INSOL WORLD

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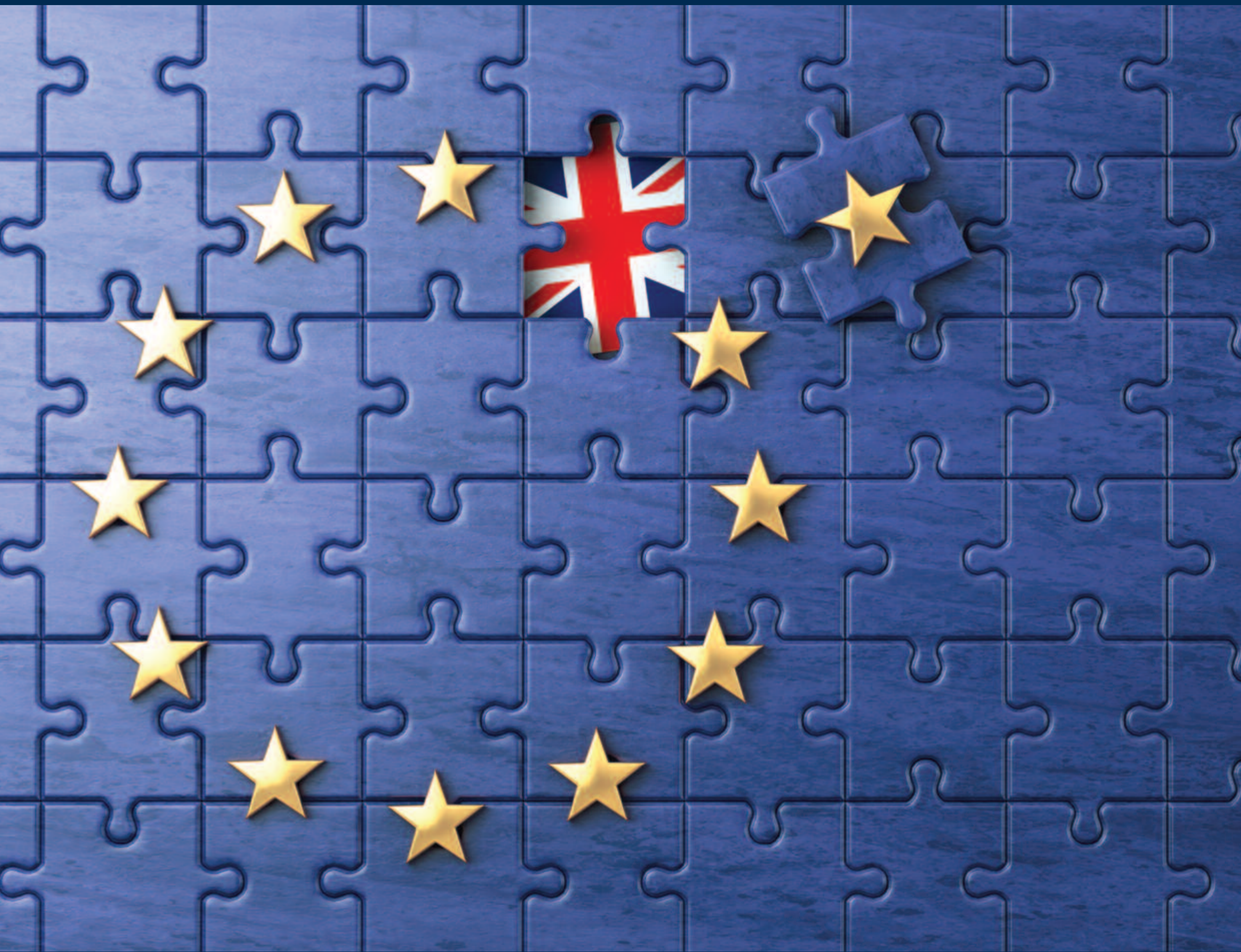

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Editors' Column

Ken Coleman
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Just as we mark the coming into force of the recast Insolvency Regulation - the key EU insolvency law instrument that has had such a big impact on UK law and practice - and see progress being made on an important EU initiative for ensuring that EU Member States have uniform restructuring regimes that are fit for purpose - the UK is cogitating hard over the impact of Brexit and the likely loss of the right to rely on these important EU instruments. In this issue we have articles that discuss all of these developments and issues. Filippo Chiaves and Matteo Gazzette remind us of the key changes introduced by the recast Regulation; Dr Christian Herweg and Maxi Ludwig discuss the proposal for a new directive dealing with preventative restructuring frameworks and Bob Rajan and Dr Sebastian Nimwegen ask what will happen to London and where will the next EU financial centre be after Brexit.

We also consider continuing law reform outside the EU. Silver Kayondo discusses the introduction of the Model Law in Uganda; Scott Atkins, *Fellow, INSOL International* and colleagues from Henry Davis York discuss the development of a new insolvency law for Myanmar and Andres Martinez considers the extent to which Argentinean insolvency law needs updating. In addition, we have a review of important recent case law on the treatment of *ipso facto* clauses in Finnish insolvency law.

Ensuring that courts exercising insolvency jurisdiction work effectively to facilitate successful restructurings and to resolve the disputes that are always a part of the restructuring process remains a priority. Work continues around the world to ensure that the multi-jurisdictional litigation that occurs during cross-border insolvencies is conducted as efficiently and effectively as possible. Craig Martin, *Fellow, INSOL International* discusses one important initiative in this area, the Guidelines for Court to Court Communications prepared by a group of judges from courts in the leading financial centre jurisdictions (I was one of the judges involved) and how they have been implemented in a number of jurisdictions. The importance, even in a purely domestic context, of having responsive and well managed insolvency courts is highlighted by Michael Murray in his discussion of Australian administration of InterGen Energy Group.

Recent months have seen further important developments in the process for resolving failing financial institutions in Europe under the new EU bank resolution regime. The resolution of the Spanish bank Banco Popular, involving both EU and national resolution authorities, is of particular interest and is discussed by Mariano Hernandez, *Fellow, INSOL International*.

Finally on my list, we also have a report on the recent INSOL One Day Seminar in Sao Paulo and INSOL International / INSOL Europe One Day Joint Seminar in Tel Aviv, which were both a great success and covered a wide range of important topics.

We would like to thank Mourant Ozannes for their continued support as sponsor of INSOL World, and David Rubin & Partners for sponsoring the monthly electronic news updates.

Nick Segal

Nicholas Segal

President's Column

By Adam Harris
Bowmans
South Africa

Dear Friends and Colleagues,

ISRAEL: breaking new ground in ancient territory

I was privileged to attend our first seminar in Israel, hosted jointly with INSOL Europe. It was simply excellent. The seminar was attended by over 100 delegates (both international and Israeli), and featured a broad-ranging technical programme, traversing a wealth of important and relevant topics. We were fortunate to have been able to draw upon a great depth of international experience and expertise, to contextualize and inform the delegates about the topics. And, to make it real, we heard from speakers who were at the coal-face.

We heard the experiences of a charismatic entrepreneur in the Israeli high tech industry, who told us about Israel's unique cultural parameters and the imperative of having to innovate to survive (as he put it). Eli Reifman set the backdrop to his personal story of a rise to the dizzy and seemingly untouchable heights of having been a billionaire in his twenties, to a fall to bankruptcy and prison.

I don't have the space to report on the programme in great detail here, however a fuller report can be found later in this issue. I will however mention one of the sessions showcasing the international expertise assembled in the seminar, namely that of "Cross-border Insolvencies - a view from the bench". The panel of International Judges, HHJ Davis-White, Specialist Chancery, Mercantile and TCC Judge, Retired Judge Heinz Vallender, formerly of the Cologne Bankruptcy Court, Germany, Hon. Judge Martin Glenn of the US Bankruptcy Court, Southern District of New York, shared their broad-ranging perspectives on a variety of topics under the cross-border banner. The session was moderated by leading QC Gabriel Moss of South Square.

All this was set against the backdrop of modern, vibrant Tel Aviv, the excitement and buzz seeming almost out of place in a country with such a rich and deep history. This seminar is significant for a number of reasons. As INSOL is truly global, expanding our reach by venturing into a new jurisdiction is always a milestone. Also, our member associations are important to INSOL International, and it was an excellent achievement to be able to add value to both INSOL International and INSOL Europe by undertaking such a project on a collaborative basis, particularly as this was our first venture into this country.
I must again thank the Main Organising Committee and the Technical Committee (particularly the Technical co-chairs, Robert Hertzberg and Eitan Erez) for presenting an outstanding event. And of course, thanks to Penny Robertson who seemed to deal effortlessly with complicated logistics and challenges.

INSOL Fellows

I take this opportunity to congratulate the latest class of graduates, each of whom can now with justifiable pride, enjoy the designation "Fellow, INSOL International". The INSOL Fellows are an integral part of our organisation. They are our global ambassadors, a talent pool from which we draw, and are enthusiastic supporters of the organisation.

So, it is with sadness that we heard of the passing of Carmen Genovese, (INSOL Fellow, graduate Class of 2010) and read the glowing tributes to him. I could not do better than to quote one of Carmen's IFC colleagues - fitting tribute to one of our own:

"Carmen touched the lives of many people during his 20-year career with us. To colleagues in credit and special operations, he was the model of supportiveness, collegiality, and acute insight into business and people. To investment and portfolio colleagues, Carmen's empathy and support for the people who do the hard and stressful work of appraising, negotiating, and supervising deals, and especially for those who find the deals, always stood out. Carmen worked in Hong Kong, Bangkok, Istanbul, and Washington. He won the respect of clients wherever he went. He was a valued advisor to peers and senior management, and a sought-after mentor to dozens of more junior colleagues".

Truly an ambassador for INSOL International.

Gender equality

This remains a priority topic. I am pleased to report that the statistics extracted from our records are actually encouraging. I know it is an ongoing process, as I have mentioned before, but we are alive to the issue, and are moving in the right direction. Statistics from our membership database are interesting, and thanks to Tony Ashton of the INSOL International office for doing the homework:

- In December 2014, 20% of our membership was female;
- This has grown to 28% in 2017;
- Of our current membership of 10,357 we now have 2,267 female members (28%);

The key take-home is that we have grown our female membership from 20% to 28% in the last 36 months, Whilst by no means the end-point of the discussion, this does show a positive growth-curve. Our new website goes live later this year, and its capabilities will enable us to keep better track of the statistics, not only in relation to gender. Of course, as Tony puts it, it is difficult to set a target for this profession due to the different job roles within our membership, but there is no reason why INSOL International should not be leading the market, rather than following it.

Conclusion

As the year rolls forward, there is much still to be done and experienced.

I do hope to be able to connect with you at one of the exciting events we will be presenting later this year – the Channel Islands seminar in Guernsey, the half-day seminars in China, the INSOL International/Word Bank Group Africa Round Table in Mauritius and the one-day seminar in Malaysia. We would welcome your visit to our web-site for further details.

IN THIS ISSUE:

INSOL Taskforce 2021

Toward 2021

By Scott Atkins

Fellow, INSOL International and member of the INSOL International Executive Committee
Henry Davis York

Since the publication of INSOL's Strategic Plan in March 2017, we have been working behind the scenes creating over 20 working groups to focus on the implementation of the 2017 objectives identified in the Plan. We were delighted to receive a high level of interest and offers of assistance from members who willingly volunteered to help with the strategic review and I thank all those who put themselves forward.

The working groups have started their deliberations and we are looking forward to receiving initial feedback in time for the September INSOL Board Meeting. The Working Groups include members of the Taskforce, Board Directors of INSOL International and our member volunteers. I will give members an update on progress in the Fourth Quarter Edition of INSOL World and share a range of the exciting and challenging initiatives which are being developed.

A snapshot of the objectives which are the subject of the Working Groups include:

- reviewing the membership and G36 models
- exploring local and regional liaison models
- developing further networking and business opportunities for Young Members
- reviewing and developing communication channels
- developing best practice rules for administrators and creditors
- identifying and mobilizing Global Advocacy Ambassadors
- clarifying strategic relationships with key international bodies

The work of the Working Groups is vitally important to the future of INSOL. This is a very exciting time for INSOL and we appreciate the enthusiasm of our volunteers.

Looking ahead, we have commenced the framing of our 2018 objectives in order to be able to form the Working Groups necessary to take forward the implementation of these objectives with a view to reporting back to members at INSOL New York. The 2018 Working Groups will include such objectives as:-

- the restructuring of debt contacts – design new contractual mechanism that investors will use
- assessing the feasibility of an International Arbitration Institute or other dispute resolution forum
- investigating the concept of an International Certified Insolvency Practitioner Accreditation

Any member of INSOL interested in supporting the ongoing strategy implementation work should email Claire Broughton at claireb@insol.ision.co.uk

I look forward to reporting further on our Strategic Plan in the next edition of INSOL World. In the meantime if you have any questions or wish to assist then please do not hesitate to get in touch.

Preventive restructuring frameworks and second chance: The proposed new EU Directive

By Dr. Christian Herweg,
LL.M. (Cambridge)
and
Maxi Ludwig
Hogan Lovells International LLP
Germany

1. Current situation

Unlike in some countries like UK, Spain and France there is no preventive restructuring procedure in other European Member States like Germany. Therefore, the general rules of civil and corporate law apply with the effect that the company needs the consent of all creditors to agree on reorganisation measures prior to formal insolvency proceedings. Some creditors take advantage of this and adopt hold-out tactics. They block the process until they get a special deal with the debtor company. This forces good and viable businesses with too much debt to go into classic insolvency procedures instead of restructuring their debt outside formal insolvency proceedings. This is often value destructive and not the best way to deal with a distressed situation. This was one of the main reasons why the European Commission decided to propose a new Directive and to seek to ensure that all Member States had available a procedure permitting preventive restructuring.

