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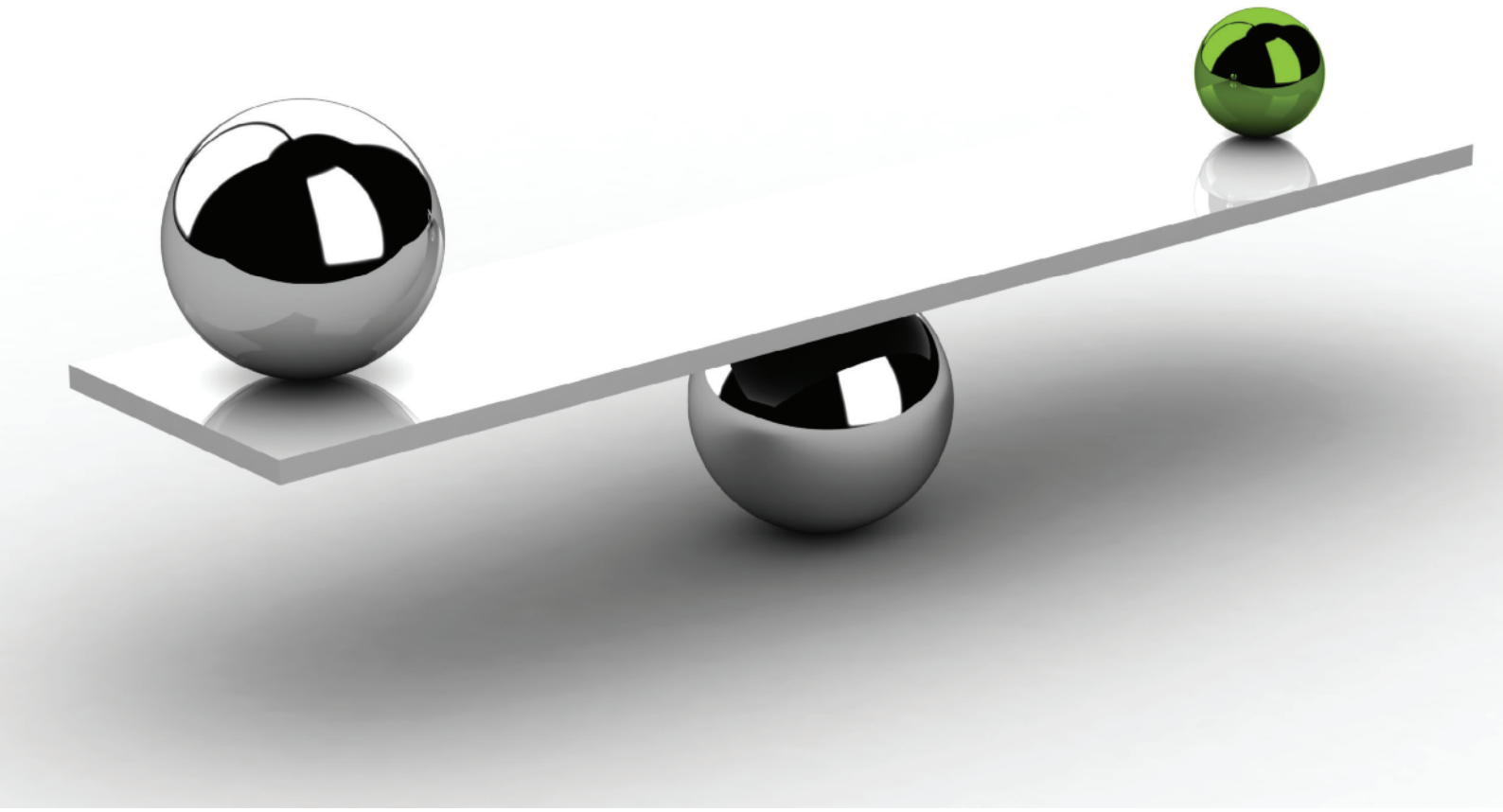

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Editors' Column

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In this issue we have an Asian focus and consider law reform, recent restructurings, new case law, the future for China's NPL issues and investing in distressed debt. We also have an obituary of the wonderful Stephen Adamson who died recently and who will be remembered with great affection and respect and sorely missed.

The process of law reform – the formulation of proposals for reform, the promulgation of draft legislation and the passing of the new legislation – continues apace across the world and we consider a number of important developments.

As regards reform proposals, Andrew Chan Chee Yin and Alexander Yeo discuss the innovative and important proposals made by Singapore's Ministry of Law for the reform of Singapore law governing schemes of arrangement and cross-border insolvencies. Singapore proposes to incorporate (transplant) into its schemes law various core-provisions of Chapter 11 of the US Bankruptcy Code (including an extension of the scope of the moratorium available for schemes, the Cram-down of classes and the priming of charges to secure new funding). It will be fascinating to see how, if these reforms are adopted, the (impressive and able) Singapore judges deal with the introduction of the new concepts into local law. The other main reform proposal involves the adoption by Singapore of the Model Law. Scott Atkins and Felicity Healy also touch on the Singapore proposals in a wide-ranging review of the status of reform proposals in Australia (in relation to which the authors express not a little frustration at the failure to make progress) as well as reforms that have taken place in Malaysia and Thailand. Reform proposals are also discussed in Professor McCormack's review of an excellent volume on Secured Transactions Law Reform in a number of jurisdictions edited by Professor Louise Gullifer of Oxford and Orkun Askeli (I must declare an interest as I'm a member of Professor Gullifer's Secured Transactions Law Reform committee!). In terms of regional surveys we also include an interesting report by Peter Sargent of his participation in a conference in Seoul which reviewed experiences of business failure across Asia.

As regards the passing of new legislation, Jody Glenn Waugh reviews the new Federal Bankruptcy Law of the UAE which became effective in December last year; Rabindra Nathan discusses the new Malaysian Companies Act 2016 and Ryan Eagle considers Queensland's new Environmental Protection Act 2016.

We include updates on a number of important cross-border restructurings. Ashok Kumar and Lim Chi Shen consider the troubles in Singapore's offshore marine and shipping industry and the position of bondholders in a number of recent defaults and Luis Ruggeberg and Gilberto Sola discuss the progress of Abengoa's Mexican insolvency proceeding.

We also review a number of significant recent judgments. Farid Assaf analyses the decisions at first instance and in the Victorian Court of Appeal in *Legend International Holdings* (which considers whether an Australian Court can make a winding-up order in respect of a Delaware corporation that had filed for Chapter 11 protection). My colleague in Hong Kong, Look Chan Ho draws our attention to some important recent cases in Hong Kong and Singapore which consider the scope of the common law jurisdiction to assist post *Singularis* and in Look's view demonstrate significant strides in perfecting a universalist approach.

Finally we have an excellent update by Jason Bedford on how China is dealing with its huge bad debt bubble and review by Bob Wessels of an interesting volume which provides an overview of developments in distressed debt investing in Europe.

We would like to announce the changes to the Editorial Board for 2017. I am delighted to accept a two year term extension and look forward to continuing in my role as the Co-Editor for another term. On behalf of the Editorial Board and INSOL members, I would like to thank the following retired Board members for their commitment and contribution to the journal: Stephen Briscoe, Fund Fiduciary Ltd., Cayman Islands; Allan Nackan, Fellow, INSOL International, Farber Financial Group, Canada; Lee Pascoe, Fellow, INSOL International, Libero Legal, Australia, and Andrew Thorp, Harneys, BVI, and welcome new Board members, some of whom have already actively contributed to this issue: Farid Assaf, Fellow, INSOL International, Banco Chambers, Australia; Simone Fitzcharles, Lennox Paton, The Bahamas; Frank Spizzirri, Baker & McKenzie, Canada, and Richard Woodworth, Allen & Overy, Hong Kong.

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

Nick Segal

Nicholas Segal

President's Column

By Mark Robinson
PPB Advisory
Sydney, Australia

Dear Friends and Colleagues,

By the time you receive this edition of INSOL World my two-year term as President of INSOL International will be rapidly drawing to a close. At a personal level my experience has been very positive and reflects that of a vital organisation with a highly engaged membership that undertakes much valuable work around the world. In addition to the INSOL Secretariat and Board, I am deeply indebted to my firm (PPB Advisory), to my professional association (ARITA), and to my family, friends and clients who have all wholeheartedly supported me. I am certain that my successor as President, Adam Harris of Bowmans (South Africa), will enjoy a similarly affirmative experience and be of great service to INSOL. Adam has been an active and highly effective supporter of INSOL over many years. I am certain that he will lead INSOL with great energy and success.

During my tenure as President it has been my pleasure to have driven, sponsored and been actively involved in a number of initiatives that are important to the continued growth, influence and vitality of INSOL. They include:

Development of INSOL Strategic Plan – Taskforce 2021

It will be an honour to launch our new strategic vision and plan at the Quadrennial Conference in Sydney. Many of the strategic initiatives are bold and, if successfully implemented, I am certain will take INSOL into new frontiers as we move towards 2021. I request that you download the Strategic Plan from INSOL's website, review it and advise INSOL staff of the Plan's goals and aspirations that you are keen to help implement. It is an immense task requiring many motivated volunteers, so I greatly encourage your involvement.

To quickly re-cap, one of the core principles of the strategic review process was to consult broadly across INSOL's membership to gather each member's thoughts and opinions on the strategic future of INSOL. The Taskforce was very industrious in its efforts to engage across the globe. The Taskforce Chair, Scott Atkins (INSOL Fellow, INSOL Director, Henry Davis York) reported that without exception there was a high level of engagement from the numerous feedback events. What the feedback revealed was INSOL members place a great value on their membership and believe that INSOL has unique strengths that underpin its success as the peak global restructuring and insolvency association. However, there was also strong support for further development to build upon and consolidate the success to date, an appetite for increasingly bolder thinking about opportunities for INSOL and its members and genuine excitement for its future.

In recognition of the effort and expertise required to implement the key initiatives of the Strategic Plan, we have recently made some important additions to the INSOL secretariat team as listed below. Please join me in welcoming them into the INSOL family:

- Jason Baxter – Chief Operating Officer
- Dr David Burdette – Senior Technical Officer

Increased INSOL commitment to Asia

One of my goals detailed in an earlier President's Column was to expand INSOL's initiatives in Asia. As an Australia based practitioner it simply made sense for me to actively progress INSOL's interests in this region. On concluding my Presidency I am happy to report that this was achieved and that there is great momentum for further growth of INSOL initiatives and events in Asia and I would like to thank all those members who supported us in this endeavour. Some of the highlights during my term were:

- Employment of a new INSOL staff member, Susannah Drummond Moray, to facilitate INSOL's expansion into Asia. From the outset Susannah's performance has been outstanding
- Provision of INSOL training in Vietnam to practitioners, the judiciary and regulators at the invitation of the Ministry of Justice by Neil Cooper, INSOL International Past President, Sijmen de Ranitz, INSOL International Past President and Peter Gothard, Fellow, INSOL International, Ferrier Hodgson
- Co-hosting the Forum for Asian Insolvency Reform (FAIR) jointly with the World Bank and Supreme People's Court of Vietnam. The meeting was ably led by Neil Cooper, Past President, INSOL International

- Participating in INSOL's inaugural seminar in Jakarta, Indonesia
- Attending and supporting the INSOL New Delhi inaugural meeting and seminar
- Attending and supporting the IPAS conference in Singapore
- Inducting the Korean Restructuring and Insolvency Practitioners Association (KORIPA) as a new Member Association of INSOL
- Co-hosting with KORIPA a one day seminar in South Korea. A full report will appear in the next edition of INSOL World
- Presenting at the World Bank Group and Central Bank of Malaysia credit infrastructure conference
- Success of INSOL seminars in PRC China. Particular note is made of James Sprayregen's (INSOL Past President, Kirkland & Ellis LLP) continuing support and involvement
- Growth of PRC China INSOL membership.

In my new capacity as Past President I look forward to continuing my work helping INSOL increase its traction and influence in Asia.

INSOL 2017, Sydney

I am writing this column 7 weeks before INSOL 2017 has commenced. Notwithstanding this I confidently declare that it will be the best Congress yet and will also successfully showcase my hometown Sydney as a premier international destination and having strong business connectivity to Asia.

I would like to extend my personal welcome to all delegates attending the Congress and I look forward to meeting many of you during its extended technical and social programmes. As always, INSOL conferences provide invaluable international networking opportunities alongside the cutting edge technical programme presented by leading international speakers.

The highlight of the Congress will be a specially developed case study film 'Oil in a Day's Work' written by two of INSOL's Fellows, Samantha Bewick, KPMG and Craig Martin, DLA Piper US LLP. I think it will be even more gripping than the fantastic 'A Tale of Two Businesses' showcased at INSOL 2013. For those of you who can join us in Sydney there will be a few surprises along the way, as the presenters try to resolve the troubles faced by our latest distressed multinational business.

For those members who are unable to attend the Congress this time, we will be featuring a full report on INSOL 2017 in the next edition of INSOL World.

Statement of Principles for a Global Approach to Multi-Creditor Workouts

Another of my goals detailed in an earlier President's Column was to attract more financiers and fund managers as members of INSOL. Under the capable leadership of Derek Sach the INSOL Lenders Group has attracted a number of new fund and financer members from various jurisdictions and undertaken an important piece of work for INSOL, a refresh of INSOL's seminal publication '*Statement of Principles for a Global Approach to Multi-Creditor Workouts*'.

I am pleased to report that the refresh is now complete and that endorsement of the revised Statement of Principles was received from the World Bank and the Bank of England. It will be my honour to launch to the new edition at INSOL 2017 in Sydney.

Directors in the Twilight Zone V

The fifth edition of 'Directors in the Twilight Zone' will also be launched at INSOL 2017, our Tenth World Congress in March this year. This publication ably addresses the risks faced by directors, managers, advisors and other third parties who trade companies in the "twilight zone" of insolvency.

The fifth edition adds nine new countries to the list, now covering over 30 jurisdictions, whilst also updating the existing country contributions. This is the first time that the Twilight series will be published in e-book format, considerably lowering costs and enabling us to add new chapters. In the future, it will allow the chapters to be updated as and when required.

Notwithstanding that I have retired as INSOL President please feel free to stay in touch through my email account at mrobinson@ppbadvisory.com

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Australian Restructuring & Insolvency Law Reform: Will the Wait Be Worth it?

By Scott Atkins
Fellow, INSOL International
and
Felicity Healy
Henry Davis York
Sydney, Australia

The long awaited proposed reforms to the Australian restructuring and insolvency system have been the subject of earlier INSOL World articles. While we had hoped that the Sydney Congress would provide the perfect opportunity to discuss and debate the new laws, regrettably the proposals remain locked in the bureaucratic and legislative reform process, with no clarity as to when they may see the light of day.

The critical drivers for reform remain unchanged and it is timely to revisit the imperatives for modernisation of the Australian restructuring and insolvency system, especially as similar reform programs sweep across the Asia-Pacific region.

This short article provides an update of the Australian reforms and other similar reforms currently being undertaken in the region.

