conflicting case law under the Judgment Enforcement Act. In Singapore, if it was determined that there was a level of connection between the Company and the UK, then it would be recognized in Singapore. If not, then it would be a question of evidence to be presented to the Singapore Courts.

Attendees were shown two videos (now on the INSOL website) from Judge Gropper (US) and Justice Ramesh (Singapore) with their respective views on what does good forum shopping really mean. Readers are encouraged to view these videos.

Artificial intelligence, social media and the "uberisation" of professional services… Global megatrends, disruptors or enablers?

Review by Alan Bloom
EY
UK

Chair: Alan Bloom, EY
Brian Empey, Goodmans LLP
David Kidd, Linklaters LLP
Simon Michaels, BDO LLP
Rachel Strickland, Willkie Farr & Gallagher LLP
Colette Wilkins, Walkers
Virtual panelist: Sophie Hackford, Futurist

This was a slightly unusual panel for INSOL in two senses. Firstly in the sense that it dealt with topics that are of fundamental importance to the way in which our business and personal lives will be impacted over the coming years, and secondly that one of our panellists, Sophie Hackford, a futurist who has spent time at Oxford, at NASA and spends considerable time working with the tech gurus in Silicon Valley, led the discussion through a series of video clips in which she introduced the various topics: Artificial Intelligence, Social Media and the Uberisation of professional services. After each of the videos had been played the panel was asked to consider the impact of these three global megatrends on both the practices that we lead and the cases for which we have responsibility. At each point the audience was given an opportunity to contribute to the discussion.

Of course the nature of the topics is such that there was no black-and-white answer as to either what the future holds under each of the topics or therefore how we might respond as professionals. However the panel was very clear that the professions need to understand the issues, prepare for the impact and in every way possible seek to use the new technologies to enable us to provide an ever better service to our clients and to as great an extent as possible stay with the curve if not ahead of it.

The first video dealt with Artificial Intelligence. Sophie Hackford was clear that we are in the very early stages of what Artificial Intelligence may be able to do for us. She said that it is not just about the efficient mechanising of routine tasks, although this is a huge benefit and one that we will need to think about hard in pricing our commodity type services . She asked us to anticipate a world in which a virtual member of the board, a robot, would contribute to the discussion as to, for example, the correct course of action for a distressed corporate, providing for the human board, the best possible analysis of the consequences of any decisions that they may take. The panel discussed the potential consequences of having such a virtual member of the board. On the one hand, if the board allowed the virtual board member to override their decision, they could be held liable; on the other hand, if they made a decision which flew in the face of the empirical evidence presented by the virtual board member, could they be made liable for not considering its views. The panel went on to consider the implications for our trainees and future generations, of robots undertaking the humdrum compliance work that the millennials are in any event reluctant to do, and how we are going to train future generations of professionals to be good advisors in a world in which they do not, as previous generations did, work their way up by dealing with the humdrum.

The second video dealt with Social Media, not as it is today, dominated by devices such as phones and tablets but in a future world where social media interaction is undertaken within the context of a virtual reality. In this world, Sophie Hackford suggested that we will not be slaves to our devices but social media will be an enabler to an ever more effective form of interacting with others. She envisaged a world in which meetings will take place virtually and interaction, even across a significant number of borders, would be as if you were actually in the room with the other individuals. She gave the example of trainee consultant surgeons who are trained through this virtual reality process and who can, on a remote basis, have the full experience of operating without the risk. The panel discussed some of the implications of this for the way in which we conduct business in the future. In terms of enabling the panel could see many beneficial applications that would assist in the smooth running of our practices, our cases and the way in which for example courts might interact with one another. On the other hand the panel could see the risks associated with providing advice in this seemingly very informal and unregulated environment. The panel took a trip down memory lane recalling the introduction of faxes and emails and having similar challenges, all of which were met by the professions and became part of everyday business life. The panel recognised that we have to embrace these new technologies as our clients and indeed our younger team members will insist upon it. This is not a question of whether we embrace these technological advances, only a question of how and when and the critical importance of putting in place procedures to ensure that the technologies are not abused or misused.

The third and final video clip dealt with the Uberisation of professional services. Sophie Hackford talked about the way in which, in the current world and increasingly in the

future world, parties will express a view on the goods and services that they receive and the people that they interact with irrespective of whether those parties expect to receive that feedback or commentary. Of course in the post Uber world, Sophie points out that each party provides feedback on the other. To translate this to our own situation, not only would our clients provide (potentially publicly) feedback on their professionals but professionals may be expected to express a view on clients, not something that we have historically been used to. The panel pointed out that we have been subjected to review by various directories such as Chambers for many years now and we are certainly used to public comparisons being drawn between different professional firms and their individual practitioners. Although it has become something of a chore to deal with these various different organisations and publications the professions have found a way of managing this. However up to now this has been done on a very generic basis and in the future it could be much more specific. We have very little experience however of making comments and providing feedback on clients, even less so in a public forum. However in a world in which the younger generations think nothing of letting their views be known on almost any subject how easy will it be to constrain people from expressing a view? The panel understood that it would be better to seek to coordinate and control this form of feedback then allow it to develop in an informal, ad hoc and therefore potentially damaging way.

The panel, all senior figures within their own organisations and with many years of experience, have by definition grown up in an environment where Artificial Intelligence, Social Media and the Uberisation of services have not been factors. All recognised and discussed the importance of grasping these new technologies and trying as best as possible to use them as effective and efficient enablers rather than focusing on the possible threats. All recognised the importance of drawing on the knowledge and experience of our younger colleagues to establish how best to adapt to these new technologies. And all appreciated that if we do not, we will lose the confidence of our teams and fail to meet the expectations of our clients.

The panel was however very confident that despite these new technologies and perhaps because of them, the need for clear and articulate professional advice in the ever more complex restructuring and insolvency situations in which we find ourselves, will be ever more critical. Whilst clients may be reluctant to pay for what they see and will increasingly be non-value added services, the importance of being a trusted advisor in a complex restructuring or insolvency will mean that we need to embrace these technologies to maximise our effectiveness and to improve the quality of our advice.

The economic future under the Trump administration: winners and losers in the US and abroad

Review by Carlyn Taylor
FTI Consulting
USA

Chair: Howard Seife, Norton Rose Fulbright US LLP
Ambassador (ret.) Norman Eisen,
The Brookings Institution
Jake Williams, Madison Pacific Group

This session was one of the most colourful sessions I have seen at an INSOL conference. The topic was meant to be provocative, and it certainly delivered! Norman Eisen worked for the Obama White House as Special Counsel and Special Assistant to the President for Ethics and Government Reform and later served as the US Ambassador to the Czech Republic. Despite his obvious strong ties to Democrats and his scathing criticisms of most of President Trump's actions while in office, Mr. Eisen also gave credit to the Trump administration for some of its accomplishments or looming foreign policy possibilities. Although Mr. Eisen apparently found it shocking that such positive attributes exist, given his obvious serious disagreements with President Trump. Jake Williams of Madison Pacific Group, who has spent decades in Asia and is a former insurance executive, was more circumspect on many of the issues, staking out less controversial opinions while offering a nuanced view of how Asia may view President Trump's actions in that region of the world.

Following on from our highly successful INSOL New York Conference, we are pleased to report that our 2019 conference will be held in Singapore.

With recent changes to Singapore's law in 2017 introducing significant new legislative tools and the UNCITRAL Model Law on Cross-Border Insolvency (Model Law) this is certainly an exciting time for this city state and an appropriate time for INSOL to holds its Asia conference there.

Considered to be the annual event for practitioners from every continent, INSOL's Annual Regional Conferences provide an excellent opportunity for delegates to meet, network and learn about developments in various jurisdictions. As the global voice of the profession, INSOL is uniquely positioned to bring together delegates and speakers to share knowledge and experiences via a relevant and comprehensive technical programme and excellent networking opportunities.

Our Main Organising Committee are working on plans for the conference and we'd like to take this opportunity to express our thanks to them.

Main Organising Committee:

Justice Kannan Ramesh	Supreme Court of Singapore	Conference Co-Chair
Cosimo Borrelli	Borrelli Walsh	Conference Co-Chair
Maria O'Brien, *Fellow, INSOL International*	Baker McKenzie	Educational Co-Chair
Sushil Nair	Drew & Napier	Educational Co-Chair
Angela EE	EY	Treasurer
Jason Karas	Lipman Karas	Marketing Chair
Geoff Simms	AJ Capital Advisory	Sponsorship Chair

The main conference begins with a welcome reception on the evening of Tuesday 2nd April followed by two days of educational sessions on Wednesday 3rd and Thursday 4th April.

The educational programme itself will include breakout sessions covering a wide array of relevant topics that are sure to be of interest to our members. It will also provide a great opportunity to meet new members of INSOL in the region and learn about the latest cross-border developments.

In addition to the main conference we will also be holding a special ancillary meeting devoted to Offshore issues on Tuesday 2nd April, and the Academics' Colloquium will take place on Monday 1st and Tuesday 2nd April.

We look forward to welcoming you to Singapore next year.

If you are interested in learning about sponsorship opportunities or would like further information please contact Jason Baxter, Chief Operating Officer, INSOL International on **Jason@insol.ision.co.uk**

Rather than being a true discussion of winners and losers under President Trump, the session painted across the entire landscape of issues that has arisen both in the US and abroad under the Trump administration, providing highly entertaining banter on almost every major current event in which Trump has played a starring role.

The discussion began with tax reform, where Mr. Eisen stated that there were clearly things to really like about the new tax reform act passed in the US. In particular, it has been well recognized for years that the US needed to lower is exorbitantly high corporate tax rate in order to remain competitive in a world where global companies locate their headquarters and operations based partially on tax policies. That said, the panel was worried that the overall cost of the tax reform was not properly covered by other changes, providing a long term risk of materially increasing US government deficits. Mr. Eisen subscribes to the Keynesian view that this will have short term positive impacts on the US economy, while presenting grave long term risks for the country's debt burden.

Apparently feeling the need also to point out an area in which President Trump's actions can be viewed as positive, Mr. Williams moved to a discussion of Asia, saying that it was time for a strong approach by the US in Asia because prior Presidents' "soft touch approaches" have been largely ignored. Mr. Williams pointed to the trade escalations with China, including insisting on better protections for intellectual property and turning up the heat on North Korea as two areas where Trump's actions are respected by Asian corporate leaders. "Most people in Asia are used to erratic decisions from government," said Mr. Williams. Most Asian company managers are flexible. The only thing that they see as inevitable is change, and people operating in emerging markets like Asia are used to dealing with uncertainty. The implication was that the Asian markets are less shocked by President Trump's behaviour and consider it to represent a standard negotiating technique that they are used to seeing.

