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FOCUS: Technological advances and insolvency practice

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Editors' Column

Peter Gothard
Fellow, INSOL International
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This issue focuses on the nature and impact of a number of critical new technologies that are already significantly changing the way in which businesses, banks and financial markets operate. In a series of excellent articles, we consider recent developments relating to, and the operation and legal regimes governing, crypto-currencies, electronic trading systems, data sets and data processing – and their potential effect on insolvency proceedings and practice. This is complex and challenging territory which is usually only safely traversed by the cognoscenti (one of our articles starts with a quotation from Professor Stephen Hawking while another starts with a quotation from Bill Gates!) but our contributors this quarter have done a brilliant job and provided clear and comprehensible accounts for the uninitiated!

Farid Assaf, *Fellow, INSOL International* reviews the different types of artificial intelligence currently available and how they are being used by lawyers and insolvency practitioners. He also considers possible future developments. Alex Carter-Silk discusses crypto-currencies and insolvency. He provides an overview of how these systems (including Bitcoin) work and then considers the likely and actual impact of insolvency proceedings, including the Mt Gox bankruptcy filing in Japan in 2014.

Some fascinating and fundamental legal issues are raised and remain to be settled regarding the nature of the rights of users with Bitcoin deposits. In the Mt Gox case, because the value of Bitcoin had fluctuated enormously after the commencement of the bankruptcy, the question arose as to whether users (creditors) or the company's shareholders would benefit from the dramatic rise in Bitcoin's value. As a result of a decision of the bankruptcy court in Japan, the shareholders have triumphed. One might be forgiven for fearing, in light of the recent decision of the UK Supreme Court in the LBIE administration regarding the treatment of creditors with claims denominated in foreign currencies, that this might be a developing (and flawed!) global trend. The Supreme Court's decision is, in fact, discussed by Jeremy Garrood, in his account of his recent and continuing experience as a liquidator (with Graham Wolloff) of a UK crypto-currency exchange (Mintpal Limited). Mintpal raises but has not yet resolved the issue of the relative ranking of holders of Bitcoin and the exchange's shareholders. In this case the question is whether holders must convert their claims to sterling at the date of the liquidation and thereby lose the benefit of the huge post liquidation increase in the value of their Bitcoin (those who wish to consider the legal issues and analysis further, particularly the comparative aspects, may wish to consult *The Law of Bitcoin* published in 2015 by iUniverse).

On the business side, Ian Renwood provides an overview of how changes to IT architecture (including those derived from the cloud and big data generally) have had an impact on operating systems and the opportunities and risks that result, while Sean Cordes and Alex Clarke discuss how data identification and preservation can be critical in insolvency proceedings and the different options for dealing with data.

We also cover a number of other significant developments. My colleague Craig Montgomery *Fellow, INSOL International* (with other colleagues) reviews a trio of airline insolvencies that occurred last year (Air Berlin in Germany, Alitalia in Italy and Monarch Airlines in the UK), and how airlines operate under the chapter 11 process, and considers how differing approaches to continued trading in insolvency can lead to very different outcomes. In addition, we have briefings concerning two important cases from Guernsey. Tim Cornfield discusses the decision in Carlyle Capital in which the court dismissed the 187 plus different claims brought by liquidators against directors and associated companies for breaches of duty and wrongful trading while Andrea Harris, *Fellow, INSOL International* and Tim Le Cornu, *Fellow, INSOL International* discuss the decision in *Eagle Holdings* which sets out guidance from the court as to the approach to applications for approvals for modifications of fee estimates.

We thank all our contributors whose work keep this publication at such a high level and practically useful at the same time. We also thank Mourant Ozannes for sponsoring INSOL World and David Rubin & Partners for sponsoring the monthly electronic news update.

Nicholas Segal

President's Column

By Adam Harris
Bowmans
South Africa

Dear Friends and Colleagues,

We like to say it. INSOL International is truly global.

2017 was a big year. We sometimes surprise ourselves with what we achieve.

Looking back on a really full year, the apparent ease with which all this was undertaken is phenomenal. But don't be fooled - it's a bit like the swimming duck analogy – all calm on the surface, but working like heck below to keep propelling forward.

- That is how we managed to stage the spectacular 2017 Quadrennial in Sydney - keeping over 1000 people happily interacting and absorbing the learning. Remember, there is no events company to organize all of this and to reduce the profitability.
- We commenced the huge and ongoing introspective Taskforce 2021 exercise undertaken by a 100 strong platoon of volunteers. It is well underway, moving towards the implementation phases.
- We presented seminars in Korea, Malaysia, Sao Paulo, Tel Aviv (in collaboration with INSOL Europe), Shanghai and Beijing, as well as offshore seminars in Sydney and the Channel Islands. We presented the Africa Round Table in Mauritius, in partnership with the World Bank Group.
- G36 functions were presented in Sydney, New York, London and Singapore.
- A full technical programme of interesting and topical publications was produced.
- We have been a part of the momentous reforms in India, engaged in training, and providing guidance where appropriate. I have to mention INSOL Past President Sumant Batra, who has contributed so much to the process.

It takes serious work to produce that much output. We've beefed up our staffing capabilities, with the appointment of a new COO, Jason Baxter. Many of you will have met him at the various G36 programmes, or at the congress or seminars. Jason has brought with him a new, but complementary skillset, and a fresh perspective on what we do and how best to achieve it. He has already taken on some of the heavy-lifting functions. In addition, we restructured and are expanding some of the administrative functions, and filling some of the gaps – not that any such needs are apparent on the world-facing view.

Leadership is so important. The Executive team (Claire Broughton, our CEO, with Julie Hertzberg, Scott Atkins and Richard Heis) is totally engaged and provides insight and depth to the deliberations, of which there are many. A skillset that is world class. I truly value the input and guidance.

Prudent fiscal policies, solid income from events with which people want to be associated, and plain hard work, means that we will have the resources to be able to implement the recommendations of the Taskforce. We are financially stable, and have been able to offer as an additional benefit, to sponsor the CEO and President of the top Member Associations (with more than 500 members) to attend INSOL New York later this year. A separate meeting of the administrative representatives of the various MA's has also been scheduled to run alongside INSOL New York.

We are working on, and have improved our gender representivity –although there is still substantial room for improvement.

This is just a helicopter view of some of the activities which we undertook during 2017. There is so much else going on beneath the surface.

On the subject of "surface", did I mention that there is a water crisis in Cape Town! INSOL has helped with this as well. My average monthly water bill is less than a dollar. I do wash, but I am not there that often. I am out and about flying the INSOL flag. Pity about the carbon footprint, but at least I'm not using the water.

Will 2018 be as demanding, yet fulfilling? Probably. In fact hopefully. We are up for it.

A year in the life of .....

By Jason Baxter
Chief Operating Officer
INSOL International

January 2017 was an exciting time to join the INSOL team. Not only did it offer me the opportunity to observe the workings of this machine over a full calendar year, it also offered me the chance to be present for the final discussions regarding the Task Force 2021 project prior to its introduction. Furthermore, I was able to observe the final stages of planning for the Quadrennial that was held in March in Sydney, Australia.

On countless occasions over the past twelve months I have been impressed by the team at INSOL and with how much such a small team is able to produce. "Punching above its weight" is a term used all too often but in the case of INSOL it is so appropriate. The conference, regional seminars, G36 events, publications, projects and specialist papers - whatever the task the INSOL team seems able to deliver efficiently. I have however also been amazed by how much time and expertise is provided by the members of INSOL International. Whether involved in the pre-planning stages of a conference or seminar, sitting on a committee, contributing a paper or addressing delegates at one of our events, I have been impressed with the level of participation and enthusiasm for getting involved, especially in an age where there never seems to be enough time.

Whilst I attended and enjoyed some of our seminars this year, by far the biggest event of 2017 was the Quadrennial held in Sydney which attracted over one thousand delegates. I had been able to observe the final stages of planning and preparation for this and was highly impressed with the attention to detail that lead to a near faultless event which garnered such positive feedback and praise from all those I spoke to. A highlight for me (and many of those attending) was the "Oil in a Day's Work" case study/film. Shown over the course of day one, this provided delegates with a subject to discuss, debate and consider in detail. Whether over coffee, lunch, dinner or drinks I saw our members discuss with great passion, a sure sign that the material was relevant. All in all, INSOL 2017 was an impressive and successful event and I look forward to INSOL New York in late April where I am sure the content will be interesting and thought provoking and on a personal note I will be able to catch up with those I met last year whilst establishing new connections.

Whilst the Quadrennial was certainly the biggest event I attended, I was fortunate to attend some of our regional seminars and events over the last twelve months. In February I attended our first seminar held in Seoul, South Korea. With over one hundred delegates attending from as far afield as the United States and Australia this was a very impressive event. So too were our seminars held in São Paulo and Malaysia which I also attended. These form part of a seminar programme which also included events held in China, Israel and the Channel Islands, and proves just how global INSOL International truly is. Moving into 2018 we will be holding seminars in countries such as Argentina, Myanmar and Finland.

I was also fortunate to attend the Africa Round Table, held in Mauritius in November. Having learned of the humble beginnings of ART with twenty or so delegates attending in 2010 it was fantastic to see close to 200 attend this

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year. Many of those I spoke to said it was the one annual event that they would always make room for in their diaries. High praise indeed and the kind of endorsement one wishes to hear.

Throughout the year I have endeavoured to meet with key representatives from our G36 firms and try to get an understanding of the value they perceive from INSOL membership. These conversations have been very enlightening with most speaking highly of INSOL with some also suggesting ways in which value could be enhanced and more visible. It is my intention to continue these meetings / calls with the G36 members as they provide an opportunity for regular communication whereby INSOL can provide information on both past and current levels of engagement whilst also providing insight on future projects or events. The G36 firms are vital to INSOL International and it is important that we enhance communications and engagement.

Whilst the G36 are obviously important to INSOL, so too are the local Member Associations. At INSOL 2017 I was fortunate enough to attend the MA round table meeting. It proved very interesting to learn from the CEOs of these organisations what pressures they find themselves under; what issues they need to resolve and how they are going about this; and what value they feel their members are receiving from INSOL membership. Sharing information and experiences always proves valuable and this was no exception. Due to the success of this round table, MA's will meet again at INSOL New York and I will ensure that discussions continue throughout the year.

One of the most exciting aspects of joining INSOL as COO in 2017 is being involved with the Implementation of the strategies that were the result of Task Force 2021 review. Sitting on three working groups (out of a total of twenty) I have been involved in discussions regarding our interaction with Member Associations and the value proposition offered to G36 firms. Both these areas benefitted from the discussions (mentioned above) I have had with both these groups in 2017 and are set to continue into 2018.

Whilst 2017 has proved interesting, challenging and exciting, 2018 already looks like it will continue in the same vein. The project to build a new website and CRM (client relationship management) system continues and at the time of writing we are putting these systems through a rigorous testing process. Functionality will be dramatically improved, the look and style will feel very modern and amongst many enhancements, members will have the ability to improve their user experience with a new personalised dashboard. As the year goes on INSOL will improve its social media presence utilising well known platforms. Furthermore, we will launch in 2018 a new APP that will compliment our website and provide our members with an easier way to engage with us when they are out of the office.

The last twelve months have certainly flown by for me and it has been a pleasure to meet and connect with INSOL members throughout the globe, wherever and whenever possible. I look forward to this continuing and am certain INSOL will still be punching above its weight in the years to come!

RICHARD TURTON AWARD

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

In recognition of those aspects in which Richard had a special interest, the award is open to applicants who fulfil all of the following:

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

Applicants for the award are invited to write to the address below enclosing their C.V. and stating why they should be chosen in less than 200 words by the 2nd July 2018. In addition the panel requests that the applicants include the title of their suggested paper as specified below. The applications will be adjudicated by a panel representing the four associations. The decision will be made by the 6th August 2018 to allow the successful applicant to co-ordinate their attendance with INSOL Europe.

The successful applicant will

- Be invited to attend the INSOL Europe Conference, which is being held in Athens, Greece from 7-10 October 2018, all expenses paid.
- Write a paper of 3,000 words on a subject of insolvency and turnaround to be agreed with the panel. This paper will be published in summary in one or more of the Member Associations' journals and in full on their websites.
- Be recognised at the conference and receive a framed certificate of the Richard Turton Award.

Interested? Let us know why you should be given the opportunity to attend the IE Conference as the recipient of the Richard Turton Award plus an overview of your paper in no more than 200 words by the 2nd July 2018 to:

Richard Turton Award
c/o INSOL International
6-7 Queen Street
London
EC4N 1SP
E-mail: jason@insol.ision.co.uk

Too old? Do a young colleague a favour and pass details of this opportunity on.

Applicants will receive notice by the 6th August 2018 of the panel's decision.