Shift to Rescue and Restructure Philosophy

For the first time since the 1980s, fundamental substantive reform is being undertaken to the Australian restructuring and insolvency regime. The landmark General Insolvency Inquiry of 1988, culminating in the so-called Harmer Report, reshaped the insolvency landscape. But that was almost 30 years ago. Systemic reform in Australia is long overdue.

In 2016, as part of the National Innovation and Science Agenda, the Australian Government committed to releasing a proposals paper on measures to improve the country's restructuring and insolvency laws, seeking to encourage Australians to embrace risk, learn from mistakes, be ambitious and experiment to find solutions.

The reforms proposed to be undertaken in Australia seek to transform the underlying philosophy and principles of the insolvency system, nudging it from a reactive and rigid creditor driven model towards turnaround, rescue and restructuring.

The approach in Australia is part of a broader trend for insolvency reform across the Asia-Pacific region, symbolized by a wave of reforms currently proposed for (or already introduced in) Hong Kong, Malaysia, Singapore, Vietnam, Thailand and Indonesia.

Australian Reforms

The Australian Government's intention to reform insolvency laws was foreshadowed in a Proposal Paper published by Treasury on 29 April 2016 (Proposal Paper). The Proposal Paper identified, relevantly, two key reforms directed at value preservation instead of potential value destruction, namely:

- introducing a safe harbour rule in respect of the insolvent trading provisions under s588G of the Corporations Act 2001 (Cth), by either:
  - amending the current legislative provisions to permit directors to trade while insolvent provided (i) the debt was incurred as part of an attempt by the directors to return the company to solvency and (ii) the directors held an honest and reasonable belief that debt was incurred in the best interests of the company and creditors; or alternatively
  - creation of a new defence to liability under s588G where a director (i) acting on advice provided by an experienced qualified restructuring adviser (ii) has a reasonable expectation that the company can be returned to solvency within a reasonable period of time and (iii) takes reasonable steps to ensure the company does;
- preventing the enforceability of *ipso facto* clauses (those allowing a party to terminate a contract upon the insolvency of the other) thereby allowing companies in financial difficulty to have breathing space within which to restructure in the knowledge that critical contracts will remain in place.

The deadline for submissions from industry and the public has closed. It is expected that the amended legislation will be introduced before the end of 2017.

The Government recognises that more often than not, entrepreneurs will fail several times before they achieve success. To create an ecosystem that enables these entrepreneurs to succeed will require a cultural shift and law reform to support it. It is well recognised that Australia's current insolvency laws put too much focus on penalising and stigmatising failure.

With these new measures in place, insolvency laws will strike a better balance between encouraging entrepreneurship and protecting creditors. Over time, these changes will help reduce the stigma associated with business failure that is a hallmark of Australia - but not of other advanced economies such as the USA.

Elsewhere across the Asia-Pacific region, significant insolvency and restructuring law reforms are underway. Here is a quick snapshot of notable developments in key jurisdictions:

Hong Kong

Like Australia, for the first time since 1984, reforms are currently underway in Hong Kong to modernise local insolvency and restructuring laws. *The Companies (Winding up and Miscellaneous Provisions) (Amendment) Ordinance 2016* (HK Reform Act) is the primary mechanism by which Hong Kong will modernise its corporate winding up processes.

REACHING THE WORLD FROM ASIA PACIFIC

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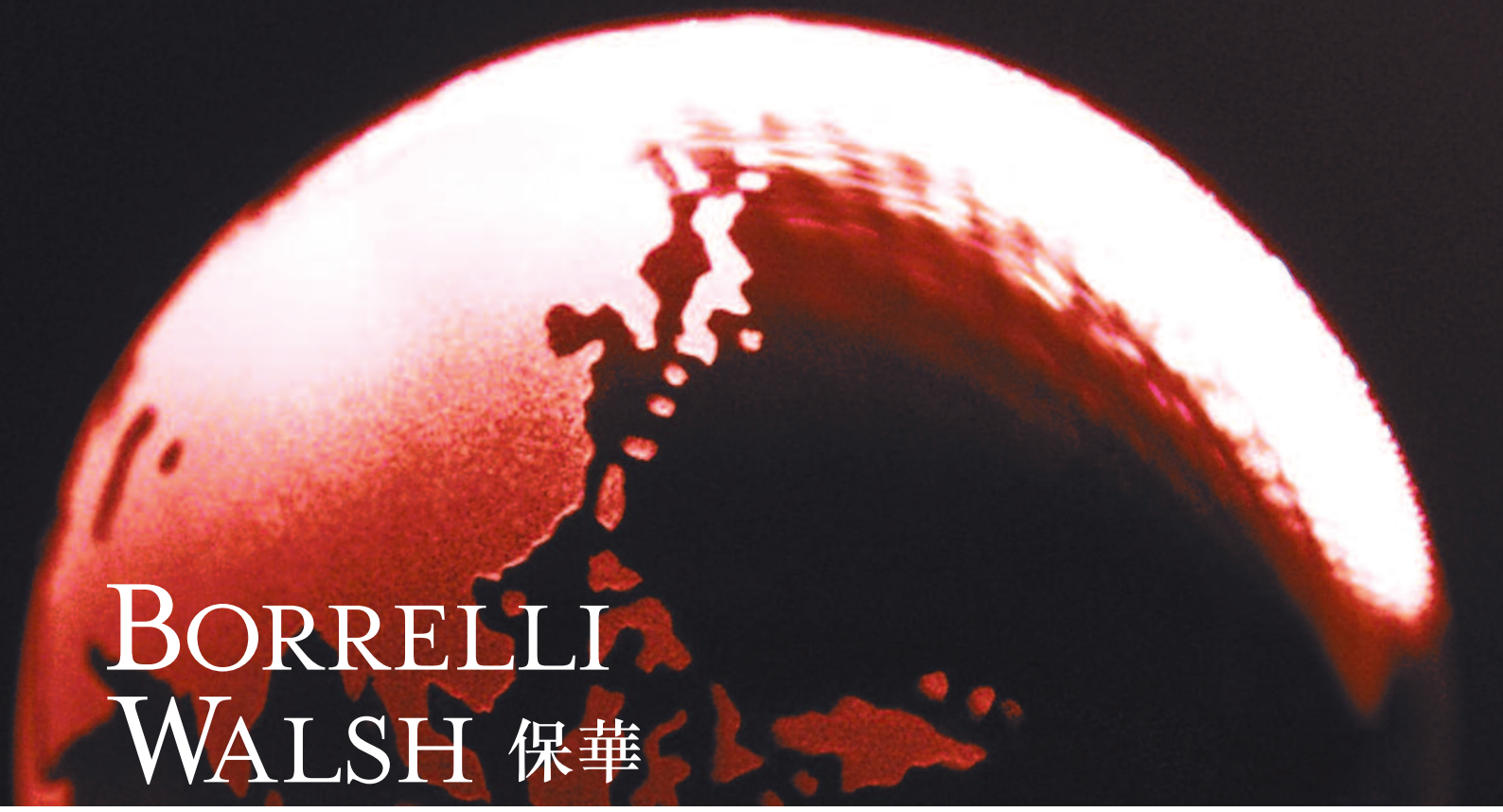

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In a media statement on 9 December 2016, the Hong Kong Government stated that its overall intention is to improve the winding up regime by introducing measures to increase the protection of creditors and investors. The HK Reform Act will come into force on 13 February 2017.

Unlike the Australian reforms, the HK Reform Act does not go so far as to provide reform in the area of insolvent trading or statutory reorganisation procedures. It also fails to enact substantive reform in the area of cross-border insolvencies (which is something that Australia embraced in 2008 with the introduction of the *Cross-Border Insolvency Act (Cth)).*

Singapore

Debate regarding the form and substance of wide ranging reform to Singapore's insolvency and restructuring regimes has occurred for a number of years.

In 2010 the Singapore Government established the Insolvency Law Reform Commission (ILRC). This Commission was charged with the responsibility for identifying current weaknesses and formulating recommendations for reform. In conjunction with the Commission to Strengthen Singapore as an International Centre for Debt Restructuring (established in 2015), the ILRC has made a number of substantive proposals for insolvency law reform, including:

- the consolidation of personal bankruptcy and corporate insolvency under single legislation;
- the adoption of the UNCITRAL Model Law on Cross-Border Insolvency;
- safeguards to protect creditors prior to the filing of an application for judicial management; and
- creation of 'super-priority' financing arrangements analogous to similar provisions contained in Chapter 11 of the US Bankruptcy Code.

In 2016 the Singaporean Government undertook a consultation process to determine options for reforming the country's corporate insolvency framework which concluded in December. It is expected that new legislation will be enacted in early 2017.

Malaysia

On 31 August 2016, the Companies Act 2016 was given Royal Assent by the Malaysian Parliament and largely came into force on 31 January 2017. The Act was introduced to provide greater protection to corporate directors and company stakeholders, to simplify the regulation of corporate activity and to enhance internal control, corporate governance and corporate responsibility.

Thailand

The insolvency regime in Thailand, governed by the Bankruptcy Act (1940), was initially based on the English system in place at the time. However in 1997 amendments were made to incorporate a Chapter 11 US Bankruptcy Code style of business reorganisation.

Most recently further amendments were enacted in May 2016, among other things, extending the applicability of business reorganisation rules to natural persons and SMEs.

Conclusion

The Australian reforms will facilitate a transformation of the domestic economy by allowing companies and directors to take necessary risks to innovate.

The Australian Restructuring Insolvency and Turnaround Association (ARITA), a Member Association of INSOL, has lead the reform debate for many years and finally its voice has been heard. The Prime Minister's Innovation Statement, as has been widely reported, contains a number of core proposals which will truly shift the dial towards the restructuring and rescue culture long advocated by ARITA. These are now reflected in the Proposals Paper.

Critically, what we now need is for the bureaucratic and legislative process to accelerate in order to progress the transformation of these proposals into revised restructuring and insolvency laws.[1]

[1] To read more, here are key reference links:
ARITA's "A Platform for Recovery" can be found at: http://www.arita.com.au/about-us/public-policy-advocacy
The Australian Government's Innovation Statement on insolvency law reform: http://www.innovation.gov.au/page/insolvency-laws-reform
The Productivity Commission Report: http://www.pc.gov.au/inquiries/completed/business/report

INSOL 2017

Tenth World Congress, 19 - 22 March 2017, Sydney, Australia

A preview of this edition of INSOL World will be available on the Congress App at INSOL 2017. We look forward to welcoming over 870 delegates from 57 countries. A cutting edge technical programme and invaluable international networking are key elements that make INSOL conferences stand out. In addition, this year we have prepared a special case study ***Oil in a Day's Work*** (co-written by the INSOL Fellows Samantha Bewick, KPMG and Craig Martin, DLA Piper US LLP), which will set up the scene to a number of breakout and plenary sessions, bringing in the world's top restructuring and turnaround experts to assess the situation and find the outcome of the dramatic disasters affecting *TOPOIL*.

Our thanks go to the Main Organising Committee for all their work in organising the Congress and to the Technical Committee for preparing the technical programme.

We would also like to thank our sponsors for their tremendous support of the Congress and INSOL International, which enables the association to continue to develop its projects and activities around the world.

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Changes to Singapore's Insolvency Legislation: Singapore's Bid to be an International Centre for Debt Restructuring

By Andrew Chan Chee Yin and Alexander Yeo
Allen & Gledhill LLP
Singapore

Introduction

In October 2016, Singapore's Ministry of Law proposed sweeping amendments to the island nation's insolvency legislation in its Companies Act, with the goal of enhancing Singapore's processes and support for international debt restructuring (the "Proposed Amendments").

These Proposed Amendments are the culmination of several focused and intensive joint efforts taken by Singapore's Ministry of Law in consultation with leading industry players, retired and current insolvency Judges from various jurisdictions, restructuring professionals, lawyers and academics.

On 4 October 2013, an Insolvency Law Review Committee, formed by the Ministry of Law, issued its final report containing comprehensive recommendations to update Singapore's corporate insolvency and personal bankruptcy laws (the "ILRC Report").

Since the ILRC Report was issued, Singapore has moved with characteristic efficiency to implement various improvements to its restructuring and insolvency framework. Just in the six months leading up to the release of the Proposed Amendments:

a. On 20 April 2016, a Committee to Strengthen Singapore as an International Centre for Debt Restructuring, formed by the Ministry of Law, issued a report on improving Singapore's debt restructuring framework (the "Restructuring Report"). The Committee's work included consultations with various industry stakeholders, retired US bankruptcy judges, academics, the Singapore International Arbitration Centre and the Singapore International Mediation Centre.

b. A public consultation was held on the Restructuring Report between April 2016 and May 2016, resulting in the Singapore Government largely accepting the Restructuring Report's recommendations.

c. On 15 and 16 September 2016, Singapore held the 3rd Regional Insolvency Conference 2016, covering numerous 'hot button' topics on insolvency and obtaining judicial, civil law and common law perspectives on issues of cross-border insolvency, litigation funding and other restructuring financing issues.

d On 10 and 11 October 2016, 11 insolvency judges from 8 territories convened in Singapore for the inaugural Judicial Insolvency Network conference. Among other things, the participating judges conferred on a set of guidelines for court-to-court communication and cooperation in cross-border restructuring and insolvency, recognition and enforcement of foreign insolvency judgments and the wider use of alternative dispute resolution tools such as mediation and arbitration in cross-border restructuring.

It is in this context that Singapore's Proposed Amendments take place. The Ministry of Law has taken a phased approach to implementing changes to its restructuring and insolvency laws, and the first phase is targeted at legislative amendments to enhance Singapore's corporate rescue and restructuring laws. We discuss each aspect in turn below.

Cross-border insolvency reforms

Perhaps the most sweeping, modern and significant of the Proposed Amendments are the numerous changes proposed to Singapore's cross-border insolvency framework.

First, Singapore shall adopt the UNCITRAL Model Law on Cross-Border Insolvency (the "Model Law"), codifying a set of rules for the recognition and assistance of foreign insolvency proceedings in Singapore.

Even before the Proposed Amendments, Singapore's courts had already been very open to recognising and assisting foreign insolvencies. In a string of decisions[1], Singapore's Courts have applied their common law powers of recognition and assistance and the principle of 'modified universalism' to empower foreign liquidators to obtain information in relation to bank accounts of the company, issue restraint and stay orders and even stay the enforcement of security.

The adoption of the Model Law would further enhance the Singapore Court's ability to recognise and assist foreign insolvencies, and add valuable legislative clarity and certainty to Singapore's cross-border laws. It would ensure that Singapore has a uniform, internationally recognised framework for dealing with international insolvencies: once the Proposed Amendments are passed by Singapore's Parliament, Singapore would share similar cross-border insolvency rules with numerous other major jurisdictions, including the United States of America, United Kingdom, Japan, Australia and Canada.