President Trump's focus on bringing down the absolute dollar value of the trade deficit was thought to be ill informed by the panel. They speculated that ZTE restrictions also may have the unintended consequence of convincing China that it cannot reliably use US suppliers as part of its supply chain, such as for semiconductors, and may push China to develop more of its own supply chain onshore. This outcome would be exactly the opposite of what the Trump administration is trying to achieve.

In other Trump administration affairs abroad, both Mr. Eisen and Mr. Williams felt that we are going to see a more coordinated foreign policy. Mr. Eisen bluntly opined that "[President] Trump has seen the disastrous results of the travel ban." Mr. Eisen believes that President Trump really likes US Secretary of Defence James Mattis and listens to him. National Security Advisor John Bolton is more aggressive, but he's never been in battle like Mattis. And, US Secretary of State Mike Pompeo is somewhere in between the two. "That's the team that [President] Trump wants," said Mr. Eisen. There was panel agreement that the ongoing dialogue with North Korea is "pretty remarkable." Mr. Eisen was of the view that while he found positive things to say about the Trump administration, bringing North Korea to the table is one of them. Every administration has tried. We have a long way to go but I'm cautiously pessimistic.... Kim Jong-un may be crazy enough that he actually understands Trump's desire to bomb him. You have these two maniacs and maybe they understand each other."

Shifting gears to Iran and the debate around its nuclear containment deal, Mr. Eisen displayed his obvious bias in favour of the deal that his former boss, President Obama negotiated. Mr. Eisen claimed that the US pulling out of the deal would "put Iran on a 6-month path to a bomb," which seemed more than a bit extreme to this writer.

Turning to US politics and the midterm elections, the panel felt there was about a 50% chance of the Democrats retaking the US House of Representatives. They need 23 seats to change parties, and the sentiment was that losing the House may not impair the Trump administration as much as they previously thought. Mr. Eisen noted that, "[President] Trump will just make deals with the Democrats and throw his Republicans under the bus. He's a dealmaker." A consequence of a Democratic House will be more investigative turmoil. "You will see a tsunami of investigations if the Democrats take the House, " said Mr. Eisen. "But by over-reaching to impeach Clinton, they made him a hero. No President has ever been impeached and convicted. Only one lower executive branch official has ever actually been impeached; there will be a tsunami of investigations, but no impeachment!"

In a brief interlude focused more on business, the panel discussed the pending Department of Justice ("DOJ") trial against AT&T regarding permission to complete AT&T's vertical merger with Time Warner. They pointed out, however, that while DOJ career employees have always disliked vertical mergers, there's no precedent for stopping them, so it's a question of fairness. The panel predicted some sort of "baby splitting" deal to allow the merger to go through.

The session ended with a lively episode about the Russian investigation by special prosecutor Robert Mueller.

INSOL New York – Ancillary Program, Sunday 29th April 2018

INSOL Offshore Meeting

Review by Christian Luthi
Conyers Dill & Pearman Limited
Bermuda

The program, chaired by Robin Mayor, Conyers Dill & Pearman, was very well attended, was designed to flow from the boardroom, to the restructuring advisors, the lawyers and finally to hear the views of the judges.

Keynote speaker James H.M. Sprayregen, Kirkland & Ellis, INSOL Past President, took us on swift canter through the historical development of the United States Bankruptcy Code offering his views on that legislation as a developing body of law. He touched on the subject of "forum shopping" and given the negative connotations of that term suggested it should be renamed – this became something of a touchstone throughout the day with some interesting suggestions for a new moniker! In conclusion, while offering what might be called a more US Chapter 11 "centric" approach, he acknowledged the necessity for the courts of the global financial centers to work together to facilitate the restructuring regardless of where the COMI is.

The View from the Boardroom panel chaired by Michael Pearson, FFP included a group of extremely experienced and well-respected restructuring professionals: Simon Appell, AlixPartners; Cosimo Borrelli, Borrelli Walsh; Erin Broderick, *Fellow, INSOL International*, Origami Capital Partners; and Igal Wizman, EY. The purpose of the session was to provide the audience with insight into the approach that might typically be taken in respect of a restructuring based on purely commercial considerations. It was interesting, although not surprising, to note that the experience of each of the panelists was similar. Erin Broderick's perspective offered some insight of the views of a private equity investor/ bond holder looking to effect an advantageous restructuring.

The program moved on to a lively panel **The Legal Overlay**, which considered the legal issues facing a business which is in financial difficulty. Participants included lawyers from Singapore (Danny Ong, Rajah & Tann), the Cayman Islands (Caroline Moran, Maples and Calder), the BVI (Ben Mays, Carey Olsen) and the Channel Islands (Jeremy Wessels) with Daniel Saval, *Fellow, INSOL International*, Kobre & Kim, US chairing. Not surprisingly the topical cross-border Ocean Rig case was the subject of some discussion and included reference to the COMI/forum shopping issues, a theme that ran throughout the day. The session also highlighted some of the key cases in these jurisdictions, including reference to the approach taken by the BVI courts regarding forum shopping.

Next came the Judges – **But Ultimately it is up to the Courts** - which was probably (with due respect to the other panels) the most anticipated panel. The session was chaired by Chief Justice Ian Kawaley, the Supreme Court of Bermuda and included Rt. Hon. Lord Justice David Richards of the Court of Appeal for England and Wales; Hon. Martin Glenn of the US Bankruptcy Court, Southern District of New York; and Justice Raj Parker, Grand Court Justice of the Cayman Islands. Each of the judges provided helpful insight and perspectives on cross-boarder judicial cooperation, forum shopping and COMI shifting. The session provoked some interesting questions from the floor. As one would expect, there was considerable judicial support for appropriately managed cross jurisdictional judicial cooperation. The panelists adopted a pragmatic approach to the question of forum shopping; recognizing that litigants are entitled to and will always push for that jurisdiction which most favours their interests. The panelists did not condemn out of hand COMI shifting provided of course that the necessary legal and factual tests are met. The panel offered a refreshing insight into judicial thinking and parried some quite tricky questions from the floor which proved to be a highlight of the day! The willingness of such a distinguished group to take the time to participate in the day's program highlights the importance of the work that INSOL as a leading force in the business of global restructuring.

Russell Crumpler, KPMG and his panel **Pulling it all Together** (Tara Cooper Burnside, *Fellow, INSOL International* Higgs & Johnson; Peter Ferrer, Harneys; Eleanor Fisher, Kalo; Rachelle Frisby, *Fellow, INSOL International*, Deloitte; Robert Foote, Walkers; Jonathan Leitch, DLA Piper; Mathew Newman, Ogier) brought the day to a close with a competitive 5 minute synopsis of interesting topics from each jurisdiction represented (Barbados, Bermuda, BVI, Cayman, Channel Islands and Hong Kong). The audience handed a well-deserved victory to Tara Cooper Burnside from the Bahamas who gave a very interesting presentation on insolvent trust issues. It was a very entertaining finish to the day!

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INSOL Fellows Forum

Review by Christiaan Zijderveld
Fellow, INSOL International
Houthoff Buruma
The Netherlands

The INSOL Fellowship Program has been running for 10 years. It has been very successful – INSOL International has quite a few Fellows by now and during the New York conference many of them came together to attend a number of Fellowship events. On the Saturday evening ahead of the opening of the main conference, a drinks reception was held at a rooftop bar in the Flatiron District. This event was well attended and it gave Fellows a great opportunity to catch up and to plan for the upcoming conference.

The next morning, the INSOL Fellow Forum Program was held. As has become customary, the program is organized and presented by Fellows, for Fellows. The forum was led by Allan Nackan (Farber Financial, Canada) and Lucas Kortmann (RESOR, The Netherlands) and they presented an excellent program.

Jane Dietrich (Cassels Brock & Blackwell, Canada), Ivo Meinert Willrodt (PLUTA, Germany) and Benjamin Jones (Bryan Cave Leighton Paisner, UK) kicked off with a session on retail insolvencies. The panelists early on concluded that retail insolvencies are quite domestic. Toys 'R Us was mentioned as an example. Although it was a large insolvency case, there were only some local insolvency filings but no relevant recognition issues. The cross-border cooperation that occurred, mostly dealt with local issues. The panelists touched on some of the issues that come up in each retail insolvency, regardless of what jurisdiction you are in. For instance: how to deal with the landlords. The approach differs per jurisdiction but the conclusion was that you should be a landlord in Germany.

The next panel was a home match for the panelists. David Molton (Brown Rudnick, USA), Tim Graulich, (Davis Polk & Wardwell, USA) and Lynn Harrison III, (Curtis, Mallet-Prevost, Colt & Mosle, USA) presented a panel on recent developments in Chapter 15 law and practice. Interesting guidance was given on what to expect (and not to expect) when coming to America from abroad. Amongst other topics, discussion was held on so called 'discovery Chapter 15s'; a Chapter 15 filed solely to benefit from the US discovery system, will likely be criticized by the US bankruptcy judge.

The program continued with an update on certain developing markets. Dhananjay Kumar (Cyril, Amarchand Mangaldas, India), Anthony Idigbe, (Punuka Attorneys, Nigeria) and Eric Jourdanet (IFC) spoke on the issues parties face when restructuring in these markets. Quite a few developing markets have new legislation, often inspired on Chapter 11. The challenge is that often this new legislation needs to operate in a judicial/legal environment that is not fully functioning. Notwithstanding, the panelists noted that in quite some jurisdictions matters are improving also in the sense that recovery rates are going up.

The final part of the program was a case study on Oi the Brazilian telecom operator in restructuring proceeding, presented by Lucas Kortmann, (RESOR, The Netherlands) Jasper Berkenbosch (Jones Day, The Netherlands) Vincent Vroom (Loyens & Loeff, UK) and Karin Sixma (Florent, The Netherlands). The reason these Dutchmen had the audacity to present a Brazilian restructuring case, was that a significant part of the debt was issued via the Netherlands. An interesting discussion was held on the litigation strategy. Especially the question whether the Brazilian and Dutch companies could have simply ignored the Chapter 15 filing before the US court, was debated extensively.

Inevitably, the program overran the time that was allotted. The event was enjoyable, with good presentations on relevant topics. Undoubtedly, the INSOL Fellow Forum Program will be run again next year in Singapore. Given the success of the INSOL Fellowship Program, most likely more Fellows will join us then.

INSOL International would like to thank the following sponsors for their support:
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Younger Members Reception

Review by Brendan O'Neill
Goodmans LLP
Canada

As Chair of the Younger Members Committee, I'm pleased to report that this year's annual conference in NYC was very well attended by many of INSOL's younger members from around the globe, including many of the growing number of INSOL Fellows. On the Monday night of the conference, younger members, Fellows and the members of the Younger Members Committee gathered at the Younger Members Committee cocktail reception sponsored by Goodmans LLP at the Grand Hyatt. The reception was a great networking opportunity for younger members and, in preparation for the reception, the Younger Members Committee had prepared a career interview of Alan Kornberg, Co-Head of the Corporate Restructuring Group at Paul, Weiss, Rifkind, Wharton & Garrison LPP, which is available in the Younger Members Committee section of the new INSOL website, together with a number of other resources (including our Top 10 Networking Tips for younger members) for INSOL's younger members.