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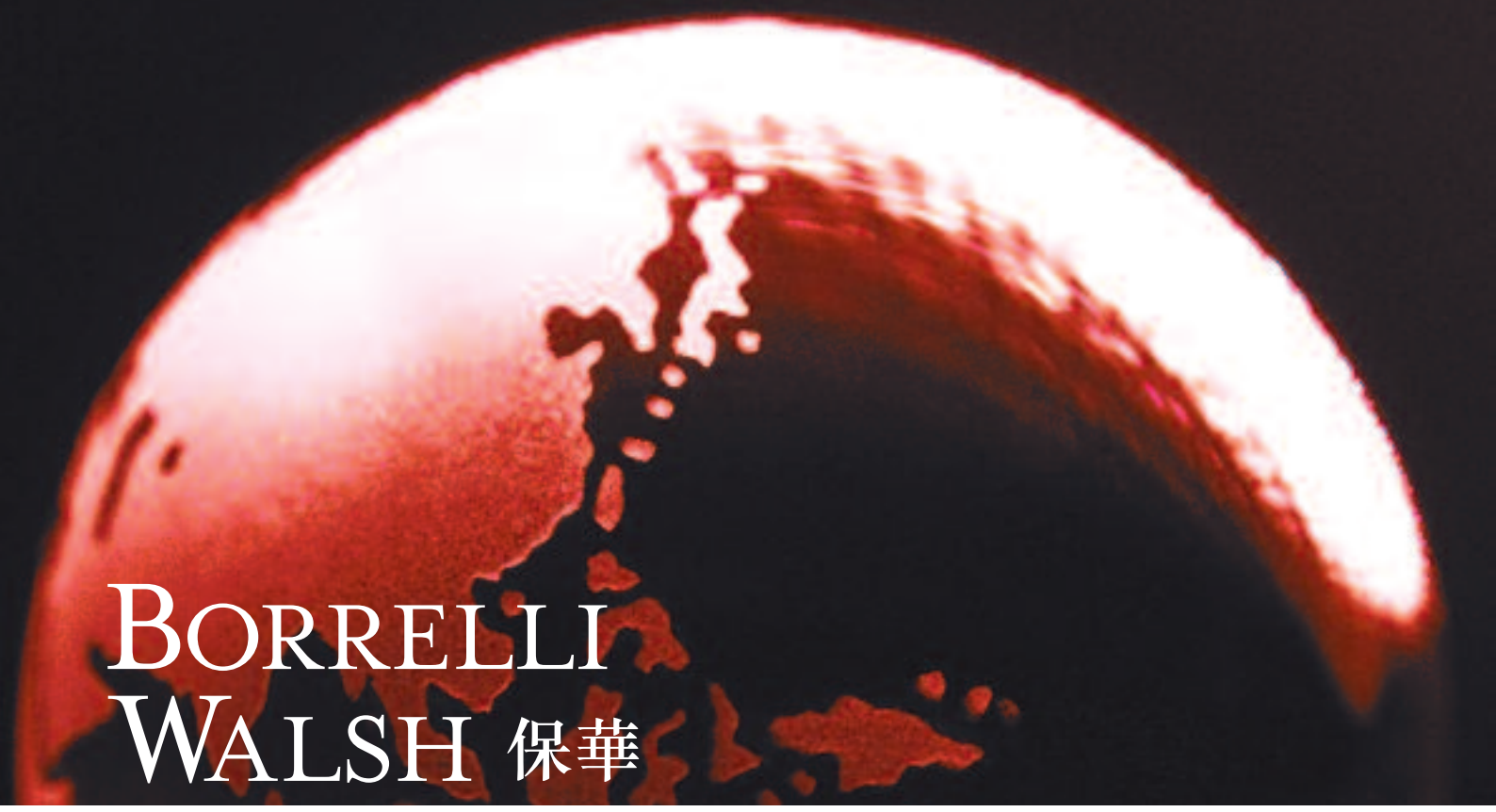

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Focus: Technology disruption and virtual currency

Bits and Bots at work – the impact of AI on the legal and insolvency professions

Farid Assaf
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Introduction

When the likes of Professor Stephen Hawking declare that the 'creation of powerful artificial intelligence will be either the best, or the worst thing, ever to happen to humanity'[1] one tends to pay attention. Microsoft co-founder Bill Gates recently opined that AI is 'on the verge of making our lives more productive and creative.' AI, it seems, has people talking. Moreover, specific AI technology is here, like it or not, and is profoundly changing (or about to change) a multitude of industries. Lawyers and insolvency practitioners are not immune from this change. While fintech start-ups and associated technologies may have received prominence in the main-stream media, legal and accounting technologies do not appear to have received as much attention. This lack of media attention however fails to reflect the rapid changes on foot, particularly in the legal industry. For example, BakerHostetler, an Ohio-based law firm founded in 1916, recently hired a 'robotic legal researcher' in its bankruptcy team.[2] Since about 2012, it has been estimated that more than 280 legal technology start-ups have raised at least $757 million[3] while the Big Four accounting firms have all started to embrace AI.[4] This article explores the current and anticipated impact of AI on the legal and insolvency professions with a view to assisting INSOL members to try and grasp the significance of these changes.

What is AI?

Despite the term 'artificial intelligence' being coined in 1956 by American computer scientist John McCarthy, there is no universal definition of the expression 'artificial intelligence.' A useful working definition is that provided by the Oxford dictionary, namely 'the theory and development of computer systems able to perform tasks normally requiring human intelligence, such as visual perception, speech recognition, decision-making, and translation between languages.' In other words, the goal of artificial intelligence is to create artificial systems to replicate human reasoning and behaviour. AI should not be confused with an algorithm. An algorithm is simply a set of instructions for solving a particular problem (think of a cookbook recipe for example). AI however is a specific research field that aims to replicate human intelligence which in most cases will utilize algorithms. As will be seen below, AI technology, particularly in the professional services sphere, has advanced considerably in recent years. Despite these advances, no technology has yet been able to pass the famed Turing Test of AI (named after the great computer scientist Alan Turing which requires an AI machine to convince a human interrogator it really is human through a series of written responses to various questions). Turing predicted technology would successfully pass his test by 2000 whereas current predictions estimate 2029 as the year computers will achieve human-level intelligence.[5] Google's director of engineering and well-known futurist, Ray Kurzweil predicts 2045 as the year in which the so-called 'singularity' is achieved, that is, that point in time where machine intelligence will dramatically exceed human intelligence.

The types of AI technologies currently available

The varieties of AI technology currently available are

1 Alex Hern, Stephen Hawking: AI Will be 'Either Best or Worst Thing' for Humanity, https://www.theguardian.com/science/2016/oct/19/stephen-hawking-ai-best-or-worst-thing-for-humanity-cambridge
2 https://www.forbes.com/sites/amitchowdhry/2016/05/17/law-firm-bakerhostetler-hires-a-digital-attorney-named-ross/#19aa5ba678c4
3 S Lohr, "AI Is Doing Legal Work. But It Won't Replace Layers, Yet." New York Times, 19 March 2017. https://www.nytimes.com/2017/03/19/technology/lawyers-artificial-intelligence.html
4 https://www.computerworld.com/article/3042536/big-data/big-four-accounting-firms-delve-into-artificial-intelligence.html
5 https://futurism.com/kurzweil-claims-that-the-singularity-will-happen-by-2045/

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extensive, however for present purposes three can be identified. *Natural language processing* is technology that allows computers to understand, and appropriately respond to, human language (the most well-known example being IBM's Watson computer who in 2011 defeated two former winners of the game-show *Jeopardy!). Machine learning* as the name suggests provides computers with the ability to automatically learn and improve from experience without being expressly programmed (Technology Assisted Review is a good example and is discussed below). *Deep learning* is a type of machine learning which uses artificial neural networks (which are modelled on the human brain). Neural network models for example have been developed for bankruptcy prediction in various industries by numerous academics.

How is AI being used in the legal and insolvency industries?

Legal technologies

Ross

What could be described as Watson's sibling, Ross is to legal research what Watson is to *Jeopardy!* The creators of Ross describe the technology as your 'own personal artificially intelligent legal researcher.' Based upon the technology behind IBM's Watson, Ross performs legal research tasks just as a lawyer would but at a dramatically faster rate. Users interact with Ross using natural language as opposed to clunky Boolean operators. For example, if a lawyer needs to know the distinction between the concepts of "loss" and "recoupment" the lawyer asks "What's the difference between loss and recoupment?'[6] Launched in 2015, Ross already is being used by legal industry heavy weights such as Shearman & Sterling, Kobre & Kim and Dentons.

CARA (CaseText)

Like Ross, CARA uses natural language research technologies to assist lawyers in finding additional case law that may not have been mentioned in a brief or memo. CARA (short for Case Analysis Research Assistant) allows users to upload a brief or memo which CARA then analyses to find additional case law relevant to the brief or memo. In the past two years, the creators of CARA have raised nearly $20 million in funding for future development of the platform.[7]

Lex Machina

Like Ross, Lex Machina (a LexisNexis company) uses natural language processing but focusing instead on 'mining' litigation data such as public court documents to provide 'legal analytics.' For example, want to know how Judge Sleet is likely to respond to a motion to transfer? By asking Lex Machina to prepare a 'Motion Metrics Report' users can see how a particular judicial officer is likely to respond to a particular application by, for example, comparing grant/deny rates to the national average.

ACE

In the United Kingdom for example, Ravn, an East London based AI start-up has developed a robot for the Serious Fraud Office that can sift, index and summarise documents just as a human investigator would but at a faster rate and without human error.[8] Ravn has developed a software robot known as ACE specifically for the SFO for use in its Rolls-Royce investigation which resulted in the engineering company admitting to a number corruption allegations in January. In the Rolls-Royce case, ACE sifted through 30 million documents sorting them into privileged and non-privileged bundles.

Technology Assisted Review (TAR)

TAR, or 'predictive coding' or 'computer assisted review', is a process utilizing computer software to electronically classify documents based on input from expert reviewers, in an effort to expedite the organization and prioritization of document collection (usually in the discovery context).[9]

[6] See for example Drew Hassleback, Meet Ross the Bankruptcy Robo-lawyer, http://business.financialpost.com/executive/smart-shift/meet-ross-the-bankruptcy-robo-lawyer-employed-by-some-of-the-worlds-largest-law-firms

[7] https://venturebeat.com/2017/03/22/casetext-raises-12-million-for-legal-research-assistant-cara/

[8] Madhumita Murgia, SFO expected to promote Ravn's crime-solving AI robot, https://www.ft.com/content/55f3daf4-ee1a-11e6-ba01-119a44939bb6

[9] https://www.edrm.net/frameworks-and-standards/technology-assisted-review/

The process has been widely embraced by courts in the USA, England and more recently Australia. In the USA for example, TAR has received judicial endorsement. In *Hyles v New York*, Judge Peck of the Southern District of New York Federal District Court observed that TAR is 'cheaper, more efficient and superior to keyword searching,' although his Honour ultimately ruled that a requesting party cannot compel a producing party to use TAR.[10] In England, TAR was used for the first time in *Pyrrho Investments and MWB Business Exchange v. MWB Property and others*; Master Matthews of the English High Court allowed the parties to use TAR for the first time in a UK court. In making his decision, Master Matthews noted that '[t]here is no evidence to show that the use of predictive coding software leads to less accurate evidence than, say, manual review alone' and 'there will be greater consistency in using the computer to apply the approach of a senior lawyer towards the initial sample (as refined) to the whole document set, than in using dozens, perhaps hundreds, of lower-grade fee earners...'[11]

Uses by insolvency and accounting professionals

The Institute of Chartered Accountants of England and Wales (ICAEW) published a paper titled 'Artificial intelligence and the future of accountancy.'[12] The authors point out that, to date, there has been limited use in real-world accounting but early research and implementation projects include; using machine learning to code accounting entries and improve on the accuracy of rules-based approaches, enabling greater automation of processes; using machine learning-based predictive models to forecast revenues and improving fraud detection through more sophisticated, machine learning models of 'normal' activities; and better prediction of fraudulent activities.

Recently, PwC partnered with Silicon Valley based H2O.ai to build a 'bot' that uses machine learning to 'x-ray' a business in its auditing arm. Known as 'GL.ai', the bot examines every uploaded transaction, every user, every amount and every account of an audited business to find unusual transactions (indicating potential error or fraud) in the general ledger, without bias or variability. GL.ai is now being trialled on audits in Canada, Germany, Sweden and the UK.[13] Earlier this year, KPMG launched KPMG Ignite described as 'a portfolio of artificial intelligence capabilities aimed to unlock the value of AI by enhancing, accelerating and automating decisions and processes that support clients' digital transformation journeys.'[14] One specific example given by KPMG is the development of an 'AI Anomalous Event Prediction Tool'[15] which is described as the use of artificial intelligence techniques to develop a model for predicting future events which would appear to capture predicting insolvency events. On that point there is a significant body of academic research suggesting ways in which artificial intelligence (and in particular neural networks) can be used to predict insolvency,[16] which has developed over the past two decades. Initiatives such as KPMG Ignite may start to see the development of real world applications of this significant body of research.

The future

There is no shortage of dire predictions for the impact of AI on professional services. Last year, Lord Thomas of Cwmgiedd, Lord Chief Justice of England and Wales, observed that 'it is probably correct to say that as soon as we have better statistical information, artificial intelligence using that statistical information will be better at predicting the outcome of cases than the most learned Queen's Counsel.'[17] In November 2016, researchers from the Massachusetts Institute of Technology and the University of North Carolina Law School studied the automation threat to the work of lawyers at large law firms and concluded that implementing all new legal technology in place immediately would result in an estimated 13 percent decline in lawyers' hours.[18] Yet for all the advances in technology to date, there is still a while to go before lawyers and insolvency practitioners are rendered obsolete. As the head of EY Global Assurance Innovation, Jeanne Boillet, recently stated, while 'AI can do a lot … there's a lot it can't do, and we cannot rely on it to deliver skepticism and judgment.'[19] While there may be uncertainty surrounding the precise impact of AI on professional services, one thing that is certain is the rapid rate of technological development in this space is a matter which legal and insolvency professionals would be wise not to ignore.

[10] https://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2010cv03119/361399/97/
[11] http://www.arma.org/r1/news/newswire/2016/04/26/uk-court-approves-tar-for-first-time
[12] ICAEW IT Faculty, AI and the Future of Accountancy Report, http://www.icaew.com/en/technical/information-technology/technology/artificial-intelligence-the-future-of-accountancy
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[15] https://info.kpmg.us/artificial-intelligence.html
[16] https://www.researchgate.net/publication/316025971_Machine_Learning_Models_and_Bankruptcy_Prediction
[17] Lord Chief Justice, Legal Wales: Shaping the Future, http://www.journalonline.co.uk/News/1022688.aspx#.Whd4fLSZ0Wp; full address: https://www.judiciary.gov.uk/wp-content/uploads/2016/12/lcj-speech-legal-wales-shaping-the-future.pdf
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[19] http://www.ey.com/gl/en/services/assurance/ey-reporting-ai-welcome-to-the-machines#item2

Tomorrow's liquidation today

By Liam Short
Elwell Watchorn & Saxton LLP
London, UK

On 27 April 2015 Graham Wolloff and I became the first joint liquidators of a UK crypto-currency exchange. The process continues on a number of fronts, but one thing that became clear very early on was that an insolvency practitioner's tools from the twentieth century will need to be updated for the twenty-first.

The appointments

Our role began in a common enough way with a creditors' appointment as liquidators of an associated company Moopay Limited (In liquidation) and then provisional liquidators of Mintpal Limited (In liquidation). Moopay provided a payment processing service, which at its peak had 90,000 customer accounts. Mintpal was incorporated in April 2014 and had been intended to operate as a crypto-currency exchange, but in fact only operated for 4 months before customers began to complain about failed transactions and an inability to access accounts.

A petition was presented by creditors of Moopay in October 2014 leading to a winding up order in the English High Court on 15 December 2014. An application for the appointment of provisional liquidators was made in relation to Mintpal on 31 March 2015 and a winding up order was made on 27 April 2015.

Once appointed, we discovered that Mintpal and Moopay were insolvent because one of the directors, had, so we allege, simply stolen the customers' crypto-currency and spent it on fast cars, holidays and casinos. That in itself is a regrettably common enough event, but the challenges that it has given rise to are not so common.