Second, Singapore will abolish its general 'ring-fencing' rule. The rule required, in the winding up of foreign companies in Singapore, the proceeds of the realisation of Singapore assets of the company to satisfy the liabilities incurred in Singapore by the foreign company, before the said proceeds could be remitted overseas to any foreign liquidator. This ring-fencing rule was previously the subject of some criticism and controversy.

The Proposed Amendments take a measured approach to reforming this ring-fencing rule, by abolishing the rule generally but retaining 'ring-fencing' for specific financial institutions, such as banks and insurance companies. This approach shares commonalities with the approach taken by other major jurisdictions, which have similarly applied their own ring-fencing provisions to such regulated industries. The logic of excluding such entities from the abolition of ring-fencing appears to be *"that the insolvency of such entities gives rise to the need to protect vital interests of*

1 From unreported cases in 2011 such as *Re Aero Inventory (UK) Limited (in administration)*, and the decision of Singapore's highest court in *Beluga Chartering GmbH* v *Beluga Projects (Singapore) Pte Ltd* [2014] SGCA 14 to several reported cases in 2016 (*Re Opti-Medix Ltd* [2016] 4 SLR 312, *Re Gulf Pacific Shipping Ltd* [2016] SGHC 287 and *Re Taisoo Suk* [2016] 5 SLR 787)

a large number of individuals, or that the insolvency of such entities requires particularly prompt and circumspect action (for example, to avoid massive withdrawals of deposits"[2].

Third, judicial management will become available to foreign companies. Singapore's judicial management regime (broadly similar to the English administration framework) permits creditors or companies to appoint a judicial manager to take charge of the company to achieve one or more of three statutory purposes, including rescuing the company as a going concern. From the time of filing a judicial management application to the expiry of a judicial management order, a moratorium against creditor action is put in place.

Prior to these Proposed Amendments, Singapore's judicial management regime was only available to local companies. This had historically posed an obstacle to efforts to rehabilitate foreign companies in Singapore, such as where English administration orders were in place but no 'parallel' judicial management order could be sought in Singapore. Thankfully, on at least two instances, Singapore Courts had been able to grant recognition and assistance of English administration procedures by granting relief (including moratoriums) similar to that available in the Singapore judicial management regime[3]. Once the Proposed Amendments become law, it will become possible to rehabilitate such foreign companies via a Singapore judicial management, without any further need to peg such relief to any prior foreign insolvency proceeding.

Fourth, specific criteria will be introduced to guide the Court on when it may exercise its discretion to wind up a foreign company in Singapore. Prior to these Proposed Amendments, Singapore law required that the foreign company have a sufficient connection with Singapore which may, but does not necessarily have to, consist of assets within the jurisdiction. The criteria introduced by the Proposed Amendments generally reflects this sufficient connection test, but makes it easier for foreign companies to be wound up in Singapore.

Reforms to the schemes of arrangement procedure

Schemes of arrangement have been widely used in Singapore for companies to compromise their debts to creditors. By an accumulation of professional ground experience, judicial guidance and support, the scheme of arrangement procedure in Singapore has developed into the favoured corporate rescue regime with distinctly Singaporean characteristics[4].

The Proposed Amendments improve on this already-solid base by introducing provisions to support creditor schemes of arrangements that implement debt restructuring proposals.

First, by enhancing the moratoriums against creditor action available in schemes of arrangement. Among other things:

e. Companies may apply to Court for a moratorium even before having actually proposed a compromise or arrangement to its creditors or class thereof (contrary to the present position), provided that the companies intend to make such a proposal and provides evidence of e.g. creditor support.

f. The scope of the moratorium will be expanded to include a stay against enforcement of security and certain quasi-security, similar to the scope of the moratorium available in judicial management.

g. Allow for an automatic 30 day-moratorium upon application to Court, subject to certain safeguards for creditor interests. Prior to the Proposed Amendments, there was no automatic moratorium which came into force upon application, but the applicant company instead needed to apply to Court for a moratorium, often on an urgent *ex parte* basis.

h. Allow for a moratorium on creditor action against related entities to the debtor, such as subsidiaries.

i. Provide for the Court-ordered moratoriums to have worldwide effect, i.e. to restrain creditor action overseas so long as the creditor is within the Singapore Court's *in personam* jurisdiction.

Second, by rescue financing provisions to enable the Singapore Court to grant new rescue financing a 'super-priority' over other creditors' claims. The purpose of granting super-priority to new financing is to aid with the rehabilitation of companies, because obtaining new financing becomes significantly more difficult once a company enters a formal insolvency process. The Proposed Amendments provide for four possible, calibrated levels of priority:

j. *Priority:* For the rescue financing to rank equally with other administrative expenses, e.g. the insolvency practitioner's own expenses, contracts retained by the estate and other post-commencement commitments.

k. *Super-priority:* For the rescue financing to rank in priority to all preferential debts, including administrative expense claims.

l. *Secured borrowing:* For the rescue financing to be secured by a security interest that is subordinate to existing security.

m. *Super-priority lien:* For the rescue financing to be secured by a superior or equal security interest on previously encumbered property. As this interferes with an existing secured creditor's rights, the granting of a super priority security interest will be subject to safeguards, to ensure existing secured creditors are not unfairly prejudiced.

Third, by 'cram-down' provisions to allow a scheme to be approved even if a class of creditors oppose the scheme, again subject to safeguards to ensure that such creditors are not unfairly prejudiced.

Fourth, by pre-packaged provisions designed to allow the Singapore Court to fast-track pre-negotiated schemes of arrangement between debtors and their major creditors.

Fifth, by introducing procedural enhancements and safeguards relating to debtor disclosure, avoidance of dissipation of assets, Court powers to order a re-vote, and other improvements.

Reforms to the judicial management procedure

The Proposed Amendments also covered enhancements to the judicial management framework in Singapore, including:

n. Enabling companies to apply for judicial management more easily.

o. Introducing super-priority provisions for rescue-financing in judicial management as well.

Conclusion

It is likely no coincidence that many of the Proposed Amendments are adapted from the US Bankruptcy Code. It appears that Singapore's restructuring and insolvency framework, historically adapted from both the English and Australian traditions, will move to adopt the best aspects of the US Bankruptcy Code as well.

In the authors' humble view, this is a positive and innovative development, which should work well to place Singapore at the forefront for international debt restructuring in the region and beyond.

2 ILRC Report, pg 243, para [45]

3 *Re Aero Inventory (UK) Limited (in administration) Originating Summons No 127 of 2011 (unreported) and Re All Leisure Holidays Limited (in Administration) Originating Summons No 17 of 2017 (unreported)*

4 ILRC Report pg 135 para [3]-[4]

Insolvency Law Reform in Malaysia – The New Corporate Rescue Mechanisms under the Companies Act 2016

By Rabindra Nathan
Shearn Delamore & Co.
Kuala Lumpur, Malaysia

The Companies Act 2016 contains the first major overhaul of Malaysia's corporate insolvency framework[1]. Its predecessor, the Companies Act 1965, did not contain any corporate rescue provisions, apart from schemes of arrangement. Corporate voluntary arrangement and judicial management are the new processes that have been introduced.

During the intervening decades, developments in the United Kingdom, Australia and Singapore, heralded the emergence of various corporate rescue mechanisms, but there was negligible reform in Malaysia. Thus corporate voluntary arrangement and judicial management are significant reforms domestically, even if well known to insolvency practitioners elsewhere.

Corporate voluntary arrangements

The corporate voluntary arrangement (CVA) procedure is only available to private companies, but excludes companies that are holders of licenses issued under the Financial Services Act 2013 and the Capital Markets and Services Act 2007, as well any company that has created a charge over its assets. This significantly narrows the pool of eligible companies. Consequently, this raises questions about the utility of the CVA process.

The CVA process commences with the appointment of a nominee, who must be a licensed insolvency practitioner. The proposed CVA and a statement of affairs are then submitted to the nominee. He is charged with monitoring the company's affairs during the moratorium; he must form an opinion as to whether the proposed arrangement has a reasonable prospect of being approved and implemented, and whether the company will have sufficient funds during the moratorium to enable it to carry on business. Both a company under judicial management and a company under liquidation may make a CVA proposal through the judicial manager and liquidator respectively. In such a case, the judicial manager or liquidator may also double up as the nominee.

There is an initial 28-day moratorium that commences automatically when the statutorily prescribed CVA documents are lodged with the High Court. The moratorium strike an appropriate balance between rescue and creditor action. Meetings of members and creditors of the company are summoned to consider the proposed voluntary arrangement. The meetings can extend the moratorium by up to 60 days.

The CVA voting thresholds are a majority in excess of 50% of members and 75% in value of creditors. Once approved, the proposed voluntary arrangement becomes binding on all creditors, regardless of how they voted. Implementation of the arrangement is carried out either by a supervisor, who may be the original nominee, or any other insolvency practitioner.

A curious drafting inconsistency remains. A provision that preserves a secured creditor's right to enforce its security notwithstanding the CVA proposal, sits uneasily with the fact that a company that has charged its assets is actually not eligible for the CVA process.

Judicial management

Eligibility for judicial management under the Companies Act 2016 is wider as only companies holding licences under either the Financial Services Act 2013 and the Capital Markets and Services Act 2007 or that operate a designated payment system are ineligible.

Either the company or a creditor may make an application for the appointment of a judicial manager. Besides inability to pay debts, the applicant must show that there is a reasonable probability of preserving all or part of the company as a going concern, and that the interests of creditors would be better served than on a winding up. A debenture holder may object to the application and if so, the court must dismiss the application unless the Court overrides the objection in the public interest.

Between the filing of the application and either the granting of the judicial management order or its dismissal, there is a limited stay on certain types of creditor action. Following the judicial management order, a wider range of creditor action is restrained. There is a good balance between protecting creditors and encouraging prospects of a rescue.

The judicial manager's appointment displaces the directors. He manages the business, and must within 60 days (capable of extension by court), present a proposal to creditors of the company. He has to summon a meeting of creditors to consider and vote on the proposal. The voting threshold is 75% in value of creditors whose claims have been accepted by the judicial manager, present in person or by proxy. Once approved, the proposal is binding on all creditors.

The Judicial Manager oversees the implementation of the proposal. Once the purpose of judicial management has been achieved, he may apply to discharge the order. If a proposal is not approved, the Court would normally discharge the judicial management order, and either receivership or liquidation beckons. It remains to be seen if judicial management fares better as a rehabilitation tool in Malaysia than its experience in Singapore[2].

The scheme of arrangement process

The Companies Act 2016 has also tweaked the existing scheme of arrangement process. One significant enhancement is the High Court's power to appoint an approved liquidator to assess the scheme's viability, and to prepare a report to be tabled at the class meetings convened to consider the scheme.

Future reform

There were some missed opportunities in the Companies Act 2016 to encourage the development of a true rescue based culture in Malaysia. Rescue financing, much discussed in reform initiatives elsewhere, is absent. Provisions enabling pre-packaged restructurings do not feature. Ensuring continuity of essential supply contracts pending the rescue and the treatment of ipso facto clauses weren't largely dealt with. A cross-border insolvency framework to facilitate multi-jurisdictional rescues wasn't included. Extending the reach of judicial management to foreign assets or international operations of Malaysian companies under judicial management should also be considered. Hopefully, future reform will enable Malaysia to keep pace with corporate rescue developments globally.

1 All parts of the Act other than the rescue provisions came into force on 31 January 2017. No date has been set for the rescue provisions to come into force.

2 See paragraphs 3 to 15 of Chapter 6 of the *Final Report of the Insolvency Law Review Committee*, Singapore (2013).

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Offshore Marine & Shipping – The Perfect Storm

By Ashok Kumar & Kenneth Lim
BlackOak LLC
Singapore

Why the perfect storm?

Falling oil prices are the harbinger of financial troubles for Singapore's offshore marine and shipping industry. Following Swiber Holding Limited ("Swiber")'s high profile bond repayment defaults, the dominos continue to fall with Swissco Holdings and Rickmers Maritime similarly defaulting on repayments. The dominos fell hardest on bondholders, most of whom were unfortunately classified as accredited investors under the Securities and Futures Act ("SFA").[1] Private banks took up as much as 49% to 92% of unrated notes issued by Pacific Andes Resources Development and Swiber, which also suggests that institutional investors shied away while retail investors bore the brunt of the implosion.

A spotlight has been cast on banks and financial institutions, whose practices have come under scrutiny following the defaults. Questions have been asked if a conflict of interest arises by virtue of the stake that these institutions have in these bonds, which were marketed to private banking clients notwithstanding the institutions' concurrent status as commercial lenders and arrangers to the bond issuers.

The "accredited investor" regime coupled with falling oil prices have created something of a "perfect storm" with a significant number of bondholders unfortunately caught in its midst. Several reforms aimed at better protecting such investors have been proposed but the question remains, "how does one best prepare to weather the storm"?

Dark clouds gather

Around the time of Swiber's provisional liquidation application, the price of crude oil had slumped to around US$40 a barrel. Falling prices deterred upstream activity by oil majors, and oil service providers in the offshore marine and shipping industry were left facing decreased profitability. Many bond repayment defaults may be traced to the fact that many offshore marine and shipping companies were highly leveraged by virtue of the large amounts of money required in the oil and gas sector. These companies felt the brunt of falling oil prices most severely, and later became unable to service payments due under bonds they had previously depended on to keep their businesses afloat.

"Accredited"?

The SFA classified retail investors as "accredited" so long as they have at least S$2 million in assets, or earned at least S$300,000 in the previous 12 months.[2] This created a situation whereby persons with no proper trading experience, nor particular investment know-how, could find themselves labelled as "accredited investors" (forgoing traditional protections in exchange for a greater range of investment options) simply because of expensive property in their name. Notwithstanding their "accredited" status, many bondholders in this category did not have sufficient disposable assets to withstand the losses that were incurred by the defaults.

Bondholders in the eye of the storm

Bondholders have suffered in light of Swiber's, Swissco's and Rickmers' defaults. With a total of S$1.2 billion in bonds issued by Singapore oil and gas services companies set to mature by the end of 2017, the skies are still far from clear. The problems faced by bondholders are further compounded by two obstacles commonly faced in the restructuring process:

(1) "dialogues of the deaf" that occur during consent solicitations, when bondholders and bond issuers speak different "languages" (by virtue of their different interests) in the process negotiation and discussion; and

(2) practical difficulties which arise from demands put forth by bond trustees, through whom demands often have to be made.

"Dialogues of the deaf" often result because bondholders and bond issuers often enter consent solicitation exercises speaking diametrically opposed "languages", with parties being neither able nor willing to see the other's point of view. Bondholders are often asked to waive potential covenant breaches and events of default, while approving restructuring proposals put forth by the bond issuers. Bondholders become understandably upset when they are asked to accept payouts far less than their investments, especially when other cost-cutting measures are given less attention. The bondholders' investments, which are often upwards of S$250,000, represent a significant portion of the bondholders' life savings; the bondholders naturally adopt a single-minded pursuit of self-preservation.