Alan's interview is a "must see" for all younger members (and older members too!) that delivers great content and insight into a tremendous career in restructuring from an outstanding practitioner. We sincerely thank Alan for his valuable contribution to on our ongoing webinar series, which also includes interviews with Jamie Sprayregen, Corinne Ball, Judge Gropper, Judge Peck and others! Watch a few over your next coffee break!

Whether it is at one our cocktail receptions or through one of our programs, we strongly and sincerely encourage all younger members of INSOL to reach out and get in touch with the Younger members Committee – we want to hear from you, we are here to serve you and we have a number of tools, tips and programs for you, along with a few free drinks to enjoy and a few new INSOL friends to meet.

INSOL International would like to thank **Goodmans LLP** for sponsoring the reception.

ABI PANEL
Cross-Border Collisions: Mass Disaster and Mass Tort Claims

Review by Mark D. Bloom
Greenberg Traurig
USA

Moderator: Patrick Shea, Gowling WLG
Debra Dandenau, Baker McKenzie
Laura Davis Jones, Pachulski Stang Ziehl & Jone
Robert Keach, Bernstein Shur

The problems of dealing with mass tort liability in insolvency cases always have been complex. Tragic for the victims and financially ruinous for the responsible parties, these situations lead typically to unmanageable numbers of individual and class action lawsuits. Over the years, through the ingenuity of counsel and flexibility of courts any number of innovative approaches have been developed in bankruptcy and restructuring cases in the United States, ranging from channeling injunctions to future claims trusts established to extend decades beyond the reorganization or liquidation of the debtor.

The problems are particularly acute, and even greater ingenuity and collaboration required, when the situations are multi-national – involving companies and responsible parties in various jurisdictions with different legal systems, claims procedures and approaches to the award of compensatory damages. It was two such situations to which the panelists devoted this program, focusing on two recent and well-publicized mass tort cases whose success can be attributed once again to their own creativity and resourcefulness.

The Montreal-Maine situation arose from the fiery, middle-of-night derailment and explosion of 63 tank cars loaded with crude oil, killing 43 people and destroying the entire downtown area of Lac Megantic, a border town of 6000 people in Quebec, Canada. The incident also led directly to 3 suicides and 4000 claims for moral damages, collectively seeking recoveries of $1 billion.

The rail line was owned by a Nova Scotia-based subsidiary wholly owned by the Montreal, Maine and Atlantic Railway Limited, a US based company. Individual and class actions were filed by and on behalf of victims in both Canada and the US, along with a separate action by the Quebec government. With the goals of invoking a stay of these actions, selling the railway as a going concern, creating an orderly claims process and reaching a global claims settlement, Montreal, Maine and Atlantic filed a Chapter 11 petition in the United States, and its affiliate Montreal, Maine and Atlantic Canada filed both a proceeding under the Companies' Creditors Arrangement Act (CCCA) in Canada and a Chapter 15 case seeking recognition of that proceeding in the United States.

The Takata airbag situation arose not from a single incident, but from a series of automobile airbag explosions caused by defective inflators, leading to injuries and fatalities and a massive recall of cars equipped with the airbags. In January of 2017 Takata entered into a criminal plea agreement providing for a $25 million fine and $975 million restitution payment, consisting of $125 million for personal injury and wrongful death claims and $850 million in damages to automobile manufacturers arising from the recall. Searching for a buyer for the company in order to pay the fine and restitution and related claims aggregating $1.6 billion, and to invoke a stay of multiple individual and class action claims and actions by state attorneys general in the United States, the US arm of Takata filed a Chapter 11 petition in the United States, and its Japanese parent filed both a proceeding in Japan and a Chapter 15 case seeking recognition of that proceeding in the United States.

In both the *Montreal Maine* and *Takata* cases the principal objectives were similar – to sell the companies in order to fund global settlements of the massive liability claims to be administered in an orderly, consolidated claims process. Through a series of alternating and interactive presentations, the panel offered their insights into the similarities and differences of the operative factual settings and paths taken to achieve that paramount goal.

In each instance the US Chapter 11 process proved well-suited – to invoke the automatic stay of all litigation and sell the assets "free and clear" of liens, claims and encumbrances of creditors and tort claimants under section 363 of the Bankruptcy Code, so as to maximize their value and, accordingly, the return to the estate that could be used to fund claims settlements. As learned from the *General Motors* Chapter 11 experience, however, the purchaser of assets obtains that "free and clear" title and protection from creditor claims only where all holders of existing and future claims are afforded notice of the proposed sale. While the tort claims against *Montreal Maine* attached at the time of the derailment and explosion and were generally confined to the limited geographic area of Lac Megantic, in *Takata* the universe of potential claimants – and particularly those who may assert future claims based on the airbag defect — was literally worldwide; accordingly, some $80-90 million was spent on notices of the sale and related proceedings.

In each instance, the professionals established a claims process that was tailored to the circumstances of the case. In *Takata* all of the claims had to be filed in Japan, where unlike the US and Canada the concept of class claims is not recognized. In *Montreal Maine* the parties adopted a dual claims process, in which claims filed in the CCAA proceeding in Canada were deemed filed in the US Chapter 11 case as well. As the approach to damages is much different — Canadian law being much more restrictive – counsel developed and reached agreement on a points-based settlement matrix as a compromise of wrongful death awards in the two countries – an innovative

blend of US and Canadian law to allocate distributions based on the age of the victim, surviving spouse and children, and other relevant factors.

The cases also differed in their approach to protocols and court-to-court communications. Consistent with prior experience in a host of US-Canada cross-border cases the parties developed a series of protocols and the courts held joint hearings in the *Montreal Maine* cases. Given the absence of cross-border jurisdictional issues in *Takata* there was no real need for protocols, and the concept of joint hearings was rejected as not culturally acceptable in Japan.

As in so many mass tort and cross-border situations, the well-managed processes and successful outcomes in the *Montreal Maine* and *Takata* cases reflect both the flexibility of the Canadian and US insolvency systems and the ingenuity of the professionals tasked with finding the best – or least bad – solution to a tragic situation. The harm to the victims can never be undone, but the collaborative efforts of the panelists and other professionals involved in those complex cross-border cases are a shining example of their resourcefulness and creativity in maximizing the opportunities available to create value for distribution to those claimants.

Member Associations' Round Table

Review by Jason Baxter, COO
INSOL International
UK

Local Member Associations and their members are fundamental to the work of INSOL International and as such we wish to support and help them wherever possible. This manifests itself in our outreach programs whereby we facilitate training or hold a seminar in a region or country that is home to a new member association in its infancy. It may also see a member of the INSOL Executive or Board member attend and speak at a conference being held by one of our Member Associations.

INSOL New York provided an opportunity to arrange meetings between the INSOL Executive committee and various members of the secretariat and/or representatives of our Member Associations. It provided an opportunity to both discuss the issues being faced by the organisation in question as well the giving INSOL International the chance to give an update on its own initiatives whilst exploring ways in which both organisations can improve the ways in which they interact.

INSOL New York also saw us hold a follow up to our very successful Member Association Roundtable that was held last year at the Quadrennial in Sydney. That session saw representation from a number of associations from around the globe and tackled subjects such as training, declining membership and alternative revenue streams.

For this year's roundtable an organising committee comprising CEOs/COOs from our Member Associations devised an agenda that was set to examine technology, strategy and governance. The session itself saw just under twenty people attend and contribute to the discussion.

Whilst those Member Associations represented may be at different stages in their life cycle with some relatively young and others having been in existence for decades the roundtable itself encourages candid conversation whereby all those in attendance can learn from one another.

The first item to be tackled was technology with a productive discussion on CRM systems, with all those attending discussing the pros and cons of the systems they use. The discussion seamlessly moved from this topic to that of websites and their content. The group discussed web presence, website use (by members), popular facilities and news content and where its sourced from. The discussion here was lively with the subject matter being tackled comprehensively. This session finished with a discussion on communications that examined how this mainly takes place, effectiveness of chosen methodology, data protection requirements and the merits of dedicated emails. All those round the table had opinions and stories to tell about their experience with different forms of communication and its fair to say that this proved a great learning experience for everyone.

With it being very common for professional bodies/ member associations to undergo strategic reviews it was appropriate that this should form part of the program. The session itself considered the questions an organisation should ask prior to embarking on a strategic review; that questions that should be embedded in the review itself; and the questions that should be posed post event. It was interesting that around the table there were organisations represented that had undergone a review or part way through a review; currently in the implementation stages or had not yet considered one. With such a diverse group of experiences the discussion itself was interesting, relevant and useful to all those who attended.

The final session looked at corporate governance and explored the background to the CPA Australia sag, its impact (locally) on corporate governance in professional bodies/member association and the lessons that can be learned from this.

With such diverse yet relevant issues for discussion the roundtable worked very well and proved and excellent platform for discussion, sharing experiences and learning from one's peer group as well as building relationships that will last beyond the session itself. The success of this event relied upon the contribution of those attending and thanks to all for their insights, experiences and warnings that they were happy to share. With this in mind we look forward to 2019, meeting once more with hopefully some new additions round the table and yet more relevant and topic material to digest and discuss.

The Indian Insolvency Code – progress and prospects

Review by Sajeve Deora
Integrated Capital Services Limited
India

Chair: Abizer Diwanji, EY
Dhananjay Kumar, Fellow, INSOL International, Cyril Armarchand Mangaldas
Nikhil Narayanan, Khaitan & Co
Anuj Jain, BSRR & Co

Insolvency and Bankruptcy Code, 2016 (IBC) ushered a change in December 2016 in the decades long regime of winding up and bankruptcy. This has paved the way for a New Way of Doing Business in the country; 'The Undisputed Liabilities Must be Paid, Else Face Insolvency'.

The growth in Non-Performing Loans of Banks, estimated at $150 billion, led several State Owned Banks to be placed under Prompt Corrective Action to enable the Reserve Bank of India to take certain structured actions to prevent such banks operating under weak conditions. Aziber Diwanji pointed out that the borrowers suffered in the last few years due to high interest rates, losses from volatility in commodity markets and impairment of overseas investments, and costs associated with changes to meet various structural reforms in the Indian economy.

The structure of IBC is based on 4 pillars, Regulator (Insolvency and Bankruptcy Board of India), Judiciary (National Company Law Tribunal, Appellate Authority: National Company Law Appellate Tribunal, Further Appellate Authority: Supreme Court), Insolvency Professionals (individuals acting as Self or organized as Entities, both regulated by Insolvency Professional Agencies), Information Utility (registry to record defaults).