The crypto-currency context

The crypto-currency the world is most familiar with is Bitcoin, which has made its mark in the mainstream press with its stratospheric rise in value from around US$ 350 in December 2014 to around US$ 17,000 in December 2017. Outside the control of central banks, Bitcoin and other crypto-currencies are digital mediums of exchange which utilise block chain technology to create and preserve a secure decentralised currency whose value is entirely a function of demand. The block chain itself is a publicly maintained ledger which records crypto-currency transactions by modifying the block chain file. The block chain is maintained, modified and reconciled by Bitcoin miners who are rewarded with Bitcoin.

Ownership of crypto-currency is evidenced by a key which is stored in a software wallet. Each key has two parts; the public part as identified in the block chain, and the private part known only to the owner of the currency. A transaction involving a crypto-currency is effected by the delivery of the private side of the key, with the transaction being publicly memorialised in the block chain.

Mintpal

On taking the appointment, we quickly identified a number of apparently improper transactions authorised by a director of the company who appeared simply to have appropriated the customers' crypto-currency deposits valued at £1,651,091 when 1 Bitcoin was valued at £294. At today's prices, the misappropriated deposits would have a value of close to £84m.

Cash or Asset

One of the more important unknowns with crypto-currencies is whether they are a class of asset or a form of currency. If Bitcoin is to be treated as a non-sterling currency, following rule 14.21 of the UK Insolvency Rules (IS 1024/2016), we would fix an exchange rate for claims referable to the date of the petition. The creditors would not be entitled to the return of their Bitcoin, and with the petition date being early 2015 they would be entitled to a claim converted at 1 Bitcoin to £294. Following the decision of the Supreme Court in *Re LBIE* (In administration) (No.4) [2017] 2 WLR 1497, none of the creditors could claim for any currency exchange loss. The balance of the assets would then go to Mintpal, to be paid out to the shareholders, including the delinquent director Mr Green.

Alternatively, if the Bitcoin is to be treated as an asset and the creditors are entitled to claim its value, the creditors may file any number of amended claims to reflect the variations in value. The potential for the dramatic fluctuations in the value crypto-currency assets may lead to adversarial position between the Joint Liquidators and creditors as to when a dividend should be declared, or even claims in damages when a liquidator is said to have declared the dividend too late or too early.

The impact of this unresolved issue remains to be determined, and the position is complicated further by the fact that only a small proportion of creditors with claims appear to have claimed. It seems that this is a matter which will only be resolved by full argument before the Court.

Asset Tracing

As the Bitcoins allegedly appropriated by the director concerned would be stolen property, and assuming the transaction took place under English law, title could not have been transferred. But in a reverse of the usual situation, we

could see the transactions evidenced in the block chain, but had no idea who the counterparties were.

Although jurisdiction arguments were not advanced on the winding up applications, the nature of Mintpal's business and the way in which it was conducted suggest that there was certainly room to argue that England was not the automatic choice as the appropriate jurisdiction for the appointment.

But even with the sophisticated tools available under English insolvency law with its 100 years of development, the routes to recover Bitcoin assets were less than clear. The key difficulty we have encountered is the public/private split and the inability to identify who owns a particular wallet.

Some wallets can be identified from public information, such as retailers or commercial enterprises who accept payment in Bitcoin, but these are a tiny fraction of the software wallets in existence across the globe. Analysis of the block chain might reveal a coincidence between a wallet and a retailer, but it would take a vast amount of resource to identify who of the customers in any particular store at any one time, is the owner of any particular wallet given the time it takes to update the block chain and verify a Bitcoin transaction.

Alternatively, say we could identify the key programmers who had written the block chain, we might seek orders compelling then to reverse the transactions by re-writing the block chain. But the identity of the original programmers remains a mystery, and even if they could be compelled, the impact of rewriting the block chain on the millions of legitimate but anonymous third-party transactions would be significant.

The English Court could make orders under sections 236 and 237 of the Insolvency Act 1986, but questions remain as to what information we would be asking for, and who we would serving those orders on.

The positive in this case is that the director concerned is not only in custody, he is also now a bankrupt with an active trustee in bankruptcy. The Police have taken an active role and with the benefit of powers under the Proceeds of Crime Act 2002 and we continue to make progress to recover assets for the benefit of creditors.

Conclusion

As Joint Liquidators of Mintpal and Moopay we have had a difficult task taking the first steps to liquidating a truly digital company rather than a company that just happens to have some assets in crypto-currency. The challenges exist on a number of levels and cover multiple aspects of the modern insolvency processes, only two of which have been identified in this article, but we are confident they can be surmounted.

The process continues.

Crypto-Currencies and Insolvency

By Alex Carter-Silk
Brown Rudnick
UK

PART 1

1 CORPORATE STRUCTURES AND CRYPTO TOKENS

Ever since man began to trade, he has created tokens which have some intrinsic or representational value. Rare spices, gold and gems have been used as a medium of exchange. The second element of any commercial transaction is authentication. If A sells to B, a horse, B must be able to prove that the transaction has taken place.

In the US the Bill of Sale was developed as evidence of title for moveable assets, and across the world complex registration and physical authentication methods, seals , deeds and signatures have been used to establish that transactions have occurred. In some transactions involving high value assets, escrow agents will hold the money until the buyer agrees that the delivery criteria have been satisfied.

One might, for convenience, divide transactions into those involving the delivery of assets (real property or moveable property) and financial transactions which are completed by (for example) the transfer of a certificate or financial instrument and electronic transfer of funds.

The latter form of transaction has since industrialisation been managed by intermediaries such as banks, exchanges and brokers who receive the monies, register ownership and record the transactions.

The requirement for all transactions to pass through centralised banks and financial institutions has obvious advantages for government and the regulation of transactions, but it's expensive, slow and requires access to bank accounts and clearance systems. Crypto currencies enable individuals to pass value directly between themselves without centralised over-watch.

With a centralised banking system government could require banks, for example, to make deposits at the Central Bank or to hold government bonds, the fiscal authority can regulate the amount of "money" in circulation and control the credit availability in a managed economy. Those who buy and sell money can be easily controlled. The central depositories also act as proof that transactions have occurred.

Before the creation of the block chain there were limited ways that two parties could make remote trusted transaction without going through a centralised authority. The advent of the block chain and the distributed ledger could in time dispense with large parts of central clearing systems or the need for expensive transaction settlement systems.

The first to arrive and best known crypto token is of course Bitcoin, but there are many others which have the attention of the investment banks; Ethereum, Ripple, Lite coin to name but a few. The fundamental difference between a crypto currency and a fiat currency is that in the latter case the state has dictated that creditors must accept fiat currency in discharge of a debt. There is nothing to prevent individuals from agreeing what they will or will not accept.

As there are no actual digital Bitcoins held in a Bitcoin wallet or at a Bitcoin address, one cannot point to a physical object, or even a digital file the question arises as to whether a Bitcoin, or other token are properly characterised as "money" or a "commodity"

There are only records of transactions between different addresses, with balances that increase and decrease. If you want to work out the balance of any Bitcoin address, the information isn't held at that address; it must be reconstructed by looking at all of the transactions that have ever taken place in the blockchain.

2 ASYMETRIC ENCRYPTION

It's is fundamental to authentication between sender and recipient (including the block chain) that only the sender has the ability to encrypt a message (and create a hash) which one unique "public key" can decrypt. The public key will not be able to create a new identical "hash". This public-private key encryption is a key enabling technology for any digital transaction.

A Public and Private key pair comprises two uniquely related cryptographic keys. The public key is made available to everyone via a publicly accessible repository or directory. The Private Key must remain confidential to its owner.

Whatever is encrypted with a Public Key may only be decrypted by its corresponding Private Key and vice versa. For example, if A wants to send a bitcoin to B, and wants to be sure that only B can receive it, he will encrypt the data with B's Public Key. Only A, who has access to the corresponding Private Key, has the capability of

decrypting the encrypted data back into its original form. A bitcoin, or any other crypto currency, is a digital data, therefore it is fundamental to any peer to peer system that only the intended recipient can receive and authenticate the data.

The output from a block of data which is encrypted in this way is a "hash". This "hash" is unique to the key which created it and to the precise block of data which was encrypted. If the data is changed in the slightest regard, the key will not produce an identical hash.

That is not enough, as the parties need to know that the block of data which represents the digital token can only be transferred once. The public block chain which underpins crypto currencies such as Bitcoin is underpinned by the combination of three technologies; 1) private key cryptography 2) a distributed network with a shared ledger and 3) an system of incentives to service the network's transactions, record-keeping and security.

3 CREATING THE BLOCK

Using bitcoin as an example; any transaction requires the sender to create a number of pieces of information; a record of which bitcoin address was used to send the bitcoins to A in the first place; details of where those bitcoins were received from, and the amount of bitcoins being sent. The transaction must also include an "output", namely the address of the recipient's bitcoin wallet. The transaction is then signed using a private key.

This is then sent from a "bitcoin wallet" out to the wider bitcoin network. The Bitcoin protocol requires that the "miners" produce a "hash" from the data they receive which records the transaction. This "hash" is created by adding a random number to the source data (a nonce). The Bitcoin protocol can only accept a "hash" which has a set format of characters. To compute mining software tries many random numbers (nonces) until the software produces an output which is acceptable to and recognised by the Bitcoin protocol. The miner is then rewarded by being awarded bitcoin for its effort. The output "proof of work" can then be added to a block.

The combination of the random number generation, delay and time stamping of the transaction and keeping this as a single chain which is distributed and replicated across all nodes in the network means that each record of a transaction cannot be replicated and once mined and added to the block cannot be undone. All transactions are distributed across all nodes in the network (distributed ledger), the block is stored, chained with all previous transactions distributed across every "node" in the network. There is no one central repository, no central control, but only one blockchain.

4 CRYPTO CURRENCIES AND WALLETS

The owner of a token must keep a digital record showing that a particular wallet/ID received the benefit of a transaction which is recorded on the distributed ledger. Whilst the transactions cannot be lost or corrupted, the storage and ownership of the wallet is vulnerable. If a wallet is lost or hacked, then the transaction balances can be transferred or lost forever.

A Bitcoin is a record of a series of transactions which is retained by a recipient in an encrypted wallet. If that wallet is lost (assuming no back up), or the Private Key is lost, then the contents have gone forever. Unsurprisingly some people choose to use hosted solutions for storing those wallets. There have been some notable disasters including the man who threw away a hard drive containing a wallet with $80m of bitcoins[1].

There are numerous wallet solutions, vaults and physical (hard) and service providers who will provide secure platforms to store wallets, but there will always remain a risk that a technology failure could result in a total loss. If the digital identity of the wallet is hacked, then the "tokens" will be lost. Anonymity of ownership cuts both ways, proving ownership of the wallet and preventing it being lost or corrupted, is the responsibility of the "owner".

PART 2

5 CONCEPTS OF OWNERSHIP THE NATURE OF TOKENS

The nature of and legal ownership rights to Bitcoins or indeed any crypto token must be evaluated on a case by case basis depending on the coding and the agreements between those who are legally or beneficially entitled to the data held within the wallets. Just as in the physical world, a transaction might be a promise to pay in the future in the form of a number of tokens or tokens to a certain value.

Saving a wallet on a third party server even if that system is an exchange is not a deposit in the sense of a banking deposit. Whether the token is currency or a commodity, the storage of a wallet on a third party system may be more generally considered akin to having one's currency in a security deposit box or even a map of where the currency is. The correct characterisation of each deposit will depend on the way the code is written and what agreements are struck between the principals as to how ownership and rights of the participants are recorded and what those records mean.

There are increasingly sophisticated exchanges and brokerages which can offer derivative products to those who wish to trade in crypto tokens. In those cases, the contractual relationship and liabilities are dictated by the parties. Whether the tokens or the right to transact using the specific wallet IP and Private key form part of the estate of the operating business, holding the wallets will be determined on a case by case basis and by looking to the contractual matrix.

Unlike a record in a centralised banking system, neither the control of the private key nor physical possession of the wallet on a hard-drive may be sufficient to constitute exclusive control of the residue of Bitcoins or other crypto tokens. The balance does not exist on the wallet but within the distributed ledger which may have significant implications when it comes to determining the legal rights to benefit from any transactions, especially if the exchange becomes insolvent.

[1] http://www.independent.co.uk/life-style/gadgets-and-tech/news/bitcoin-value-james-howells-newport-landfill-hard-drive-campbell-simpson-laszlo-hanyecz-a8091371.html

As a piece of code, a token could give the holder the right to exchange this for property or services, or indeed it could give the holder the right to share in the profits of a business or anything which the software engineer can dream up. The token is no more than code which is programmed to behave in a particular way in any given circumstances.

There is a distinct difference between a token which has no utility other than as a medium of exchange and a token which is issued as a pre-sale for services and which has created a value by being traded on an exchange.

If the token is a free standing tradeable "currency" then it should survive insolvency. By contrast if the token is functionally a "utility" token any value in the trade of that token would always be dependent upon the expectation that the token can be redeemed at some time in the future, in which case, the failure of the underlying business would render the token valueless.

6 DISTRIBUTED LEDGERS AND SMART CONTRACTS

In the corporeal world, contracts are made by writing or by speaking. Some electronic trading systems can trade securities according to pre-programmed rules. Once the trade is completed settlement systems sort out payment and registering the transfer of the securities.

In the tokenised world the transaction and settlement happens instantaneously between the parties (peer to peer) without the intervention of a central agent. A token can be programmed to behave in a particular way and in accordance with a pre-selected set of parameters.

Similarly, the parties can engage in third party agreements such as auctions which are automatically executed and tokens transferred. The way in which the token behaves is dictated by its code. By accruing the token, the recipient accepts that code and all of the implications which flow from it. The agreement between the token holder and the issuer is determined by the code or what is referred to as a "smart contract". By accepting the token, the purchaser accepts all of the idiosyncrasies of the underlying code. There is no need to sign or agree to terms, the code is published so everyone knows what it does.

Ethereum, unlike Bitcoin, supports smart contracts that execute automatically. Though it garnered significant attention from the start, Ethereum's biggest moment came in April 2016, with a radical experiment called the Distributed Autonomous Organization, or the DAO. Created by German blockchain start-up Slock.it, the DAO had an ambitious goal—to build a human less venture capital firm that would allow the investors to make all the decisions through smart contracts. There would be no leaders, no authorities. Only rules coded by humans, and executed by computer protocols. Launched on April 30th, by May 21, it had raised $150 million from roughly 11,000 investors. Then the DAO code was hacked.