2. What is new?

The Directive aims to create a legal framework enabling creditors to vote on restructuring measures like waivers of debt and be bound provided that requisite majorities of the affected classes of creditors vote for the measures and a court confirms them. This process takes place outside formal insolvency proceedings and with limited court involvement. The entry requirement for a preventive restructuring process is the likelihood of insolvency.

a) The heart of the Directive is a restructuring plan, which is similar to the UK's scheme of arrangement. Creditors affected by the restructuring plan vote in separate classes. The criteria for a class of creditors are similar to those of the UK's scheme of arrangement. A separate class must be formed when the rights of the creditors are different, e.g. secured and unsecured creditors (the Directive provides that classes shall be formed in such a way that each class comprises claims or interests with rights that are sufficiently similar to justify considering the members of the class a homogenous group with commonality of interest). The restructuring plan is approved when a majority in the number of claims or interests is obtained in every class. Each Member State is required to determine the requisite majority, which shall not be higher than 75% of the total of claims or interests in each class. If the requisite majority is obtained for each class, the plan is binding subject to confirmation by a court or administrative authority (unless there are no dissenters). When the necessary majority in each class cannot be reached, the plan can still be binding even for the dissenting classes provided that the cram-down requirements are satisfied (following the US model). These require the confirmation of the plan by a judicial or administrative authority upon request of a debtor or creditor (Cram-Down) and that at least one dissenting class has approved and the plan satisfies the absolute priority rule.

b) Additionally, the directors of the company must remain in total or partial control of the assets of the company and the day-to-day operation of the business during the preventive proceeding. The appointment of a manager or insolvency practitioner by the court is required in every case. This basically can result in a complete self-administration of the debtor during the preventive restructuring and goes far beyond other restructuring procedures in many European Member States.

c) The Directive also aims to encourage and protect new and interim financing by giving priority to such financing in case of subsequent liquidation procedures. The creditors of such new and interim financing are ranked at least senior to the claims of ordinary unsecured creditors. Furthermore, new and interim financing is protected from insolvency claw-back in subsequent insolvency proceedings. This makes it easier for debtors to obtain new financing and restructure their debt.

d) Another important aspect is the debtor's need for time to negotiate with its creditors. Therefore, the Directive gives the debtor the right to apply for a suspension of individual enforcement measures during the negotiations up to four months. The moratorium can be extended up to twelve months. During the moratorium, the duty of the debtor or its managing directors to file for insolvency and the possibility of the creditors to do so are suspended. The creditors therefore are not able to prevent the restructuring process by enforcing their claims.

e) In many European Member States, it takes more than three years for bankrupt, but honest entrepreneurs to get fully discharged and make a new start (second chance). Under the Directive Member States they must ensure that the period of time for over-indebted entrepreneurs to get a second chance shall not be longer than three years.

To conclude

The Directive of the European Commission is highly welcomed. There is strong evidence that recovery rates are higher in economies where restructuring is the most common insolvency proceeding. Therefore, some European companies with a desire for preventive restructuring proceedings aim for a scheme of arrangement in the UK, if their laws do not provide for such proceedings. After Brexit, this way of restructuring might be barred for companies in European Member States due to missing recognition rules. In any case, it is important to implement preventive restructuring proceedings in all European Member States.

Banco Santander bought Banco Popular in the framework of bank recovery and resoluton Directive 2014/59/EU. Different solution for Italian Banks: Veneto Banca and Popolare di Vicenza.

By Mariano Hernandez
Fellow, INSOL International
MM Abogado
Spain

The resolution of Banco Popular has recently been implemented by the European and Spanish bank regulators pursuant to the European Single Resolution Mechanism Regulation Regulation (EU) No 806/2014, .

The resolution involved the transfer by the European Single Resolution Board of the shares and capital instruments in Banco Popular to Santander, an institution of recognized financial strength. The consideration was one Euro. In this way, Banco Popular clients were able to continue normal banking services with customers retaining full access to their current accounts and deposits. As a consequence of the decision, functional continuity is preserved. The purchase was made without the use of public funds. This is one of the main differences from the solutions adopted in the cases of Veneto Banca and Popolare di Vicenza that will be bailed out with public funds.

The resolution process involved the European Central Bank (ECB), the SRB and the Spanish National Resolution Authority (FROB). The ECB decided on 6 June 2017 that, due to its recent liquidity problems, Banco Popular was "failing or likely to fail " and determined that determining that the entity were objective grounds for supporting a determination that the entity will, in the near future, be unable to pay its debts or other liabilities as they fall due. (in accordance with Article 18 (1) of the Single Resolution Regulation). The ECB then notified the SRB. The SRB exercised its resolution powers under the Regulation (after obtaining the required preliminary valuation of Banco Popular) and approved the resolution scheme involving the then transfer of Banco Popular's shares, as set out above. It was then for the FROB to implement the decisión. Both the SRB and and the FROB decided that the sale was in the public interest, since it protected all depositors of Banco Popular and guarantees financial stability.

The European Commission approved the resolution scheme because the conditions for resolution were met: the bank was bankrupt, there were no private sector solutions outside the resolution and there were no supervisory measures that would have prevented its failure. The resolution for sale of businesses is provided for in the Bank Recovery and Resolution Directive (BRRD) in the framework of the resolution of EU banks. It was the best course of action to ensure the continuity of important functions performed by the bank and to avoid significant adverse effects on financial stability. In this particular case, the losses were absorbed in full by shares and subordinated debt.

The EU Resolution Framework

During the recent financial crisis, taxpayer money was used at an unprecedented level to bail out banks that were considered "too big to fail" at the expense of other public goals. This led to the need to create a clear and comprehensive bank recovery and resolution regime to ensure long-term financial and economic stability while minimizing the potential public cost of possible future financial crises.

The Bank Recovery and Resolution Directive (BRRD) establishes the EU framework for managing bank failures in a way that avoids financial instability and minimizes costs for taxpayers. On the other hand, the Regulation of the Single Resolution Mechanism (SRMR), Regulation EU 806/2014, establishes specific provisions for the Member States that participate in the Banking Union when banks need to be solved.

The BRRD and the SRMR form the EU resolution framework, which provides competent authorities with comprehensive and effective arrangements to deal with bankrupt banks, as well as cooperation agreements to address cross-border bank failures. The key objectives of the EU resolution framework, in line with international efforts, are to preserve the continuity of critical functions of banks while avoiding the use of public funds and the negative effects on the financial system. Effective resolution must also address moral hazard, as one of its key functions is to improve discipline within markets. Hence, resolution is a vital complement to other work streams designed to make the financial system more robust, by making banks stronger by requiring higher levels of capital of better quality, greater depositors protection, safer and more transparent market structures and practices, and better supervision.

The regulatory framework in Spain

Law 11/2015, of June 18, on recovery and resolution of credit institutions and service and investment companies, transposes the BRRD into the Spanish legal system.

This Act therefore implements the transposition of Directive 2014/59 / EU of 15 May 2014 and Directive 2014/49 / EU of the European Parliament and of the Council of 16 December 2014 and introduces those provisions that allow for the coordination of the Spanish resolution system and the European system. Thus the law regulates the collaboration between the European resolution authorities, in the event that an entity operating in different Member States of the Union is resolved, and the representation of the Spanish resolution authorities in the Single Resolution Mechanism. As its preamble indicates, this Law connects with a regulation previously in force and operative in Spain. In fact, this Law is heir to Law 9/2012, dated November 14, in which preparation was already considered the preparatory work that existed at the time of the current Directive 2014/59 / EU, dated May 15, 2014. Article 26 regulates the sale of the entity's business (included in articles 38 and 39 of the BRRD and article 34 of SRMR), one of the resolution tools.

The next financial centre after Brexit… not so fast

By Bob Rajan
and
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Introduction

Since the summer of 2016, most finance and finance-related professionals have wondered what the implications of the Brexit vote may be. At the onset of the referendum, it was obvious that no one knew what the decision meant, let alone some people did not even understand what they actually voted for. However, on 29 March 2017, when Prime Minister Theresa May enacted Article 50, it was then determined that the UK would start negotiating its exit, although the how and when of the execution is still very vague. In addition, Mrs. May's re-election on 8 June was not as easy as some thought, and will put even more pressure on her to implement her agenda.

Regardless of the actual outcome of these negotiations, companies, and in particular, financial institutions, as Britain's major industry, are considering the potential implications of Brexit on their businesses. Consequently, the discussion whether London will be replaced as the global financial hub is ongoing.

A lot has been written in the press about potential replacement cities should London not survive as a financial centre post-Brexit. Financial regulators have been in discussions with several UK-based financial services firms regarding their interaction and access to the European market. Without stating the obvious, tension has always existed between the UK and other European nations on a variety of topics related to the financial services sector. For example, it has been difficult for some European nations to swallow that the principal centre for 75 per cent of trading in Euro-denominated derivatives, is actually not within the Eurozone! Now, the continental European Prime Ministers are using Brexit as a pretext to change this.

Will Brexit be enough to move the financial centre? London's largest wildcard is the availability of skilled, fluent, English-speaking labour since many finance professionals wish to have a 'career stint' there at some point, although, the reverse may not be true. The table[1] on page 11 illustrates the current situation:

Potential Candidates

Frankfurt

Although Frankfurt may not often be considered a top tourist destination, on the surface, Frankfurt may be seen as a viable alternative, with its prominent English-speaking international community, and the fact that the European Central Bank (ECB) is based there. Several of the major financial institutions already have a large foundation and operations in Frankfurt and the big prize (as mentioned above) is the clearing of trades in Euros. Frankfurt should focus on this aspect, given that Prime Minister May needs to address this. The city of Frankfurt has made significant lobbying efforts and spoken with several financial institutions informally thus far, with predominantly positive support.

	London	Frankfurt	Paris	Dublin
Employed in the financial sector	729,600	74,700	333,000	35,500
Global Financial Centres Index	1	19	29	31
World Bank Ease-of-Doing-Business Index (2016)	7	17	29	18
% of Euro-denominated OTC derivatives cleared (Daily average, April 2016	75%	2%	13%	

[1] *http://speri.dept.shef.ac.uk/2017/04/03/will-frankfurt-paris-and-dublin-replace-the-city-of-london-after-brexit/*

Paris

For quite some time now, the lobbying efforts from French ministers and officials has been very aggressive trying to lure large international banks to move their headquarters to la Ville Lumière. The appointment of Prime Minister Macron is a move in the right direction, given that he does not lean too far-right or too far-left and of course, is an ex-investment banker. Paris has the immediate advantage of already being perceived as a global city, although it still needs to battle its self-inflicted image of having high taxes and being anti-financial market, but they are making progress. In certain cases, some tax laws have changed to favour foreign workers. The primary corporate tax rate is due to decrease to 28 per cent by the year 2020 and tax laws for high earners who have lived outside France for a minimum of five years and used to enjoy certain privileges can now extend their stay to a period of eight years and enjoy such privileges. In addition, the new government aims to make labour laws more flexible, attempting to make Paris more attractive for foreign financial institutions.

Dublin

Upon the Brexit decision, Dublin has also been keen to potentially expand its importance in the finance world, building upon its already strong European lending operations. Ireland has recently expanded its fund administration services making Dublin the third-largest centre for investment funds globally after the US and Luxembourg and is indicating that it can step into London's shoes.

Other

There are other cities that have been honourably mentioned, such as, Luxembourg, Amsterdam, Warsaw and Madrid - each have their respective pros and cons. However, current discussions indicate that the cities mentioned previously may benefit the most from Brexit.

On the recent developments regarding ipso facto clauses in Finland

By Peter Huhanantti
Asianajotoimisto Tuomaala & Co Oy
Helsinki

Traditionally in Finland – as, for instance, in all other Nordic countries – contractual clauses providing that, for example, a supplier or a lessor has the right to rescind a contract solely on account of bankruptcy or corporate restructuring proceedings, have been null and void *vis-à-vis* creditors. In my experience, such *ipso facto* clauses are frequently included in various types of business agreements. In particular, such clauses include lapsing and rescission clauses drafted to cover bankruptcy or corporate restructuring proceedings, the right of a contractual party to withdraw from the relevant agreement and liquidated damages clauses included for the eventuality of bankruptcy. Provisions such as these have traditionally been null and void *vis-à-vis* creditors, if they improve the position of the solvent party from the position they would otherwise be in under the bankruptcy statute. On the other hand, contractual terms that impair the position of the creditor, such as debt subordination conditions in debt subordination agreements are, as a general rule, binding upon the creditors of the company declared bankrupt or undergoing corporate restructuring proceedings.

Usually the scenario is one where a larger company has included *ipso facto* clauses in its general terms and conditions. Small or medium-sized companies do not normally ever have the opportunity to influence, for instance, the general terms and conditions drafted by goods or raw material suppliers. On the other hand, contractual parties rarely even need to concern themselves with the interests of their potential future creditors. Perhaps surprisingly, the binding effect of such clauses has been tested in Finnish courts relatively infrequently. Nevertheless, in individual cases the question is fairly significant, such as, for instance, in the below-mentioned ruling of the Supreme Court of Finland KKO 2016:100, dealing with whether the Social Insurance Institution of Finland KELA was permitted to submit a proof of debt concerning its receivable amounting to EUR 20 million, or whether the recovery clause was null and void *vis-à-vis* the creditors of the bankrupt company.

Pursuant to Chapter 3, Section 8 of the Finnish Bankruptcy Act, a bankruptcy estate essentially has the right to commit to an agreement in force upon the commencement of the debtor's bankruptcy, which the bankruptcy debtor has not fulfilled. The provision in question constitutes mandatory law for the benefit of the bankruptcy estate, which means that a clause included in the agreement by the parties, stipulating that the agreement is capable of being rescinded on account of the bankruptcy of the other party, is null and void *vis-à-vis* the creditors. The same applies to clauses connected to the commencement or instigation of corporate restructuring proceedings. As a point of departure, the formulation of the stipulation is irrelevant from the point of view of nullity but, rather, the decisive factor is the factual effect of the stipulation in question. For instance, it is possible to rescind an agreement owing to a material breach of contract.

In fact, just one ruling of the Supreme Court of Finland, KKO 1995:35, is noteworthy as relates to the previous case law concerning the *ipso facto* clause. In the case in question, an agreement concluded between the bankrupt company and an employee contained a clause stipulating that should the employment terminate as a result of the employer's bankruptcy, the employer would be obligated to pay the employee 24 months' worth of additional salary. The clause was held to be null and void *vis-à-vis* the employer's bankruptcy creditors, and the underlying receivable could not be affirmed for payment out of the assets of the employer's bankruptcy estate. It was stated in the reasoning for the ruling that the clause in the employment agreement had been included to prepare for the eventuality of bankruptcy, and, hence, related to the right of a third party, i.e. that of the bankruptcy creditors. It would have resulted in the company's bankruptcy creditors being in an inferior position compared to the one they would have been in pursuant to the statutory provisions. For this reason, the said agreement clause was null and void *vis-à-vis* the company's bankruptcy creditors. Consequently, the provision in question constituted a rather obvious *ipso facto* clause, since it stipulated that the obligation to effect additional salary arose solely in the case of bankruptcy.