Bond issuers, on the other hand, fret over accessing bank loans to avoid liquidation, and the banks controlling such loans often require notes to be restructured in some way before the loans are released. Faced with the obstacles previously described, bondholders may see liquidation as a quick way to extract themselves from a situation of bond default, but would do well to realise that they may not get anything in a liquidation scenario by virtue of their status as mere unsecured creditors, unless they have viable "clawback" claims or director claims to be made. Effective negotiation, particularly if it is done with the aid of legal counsel, may help achieve better-than-liquidation outcomes in the consent solicitation process, but bondholders and bond issuers will ultimately benefit the most by making better efforts to communicate and see eye-to-eye.

As described earlier, bondholders also face obstacles because requests and representation sometimes may only be made through bond trustees. Bond trustees, however, sometimes demand pre-funding and indemnity before agreeing to act against the bond issuers. Thus, while bondholders theoretically have rights against issuers, these rights may be practically difficult to assert.

That bondholders are seething is no surprise especially since it was also recently revealed that private banks often did not disclose rebates of up to 1% that were paid as incentives to sell the unrated bonds.

Raincoats and brollies

Having seen bondholders battered in the storm, the Singapore government has moved to provide several "raincoats" and "brollies" to ameliorate the situation. First,

1 Securities and Futures Act (Cap 289, 2006 Rev Ed s 4A(1)
2 Securities and Futures Act (Cap 289, 2006 Rev Ed) s 4A(1)

amendments to the SFA were passed in January 2017 to tighten the criteria for accredited investors. Under the amended SFA, property value may only contribute half of the S$2 million threshold, excluding retail investors whose wealth lie mainly in property. The "accredited investor" regime is now opt-in, such that investors have to both qualify and choose "accredited" status before they will be deemed as such. The Monetary Authority of Singapore ("MAS") has also stated that rebates on bond sales should be disclosed, addressing perceived issues of conflict of interest. MAS emphasised that private banks should deal with their customers fairly, regardless of "accredited" status or rebates.

Secondly, the offshore marine and shipping industry looks poised to benefit from targeted measures such as the re-introduction of Spring Singapore's bridging loan and enhancements to International Enterprise Singapore's Internationalisation Finance Scheme. These measures facilitate access to working capital as the government takes on 70% of the default risk.

Recent legal developments in the High Court have shown a tendency towards a universalist approach regarding cross-border insolvency, which is likely to promote an orderly marshalling of restructuring and reducing the likelihood of a chaotic free-for-all rush for assets to the detriment of unsecured creditors like bondholders. In *Re Taisoo Suk*[3], the court recognised Hanjin Shipping's Korean rehabilitation proceedings, exercising its inherent power in staying and restraining proceedings against Hanjin.[4] In *Pacific Andes Resources Development Ltd & Other Matters*[5], the court held that it had no jurisdiction under s 210(10) of the Companies Act[6] nor inherent jurisdiction to restrain Pacific Andes' creditors from commencing proceedings outside Singapore,[7] but nevertheless, it held that such jurisdiction may exist where the court had sanctioned the scheme.[8]

The universalist approach has also been clearly endorsed by Singapore in proposals for the Omnibus Insolvency Bill and the Companies (Amendment) Bill 2017. The proposed legislative changes balance both debtor and creditor interests, prime Singapore as a debt restructuring hub. They include:

- adopting the UNCITRAL Model Law on Cross-Border Insolvency;
- enhanced moratorium for schemes of arrangement;
- introducing cram-down provisions which allow schemes to be passed notwithstanding the dissenting class of creditors' objections (subject to safeguards ensuring that they are not prejudiced);
- permitting pre-packaged restructuring to speed up the scheme of arrangement process;
- permitting super-priority for rescue financing.
- stricter disclosure obligations to protect creditors;
- permitting foreign companies to apply for judicial management; and
- easier access to judicial management orders.

Conclusion

Ultimately, while "raincoats" and "brollies" are a welcome relief, bondholders must take personal responsibility for their investment decisions. To best weather the perfect storm, bondholders would do well to bring their own "raincoats" and "brollies" by looking beyond the headline yield, appreciating the risks involved and making better efforts understanding their legal rights and potential consequences in that may result in this stormy market.

3 *Re Taisoo Suk* [2016] SGHC 195
4 *Re Taisoo Suk* [2016] SGHC 195 at [12]
5 *Pacific Andes Resources Development Ltd & Other Matters* [2016] SGHC 210
6 Companies Act (Cap 50, 2006 Rev Ed) s 210(10)
7 *Pacific Andes Resources Development Ltd & Other Matters* [2016] SGHC 210 at [29]
8 *Pacific Andes Resources Development Ltd & Other Matters*[2016] SGHC 210 at [28]

Pacific Andes: BVI Case Note

By Harneys' Inoslvency and Restructuring Team

The spotlight is likely to continue on global seafood producer Pacific Andes and its group companies, which has been at the centre of a multi-jurisdictional web of insolvency proceedings, with recent developments playing out in the British Virgin Islands where liquidators have been appointed over a number of Group entities since November 2016.

The Pacific Andes Group has been caught in financially troubled waters since 2014 when the *El Nino* weather pattern and the depleted Peruvian anchovy stocks apparently resulted in the Group being unable to meet certain obligations to its lenders. This led several major creditors to file for or support various Group entities entering insolvency proceedings with independent oversight after negotiations for repayment broke down.

Creditors, unsurprisingly, focused on bringing insolvency proceedings in the offshore jurisdictions where the relevant Group entities are incorporated, namely in the Cayman Islands, Bermuda, the British Virgin Islands *(BVI)* and Hong Kong SAR. Most recently, proceedings in the BVI have gained traction, as explored further in this Case Note.

However, members of the Ng family have sought to stay one step ahead of the Group's creditors by initiating proceedings in predominately debtor-friendly jurisdictions. These efforts have largely been consolidated in proceedings in the United States Bankruptcy Court, Southern District of New York (the *US Bankruptcy Court*), where 17 Group entities have now filed for Chapter 11 bankruptcy protection. The Group had previously sought refuge in insolvency proceedings in Peru (where the Group's highly-valued anchovy, fishmeal and processing operations are based) and from the High Court of Singapore for a proposed scheme of arrangement but ultimately abandoned Singapore for US Chapter 11 protection when the Singapore Court held it did not have jurisdiction to stay proceedings extra-territorially.

Group structure

Pacific Andes International Holdings Limited *(PAIH)*, the parent company of the Group, is incorporated in Bermuda and listed on the Main Board of the Stock Exchange of Hong Kong. Its subsidiaries, Bermuda-incorporated Pacific Andes Resources Development Limited *(PARD)* and Cayman Islands-incorporated China Fishery Group Limited *(CFGL)* are listed on the Main Board of the Singapore Stock Exchange. PAIH is owned and controlled by the Ng family which holds the majority shares in N.S. Hong Investment (BVI) Limited which in turn holds the majority shares in PAIH.

Background

Certain creditors petitioned to wind up Group entities CFGL and China Fisheries International Limited (CFIL) in the Hong Kong High Court and the Grand Court of the Cayman Islands (the *Hong Kong Petition* and *Cayman Petition*) in late 2015, with joint provisional liquidators appointed in each jurisdiction. Undertakings were entered into that led to the winding-up petitions being dismissed and an agreement with the Group for the sale of assets so as to secure funds for the repayment of bank debt. Negotiations for a sale of the Group's highly-valued Peruvian business continued up to June 2016, attracting interest from a number of investors, but failed to materialize before the Group filed to put key Group companies into debtor-friendly insolvency proceedings in the US, Peru, BVI and Singapore, seemingly to avoid independent oversight and to stump potential creditor actions.

By September 2016, with no substantive, creditor-approved restructuring plan in place, lender Malayan Banking Berhad *(Maybank)*, with the support of Cooperative Rabobank, U.A. Hong Kong branch *(Rabobank)* and Standard Chartered Bank (SCB), filed to wind up PARD in Bermuda (the *Bermuda Petition*). This development might be seen as the most telling break down in relations between lenders and Group management, given that it was some of these same creditors who had in late 2015 and early 2016 supported the dismissal of the Cayman Petition and Hong Kong Petition to allow the Group to sell valuable assets, the proceeds of which were to be applied to repay creditors. This time, instead of seeking to work with these previously supportive creditors, Group management filed for Chapter 11 protection with the US Bankruptcy Court over PARD, in advance of and effectively derailing the Bermuda Petition from being heard[1].

BVI winding-up petitions

On 26 September 2016, Bank of America N.A. *(BoA)*, a creditor of several Group companies incorporated in the BVI, filed to appoint liquidators over three Group entities: Pacific Andes Enterprises (BVI) Limited (*PAE*), Parkmond Group Limited *(Parkmond)* and PARD Trade Limited (*PARD Trade*) (together, the *BVI Companies*). BoA's application, heard in November 2016, was supported by a number of lender creditors and trade creditors, including Rabobank, SCB and Maybank.

Before BoA's application came on for hearing, Rabobank and SCB filed an *ex parte* application to appoint joint provisional liquidators on an urgent basis over PAE, concerned that Group management may once again (as in the case of PARD a month earlier) try to avail themselves of Chapter 11 protection to avoid the appointment of independent insolvency professionals over Group entities. On 31 October 2016, the BVI High Court granted that application, appointing FTI Consulting's Nicholas Gronow, Ian Morton and Joshua Taylor as joint provisional liquidators (the *PAE JPLs*).

At the hearing of BoA's application a few weeks later, the PAE JPLs were appointed joint liquidators over the BVI Companies.

BoA's application was made on the grounds of insolvency, the BVI Companies having failed to pay about US$15 million owing to BoA. It also asserted just and equitable grounds for the making of an order to wind up the BVI companies, alleging, in relation to PAE, that a number of suspicious payments within the Group had previously been identified by FTI Consulting, who had been mandated by HSBC (a creditor of various Group companies), to undertake a forensic analysis of certain Group bank accounts.

1 PARD announcement to the SGX on 30 September 2016: "The filing under Chapter 11 had to be made on an expedited basis given the hearing in Bermuda is scheduled for 30 September 2016."

The BVI Companies sought an adjournment of the winding-up applications, on the basis that the orders sought by BoA would "irretrievably" damage the "the possibility of a global, group restructuring".[2] This view was rejected by the BVI High Court, after consideration of among other things, whether a confidential outline restructuring plan submitted to the Court and which could only be shared with the BVI Counsel representing the creditors but not the creditors themselves should be allowed (as detailed further below). The BVI High Court also gave some weight to a recent ruling by US Bankruptcy Judge James L. Garrity Jr., in connection with a motion to appoint a US Trustee in the wider Group's US Bankruptcy Court proceedings.

BVI Commercial Court Judge Malcolm Davis-White QC said in his judgment:

"Not only am I not satisfied that the appointment of liquidators will in any way damage any restructuring plan, I am wholly persuaded that the creditors who wish liquidators to be appointed have a perfectly reasonable commercial rationale for so doing to ensure that the companies in question are managed and controlled by independent professionals who can investigate the position and come to a view as to what is best for creditors, whether ultimately their view is relayed by recommendation to creditors or by way of proposed action by them which is subject to oversight of the court..."[3]

In respect of the "confidential" evidence filed with the BVI Court, Mr. Justice Davis-White QC declined to consider the confidential material, satisfied that it would be inappropriate to do so in the present circumstances without the information being made available to all creditors before the Court.

The Court also discounted the objections of Group company, Richtown Development Limited, who as a creditor of PAE opposed the winding up of the company: *"In this context, I was referred to the helpful case of Lummus Agricultural Services Ltd [1999] BCC 953. In that case Park J applied the principles that I have set out…He held that where opposing creditors were not independent outsiders but associated with the company itself and with its directors (who opposed the application) their views should be discounted or at least in the Judge's discretion could be discounted…I am satisfied in all the circumstances that the views of Richtown should be discounted."*

Taking into account that there was an outstanding debt to BoA (as petitioner), and that the grounds for *not* making a winding-up order where a Company is unable to pay its debts had not been sufficiently made out, and, further, that the making of an order winding up the BVI Companies was supported by a majority of creditors, Mr Justice Davis-White QC ordered the appointment of the liquidators over PAE and PARD Trade, and separately, over Parkmond.

At this stage, the battle between the Group and its creditors has been playing out for well over a year now and it looks likely that the spotlight will continue well into 2017. On 26 January 2017, Justice Jonathan Harris sitting in the High Court in Hong Kong recognized the appointment of the liquidators over the BVI Companies.

2 Judgment of the BVI High Court of Justice dated 1 December 2016 in the matter of Bank of America N.A. and Pacific Andes Enterprises (BVI) Limited and others, paragraph 8.
3 Judgment of the BVI High Court of Justice dated 1 December 2016 in the matter of Bank of America N.A. and Pacific Andes Enterprises (BVI) Limited and others, paragraph 44(5).

OBITUARY

Stephen James Lister Adamson

10.07.1942 – 21.10.2016

The insolvency world was shocked to learn in October 2016 that Stephen Adamson CBE, Past President of INSOL International had died. Stephen had not been fully fit for some time, but still managed to live an active life since retiring as an international restructuring partner with Ernst & Young in London in 2002. He had joined a predecessor firm, Arthur Young McLelland Moores & Co. (later Arthur Young) in 1976 and became a partner two years later.

Stephen's funeral was held in Egham in Surrey, England not far from the home that he had shared with his wife of 44 years, Liz, as well as their three sons, Neil, Stuart and Ross, all of whom had fled the nest over the years. Stephen was a family man and was devoted to all his family which includes his six grandchildren.

The funeral was well attended demonstrating his popularity both professionally and socially, as many will understand.

His out of work (not that he ever was!) and retirement passions included attending international rugby matches, fly fishing, playing bridge, theatre including amateur dramatics, and also completing *The Times* cryptic crossword daily. Besides that, he was a trustee of a local school and a charity and also, he particularly enjoyed supporting local organisations, to include a regional epicurean society, the Egham Dining Club.

His domestic professional assignments included the household names of British & Commonwealth, Canary Wharf, Railtrack, Eurotunnel, Tottenham Hotspur Football Club and Barings Bank. In addition, he advised in respect of many international matters including corporate rescues in the Far East, in particular in Thailand in the late 1990's. He led the most challenging assignments.

As if working on very challenging cases was not enough, he also felt obliged to give of his time back to the insolvency profession, perhaps appreciating the benefits that he had gained in his day to day working. He rose to high office in the profession and, by way of example, was President of the Insolvency Practitioners Association in 1989/90, President of INSOL from 1993/95 and many will remember him as Chairman of the organising committee for the successful INSOL International Quadrennial Congress in London in 2001.

Stephen remained involved in INSOL International, still serving as Chair of the Nominating Committee the day we lost him. Stephen served in many roles including Board Member, Future Planning Chair, Member of the Richard Turton Award Panel and, frankly, any role where he was needed for INSOL.

His work with INSOL was just a part of the impact Stephen made in the world of cross-border practice. He was known and respected throughout the world whether in Dubai, Bangkok, Tokyo or New York.