On June 17th the money was stolen. A live video feed recorded the robbery. By the end, the hacker, who has said that he was simply taking advantage of a technical loophole in the DAO, had amassed $50 million in ether, based on current exchange rates. The solution was to "hard fork" the Ethereum block chain. Essentially, despite the fact that the DAO was not part of the Ethereum platform, the Ethereum foundation pressed the reset button and eliminated the DAO, rolling back the code to a point before the DAO was created.

In this case the fraud was neutralised by action taken by Ethereum itself. For a trustee in bankruptcy it's not possible, as the law stands, to shut down a business which is operating on a distributed basis.

It can't simply be shut down by a cease-and-desist order delivered to an office, or cart away servers. That's because that particular pool of funds exists as an application on the Ethereum blockchain, which is dispersed around the world on whatever servers run its code.

7 THE STRUCUTRE OF TOKENISED BUSINESS

There are many different corporate structures for businesses which envision token issue as a viable funding strategy.

Once the software has been implemented, the code is uploaded to the cloud, participants can contribute and be rewarded using digital tokens as a medium of exchange, whether the system provides access to on line games or mobile telephone services (to name but a few). All of this can occur without any interaction with "management". The concept of "equity" can be bypassed completely. There is no need for the code to be owned as such; the right to change and develop the code is independent of any concept of ownership. Crypto-currency has its origins in the open source community whose objective was to prevent corporate ownership of the product of software developers.

In one form of structure; company A raises conventional equity capital to build an operating platform (software). Company A then licenses the software to company B which may be, for example, a company limited by guarantee. In consideration of the license company B passes fees/tokens generated by the platform back to the licensor. The owners of the tokens frequently have no legal redress or interest in the operating company which often owns the software and any Intellectual Property Rights.

The initial motivation for the development of ICO's (Initial Coin Issues) was the developer's desire to fund development, by tapping into a broad base of "investors" who in return for a service in the future, the so called utility token, the buyer would pay for the token in tradeable tokens such as Ether or Bitcoin.

The advantage to the issuer is fast access to capital (not equity). The advantage to the buyer is a bundle of rights which the buyer hopes will be worth more as the platform develops and the tokens come to be redeemed.

The "token-omics" (economics of the token) need to be worked out for each case. In order to make a token issue successful, the token needs to be "listed" on one of the crypto exchanges. An exchange will only list the token if the exchange operators believe that the token will "trade" in sufficient volumes to be remunerative for the exchange, that trading presents the opportunity from fluctuation in the value of such tokens.

8 REGULATION

It is repeatedly said that crypto-currencies and businesses

who issue tokens are unregulated. That statement is not true.

Most law and regulation is "technology neutral". Existing regulations for payments, e-monies and securities, the rules for money laundering, proceeds of crime and host of other legal principles apply to the digital crypto-currency world just as it does in the corporeal world. If the token provides the buyer with a share of profit, then the rules relating to securities will apply. If the seller wants to sell such tokens to the public which carry dividends, bonus token or distributions then these are benefits linked to the profits of the business; the rules relating to investor protection will apply as will KYC (Know your Client). It is perfectly feasible to digitise shares in a company. It is also feasible to sell a share in future profits without equity ownership, but that does not step the operators outside of the established investor protection regulation.

9 MT GOX

In July 2010, Mt Gox (which had been one of the first Bitcoin exchanges was handling 70% of all Bitcoin transactions) and was incorporated in Japan. In February 2014 Mt Gox filed for bankruptcy. Mt Gox lost 850,000 Bitcoins, $450,000,000. It remains unclear whether these tokens were hacked or embezzled.

Furthermore, when one of the customers sued for the return of his Bitcoin deposits, the issue that came before the court was whether the user could prove "ownership" of the Bitcoins. The court refused the application for the return of the Bitcoins on the basis that the Administrator of the private key related to the Bitcoin could not be seen as "detaining exclusive control" because "no electromagnetic record representing the account itself exists on the Bitcoin address. As set out above there is no "account" and no coin as such only a series of transaction recorded in the blockchain.

The ruling effectively left the users with a damages claim, rather than a proprietary claim for ownership of the Bitcoins themselves. The value of the claim at the date of insolvency was set at one Bitcoin to 50,000 Yen.

By November 2017, the value of the Bitcoin had reached $9,500 each or $1.2 billion. After the payment of the creditors the balance of the value will be returned to the shareholders.

Whether such a technical analysis of the ownership of tokens would be applied by other courts is highly questionable. The UK courts take a much more purposive approach to contractual and equitable relationships. Certainly the users of the Mr Gox system would, if asked have said "I own the Bitcoins", and that was clearly what was intended. The idea that the "owners" of the Bitcoins should have a damages claim suggests that the deposit of Bitcoins in a wallet on an exchange server is akin to a banking deposit and a debt which has significant implications for regulators.

The insolvency of virtual businesses, DAO's and exchanges is very likely to be the ground on which the legal rights surrounding the creation, transmission and ownership of digital tokens will be worked out.

How digital forensics and eDiscovery services can assist insolvency practitioners

By Sean Cordes and Alex Clarke
LDM Global

Complex or contentious insolvency proceedings often cause confusion for legal teams who don't always have full access to the entity and need to move quickly to preserve data. Digital forensics and eDiscovery services can offer vital support to insolvency practitioners for dealing with these complicated matters, as well as helping with more standard matters.

Data Identification and Preservation

During an insolvency, it is imperative to identify and preserve the debtor's data immediately. Once the possible data sources are identified, computer forensic experts can collect the data in a defensible and repeatable manner. The forensic documentation process should be meticulous enough to stand up to any scrutiny ("Defensible"), and repeatable, or producing the exact same result when followed by an alternative expert.

If you don't preserve the data and are later faced with litigation, it is difficult to rely on the electronic evidence in your defense; the data will not be defensible. For example, the team may have been opening documents to review, which alters the metadata even if no changes are made to the content. Given the relatively low costs and widespread availability of technical capabilities when conducting a preservation exercise, every precaution should be taken for data preservation and collection.

When it comes to analysing the data, forensics tools can be useful for culling the data before processing it for analysis. Then, there are a number of strategies depending on the circumstances:

- Organising the documents, made much easier with technology and review tools, allows IPs to find the relevant information more quickly and efficiently. Creating a chronology of events can help to uncover whether there was fraud or why something happened at any point in time. Additionally, built-in quality checks identify whether there are gaps in the data, such as email communications missing when the other side won't give you all the information.
- Using concept and social analyses to help perform "asset tracing exercises" and investigations allows you to follow the money and find the fraud.
- Developing a SQL backend to build models of equitable tracing principles such as the Lowest Intermediate Balance Rule (LIBR), Last In First Out (LIFO), and/or First In First Out (FIFO).
- Utilising Information Sharing Agreements (also known as Information Management Agreements). An Information Sharing Agreement allows one or more parties to obtain data that is co-mingled with other data. The agreement uses an independent party to collect and search the data so that only what is relevant to the party is handed over.

Forensics and eDiscovery services can provide a boon regardless of the amounts of data. However, in matters with very large amounts of data, it is almost critical to use these services. LDM Global helped with a recent case in which 30+ terabytes of data needed to be preserved and collected. A team of forensic experts went on site for a month forensically to collect the data. Prior to releasing data to the relevant parties, the data was ingested in a forensic platform where culling processes were implemented to reduce the data set. Putting the data in a forensic platform allows the client to take advantage of culling features prior to the data entering further processing and review phases, helping to control costs.

Case Study: Seeking information on a small budget

Support for insolvency cases need not be expensive to be successful. This was true in a case in which the client was able to get a view of the documents without fully processing the data.

A brokerage firm in the Caribbean was investing money on behalf of investors. However, the brokerage firm was unable to service their debts as they fell due and entered into official liquidation. LDM Global was engaged by client Chris Johnson Associates Ltd. to help with identifying, collecting and preserving the data.

Graham Robinson, one of the appointed Joint Official Liquidators, said that, from the onset, the case was difficult and complicated. It was what Robinson called an old fashioned "hostile" appointment not supported by the director and owner of the companies. There were two closely linked companies, and though the documents for the brokerage firm were in their own office, the office space was leased by the other company. Thus, gaining access to the office was not easy.

Once access was granted to the office, LDM Global's director promptly went on site with Chris Johnson Associates personnel to ensure data was defensibly collected from the servers and workstations.

LDM Global's forensic consultants then performed keyword searches on the data using a forensic tool to help identify key documents. Robinson said this helped with providing background information on the case and helped to piece the puzzle together.

"What's been really difficult is tracing the assets," Robinson said. "There is no physical person whom we can talk to and ask questions, so the information found on the servers has been very valuable to us. It was obvious that the company's records were incomplete and not up to date. It's an old-fashioned way – using new technology – to get the data and search through this information in an

attempt to locate assets."

This keyword search process benefitted the client by allowing them to get a view into the documents without having to go through the whole processing procedure, which would have taken longer and increased costs.

Processing uses powerful hardware and software to process the collected data into a fully searchable, hosted database. Processing includes text gathering (which allows documents not previously word searchable to become searchable), indexing, capturing of metadata fields, unbundling compressed files and the potential for preliminary culling by date range. This also requires a variable amount of manual intervention to manage corrupt, encrypted or password-protected files. Avoiding this processing stage while still giving the client a look into the documents provided value quickly.

"We're really at the stage now where we can put the picture together from the documents. The work done to date has highlighted a number of potential investigation issues," Robinson said. "But, if the liquidators don't get the necessary approval from the creditors and the court to continue with the investigation, then we won't go through with processing the documents into a platform for review and won't incur those costs."

"What LDM can offer liquidators is an invaluable tool to assist us in our primary objective of protecting assets. This case highlights that, even on a small budget, LDM can offer solutions that work."

Case Study: Dealing with co-mingled data in a defensible way

This case involved two insolvent funds trying to get data from an investment management company. LDM Global was brought in to consult and be an independent third party to ensure the investment manager's confidential information was not shared and that each company managing the funds did not get the other company's data.

Because the two funds were managed by the same investment manager, the funds wanted to ensure that their data was correctly segregated and preserved. LDM put forward a process for them to do this while sharing in the costs. An information management agreement, or IMA, was designed to allow LDM Global to act as the independent third party. The client said LDM Global provided valuable insight during this IMA process.

"I appreciated the input at the outset on the IMA," he said. "It turned into quite a lengthy legal document and (LDM Global's director) told us when he thought outside legal input was needed. I quite liked LDM's role in that process."

After all parties had signed up to the IMA, LDM Global collected data from the cloud, servers, and two workstations. The data was then processed, after which LDM consultants ran keywords and various analytics across the corpus of data. This resulted in four data sets: One unique to Fund A, one unique to Fund B, one unique to both funds' search terms, and one of the restricted/privilege data set. The IMA called for overlapping documents to go to an adjudicator who would decide which documents would go to which fund.

To help lower costs the funds would need to pay to the adjudicator, LDM Global's consultant helped devise a creative solution to provide to both funds limited metadata for the documents that overlapped. This way, the funds' team could look at fields such as "to," "from" and "email subject" and decide whether there were items that were not pertinent to their case. LDM Global used Assisted Review to determine the likelihood that the overlap documents were related to each fund.

The project was challenging and required high attention to detail to ensure the terms presented by each side could not be used to influence the other. It benefited both clients by allowing them to streamline their processes and ensured defensibility and protection of documents and data.

Conclusion

When it comes to insolvencies, there are a number of digital forensics and eDiscovery services that can support the matter. A one-hour consultation call with an expert, such as LDM Global, will allow insolvency practitioners to discuss their matters with an expert and receive recommendations on support.

About LDM Global: LDM Global has been in business for more than 20 years and provides digital forensics, eDiscovery and cyber security services to law firms, corporations and insolvency practitioners. With offices around the world, including in Guernsey and the Cayman Islands, LDM Global can support at any location. Learn more at ***http://www.ldmglobal.com****/.*

Digital Disruption

By Ian Renwood
Head of Digital
Ferrier Hodgson
Australia

Disruption is real

"We need banking, *but we don't need* banks *any more."*
Bill Gates 1994

This famous Gates quote may have been uttered almost 24 years ago and for many futurists it may have taken longer than expected but in 2018 established players in almost every industry would concede (at least privately) that their organisations are facing a sustained threat to their traditional business models. Evidence of this is everywhere; from Uber and Lyft in the transportation industry, Airbnb in the hotel industry, Amazon in the retail industry and Waze in the navigation industry. Companies such as Facebook and Twitter have created industries that did not exist when Gates uttered this quote. The changes being confronted by organisations today is at its greatest since the industrial revolution.

What are the key technologies enabling this disruption and how can organisations utilise these technologies to disrupt themselves and drive their own turnaround?

Technologies that enable disruption

The evolution of technology has enabled significant changes in the way technology, particularly IT infrastructure, can be harnessed as an enabler to transform an organisation. This is a significant change. Until quite recently organisations, particularly in the SME sector, would view the capital outlay as a significant constraint on an organisation's ability to use technology to transform. The key technologies that have enabled this disruption are profiled below; neither this list nor explanations are exhaustive.

Cloud

The most revolutionary transformation and bedrock for wide-spread disruption is cloud technology. Amazon, via their Amazon Web Services (AWS) subsidiary, is a great example of disruption. Initially developed so Amazon could scale their online store empire, it was so revolutionary they decided to offer the service more broadly and AWS was born. They have since been followed into this space by Google, Microsoft (via their Azure platform) and others. The key services ("X"aaS) delivered via cloud are Infrastructure (IaaS), the environment upon which applications are developed or the Platform (PaaS) and a complete application solution or Software (SaaS). These services can be delivered to the consumer via the public internet known as the Public Cloud, from within an organisation's own environment known as the Private Cloud or via a combination of the two known as the Hybrid Cloud. While all cloud environments are characterised (compared to traditional infrastructure) as self-service, variable cost, scalable and fast to deploy, the Private Cloud has the added advantages of increased control and security. It's the cloud that's the building block for most of the disruptive success stories, as the capital constraints for go-to-market (especially the hardware element) are removed. The use of the cloud is a significant enabler for any turnaround. It can deliver significant cost reduction to an organisation's IT budget, it moves costs from CAPEX to OPEX that's tied directly to consumption and provides a platform for the rapid development and deployment for new products and services.