At the end of last year, the Supreme Court of Finland issued a significant decision in this area in its ruling KKO 2016:100. This case related to a situation in which the Social Insurance Institution of Finland KELA had for decades subsidised the operations of a rheumatism hospital run by a foundation that was declared bankrupt. Pursuant to the relevant contractual clause, the foundation that maintained the hospital was obligated to reimburse the subsidies granted to it in case the facility were to be transferred to another owner, ceased operations or made substantial changes to its operations. The foundation was declared bankrupt and its operations ceased. In the bankruptcy of the foundation, the Social Insurance Institution of Finland submitted its proof of debt regarding its receivables under the reimbursement or recovery clauses contained in the subsidy decisions, which the administrator of the bankruptcy estate disputed. The Supreme Court of Finland ruled that the clause was binding upon the bankruptcy creditors, because the reimbursement condition could have been fulfilled also in a variety of other circumstances besides bankruptcy, and even a bankruptcy did not automatically cause the operations of the hospital to cease.

Partially in deviation from the views previously presented in legal literature, it was deemed in the reasoning that an *ipso facto* clause pertaining to the ramifications of breaches of contract was valid when under the terms and conditions for same, the relevant receivable arises solely *in bankruptcy, or factually solely therein*. At least in the Finnish legal literature, it had been previously held that the relevant consideration regarding the binding nature of such clauses was whether the scope of application of the clause had been expanded in any relevant manner so as to encompass situations other than, *inter alia*, bankruptcy and corporate restructuring proceedings. On the other hand, normal provisions applicable in situations other than bankruptcy or corporate restructuring proceedings are primarily also binding upon the creditors. Now, the Supreme Court of Finland has, however, made a rather strict delineation, limiting the nullity effect exclusively to clauses that only become applicable in bankruptcy, or factually only in bankruptcy.

Pursuant to the explanatory memorandum of the directive proposal issued by the European Parliament and the Council at the end of last year[1], based upon the Commission's recommendation of 2014[2], when a debtor faces insolvency proceedings, some suppliers may have a contractual right to terminate the agreement for the supply of goods *solely* on the basis of the insolvency (so-called *ipso facto* clauses). The same may apply to circumstances in which a debtor is seeking pre-emptive restructuring measures. If such clauses are invoked at a time when the debtor is still merely negotiating the restructuring plan, or requesting a stay of enforcement actions or in conjunction with any other measure pertaining to the stay of enforcement actions, premature termination may have an adverse effect upon the business operations of the debtor and upon the chances of salvaging same. When a legislative or administrative authority grants a stay of enforcement actions, creditors affected by the stay must for this reason not have the possibility of invoking *ipso facto* clauses referring to negotiations pertaining to a restructuring plan or a stay or any other comparable event related to a stay.

The actual text of the proposed directive provides that the Member States must ensure that creditors do not stay the enforcement of agreements to be executed at a later time, or terminate, accelerate or in any other manner amend such agreements to the detriment of the debtor on the basis of a contractual clause stipulating upon such measures, solely because the debtor has commenced negotiations pertaining to restructuring, or because a stay of individual enforcement actions has been sought, or because such a stay has been granted or owing to any comparable event pertaining to such a stay.

In the explanatory memorandum of the proposed directive, the desire, therefore, is to establish a harmonised European approach to *ipso facto* clauses in contracts under which, for instance, a goods supply contract may be terminated solely owing to insolvency, commencement of restructuring negotiations, granting of a stay of enforcement actions or of an enforcement ban, or owing to any event pertaining to such a stay. If the final wording of the said directive follows the proposal, the remarks made in the Finnish Supreme Court ruling KKO 2016:100 mentioned above regarding clauses triggered by the commencement of bankruptcy proceedings being null and void *vis-à-vis* creditors if they pertain solely to bankruptcy situations or when they in actual fact become applicable solely in such situations, may no longer be true in the future, since in the proposed directive, the desire is to extend the nullity effect to an earlier point in time than the statutory collective insolvency proceedings, in an effort to enable earlier restructurings.

It will be interesting to see what the final text of the directive will be like, in what form the directive will be implemented and how it will be interpreted going forward. One notable question that at least the proposed directive would not appear to be addressing is how to

1 Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on preventive restructuring frameworks, second chance and measures to increase the efficiency of restructuring, insolvency and discharge procedures and amending Directive 2012/30/EU, Strasbourg, 22.11.2016 COM(2016) 723 final.

2 COMMISSION RECOMMENDATION of 12.3.2014 on a new approach to business failure and insolvency Brussels, 12.3.2014 C(2014) 1500 final

handle the rescission of agreements where the rescission takes place prior to the commencement of the restructuring negotiations. In the worst-case scenario, the regulation may at least in some cases result in professional operators, such as large landlords and goods suppliers, embarking upon rescinding contracts immediately upon the appearance of even minor financial hardship, in which case the entire regulatory framework would be functioning entirely against its own purpose. According to the laws of Finland, the sole mechanism for interfering with the rescission of an agreement carried out prior to the commencement of insolvency proceedings is to demand the reversal of the rescission of such an agreement. The reversal of the rescission of an agreement, on the other hand, is in Finland tied to extremely stringent criteria, and such reversal is only possible primarily in obvious cases. Indeed, in Finland, the rescission of an agreement has not been deemed to constitute debt repayment, provided such rescission is based upon a retention of title or right of recovery clause binding on an inter partes basis. In the case law of the Finnish Courts of Appeal, the same has been held to apply, *inter alia*, to the rescission of a leasing agreement.

An appraisal of the UNCITRAL Model Law on Cross-Border Insolvency under Uganda's new insolvency regime

By Silver Kayondo
Uganda

On 1st July 2013, the Insolvency Act of 2011 came into effect in Uganda following a long legal reform process that commenced with assigning a team from Reid and Priest LLP to carry out a technical review of Uganda's insolvency legal regime. The team's work culminated in a report tabled in June 1998. This was followed by another review by Clare Manuel, an international expert who tabled her proposals reform of Uganda's insolvency law in 1999. The Uganda Law Reform Commission issued its final study report on insolvency law in 2004. This process marked the eventual repeal of the prior insolvency laws such as the Bankruptcy Act of 1931, the Deeds of Arrangement Act of 1931, and eventually, some provisions of the former Companies Act (Cap. 110) that had been "inherited" from the United Kingdom.

The new insolvency legal dispensation took a number of lessons from the Cork Committee Report (UK), the Tyler Committee Report (Hong Kong), the US Bankruptcy Code of 1978 and the UNCITRAL Model Law on Cross-Border Insolvency (1997), among other international benchmarks. The objective of the new insolvency legal framework is to provide for (and amend and consolidate the law relating to) receivership, administration, liquidation, arrangements, bankruptcy, the regulation of insolvency practitioners and cross-border insolvency; and to provide for other related matters.

Cross-Border Insolvency is specifically governed by part IX of Uganda's Insolvency Act, 2011. In terms of section 221, where the Minister of Justice is satisfied that any State has enacted laws for reciprocity in bankruptcy which have the same effect as part IX, the Minister may by statutory instrument declare the State to be a reciprocating State and the court with jurisdiction in bankruptcy to be a reciprocating court for purposes of this Act. This applies to all bankruptcy proceedings instituted in the reciprocating State against a debtor with property in Uganda after the declaration of reciprocity. In all other cases, the law gives Uganda the leeway to enter into reciprocal agreements, treaties or arrangements for cross-border insolvency, using the terms of that agreement, treaty or arrangement and the provisions of the Act are then to apply with the necessary modifications, consistent with the subsisting agreement, treaty or arrangement to which the insolvency cases are subject.

Section 213 of the Act stipulates the legal effect of an order of a reciprocating court against a property owner in Uganda. Where a bankruptcy is commenced in any reciprocating territory or any appointment of a special manager or interim receiver is made in any reciprocating territory in bankruptcy proceedings against a debtor with property in Uganda, the order or appointment shall have the same effect as if it had been made in bankruptcy proceedings against the debtor in Uganda, and the affected debtor and his or her creditors shall be taken to be in the same position, with the same rights and privileges. They are also subject to the same disqualifications, restrictions, obligations and liabilities in every respect as if the order or appointment was made in Uganda.

Section 214 vests the bankrupt's property in Uganda in a trustee appointed in a reciprocating territory in the same manner as if the bankruptcy order and the appointment of trustee had been made in Uganda, and the superintendence of the trustee continues to be exercised by the committee of inspection appointed in the reciprocating state or, if there is no such committee, by the reciprocating court itself. In terms of local powers of foreign representatives, an official receiver, interim receiver, special manager or trustee of a reciprocating state officiating in bankruptcy proceedings against a debtor with property in Uganda is subject to the control of the court by which he or she is proceeding. During the management of the affairs of the debtor or bankrupt within Uganda, foreign representatives have the same powers, rights, duties, obligations and liabilities as the local representatives.

In relation to concurrent cross-border bankruptcy proceedings instituted in Uganda and in any reciprocating territory where the property of the debtor or bankrupt situated in Uganda vests in or is administered by a trustee or receiver in a reciprocating State, the court has power to rescind its receiving order and annul its order of bankruptcy or dismiss the petition upon such terms as the court may think fit. However, the rescission of a receiving order or an annulment of bankruptcy does not invalidate any acts lawfully done by the receiver or trustee in Uganda or any other person lawfully acting under the authority of the receiver or trustee.

Section 226, defines important terms such as "foreign proceeding", "foreign main proceeding", "foreign non-main proceeding", "foreign court" and "foreign representative". It is noteworthy that these definitions are in exact pari materia with the UNCITRAL Model Law on Cross-Border Insolvency both in terms of terminology and content. More fundamentally, section 231 of the Insolvency Act gives foreign representatives a direct right of access to apply directly to the High Court for any order under the Act. Upon recognition of a foreign proceeding by the High Court, the foreign representative is entitled to participate in a proceeding regarding the debtor. Foreign creditors also enjoy the same rights regarding participation in insolvency proceedings as creditors in Uganda, and foreign creditor participation does not affect the ranking of claims, except that the claims of foreign creditors may not be ranked lower than non-preferential debts in terms of section 233(2) of the Insolvency Act.

Section 235 gives foreign representative *locus standi* to apply to the High Court of Uganda for recognition of foreign proceedings in which the foreign representative has been appointed. The application for recognition must be accompanied by a certified copy of the decision commencing the foreign proceeding and appointing the foreign representative; a certificate from the foreign court affirming the existence of the foreign proceeding and of the appointment of the foreign representative; or any other evidence acceptable to the court, of the existence of the foreign proceedings and the appointment of the foreign representative. A statement identifying all foreign proceedings against the debtor that are known to the foreign representative must also be attached. The court may require a translation into English of documents supplied in support of the application for recognition.

Section 225 gives power to the Chief Justice in consultation with the Minister of Justice to enact rules to give effect to cross-border insolvency provisions. However, these rules have not yet been enacted. Therefore, there is urgent need to enact the cross-border insolvency rules since cross-border insolvency proceedings are becoming common features of modern business due to increased penetration of multinational firms in Uganda and East Africa. There is also need to synchronize the rules with the legal regimes of other East African Community (EAC) member states in order to comply with regional obligations, frameworks and treaties.

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Transnational insolvency proceedings: time for a change in Europe

By Filippo Chiaves
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Where we stand

Two years ago, Regulation (EU) No. 2015/848 of the European Parliament and of the Council of 20 May 2015 (the "Regulation") entered into force on 26 June 2015 with a view to superseding Council Regulation (EC) No. 1346/2000 of 29 May 2000 and further enhancing transnational insolvency proceedings. Now the time has come to focus on the implications of such revised rules, many of which become applicable in 2017. Indeed, the Regulation applies to transnational insolvency proceedings affecting entities located in EU Member States that are opened from 26 June 2017 onwards, providing a new set of governing provisions for such proceedings.

The need of a renewed regulatory framework was inter alia connected to criticism expressed by academia, market operators and stakeholders on the rules set forth by the previous regulation which dated back to 2000. The most significant concerns involved the difficulty in applying and construing the concept of COMI (centre of main interests) and the ensuing risk of favoring forum shopping practices. Criticism was also expressed on the inapplicability of the existing rules to a number of hybrid and pre-insolvency preventive procedures and arrangements widely used in common practice in various EU Member States.

The new Regulation is mainly aimed at tackling these kinds of issues and at improving the effectiveness of transnational insolvency proceedings falling within the scope of the Regulation.

Key changes

The core innovations introduced by the new Regulation are analyzed below...

Extension of scope

First, it is important to underline how the new Regulation extends the scope of its applicability. The Regulation covers not only proceedings whereby a given entity is already in irreversible economic distress, but also creditor arrangement schemes, pre-insolvency and hybrid proceedings "for the purpose of rescue, adjustment of debt, reorganization or liquidation" (Regulation, Article 1). Moreover, the scope of application of the Regulation is also broadened by extending the types of proceeding that are treated as 'secondary proceedings' (proceedings opened in another Member State where the distressed entity has an establishment but not its COMI). Secondary proceedings now also cover creditor arrangement schemes, pre-insolvency and hybrid proceedings.

Centre of Main Interests concept

The principal provisions to determine jurisdiction in cross-border European insolvency proceedings reflect those established by the previous regulation and the concept of Centre of Main Interests (COMI) is still found in the text of the new Regulation, confirming the rule whereby primary (main) insolvency proceedings must be opened in the venue where the distressed entity has its centre of main interests.

However, the concept of COMI – whose interpretation caused significant issues in the past – has now been defined in accordance with the principles outlined by the European Court of Justice case law, so that it is defined as the "place where the debtor conducts the administration of its interests on a regular basis and which is ascertainable by third parties" (Regulation, Article 3). This innovation should help clarify a long-debated concept.

Registers of insolvency proceedings

With a view to promoting increased efficiency and openness, the new Regulation implements a widely accessible system of information on insolvency proceedings. To this end, publicly-available on line registers are to be created on a national and European level to enhance transparency and accessibility to user-friendly information regarding insolvency proceedings involving European entities.

Member State registers on insolvency proceedings shall be implemented by 26 June 2018, while the European decentralized system for the interconnection of insolvency registers shall be implemented by 26 June 2019.