Following retirement from active work and as a reflection for all he had done in the profession, he was awarded the INSOL International Scroll of Honour in 2005. This, of course, was not before he had been made a Commander of the most excellent Order of the British Empire in 1999 for services to the insolvency profession. He used to joke that several fraudsters fulfilled that role as well!

Many tributes have, of course, been paid to him, but some of the following might give readers instant recall, such as 'he was a real gentleman' , 'one of the best', 'I always enjoyed his company' , 'he always had something perceptive to say and normally with a glint in his eye', 'he was a kind and loyal friend, of great talent and a huge inspiration; one of those very special people who make life fun while achieving so much' and 'I will always think of him with a twinkle in his eye, giggling'.

While we honour his accolades, we, more so, honour Stephen the man.

This quote captures Stephen:

"A gentle word, a kind look, a good natured smile can work wonders and accomplish miracles." William Hazlitt.

Whether on the world stage, at the Egham Dining Club, at the Board Meeting of the local school or charity, or as an actor in the local theatre, the charm and sincerity of this man filled the room.

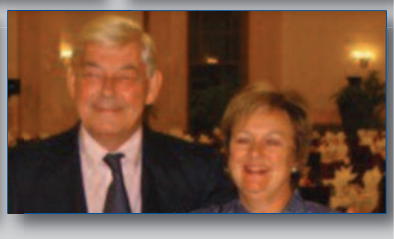
Through his family, he did more than fill the room, he filled their hearts. His remarkable character lives on through their three special sons.

All of that and more, is how we should remember him, as we are sure we will. In addition, another way to remember him is to read the very fitting obituary published in *The Times* on 30th December, 2016.

Stephen will be greatly missed by his many former colleagues and friends across the world. We extend our deepest sympathy to his wife Liz and all the family.







Hong Kong and Singapore Perfecting Universalism

By Look Chan Ho
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Through a series of recent decisions recognising foreign insolvency proceedings and assisting foreign officeholders, the Hong Kong and Singapore courts have made great strides towards perfecting the theory of universalism.

At common law, the court has power to recognise and grant assistance to foreign insolvency proceedings. As the Privy Council confirmed in *Singularis Holdings v PricewaterhouseCoopers*,[1] the conceptual underpinning is the principle of modified universalism, namely that the court has a common law power to assist foreign winding up proceedings so far as it properly can, extending a degree of co-operation to foreign insolvency proceedings whilst also protecting local interests.

The scope of common law recognition and assistance after *Singularis* remains somewhat uncertain. It is helpful that the recent Hong Kong and Singapore decisions have clarified the practical operation of universalism. Below is a review of the decisions.

Hong Kong developments

Where a company is subject to insolvency proceedings in its country of incorporation, the foreign insolvency representative (for instance, provisional liquidators) may need some assistance in Hong Kong, especially where the company has assets in Hong Kong.

A series of decisions made by Mr Justice Harris have firmly established that the Hong Kong court has power to provide assistance to a liquidator of a foreign incorporated company appointed by the court of the company's place of incorporation if the insolvency laws of the place of incorporation grant similar powers to a liquidator to those available under our own insolvency legislation.

In *Bay Capital Asia Fund v DBS Bank (Hong Kong)* [2016] HKCFI 1832, *Joint Provisional Liquidators of BJB Career Education Co v Xu Zhendong* [2016] HKCFI 1930 and *Re The Joint and Several Liquidators of Pacific Andes Enterprises (BVI)* [2017] HKCFI 128, the Hong Kong court has clarified the type of assistance the foreign insolvency representative may expect to obtain in Hong Kong as follows:

(a) the foreign liquidator may request and receive from third parties documents and information concerning the company and its promotion, formation, business dealings, accounts, assets, liabilities or affairs including the cause of its insolvency;

[1] *Singularis Holdings v PricewaterhouseCoopers* [2014] UKPC 36; [2015] AC 1675. See also *Akers as a joint foreign representative of Saad Investments Company Limited v Deputy Commissioner of Taxation* [2014] FCAFC 57; (2014) 311 ALR 167.

(b) the foreign liquidator is entitled to make a request of or give instruction to a person in Hong Kong, just like the company's board of directors;

(c) accordingly, if a bank receives a request from the liquidators of a company which has an account with them, once it is satisfied that the liquidators have been properly appointed by the court of the place of the company's incorporation, the bank must hand over documents to which the directors of the company would have been entitled;

(d) if a foreign liquidator wishes to deal with the assets of the company in Hong Kong, he should obtain an order from the court authorising him to do so (such as an order authorising transfer of cash balances);

(e) the court may make an order for the oral examination of an officer of a foreign company or other persons in possession of information which the foreign liquidator requires to conduct properly his investigations into the company's affairs, provided the foreign liquidator has the equivalent power under foreign insolvency law.

However, some recent cases suggest the Hong Kong court's assistance may be subject to some limitations. First, one might argue that the Hong Kong court could not recognise insolvency officeholders appointed in a jurisdiction other than the debtor's place of incorporation.[2]

Second, the recognition of foreign insolvency proceedings in Hong Kong might not entail the recognition of any foreign compromise or discharge of debts which are governed by Hong Kong law, in light of the 19th century case of *Antony Gibbs & Sons v Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399.[3]

These issues remain outstanding and to be debated fully in Hong Kong.

Singapore developments

The Singapore courts have developed and applied the concept of universalism in a robust manner, including answering some of the questions that are outstanding in Hong Kong. The Singapore approach seems to be heavily influenced by the UNCITRAL Model Law on Cross-Border Insolvency.

First, in *Re Opti-Medix* [2016] SGHC 108; [2016] 4 SLR 312, the Singapore court confirmed that insolvency proceedings commenced in a jurisdiction other than that of the debtor's place of incorporation could be recognised in Singapore provided there was a basis for doing so. Accordingly, in *Opti-Medix*, the Singapore court recognised insolvency proceedings commenced in Japan in respect of British Virgin Islands-incorporated companies because the companies had their respective centre of main interests in Japan.

Second, the decision in *Re Pacific Andes Resources Development* [2016] SGHC 210 suggests that the Singapore court may, upon recognising foreign insolvency proceedings, give effect to a compromise or discharge of debts governed by Singapore law pursuant to foreign insolvency law. The court's reasoning endorsed a number of academic criticisms of the *Gibbs* decision.

Third, in *Re Taisoo Suk* [2016] SGHC 195; [2016] 5 SLR 787, the court confirmed that the jurisdiction to recognise foreign insolvency proceedings also extends to foreign restructuring and rehabilitation proceedings. The assistance that may be granted to foreign officeholders includes restraining and staying proceedings (such as ship arrests) against the debtor and its affiliates.

Fourth, in *Re Gulf Pacific Shipping* [2016] SGHC 287, the court recognised the liquidators of a Hong Kong company, which was put into creditors' voluntary winding up; the court also granted orders empowering the liquidators to obtain information in relation to bank accounts belonging to the company. This decision departed from some obiter observations in *Singularis* that the common law powers of assistance to foreign liquidation did not extend to voluntary winding up because voluntary winding up was characterised as an essentially private arrangement.

Fifth, in *CIFG Special Assets Capital I v Polimet* [2017] SGHC 22, the court proceeded on the basis that the court's inherent power to recognise foreign insolvency proceedings also extended to foreign schemes of arrangement. However, in this case, the court exercised its discretion not to assist the Malaysian scheme of arrangement proceedings by staying the creditors' action against the debtor in Singapore. This is because the debtor was taking inconsistent positions in the Singapore and Malaysian proceedings. In Singapore, the debtor did not accept that it was indebted to the creditors, whereas in Malaysia it was prepared to accept that it was so indebted. Therefore, the court concluded that it would in fact be helpful to the Malaysian scheme proceedings if the court went on to determine if the debtor was indebted to the creditors.

Conclusion

Universalism is the cornerstone of modern cross-border insolvency regimes and is thus the guiding principle for courts around the world when faced with novel cross-border insolvency issues.

The recent decisions in Hong Kong and Singapore are welcome development. They show how universalism operates in practice. More importantly, they serve to promote and facilitate the orderly resolution of cross-border insolvencies. These cases demonstrate that, to paraphrase Martin Luther King, the arc of universalism is long, but it bends towards cross-border justice.

2 *The Joint Administrators of African Minerals v Madison Pacific Trust* [2015] HKCFI 645; [2015] 4 HKC 215.
3 *Re Winsway Enterprises Holdings* [2016] HKCFI 1915.

China's Bad Debt Bubble: A Crisis Waiting to Happen?[i]

By Jason Bedford
UBS
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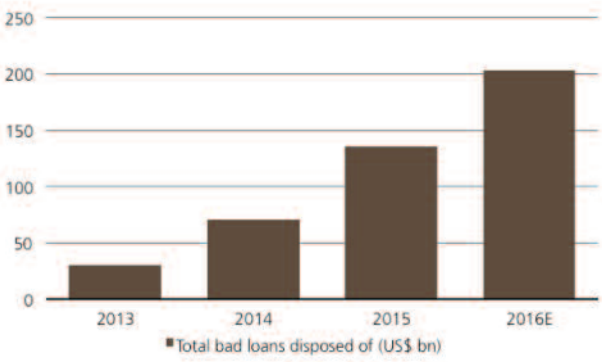
There tends to be a perception, particularly in the West, that the official NPL numbers in China are wholly inaccurate and that the economy will soon enter into a death spiral caused by a build-up of bad debt and inefficient state companies. What would that look like? Soaring bad debt disposals, banks blowing up, skyrocketing bankruptcies and bad banks being set up to clean up the mess probably comes to mind. What the market seems to be missing is that a lot of these things are happening – perhaps not on the scale that will ultimately be needed, but this is not a system that is on a one-way treadmill to hell and at the seams there are positive incremental changes happening.

China banks disposed of an estimated 1.5% of their total loan book last year or about US$200bn in 2016 – still significantly below the annual average of 2.5% that Japanese banks were disposing of when they began to fully clean up their banks but not an inconsequential amount. In addition, the previous structures and restrictions that hindered NPL disposal have been relaxed and a thriving private sector domestic distressed debt market is emerging to acquire these bad assets.

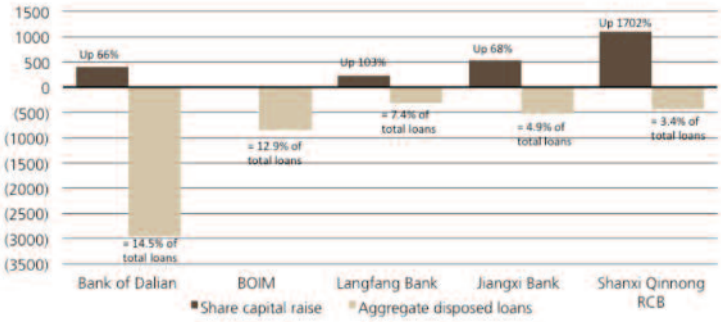
Chart 1: NPL disposals are surging



Why aren't banks imploding under the stress of bad loans? Well actually, they are. For the first time in nearly a decade bailouts of individual – and in some cases quite large – institutions are starting to occur. Bank of Dalian,

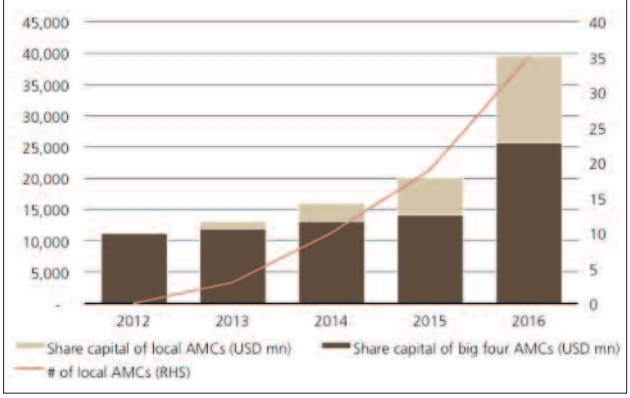
[i] The views presented in this article are that of the author and do not necessarily reflect the views of UBS.

Chart 2: What a bank bailout looks like (US$ mn, 2015)



Bank of Langfang, Bank of Inner Mongolia (BOIM), Jiangxi Bank and Shanxi Qinnong Rural Commercial Bank all implemented restructuring and bail out plans in 2015. And more than likely, a few more names have been added to that list in 2016.

Chart 3: Bad banks are being set up at a rapid rate



Three approaches have been adopted to recapitalize and bail out troubled banks:

- Classic recap and write-off: Involves a recapitalization via injection of new share capital combined with sharp write-offs and impaired asset transfers (BOIM and Langfang Bank).
- Bailout via consolidation (Jiangxi Bank - merger of stable Nanchang Bank with distressed Jingdezhen City Commercial Bank). Many of the mergers between banks at the local level are not conducted on a commercial basis but rather as a way to handle distressed local lenders. This typically involves marrying a balance-sheet challenged lender(s) with a stronger, more stable local institution. These mergers are always done at the provincial level.
- Bad debt for equity swap (Bank of Dalian and Shanxi Qinning RCB): For particularly distressed institutions, the bank is bailed out via transfer of a controlling stake to third party companies in exchange for a swapping out of the bad debt.

What was interesting to note was the lack of participation by any nationally licensed or listed banks in the bail-outs of problem banks. Fears that the major banks will be called upon to do "national service" and take over weak banks are overstated. Nonetheless, none of the banks that have been bailed out to date could be considered a systemically significant institution, the largest being a US$45bn balance sheet bank. Given that China now has 15 banks with balance sheets in excess of US$ 500bn, certain institutions could pose a far bigger challenge *(See Chart 3)*.

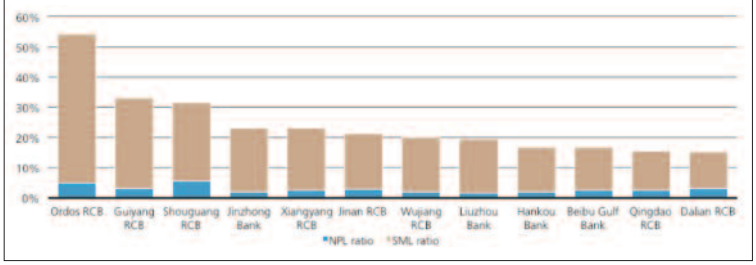
China's equivalent of a so-called bad bank is known as an "asset management company (AMC)". Originally there were only four such AMCs, Cinda, Huarong, Orient and Great Wall, and they were set up in the early 2000s to specifically bail out the five largest banks in China. While they continue to grow and still play a key role in NPL disposal, new AMCs started to be set up in 2013 when the government initiated a scheme to set up AMCs at the local level to deal with provincial level NPL issues. And in the current credit cycle, this is where the needs are most acute. Bad debt problems are far more concentrated in the smaller, regional banks as opposed to the large state institutions. The numbers of AMCs set up since 2013 has ballooned to 35 as at 9 February 2017 – and it will likely be in excess of 60 by the end of this year.