Big Data

From a disruption standpoint, the most critical Big Data innovation has come within a subset known as databases. The evolution from the traditional database, broadly known as a relational or Structured Query Language (SQL) database to a distributed form of database known as the Not Only SQL (NoSQL) database is the most underappreciated technological development of the last decade. While the traditional relational SQL continues to play a role for mission critical records such as customer and payments data, NoSQL databases have increased scalability, delivered faster speeds for interrogation and deployment (minutes vs weeks) and lower cost of ownership. This enables companies to analyse large amounts of data, both structured (e.g. spreadsheets and customer records) and unstructured (e.g. email messages and social media) enabling the company to generate rapid insights into customer and product behaviour, driving profitable business decisions. The most often cited example of NoSQL database technology is MongoDB, widely used by organisations such as Barclays, eBay and Salesforce.com, but there are others like Cassandra and Voldemort used by Facebook and LinkedIn respectively.

Artificial Intelligence

The technology most likely to drive the biggest transformation of an organisation's operating models over the next decade is Artificial Intelligence (AI). It's also the least mature of the technologies profiled. At its most basic form it represents a move from humans telling a computer how to act to computers learning how to act. The two key reasons behind the growth of AI right now is a combination of faster and more affordable computing power and the massive growth in data being generated. This growth in data is particularly important as the richer the data provided, the more efficient the AI. According to the technology research firm IDC the volumes of data generated will grow from 5 Trillion GB per annum in 2015 to 44 Trillion GB in 2020. While the application of AI has manifested itself in everyday applications such as Amazon's Alexa, Apple's Siri and Google online search, its transformational potential to business models is much broader. A recent report by Goldman Sachs (Artificial Intelligence: The fuel of productivity) identified a raft of processes automation use cases (aka Robotic Process Automation). By 2025 these use cases could deliver cumulative cost savings of $140 billion across many industries.

Architecture

The evolution of IT architecture over the last decade has also played a significant role in the rise of digital disruption. This evolution has moved organisations from traditional large-scale often multiyear software development programmes known as monolithic to a series of much smaller software development packages referred to as microservices. While this kind of approach has been attempted previously, its widespread adoption has been driven by the faster (aka agile) world of the start-up. Microservices developed for one project can be reused and reconfigured multiple times and leveraged for other projects creating efficiencies.

Another change to IT architecture is the ability for other systems (internal or external) to exchange information with an organisation's system. This is achieved by building an integration layer commonly known as Application Programming Interfaces (APIs) and has become a key building block of digital. While APIs are a standard way of consuming microservices, other existing applications can also be "exposed" by what is commonly known as an API layer. This use of APIs and the access to data, normally for a fee, has opened up new revenue streams to an organisation, which is frequently referred to as the "API

Economy". For mature organisations who are custodians of valuable data this is an ideal avenue to reinvent themselves as digital organisations and partner with newer start-ups to bring new innovative products and services to market. These ecosystems also act as a multiplier effect and can drive significant new revenue streams. Citi is one organisation who has used this approach successfully to accelerate innovation and monetise its data; it does so through a series of global innovation competitions known as the Citi Mobile Challenge.

How do you embrace digital?

The advent of digital technologies has created a significant opportunity for organisations to partner with or leverage others to build technology platforms. Many of these are aligned to an industry, for example Amazon in the retail and increasingly in the media sector. These platforms need to be carefully navigated as they often present the greatest risks to traditional business models. Traditional organisations also have a significant opportunity to partner with the start-up community and create their own industry platforms. By doing so, start-ups get access to a scalable market and established brand while the organisation benefits from the start-up's ability to innovate and execute with speed and cost efficiency. It's this speed and cost efficiency which is the biggest asset to be leveraged, rather than, as frequently assumed, the innovation itself. The majority of start-ups who succeed do so because they take an idea quickly to market and rapidly scale it; genuinely disruptive innovation, such as the shared economy (e.g. Uber & Airbnb) is relatively rare.

Properly executed ecosystems have an ability to deliver rapid short term financial benefits via new markets, products and cost savings, however they need to be viewed within the context of the overall strategic plan that ensures these short-term benefits are building blocks for a larger strategic vision.

Embracing digital to turn around an organisation has three key elements; engaging, executing and incubating.

- Engaging within the business to validate existing strategies (if any), assessing the maturity for adoption and developing roadmaps for the future.
- Executing to make the strategies come to life by identifying the appropriate partners, overseeing execution and validating the financial benefits.
- Incubating by building and teaming with digital partners to accelerate capability and unlock value.

In conclusion, the same technological innovations that have driven disruption in many industries, can be utilised to deliver speed and cost reduction to any organisation that requires turnaround. If the insolvency industry is to avoid disruption it's critical that we fully incorporate digital into our engagements.

G36 Diary

To the Members of G36! As you may know INSOL International regularly organises events in conjunction with G36 firms around the world. In the past we have seen events held in London, New York, Hong Kong and Singapore. We are looking forward to expanding our events into Australia and India this year. If you are interested in attending any of these events, please contact Hatty Norman harriet@insol.ision.co.uk

February 2018			
19	G36 Reception	Sydney, Australia	Kindly hosted by Norton Rose Fulbright
21	G36 Reception	Melbourne, Australia	Kindly hosted by PPB Advisory
March 2018			
14	G36 Reception	London, UK	Kindly hosted by Clifford Chance
27	Open Call, 12pm GMT		
May 2018			
1	INSOL New York, G36 Breakfast	New York, USA	
September 2018			
4	Open Call, 12pm GMT		
November 2018			
6	G36 Reception	Hong Kong	Kindly hosted by DLA Piper
12	G36 Reception	India	TBA

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Helpful Guidance on Fee Applications Issued for Guernsey IPs.

By Andrea Harris
Fellow, INSOL International
&
Tim Le Cornu
Fellow, INSOL International
KRyS Global
Guernsey

Introduction

In the matter of Eagle Holdings Limited (In Liquidation) (**"Eagle"**), KRyS Global made an application to the Royal Court of Guernsey (**"the Guernsey Court"**) to request an increase (**"the 2017 Application"**) to a previously approved fee estimate in accordance with Practice Direction 3 of 2015 (**"the Practice Direction"**). As part of the order approving the 2017 Application, the Guernsey Court has provided some helpful guidance to Insolvency Practitioners as to their expectations for what should be included in any future applications made under the Practice Direction.

The Practice Direction

On 19 August 2015, the Guernsey Court issued the Practice Direction, with immediate effect, which applies to all applications to place a company or other entity into Compulsory Liquidation or Administration.

All applications must include a curriculum vitae of the proposed Liquidator(s) or Administrator(s), the maximum hourly charge-out rates of the Liquidator(s) or Administrator(s) and their firms, by staff grade, as at present. Applications are also required to include:

(i) an estimate of the total fees to be charged by the Liquidator or Administrator together with an indication of the nature of any other expenses likely to be incurred, such as in seeking other professional services e.g. from Advocates and an estimate of the cost of such services where it has been possible to obtain a quotation; or

(ii) a statement that a creditor or group of creditors has agreed to underwrite the fees and expenses without charge to any other creditor; or

(iii) in exceptional circumstances, an explanation as to why it is impossible to estimate all or some of the fees and expenses at that stage, for instance where legal expenses are to be incurred, it may be difficult to estimate the cost in advance.

Applications are also required to include a description of the nature of the work to be undertaken, including any work to be done elsewhere than in the Bailiwick.

If in the course of the Liquidation or Administration it is necessary to seek a variation of the estimate or if additional information comes to light which will make a significant difference to the work involved or the total costs, an application for directions must be made to the Guernsey Court supported by a statement by the, or one of the, Liquidator(s) or Administrator(s):

a) explaining why the original estimate has been, or is expected to be, exceeded; and

b) providing details of the additional work required and the revised estimated total fees and expenses.

All applications to the Guernsey Court for directions during the course of a Liquidation or Administration must be made in written form and may be considered on the papers unless directed otherwise.

Since the introduction of the Practice Direction, Insolvency Practitioners have observed different approaches by the Guernsey Court to the substance of applications for an increase in any previously imposed fee estimates. In some cases, the Guernsey Court was critical of applications being made after previous fee estimates had been exceeded. Insolvency Practitioners often received requests from the Guernsey Court for additional information and / or clarification on the application before issuing an Order in response to a fee increase application.

Circumstances of the 2017 Application

Eagle was placed into Administration by the Guernsey Court in 2013. During the hearing for the discharge of the Administration order and to place Eagle into Liquidation in 2015, a fee estimate was requested by the Guernsey Court. In 2016, the Liquidators applied for an increase to the fee estimate in accordance with the Practice Direction, and after seeking some additional information, the Guernsey Court granted the increase requested. The 2017 Application was subsequently made for an increase in the fee estimate approved by the Guernsey Court in 2016. Both applications were made on the papers in accordance with the Practice Direction.

In response to the 2017 Application, the Guernsey Court provided the Liquidators with a number of points for which it required further clarification. The Court also requested one of the Joint Liquidators attend a half-day hearing to address those points, and suggested that in order to minimise the costs to the estate, the joint liquidator should appear unrepresented.

Judgement Note Issued by the Guernsey Court

After providing the Guernsey Court with further oral submissions, the Liquidator's requested increase in the 2017 Application was granted. At the hearing, the

Guernsey Court suggested it would provide a short note of guidance regarding the scope and form of the information with which it would expect to be provided upon such applications, so as to assist Insolvency Practitioners in future applications. (**"the Judgement Note"**).

The Judgement Note identified the following points: -

1) The Guernsey Court's function on such applications, concerning the supervision of liquidators' fees, is an oversight and scrutiny function, exercised in the interests of the creditors of the Company. The Guernsey Court, and in particular the Jurats[1], will therefore wish to keep abreast of the progress of the liquidation and the fees being charged by the liquidator(s), and to satisfy themselves that those fees, and the future fees for which authorisation is sought, are being reasonably incurred having regard to the complexity and the present state of the liquidation, and to its future anticipated conduct and prospects.

2) The Information supplied does not need to be provided in minute detail, but more in the form of an "executive summary" with sufficient detail to enable the Guernsey Court to understand the status of the liquidation, reasonableness and cost effectiveness of the increase application.

3) An estimated Statement of the Company's Affairs should be included, together with a list of the Company's creditors and the amount of their claims, with appropriate explanatory notes where applicable. This also includes estimated anticipated realisations in the period in question.

4) Sufficient breakdown and specification of relevant aspects of liquidation work to identify and differentiate them so that the Guernsey Court can identify the work which is intended to be carried out under the fee allowance that is being applied for.

5) Any contingencies should be clearly identified and explained.

6) The Guernsey Court may wish to see that creditors have been informed of the request for increased fee authorisation, including an update on the progress of the liquidation.

Importantly, the Guernsey Court clarified that its function on such applications is not to "second guess" either the work or the decisions of the Insolvency Practitioner. Rather, its role is to review the intended expenditure of creditors' monies and satisfy itself that reasonable fees for appropriate work are being charged, with a view to maximising the benefit of the liquidation for creditors.

Conclusion

The Judgement Note provides helpful guidance to Insolvency Practitioners in relation to the information that the Guernsey Court will expect to see as part of any application to which the Practice Direction applies. This is a useful tool that will help in preparation of future fee applications and provide transparency across Administration and Liquidation appointments as to the substance of applications filed with the Guernsey Court.

Should you wish to obtain a copy of the Judgment Note or have any queries, please contact the authors of this article.

[1] There is no jury system in Guernsey. Jurats act as a jury and are judges of fact in both civil and criminal cases, and decisions are reached by a simple majority. Jurats are not interpreters of law – that function is undertaken by the presiding Judge, and the Jurats must follow their directions.

The Carlyle Case: Directors and Companies(Guernsey)

By Tim Corfield
Carey Olsen
Guernsey

On 4 September 2017, Hazel Marshall Q.C. sitting as Lieutenant Bailiff, handed down a truly weighty judgment in the case of *Carlyle Capital Corporation Limited (in Liquidation) and others v. Conway and others* [2017] Civil Action 1510. Running to 529 pages, this tour de force reflected the sheer enormity of the proceedings. Surprisingly, this was the first time that a Guernsey court has memorialised the fundamental legal principles affecting directors and the companies they serve.

In July 2010 the liquidators of Carlyle Capital Corporation Limited ("CCC") commenced a claim against its former directors with a statement of claim which ran to 252 pages. The defences of the key protagonists and the independent directors ran to 305 pages and 269 pages respectively. The 85-day trial was live streamed to London, the United States of America and Australia, where parties and their ancillary legal teams were based. Alongside this Herculean administrative undertaking, Marshall LB noted the general impenetrability of the subject matter to an uneducated outsider, stating that until she had taken responsibility for this case, she could have been forgiven for thinking that, *"'synthetic shorts' were some kind of Lycra cycling gear".*

CCC was a Guernsey incorporated closed-ended investment company opened in 2006 by the multi billion dollar U.S. private equity firm and sponsor Carlyle Group. Its fixed income asset class included investments in residential mortgage-backed securities, and a specific strain thereof the *"Agency AAA capped floater RMBS".*

The word *"Agency"* denoted that the securities were issued by Fannie Mae and Freddie Mac[1], bring with it the strength of security offered by being supposedly guaranteed by these *quasi*-governmental agencies. The *"AAA"* tag denoted the perceived strength of their risk-rating and their quality, and the *"capped floaters"* aspect referencing the floating, capped rate of interest payable. These were not investments in the now infamous sub-prime mortgage backed security market, but at the time were considered to be a more certain and secure investment quality.

CCC used leverage to acquire its portfolio of RMBS using repurchase or 'repo' financing, in this case with interest rates fixed by reference to LIBOR, but lower than the capped floating rate earned on the RMBS. CCC was eventually leveraged at 37 times its issued share capital value with a portfolio of RMBS valued at circa US$23billion.

As the 2008 crisis blossomed into a catastrophe, the repo financing market constricted and obtaining continued affordable repo financing became less viable. Institutions plagued by uncertainty and no doubt disbelief, braced themselves for the inevitability of the collapse in the financial markets. CCC's lenders made drastic margin calls and sought higher haircuts on lending. CCC was simply unable to continue as a going concern, and on 17 March 2008 the directors applied for compulsory liquidation orders with a net deficiency of assets as regards creditors was at US$ 350m having lost US$ 1.3bn in only eight months.