The threshold for initiating insolvency proceedings is Rs. 100,000 ($1400) and a single financial or operational creditor can initiate it. The demand raised by the creditor must remain unpaid and there must be no existing dispute. The proposed IP acts as an Interim IP and can be confirmed or changed by the Committee of Creditors. The creditors direct the course of insolvency proceedings and the proceedings must be closed within a maximum of 270 days, failing which liquidation ensues. Nikhil stated that the reorganization is structured around maintaining the debtor as a going concern and the resolution will take place as a share deal and not as an asset deal. He also mentioned that the Committee is closely involved in the resolution process. The highest bidder is the person with whom the Committee will negotiate in order to achieve a successful outcome, and owners of debtors can be the Resolution Applicants in prescribed circumstances, which are rather limited.

Within a short period IBC has had to undergo changes in order to make it fit for purpose and consistent with the country's business and social conditions and the Government and the Legislature have made amendments in order to provide effective mechanisms for its implementation. The changes to IBC have included the following: the Reserve Bank as supervisor of the banking system is mandated to take decisions to direct banks to file applications for insolvency; the owners of the business are disqualified from bidding for the assets in most situations; the home buyers constitute financial creditors in the case of real estate developers; the reduction of the voting majority in the Committee from 75% to 66% and restricting to 51% when voting on routine matters, and insolvency proceedings to be set-aside if at least 90% of financial creditors give their consent.

These concessions have been extended into other legislation to facilitate resolution under the IBC. For instance, there is exemption from tax on book profits resulting from a write back of liabilities; the continuation of carry forward losses under direct tax regardless of a change of majority ownership; an exemption from having to make a public offer under securities law on change of management of a debtor whose securities are listed for trading on stock exchanges; and exemption from the need to pass resolutions under the Companies law. Anuj Jain emphasized that in his view a process based approach adopted by creditors / lenders is not being replaced by a solution based approach.

The judiciary has placed implementation of IBC on a fast track and the principles of natural justice and equality before law are being respected and upheld. Matters of insolvency can be resolved as per the framework provided under IBC and not taken to Civil Courts, and Courts have sparingly provided shelter to debtors. The default test or the cash flow test is being applied, and made applicable to all subsisting and prior defaults of corporate entities, who were not extended any transition period. For the present, there have been a large number of applications filed before the Tribunal, and in some cases multiple proceedings in the case of same debtor – priority is afforded to the application of the larger creditor, and amongst creditors to financial creditor. Dhananjay Kumar brought out the decisions of Courts rendered under IBC, and pointed out that the IP and the Committee perform public functions and their decisions are subject to scrutiny.

India is not a signatory to UNCITRAL Model Law on Cross -Border Insolvency, and IBC provides for bilateral agreements to deal with cross-border proceedings. The personal bankruptcy has not been notified, and guarantors of borrowings of corporate entities face separate proceedings before a separate Tribunal under the debt recovery law.

The panel deliberated the significant challenges to revival plans, which include: the absence of interim financing; the lack of acquisition funding; the non-existent market for distress/restructuring bonds; and the reluctance of existing lenders to provide new money. It was felt that as State Owned banks have 70% exposure to the debt market and are unable to accept hair-cuts beyond a certain point, the revival is restricted to persons loosening the purse quicker than others and who are willing to acquire the enterprise on a going concern basis. Further possible changes are expected in due course including the opening up of the market for dealing with distress assets and a deepening of the finance market. The non-banking finance companies

and private banks are filling the gap for now left by State owned banks.

The panel brought out the role of asset and people tracers, and transaction and forensic auditors, who are bringing to light past excesses, and actions in relation to, preferential treatment and payments, fraudulent preferences, undervalued and extortionate transactions, and transactions to defraud creditors, which are all starting to be unearthed. The aforesaid findings when taken to a logical conclusion will provide restitution for creditors – large part whereof will flow to the State Owned lenders.

IBC provides a framework to deal with instruments of debt and money market. It is expected that bonds, commercial paper and the like, which are witnessing incremental issuances, will see quicker and larger recovery for the stakeholders.

The current pace of events and changes to IBC are aligning it with the expectations of various sections of the society, and the gains from IBC are beginning to accrue. The recovery from marginal defaulters has since improved as the threat of dispossession of ownership and control of the debtor from the day of opening of insolvency proceedings has come for real for defaulters.

The long term benefits of IBC will accrue to the economy as debtors achieve workout with lenders ahead of a default.

Successful Small Practice meeting

Review by John S. Mairo
Fellow, INSOL International
Porzio, Bromberg & Newman, P.C.
USA

INSOL New York had an informative, well-attended Small Practice Issues Open Meeting, which was sponsored by Porzio, Bromberg & Newman, P.C., USA. The Small Practice Issues Committee Chair Eric Levenstein (Werksman Attorneys, South Africa) and past chair Hans Klopper (BDO, South Africa) provided opening remarks, each highlighting the growth of INSOL's Small Practice membership and programming. Mr. Levenstein briefly discussed some past Small Practice projects that were recently completed, such as the publication "Restructuring Options for Micro-Small-Medium Enterprises (MSME) and Proposals for Reform," and future projects for the Small Practice Group, including a periodic newsletter addressing topics of interest for members.

Mr. Levenstein then introduced the first panel discussion chaired by Robert Hänel (Anchor Rechtsanwälte, Germany) entitled **"Is It Worth It? – Cost Assessment for Debt Collection Abroad."** Joining Mr. Hänel on the panel were: Stephen Briscoe (FFP, BVI); Simeon Gilchrist (Edwin Coe LLP, UK); and John Mairo (*Fellow, INSOL International*, Porzio, Bromberg & Newman, P.C., USA). For each of their home jurisdictions, the panelists addressed the following issues: (i) what are the estimated costs for pursuing claims of different amounts, i.e., US $5,000, US $50,000 and US $500,000; (ii) which jurisdictions allow or provide for contingency fee arrangements and litigation financing; (iii) what sources of information are available regarding whether a debtor is without means or subject to an insolvency proceeding; and (iv) what main enforcement measures are available and what are the costs. In addition to a lively panel discussion, the audience was entertained with short video clips of practitioners from Hong Kong, Australia and Spain addressing a streamlined version of the panel's topics. While each jurisdiction had differences, there was some consensus that smaller claims (e.g. US $5,000) would probably not be worth the cost/effort, unless such a claim could be sold outright or pursued on a contingency basis, whereas larger claims (above US $50,000) are likely to be worth the cost/effort if some due diligence can be performed showing that the debtor has some assets to potentially satisfy the claim demand. A point raised during the panel discussion which impacts the cost/claim analysis is that the US general rule on attorney fees (American Rule) is that each side bears its own costs, whereas the English Rule, i.e., the party who loses in court pays the other party's legal costs, is the law in many jurisdictions.

The second panel addressed the topic: **"Personal Liability of Insolvency Practitioners – What Happens When the Music Stops?"** Mr. Levenstein chaired the second panel which included: Vicki Bell (*Fellow, INSOL International*, Gilbert & Tobin, Australia); Judge Daniel Carnio Costa (São Paulo Bankruptcy Court, Brazil); and Ivo-Meinert Willrodt (*Fellow, INSOL International*, PLUTA Rechtsanwalts GmBH, Germany). The panel utilized a case study of a fictitious company, Don't Blame Me (Pty) Ltd., to focus on the legal and statutory obligations of Insolvency Practitioners. Specifically, the panel highlighted many of the practical issues confronted by Insolvency Practitioners, including: (i) the level of pre-assessment that should be done by an Insolvency Practitioner before taking on an appointment; (ii) the level of skills required to effect a successful restructuring/rescue; (iii) potential conflicts of interest; (iv) appropriate fee charging; and (v) potential consequences for an Insolvency Practitioner that delays filing a restructuring plan. The session considered the manner in which these issues are dealt with in the jurisdictions represented by the speakers. Some of the takeaways from the spirited discussion was that Insolvency Practitioners should be sensitive to: (1) expectations of the key players; (2) setting realistic time frames; (3) properly assessing conflicts of interest, whether perceived or actual; (4) replacing existing management too quickly; (5) post-petition financing needs; and (6) considering an external view by a consultant.

In sum, the Small Practice Issues Open Meeting at INSOL New York was successful in providing entertaining formats for learning about topics of interest for practitioners. Additionally, the scheduled breaks during the meeting enabled those in attendance to network with fellow practitioners from around the world.

INSOL International would like to thank **Porzio, Bromberg & Newman, P.C.** for sponsoring the Small Practice meeting and dinner.

Global Insolvency Practice Course

International Association of Restructuring, Insolvency & Bankruptcy Professionals

Global Insolvency Practice Course – Module B and C

Report by Michael Veder

Course Leader
Radboud University Nijmegen/RESOR
The Netherlands

The current class of potential Fellows taking the INSOL Global Insolvency Practice course attended the second of three course segments of the Global Insolvency Practice Course in New York, USA, from April 25-28, 2018, immediately prior to INSOL New York.

Module B consisted of two intensive days of educational sessions taught by a faculty of leading practitioners, judges and academics. Increasingly, the Core Committee of the GIPC seeks to involve Fellows in the faculty and this year's Module B was no exception. The Core Committee is very grateful for the time, dedication and commitment of all lecturers to make the GIPC the success that it is. The course is revised regularly to reflect the evolution of the law and practice of insolvency and restructuring throughout the world.

Module B opened with a session that highlighted a tremendous success of the Sydney conference in 2017: 'Oil in a day's work', a movie that was developed by INSOL Fellows Sam Bewick, formally of KPMG and Craig Martin, DLA Piper. Scott Atkins, *Fellow, INSOL International*, Norton Rose Fulbright, Australia and Jane Dietrich, *Fellow, INSOL International*, Cassels Brock & Blackwell LLP, Canada used this movie as a stepping stone to discuss a number of difficult (strategic) questions and issues that may come up in large cross-border restructurings. Dr Paul Omar, Leicester De Montfort University, UK, continued with a highly interactive discussion of cross-border business rescue case studies. The Hon. Allan Gropper, Judge of the United States Bankruptcy Court for the Southern District of New York (Ret.), USA, lectured on the developments in cross-border recognition under Chapter 15 of the United States Bankruptcy Code (the US version of the UNCITRAL Model Law). The course seeks to provide a balance between theoretical principles and practical approaches. Given the recent expansion in the number of jurisdictions offering restructuring options, it becomes increasingly important to explore the strategies in selecting a restructuring jurisdiction. The selection of appropriate restructuring jurisdictions was explored in a practical session led by Vicki Bell, *Fellow, INSOL International*, Gilbert + Tobin, Australia, Jane Dietrich, *Fellow, INSOL International*, Cassels Brock & Blackwell LLP, Canada, and Nico Tollenaar, *Fellow, INSOL International*, RESOR NV, The Netherlands.