None of the above is meant to suggest that China's financial system is safe and sound and no collapse is imminent. Quite the opposite, the rapid growth rate of credit growth at 2.5 times the rate of GDP (or to put it another way, China needs $2.5 of loans to create $1 of GDP growth) is deeply concerning. This suggests that much of the new credit issuance is going to distressed, inefficient companies that are borrowing to either finance losses or repay existing debt. This dynamic can be seen in the ballooning gap between special mention loan ratios and NPL ratios. The main reason a loan is deemed an NPL? Missed payments. A key reason a loan is booked as a special mention loan (SML)? The underlying borrower has been loss making for two consecutive accounting periods.

Many of these so-called zombie companies that are absorbing this credit are in over-capacity industries like steel and mining. But they have leveraged up to such a point that even if commodity prices were to triple, it is unlikely that their debt loads would be manageable even then.

But given the size of the economy, the amount of liquidity in the system and the steps being taken to address bad debts, it is too early to say whether a full blown banking crisis is a certainty or not.

Chart 4: The mushrooming gap between NPL ratios and SML ratios indicates bad borrowers are still able to service their debt (2015)



Global Entrepreneurship Week Korea 2016: "Fail Conference"

By Peter Sargent
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Cleckheaton, UK
INSOL Small Practice Issues Committee Member

Some would wonder why the organisers of a conference about entrepreneurship would want an insolvency practitioner, to come and speak to delegates and so did I.

My invitation to speak came from the Korean government's Small and Medium Administration department via INSOL, and there was a desire to learn more about insolvency procedure in the UK and how business failure is perceived and dealt with.

My presentation was entitled *From Failure to Turnaround* and looked at policies and procedures in the UK; a copy of the PowerPoint slides is available on my LinkedIn profile.

My fellow speakers included Shinjiro Takagi of Morgan Lewis & Bockius, whose presentation was entitled *Business Reorganisation Schemes in Japan*, and he compared them with those in Korea; Hirofumi Kato of Abe, Ikubo & Katayama talked about *System and Achievements of SMEs*; Daniel Isenberg of Babson College talked about *Balancing Success and Failure to Scale Up Entrepreneurship*; Qian Wang of Zhongguanchun Inno Way discussed *Failure and Restart in China* and finally last but not least Young-dal Lee of Dongguk University finished the day off with a presentation entitled *Entrepreneurial Morass and Serial Entrepreneurship*.

All speakers in their different ways talked about their experience of business failure, turnaround, reorganisation and new beginnings in their diverse jurisdictions.

The morning had started with breakfast and a press conference with Mr Young-Sup Joo, the minister in charge of the Small and Medium Administration department and his officials. It was great to learn that the Korean government had a specific department to deal with small and medium businesses, and also that the government was keen to promote entrepreneurship.

A wide ranging discussion took place concerning entrepreneurship education, the fear of failure, and Korea's fear that new generations are more risk averse and as a result less entrepreneurial.

From discussions in the conference and with various officials it was apparent that one of the great fears was that of having to take on the bank borrowings of failed businesses as personal guarantees are so prevalent. There was also great concern over the dishonour of business failure, which again discouraged entrepreneurship.

The conference then started with the formal opening ceremonies which were then followed by prize giving to new entrepreneurs young and not so young!

These new entrepreneurs were loudly applauded by the 150 so delegates present at the conference.

It was great to see entrepreneurship recognised and rewarded by the government.

Daniel Isenberg gave a key note address and this was followed up by an interesting Q&A session with official from the department joining Mr Isenberg on stage.

After lunch the 'Fail Conference' started the more serious work of the day, and all the speakers (see above) provided interesting and well received presentations for the delegates (I would say that wouldn't I).

As a lover of quotes I thought I would share these I collected on the day:-

'Look after the scale-ups, the start-ups will look after themselves'
'Scale-up is the future not start-up'
'Entrepreneurship is not just something new, but adding new value to an existing product'
'Government should keep its noses out of rescue procedures'
'Bad companies should die, die quickly and efficiently'
And finally -
'Entrepreneurs don't need telling, smart people do it naturally'
'To cross the river by feeling the stones'.

This was my first ever trip to Seoul, my first impressions were of a busy vibrant economy with a young population (I am told they have an ageing problem like many developed nations). Everyone was pleasant and welcoming and I felt a sense of gratitude, honour and pride at being asked to present to the conference.

INSOL International
GROUP THIRTY-SIX

Ferrier Hodgson

Environmental Issues in Restructuring and Insolvency – Who Bears the Clean-up Costs?

By Ryan Eagle
Ferrier Hodgson
Sydney, Australia

Introduction

Many restructurings involve businesses with potential environmental clean-up costs either due to the operations themselves - mining, waste management, manufacturing, ship building - or the company's declining financial ability to meet environmental standards. These costs can run into the hundreds of millions of dollars.

In a restructuring, potential clean-up costs can be a difficult issue which the company, its advisers and various stakeholders, need to factor into their decision making. In a formal insolvency administration, the costs involved are generally provable claims against the company, although difficulties often arise in terms of their quantification and contingent nature.

In most cases stakeholders at the negotiating table have little desire to allocate any of the limited funds available to meet these costs. Given the widespread impact of environmental harm, it can often be the State which is left with the cost and task of remediation.

The State Government in Queensland, one of Australia's major resource states, has recently introduced laws that broaden the scope for Environmental Protection Orders (EPOs) to be issued. In addition to imposing liability on the company, these laws seek to draw holding companies, landlords, financiers, shareholders, joint venture parties, directors, senior management, restructuring advisors and insolvency practitioners into the 'chain of responsibility' for the cost of environmental clean-up.

Environmental Protection (Chain of Responsibility) Amendment Act 2016 (CoRA)

Queensland's *Environmental Protection (Chain of Responsibility) Amendment Act* 2016 (CoRA) added this new regime to the *Environmental Protection Act* 1994 (EPA) in April 2016.[1] A statutory Guideline further explaining the impact of the CoRA was issued in January 2017.

Under the new law, in addition to an EPO being issued to a company, a CoRA EPO can be issued to a 'related person' with a 'relevant connection' to a corporate polluter. A related person is defined as someone **who gains a significant financial benefit from the company's activities**, or someone who, at any time in the prior two years, **has been in a position to influence the company's conduct** in its compliance with its environmental obligations.

A CoRA EPO may also be directly issued to a related person of a 'high risk company' irrespective of whether an EPO has been issued to the company itself. A high risk company is one under a formal insolvency administration or a related entity of such a company.

In deciding whether to issue a CoRA EPO, the law requires the regulator to take into account of whether the related person took 'all reasonable steps' to attend to the company's environmental concerns. Factors to be considered include the extent to which the person was in a position to influence the company's compliance, and its adequate provisioning to fund the environmental consequences of the company's activities.[2] Further considerations include the person's:

- Legal and practical ability to influence the company's conduct;
- Actual and expected knowledge of the company's environmental obligations;
- Exertion of power and influence, including any financial decision making; and
- Reliance on others to ensure environmental harm was avoided and whether this reliance was reasonable.

The January 2017 Guideline recently issued sets out that the objectives of the CoRA are to:

- Facilitate enhanced environmental protection for sites operated by companies in financial difficulty; and
- Avoid the State bearing the costs for managing and rehabilitating sites in financial difficulty.

The effect of the law is to cast a wider net over stakeholders potentially liable for the cost of environmental clean-up in order to encourage behaviour which prevents or contains environment issues and so that funds are more likely available for remediation activities.

Key considerations

The CoRA requires the concept of culpability to be considered in determining responsibility for an offence. In considering culpability, the following considerations will be taken into account:

1 Chapter 7, Part 5, Division 2 of the EPA.
2 Section 363ABA

- Who was primarily responsible for the offence, that is:
  - Who committed the act;
  - Who formed the intention (if relevant);
  - Who created the material circumstances leading to the alleged offence; and
  - Who benefited from the offence;
- What was the role of each alleged offender (where there is more than one alleged offender).

The law provides the relevant State Government Department with a range of investigative powers that are aimed at interrogating the circumstances leading up to environmental damage being caused and ensuring that culpable parties under the act are pursued.

In determining whether a person has a relevant connection with a company, the law requires consideration to be given as to whether the relevant matter existed at the time the person was a related person or whether those matters existed at an earlier time. Initial drafts of the Guideline sought to include, the concept of insolvency practitioners being liable for environmental issues created prior to their appointment. Thankfully, the final drafting limits the liability of insolvency practitioners to issues created after their involvement commenced.

It is however, often the case that it is difficult to identify precisely when environmental issues arise and to determine at what stage environmental damage is caused.

Such uncertainty, makes the already common practice of completing an environmental audit immediately upon an insolvency practitioner's appointment, a critical step in any administration.

Conclusion

Stakeholders dealing with businesses that have potential environmental issues are faced with the competing interests of attempting to achieve a successful restructuring, ensuring that the rights of stakeholders are appropriately addressed, and ensuring that provision is made for current and future environmental issues to be remediated.

It is important to ensure that practitioners are well informed on the environmental risks that may exist or present in the future, the actions being taken by the company and the relevant local laws. Early engagement with the regulator is recommended.

Lenders also need to be cognisant of the new laws and the potential for them to be drawn into the chain of responsibility around environmental damage, particularly in the context of a restructuring or insolvency.

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

When (Insolvency) Worlds Collide – the Case of Legend International Holdings Inc (in liq)

By Farid Assaf
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Barrister, Banco Chambers
Sydney, Australia

Introduction

In the recent decision of *Legend International Holdings (in liq) v Indian Farmers Fertiliser Cooperative Limited & Kisan International Trading FZE* [2016], the Victorian Court of Appeal considered whether an Australian court could make a winding up order against a Delaware registered company in circumstances where the company had filed for US Chapter 11 relief subsequent to the wind up application being filed but before that application was determined. The Victorian Court of Appeal is an Australian intermediate appellate court equivalent to the Court of Appeal of England and Wales and the United States circuit courts. The insolvent company, Legend International Holdings Inc ('Legend') was a US Corporation, registered in Delaware but with its COMI in Melbourne, Australia. Its main assets comprised of shares in an Australian mining company with the *situs* of those shares in Australia. Indian Farmers Fertiliser Cooperative Limited ('IFFCL'), an Indian company, applied for the winding up of Legend in Australia after obtaining an arbitral award for $US12.35 million in Singapore. IFFCL's application for the winding up of Legend was filed in the Supreme Court of Victoria on 11 April 2016. On 8 May 2016, Legend filed for Chapter 11 relief. On 10 May 2016, prior to the return date of the winding up application, Legend filed an originating process to seek recognition of the US proceeding pursuant to the Model Law on Cross-Border Insolvency ('the Model Law') which Australia adopted in 2008. On 17 May 2016, there was a status conference hearing before the Honourable Brandan L. Shannon of the United States Bankruptcy Court however his Honour adjourned that conference to await the outcome of the Australian winding up application.

The first instance decision of Associate Justice Randall

Randall AsJ refused the application for recognition of the Chapter 11 proceedings on the basis that Legend's COMI was in Australia and therefore the US proceeding was not a foreign main proceeding under the Model Law. His Honour also found the US proceeding was not a foreign non-main proceeding as there was no 'establishment' in the US. Accordingly, Randall AsJ considered the Court's obligation under section 581 of the *Corporations Act* (operating independently of the Model Law) to 'act in aid of, and be auxiliary' to other courts. Section 581 is similar to s 426 of the *Insolvency Act* 1986 (UK). Randall AsJ accepted that the duty to act in aid of z foreign court was still operational despite no request being made by the court itself. However, his Honour considered that the Court did not know what specific action would be auxiliary to a US Court having received no indication from that court. His Honour considered that in the circumstances, a winding up order would not be objectionable, especially given that the US trustee had proposed a status conference to be held after the application in Australia had been determined. Accordingly, Randall AsJ made the winding up order.

The decision of the Victorian Court of Appeal

In the Victorian Court of Appeal, the main issue was whether Randall AsJ erred in making the winding up order whilst the Chapter 11 proceeding was underway. Randall AsJ's findings regarding the Model Law were not disturbed. The Court of Appeal, comprising, Whelan, Beach and Ferguson JJA considered whether the order should have been made in circumstances where the Court was under an obligation to 'act in aid, and be auxiliary to' the US Bankruptcy Court, it being a court of a 'prescribed country' under the Model Law. Legend contended that the Court, in fulfilling it's duty 'to act in aid of, and be auxiliary to' the US Bankruptcy Court, was obliged to refrain from making a winding up order, so as not to thwart the US proceedings. Legend contended that there was conflict between a winding up order under the Australian Act, which is principally aimed at realisation and distribution of the corporation's assets, and proceedings under Chapter 11 of the US Bankruptcy Court, which are aimed toward continuance of the corporation. Legend argued that by its proper construction, s 581(2)(a) would not permit the court to make a winding up order while there is an imminent Chapter 11 proceeding, except in special circumstances. Legend also argued that making a winding up order would be the antithesis of providing aid or would be repugnant as it would defeat the purpose of the Chapter 11 proceeding.

The Court of Appeal rejected Legend's arguments and held that no error had been made at first instance and dismissed the appeal. In considering s 581 the Court drew on the reasoning expounded by the English Court of Appeal in *Hughes v Hannover Ruckversicherungs–Aktiengelsellschaft* [1997] 1 BCLC 497 which considered s 426 of the UK Insolvency Act. Much like the English Court of Appeal, the Victorian Court of Appeal held that very clear words would be required by Parliament to justify a conclusion that an Australian Court was obliged to refrain from exercising a discretionary power under the *Corporations Act* to wind up a company simply because the company had filed for Chapter 11 relief in the USA. Such clear words are not found in s 581. Further, the Court held that on its proper construction, section 581 requires the Court to consider what aid may properly be given and how it might act in an auxiliary manner. The Court of Appeal identified a number of factors in favour of exercising the discretion to wind up Legend, including:

- Both the US proceedings and the liquidation were still at an early stage - at the time of the hearing in the Court of Appeal, there was no proposed plan for reorganization in the US. Thus potential conflict would be able to be controlled;
- Because the US proceedings were not recognised as a foreign main proceeding the benefits that flow from such recognition were not available to Legend. The Court of Appeal also pointed out, *in obiter,* that even if the US proceeding had been determined as a foreign main proceeding, Article 20(4) of the Model Law contemplates that an application to wind up Legend could still be made;
- The winding up application was filed before the bankruptcy petition in the US, and the potential for a reorganisation plan was an insufficient reason to refrain the Court from winding up. If such a plan did eventuate, the liquidators could still investigate and pursue that path;
- No request was made by the US Bankruptcy Court in circumstances where the presiding Judge was aware of the winding up proceeding;
- In the absence of a reorganization plan or proposal there was no indication that creditors would be better off if Legend were not wound up in Australia.

Conclusion

Some of the comments made by the Victorian Court of Appeal suggest a distinctly territorialist approach to cross-border insolvency. The Court expressly observed that even if the Model Law did apply to the case before it, it would nonetheless have thought it appropriate for Legend to have been wound up in Australia. That said, the outcome may have been quite different in this case had their been a concrete proposal for reorganization in the Chapter 11 proceedings and the US Court had made a request for assistance.