This article is far too short for detail on the 187 plus claims brought by CCC's liquidators against the seven directors and three principal Carlyle Group, companies which in general terms covered breach of fiduciary duty and/or gross negligence as directors or shadow directors in the case of the corporate entities above CCC in the group structure, and wrongful trading. Collectively, it was alleged that from July 2007 through to March 2008, notably from the very beginning of the financial markets crisis, the decisions and actions, or lack of action, by CCC's directors or quasi-directors were wrong and/or wrongful; that the directors had breached their fiduciary obligations because they were improperly motivated by the interests of the wider Carlyle Group above those of CCC, and that they had conflicting personal benefits; further, that the decisions and actions were taken negligently and were reckless; that such neglect constituted statutory misfeasance; and further still that these decisions were taken at a time when the directors knew or ought to have concluded that there was no reasonable prospect of CCC avoiding an insolvent liquidation, *i.e.* it constituted wrongful trading.

These are ubiquitous claims in the common law world, and it has been long settled in this jurisdiction that as the concept of a limited company was incorporated into Guernsey law from England, authorities from that jurisdiction are highly persuasive. One could have been forgiven at this stage, therefore, in believing that almost 120 years' worth of now settled authority would mean that the competing teams would have known the lie of the land, and the nuance of the battlefield.

[1] Respectively, The Federal National Mortgage Association and The Federal Home Loan Mortgage Corporation.

Almost from the beginning of the trial, however, HH Marshall LB noted that the Plaintiffs' legal counsel's opening submission was that the Defendants' duties were *"heightened"* because CCC was a listed company. This was very quickly dismissed by the judge as owing more to *"rhetoric than legal analysis"*, but so commences a theme in the judgment that suggests that at every opportunity attempts were made to heighten, extend, inflate or conflate what were otherwise well-established legal principles.

Of the 187 discrete claims, not one succeeded.

At the INSOL One Day Conference in Guernsey in September 2017, less than one week after release of the judgment, it was clear that two distinct camps had quickly formed: those most likely to have the onerous task of scrutinising the conduct of directors, reporting to the court, and bringing proceedings where behaviour is found wanting the IPs and related professionals decried the judgment as raising the threshold too high in favour of protecting directors from claims of breach of duty. In contrast, those who fulfilled management responsibilities found comfort in the judgment that rightly protected those who take a seat in this jurisdiction's plentiful supply of boardrooms, for the benefit of the financial services industry.

I would suggest that on reflection, both camps are wrong.

Despite the weight and breadth of legal argument which drew on law and principles from the four corners of the globe in a case which analysed evey conceivable aspect of a company director's duties in a fresh jurisdiction in a fresh century, the judgment in *Carlyle* memorialises the fundamental principles of company law as affects directors and the companies they serve, with legal rigour and analysis, and not a little humour. When one strips away the external hype, the judgment in *Carlyle* is at its heart a restatement of legally accepted orthodoxy, as developed over the last 120 years in England and Wales, and properly applied to Guernsey companies, their directors and service providers operating in the 21st century global investment funds business, and at the same time confirming the solidity of the rules.

Further, and if nothing else, the trial and the judgment demonstrate that Guernsey as a jurisdiction, and as a court of competent jurisdiction, is versatile and adaptable, capable of hosting the most legally and administratively complex, cross-jurisdictional, heavyweight litigation, offering excellent judges, committed court staff, certainty of civil process and outstanding administrative and technological flexibility.

National differences lead to very different outcomes for insolvent European airlines

By Craig Montgomery, *Fellow, INSOL International*, **Alan Ryan, Abbey Walsh and Marvin Knapp,** Freshfields Bruckhaus Deringer[1]

In the last year, Europe has seen a trio of airline insolvencies: Air Berlin in Germany, Alitalia in Italy and Monarch Airlines in the UK. These have shown how differing approaches to continued airline trading in insolvency can lead to very different outcomes, despite a shared regulatory platform. In this article, we will look in a little detail at those different approaches and we will also compare them to the Chapter 11 regime in the USA, which has been much used by US airlines.

Germany – Air Berlin

Air Berlin faced insolvency in August 2017, when main shareholder Etihad withdrew financial support. This left Air Berlin unable to continue as a going concern and deemed 'over-indebted' under German insolvency law – trigger for a strict statutory insolvency filing obligation, backed by civil and criminal law sanctions. The directors had no choice but to file for debtor-in-possession insolvency proceedings

To ensure ongoing operations until a sale of the business and to avoid stranding hundreds of thousands of passengers during the holiday season, it was critical for Air Berlin to maintain operations using its approximately 140 leased aircraft. This required close coordination with, amongst others, the German Federal Aviation Authority, for Air Berlin to keep its Air Operator Certificate (AOC) and the Operating License (OL) which are required for flight operations. Maintaining the AOC and the OL was also necessary to avoid forfeiture of the airline's most valuable assets: the take-off and landing slots at airports. Generally, an airline must use slots at least 80% of the time, under EU regulation (the 'use it or lose it' rule).

The two most critical requirements were securing sufficient liquidity to continue to operate and maintaining continuity of control over the business by incumbent expert management. Liquidity support was provided under a €150 million priority bridge loan granted by state-owned bank KfW and backed by a guarantee from the German state, which was approved by the European Commission. Concessions by other major stakeholders and the pre-financing of three months' salaries by the German Federal Labour Office further supported the airline until the end of October, while it faced a significant decline in bookings. Management remained in control, supported by a chief restructuring officer in the debtor-in-possession proceedings, under the supervision of a court-appointed custodian.

In relation to leased aircraft, German insolvency law affords only limited protection against termination and repossession of the aircraft by lessors. Early communication with the lessors was therefore critical to prevent enforcement action by the lessors which could have resulted in an immediate grounding of the fleet. Lessors largely responded reasonably.

As Air Berlin had significant flight operations to the United States, Air Berlin also filed a petition for recognition under Chapter 15 of the US Bankruptcy Code. The US Bankruptcy Court issued a temporary restraining order within hours of the filing and granted recognition of the German proceeding as a "foreign main proceeding" several weeks later. Recognition gave Air Berlin the benefit of the automatic stay. The order, followed by the imposition of the stay, prevented Air Berlin's creditors from attempting to seize any of its aircraft in the US or to take any other enforcement action.

Immediately after the filing of debtor-in-possession proceedings, a formal sales process was initiated for the assets, including shares in operating subsidiaries.

Italy – Alitalia

Following employee rejection of a reorganisation plan in May 2017, Alitalia voluntarily petitioned for *amministrazione straordinaria delle grandi imprese in crisi* (the extraordinary administration procedure for large insolvent companies).

On the petition date, the Italian Minister of Economic Development admitted Alitalia to *amministrazione straordinaria* and appointed three commissioners to oversee the proceeding. The commissioners were vested with the power to operate Alitalia's business and administer and dispose of its property, regardless of location. The Minister required the commissioners to

[1] Craig Montgomery (*Fellow, INSOL International*) and Alan Ryan are partners, Abbey Walsh counsel and Marvin Knapp a principal associate in Freshfields aviation and restructuring and insolvency practices in London, Brussels, New York and Hamburg respectively. Freshfields acted for Air Berlin, Alitalia and Monarch Airlines.

submit a plan for Alitalia's restructuring or liquidation of all or some of its assets, within 180 days of appointment.
The commissioners arranged for an auction of the company, setting various deadlines starting with initial bids in June 2017 and ending with final binding offers in November 2017. The deadlines have since been extended, with the sale process now scheduled to conclude in April 2018. This has been seen as seeking to achieve a sale of the business as a going concern, rather than an asset sale, in which there has been interest expressed.

Throughout this process, Alitalia has largely operated on a business-as-usual basis, reducing its ongoing losses compared to previous years, and relying on approximately €900 million of financing from the Italian government.
Facing imminent rescission of key contracts by US creditors, Alitalia also filed for Chapter 15 protection, on a similar basis to Air Berlin.

United Kingdom – Monarch Airlines

With the closure of its Turkish and north African routes and a falling pound hitting revenues, Monarch, the UK's oldest airline, filed for administration on 1 October 2017. Unlike the Air Berlin process and Chapter 11, administration is not a debtor in possession process and a company in administration is run by administrators, who are restructuring professionals. It is not, in practice, possible for an airline to continue to trade in administration, given the usual requirement of the UK Civil Aviation Authority (CAA) that flight operations immediately cease for reasons of safety (including provisional suspension of the AOC). There would also be practical difficulties with obtaining insurance for flight operations and preventing creditor action disrupting operations at non-UK airports, which would mean huge funding requirements.

Monarch's fleet of 35 aircraft was very quickly repossessed by the lessors and almost all flight, cabin and operational crew eventually had to be made redundant (except for the engineering division, which is a separate legal and business entity and continues to trade outside administration).

This left hundreds of thousands of customers at destination airports requiring repatriation. For those who purchased package holidays, this was funded by the Air Travel Trust, but the vast majority were repatriated by a CAA-led operation, with the administrators providing support services, pursuant to an agreement with the CAA.
Monarch's insolvency coincided with the window for allocation of summer 2018 slots, the right to which (having operated 80%+ of summer 2017 slots) was one of the airline's most valuable assets. The slot coordinator for London Gatwick, Luton and Manchester airports sought to deny Monarch the slots, on the basis it was not an 'air carrier' under the EU regulation, having ceased operations. This would have seen the slots tipped into a pool and distributed free of charge to other airlines. The administrators successfully challenged the refusal to allocate, securing a judgment from the Court of Appeal in just three weeks. This allowed the slots to be exchanged by the administrators, securing significant value for Monarch's creditors.

In the UK Parliament, the Transport Minister announced that the UK government would look into reforms to enable airlines to wind down in an orderly manner and look after their customers themselves, without the need for government to step in. This could mean, for example, a special administration procedure for airlines, like in other key industries, but it is unlikely there will be any parliamentary time for speedy reform, given other priorities, such as Brexit.

United States – Chapter 11

It is interesting to contrast the European experience with that of the US, where, over the course of approximately ten years, beginning with United Airlines in 2002, five major American airlines (along with many other smaller carriers) have filed for bankruptcy under chapter 11 of the US Bankruptcy Code. The filings were, in a sense, contagious. As the first airlines to file reduced their operating costs, it made it harder for the others to remain competitive on price without undergoing their own restructuring. American Airlines was the last of the major carriers to file in 2011.

In each carrier's chapter 11 filing, the airline was able to continue operating while in bankruptcy and successfully reorganise (although many smaller airlines that filed for bankruptcy during the same time period were forced to liquidate). In each case, the successful reorganisation was either tied to or soon followed by a merger with another US airline, resulting in the consolidation of the US airline market down to four major players. United Airlines acquired Continental Airlines in 2010. Delta and Northwest filed for bankruptcy in 2005 and merged in 2008. US Airways filed for bankruptcy in 2002, and again in 2004 and then merged with America West. Finally, American Airlines filed for bankruptcy in 2011 and merged with US Airways in 2013. The key to these chapter 11 cases was reduction of operating costs through rejection or renegotiation of aircraft leases, pension plans and labour contracts.

Conclusion

The law on the licensing of airlines and the permissibility of government support is common throughout the European Union, as is the recognition of insolvency processes. Substantive insolvency law is not harmonised and there is significant variation in how the airline licensing regulations are applied in practice by member state regulators.

It is difficult to say if a debtor-in-possession process similar to the Air Berlin process or Chapter 11 would have allowed Monarch to fly again, but it might at least have allowed for a softer landing and for taxpayers to save the millions spent on a short-lived shadow airline to repatriate holidaymakers and instead to have assisted a rescue of the business to the benefit of employees, pensioners and the travelling public. UK reform is therefore to be welcomed.

More widely, aviation is also one of the areas in which EU member states cooperate most closely and the future shape of the industry in the UK will await the outcome of Brexit negotiations.

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Farid Assaf, Banco Chambers, Fellow, INSOL International Class of 2015 / 2016:
The Global Insolvency Practice Course offers a unique combination of practical focus and academic rigour. Taught by world-class academics and industry leading professionals, the course offers participants an invaluable opportunity to not only dramatically improve their knowledge of cross-border insolvency but also rub shoulders with the best of the best in global insolvency. Everything about the course was exemplary – from the written material, the lecturers and the tireless support staff – the Global Insolvency Practice Course exceeded all of my expectations for a post-graduate course. I cannot recommend the course highly enough and remain forever indebted to INSOL for an opportunity to complete the course and meet new colleagues and friends from around the world.

Benjamin Jones, Berwin Leighton Paisner LLP, Fellow, INSOL International Class of 2014 / 2015:
The Fellowship course was an immensely rewarding experience, if not at times towards the end pretty intense! The teaching really takes off where the text books and cases end, giving you a first-hand insight from the experts of the law and practice of cross-border insolvency and the strategy and tactics that go into achieving successful cross-border insolvency proceedings and restructurings. What I most enjoyed was the camaraderie and insight of the other fellowship candidates. I can't imagine any other forum exists for twenty practitioners from around the world, each working at the coal face of their local restructuring and insolvency markets, to get together over a number of months to discuss and debate in detail the intricacies of the international framework of insolvency law.

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Working Toward 2021 – Technical Update

Report by Sonali Abeyratne
Technical Director,
INSOL International

It has been a very busy period for the INSOL Taskforce 2021 Working Group 17.

The objective of WG17 is to develop a four-year plan for technical education production using ideas from members and academics. Following from the feedback the Working Group received from the INSOL Board of Directors, the Group is currently working to finalise an "implementation plan" to move forward with the planning of the various technical projects that have been identified so far. Many more will be added to the list as we progress in the next three years.

Alongside the Taskforce work, we continued to produce a number of publications in the last few months. In November INSOL published an excellent paper titled "Retail Disrupted – Welcome to The Hunger Games". This paper is not theoretical in nature. It highlights a range of practical issues that would be of interest to insolvency practitioners dealing with retail sector restructurings in the developed and developing markets such as - the drivers of the disrupted retails industry; common denominators of retail failure; restructuring - what practitioners need to know; and examination of the historic buy out of US fashion retailer Aeropostale (in Chapter 11) by a consortium.

We also shared with our members a very informative report on "The Protection of Intellectual Property Rights in Insolvency Proceedings". This report analyses the manner in which 12 different jurisdictions around the world approach the issue of protection of intellectual property rights in insolvency proceedings. Considering the important role intellectual property plays in the current global economy, it is surprising to find, as this special report demonstrates, that the treatment of intellectual property rights in insolvency proceedings is so underdeveloped in insolvency laws around the world. With the exception of the US, Canada and Japan, none of the countries covered in this report have detailed insolvency provisions dealing specifically with the effect of insolvency proceedings on intellectual property rights.