The second day of Module B started with a discussion on insolvency and restructuring options available in a number of selected jurisdictions. Professor Charles D. Booth, University of Hawai'i at Manoa, USA, analyzed the Chinese and Japanese approaches to insolvency. The laws of Brazil, Canada, India, and Singapore were discussed by a panel of experts: Patrick Ang, Rajan & Tann, Singapore, Judge Daniel Costa, Bankruptcy Court of Sao Paulo, Brazil, Gavin Finlayson, Bennett Jones LLP, Canada and Dhananjay Kumar, *Fellow, INSOL International*, Cyril Amarchand Mangaldas, India. The panel was chaired by David Burdette, Senior Technical Research Officer at INSOL International, UK. These comparative insolvency law sessions, combined with the discussions of the laws and practice in England, France, Germany, The Netherlands and the United States in Module A, provide the participants with a good overview of the rescue options available in a number of important jurisdictions around the globe. The session on Off-Shore jurisdiction practice, presented by Chief Justice Ian Kawaley, Supreme Court of Bermuda, and Ian Mann, *Fellow, INSOL International*, Harneys, Hong Kong, analyzed the restructuring options for Chinese enterprises with on-shore operating companies that obtain financing through off-shore holding company structures. The final session, a very practical simulation exercise led by Scott Atkins, *Fellow, INSOL International*, Norton Rose Fulbright, Australia, Timothy Graulich, *Fellow, INSOL International*, Davis, Polk & Wardwell LLP and Richard Pedone, *Fellow, INSOL International*, Nixon Peabody LLP, USA, explored the methods of implementing co-operation and co-ordination in practice.

Module B concluded with the oral examinations. The lecturers and examiners were impressed with the level of knowledge and understanding of the group.

The final segment of the course was the Module C practical exercise designed and run by Professor Janis Sarra, University of British Columbia, Canada. Module C took place June 4 to 8, 2018. Module C involves a workout simulation of a cross-border rescue problem, with the class members assigned a variety of roles. The session starts with the class members filing a variety of motions in different jurisdictions and two simulated live court hearings before sitting judges from England and the United States. We are honoured by and very grateful for the involvement of all the justices who made Module C a success: Lord Justice Sir David Richards. Court of Appeal, London, UK, Judge Robert Drain, United States Bankruptcy Court, Southern District of New York, New York, US, Regional Senior Justice Geoffrey Morawetz, Ontario Superior Court of Justice, Commercial List, Toronto, Canada, Mr. Justice Eberhard Nietzer, Heilbronn Insolvency Court, Germany, Mr. Justice Paul Heath, High Court of New Zealand, New Zealand (ret), Mr. Justice Daniel Carnio Costa, Court of São Paulo, Brazil and Mr. Justice David Tysoe, British Columbia Court of Appeal.

For more information about GIPC and to apply for the Class of 2018/2019 please contact Heather Callow at **heather@insol.ision.co.uk**.

Professor Ian Fletcher QC

The international insolvency community is mourning the passing of an intellectual giant and a respected colleague and friend, Emeritus Professor Ian Fletcher QC (hc). For members of the INSOL International Academics' Group, Ian Fletcher holds a special place in our affections as its founding Chair. Professor Fletcher convened the inaugural meeting of insolvency academics in conjunction with INSOL's 5th World Congress in New Orleans in 1997. From that small gathering in 1997 until Professor Fletcher handed on the reigns as Chair in San Francisco in 2015, the INSOL Academics' Group grew in number and diversity under Professor Fletcher's leadership.

An academic attending the first two meetings in New Orleans and Munich, recalled that for London 2001, "mainly thanks to Ian's involvement and efforts", the Academics met in the same venue as the main conference so practitioners could benefit from the academics and vice versa. Professor Fletcher's encouragement for INSOL's practising and academic members to interact was an ongoing feature of his leadership. Another was his collegiality and support for both early career and established scholars. With "his modest and friendly character disguising his knowledge" he was always prepared to discuss all kind of topics and provide insights.

As a scholar, Professor Fletcher engaged with practice. He was elected as a Bencher of Lincoln's Inn in 2003, and was an academic member of South Square Barristers' Chambers, Gray's Inn. He was appointed Queen's Counsel (Honoris Causa) in 2013. He co-authored a number of publications with Gabriel Moss QC who noted that his texts were "not only insightful but also very accurate and often cited by the courts." Upon his retirement, Professor Fletcher was acknowledged in a Festschrift of papers contributed by practising and academic colleagues from around the globe.[1]

At the time of his passing, Professor Fletcher was Emeritus Professor of International Commercial Law and a Research Associate of the Faculty of Law of the University College London. He began his academic career in 1967 teaching at the University of Aberystwyth where he also occupied leadership roles and progressed to become a Professor in Law in 1986. In 1991, Professor Fletcher was appointed to Queen Mary and Westfield College, London University, leading a number of research centres in Commercial Law and he subsequently joined University College London in 2009. He also served as a visiting professor at the University of Texas at Austin, and at Tulane University of Louisiana.

Educated at Cambridge, culminating in the honour of an award of a Doctor of Laws, Professor Fletcher is renowned globally for his seminal work on *Insolvency Law in Private International Law*. However this is but one of his many influential publications that range across domestic UK and international insolvency law. From the early 1990s, he was making an international impact notably through the edited monograph *Cross-border Insolvency: Comparative Dimension: The Aberystwyth Insolvency Papers*. Together with his close colleague Emeritus Professor Bob Wessels, Leiden University, he was appointed Special Reporter by the American Law Institute (ALI) and the International Insolvency Institute (III) to develop the 2012 *Global Principles for Cooperation in International Insolvency Cases*. Professor Fletcher also engaged deeply in European cross-border insolvency scholarship, working on many projects promoting cooperation and coordination, including in 2015 chairing the advisory board on the European cross-border cooperation principles for judges.

Following the INSOL International Academics' Colloquium in Sydney in 2005, he attended a further insolvency teaching and research Workshop in Brisbane. The group's final session sparked the 'Brisbane Initiative', an idea that grew into the unique and highly regarded professional course, the INSOL International Global Insolvency Practice Course. Professor Fletcher was a key member in its design and delivery. He was also the foundation editor of the *International Insolvency Review*, leading this respected journal's international editorial board for many years.

Professor Fletcher led insolvency scholars by example in engaging with legislators and with policy-makers both at home and on the international stage to improve the design of insolvency systems. Concluding a presentation in the Federal Court of Australia in 2103, he continued to promote the Internationalist Principle[2] noting "The ever-present hope is that in tomorrow's world the level and quality of international insolvency cooperation will be appreciably higher than has hitherto been the case. If that is the outcome, our past and present efforts will not have been in vain."[3]

Certainly Professor Fletcher's efforts have not been in vain. His legacy in the field of international insolvency law has been recognised by the judiciary, practitioners and academics alike. Since 2017, this has been acknowledged through the Ian Fletcher International Insolvency Law Moot, named in his honour. The international competition encourages law students to learn about international insolvency law and enables their written submissions and advocacy to be judged by senior judges and practitioners from around the globe. While ill health prevented Professor Fletcher attending the Sydney and Vancouver Moots, he followed them with great interest. In his welcome message read to the inaugural participants, he saluted "the spirit of adventure, and the dedication to scholarship" which brought the teams together from many quarters of the world. It is these same attributes that were hallmarks of Professor Fletcher's professional life.

Professor Fletcher was a very private person and said little about his long illness. When the prognosis became terminal, he thoughtfully stepped back and informed everyone that he could no longer continue with his commitments, in effect saying goodbye. As always he was the perfect, thoughtful professor whom everyone will remember with affection and the highest regard.

We extend our sincere condolences to Professor Fletcher's wife Dr Letitia Crabb, his sons Daniel and Julian and family on their loss.

By Professor Rosalind Mason, Queensland University of Technology, Australia and Chair, INSOL International Academics' Group with contributions from Professor Reinout Vriesendorp, Leiden University, The Netherlands and Gabriel Moss QC, South Square, UK.

1 (2015) 3 *Nottingham Insolvency and Business Law e-Journal* at https://www4.ntu.ac.uk/nls/document_uploads/185348.pdf
2 Ian F Fletcher, *Insolvency in Private International Law,* (2nd ed Oxford University Press), [1.16-1.18].
3 Ian Fletcher QC, "Tomorrow's World – Current and Future prospects for International Cooperation in Insolvency Matters" in in Perram N (ed) *International Commercial Law and Arbitration*, Ross Parsons Centre for Commercial, Corporate and Taxation Law, University of Sydney, p111.

Fellow of INSOL International
International Association of Restructuring, Insolvency & Bankruptcy Professionals

A Cauldron of Fraud: AHAB v SICL & Ors – from the Middle East to the Cayman Islands and beyond

By David J Molton,
Fellow, INSOL International
and Cameron Moxley
Brown Rudnick, USA
and William Peake
and Grainne King
Harneys, UK/Cayman Islands

In a landmark ruling for the Cayman Islands jurisdiction, the Honourable Chief Justice Smellie of the Grand Court, on 31 May 2018, emphatically dismissed a multi-billion dollar claim in the case of *Ahmad Hamad Algosaibi & Brothers Company* ("AHAB") *v SICL & Ors*, involving allegations of fraud arising from one of the largest corporate collapses of the financial crisis. This case rivalled, if not surpassed in respects, the notorious Madoff Ponzi scheme which was also uncovered during the financial crisis, and has been described, both in terms of length and value, as the most substantial trial ever to be heard in the Cayman Islands. This article looks at the global scope of the dispute which led to the Cayman judgment.

Background

The proceedings began as a family dispute between the AHAB partners and Maan Al-Sanea who was the head of AHAB's investment division over a thirty–year period (the "Money Exchange") and married to the daughter of one of the AHAB founding partners. It was alleged that Mr Al Sanea abused his authority to enter into billions of dollars' worth of revolving credit facilities by means of the production of dishonest financial statements and using the AHAB name as collateral (or "name lending"), unbeknownst to the AHAB partners.

When the lending banks began calling in their loans in 2009, amidst the global liquidity crisis at that time, the AHAB partners insisted that they had no knowledge of the level of borrowings incurred on their behalf, and that they were in fact the victims of a US$9.2 billion fraud. In what was later described by the Court as "one of the largest Ponzi schemes in history", their claims included allegations of forgery and the siphoning of proceeds of fraud to special purpose vehicles incorporated by Al Sanea in the Cayman Islands, Switzerland and Bahrain.