Rules on groups of companies

One of the most significant innovations of the new Regulation relates to the rules introduced to favour of cooperation between the insolvency administrators (i.e. trustees, receivers, courts etc.) of different companies belonging to the same group and all subject to insolvency proceedings in several Member States. The aim of such provisions is to increase efficiency and encourage common and shared solutions for the administration of the proceedings.

Particularly, the new Regulation establishes guidelines for the administrators handling the insolvency proceedings to exchange all pertinent information and duties of cooperation in the elaboration of a rescue or restructuring plan concerning all the distressed companies of the group. Moreover, each administrator is entitled to participate in the procedure affecting one of the other companies of the same group, being entrusted with several powers such as the authority of expressing opinions, the opportunity to seek the stay of the proceedings and the possibility of proposing a rescue or restructuring plan.

To conclude

The time is ripe to see how the new rules provided by the Regulation will work in practice: hopefully, from 26 June 2017 a clearer and more efficient system may aid the administration of transnational European insolvency proceedings.

Court adopt the judicial insolvency network's Cross-Border Guidelines

By: R. Craig Martin
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If you attended INSOL's Tenth World Congress in Australia this year, you probably heard about Singapore's recent reform efforts and its increasing focus to establish Singapore as an international debt restructuring center.[1] One aspect of this effort was the creation of a Judicial Insolvency Network ("JIN"), initiated by the Supreme Court of Singapore, with the aim of encouraging communication and cooperation among national courts. The JIN held a conference on October 10-11, 2016. This October conference was hosted by the Supreme Court of Singapore and Judges from Australia (Federal Court and New South Wales), the British Virgin Islands, Canada (Ontario), the Cayman Islands, England & Wales, and the United States (Delaware and Southern District of New York) attended in person. Representatives from the Hong Kong SAR attended as observers and the Bermuda Commercial Court participated in the conference electronically.

During this October conference, the participating Judges discussed the need for guidelines and the key aspects of communication and cooperation among courts, including the role of insolvency officeholders or other representatives and other parties involved in cross-border insolvency proceedings. These judges drafted Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters (the "Cross-Border Guidelines") as a new set of guidelines, albeit with reference to other guidelines such as those which have been used by courts in the past, but specifically distilled concepts set out in the Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases jointly promulgated by the American Law Institute, the American Bar Association and the International Insolvency Institute. The underlying rationale was to consolidate, update and modernize the principles contained in other guidelines and protocols based on actual judicial experience.

The Supreme Court of Singapore implemented the Cross-Border Guidelines, effective on February 1, 2017, and the United States Bankruptcy Court for the District of Delaware has adopted a new local rule, effective February 1, 2017, that permits application of the Cross-Border Guidelines.[2] Under this rule, the Cross-Border Guidelines will apply where the bankruptcy court approves, either on application of the parties or at the bankruptcy court's own initiative, a protocol or enters an order applying the Cross-Border Guidelines as adopted.

Subsequently, on February 17, 2017, the United States Bankruptcy Court for the Southern District of New York entered General Order M-511, adopting the Cross-Border Guidelines. On March 9, 2017, the Supreme Court of Bermuda issued a Practice Direction which permits the application of all or any part of the Cross-Border Guidelines. Thereafter, Courts in both the British Virgin Islands and England adopted the Cross-Border Guidelines on March 18, 2017, and May 5, 2017, respectively.[3]

Description of the Cross-Border Guidelines

The Cross-Border Guidelines start with an introduction which describes the rationale behind them, including, the "overarching objective" of improving the efficiency and effectiveness of parallel cross-border insolvency proceedings by enhancing coordination and cooperation among courts supervising parallel insolvency proceedings. The Cross-Border Guidelines aim to promote timely coordination by perming consideration of the Cross-Border Guidelines at the earliest practicable opportunity. The Cross-Border Guidelines also seek to ensure that relevant stakeholders' interests are respected while information is shared to reduce costs in identifying, preserving and maximizing the value of the debtors' assets and business. To that end, the Guidelines seek to avoid or minimize litigation, costs, and inconvenience to stakeholders and ensure the management of a debtor's estate in a way that is proportionate to the aggregate amount of financial claims involved, the nature of the case, the complexity of the issues, the number of creditors and the number of jurisdictions involved in the parallel insolvency proceedings.

There are then 14 different guidelines covering the adoption and interpretation of the Cross-Border Guidelines, communication between courts, appearance in court and consequential provisions. There is also an Annex A that sets out seven principles for the conduct of joint hearings between courts.

1 See generally Report of Committee to Strengthen Singapore as an International Centre for Debt Restructuring, <https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/Report%20of%20the%20Committee.pdf>.

2 See Del. Bankr. L. R. 9029-2.

3 In England the Cross-Border Guidelines were adopted by an update to the Chancery Guide. See Guidelines on Court-to-Court Communication and Co-operation In Cross-Border Insolvency Cases Endorsed by the Chancellor: Media Release, < https://www.judiciary.gov.uk/announcements/guidelines-on-court-to-court-communication-and-co-operation-in-cross-border-insolvency-cases-endorsed-by-the-chancellor-media-release/>. The Eastern Caribbean Supreme Court in the Territory of the Virgin Islands adopted the Cross-Border Guidelines by Practice Direction 8, No. 2 of 2017 made pursuant to Rule 8(2) of the Insolvency Rules, 2005 and became effective on 18th May 2017. See Press Release Eastern Caribbean Supreme Court adopts Judicial Insolvency Network's Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters at < https://www.eccourts.org/press-release-eastern-caribbean-supreme-court-adopts-judicial-insolvency-networks-guidelines/>.

Adoption and Interpretation – Guidelines 1-6: The first six guidelines address the manner and scope of the adoption of the Cross-Border Guidelines, including suggesting that the courts supervising parallel proceedings should encourage their adoption as early as practicable to aid in administration. In so doing, *Guideline 2* provides that the Cross-Border Guidelines should be adopted by a protocol or a court order following an application by the parties or, if the court has power to do so, at its own direction. *Guideline 3* provides that if possible, the protocol or order should address coordination of requests for court approvals or communications with creditors in a time saving way that avoids unnecessary and costly court hearings.

Guidelines 4 and 5 clarify that the Cross-Border Guidelines are intended to be procedural in nature and are not intend to interfere with a court's jurisdiction in administering the proceeding before it or to interfere with or derogate from applicable rules or ethical principles relevant to the proceeding. *Guideline 4* provides that a court may refuse to take any action that would be "manifestly contrary to the public policy" in its jurisdiction or that would not sufficiently protect the interests of the creditor or other interested parties. These provisions are consistent with certain provisions in UNCITRAL Model Law on Cross-Border Insolvency (1997) ("UNCITRAL Model Law").[4] In a similar vein, *Guideline 6* is similar to Article 8 of the UNCITRAL Model Law in that it provides the Cross-Border Guidelines should be interpreted with due regard to their international origin and the need to promote good faith and uniformity in their application.

Communication between Courts – Guidelines 7-9: *Guideline 7* provides that courts may receive communications from a foreign court and may respond directly to them for the purpose of the orderly making of submissions, rendering decisions by the courts and to coordinate and resolve any procedural administrative or preliminary matters related to a joint hearing under Annex A. These communications may occur as agreed to by the courts in specific cases and may include either the court sending or transmitting orders, judgments, opinions and other records of proceedings directly to the other court with advance notice to counsel as the court considers appropriate or directing counsel to transmit these materials.

Guideline 7 also permits two-way communication by telephone, video or other electronic means as contemplated by Guideline 8. *Guideline 8* provides that in the event of these communications, other than on procedural matters or unless the courts otherwise direct, the parties may be present and if they are entitled to be present, they should receive advance notice in accordance with the rules of the courts. The communications should also be recorded and any transcript of the communications should be prepared and filed on the record. Of interest, Guideline 8 also authorizes court personal other than the judges in each court the ability to communicate with one another outside of the presence of the parties to enable them to establish appropriate arrangements for the communications between the judges.

Finally, *Guideline 9* permits a court to provide notice of all of its proceedings to parties in proceedings in another jurisdiction. This will allow a court to ensure transparency and that the parties in the various jurisdictions are aware of proceedings in the various, but relevant, jurisdictions.

Appearance in Court – Guidelines 10-11: These two Guidelines provide interesting and useful provisions that allow a party, or an appropriate person, to appear before and be heard by a foreign court, subject to the approval of the foreign court to such appearance. While it is the practice in many cross-border cases to permit foreign counsel to speak at podium, *Guideline 10* will permit the more formal authorization of such appearances and will likely create some certainty and comfort for out-of-country counsel when seeking to explain the foreign parallel proceedings. *Guideline 11* also permits a court to allow a party to appear and be heard on a specific matter without thereby becoming subject to its jurisdiction other than with respect to the specific matter on which the party appears. This jurisdictional exception must be permitted by the law and be otherwise appropriate. This is a significant Guideline that may ensure that foreign creditors will be able to participate in foreign insolvency proceedings without fully exposing themselves to the jurisdiction of a foreign court for general purposes.

Consequential Provisions: Guidelines 12-14: The last three of the Cross-Border Guidelines provide that a court should recognize and accept as authentic the provisions of the statutes, statutory or administrative regulations and rules of the court applicable to a foreign proceeding as well as the orders made in that proceeding without any further proof subject only to proper objection on valid grounds and then only to the extent of such objection. *Guideline 14* permits that a protocol or order made under the Cross-Border Guidelines may be amended, modified and extend as appropriate by the relevant court and consistent with the Cross-Border Guidelines.

Annex A (Joint Hearings): Annex A sets forth guidelines for the conduct of joint hearings and by its terms encourages the parties to address the matters set out in Annex A in the protocol or order entered under the Cross-Border Guidelines. The Annex permits the conduct of a joint hearing and sets out seven different principles that should apply if a joint hearing is conducted, which are:

(i) The implementation of this Annex shall not divest nor diminish any court's respective independent jurisdiction over the subject matter of proceedings. By implementing this Annex, neither a court nor any party shall be deemed to have approved or engaged in any infringement on the sovereignty of the other jurisdiction.

(ii) Each court shall have sole and exclusive jurisdiction and power over the conduct of its own proceedings

4 See Articles 6 and 21 of the UNCITRAL Model Law.

and the hearing and determination of matters arising in its proceedings.

(iii) Each court should be able simultaneously to hear the proceedings in the other court. Consideration should be given as to how to provide the best audio-visual access possible.

(iv) Consideration should be given to coordination of the process and format for submissions and evidence filed or to be filed in each court.

(v) A court may make an order permitting foreign counsel or any party in another jurisdiction to appear and be heard by it. If such an order is made, consideration needs to be given as to whether foreign counsel or any party would be submitting to the jurisdiction of the relevant court and/or its professional regulations.

(vi) A court should be entitled to communicate with the other court in advance of a joint hearing, with or without counsel being present, to establish the procedures for the orderly making of submissions and rendering of decisions by the courts, and to coordinate and resolve any procedural, administrative or preliminary matters relating to the joint hearing.

(vii) A court, subsequent to the joint hearing, should be entitled to communicate with the other court, with or without counsel present, for the purpose of determining outstanding issues. Consideration should be given as to whether the issues include procedural and/or substantive matters. Consideration should also be given as to whether some or all of such communications should be recorded and preserved.

Some of the points regarding joint hearings replicate the earlier Guidelines (e.g., Guidelines 10 and 11 address appearance in a court and submission to jurisdiction as do item (v) of Annex A). Thus, it seems that in the general course, a court may permit certain actions in connection with administrative hearings before itself that it may need to reconsider or replicate if a joint hearing is to be conducted. This thoughtful process as to the impact of appearance and participation in joint proceedings as contrasted to independent hearings will likely aid in certainty of administration. The Cross-Border Guidelines contemplate setting out solutions to the problems in advance so as to provide greater certainty and efficiency in the conduct of parallel cross-border proceedings.

Conclusion

The adoption of the Cross-Border Guidelines is important and while many courts have in the past implemented similar concepts in orders approving cross-border protocols, not every case can support the time and expense of such a protocol. It is foreseeable that the implementation of the Cross-Border Guidelines will lead to a more efficient and prompt coordination and cooperation in many cases, but especially those smaller cases that in the past have not had the resources to pursue expensive and lengthy negotiations and hearings over a cross-border protocol.

Because the Cross-Border Guidelines have been developed by judges from leading commercial jurisdictions worldwide, they provide a practical and efficient means to implement best-practice principles in cross-border insolvency cases of any size. The adoption of the Cross-Border Guidelines is an important step in the ongoing effort to coordinate insolvency proceedings across multiple jurisdictions. It is expected that other jurisdictions will adopt the Cross-Border Guidelines taking consistency and uniformity in global insolvency proceedings to a new international standard. It is also envisaged that the JIN will convene a conference every two years in the various jurisdictions and this judicial input into the practice and procedure of cross-border insolvency law likely will be an important step forward in the development of best practices in the adjudication of cross-border insolvencies.

Argentinean insolvency system – time for an update?

By Andres F. Martinez
World Bank Group

Argentina has a reasonably modern insolvency system that has been tested during past crises – most notably, at the beginning of last decade. The present insolvency law features most aspects that are essential to a functional insolvency process, however, some legal provisions are outdated, and there is room for improvement over institutional components. Specific topics where updates may be needed include: the introduction of specific SME insolvency provisions; the strengthening of the insolvency administrators' system; the adoption of the UNCITRAL Model Law for Cross-border Insolvency; and, the inclusion of a priority ranking for post-commencement financing, among others. In the last ten years, several countries in Latin America have undertaken major reforms in their insolvency systems, further evidencing the need for Argentina to consider how they too, will undertake an essential update.

An Insolvency Law Broadly Aligned with Leading Practices

When Law 24.522 came into force in 1995, Argentina's insolvency regime was one of the world's most modern. Although several amendments have been made, the Law in force today contains a very similar structure as the original Law, with no major adjustments. Because the Law was at the forefront of insolvency legislation when it was initially implemented, it remains largely in alignment with many best practices that give rise to strong insolvency regimes. The Law contains a clear test for commencement based on illiquidity, and a robust reorganization process that includes a reasonably brief automatic stay and grants distressed but viable debtors the opportunity to be rescued. It also emphasizes the protection of creditor's rights, by allowing, upon expiration of the stay period, creditors to continue to enforce their rights over the collateral. The debtor remains in possession of the estate, however is under the strict control of the insolvency administrator. Finally, the Law contemplates a rapid liquidation process that meets standard characteristics of well-functioning systems. An abundance of non-mandatory judicial precedents have been issued since the inception of the Law (including some mandatory precedents, known as "plenarios"), that interpret articles whose meaning was considered obscure.This has contributed to some predictability in judicial decisions on insolvency cases, which are public and easily accessible.