A special report on the rights of secured creditors in the context of the EC Directive on preventive insolvency proceedings as well as a technical report on the restructuring and bankruptcy law and practice in Poland was made available to our members.

Under the small practice technical paper series entitled "A Collection of Practical Issues Important to Small Practitioners", three country studies have been published since the last update in relation to Nigeria, the PRC and Jersey.

We are currently working on several technical projects and to name a few, readers can expect a technical paper on Uganda covering issues that are important to small practice members, a comprehensive report on the PRC bankruptcy law and practice in China to mark the 10th anniversary of the new Enterprise Bankruptcy law that came into effect in 2007, and a report consisting of 19 country chapters on the subject of insolvency of corporate groups with some suggested best practice guidelines for practitioners.

The technical program for our Annual conference in New York this year has been finalised and we promise it will be yet another high-level content packed learning experience on a range of hot topics. Registrations are open and we are delighted with the response so far.

Africa Round Table

Report by Adam Harris
INSOL President
Bowmans,
South Africa

ART (which INSOL International presents annually with the World Bank Group), has always been a vibrant and engaging initiative. 2017 was no different and with an interesting, tailor-made programme, and set against the magnificent backdrop which Mauritius offers, this was really one to write home about.

The theme of the meeting this year was "Plugging the Implementation Gap". In dealing with the implementation of new legislation, the various discussions covered a range of topics. This arose from an observation of a current trend in some African jurisdictions to implement an insolvency law which includes numerous best practices. However, notwithstanding the enactment of the legislation, it remains underutilised or perhaps virtually not used in practice at all. The focus of the project was to explore and to understand how different jurisdictions could better implement the law. This included an examination of, for example, appropriate rules and regulations, the establishment of the office of a regulator, the regulation of insolvency practitioners and the establishment of more effective institutions. Process and technology issues were high on the agenda.

The programme was topical and varied. The delegates were interested and engaged. The venue (the Sugar Beach resort in Mauritius) was superb and added to the experience. We utilised the recently adopted format of hosting the project over two separate days, the first being a closed session for regulators, policymakers, judges and academics, and the second day being an open session attended, in addition, by a number of practitioners, advisers and other interested parties from the region and abroad.

Accepting that Mauritius is a small jurisdiction, the interest shown in the project by the Mauritians themselves was noteworthy. The Minister of Justice attended and delivered a keynote address. A number of other senior personnel attended. I have to specifically mention the tremendous work done by Prabha Chinien, the Mauritian Registrar of Companies and her team. The on-the-ground assistance from the Mauritian side, the interest generated by them in the project, and their introduction of a number of sponsors and supporters to the event added to the lustre of the project and undoubtedly contributed greatly to its overall success.

Known for being a progressive jurisdiction and with their friendly assistance and support we (INSOL International and the World Bank group) were able to deliver a range of interesting and relevant topics in user-friendly format.

The attendance by international experts and practitioners also added to the occasion. Amongst others, Ms Justice Mary-Jo Heston, US Bankruptcy Court, Western District of Washington; Glen Davis QC of South Square; River Paul of the Australian Financial Services Authority; Alan Roberts, Grant Thornton, Channel Islands; James Wood, Lipman Caras, Hong Kong; Craig Martin (INSOL fellow) and Chris Parker of DLA Piper, USA/UK; Julie Hertzberg (Alvarez & Marsal, and Vice-President, INSOL International), Ken Krys of KRyS Global in Caymans/BVI, and a number of distinguished professionals from across the African continent, contributed greatly to the project, bringing a truly global perspective.

One of the highlights of the meeting was a workshop case

study developed and presented by PwC (one of the 2017 ART's platinum sponsors). They really put in a tremendous effort! The case-study took the delegates through a simulated workout, dealing with cross-border aspects of companies based in Mauritius, Kenya and Tanzania. The delegates were given the opportunity to analyse and to advise on an appropriate restructuring for the UJENZI group. The workshop, based upon an actual fact-pattern, was designed to give a flavour of the skills required of practitioners and their advisors in implementing an operational restructuring and dealing with the appropriate cross-border issues.

This year (as in the past), a number of jurisdictions spoke to developments in their own legal systems and this reinforced the need for a shift of focus from the enactment of new legislation to its implementation. Reflecting on the history of the ART (which was born in 2010) the focus has largely been on introducing delegates from across the African continent to the numerous and varied restructuring and insolvency tools available. So, historically, this meant that the emphasis was on encouraging jurisdictions to undertake reform of their insolvency legislation. What is however clear, is that reform on its own does not necessarily translate into proper and effective implementation of the law. This, in turn, has the potential of negating the benefits of the enactment of modern, purpose-built legislation.

There were too many contributors to the success of the ART 2017 to name each individually. We do thank you all for the input and contributions. Collectively, the Mauritian input and the country itself, layered onto Penny Robertson's flawless organisation of the event, ensured the success of the project and the fact that it has become not only a relevant event on the African calendar, but a sought-after date to diarise.

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INSOL INTERNATIONAL
Strang Founders' Award

Ian Strang was the first president of INSOL International and was instrumental in creating INSOL International, laying the foundations of the association that we have today.

To recognise his achievements we have created an award in memory of Ian. The Ian Strang Founders Award provides an educational opportunity for a post graduate specialising in insolvency and turnaround to attend the annual INSOL International Academics Colloquium and the annual INSOL International Conference (when held jointly).

The Ian Strang Founders' Award provides an educational opportunity for a post-graduate specialising in insolvency and turnaround to attend the annual INSOL International Academics Colloquium and the annual INSOL International Conference (when held jointly).

The applications are now open for 2018.

The Ian Strang Founders' Award will be awarded to the best paper put forward by a postgraduate covering this specific field of study. The criteria for applying for the award are as follows:

- Be a postgraduate or early-career academic researcher in the field of law or accountancy specialising in insolvency and turnaround, or a recently qualified lawyer or accountant interested in the academic as well as the practical aspects of the subject.
- Provide a paper of not more than 10,000 words with regard to areas concerning cross-border comparative or international issues.
- This paper should be an original piece of work, which has not previously been published in the form in which it is submitted.

The paper should be submitted by the 3rd September 2018. A panel of international academics and professionals will judge the papers and make the award by the 5th October 2018. Applicants are asked to submit their CV along with the paper.

The successful applicant will:

- Be invited to attend the INSOL Cape Town Annual Regional Conference and Academic Colloquim due to be held in Europe, which will be taking place at a different time in 2019. An allowance will be provided to cover travel and accommodation.
- Have the opportunity to present the paper at the INSOL International Academics Colloquium;
- Be recognised at the conference and receive a framed certificate of the Ian Strang Founders Award.
- Be encouraged to submit the paper to the International Insolvency Review with a view to its publication. The paper will also be published on the INSOL website.

Please send your application to:
Ian Strang Founders Award
INSOL International, 6-7 Queen Street, London EC4N 1SP, UK or email to Jason Baxter at:
jason@insol.ision.co.uk

INSOL International Kuala Lumpur One Day Seminar – 28 November 2017

Report by Ooi Woon Chee
President of IPAM, Malaysia

INSOL International's inaugural seminar in Kuala Lumpur, Malaysia was held on 28 November 2017 at the Hilton Hotel in Kuala Lumpur in association with the Insolvency Practitioners Association of Malaysia (IPAM). The seminar was attended by approximately 110 delegates and speakers, about 40% of whom were from outside Malaysia and were mainly from countries around the region, including Australia, China, Hongkong, Singapore, Indonesia, Brunei and India. The delegates were from various background like regulatory bodies, lenders, solicitors as well as leading insolvency practitioners.

The programme comprised 4 panel discussion sessions covering cross-border resolution and restructuring, legal developments in Asia, challenges within the restructuring and insolvency profession and the outlook for the industry. Speakers shared their experience on past cases and provided insights for the benefit of delegates who may not have had similar experience.

An Executive member of INSOL International, Scott Aktins, Fellow, INSOL International, opened the seminar with his welcome address to the delegates and speakers while the Seminar Chair, Woon Chee Ooi (President of IPAM) gave the opening remarks.

Session 1: Cross-border resolution and restructuring in a modern environment

Moderator: Rabindra Nathan (Shearn Delamore & Co, Malaysia). Speakers: Cheung Kwun-Yee (Baker McKenzie, Hong Kong PRC), Glenn Peters (Ernst & Young, Singapore), Shaun Folpp (Mourant Ozannes, Hong Kong PRC) and Tan Mei Yen (Wong Partnership, Singapore)

The panel focused on observations in relation to restructuring of debts and recent developments within their respective countries. In Hong Kong, it was noted that where there is a connection established to Hong Kong (e.g. via assets or businesses) and a parallel scheme is being worked out in other jurisdictions, the Court in Hong Kong has become more accommodative of the recognition of foreign liquidators appointment. Such recognitions, including foreign proceedings (e.g. USA's Chapter 11) are also becoming more prevalent in Singapore. The panel also briefly discussed changes in the Singapore legislation such as the introduction of a worldwide moratorium (albeit only binding on persons subject to the jurisdiction of the Singapore Court) and cross-class cram downs (this being potentially a legally challenging prospect). Speakers also explored the issue of forum shopping, where it was agreed that the jurisdiction in which relief is sought should be recognised by other jurisdictions (i.e. there is legal certainty) and taking into consideration the speed of legal actions.

Session 2 : Legal developments and legislative change in Asia

Moderator: Lee Shih (Skrine, Malaysia). Speakers: Ameya Khandge (Trilegal, India), Justice Nallini Pathmanathan (Court of Appeal, Malaysia) and Sim Kwan Kiat (Rajah & Tann, Singapore)

From a Malaysian perspective, it was noted that the introduction of the Companies Act 2016 (which came into effect on 31 January 2017) was to alleviate the deficiencies in the previous Companies Act 1965. In addition to the previous scheme of arrangement available (which continues to be available under the new Act), the proposal for Corporate Voluntary Arrangement and Judicial Management (JM) will provide more restructuring options. The panel then discussed Singapore's legal developments in its effort to be a regional restructuring hub, including the ability for foreign companies to effect a scheme of arrangement in Singapore (if a substantial connection can be established), cram down on dissenting classes, abolition of veto right of floating charges in a JM, the UNICITRAL Model Law and adoption of the Judicial Insolvency Network Guidelines. In India, the introduction of the Insolvency and Bankruptcy Code 2016 (IBC) has consolidated the previously fragmented legislative approach. While clarifications have also been issued by the Government and amendments continue to be made to the IBC for oversights, there are still various issues to be ironed out. Nevertheless, the Indian Government has taken promising steps in support of the IBC, including stricter guidelines on identification of defaulters, requiring more realistic provisioning by banks, etc.

Session 3 : The challenges facing the restructuring and insolvency profession

Moderator: Khoo Poh Poh (Ernst & Young, Malaysia). Speakers: Aji Wijaya (Aji Wijaya & Co, Indonesia), Blossom Hing (Drew & Napier, Singapore), David Heroy (Baker McKenzie, USA), Jimmy Ng (Chooi & Co, Malaysia), Lim San Peen (PwC, Malaysia) and Ng Chih Kaye (Malaysia Debt Ventures Berhad, Malaysia)

For Indonesia, it was highlighted that a major issue faced is the fact that Courts do not necessarily recognise precedent cases even where circumstances are very similar and that foreign court judgments are not enforceable in Indonesia. In addition, while it may be common for borrowers and lenders to agree to a foreign governing law, there may be issues of enforcement in Indonesia if action has been taken pursuant to the foreign governing law. In Singapore, there are often cases with multiple creditors from multiple jurisdictions where disputes settled via a Court process may be time consuming and costly. As this will continue to be a challenge, a dedicated insolvency mediation panel has been set up and stakeholders were encouraged to consider this as an option. The Lehman Brothers case was highlighted as one of the successes of a mediation process.

For the USA, it was noted that the reforms to the insolvency laws have led to a debtor driven model and greater ability for companies to restructure themselves. However, delegates were cautioned that as a result of the reforms, the costs of the insolvency process in the USA have also increased due to the multiple appointments of professionals (e.g. lawyers, accountants, etc.) to advise each category of stakeholder. In Malaysia, disruption to the banks' businesses (e.g. intermediation, crowdfunding, digital currencies, etc.) may affect the number of appointments moving forward. In addition, assets such as intellectual property and licences are also becoming more commonplace and harder to assess in terms of recoveries. Although it was previously a challenge for Receivers and Managers (R&M) to exert their powers, moving forward this is expected to be less challenging as the Companies Act 2016 has now codified the R&M's powers.

Session 4: Restructuring and insolvency outlook – boom or bust times ahead?

Moderator: Nick Gronow (FTI Consulting, Singapore). Speakers: Roger Dobson (Jones Day, Australia), Samantha Baker (Malayan Banking Berhad, Malaysia) and Srinivas Parthasarathy (Trilegal, India)

The panel noted that challenges faced by Malaysia include the dependence on commodity prices, public expenditure on infrastructure development and domestic consumption to keep the economy growing. It was also noted that restructuring and insolvency work in Malaysia had increased in 2017 as compared to the previous year. For Australia, its mining boom has wound down and interest rates remain low. However, in view of the high household debt, any increases in interest rates could trigger more restructuring and insolvency

work. Nevertheless, directors in Australia tend to recognise issues earlier and seek advice of professionals. Legislative changes may also lead to earlier restructurings (instead of relying only on formal insolvency options). India's economy appears to be growing at a stable rate but there may be unseen issues as the non-performing loan rate has increased from approximately 7% in March 2016 to 9.5% in March 2017. As the Reserve Bank of India has directed banks to target large defaulters, there are now more cases and with more expected to come. However, insolvency practitioners may not have sufficient experience to deal with the number of cases as well as the potential complexity. The panel also touched on forum shopping and noted that while each jurisdiction would likely fight to protect their legislative regimes, both borrowers and lenders can be expected to continue with this. The panel concluded that the restructuring and insolvency profession could expect 2018 to be a busier year.

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INSOL International Academics Group 20th Colloquium, London, 11-13 July 2018, BMA House, Tavistock Square, London

Report by Professor Rosalind Mason

Queensland University of Technology
Chairman, INSOL International Academics' Group

An exciting programme is being assembled for the INSOL Academics Group 20th Colloquium, to be held on 11-13 July 2018 in London. As occurred in 2016, the Colloquium is being held mid-year and hence separately from the main annual conference. This strategy in even years of settling its timing between teaching periods will, we hope, enable academics who cannot obtain leave from universities during 'term time' to attend. It is also in the northern summer which may also suit practitioners who are planning to visit, in this case, London in July.