Cayman proceedings

AHAB's Writ of Summons was filed in the Grand Court of the Cayman Islands on 27 July 2009, following which several of the defendants, including Mr Al Sanea, brought applications seeking, variously, case management stays of the proceedings in favour of proceedings underway in Saudi Arabia or stays or strike outs on *forum non conveniens* grounds. These challenges were unsuccessful, with the Court of Appeal's judgment remaining the leading case in Cayman on case management stays. The Court of Appeal (overturning the Grand Court in part) confirmed a case management stay would only be appropriate in the most compelling circumstances, if at all, to impose a temporary stay on proceedings commenced as of right in the Cayman Islands in order to force a plaintiff to commence parallel proceedings in a foreign jurisdiction.[1] This robust approach was critical given the jurisdictionally labyrinthine dispute.

Some six years later, the substantive trial eventually commenced. The primary themes upon which the 129 day-long trial hinged were those of knowledge and authority. Dismissing AHAB's claims, the Cayman Islands Court found "overwhelmingly and conclusively" that the AHAB partners knew of and authorised fraudulent borrowing through the Money Exchange, as well as AHAB's other financial businesses over a period of about 30 years. Other key findings centered on issues such as forgery, manipulation of documents, tracing and illegality.[2]

Saudi Arabia

Proceedings were brought relating to debts owed by AHAB to Saudi banks before a body known as the "Royal Committee" formed by Royal Order in Saudi Arabia in 2009

1 The Court of Appeal found there was no evidence before it to give rise to an expectation that the Royal Committee established in Saudi Arabia would reach a determinative decision, how long it would take, or whether it would be binding on the Cayman companies in liquidation which would be unlikely to submit to the Saudi jurisdiction. Conversely, a case management stay gave rise to the possibility that the underlying issues might be tried in both Saudi Arabia and Cayman Islands with the potential for inconsistent findings.

2 Counterclaims brought by two of the defendants were also dismissed.

at AHAB's instigation to inquire into its allegation of Al Sanea's fraud against the banks, as well as against AHAB itself.

A further entity was established by Order of the Supreme Judicial Council in Saudi Arabia on 21 March 2016 called the Joint Directorate of enforcement at the General Court of Al–Khobar ("JDEK") responsible for issuing enforcement orders against AHAB and overseeing the process of distributing AHAB's assets to satisfy those orders, either through a settlement or liquidation process. It is understood this process is on-going.

London proceedings

The Cayman Islands was not the only trial venue in the saga; in 2011, five of the defrauded banks went to trial in London's Commercial Court over AHAB's unpaid borrowings. Despite AHAB's sticking to its familiar "deny all knowledge" refrain, the dramatic discovery of a set of damning documents just days into opening submissions, suggesting at least some knowledge and awareness on AHAB's part of the borrowing, led to the spectacular collapse of AHAB's defence. Those documents, known as the "N Files", mysteriously placed in Saud Algosaibi's office (not having been found during several previous discovery-related sweeps) and later described as "eerily neatly stacked" by AHAB's CEO, ultimately proved central to the defence of the Cayman proceedings.

New York

In New York, two of the defendant groups, which formed part of Mr Al Sanea's business empire, the AwalCos and SICL, instituted proceedings under Chapter 15 of the US Bankruptcy Code, whilst another Saad Group defendant, SIFCO5, sought recognition in the Delaware Courts. These applications resulted in the defendants' foreign bankruptcy proceedings in the Cayman Islands being recognized by the US bankruptcy court. Such recognition under Chapter 15, which implements the UNCITRAL Model Law on Cross-Border Insolvency, brings with it a host of tools and powers which assist the office-holder (or "foreign representative" in the parlance of the US statute) in identifying and gathering estate assets for the benefit of creditors. Chapter 15 recognition also provides the benefit of US bankruptcy law's "automatic stay," which shields the entity with bankruptcy proceedings pending abroad from being sued in the US, protects that entity's assets in the US from attachment or execution and stays any pending proceedings it is a party to, in the event the entity is already a party to any lawsuit or other proceedings. Moreover, one of Chapter 15's primary purposes is to facilitate international cooperation between and among the US courts and those handling foreign insolvency proceedings and to streamline the identification of cross-border assets. To that end, the defendants were able to utilise these Chapter 15 tools (with the US Bankruptcy Court's approval) to great effect, in particular the ability to obtain discovery from entities with key information in support of worldwide efforts to identify and gather estate assets.

To aid its own discovery efforts, AHAB sought and obtained the assistance of the United States District Court for the Southern District of New York in obtaining discovery from certain financial institutions in New York pursuant to 28 U.S.C. § 1782, a federal US statute under which a US district court may order the production of documents for use in a foreign proceeding. To obtain such assistance under Section 1782, certain discretionary factors must be met, as well as the following statutory requirements: (1) the discovery target must reside or be found in the district of the district court to which the application is made; (2) the discovery must be for use in a proceeding before a foreign tribunal; and (3) the application must be made by a foreign or international tribunal or any interested person. The Section 1782 application led to the imposition of confidentiality restrictions on AHAB and the defendants alike, each of which was required to sign confidentiality undertakings governing the use of the 1782 material, as well as agree a pre-trial Order stipulating that the trial would be heard *in camera* on occasions such material was referred to in open Court.

Other cross-border workstreams have included:

- Proceedings in the High Court of England and Wales for recognition under s236 of the Insolvency Act, 1986;
- Proceedings in Switzerland for recognition under Article 166ff of the Swiss Private International Law Act;
- Various proceedings between AHAB and one of its financial business subsidiaries, TIBC, in Bahrain and Saudi Arabia;
- Letters of request for judicial assistance to the authorities of Saudi Arabia and Switzerland;
- SIFCO5 also engaged the Chapter 15 process in Delaware which was the first successful one before those Courts following the high-profile denial of Chapter 15 relief in the US to two Cayman-incorporated Bear Stearns' managed hedge funds on grounds that they did not have a true business interest establishment in its place of incorporation.[3] SIFCO5 successfully argued before the Delaware Courts that COMI should follow where the liquidators were located, regardless of where management of the entity may have been pre-liquidation, a principle that was further developed by the Second Circuit in the Fairfield case.

Conclusion

The enormous scale and truly international scope of these proceedings has showcased the ability of practitioners to work collaboratively across several jurisdictions to successful ends. Not only did the proceedings grow from a family dispute to the most substantial trial in Cayman Islands history, it also contributed to the development of US bankruptcy and Cayman Islands law. The Cayman litigation also demonstrated the jurisdiction's ability to manage high profile litigation, the quality of its judiciary and the Court's ability to use cutting-edge technology, as well as the resources and flexibility to manage a year-long, multi-jurisdictional trial.

With numerous Chapter 15 proceedings pending in the US bankruptcy court and AHAB's Appeal[4] slated to be heard in May 2019, it is clear that this global saga already spanning nine years is not set to end anytime soon.

3 The Bear Stearns decision was later superseded by the United States Court of Appeals for the Second Circuit in the Fairfield Sentry Ltd. case, which enunciated principles making Chapter 15 available to offshore funds.

4 Notice of Appeal was lodged on 14 June 2018.

The Takata saga: roadside assistance for a global car crash

(Part 2 of 3)

By Leonard P. Goldberger,
Fellow, INSOL International,
Stevens & Lee, P.C.
and
Qing Lin, Esquire[1],
Dai & Associates, P.C.

This is the continuing story of 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 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. This Part II will discuss on how and why its successful U.S. bankruptcy case became the focus of its global restructuring.[2]

Takata faced an existential crisis as it was being overwhelmed by billions of dollars of civil and criminal liability. These claims arose from its automotive airbags containing a PSAN Inflator, the defective component that caused them to rupture upon deployment, causing bodily injuries, more than a dozen deaths, and substantial economic losses. The problem became a true mass tort considering that Takata's defective airbags were installed in an estimated 60 to 70 million cars worldwide. All of this led to massive automotive recalls, the largest in US history. Part I discussed the extraordinary complexities faced by Takata in effecting a sale of its assets and a restructuring as the only practical means by which to salvage the going concern value of its non-PSAN Inflator global operations for the benefit of its creditors, employees, vendors and other parties in interest.

During its slide into bankruptcy, Takata faced enormous pressures – in terms of both time and money – from governmental civil and criminal enforcement actions, as well as from numerous pending private litigation actions. As such, it became abundantly clear that a privately-negotiated sale of Takata's assets would not work because no buyer would assume the open-ended successor liability (of several orders of magnitude greater than the value of the assets themselves). Moreover, all of this needed to be done fast in order to meet certain crucial deadlines contained in settlements with governmental enforcement authorities. ("Fast," of course, is a relative term in the world of insolvency.) There simply was not enough time to outrun the mad scramble for Takata's assets from competing litigations and governmental enforcement actions raging in courts around the world.

Clearly, some external – and supervening – legal authority was necessary to suspend the global litigation so that Takata could shift its focus from deflecting liability to effectuating a business solution based on isolating the PSAN Inflator-related liability in order to maximize the value of its remaining assets. As such, Takata and a critical mass of its creditor constituents, including more than a dozen leading worldwide automotive manufacturers, settled on filing a Chapter 11 case under US bankruptcy law. This would serve as the focal point of its global reorganization strategy – of which the sale of its worldwide, non-PSAN Inflator assets was the centerpiece.

Architecture of the Plan

Takata filed its Chapter 11 case on June 25, 2017. And only 241 days later, its Fifth Amended Joint Chapter 11 Plan of Reorganization of TK Holdings, Inc. and Its Affiliated Debtors (the "Plan") was confirmed on February 21, 2018. Not surprisingly when reorganizing a global enterprise like Takata, the Plan was extraordinarily complex. This will summarize the Plan's architecture designed to implement its business solution with the following essential elements:

- Selling substantially all of Takata's worldwide assets **unrelated to the manufacture and sale of PSAN Inflators** to Joyson KSS Auto Safety S.A. ("KSS"), a US subsidiary of a Chinese automotive parts company, for an aggregate purchase price of $1.58 billion, free and clear of all claims, interests and liabilities of any kind or nature whatsoever.
- Carving out from the assets being sold to KSS certain PSAN Inflator-related assets (i.e., those used exclusively in the manufacture, design, assembly, sale, distribution, or handling of PSAN Inflators) and vesting them in the reorganized Takata upon its emergence from bankruptcy so that it could continue to operate its business long enough to fulfill its obligations to support the automotive manufacturers' recall program.
- Vesting certain other PSAN Inflator-related assets in a new corporation established under the Plan to comply with Takata's continuing obligations to governmental regulators and its automotive manufacturer customers and to continue the maintenance, shipping, and disposal of those product-related assets.
- Settling certain automotive manufacturer creditors' claims in exchange for payment of an $850 million restitution claim imposed by the US Department of Justice and funding certain reserves for certain other post-bankruptcy obligations.
- Paying all administrative expense claims, priority claims and other secured claims, in full, from the proceeds of the sale of the global non-PSAN Inflator assets.
- Establishing and funding a separate, post-bankruptcy trust to administer, and make distributions to, holders of various classes of unsecured claims.

Establishing and funding a separate, post-bankruptcy trust to administer and resolve the personal injury and wrongful death claims arising from the defective automotive airbags.