Areas to Update

Despite its strong foundation, the Law lacks critical components that have come into light in recent years. Some of the legal and institutional shortcomings include:

- **No Priority for Post-Commencement Funding** If a distressed company is infused with fresh financing to cover costs in an attempt to revamp operations, priority for such financing is not granted easily under the Law. Without priority, creditors lack the incentivize to grant post-commencement financing, reducing the availability of this type of credit. This may seriously harm an entity's ability to conduct an operational restructuring in Argentina, where restructurings of this type are already rare.

- **Absence of "Business Plan" Requirement** The viability test is conducted largely on the basis of the proposal that the debtor must file to its creditors, which does not need to include a proper, fact-based business plan. The Law merely encourages financial rescheduling, rather than operational restructuring that aims to restore a debtor's future viability. Business plans are essential to ridding the entity of processes that led to its failure, and creating a viable business going forward.

- **Limited Role of Insolvency Administrator** The role and capabilities of the key institutional player, the insolvency administrator (or "sindico"), are limited. In this regard, the *sindicos* regulation under the Law is in need of major modifications. The present Law dictates that the Insolvency Administrator must be an accountant. There is no transparent *sindico* profession that governs conduct, nor are Insolvency Administrators appointed in a manner that considers individual qualification or expertise that would complement the case at hand. The need for amendments in this area is bolstered by transparency concerns in both past and recent cases.

- **Weak SME Insolvency Process** While the current administration has emphasized the need to strengthen SMEs in various areas of their operations, SMEs do not benefit from a swift, expeditious insolvency process. Two provisions (Articles 288 and 289) offer a mild attempt at shortening the typical length of the insolvency process, however, with little success. Difficulties in exit further hamper access to finance for SMEs.

- **Disconnect in Creditor Committee Regulation.** The creditors' committee regulation was intended to attract key unsecured creditors, yet in actuality it acts as a deterrent for them when major creditors are invited to join. This is largely due to the non-binding nature of its recommendations and other limitations contained in the Law.

- **Employee Takeovers** Recent amendments allowing employees to take over companies have generated controversy in their practical application, raising concern over whether firms are *de facto* restructured, or whether the death of the company is merely postponed at the expense of creditors.

- **Electronic Advancements** Several countries have introduced e-auctions that work to maximize liquidation value, and are a relevant consideration for Argentina to implement.

- **Revisions to Cross-border Insolvency** Finally, globalization has emphasized the need to replace weak cross-border provisions, as outlined in the 1995 version of the Law, with the updated UNCITRAL Model Law on Cross-border Insolvency.

Regional Trends

Over the last decade, many Latin American economies have engaged in the process of updating their insolvency systems. Colombia replaced its crisis-inspired and debtor-friendly law from 1999 in 2007, in an attempt to provide creditors with enhanced rights. Chile recently engaged in a massive overhaul of its insolvency regime, replacing its liquidation-oriented law with a reorganization-focused framework. They further took to reduce the stigma associated with bankruptcy by changing the name of its supervisory body from "superintendencia de quiebras" to "superintendencia de insolvencia y reemprendimiento". In 2008, Uruguay and Mexico both updated their insolvency frameworks. Paraguay is discussing much-needed updates to its insolvency system, the core of which has not been reformed since 1969. Many countries are attempting to reflect leading practices in their legislation wherever possible, to align with standards set by UNCITRAL[1] and the World Bank[2], and to improve their ranking in the World Bank's Doing Business[3] report.

Conclusion

A major renovation to Argentina's insolvency framework is likely not necessary to remedy the key shortcomings outlined above. In fact, a radical reform runs the risk of backtracking the abundance of judicial precedents that provide some predictability in the application of the Argentine insolvency law. However, as highlighted above, there are several legal and institutional aspects where an update is highly recommended and it would be desirable that policymakers diarize insolvency updates for short or medium term discussions.

[1] Refer to: UNCITRAL Legislative Guide on Insolvency Law (2005)
[2] Refer to: World Bank Principles for Effective Insolvency and Debtor and Creditor Regimes (2016)
[3] Refer to: World Bank Doing Business Report 2017, Economy Rankings (http://www.doingbusiness.org/rankings)

INSOL International
GROUP THIRTY-SIX

HENRY DAVIS YORK

Towards prosperity - rebuilding Myanmar's insolvency and restructuring laws

By Scott Atkins
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John Martin,
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Australia

Synopsis

After more than 50 years of military rule, Myanmar is transitioning towards democracy and a market economy. Updating and strengthening Myanmar's insolvency laws is acknowledged by many in the country and beyond to be a vital part of the attempt to leverage Myanmar's strengths and development potential in this new environment.

Henry Davis York has been engaged by the Asian Development Bank to help Myanmar draft its new insolvency and restructuring laws and to undertake associated capacity development of institutions and professions to support the introduction of those laws. This article outlines some of the key features of those new laws and the principles and matters that is guiding its development.

Introduction

Emerging from decades of economic and political isolation, the Republic of the Union of Myanmar is undergoing an historic transformation towards democracy and a free market economy.

Myanmar's economy was centrally planned for almost 60 years. During that period, banking and financial activities were very limited, with commercial credit almost non-existent. Myanmar's corporate insolvency laws and procedures were largely unutilised, saved for member's voluntary windings up. As a consequence, there are professional and institutional challenges to Myanmar's capacity to effectively deal with commercial and corporate matters, including corporate insolvencies. To help fuel a free market economy, Myanmar is seeking to create a viable insolvency system which will encourage the greater availability of credit by offering a systematic means of dealing with financial distress and failure.

Henry Davis York (HDY) has been retained as a consultant by the Asian Development Bank (ADB) to assist Myanmar to strengthen and modernise the legal and institutional framework of its insolvency and restructuring regime as well as undertaking associated capacity development of institutions and the profession of insolvency practitioners to support the introduction of those laws. The overarching objective is to create a platform that matches Myanmar's broader legal and commercial systems; a platform that will not only serve Myanmar in its present circumstances, but one which will be sophisticated enough to maintain its relevance into the future as Myanmar's economy develops.

Key principal considerations include the importance of a practical corporate rescue process for the rehabilitation of financially distressed companies, and the significance of Myanmar's micro, small and medium enterprise economy as the employment and economic backbone of the country.

Present legal framework and circumstances

A significant majority of Myanmar's citizens make a living by working in small enterprises, often led by families or individuals. Much of the country's GDP and labour force is reliant on agriculture.[1] Myanmar is also seeing a rapidly expanding consumer market and growing middle class[2] which is spurring economic growth. The Myanmar government's program to privatise state owned enterprises has begun to provide additional stimulation and growth to the economy. Further, foreign investment in the country is likely to increase, particularly in Myanmar's natural resource assets, including gas, oil, mineral reserves and gems.

1 See The Economist, "Myanmar's Economy: Miles to Go", August 6 2016, <http://www.economist.com/news/asia/21703405-new-government-unveils-promising-vague-economic-plans-armed-forces-loom?zid=306&ah=1b164dbd43b0cb27ba0d4c3b12a5e227> (accessed 11 February 2016); Pricewaterhouse Coopers, "Myanmar - The Awakening Tiger", <http://download.pwc.com/mm/gobig/index.html#featured-insights> (accessed 11 February 2016); Central Intelligence Agency World Factbook, "Economy: Burma", <https://www.cia.gov/library/publications/the-world-factbook/geos/bm.html> (accessed 11 February 2016); Asian Development Bank, "Myanmar: Economy", <http://www.adb.org/countries/myanmar/economy> (accessed 11 February 2016); The World Bank, "Myanmar Overview" <www.worldbank.org/en/country/myanmar/overview> (accessed 11 February 2016).

2 Myanmar's middle class is expected to grow from 5.2 million to over 10 million by 2020: Boston Consultancy Group, Vietnam and Myanmar: Southeast Asia's New Growth Frontiers, December 2013.

As a former British colony, Myanmar is a common law jurisdiction. Its existing insolvency laws are derived from 19th century British company laws which contain basic provisions for winding up, receiverships and schemes of arrangement.[3] These processes, which have not been amended since the Myanmar's Companies Act (Companies Act) was enacted in 1914, provide mechanisms to address and wind up the affairs of an insolvent company; however, they are in many respects out of date and do not reflect international best practice.[4] The only corporate rescue mechanism set out in the Companies Act is by way of scheme of arrangement. This process is well understood and remains a common feature of most common law insolvency systems, but it is a rescue mechanism that is only feasible for large companies and complex corporate groups. The law therefore is an awkward fit for Myanmar's micro, small and medium enterprise (MSME) economy[5] where business structures are simple. Square pegs and round holes come to mind.

Developing the new laws

The wholesale transplantation of foreign laws is undesirable[6] as it ignores the cultural aspects and features of the host country. Cultural differences around the world, the distinct history of each country's economy, and differing attitudes about money and debt mean that there can be no "one-size-fits-all" insolvency system for enterprises or individuals.[7]

Nevertheless, for a country that is transitioning from a controlled economy to a market economy, importing legal concepts and structures from mature insolvency systems and international institutions may be useful to guide the development of a market based society. Furthermore, while insolvency systems must be appropriate to their host country's context, there are some broad principles applicable to all.[8]

According to the World Bank,[9] an effective insolvency system should match with the state's broader legal and commercial systems. It should offer an efficient liquidation process for non-viable businesses and reorganisation of viable businesses if this will lead to a higher return to creditors. It should maximise the value of the assets of the debtor-company and recovery by creditors.

There is a substantial similarity in the approach adopted by most common law jurisdictions to the liquidation of companies, where voluntary liquidation and court-ordered liquidation are the two means for the commencement of a liquidation proceeding. These mechanisms are currently available under the Companies Act and will be retained in Myanmar's new insolvency law.

However, a country's laws should reflect the economic needs of the society and best practice principles. Two features are incorporated into Myanmar's new insolvency regime which are drawn from an examination of Myanmar's present economic climate and best practice principles:

(a) an emphasis on corporate rescue processes, including the introduction of a "Rehabilitation Proceeding"; and

(b) a separate corporate rescue and insolvency regime tailored specifically to the circumstances of the MSME sector to acknowledge the significant role of MSMEs in Myanmar's economy.

Focus on corporate rescue

More recently, governments across the world have come to realise that a more forgiving insolvency system, which recognises the value-preserving features of supporting the rehabilitation of viable businesses and moves away from a regime that focuses on penalising company directors and stigmatising failure, can be valuable. This appreciation of corporate rescue has been put in motion by international organisations such as INSOL International, the World Bank, the International Monetary Fund, and the United Nations Commission on International Trade Law, who are all committed to improving insolvency and corporate rescue systems at a global level.

In formulating a corporate rescue regime for Myanmar, it has been important to ensure that the regime is suited to dealing with the reality of the present business environment, as well as having the capacity to facilitate increasingly complex and substantial rehabilitations as Myanmar's economic circumstances develop. Thus, schemes of arrangement will be retained in the Companies Act, but will be supplemented by a corporate rescue mechanism in the new insolvency law to be called a "Rehabilitation Proceeding". This mechanism is similar to provisions for company administrations in other jurisdictions and will be made available to all distressed companies in Myanmar with the following characteristics:

- the management of the debtor company will be given over to an independent "Rehabilitation Manager", who will take on a managerial role and be responsible for the management of the debtor during the course of the rehabilitation procedure;
- in order to commence a Rehabilitation Proceeding, the debtor must be insolvent, or at risk of being so;
- a moratorium provision will operate automatically upon the appointment of a Rehabilitation Manager while a rehabilitation plan is formulated. The moratorium may be extended by the terms of the rehabilitation plan if approved by creditors and the court;
- the approval process for the rehabilitation plan and the implementation period for the plan will be subject to strict timelines; and
- in the event that a rehabilitation plan is not approved, or an approved rehabilitation plan is not able to be implemented, there will be a conversion mechanism whereby the debtor enters into liquidation.

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3 Myanmar's existing insolvency laws are contained in Part V of its Companies Act 1914 (Myanmar).

4 England's first bankruptcy laws were created in 1543. Early English bankruptcy laws were filled with numerous penalties and punishments for non-payment including debtors' prison. See Robert Weisberg, Commercial Morality, the Merchant Character, and the History of the Voidable Preference, 39 Stanford Law Review 3 (1986), Charles Jordan Tabb, The Historical Evolution of the Bankruptcy Discharge, 65 American Bankruptcy Law Journal 325 (1991) and Nathalie Martin, The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation, 28 Boston College International and Comparative Law Review 1 (2005).

5 100% of Myanmar's companies have 50 employees or less (80% have 10 employees or less) and its economy is heavily skewed towards agriculture (like many developing countries) at 70%, with services at 23% and 7% in industry. See above note 1.

6 Commentators have suggested that wholesale transplantation is undesirable as it ignores the cultural aspects and features that make the host country's culture unique: see Martin, above note 4.

7 Judith Duinkerken, Corporate Rescue in Developing Countries: 'One Size Fits All'?, 14(2) International Corporate Rescue 98 (2017).

8 The authors refer to the following guiding principles: Promoting Regional Cooperation in the Development of Insolvency Law Reforms, Asian Development Bank, 2008; Legislative Guide on Insolvency Law Part 1 and 2 (2005) and Part 4 (2013), United Nations Commission on International Trade Law; Principles for Effective Insolvency and Creditor/Debtor Regimes, The World Bank, 2015 (World Bank Principles); and Creditors Rights Insolvency Standard based on the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes and UNCITRAL Legislative Guide on Insolvency Law, International Monetary Fund, 2011.

9 World Bank Principles, above note 8.

Although there is currently no culture of corporate rescue in Myanmar, it is hoped and anticipated that the implementation of a legal corporate rescue regime may lead to a swift change of culture. To achieve this, it will be important to ensure that Myanmar is ready to take advantage of the corporate rescue regime that will be delivered to it. Having effective property, company, taxation and private laws, as well as institutions and experts that are able to support the development of a corporate rescue, will be essential. Capacity development in Myanmar at every level relevant to the new insolvency and rehabilitation regime will be a key issue moving forward.