A New Bankruptcy Law for the United Arab Emirates

By Jody Glenn Waugh
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Background

Ever since the financial crisis in 2008 the bankruptcy law in the UAE has been the focus of attention with many commentators voicing concerns over the regime in the UAE. Although the economic downturn in the UAE was no different to that experienced in many jurisdictions across the globe, the modernisation of the UAE bankruptcy laws to make them more user friendly and promote restructuring was the focus. In particular the criminal sanction attached to bounced cheques was seen as an obstacle to an effective bankruptcy regime. The International Monetary Fund and World Bank have been among those vocal in their desire to see such a change.

While certain commentators did not, perhaps, fully understand the bankruptcy laws which already existed in the UAE, the concerns over the effectiveness of the regime were to a large extent warranted. This was reflected in an environment where court supervised bankruptcy procedures were not seen as a viable option, and skipped debtors was (and is) the norm.

Against that background the passing of Federal Law No 9 of 2016 concerning Bankruptcy in the UAE (the "Law") has been welcomed. The Law became effective at the end of December 2016.

How the Law works

There are essentially three avenues within the Law:

1. *Financial re-organisation committee*

   The committee will oversee the procedures of financial re-organization outside the scope of the UAE courts. The purpose of the FRC is to supervise the procedures of financial re-organization of financial institutions licensed by supervisory bodies in order to facilitate reaching an agreement between a debtor and its creditors[1].

2. *Preventative composition*

   This is essentially court supervised restructuring. It is available for traders who have suspended payment of their debts for less than 30 business days.

   If the application is accepted, the composition trustee and company work together to develop a composition scheme. If approved by the court, and accepted by the creditors, the scheme will be binding on all creditors.

   Once the application is accepted, all legal proceedings are suspended. This includes criminal proceedings based on bounced cheques issued by the trader.

3. *Bankruptcy*

   Bankruptcy is mandatory for traders who have suspended payment of their debts for more than 30 business days. An application for bankruptcy can result in either:

   a. Restructuring - this largely follows the process for preventative composition.
   b. Bankruptcy / Liquidation - if restructuring is not viable for the trader, the bankruptcy trustee would proceed to liquidate the business and assets.

What has changed?

As is common in the region, the Law remains true to its predecessor and does not seek to revolutionize bankruptcy in the UAE. Rather it has been developed based on the existing law introducing improvements and imposing a greater focus on restructuring.

Highlights include:

1. *Scope* - the Law applies to all traders, but not to individuals in their personal capacity. The Law does not apply to the Government, and the position of 'decree entities' has been clarified, with the Law only applying to them if they 'opt in' to the Law.
2. *Re-organisation committee* - establishment of a Financial Re-organisation Committee.
3. *Insolvency trigger* - the trigger for insolvency, being the suspension of payment of debts, has been extended from 30 days to 30 business days.
4. *Composition schemes* - preventative composition procedures have been enhanced. However whereas the old law had schemes requiring repayment of 50% of the debt in 3 years, the Law provides for schemes to be "implemented" in 3 years (with 3 year extension option). The Law also provides that only unsecured creditors can vote on any composition scheme.
5. *Bankruptcy options* - bankruptcy applications now result in two avenues: restructuring or bankruptcy (liquidation), as decided by the court under the guidance of the bankruptcy trustee. Where restructuring is decided, the process largely follows the preventative composition process, albeit the restructuring scheme can be 5 years (with 3 year extension option).
6. *Suspension of proceedings* - legal proceedings are suspended during preventative composition or restructuring, albeit secured creditors can seek approval of the court to enforce over the secured assets.
7. *Bounced cheques* - Criminal proceedings based on bounced cheques issued by the debtor are also suspended during preventative composition or restructuring.
8. *New money* - a concept of new money has been introduced, such new money if approved having priority over unsecured creditors.
9. *Set off* - set off provisions have been amended, with

1 We believe this is reference to reorganization of debtors who owe money to financial institutions, as opposed to reorganization of financial institutions however the exact scope of the committee remains unclear.

set off permitted at any time provided the conditions for set off existed prior to the initiation of bankruptcy proceedings.

10. *Private trustees* - the ability to nominate the trustee (for composition or restructuring). Whereas the old law would result in court appointed experts undertaking this role, the Law allows for parties to nominate the trustee, possibly being private restructuring specialists.

The verdict

With such a transient population and the ability to pack up and leave at a moment's notice, the UAE has peculiar challenges when tackling insolvency. Any changes to the laws also have to be considered against the backdrop of existing civil laws.

With that in mind what is the verdict on the new Law? The Law has undoubtedly made improvements to the insolvency regime and sought to promote restructuring wherever possible. With the suspension on criminal proceedings for bounced cheques it has also addressed a long standing issue which has traditionally resulted in skipped debtors.

However the Law did not perhaps go as far as many would have liked. Personal bankruptcy has not been addressed[2] and financial institutions in particular have voiced concerns over certain aspects of the Law. In addition some requirements and thresholds debtors need to satisfy (eg not suspending payments for more than 30 business days or proposing a 3 year composition scheme) may not make court supervised procedures as user friendly as hoped.

Predictions

While the Law contains certain aspects which may make an application for preventative composition or bankruptcy more attractive, it is likely parties will still prefer to restructure debts consensually outside of the court.

Although the suspension of criminal proceedings based on bounced cheques is a welcome development to give the comfort necessary for debtors to remain in the UAE and restructure their debts, the protection offered is only a suspension and only exists for preventative composition and restructuring, meaning certain debtors (especially those where restructuring is uncertain) may still choose to skip the country.

Like any new law it will take time for all stakeholders, including the legal fraternity, to fully understand how the Law will be implemented in practice. Notwithstanding the fact that 2017 should not see the volume many commentators may expect, it is almost certain applications and bankruptcy proceedings will increase - which you could say is not difficult considering bankruptcy is virtually nonexistent in the UAE at present.

2 The UAE Government has advised this will be addressed in a separate personal bankruptcy law.

Overview of Insolvency Proceedings in Mexico: The Abengoa Mexico Proceeding

By Luis Miguel Ramírez Ruggeberg and Gilberto Miranda Sola

ONTIER Mexico
Mexico

According to Mexican law, in order to open an insolvency proceeding, an individual or a legal entity engaged in a business (hereinafter, the "Debtor"), certain criteria need to be met. The Debtor must be in general default in payment obligations. The Debtor may then make an application for commencement of insolvency proceedings (also known as voluntary proceeding). Alternatively the Public Authority or one or more creditors can file a claim against the Debtor considered to be unable to pay its debts, having the obligation to demonstrate this situation to the Court.

The competent Court, specifically the District Court which may receive the application or the claim, must be satisfied that the Debtor is in fact in general default in payment obligations against two or more different creditors. This means, in accordance with article 10 of the Insolvency Proceedings Law (*Ley de Concursos Mercantiles*) (hereinafter the "Law"), that each of the following is satisfied: (i) that the due obligations with at least thirty days past due, represent at least 35% of all the Debtor's obligations up to the date of the claim or application; and, (ii) that the Debtor does not have enough assets to pay at least 80% of the due obligations up to the date of the claim or application. The assets referred to above, may be cash or deposits; investments, deposits and receivables that do not exceed a ninety-day term; and even securities registering purchase operations in relevant markets that could be sold within no more than thirty days, and have known value.

Once the application or claim has been admitted by the Court based on an insolvency decision, the Debtor and its creditors, must offer any evidence and documents that may be deemed convenient. In the insolvency decision, the Court shall request the Federal Institute of Specialists in Insolvency Proceedings (*Instituto Federal de Especialistas en Concursos Mercantiles*) ("IFECOM") as assisting administrative body, to appoint an examiner.

The examiner is the Court's assistant whose purpose is to issue a technical opinion reviewing the accounting, financial statements, and other documents in which the financial and accounting situation of the Debtor is stated. The examiner can also conduct interviews with directors, executive or administrative personnel and perform any action deemed necessary to issue its technical opinion.

The opinion referred to above, provides information to the Court: (i) regarding whether the conditions established in the Law for opening an insolvency proceeding in respect of the Debtor are satisfied; (ii) if applicable, sets out details of the date on which liabilities and debts fell due for payment; and (iii) makes recommendations to the Court as to whether to order precautionary measures against Debtor's property to protect the creditors' rights.

As a general rule, the opinion issued by the examiner does not constitute a final resolution, although it provides helpful guidance to the Court. The Court must notify the Debtor and creditors (and when applicable the Public Authority) about its final decision, after allowing them to make their final arguments.

The figure of the examiner has caught the attention of international entities operating in Mexico. This is because of the current proceeding in respect of Abengoa's Mexican subsidiary (hereinafter "Abengoa Mexico"), where the examiner s opinion reflected the fact that not all the requirements established in the Law which need to be satisfied in order to continue with the insolvency proceeding were met; but nonetheless the Court decided that Abengoa Mexico was to be treated as being in general default of its payment of obligations.

There are two stages once the insolvency proceeding is opened (i) the reorganization; and (ii) bankruptcy. The reorganization period is opened when the Debtor requests the proceeding or when it does not accept the claim made by the creditors or Public Authority. The bankruptcy stage is opened when the Debtor accepts the claim (meaning there is no reorganization period) or when the Debtor and creditors do not reach an agreement.

Once the formal insolvency proceeding is declared, a reorganization period will begin. The reorganization period will last for 185 days, and is extendable to a maximum of 365 calendar days. The purpose of the reorganization period is to restore business activities and the preservation of Debtor operations through various means including the negotiation of agreements with the acknowledged creditors. The law provides for the appointment of a mediator and establishes that the administration of the business is to be conducted by the Debtor (unless the mediator deems necessary to remove the Debtor from the business administration). The mediator however must approve pending contracts and new credits.

When an agreement is settled during the reorganization period, the agreement shall include a reorganization plan, including: (i) the debt payment due up to the date the resolution took effect; (ii) the payment of generated amounts and accessories, since the date of the resolution to the agreement's approval; and (iii) the payment of the due obligations since its approval.

The agreement may make provision for a set-off, a standby period to comply with commitments and payments, or both. Once the agreement has been approved by the Court, it is binding on all the acknowledged common and subordinate creditors. The creditors entering into the agreement with a secured debt or security interest will be entitled to priorities ahead of other creditors. However, entry into the agreement by the acknowledged creditors with a secured debt or security interest, does not mean the waiver of their securities or privileges.

Currently, Abengoa Mexico is in the reorganization period. It is possible that Abengoa Mexico will be able to conclude its insolvency proceeding by reaching an agreement and reorganization plan with its creditors. Creditors who agree must represent more than 50% of the acknowledged debt owed to the common and subordinated creditors, and those with a secured debt or special privilege.

INSOL Global Insolvency Practice Course Welcomes Eighth Class

Report by G. Ray Warner
Course Leader, Class 2016-17

The successful INSOL Global Insolvency Practice Course started its eighth year with a class of 22 prospective Fellows. The diverse group consisted of insolvency professionals from 13 different jurisdictions. The first of three intensive multi-day training sessions, Module A, was presented at the Grange St. Paul's Hotel in London from 7 through 9 November 2016.

The Course is designed to provide the Fellows with a thorough insight into the major issues, debates, and theories in legal and financial topics in international insolvency. Course exercises help Fellows to develop the analytical and practical skills needed to apply international insolvency rules to situations they may encounter in practice. The Course covers both the legal and financial issues involved in international insolvency.

Module A provides a broad-based introduction to cross-border insolvency law. Participants study the structure of insolvency law and learn about the sources of modern Cross-border insolvency law. The Module A lectures cover US and UK restructuring practice, the European Insolvency Regulation, the UNCITRAL Model Law on Cross-Border Insolvency, cross-border recue in the EU, and accounting and finance. The module also includes case studies and exercises that force the participants to negotiate a complicated workout and to understand management issues and appreciate the causes of business failure.

The participants in the class of 2016-17 are Simon Dickson (Mourant Ozannes, Cayman Islands), Liam Faulkner (Campbells, Hong Kong), Simone Fitzcharles (Lennox Paton, Bahamas), Ian Fox (Dentons UKMEA LLP, UK), Nastascha Harduth (Werksmans Attorneys, South Africa), Charles (Chip) Hoebeke II (Rehmann, USA), Krijn Hoogenboezem (Boekel N.V., The Netherlands), Jan Willem Huizink (RESOR N.V., The Netherlands), Ayodele Kusamotu (Kusamotu & Kusamotu, Nigeria), Dhananjay Kumar (Cyril Amarchand Mangaldas, India), Howard Lam (Latham & Watkins, Hong Kong), Shaun Langhorne (Hogan Lovells Lee & Lee, Singapore), Orla McCoy (Clayton Utz, Australia), Craig Montgomery (Freshfields Bruckhaus Deringer LLP, UK), Maria O'Brien (Baker & McKenzie, Australia), Nicolas Partouche (Jeantet, France), Vanessa Rudder (PwC, UK), Mark Sinjakli (AlixPartners Services LLP, UK), Derrick Talerico (Bosley, Till, Neue & Talerico LLP, USA), Lloyd Tamlyn (South Square, UK), Sonya Van De Graaff (Morrison & Foerster LLP, UK), and Nicolás Velasco Jenschke (Superintendency of Insolvency and Entrepreneurship, Chile).

The feedback by way of formal evaluations was very positive. While the instructional sessions were intensive and demanding, the program also provided opportunities for socializing and networking. Module A opened with dinner at the Sky Bar & Terrace, Grange St. Paul's Hotel, where Samantha Bewick, an INSOL Fellow and a Director in Restructuring at KPMG LLP (UK), spoke about some of her experiences in cross-border restructuring and, in light of the Brexit vote, also shared a few observations about the new challenges presented by that development. The second evening was spent at the Bleeding Heart Restaurant, where two Fellows from different E.U. jurisdictions discussed the impact of Brexit on cross-border practice. That presentation was delivered by Mark Craggs, (Norton Rose Fulbright, UK) and Ivo-Meinert Willrodt, (PLUTA, Germany). Both dinners provided an opportunity for the participants to become acquainted with each other and to network with program alumni and faculty.

Lectures for Module A were André Boraine (University of Pretoria, RSA), G. Ray Warner (St. John's University, USA), Jan Adriaanse (University of Leiden, The Netherlands), Bob Wessels (University of Leiden, The Netherlands), Michael Veder (Radboud University, The Netherlands), Ian Fletcher (University College London, UK), Stephen Taylor (Isonomy Ltd, UK), Nick Cropper (AlixPartners LLP, UK), Dolf Bruins Slot (EY, The Netherlands), Bob Rajan (Alvarez & Marsal LLC, Germany), and Russell Downs (PwC, UK).

The participants will have completed research papers prior to Module B, which is scheduled for March 2017, immediately before the INSOL Tenth Quadrennial Congress in Sydney, Australia. Module B includes additional case studies, further study of the Model Law and different national insolvency systems. At the conclusion of Module B, the participants will sit for their oral examinations. The program culminates with Module C in May 2017, where the participants will apply the information learned in the prior two modules in a one-week intensive insolvency workout simulation that includes a video conference court hearing before a US and a UK judge.