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

2 The factual information for Part II of the article was taken directly from the "Disclosure Statement for Third Amended Joint Plan of Reorganization of TK Holdings, Inc. and its Affiliated Debtors" dated January 5, 2018, filed in Takata's U.S. bankruptcy case, *In re TK Holdings, Inc., et al.*, pending in the United States Bankruptcy Court for the District of Delaware, at Case No. 17-11375-BLS (Jointly Administered). [Doc. No. 1630].

The finely-tuned (and intensely negotiated) legal strategy incorporated into the Plan allowed Takata to effectuate a business solution that would have been all but impossible without the statutory tools available under US bankruptcy law. In the first instance, the Plan allowed Takata to monetize (at a fair price) the going concern value of its worldwide, non-PSAN Inflator business that was sold to KSS. The allocated proceeds of that sale were made available to satisfy, in full, the claims of various classes of priority and secured creditors; as well as to make certain distributions to unsecured creditors. The Plan also carved out certain PSAN Inflator-related assets that were necessary to satisfy the reorganized Takata's continuing obligations to governmental regulators and its automotive manufacturer creditors to supply replacement products in connection with ongoing remedial automotive recall and airbag replacement programs. This was made possible by the structure that allocated certain pools of assets to the post-bankruptcy trusts dedicated to satisfaction of claims of specific creditor groups, and insulating them from competing claims of other creditors.

Why It worked

In retrospect, Takata and its supporters bet right in their decision to use Chapter 11 as the focus of the global reorganization. As with any complex legal proceeding, there were dark moments when the entire effort appeared to be doomed. However, there was enough momentum to push forward and incorporate into the Plan a series of significant compromises resolving the remaining objections of various creditor constituencies. This is the process that is encouraged by the structure and culture of Chapter 11 itself. At the risk of grossly oversimplifying a complex legal system, the reason that Chapter 11 worked for Takata can be viewed in the context of three fundamental features (there are undoubtedly others):

- The ability to sell assets "free and clear" of claims, thus insulating the buyer, KSS, from all present and future claims – and avoiding what would have otherwise been substantial discounts of asset prices in order to compensate for the risk that such liabilities would likely have been assumed as a matter of law. This allowed Takata to preserve – and maximize – the going concern value of its worldwide non-PSAN Inflator assets for the benefit of its creditors and the various other constituents and parties in interest.
- The availability of various Plan-related injunctions to enforce the allocation of certain assets for the exclusive benefit of specific creditors without the overhang of successor liability, and channeling those creditors' claims exclusively to those specific asset pools. The successful effectuation of the reorganization required the separation – with somewhat surgical precision – of the tainted, PSAN Inflator business line from Takata's otherwise healthy worldwide lines of business. (Think of an amputation of a limb to prevent the spread of an infection to other parts of a body that would ultimately prove to be fatal.)
- The ability to coordinate foreign insolvency proceedings (which, here, were also commenced in Japan and Canada and recognized by the US bankruptcy court) in order to stay numerous pending legal proceedings against Takata by it foreign creditors and to coordinate approval of various transactions necessary to implement the global restructuring (including the limited continuation of the reorganized Takata's business on 3 continents to support the ongoing automotive recall and airbag replacement program).

These fundamental aspects of US bankruptcy law, as implemented by the general equity powers of the US bankruptcy court, provided the legal foundation and framework necessary to facilitate Takata's global reorganization strategy. This structure was enforced by the various injunctions (especially the so-called channeling injunction) that directed present and future claims to specific pools of assets and insulated the post-bankruptcy owners (and other protected parties such as releasees contributing to the reorganization effort) from the overhang of successor liability and exposure to competing claims. Importantly, all of this was built on a solid legal foundation. The US bankruptcy jurisprudence for dealing with such mass tort cases already existed, and its roots can be traced back over 35 years to the *Manville* bankruptcy case which dealt with legacy asbestos-related liabilities that similarly overwhelmed a manufacturer with multiple lines of business. In that respect, Chapter 11 again demonstrated its elasticity as a legal platform by which to quickly and efficiently reorganize a distressed global business.

Part III of this article will discuss some of the lessons learned, and how they are likely to resonate throughout cross-border insolvency practice. To be continued.

INSOL International Buenos Aires One Day Seminar, 22 March 2018

Report by Fernando Hernández (Seminar Chair)
Marval, O'Farrell & Mairal
Argentina

On 22nd March, 2018, INSOL's International Regional One Day Seminar was held in Buenos Aires for the third time.

The members of the Main Organizing Committee, integrated by Fernando Hernández, Marval, O'Farrell & Mairal (Argentina), Javier Lorente, NTMDALL (Argentina), Howard Seife, Norton Rose Fulbright (USA), Mariana Joszpa, Estudio Bouzat, Rosenkrantz & Asociados (Argentina), Judge María Cristina O'Reilly, National Commercial Court No. 26 (Argentina), Nicolás Velasco, *Fellow, INSOL International*, Superintendency of Insolvency and Entrepeneurship (Chile), Bernardo José Porrás, Hughes & Hughes (Uruguay) and Domingo Refinetti, Stocche Forbes (Brazil), did a great job putting together a very interesting and ambitious program, and gathering an impressive list of speakers and chairs among some of the most experienced practitioners and judges in the field in the region. Once again, the seminar was a success and was attended by delegates from various countries in the region, showing the interest in the seminar with the membership in Latin America.

After the welcome from Howard Seife, we commenced the program that included the following panels:

Session 1: Coordinating cross-border insolvencies: Should Argentina adopt the UNCITRAL Model Law?

The panel was chaired by Judge Cristina O'Reilly, National Commercial Court No. 26 (Argentina), and integrated by Judge María Elsa Uzal, National Commercial Chamber of Appeals (Argentina), Thomas Heather, Ritch, Mueller, Heather y Nicolau S.C. (Mexico), and Nicolás Velasco, Superintendency of Insolvency and Entrepeneurship (Chile).

The panel discussed the complexities of cross-border insolvencies and particularly the description of the current situation in Argentina, where in matters of cross-border insolvencies Argentina has historically adopted the principle of territoriality (pursuant to which the foreign insolvency cases are only recognized as a cause for the commencement of a full plenary insolvency case in Argentina). The discussion followed with an analysis of the pros and cons of the adoption of the UNCITRAL Model Law in Argentina, the need of reciprocity and the experience of Mexico and Chile. In the past Argentina has been reluctant to address this discussion, however, for the first time the possibility of adopting the UNCITRAL Model Law is on the agenda. The adoption of the UNCITRAL Model Law has previously been rejected by a portion of the scholars, and now even some of the detractors are considering the possibility of its adoption, but not without some changes.

Session 2: Significant potential changes in the Argentine and Brazilian insolvency laws

The panel was chaired by Judge Fernando Saravia, National Commercial Court No. 11 (Argentina), and integrated by Marcelo Gebhardt, Aguirre Saravia – Gebhart Abogados (Argentina), Judge Javier Cosentino, National Commercial Court (Argentina), and Francisco Satiro, Satiro & Ruiz Advogados (Brazil).

In Argentina the government proposed the formation of a committee of practitioners and judiciaries to analyze a comprehensive reform of the Argentine Insolvency Law. The Argentine panelists, all members of such committee, discussed the reforms that will be proposed, including the adoption of the UNCITRAL Model, DIP financing, crisis preventive procedures, consumer insolvency and trusts insolvency. In Brazil, as pointed out by Francisco, during the last few years, only a minor portion of the reorganization plans have been approved and liquidations are long and bureaucratic. In order to improve these and other issues in matters of insolvency law, Brazil is now also proposing a bill amending the Brazilian insolvency law, aiming mainly at speeding up and facilitating liquidations. It will also include new rules regarding, amongst others: cross-border insolvencies; the adoption of the UNCITRAL Model Law; DIP financing; and the creation of specialized courts with regional jurisdiction for bankruptcy and reorganization proceedings, and incentive of out-of-court restructurings.

Session 3: Facilitating reorganization through financing companies in insolvency proceedings

The panel was chaired by Fernando Hernández, Marval, O'Farrell & Mairal (Argentina), and integrated by Judge Martin Glenn, Southern District Court of New York (USA), Sebastián Perez Ziccardi, Grupo Supervielle (Argentina), and Laura Silvia Rey, BBVA Bank (Uruguay).

The panel discussed the DIP financing regulations and problems in each jurisdiction. Despite the existence of the super priority rule in the United States, Judge Glenn discussed that generally in practice it has not been applicable. And despite Argentina not having specific DIP financing rules, the Argentine Insolvency Law includes rules on the debtor in possession incurrence of indebtedness that are similar to the US DIP financing rules, except for the super priority rule. However, as Sebastián pointed out, in

Argentina, banks and financial institutions do not extend financing to DIP borrowers, but this restriction is not due to the lack of regulations in the Argentine Insolvency Law, but rather is due to the regulatory requirements on provisions and minimum capital requirements, etc. of the Argentine Central Bank. As Laura indicated, the Uruguayan law grants preferences to post petition credits. Similarly to Argentina, there are no legal restrictions on the Uruguayan Central Bank's regulations for the extension of post-petition financing to debtors in possession, but there are also financial consequences to the financial entity extending the financing due to the Uruguayan Central Bank's requirements on provisions and capital requirements, etc.

Session 4: Lessons learned in cross-border insolvencies

The panel was chaired by Howard Seife, Norton Rose Fulbright (USA), and integrated by Mark Bloom, Greenberg Traurig (USA), Jorge Sepúlveda, Bufete García Jimeno (Mexico) and Andrew Thorp, Harneys (BVI).

This panel focused on some of the most prominent issues faced in recent cross-border insolvencies. In particular, the panel analyzed recent developments in the insolvency proceeding of the Brazilian telecom company Oi S.A. This highly contentious restructuring was based in Brazil but had an ancillary Chapter 15 in New York as well as a competing insolvency proceeding in the Netherlands. The panel discussed the complex considerations for determining the center of main interest ("COMI") for a company's insolvency proceeding. The issue came up in Oi as their finance subsidiary was organized in the Netherlands but was run out of Brazil. The issue of "good faith" also came up in the Oi context, as the US Bankruptcy judge turned aside a challenge to the recognition of the Brazilian proceeding noting some questionable activities of the hedge fund challenging recognition in the Chapter 15. The panel concluded with a review of the cross-border issues that arose regarding the insolvent airline Mexicana and its attempts to get recognition of its Mexican Concurso proceeding, as well as a preliminary injunction, it a chapter 15 in New York.

Session 5: What claims should be given priority in insolvency proceedings?

The panel was chaired by Javier Lorente, NTMDALL (Argentina), and integrated by Roberto Cortez, Deloitte (USA), Rebecca Hume, Kobre & Kim, Cayman Islands, and Paulo Campana Filho, Felsberg Advogados (Brazil).