MSME specific insolvencies

At present there is little need for sophisticated restructuring and insolvency mechanisms when almost all of Myanmar's private companies and businesses are simply structured MSMEs. The emphasis for these enterprises should be on an efficient, quick and cheap process. Where undertaking a corporate rescue or liquidation process is expensive, such a process will be outside of the reach of many financially troubled MSMEs.

Just as MSMEs are present in large numbers, so too do they fail in large numbers, and Myanmar's new insolvency system must be ready and willing to cater to its frequent and many users. Therefore, we hope to establish for Myanmar's MSME insolvencies a separate regime that reflects their unique attributes.

Bearing this in mind, a principal feature of Myanmar's new insolvency law is to include a separate regime specifically tailored to providing a streamlined and simplified rehabilitation and liquidation process for MSMEs, featuring the following characteristics:

- the availability of the regime will be determined by reference to the amount of the debtor's total debt outstanding at the time of lodgement of the application;
- in order to commence a rescue and rehabilitation process, an MSME debtor must be insolvent, or at risk of being so;
- for a MSME corporate rescue process, the debtor's management will remain in place through a MSME rescue and rehabilitation process, but a "Rehabilitation Advisor" (a qualified insolvency practitioner) will be appointed to oversee the process and advise on a suitable MSME rehabilitation plan, based on financial and creditor information provided to him by the MSME;
- a MSME Rehabilitation Plan will be approved unless more than 50% of creditors by value object to it, with an initial vote by mail or email. A creditors' meeting will only be convened if the Rehabilitation Advisor thinks there may be some benefit; and
- the corporate rescue of an MSME will be designed to provide an expedited distribution of available assets without expending time and costs on detailed investigations. There will be no obligation on liquidators to investigate the affairs of the company or pursue the recovery of preferential or uncommercial transactions under the MSME regime, unless creditors consent and provide funding. Creditors will have recourse to apply to the court for review if they are dissatisfied.

Final thoughts

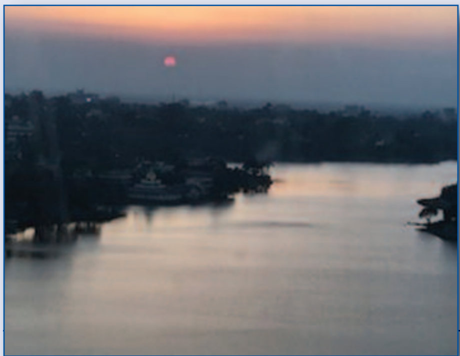
It will be crucial that Myanmar is willing to establish the institutions necessary for the success of its new insolvency law.

A realistic assessment of the capacity of the existing legal system will be necessary. There also appears to be some challenges facing the success of the new insolvency law with the limited numbers of experienced professionals ready to take up the requirements of the regime. The institutional capacity of regulatory authorities[10] and the judiciary to carry out their functions under the new regime is also of concern. These will present challenges to the proper practice and adjudication of insolvency disputes; however, they are not insurmountable. Judicial capacity development initiatives will need to be undertaken to enable the judiciary to properly perform its supervisory and adjudicative role in respect of insolvent administrations and disputes. Likewise, proper education, licensing and regulating of insolvency practitioners need to be developed. The capacity of the corporate regulator to perform any regulatory functions that may be allocated to it under corporate insolvency legislation will be an important factor in the success of any new regime, and thus proper resourcing of those authorities will be crucial to maximise its efficacy. These matters are critical to the success of the new insolvency and restructuring framework to effectuate corporate rescue and winding up proceedings.

Finally, it is hoped that, at some point. Myanmar will adopt the UNCITRAL Model Law on Cross-border Insolvency. HDY and the ADB are of the view that adoption of the Model Law will be an attractive part of Myanmar's legal infrastructure compatible with foreign investment in the country. It has the potential to provide a clear and inexpensive means for addressing international insolvencies, that are consistent with international best practice.

More than a century ago, Rudyard Kipling described Myanmar as "quite unlike any land you know about". The same may be said today, but with a population of approximately 52 million, Myanmar will be a significant market for many goods and services and will offer tremendous possibilities for investors. As the country modernizes, there will be huge opportunities to build infrastructure such as roads and power supplies and undertake mining and resources projects within the country.

Supporting the development of a credit-based market economy in Myanmar goes hand-in-hand with developing a systematic means of dealing with liquidation and restructuring.



INSOL New York 29 April – 1 May 2018

Plans move apace for our annual Americas Conference and we look forward to seeing everybody in New York next year. The Educational Committee led by Lynn Harrison 3rd, *Fellow, INSOL International,* Curtis Mallet-Prevost Colt & Mosle LLP, and Farrington Yates, *Fellow, INSOL International,* Kobre & Kim, are planning an amazing up to the minute program, which is under wraps at the moment until we launch the registration brochure in September.

There are some exciting new topics that the profession are now having to deal with that we have not covered before so we consider that it will be a ground breaking INSOL conference. INSOL 2017 dealt with Embracing Change and this theme still resonates in our 2018 program as we have to work with new developments in the business world which create new and intricate issues in the world of insolvency and turnaround.

Our thanks go to our Educational Committee listed below who are working on the plans for the conference:

Educational Committee

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The educational program will include the opportunity to attend breakout sessions covering different topics of interest to our members on both Monday & Tuesday in order to offer greater choice of selection. You will notice that we have many Fellows involved this year and they have brought exciting new ideas to the development of the program. We will also be holding a specialist ancillary meeting devoted to offshore issues on Sunday 29th April and a half-day small practice issues meeting.

This is also a great opportunity to meet new members of INSOL in the region as well as hearing about the latest cross-border developments that have taken place since INSOL 2017. We encourage our younger members particularly to join us at the Conference and develop your network of contacts. Our USA/Canada Membership Development Committee led by Co-chair David Fournier, Pepper Hamilton LLP and Co-chair Veerle Roovers, Davis Polk & Wardwell LLP are bringing together younger members throughout the year at special networking events to encourage attendance as this is only a once in every four-year's opportunity for our local USA/Canada members to be able to attend a conference in your home country. Additionally, we hope that many of our members based in Latin America will also join us in New York.

We look forward to welcoming you to New York.

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Rescuing an Australian power generator through effective use of the courts and flexibility of the insolvency regime in Australia

By Ben Campbell
Director
PPB Advisory
Australia
and
Michael Murray
Senior Associate
Ashurst
Australia

The administration of the InterGen Energy Group companies demonstrates the effective use of the courts and flexibility of the insolvency regime in Australia to facilitate the return of a company to solvency and to the control of its directors.

The successful restructure of the InterGen Energy Group companies and their exit from administration was achieved in part due to the speed and efficiency with which the Court orders were sought and obtained. The orders allowed Grant Sparks, Stephen Longley and Martin Ford from PPB Advisory, in their capacity as administrators of the Group (the Administrators), to borrow $270m as part of a rescue proposal from shareholders, return the Group to solvency and to the control of its directors.

On each occasion, the Court heard and granted the orders sought by the Administrators on the same day. The short timeframes within which the Court was able to consider and grant these orders can be favourably compared with a large number of other jurisdictions around the world. This is, for example, in stark contrast to the timeframes and process for obtaining court approval for 'debtor-in-possession' (DIP) financing under Chapter 11 in the US, which often takes more than a month and requires multiple court hearings.

The significant benefits to all stakeholders of the InterGen Energy Group included:

- secured creditors were repaid in full
- unsecured third party creditors were repaid accrued pre-appointment debts in full and stand to benefit from ongoing trading with the Group
- the Group's joint venture partner has greater certainty regarding ongoing contribution of funding and expertise to protect and grow the value of the Callide C Power Station
- shareholders have had significant equity value protected
- the directors are now in control of the Group.

Restructuring steps undertaken by the Administrators

1. Following negotiations with two parties regarding competing restructuring proposals, agreement is reached on the terms for a $270m loan from overseas shareholders, including a North American pension fund and Chinese state owned enterprise.
2. Application to the Court for orders that the Administrators are commercially justified in entering into the shareholder loan and are absolved from any associated personal liability.
3. Execution of the shareholder loan of $270m which, together with approximately $60m in cash held by the Group, is used to repay the existing lenders and meet the costs of the receivers and managers to effect retirement of the receivers and managers, thereby ceding control of the business and assets to the Administrators.
4. Appointment of a related entity not under external administration as services provider responsible for managing the Group's interests in the Callide C Power Station at no cost.
5. Implementation of a number of initiatives to maximise the Group's ability to exit administration based on solvency rather than through an insolvent restructure.
6. Preparation of a 'solvency report' to support an application to the Court for orders that the Group's administration should end.
7. Application to the Court for orders that the administration of the Group end and that the Court fix the Administrators' remuneration.

Background

The InterGen Energy Group companies owns a 50% interest in the Callide C Power Station, a supercritical coal-fired power station located in Central Queensland, Australia. Thermal coal used as fuel for the Callide C Power Station is sourced from an adjacent coal mine which was owned by a global mining group. The coal was supplied under a long term coal supply agreement.

From 2013, the coal supply agreement had been the subject of extensive litigation, casting significant doubt over the continued supply of coal and future viability of the Callide C Power Station. This was exacerbated by low electricity prices and a looming maturity date for a $285m loan facility from the Group's banking syndicate in mid-2016.

Despite extensive negotiations with shareholders and the banking syndicate during 2016, the Group was unsuccessful in securing new funding or an extension of the maturity date for its debt. Consequently, the directors resolved to appoint Grant Sparks, Christopher Hill and Martin Ford of PPB Advisory as voluntary administrators on 14 June 2016. The Group's banking syndicate then appointed receivers and managers on the same day.

Competing rescue proposals

In early November 2016, the Administrators entered into negotiations with one of the Group's lenders, a global private equity fund, which was looking to execute a loan-to-own strategy through an insolvent restructuring tool known as a Deed of Company Arrangement (DOCA). The DOCA proposal was to provide for full repayment to all other secured creditors and a substantial, but lower than full, return to unsecured creditors, in exchange for 100% ownership of certain entities which owned the Callide C Power Station.

In late November 2016, the Administrators were advised by the Group's ultimate shareholders that they were formulating a recapitalisation plan which would provide for full repayment to secured creditors and potentially full return to all third party unsecured creditors. In the following weeks, the Administrators engaged in extensive negotiations with the shareholders regarding the details of their proposal which was to be effected in three stages:

1. The first stage involved the Administrators causing the Group to borrow $270m from the Group's shareholders which, together with approximately $60m in cash held by the Group, would be used to repay the existing lenders and meet the costs of the receivers and managers to effect retirement of the receivers and managers, thereby ceding control of the business and assets to the Administrators.
2. The second stage involved the Administrators appointing a related entity as service provider with responsibility for managing the Group's interests in the Callide C Power Station at no cost to the Group. Under this arrangement, the Administrators retained control over the operations including all receipts and payments, and incurrence of debts.
3. The third stage required control of the Group to be returned to the shareholders either by way of an application to Court that the administration should end on the grounds of solvency or by way of a DOCA.

In response to the shareholder proposal, the lender proposing a restructure by way of a DOCA wrote to the Administrators contesting whether it was in the interests of creditors for the shareholder proposal to be implemented (or considered at all). The Lender threatened to withdraw its DOCA proposal if it was not accepted by the Administrators within a short period of time or if the Administrators took any steps to implement the shareholder proposal. The Administrators formed the view that the shareholder proposal was in the best interests of all creditors and shareholders of the Group as it had greater prospects of returning the Group to solvency, maximising returns to creditors and retaining value for the existing shareholders. This is in line with the objectives of the insolvency regime in Australia (and most other jurisdictions).

First Court application

It is relevant to note that administrators in Australia take on considerable risk compared to insolvency practitioners in some other jurisdictions as they assume personal liability for any debts incurred from the time of their appointment to an insolvent entity. In limited circumstances, administrators may seek court orders absolving them of personal liability.

To give effect to the shareholder proposal to recapitalise the InterGen Energy Group companies, the Administrators sought an order from the Court releasing them from any personal liability for entry into the shareholder loan and the services agreement. Further, the Administrators also sought a direction from the Court that they were justified in causing the Group to enter into those agreements. The applications were filed and heard on the same day. Both orders were granted.

In granting the orders, the Court applied a previous judgement where it was noted that it would be "the exception, rather than the rule" that the Court would be prepared to give a direction in respect of arrangements that relate to commercial issues. This is because it is generally the Court's view that commercial issues are best weighed and assessed by the Administrator, rather than the Court. However, in this case, the Court found that where the issues are "particularly complex and involve the competing interests of different classes of creditors" the Court may be prepared to grant the orders absolving the Administrators from personal liability. Of relevance to the Court's decision in the InterGen Energy case was the presence of competing DOCA and shareholder proposals, which required an assessment of the interests of two distinct classes of stakeholders in the Group.

The responsiveness of the Court in hearing the application and granting the orders can be favourably compared and contrasted to the process for the courts to grant an order for 'debtor-in-possession' (DIP) financing under Chapter 11 in the US which usually involves:

1. An interim DIP hearing being held with notice to be provided to certain creditors and the US Trustee (which usually occurs within a few days after filing for Chapter 11 bankruptcy protection).
2. A final DIP hearing after the official committee representing the interests of unsecured creditors has been appointed and has had time to consider the proposed deal (usually 30 to 45 days after the appointment of the official creditors' committee but potentially longer if the application is contested).

The path to restoring solvency

After the Administrators took control of the business, the market price for electricity also moved favourably amidst well publicised supply constraints following the announced closure of another large coal-fired power station located in Victoria, hotter than normal weather over the summer months, blackouts in South Australia and calls for Government intervention to deal with what had been commonly reported as an "energy crisis".

However, despite the benefits of a material improvement in electricity prices, the Group continued to face a number of risks which threatened its ability to exit administration based on solvency:

- continued uncertainty in relation to coal supply as a result of ongoing litigation and the recent sale of the source mine to a smaller and less capitalised owner
- a cost dispute with the operator of the Callide C Power Station in relation to the renewal of an operations and maintenance agreement

- large and growing contingent claims against the Group for 'out of the money' hedge contracts entered into before administration
- significant capital expenditure required following recent mechanical issues which indicated a heightened risk of a major breakdown occurring in the short to medium term.