Academics and practitioners from around the globe have been offering papers – so far representing current issues and insights from Africa, Asia, Australia, Europe, and North America. We are looking forward to welcoming some academics and practitioners to their first Colloquium. Such renewal augurs well for the future development of the Colloquium.

The Call for Papers is focussed on a number of broad topics: regional developments in Europe; insolvency and restructuring law reforms; cross-border insolvency, including communication and cooperation between courts in international insolvency cases and current topics being examined by UNCITRAL Working Group V (insolvent groups; recognition of judgments). Once again we include insolvency for Small and Medium-sized Enterprises (SMES) and for individuals or natural persons, the latter often arising from consumer over-indebtedness. Some topics that are having a global impact are developments in pre-insolvency practice as well as the use of technology in insolvency practice, notably the impact of Blockchain and Artificial Intelligence.

Not all these topics will necessarily feature on the final programme and consideration will be given to proposals for papers on Hot Topics that fall outside the list. The programme is also seeking papers on work-in-progress from early career academics and doctoral candidates.

Members are encouraged to attend the Colloquium. Academics have enjoyed fruitful discussion with practitioner members, in particular INSOL Fellows, over many years. Please also bring the Colloquium to the attention of local academic networks in your jurisdictions. For more information please contact Tina McGorman - tina@insol.ision.co.uk

Ian Fletcher International Insolvency Moot 2018

Peter A. Allard School of Law, University of British Columbia, Vancouver Canada, 5- 8 February 2018

After a wonderfully successful inaugural International Insolvency Moot in 2017, named in honour of the founding Chair of the INSOL Academics' Group Professor Ian Fletcher, it is exciting news that the Peter A. Allard School of Law of the University of British Columbia will be hosting a second Fletcher Moot next year. It is being led by long-standing INSOL Academics Group member Dr Janis Sarra and will be held in Vancouver on 5-8 February 2018 immediately prior to Professor Sarra's Annual Review of Insolvency Law conference.

The 2018 Moot is being co-sponsored by INSOL International, the International Insolvency Institute, Queensland University of Technology and the University of British Columbia. It is also made possible by volunteers who assist the moot organisers in a range of ways – such as being members of the competition committee; writing the moot problem, judging the qualifying round of written submissions; mentoring through practice moots as preparation for the oral rounds; participating on panels when the preliminary oral rounds are held in Vancouver; and last but not least, present-day judges from many jurisdictions will be sitting on the semi-final and final round benches in the Heritage Courtroom, British Columbia Court of Appeal on 8 February.

The Fletcher Moot provides a unique opportunity for universities to participate in a competition dealing with international insolvency and restructuring litigation. The moot problem required consideration of international insolvency law issues in a hypothetical jurisdiction. It is a great educational exercise requiring students to learn about the UNCITRAL Model Law on Cross-border Insolvency. Regardless of whether or not their jurisdiction has adopted the Model Law, this is a useful activity to promote learning about cross-border insolvency issues.

There are practical benefits in holding an annual competition that can become part of a Law School's mooting schedule and for which competing Law Schools' students can mentor their following year teams. The moot also raises the profile of insolvency and restructuring within the university curriculum – in particular the complexities of cross-border business, finance and insolvencies.

It also provides an additional avenue for insolvency and restructuring academics and practitioners around the world to connect. Practitioners have the opportunity to support the moot in a variety of ways. In particular, they can encourage local universities to participate, especially as it is free to take part in the qualifying written submission round.

If members are interested in possible engagement in the Fletcher Moot in future years, please don't hesitate to contact me as Chair of the Competition Committee at rosalind.mason@qut.edu.au

INSOL New York 29 April – 1 May 2018

Grand Hyatt New York

Final Booking Deadline 28 March 2018

Please be sure to register before the 28 March as delegate places are limited.

We look forward to seeing you all at the Sunday Welcome Cocktail Reception kindly sponsored by BDO which takes place at the historic Cipriani's, formerly known as the Bowery Savings Bank. It is a national landmark conveniently located adjacent to the Grand Hyatt. The reception runs from 6.00pm-9.00pm allowing delegates to meet up with old friends and colleagues and if they wish go on to dinner after the reception and sample the night life that New York offers.

We have a very exciting educational program which is preceded by an Offshore Ancillary meeting on the Sunday sponsored by Borrelli Walsh, Carey Olsen, FFP and Walkers with KRyS Global sponsoring the coffee breaks. The Offshore Meeting is preceded by an Offshore Delegates Cocktail Reception sponsored by KPMG on the Saturday evening. Details of the program can be found in the registration brochure.

The INSOL International Fellows are hosting a reception for Fellows on the Saturday evening followed by a half day forum on Sunday morning. The events are kindly sponsored by Curtis Mallet-Prevost, Colt & Mosle LLP, Davis Polk & Wardwell LLP, Nixon Peabody LLP and Schiebe und Collegen.

There will be a Small Practice Issues meeting on Sunday afternoon and a dinner on the Monday night sponsored by Porzio Bromberg & Newman P.C. For information on these events please contact Heather Callow at **heather@insol.ision.co.uk**.

Additionally, on Sunday afternoon there will be a dedicated session called "The Indian Insolvency Code – Progress and Prospects". By May 2018, the new Indian Insolvency Code will have been in place for eighteen months. The first year has been spectacular considering the progress made. The Indian government pushed the banks to file insolvency in respect of the twelve largest non-performing assets to jump start the law. The session will share the learnings from the 'dirty dozen', key issues around restructuring of assets, opportunities for professionals, interim and post administration financing issue and cross-border schemes.

The main conference is kindly sponsored by Borrelli Walsh, Lipman Karas, Norton Rose Fulbright and RSM. The program runs through Monday and Tuesday and offers break out choices on both days covering industry topics energy, retail and shipping. A review of the reform of Chapter 11 and an update on Chapter 15. New insolvency legislation in India, Russia, Africa and the UAE along with an update on Brexit, Fintech and a keynote speech on the darker side of IP- hacking, data breaches and your next restructuring engagement. A wide range of topics suggested by our members which we think offers an interesting and diverse program with subjects of interest to everyone.

On Monday evening, there is a younger members reception sponsored by Goodmans LLP. The Conference will close with the Gala Dinner on Tuesday evening kindly sponsored by AlixPartners LLP.

We look forward to seeing you in New York in 2018.

INSOL would like to thank our Conference sponsors:

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INSOL International PRC Half Day Seminars on Cross-border Insolvency and Restructuring

Report by the Bankruptcy Law and Restructuring Research Center

China University of Political Science and Law

INSOL International PRC half day seminars were successfully held in Beijing on September 26th, 2017 for the sixth time and Shanghai on 28th, for the fourth time. With the background of advancing supply-side structural reform and addressing overcapacity, the use of bankruptcy law attracted more and more bankruptcy practitioners, scholars and officials within and out of China in the 10th anniversary of the implementation of the bankruptcy law in China.

At the beginning, Co-Chair of the seminar, Prof. Li Shuguang, the Director of Bankruptcy Law and Restructuring Research Center of China University of Politics and Law, made a welcome speech. Seminar Co-Chair Helena Huang from King & Wood Mallesons in Beijing and Andrew Koo from EY in Shanghai separately welcomed attendees in the opening remarks.

At the first session, the topic was Bankruptcy Law Update - Marking the 10th Anniversary of the Chinese Bankruptcy Law. Prof. LI reviewed three major changes in the implementation environment of the bankruptcy law over the past ten years. First, Chinese market was increasingly open after bankruptcy law was put into practice because of hosting the Olympic Games, the development of network data technology and the supply-side structural reform. At the same time, however, as the economy downward pressure increased, the number of zombie companies were increasing gradually. Thus, overcapacity became a cruel problem. Undoubtedly bankruptcy law was facing more and more pressure. Second, among the ten years of implementation of bankruptcy law, rights consciousness of creditors, debtors and investors in the market had become stronger and more mature. As a result, bankruptcy law was applied more often than before. Third, as the number of bankruptcy cases accepted by the courts rose, bankruptcy law was increasingly needed for reform and improvement. Professor LI also spoke especially about the Central Economic Work Conference (the Conference) of last December with special attention to reducing leverage, "black swans" and "gray rhino". The Conference highlighted the necessity to guard against systemic financial risks, the measure of which was mainly dealing with toxic assets. Attitude of the central government towards zombie companies was "market-oriented and disposal of zombie companies legally" Those who revived with no hope should be bankrupt and liquidated instead of bailout by governments and state-owned banks.

In Beijing seminar, Judge HE Xiaorong, the Presiding Judge of Civil II Trail Division at the Supreme People's Court, talked about the development of China's bankruptcy law in three aspects. First, Judge HE summarised the progress of Chinese Enterprise Bankruptcy Law. The development of China's bankruptcy legislation was not only a perfect process of building a socialist legal system with Chinese characteristics, but also a process of rapid development of market-oriented economy with Chinese characteristics. Second, Judge HE pointed achievements and challenges faced by Chinese bankruptcy trial. The eminent achievement of ten-year enforcement of bankruptcy law was to make the whole society understand the value of the bankruptcy law. There were challenges in the aspects of time-consuming and overcomplicated procedures, types and appointment of trustees, discharge order and operation of reorganization. Third, Judge HE proposed suggestions for the improvement of bankruptcy trial. Bankruptcy judges needed to combined local circumstances with advanced experiences of foreign countries. It is imperative to improve from the top design, devise the mechanism of the diversion of bankruptcy cases in trial based on the complexity of cases and strengthen the active interaction between the judiciary and administration.

ZHANG Jingsong, the Vice Director of Legal Affairs Apartment of Banking Regulation Commission pointed out that the role of the creditor committee should be strengthened. ZHANG commented that the debt commission system is an inevitable choice for the long term stability of the financial & regulatory environment in the country. LIU also noted that stock exchanges could intervene in the reorganization process to protect shareholders' interests at present. The stock exchanges were actually exercising public power in China.

At the Shanghai seminar, Judge FU Wang from Shanghai Second Intermediate People's Court summarized the implementation of the bankruptcy law from a judicial point of view. Judge FU reported that cultural differences, lack of experience, judges' assessment methods and difficulties in filing cases are major obstacles in the implementation of Chinese bankruptcy law. Nonetheless, Chinese courts have made great efforts to promote the implementation of the bankruptcy law in the past ten years, such as the introduction of a series of related judicial interpretations of bankruptcy laws and the establishment of the website of bankruptcy information cases. At present, the number of cases of bankruptcy in

China has risen significantly. HOU Tailing, the deputy director of the Legal Affairs Department of the Construction Bank of China, and WANG Fuxiang from King & Wood Mallesons clarified their views respectively on the bankruptcy procedure in practice problems and put forward certain suggestions from the perspective of creditors and bankruptcy administrators.

Panel II focused on the issue of Trends and Observations on Recent Bankruptcy Cases in China. LIANG Minhai from EY indicated that bankruptcy law might not be implemented well if the legal environment is not idealistic. Specifically, the liquidation group ought to be composed of accountants, lawyers and other professionals, and creditors should be given rights to choose the bankruptcy administrator so that the courts maintained a neutral position. Tommy SU from KPMG reported trends that group companies applied bankruptcy procedure to clear out their subsidiary zombie companies were increasing. SU emphasized the protective effect of bankruptcy procedure to the interests of creditors and debtors.

In Beijing, YANG Li from King & Wood Mallesons mentioned that the key features of the Chinese reorganization procedure include: upwards trends of application; better clarity of its function; and more restructuring tools. Recently, more attention has also been paid by investors. ANG Chiang Meng from Borrelli Walsh mentioned that the number of listed companies which entered reorganization was satisfactory, but could be better.'

In Shanghai seminar, WU Jia from King & Wood Mallesons took the reorganization cases of Sainty Ship and Future Electronics as examples. WU emphasized that the adjustment of asset business orientation had increasingly become an important issue in reorganization, and reorganization plans should focus on the integrity of original industrial chain. LI Kai from Fangda LLP analyzed related cases from the perspective of investors and debtors.

The issue of Panel III was How to Save a Sick "Panda". Under the host of Agnes TSANG of Allen & Overy, Peter Hoegen from Allen & Overy, Daniel Imison from AlixPartners, and David Kidd from Linklaters separately introduced the measures of tackling the "Panda" bond issue in Germany, the UK and Hong Kong. This panel also launched a heated discussion on the rescue culture, the concrete operation of the bankruptcy reorganization procedure and the restriction measures of the creditors who held the opposite views.

Panel IV talked about the Brazilian bankruptcy regime and how Chinese investments had been affected by Brazilian

distressed companies. The chair of this panel is Andrew KOO. While unable to attend the conference, James Sprayregen from Kirkland & Ellis LLP delivered a video to described in detail the economic situation in Brazil, including the Brazil international creditor's rights and Chinese investors' investment opportunities in Brazil. Beni Rosenzvaig from Brazil EY focused on differences of the bankruptcy law systems used by China, America and Pakistan, in particular the start of bankruptcy procedure, the risk of compulsory bankruptcy, automatic stay and cross-border insolvency. Mr. Rosenzvaig also emphasized the influence of the Brazil bankruptcy system to Chinese investors under the background of cross-border investment.

After more than four and a half hours in Beijing and five and a half hours in Shanghai, the seminars came to an end. Professor LI and KOO addressed closing speeches separately in Beijing and Shanghai. They pointed out that although the implementation of Chinese bankruptcy law still faced various problems, the progress that was made in the past ten years was huge and undeniable. Chinese bankruptcy law would embrace a bright future. Prof. LI and Andre KOO expressed their heartfelt thanks to all the co-organizers of the conference and invited all bankruptcy practitioners to continue their participation in next year's seminar.

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29	INSOL Offshore Program	New York, NY	INSOL International	www.insol.org
May 2018				
23-25	R3 Annual Conference 2018	Vilamoura, Portugal	R3	www.r3.org.uk
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31 May-1June	Eastern European Countries Committee Conference	Riga, Latvia	INSOL Europe	www.insol-europe.org
13	INSOL International Helsinki One Day Seminar	Finland	INSOL International	www.insol.org
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3	INSOL International Jersey One Day Seminar	Channel Islands	INSOL International	www.insol.org
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TBC	INSOL International Indonesia One Day Seminar	Indonesia	INSOL International	www.insol.org
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4-7	INSOL Europe Annual Congress	Athens, Greece	INSOL Europe	www.insol-europe.org
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7	INSOL International Hong Kong One Day Seminar	Hong Kong	INSOL International	www.insol.org
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