The panel discussed the claims that are given priority in the insolvency proceedings in each jurisdiction. In the case of Argentina, the order of priority granted to the claims in a liquidation is the following: claims with special preference on the proceeds of the sale of certain assets (i.e. labor claims for 6 months' salary, severance payments and indemnification for health claims, on the inventory, raw materials and equipment located at the facilities where the employees rendered services; taxes on property and on such assets, and claims secured by mortgages or liens, on the collateral under such security); administrative expenses; claims with general preference (i.e. labor claims - claims for 6 months' salary, severance payments and indemnification for health claims), including the interest accrued during the last 2 years after the claim became due and payable, as well as any related litigation costs and expenses and the amount of principal on taxes and social security, but only on the amount equal to 50% of the proceeds of the estate property after payment of the claims with special preference, administrative expenses and the principal amount of any labor claims; unsecured claims; and subordinated claims. In Brazil, the order of preference is the following: receiver's fees; labor claims of up to 150 times the prevailing minimum wage for each creditor, and claims deriving from accidents; secured credits up to the proceeds of the collateral; taxes; claims with special preference; claims with general preference; unsecured claims; and subordinated claims. In the case of the United States, the order of priority is as follows: secured claims; administrative expenses; priority claims; unsecured claims; and subordinated claims. Finally, in the Cayman Islands, the order of priority is the following: secured claims; liquidation expenses; preferred claims; claims with floating charge security interest; unsecured claims and subordinated claims.

INSOL International would like to thank **Marval, O'Farrell & Mairal** for kindly hosting the event.

INSOL International – INSOL Europe – Finnish Insolvency Law Association Helsinki One Day Joint Seminar, 13 June 2018

Report by Tuomas Hupli

University of Turku
Finland

On 13 June 2018, INSOL International hosted a one-day seminar in the Nordic region for the first time. Close to 100 delegates congregated at the Hilton Helsinki Strand Hotel, Finland. The event, jointly hosted by INSOL International, INSOL Europe and FILA (Finnish Insolvency Law Association), was truly global, with delegates and speakers from Denmark, Finland, Norway, Sweden, Germany, France, Hungary, Scotland, the UK, the USA, and Romania.

INSOL International Board Director Nick Edwards (Deloitte), Nina Aganimov (DLA Piper) and Radu Lotrean (President of INSOL Europe and CITR) welcomed delegates to the event.

Basic principles for the harmonisation of insolvency laws

The technical programme kicked off with a session on the basic principles for the harmonisation of insolvency laws. The session was co-chaired by Tuomas Hupli (President of FILA, University of Turku) and Erik Selander (DLA Piper, Sweden). The panel started by dealing with the core principles of the harmonisation of insolvency laws under the EU Draft Directive on Preventive Restructuring, as well as The Nordic-Baltic Recommendations on Insolvency Law. It soon became clear that the EU Regulation on Insolvency Proceedings, which governs cross-border issues in insolvency cases in the EU, is not sufficient, on its own, to ensure coherence of the insolvency laws of EU Member States. Needing more substantial coherence, it was suggested that harmonisation of the insolvency laws of EU Member States was one way of achieving this. In particular, the need for early warnings and measures was highlighted. Before the harmonisation process had even started at EU level, the Nordic-Baltic Insolvency Network had already produced recommendations on how to harmonise the key issues around business restructuring. The work of this Network demonstrates that it is possible to move further and faster in achieving harmonisation than the efforts contained in the EU Draft Directive. Mari Aalto (Ministry of Justice, Finland) informed delegates in more detail about the current status of the drafting taking place in Brussels. Mari highlighted some of the more problematic aspects (for example, the stay of individual enforcement actions) that need clarification before the final version of the Directive will be ready for enactment. Thomas Heering (Gorrissen Federspiel, Denmark) then evaluated the new Danish reform on the law of business restructuring, enacted in 2010, when compared to the proposals contained EU Draft Directive. He also analysed some practical aspects relating to the fact that the European Insolvency Regulation does not apply to Denmark. It remains to be seen whether Denmark will take any measures to reduce the uncertainty concerning recognition, in the EU, of insolvency proceedings opened in Denmark.

Case analysis on transactions in operational restructuring

The second session dealt with a stimulating case study from the fashion industry. Chaired by Masse Ervasti (EY), this session involved Antti Rönkkö (CEO, Nanso Group) taking delegates through the process of how this Finnish fashion company, established in the 1920s, was rescued. With the help of insightful comments from Aino Romo (EY, team member in the Nanso case and co-educational chair of the seminar) from the floor, Antti took delegates through the entire rescue process, from the disruption caused by the rapid expansion of e-commerce through to the successful restructuring many years later. This case study served as an excellent example of how companies can overcome their financial distress by early intervention and the support of experts in operational and financial restructuring. Although the various measures to rescue the company took place under severe pressure and involved the implementation of constant structural changes, the company managed to stay in business and emerged without the crippling debt that brought it to its knees in the first place. While serving as an excellent example of a successful operational and financial restructuring, the case study was also inspirational in showing how the leadership of the company had the will and talent to keep staff motivated during a long period of uncertainty, while at the same time retaining the support and trust of the company's major creditors.

Cross-border restructuring of multinational enterprise groups

The third session dealt with recent developments on cross-border issues involving financially distressed groups of companies. Chaired by Dr Miriam Mailly (Bar of Boulogne-

Sur-Mer, France), the panellists – Friedrich von Kalternborn-Stachau (BRL, Germany and Fellow of INSOL International) and Prof Irit Merovach (University of Nottingham, UK) – kicked off the session by explaining the basics of this complex area under the EIR prior to the recast regulation, at which time the problems relating to groups of companies had not been fully appreciated.

This was followed by a discussion of Chapter V (Insolvency Proceedings of Members of a Group of Companies) of EU Insolvency Regulation 848/2015 (Recast), especially in relation to group coordination proceedings.

The third session concluded with a discussion of the current work being undertaken by UNCITRAL Working Group V. Delegates became more familiar with the UNCITRAL Model Law on Cross-Border Insolvency and with UNCITRAL's idea of the "planning proceeding" that aims at developing solutions for group insolvencies, including the new proposal for "synthetic main proceedings".

Regional hot topics and the future

As is the tradition at INSOL International one-day seminars, a regional element was included in the programme. Two topics formed the focus of the fourth and final session, namely environmental liabilities in bankruptcy and debt-to-equity swaps in rescue proceedings. This session was ably chaired by Jan Lilius (Hannes Snellman).

Tuomas Hupli commenced the discussion on environmental issues by discussing the position in Finland. From Tuomas's discussion it became clear that environmental damage – or the risk of it – is problematic in liquidation proceedings in Finland, as these claims do not rank equally with the claims of other bankruptcy creditors. Environmental agencies claim that the costs involved in rehabilitating the environment are not claims that rank equally with the claims of other creditors, but that they must be paid by the bankrupt estate as an administrative expense. This in turn means that the creditors, who have nothing to do with the environmental damage that was caused, have to pay for it. This approach has been confirmed by the Supreme Administrative Court of Finland in two recent cases, despite the fact that this is in conflict with the "polluter must pay" principle enacted in primary EU law. Jenny Hildén (Walthon Advokater, Sweden) then analysed the state of the law in this regard in Sweden, referring to her own experience in real cases she has been involved in. Jenny also explained how and when the bankruptcy estate may abandon the property at a negative value. In closing, Tuomas noted that the Ministry of Justice in Finland has proposed a reform to the law in terms of which the bankruptcy estate would not be liable for the costs of environmental remedies, unless there is a serious risk of danger to the environment. Siv Sandvik (Schjodt Law Firm) and Lars Skanvig (Plesner) mentioned that in Norway and Denmark environmental liabilities have not caused serious problems in bankruptcies. Compared to Finland, it appears that the "polluter must pay" principle is more effectively applied in Denmark, Norway and Sweden.

Siv Sandvik and Lars Skanvig then analysed the use of

debt for equity swaps in business reorganisations in Norway and Denmark. In both countries debt for equity swaps are allowed and are legal, but this is subject to the consent of the debtor company. A proposed change to the law, to enhance the use of the swap, was published in Norway in 2016 but it is uncertain whether the government will implement these proposed changes. Comments by Jenny Hildén and Tuomas Hupli confirmed that the situation is similar in both Sweden and Finland, with Tuomas pointing out that an international comparative report on debt to equity swaps was published in Finland in 2018. The problem of the priority of ranking between shareholders and creditors in swap arrangements, came to the fore during the delegate discussion.

An extremely stimulating day was followed by and dinner at Restaurant Sipuli. With delicious traditional Finnish summer cuisine, and with warm-hearted dinner speeches, everyone had an unforgettable evening under the midnight sun. With the ice now broken by this joint seminar in Helsinki, it was unanimously decided that the presentation of a one-day seminar in the Nordic region should become a permanent fixture on the INSOL International calendar.

The organisers would like to thank the following sponsors for their support of the seminar:

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September 2018				
13	INSOL International Jakarta One Day Seminar	Indonesia	INSOL International	www.insol.org
26-28	TMA Annual Conference	Colorado Springs, CO	TMA	www.turnaround.org
October 2018				
3	INSOL International Dubai One Day Seminar	Dubai	INSOL International	www.insol.org
4-7	INSOL Europe Annual Congress	Athens, Greece	INSOL Europe	www.insol-europe.org
17-18	ABI Annual Insolvency Symposium	Milan, Italy	ABI	www.abi.org
24-25	ARITA National Conference	Sydney, Australia	ARITA	www.arita.com.au
27-28	IWIRC Annual Fall Conference	San Antonio, TX	IWIRC	www.iwirc.com
November 2018				
7	INSOL International Hong Kong One Day Seminar	Hong Kong	INSOL International	www.insol.org
15-16	South African Restructuring & Insolvency Practitioners Association	Cape Town, South Africa	SARIPA	www.saripa.co.za
29- Dec 1	TMA Leadership Conference	Chicago, IL	TMA	www.turnaround.org
December 2018				
1-2	INSOL India Annual Conference	New Delhi, India	INSOL India	www.insolindia.com
6-8	ABI Winter Leadership Conference	Scottsdale, AZ	ABI	www.abi.org
April 2019				
2-4	INSOL Singapore Annual Regional Conference	Singapore	INSOL International	www.insol.org

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BERMUDA

CHRISTIAN R. LUTHI
christian.luthi@conyersdill.com
+1 441 298 7814

CAYMAN ISLANDS

PAUL SMITH
paul.smith@conyersdill.com
+1 345 814 7777

BRITISH VIRGIN ISLANDS

MARK J. FORTE
mark.forte@conyersdill.com
+1 284 346 1113

HONG KONG

NIGEL K. MEESON QC
nigel.meeson@conyersdill.com
+852 2842 9553

conyersdill.com