The Administrators continued working with the shareholders to implement initiatives aimed at mitigating these risks, and maximising the Group's chances of exiting administration based on solvency rather than through a DOCA. These initiatives included:

- continuing litigation and negotiations with the mine owner regarding a potential settlement and ongoing coal supply, whilst simultaneously assessing contingency plans to deal with any risk of interruption to coal supply
- negotiating and reaching agreement with the operator in relation to the terms of the operations and maintenance agreement
- negotiating with one of the major hedge counterparties to avoid termination of its respective hedge contract (and therefore avoid crystallising a loss to the Group)
- negotiating with the joint venture partner to undertake a staged capital expenditure program to defer certain items of expenditure.

Over the next three months, whilst under the control of the Administrators, the Callide C Power Station generated substantial cash flows as a result of the favourable electricity price movements, and a number of the risks had been largely mitigated, demonstrating a significant improvement in value to creditors and shareholders.

Second Court application

Following this period of improved trading performance and successful implementation of initiatives to deal with risks facing the Group, the Administrators then turned to the process required to effect their retirement and return the Group to the control of its directors. In this regard, the Administrators made a further two applications to Court, namely: that the administration of the Group end; and that the Court fix the Administrators' remuneration on the date of the hearing, in the amount sought.

The application for the administration to end was supported by analysis of the Group's forecast cash flows and financial position, and a detailed report on the solvency of the Group. The Court was satisfied that the Group was solvent as at the date of the hearing and made both orders.

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

Working Toward 2021 – Technical Update

In the INSOL International Strategic Plan – TOWARD 2021 the key objectives with respect to technical education and publications are that by 2021 INSOL International is a leading global source of curated technical expertise and high calibre education services to meet the dynamic needs of the global market place and members. Its publications are world class and are supported by training delivery that provides a well-regarded experience for users. The range of courses meets the needs of seasoned professionals and academics, as well as new entry members to the industry.

One of the key elements of this endeavour is to "ensure that the technical products meet the needs of all members". This indeed is a challenge due to the wide geographical spread of our members as well as the varied interest groups but the INSOL Technical Research Committee together with the technical team is working towards getting this balance right. On the one hand, we produce material that has cross-border implications and relevance to several jurisdictions. On the other hand, we produce material that are specifically written to provide information about jurisdictions and subjects that may not be otherwise readily available in English.

We published the following in the last six months:

Books

- Statement of Principles for a Global Approach to Multi-Creditor Workouts II
- Directors in the Twilight Zone V

Special Reports / Projects

- Office-holder Remuneration: Some International Comparisons
- Jurisdictional Considerations in Cross-border Insolvencies (web based)
- Protocol for International Recognition of Insolvency Proceedings Affecting Natural Persons
- Cross-border recognition and enforcement post the Rubin decision – Update from around the world

Going forward we will keep you posted of all the technical publications that we produce half yearly and if you have missed reading any one of them please access the technical library on the INSOL website where all our publications are available to members.

We would also be delighted to hear from our members with new topic suggestions and indeed if you would like to volunteer to lead a technical project. Our objective is to produce material that is relevant and of interest to the practitioners and we greatly value your feedback.

Fellow of INSOL International

International Association of Restructuring, Insolvency & Bankruptcy Professionals

INSOL International is pleased to announce the eighth graduating class of the Global Insolvency Practice Course. The successful participants are now formally recognised as a Fellow, INSOL International.

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Website development

Report by Jason Baxter

Chief Operating Officer,
INSOL International

The importance of an organisation's website cannot ever be underestimated. It is the shop window from which it promotes its products and services and it is the means by which it can inform its audience of developments it deems to be of interest.

So often now we hear of the user journey or the user experience. A functional, attractive, appealing, relevant and easy to navigate website has become the standard. Anything less will lead in time to disappointment.

It is fair to say that the content to be found on the website, then and now, was/is of the highest standard but sometime finding it could be problematic and frustrating. In 2016, INSOL International started on a journey to modernise and reinvent its website and in so doing enhance its members' user experience. The look and feel of the website had to be fresh, modern and appealing to INSOL members. The content had to be readily accessible with functionality relevant to the needs of the users. To enhance the members experience, a modern CRM (Client relationship Management) system would have to sit behind the website.

The journey continued into 2017 with several expert website developers and CRM providers invited to meet with members of the INSOL staff (including myself) to learn about our requirements and pitch their solutions. Whilst cost is an issue that never can be ignored it was fundamental that the organisation we found truly understood the issues faced by a member association and the dynamic between it and its members. Furthermore, the desired partner in this endeavour needs to understand what INSOL International did for its members, how it engaged, communicated and worked with them. Only with this level of understanding would our choice of partner be able to deliver the tool that we envisaged would significantly enhance the way in which our members engage with us and set the standard for what should be expected.

Having spent much of January and February considering who was best placed to work with us a firm was chosen in March and tasked with delivering to INSOL a new website and CRM system by autumn 2017. No mean feat I may add. Very rarely is the time frame so short for such a huge endeavour.

From initial scoping exercises in April, work has continued throughout the spring and summer with the build now taking shape. Drafts of web page designs have been drawn up and with the emphasis on making the most of what is displayed on the screen whilst not appearing too "busy". INSOL International does a lot of work for the benefit of its members and we wish to ensure that this is known. Whether it's the homepage promoting the benefits of membership, forthcoming events and publications, or the technical library providing access to papers relevant to our sector we want to ensure that everything is clearly identified and easy to find with further information available exactly where one would expect it to be.

I have accompanied this article with some "mocked up" designs of the new website but would like to take this opportunity to highlight some of the new functionality and how it will impact on our members.

Whilst the appearance of the website is noticeably different, incorporating a more dynamic style the fundamental difference which will dramatically change things (for the better) is the use for discrete usernames and passwords. Every INSOL International member will possess his/her own username and password and will use this to reach the member section of the website. He/she will be able to access their own user dashboard, see detail on how they engage with INSOL via committees etc and make changes to personal data and preferences. This will allow the member to fully personalise their relationship with INSOL International. Furthermore, it will provide very useful data and metric regarding usage and we will be able to pinpoint what areas of our website are getting significant traffic, what papers have peeked interest and are being viewed by many "DIFFERENT" members and where they are located. It will allow us to pinpoint what additional services and information that can best benefit our community.

A significant aspect of INSOL's services to its members is its conferences and seminars. With over 1000 attending the Congress held this year in Sydney it is fundamental that we can promote these events effectively on our website and make registration as simple as possible. As such we will be integrating a new online booking system into the website that will provide members with immediate confirmation on registration. Rigorous security will ensure transactions are safe and provide the peace of mind all online purchasers demand. Furthermore, a registered delegate will be recognised and permitted to access information on the event aimed solely at those attending.

Technical library. I mentioned above that INSOL currently has many interesting and relevant papers on its website. Some may be easier to find than others. The new website will provide a much easier search function whilst also promoting new papers and technical documents, as well as those that are proving very popular. This should make finding the paper you are after or the subject you are researching much less time consuming.

Our local member associations will be given significant prominence on the website and we hope that this will promote them to potential local members. Anyone in these jurisdictions should be able to readily access information on their local association(s) and be easily directed to them.

The G36 are vital to INSOL International and as such have significant profile both on the home page and subsequent other pages. We hope that this aptly shows our appreciation of this body and the contribution they make to INSOL and the work it does around the globe.

As I mentioned earlier, included with this article are some mock up designs of the website.

With so many accessing the internet via tablets and smartphones we have taken time to ensure that the INSOL website view will be optimised regardless of what medium is used. It will effectively bend and shape to the device.

Furthermore, and in parallel with this project we are also working on an enhanced APP that builds on what many of you may have used at our Conferences. Though we are at the very early stages of this endeavour we have formulated a plan of how it should interact and synchronise with the INSOL website to ensure it is always up to date. It is fundamental therefore that the website and CRM system currently being built can adapt and incorporate new functionality we might wish to have in the future.

With a launch set for Autumn, and as the build process continues, we will be entering the testing phase in the coming weeks and not long after that you, our members, will receive instructions re "usernames" and "passwords" that will be required. At this stage, I invite feedback on your thoughts regarding the design and my description of functionality. Furthermore, I would appreciate any volunteers who would like to participate in the testing phase. This is an exciting time for INSOL, the Task Force is testament to that, and the release of an enhanced and modernised Website and CRM system demonstrates our appetite to demonstrate and deliver value.

INSOL International / INSOL Europe Tel Aviv One Day Joint Seminar – 27 June 2017

Report by Eitan Erez,
Eitan S Erez & Co.,
Tel Aviv, Israel

A success to the one day joint seminar organized by INSOL International and INSOL Europe in Tel Aviv, Israel on 27 June.

The seminar started on Monday 26 June with a fascinating reception on the beautiful terrace of the Hilton in Tel Aviv. The delegates were greeted by the Presidents of INSOL International & INSOL Europe, Adam Harris, Bowmans, South Africa & Dr. Steffen Koch, hww hermann wienberg wilhelm, Germany who were presented by the Chair of the Israeli organizing committee Eitan Erez. The delegates then joined for dinner, overlooking the sunset in the Mediterranean Sea, enjoying opportunities for networking and making new friends.

The panels at the Hilton Hotel in Tel Aviv were fascinating and enriching!

120 participants from Israel, Europe, the U.S. & South Africa learned about innovations in Europe regarding cross-border insolvency, and UNICTRAL. The delegates were enriched by a panel on insolvency and recovery of distressed businesses in Israel. The panel included Adv. Amit Pines from FBC law firm and the honorable Judge Adi Zarenkin (retired). The panel also included Mr. Yuval Cohen from Fortissimo capital fund which is one of the leading venture capital funds who invest in the Israeli high-tech industry. This interesting panel was moderated by advocate Ofer Shapira, Shapira & Co.

The delegates discussed the proposed new Israeli insolvency law and the setting of the appropriate forum for discussing an international insolvency case (COMI).

The delegates then heard a fascinating lecture from former high-tech mogul Eli Reifman, who described "the startup nation", Israel, which is a magnet for investors from around the world in the high-tech field. Eli Reifman was one of four founding partners and a key member of the senior management team that built Emblaze Systems from start-up to a multi-billion dollar and one of the largest Israeli high-tech companies, traded on the London Stock Exchange. One of the great things that Emblaze developed was a system of file compression and streaming video.

At its peak Emblaze employed over 5,000 employees and generating over 500 million USD per annum.

Reifman is currently under bankruptcy procedures. Debt claims have been filed against Reifman to the tune of NIS 200 million

Reifman was sentenced to 4 years imprisonment by Tel-Aviv district court but is now a free man, coming up again.

Afterwards the delegates enjoyed a panel called "just over the horizon". This panel discussed the application of the EU Insolvency Regulation and the latest proposed Israeli insolvency law and case law, by means of a theoretical case study involving cross-border Israeli-European aspects.

The Panelists were Dr. Reinhard Dammann, Clifford Chance; Dr. Ernst Giese, Giese and Partners; Adam Plainer, Weil Gotshal & Manges LLP; Guy Gissin, Gissin and Partners; Dr. Israel (Reli) Leshem, Meitar Liqournik Geva Leshem Tal & Dr. Etai Hass, Ministry of Justice. The panelists were among the leading insolvency firms in Israel & Europe. Dr. Etai Hass is the legal advisor of the Ministry of Justice and the official receiver department and involved with writhing of the new insolvency code in Israel.

The panelists mainly focused on the theme of "Cross-border Insolvency" which was the panel's goal: to analyze how to successfully conduct complex cross-border insolvency cases involving EU and Israeli aspects and to bring to an effective harmonization of decisions taken by the different courts. The panelists also discussed the determination of COMI via EU Law and Israeli Law.

In today's global village cross-border insolvency is necessary to handle fraud of debtor, countries which operate as "debtor shelter" [paradise for bankruptcies]. It is important to lead to harmony between countries and strengthen cooperation in insolvency.

Another interesting panel was about: Advanced planning and coordination across jurisdictions from multinationals - A fascinating panel led by Christopher Mallon, Skadden, Arps, Slate, Meagher & Flom LLP and with the participation of Adv. Debora Dandeneau, Baker & McKenzie LLP; Adv. Marshall Huebner, Davis Polk & Wardwell LLP and Adv. James H.M. Sprayregen, INSOL Past President, Kirkland & Ellis LLP.

The panel discussed current issues of multinational businesses and the choice of forum, with reference to the applicability of the U.S. Chapter 11 procedure and also the relevance of Chapter 15.

The panel was brainstorming with the participation of a lively audience that included the best minds from around the world, including judges in the field and leading lawyers.

Towards the end of the day there was a panel about cross-border insolvencies:

- A View from the Bench: In Israel, as in other advanced economies, business is international, particularly in the case of the critical Israeli high-tech industry.
- Israeli businesses are listed on the US and UK stock exchanges and have US and other bondholders/ shareholders/bankers

- Businesses often become insolvent or get into financial problems and need to be rescued or restructured, or if necessary liquidated. Where business is international, so are insolvency proceedings, at least in principle

The prevailing concepts are unity and universalism. Unity means just one insolvency or rescue/restructuring proceeding for one debtor at his domicile, historically, interpreted for corporations as the place of registration, but now perhaps better understood as the "Centre of main interests", universalism means that in principle that one proceeding should be recognized/ assisted judicially in other countries.

This panel was comprised of current and retired judges from the US, UK, and Germany, giving relevant examples from their judicial experiences, how their jurisdictions deal with such problems and explain what recognition and judicial assistance their jurisdictions can offer to foreign insolvency proceeding and foreign insolvency practitioners.

In this panel participated the honorable Judge Malcolm Davis-White QC, Specialist Chancery, Mercantile and TCC Judge, North Eastern Circuit, UK; Judge Martin Glenn, US Bankruptcy Court, Southern District of New York and the honorable Judge Heinz Vallender (retired), Cologne Bankruptcy Court. This interesting panel was moderated by Gabriel Moss QC, South Square.

The seminar was closed when the participants heard an interesting lecture by General Yom Tov Samia, who elaborated on the story of Israel's foundation and the geo-political situation in the Middle East.

The seminar took place at the Hilton Tel Aviv overviewing the blue Mediterranean and the 4,000 years old city of Jaffa.

The President of INSOL International, Adam Harris and the President of INSOL Europe Dr. Steffen Koch, joined the seminar and met with many of the Israeli delegates who attended.

The delegates also had the opportunity to visit historical sites like Jerusalem, Bethlehem, Tiberias, Nazareth and Masada as well as the bustling city of Tel Aviv, the white city that never sleeps.

The Organizing Committee was chaired by Eitan Erez, who was assisted by his colleagues Shaul Kotler and Ofer Shapirafrom Israel and included Robert Hertzberg, Pepper Hamilton; Dr Reinhard Dammann, Clifford Chance; Jay Goffman, Skadden, Arps, Slate, Meagher & Flom LLP and Scott Greenberg, Jones Day.





INSOL International and INSOL Europe would like to thank the following sponsors of the Tel Aviv seminar:

Welcome Dinner Sponsor:
Weil, Gotshal & Manges LLP

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ENSAFrica

Lunch Sponsor:
Skadden, Arps, Slate, Meagher & Flom LLP

INSOL International São Paulo One Day Seminar – 25 May 2017

The ninth INSOL International Latin American One Day Seminar was held in São Paulo on 25 May 2017 at the Hotel Unique. The event was once again very well attended, showing that the Latin America one-day seminars are very popular with the membership in this region. The main organising committee did a fantastic job of putting together a formidable list of practitioners, judges, academics and government representatives in the region, as chairs and speakers for the seminar. The profile of the chairs and speakers were likewise reflected in the delegate list, which gave rise to excellent interaction between the delegates and the various panels. The seminar was attended by more than 100 delegates, comprising key players in the industry.

The seminar program included the opening section and 5 panel discussions, which covered everything from substantive consolidation and the implementation of the UNCITRAL Model Law on Cross-border Insolvency in the region, to financing companies in insolvency proceedings, litigation in large and contentious restructurings and the impact of hedge funds and debt traders in Brazilian restructurings. Discussions emanating from the program were enhanced by the fact that there were speakers and delegates in the audience who had first-hand experience of the issues that were covered.

Mr Leonardo Morato, Board Director of INSOL International, (Mayer Brown, Brazil), opened the seminar with the welcome address, and the Seminar Chair, Mr Luiz de Paiva (Pinheiro Neto Advogados, Brazil) gave the opening remarks. They were followed by Mr. Waldery Rodrigues Junior and Mr. Pedro Cahlman de Miranda, both representing the Brazilian Minister of Treasury, who gave for the first time a public statement on the views of the Government about the Bill to Amend the Brazilian Bankruptcy Law that is being prepared to be shortly presented to the Brazilian Congress.

Session 1: Can the insolvency courts ignore the corporate separateness of complex corporate organizations?

Chair: Leonardo Morato (Mayer Brown, Brazil)
Speakers: Justice Fábio Tabosa Pessoa (Tribunal de Justiça de São Paulo, Brazil),
Mark Bloom (Greenberg Traurig LLP, USA),
Professor Bruce Markell (Northwestern University, USA),
André Moraes Marques (Pinheiro Neto Advogados, Brazil)

The first panel focused on a very polemic issue in Brazil: substantive consolidation of companies in a single court restructuring proceeding. Leonardo Morato introduced the topic, commenting on the lack of regulation/rules for substantive consolidation in Brazil, highlighting the current indiscriminate use of that, and the related problems and risks deriving from this. Justice Tabosa, from the São Paulo State Court of Appeals, presented his view on the issue, emphasising that, despite the existing decisions, it is not recommendable to ignore the corporate separateness of each legal entity of a complex corporate organisation without strong reasons (including fraud). Each company has its own assets, responsibilities, debts and creditors. The substantive consolidation should be used as a very restricted exception. Subsequently, Professor Bruce Markell gave a detailed presentation on substantive consolidation in US Bankruptcy cases, touching on the authority for substantive consolidation, and the standards for its use. Mark Bloom then commented on Professor Markell's presentation by adding concrete examples of the use of the substantive consolidation. Both Professor Markell and Mark Bloom highlighted that substantive consolidation should not be the rule, but an exception that cannot harm the creditor s rights. Finally, André Marques commented on all the previous presentations, bringing useful thoughts on how to use the US experience in order to improve the Brazil system.

Session 2: Cross-border insolvency issues and the implementation of the UNCITRAL Model Law

Chair: Andrew Rosenblatt (Chadbourne & Parke LLP, USA)
Speakers: Paulo Campana Filho (Felsberg Advogados, Brazil),
Mark McDonald (Grant Thornton, BVI),
Francisco Satiro (Instituto Brasiliero de Estudos de Recuperacao, Brazil)

The second panel focused on whether Brazil should follow the United States and 22 other jurisdictions, including Mexico, Colombia and Chile, which have adopted the Model Law on cross-border insolvencies created by the United Nations Commission on International Trade Law (UNCITRAL). The panel first provided an overview of the Model Law by focusing on Chapter 15 of the U.S. Bankruptcy Code (the U.S. version of the Model Law) and discussing the objectives, uses and benefits of Chapter 15, and the process for obtaining recognition in the United States. The panel then focused on how Brazilian courts, currently without the benefit of formal cross-border legislation, treat requests for recognition of foreign insolvency proceedings. In particular, the panellists provided a first-hand account of their experiences requesting recognition of foreign insolvency proceedings from a Brazilian court and also highlighted the key factors that Brazilian courts take into account when considering such a request. Relatedly, the panel also discussed how, in the absence of Brazilian law on cross-border insolvencies, foreign debtors sometimes are compelled to commence full-blown insolvency proceedings in Brazil in order to protect assets located in Brazil and to stop creditor enforcement actions. The panel also provided an update on the proposed adoption of the Model Law in Brazil, highlighting key aspects of the proposed legislation. Finally, the panel addressed how Brazilian courts might apply the Model Law, if adopted, and how public policy considerations, which are often at the heart of Brazilian judicial decisions, could play a key role in application of the law.

Session 3: Financing companies in insolvency proceedings

Chair: Fábio Rosas (Souza Cescon, Brazil)
Speakers: Judge Daniel Carnio Costa (São Paulo Bankruptcy Court, Brazil),
Fernando Hernández (Marval O'Farrell & Mairal, Argentina),
Luiz Fabiano Saragiotto (TMA Brasil, Brazil)

The panel discussed the importance of new loans for the distressed companies in a reorganisation proceeding and the means of financing the company under a financial crisis and a formal restructuring proceeding. The speakers could explain the Brazilian and Argentinian legal systems and the existence of a "DIP Financing" equivalent instruments on each respective jurisdiction. The main aspects discussed involved the advantages and disadvantages of the DIP Financing in each system and the need of "superpriority" effective assurance for new loans to the companies under reorganisation and also the granting of guarantees, security and collateral over assets to assure new loans transactions in high distressed situations. Regulatory and financial market aspects for the development of a DIP Financing market were also debated, specially the Central Bank Regulations, Taxation of credit and other aspects that currently obstruct a structured formation of a "DIP Financing" market on Brazilian and Argentinean jurisdictions. The risks of competing with other creditors (at least post-petition creditors) and the "superpriority" classification in bankruptcies and liquidations were also important factors considered for the low development of the DIP Finance in the region. The existence of international funds specialised in DIP Financings and the creation of a legal and business environment in which the certainty of repayment of the DIP Financing are extremely high were common positive views and solutions to be implemented in the region for the distressed companies starting to have access of new money during the reorganisation proceeding. The speakers could debate few past experiences in which the DIP Financing were actually used (such as OGX and OSX cases, OAS case, etc..) and the results and practical effects of the suggested solutions. The panel discussed about the new project of amendments of Bankruptcy Law in Brazil and the provisions added for the creation of a better legal environment to create a "DIP Financing" market in the country.

Session 4: How to avoid endless litigation in large and contentious restructurings

Chair: Otto Lobo (LMOV Advogados, Brazil)
Speakers: Judge Marcelo Barbosa Sacramone (Second Bankruptcy Court of São Paulo, Brazil),
Ricardo Reveco (Carey & Cia, Chile),
Mahesh Uttamchandani (The World Bank Group)

The fourth panel focused on the increase in use of alternative dispute resolution as a tool to avoid the burden of endless litigation in large and contentious restructurings. It approached the use of mediation in insolvency procedures in the United States, where mediation is a widely used as an alternative in insolvency procedures, including large cases such as the Lemann Brothers case. In the US, there is no longer an issue regarding the legality and effectiveness of mediation in insolvency cases, but rather the current scope focuses on benefits derived from the use of this tool in resolving cases in less time and more cost efficiency. The panel also discussed the expansion of mediation in the European Union to provide a better closure for insolvency procedures. Furthermore, the panel analysed the Alumini and Oi cases in Brazil in which mediation and arbitration have been used for the first time. The Alumini case involves mediation to settle the disputes between the parties in the best means possible. While the mediation in the Oi case serves as one of the foundations of the restructuring plan. The objective of the panel was to assess how these new forms of alternative dispute resolutions in insolvency procedures were used and what are the consequences and the outcomes under Brazilian law.

Session 5: The impact of hedge funds and debt traders in Brazilian restructurings

Chair: Tim DeSieno (Morgan, Lewis & Bockius LLP, USA)
Speakers: Samuel Aguirre (FTI Consulting, Brazil),
Richard Cooper (Cleary Gottlieb Steen & Hamilton LLP, USA),
Guilherme Ferreira (Jive Investments, Brazil)

Panel five focused on the increasing role of hedge funds and distressed debt traders in Brazilian insolvencies. The panel explored how such investors are motivated, what actions they tend to deploy, whether they engender more litigation, and whether they bring more creativity to deal design and implementation. The panel agreed Brazilian restructurings have indeed evolved, in part due to these offshore investors' behaviour. Just as much, however, Brazilian entities' regulatory and other motivations, as well as their deep experience, have advanced restructuring practices greatly. The panel concluded with substantive issues such as consolidation of estates, DIP financing, menu plans, and plan voting, each from the perspective of experience and needed changes.

From the feedback received from delegates after the seminar, it is clear that this seminar was once again a resounding success. While the success of any event can be measured by a good turnout, it should be borne in mind that the real success behind these events is made possible by the generosity of the sponsors, the hard work of the members of the Main Organising Committee and the enthusiastic participation of both speakers and delegates.

INSOL would like to thank the following sponsors Coffee Break Sponsor: Mayer Brown; Lunch Sponsor: Souza Cescon; Gold Sponsors: Demarest Advogados, Gordon Brothers, Machado Meyer Advogados, Pinheiro Guimaraes Advogados, Stocche Forbes Advogados and our Joint Cocktail Reception Sponsors: Deloitte and Pinheiro Neto Advogados

Our thanks also go out to everyone involved for making the ninth INSOL International Latin American One Day Seminar such a resounding success.

Conference Diary

August 2017				
22-24	CAIRP Annual Conference	Kelowna, B.C.	CAIRP	www.cairp.ca
September2017				
13	INSOL International Channel Islands One Day Seminar	Guernsey, Channel Islands	INSOL International	www.insol.org
22-23	INSOL India – SIPI Insolvency Summit	Mumbai, India		INSOL India / SIPI
26-28	INSOL International Beijing and Shanghai Half Day Seminars	PRC China	INSOL International	www.insol.org
October 2017				
5-8	INSOL Europe Annual Congress	Warsaw, Poland	INSOL Europe	www.insol-europe.org
26-27	SARIPA 9th Annual National Conference	Johannesburg, South Africa	SARIPA	www.saripa.co.za
November 2017				
2	TMA Annual Conference	Orlando, FL	TMA	www.turnaround.org
10	INSOL International / World Bank Africa Round Table Open Forum	Mauritius	INSOL International	www.insol.org
16	TMA UK Annual Conference	London, UK	TMA	www.turnaround.org
28	INSOL International Kuala Lumpur One Day Seminar	Malaysia	INSOL International	www.insol.org
December 2017				
30 Nov - 2	ABI Winter Leadership Conference	Palm Springs, CA	ABI	www.abi.org
April 2018				
29 Apr-1 May	INSOL New York Annual Regional Conference	New York, NY	INSOL International	www.insol.org
July 2018				
11-13	INSOL Academics Colloquium	London, UK	INSOL International	www.insol.org
March 2019				
17-19	INSOL Cape Town Annual Regional Conference	Cape Town, South Africa	INSOL International	www.insol.org

Member Associations

American Bankruptcy Institute
Asociación Argentina de Estudios Sobre la Insolvencia
Asociación Uruguaya de Asesores en Insolvencia y Reestructuraciones Empresariales
Association of Business Recovery Professionals - R3
Association of Restructuring and Insolvency Experts
Australian Restructuring, Insolvency and Turnaround Association
Bankruptcy Law and Restructuring Research Centre, China University of Politics and Law
Business Recovery and Insolvency Practitioners Association of Nigeria
Business Recovery and Insolvency Practitioners Association of Sri Lanka
Canadian Association of Insolvency and Restructuring Professionals
Canadian Bar Association (Bankruptcy and Insolvency Section)
Commercial Law League of America (Bankruptcy and Insolvency Section)
Especialistas de Concursos Mercantiles de Mexico
Finnish Insolvency Law Association
Ghana Association of Restructuring and Insolvency Advisors
Hong Kong Institute of Certified Public Accountants (Restructuring and Insolvency Faculty)
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INSOL Europe
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Instituto Iberoamericano de Derecho Concursal
International Association of Insurance Receivers
International Women's Insolvency and Restructuring Confederation
Japanese Federation of Insolvency Professionals
Korean Restructuring and Insolvency Practitioners Association
Law Council of Australia (Business Law Section)
Malaysian Institute of Certified Public Accountants
National Association of Federal Equity Receivers
Nepalese Insolvency Practitioners Association
NIVD – Neue Insolvenzverwaltervereinigung Deutschlands e.V.
Recovery and Insolvency Specialists Association (BVI) Ltd
Recovery and Insolvency Specialists Association (Cayman) Ltd
Restructuring and Insolvency Specialists Association of Bermuda
REFOR-CGE, Register of Insolvency Practitioners within "Consejo General de Economistas, CGE"
Restructuring Insolvency & Turnaround Association of New Zealand
Russian Union of Self-Regulated Organisations of Arbitration Managers
Society of Insolvency Practitioners of India
South African Restructuring and Insolvency Practitioners Association
Turnaround Management Association (INSOL Special Interest Group)

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