Finally, on behalf of the Core Committee I express our gratitude for the support received from INSOL, its management and staff members. The success of Module A was due in large part to their kind and conscientious efforts.

INSOL BVI One Day Seminar – 17 November 2016

Report by
Andrew Thorp and **Russell Crumpler**
Harneys
Tortola, BVI
Seminar Chair

KPMG
Tortola, BVI

The BVI was the sell-out destination for the INSOL International Offshore Seminar 2016. Peter Island provided the paradise backdrop to this popular event that attracted 145 delegates from North and South America, Europe, Asia and Australia.

Experts from all walks of industry led panel discussions and presented views on current hot topics and the future of international insolvency. The palm fringed island surrounded by azure blue seas provided a fitting setting for topics that ranged from the importance of the offshore world via arbitration, to global insolvency and restructuring.

Fortunately for the delegates, the conference also provided an opportunity to experience island life outside of the conference hall. The dialogues spread beyond the latest interpretations of US bankruptcy law and the challenges of recovering assets in international fraud to an enjoyable second day where the delegates happily sailed catamarans between the islands, snorkeled, ate lunch on the beach and delighted in the odd rum cocktail.

The seminar was opened by Julie Hertzberg of the INSOL Executive Committee who tactfully avoided too much controversy after the recent US presidential election. She focused on the important initiatives that INSOL were working on throughout the year- notably education and the burgeoning popularity of the INSOL Fellowship course.

Andrew Thorp of Harneys chaired the ambitious event that for the first time included workshop breakout sessions as well as plenary events, a networking day and the attendance of the BVI's Premier at the formal seminar dinner.

The first session, entitled '*Show Me the Money – or Not!*' was very entertaining and kick started the seminar on a very pleasant note. Russell Crumpler of KPMG played an excellent role as chair. He enticed the panel into providing some fascinating examples of the difficulties in enforcing against errant debtors across borders. Jake Williams of Madison Pacific along with Alex Moglia of Moglia Advisors recounted some colourful enforcement tales along with their more idiosyncratic tactics which included freezing accounts used for paying school fees! Craig Montgomery of Freshfields Bruckhaus Deringer provided a very insightful view on cross-border methodologies for maximizing returns and all of this was balanced by the insights of Dawn Smith, Senior Counsel for the BVI FSC, who talked to the challenges regulators face when facing the mess created by international frauds.

Howard Seife of Chadbourne & Parke lent his extensive cross-border experience to lead the first breakout session '*Hot Topics in Offshore Liquidations*'. The much anticipated commentary from Hon Robert Gerber (ret) on offshore incorporations proved less controversial than some expected as the Judge confirmed his support for a less contentious method of deciding COMI than was currently in play. Mark MacDonald of Grant Thornton and Jan Golaszewski of Carey Olsen gave their perceptive views on recent BVI and Cayman issues, notably the respective Courts attitudes to recognizing foreign insolvency appointments.

Jonathan Bailey of Nerine chaired the next breakout session which sought to demystify some of the much maligned offshore structures. He provided some guidance as to both why they are deployed and spoke to the much regulated environment in which they now operate. Annette Escobar of Astigarraga Davis provided the US Courts' views and propensity to seek jurisdiction over, and on occasion to pierce the veil of, offshore entities. Rachael McDonald of Mourant Ozannes gave her insight into the formation of offshore structures whilst Colin Riegels of Harneys dealt with their deconstruction and legitimate place in modern finance.

The *Arbitration* breakout session was particularly relevant given the opening of the BVI Arbitration Center the night before and the recent introduction of the new BVI Arbitration Rules. Mark Forte of Conyers, Dill and Pearman skillfully chaired the session which was balanced between the judiciary and arbitration worlds. Dame Justice M. Pereira OBE, Chief Justice of the Eastern Caribbean Supreme Court expressed the Court's intent to support BVI arbitrations. John Beechey, Chair and Francois Lasalle, CEO, of the BVI Arbitration Centre spoke of the exciting new opportunities that arbitration could provide alongside insolvency related disputes.

The start of an insolvency process is always met with a sense of excitement by practitioners. To capture this, the

session on '*Building the Picture from Day One*' was a practical take on the aspects of insolvency work in the offshore market and the largely cross-border nature of most engagements. The panel, led by Martin Trott of RHSW covered practicalities of handling initial duties such as securing the assets and immediate legal steps when faced with an alleged fraud. Chris O'Reilly of LDM provided technical support surrounding how to protect and preserve a company's data. Hadley Chilton of Baker Tilly and Brian Lacey of Ogier presided over a case study where delegates formed 4 groups and came up with a variety of issues and solutions to address a typical cross-border insolvency situation. There followed much lively debate and input between delegates and the panel as to the initial actions that needed to be taken in the case study which really highlighted where different jurisdiction's insolvency/bankruptcy processes could be utilized.

The final panel was a star studded affair of offshore insolvency as some of the industry's biggest hitters provided their war stories in the aptly titled '*Boots on the Ground*'. David Molton of Brown Rudnick and INSOL Fellow had the unenviable role of marshalling the discussion as it moved at a break neck pace through some of the globe's largest cross-border cases. Meade Malone of Borrelli Walsh spoke about private enforcement rights in the BVI being jeopardized by interaction with rescue proceedings in the US whilst Stuart Mackellar of AlixPartners recounted his experiences in dealing with the Kingate funds. The US theme continued with Chris Hill of EY and Ken Krys of KRyS Global trading tales of dealing competing appointments in the US. Derek Lai of Deloitte provided a fascinating insight into the machinations of recovery procedure in mainland PRC, whilst Simon Conway of PwC dealt with amongst other issues regulatory arbitrage across jurisdictions.

That left the conference Chair to bring the proceedings to a close in the best way possible – succinctly – before delegates retired to the bar for a pre-dinner Caribbean cocktail.

INSOL International would like to thank the following sponsors for their generous support of the BVI One Day Seminar: **Platinum Sponsors:** Brown Rudnick, Carey Olsen, EY, Harneys; **Gold Sponsors:** Grant Thornton, Campbells, Kobre & Kim, PwC, RHSW Caribbean; **Breakfast Sponsor:** Maples and Calder; **Coffee Break Sponsor:** Deloitte; **Lunch Sponsor:** Conyers Dill & Pearman; **Dinner Sponsors:** Harneys, KPMG.

INSOL Academics: 19th Colloquium and Inaugural Ian Fletcher International Insolvency Moot, Sydney March 2017

By Prof. Rosalind Mason
Queensland University of Technology
Brisbane, Australia
Chairman, INSOL International Academics' Group

Sydney Colloquium

An exciting programme has been assembled for the INSOL Academics' Group 19th Colloquium on 18 – 19 March in Sydney immediately prior to the INSOL Congress 2017. Academics are travelling to Sydney from Asia, Africa, Europe, North America and Australasia. There are a number of senior and junior academics whom we will be welcoming to their first Colloquium. This augurs well for its future development.

The programme features a panel on Developments in Asia with speakers on China, Japan and Singapore. From regions further afield, speakers will address the impact of Brexit and the effects of the European Union Insolvency Regulation on non-member countries. A popular theme this year is that of Insolvency Practitioners with papers examining their remuneration; regulation; and recognition. The topic of natural person insolvency has also attracted interest, as has that of director duties – bringing the individual dimensions of insolvency to the fore. Once again the topic of restructuring and rescue is a common theme for a number of papers.

Ian Fletcher International Insolvency Moot

Preparations for the inaugural Ian Fletcher International Insolvency Law Moot (the Fletcher Moot) are well underway. This will run from 15 – 17 March, with the preliminary and semi-final rounds to be held at the University of Sydney Law School, and the final round at the Federal Court of Australia.

The Fletcher Moot provides a unique opportunity for universities to participate in a competition dealing with international insolvency litigation. The moot problem requires consideration of a range of laws relevant to international insolvencies, in particular the UNCITRAL Model Law on Cross-border Insolvency.

From among the participating universities in the Written Round, 8 teams have been selected to participate in the Oral Rounds in Sydney in March.

The final and semi-final panels will be chaired by Judges from Australasia; Hon Justice James Allsop, Chief Justice of the Federal Court of Australia, Hon Justice Ashley Black, Judge of the Supreme Court of New South Wales, and Hon Justice Paul Heath, High Court of New Zealand. Other members of the Semi-Final and Final judging panels will comprise of judges from different regions of the world.

Throughout development of this competition, there has been outstanding cooperation from expert volunteers around the world to oversee the Competition; develop the problem; and judge the written submissions. Similarly the preliminary oral rounds panels already comprise judicial, practitioner, and academic volunteers from Australia; Austria; Hong Kong; Japan; the Netherlands; South Africa; the United Kingdom; the United States.

Conclusion

The INSOL Academics' Group welcomes the recent appointment of internationally regarded former academic, Dr David Burdette as a Senior Technical Officer at INSOL International. One aspect of Dr Burdette's role will be to liaise with the INSOL Academics' Group and accordingly he has joined the Academics' Steering Committee. David has advised that he is looking forward to working closely with the group.

Of course, additional contributions by academic members to INSOL International continue through activities such as the Global Insolvency Practice Course; research projects; the INSOL Scholar's Award and the Ian Strang Award competitions.

Forum for Asian Insolvency Reform (FAIR) 2016 – Hanoi, Vietnam

Report by Neil Cooper,
Past President, INSOL International

On 21st and 22nd November 2016 150 delegates from 23 countries and organisations attended the tenth FAIR. Our hosts were the Supreme People's Court of Vietnam and the conference was organised by INSOL International and the World Bank Group (WGB).

INSOL's multi-national meetings often feature peer-to-peer reports on progress by country. FAIR was no exception and we considered the drivers for (and obstacles to) reform. Reform requires political will but even with that, the process of reform and the choices of policy options are not always smooth. A common feature is the need for institutional capacity development to deliver the lawmakers' intentions. In the absence of a developed and organised insolvency profession, skilled and technically competent judges and regulators to monitor the insolvency practitioners, implementation of a new insolvency and reorganisation law is problematical.

There has been considerable development of the insolvency laws in the region and the growth of cross-border commerce has led to a number of significant cross-border cases, particularly in shipping and airlines. However, new liquidation and reorganisation laws will not necessarily lead to such procedures being used: the principle obstacle to the timely commencement of proceedings often remains the perceived stigma of bankruptcy.

While the legal framework remains important, unfortunately, in some jurisdictions, there is a low awareness of the constructive roles that IPs, lawyers or accountants can play when assisting clients with financial difficulties. Even some countries with developed insolvency systems lack systems of licensing and supervision of IPs, resulting in the profession, such as it is, being held in low regard in the financial communities.

The experience of consumer and SME insolvency systems developments in Asia varies widely, from states where this is a major problem to others with very little non-corporate debt, largely for internal economic policy reasons. SMEs typically account for a large percentage of firms and jobs provided but while they are engines of job creation, they are typically severely credit constrained. While the key determinant of development of SMEs is access to finance, the market does not know how to price risk. The challenges frequently include the absence of reliable financial information and financially unsophisticated management who are unaware of insolvency or its ability to restructure financially troubled but otherwise viable businesses. This typically results in late filing, with the result that creditors have a major role in SME cases, albeit that the costs may seem disproportionate and there is little benefit for creditors. The solution requires new approaches and procedures.

Asia has seen the growth of asset management and reconstruction companies: although some states have developed financial restructuring practices, most have little experience or resources in operational restructuring. Out of court workouts have increased throughout Asia, but to widely differing extents. The INSOL Principles for Multi-Creditor Workouts were used in the region to reduce bank NPLs; now extended to include non-banks. While these have stood the test of time, simplified Asian principles are used by some organisations.

While wrongful trading provisions can encourage directors not to continue trading past the point of insolvency, such provisions should not jeopardise valid attempts at restructuring. The meeting heard that some nations are considering safe harbour rules where restructuring advisors have been engaged to prevent directors having to file to avoid personal liability.

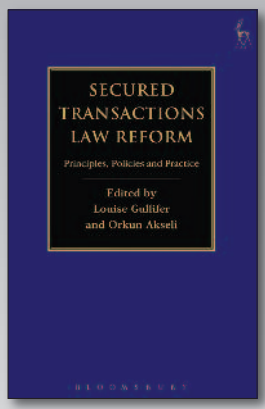
A large portion of the meeting was spent considering the development of judicial capacity and exploring the ways in which courts can cooperate when faced with a multinational insolvency. Currently 41 nations in 43 states have adopted the UNCITRAL Model Law on Cross-Border Insolvency with Singapore and Thailand expected to join shortly and other countries in the region adopting reforms that have essentially the same effect.

The meeting considered the pros and cons of specialised courts, which some countries have had for twenty years.

The meeting received a brief report on the activities of APEC. Unfortunately, the US threat to cancel the Pan Pacific Partnership arrangements will disrupt matters.

Thanks were offered to our generous hosts and to the organisers. It was intimated that the next FAIR would be in 2018 in a country yet to be decided. A full report on the FAIR is available on the INSOL website.

Nguyen Hoa Bing, Chief Justice, Supreme People's Court of Vietnam and Mark Robinson, INSOL President



Secured Transactions Law Reform: Principles, Policies and Practice[1]

Louise Gullifer and Orkun Akseli, Hart Publishing, 2016, 542 pp, ISBN 9781849467438

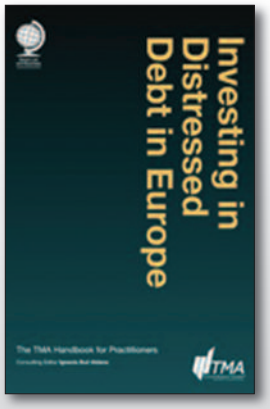
Review by Prof. Gerard McCormack, University of Leeds, UK

This is an important and interesting book, excellently produced and edited. It makes a very persuasive case for secured transactions law reform most notably in the UK but also more generally and internationally. The message is not altogether surprising for much of the team behind the book is also behind the Secured Transactions Law Reform project which is actively pressing for reform in the UK along the lines of Article 9 of the US Uniform Commercial Code and the Personal Property Security Acts in many Commonwealth countries including Australia, Canada and New Zealand. The Commonwealth countries had a system of credit and security law that was more or less similar to the English law but have since moved over to a model that is much more closely akin to the US Article 9 though with significant stylistic and some terminological differences. The editors have assembled a distinguished team of writers that explain in separate chapters how the reforms have worked in the different Commonwealth countries. In the main, the reforms appear to have worked well though with inevitable teething issues and problems of conceptual adjustment as in Australia.

One of the planks in the 2005 Conservative Party manifesto was to move Britain up in the World Bank Doing Business rankings and secured transactions law reform may be one element in doing this. The 'Getting Credit' indicator in the Doing Bank rankings essentially measures the state of the secured transactions law in a particular country rather than the actual availability of credit and it does so according to a US Article 9 blueprint. The UK currently languishes in 20th position on 'Getting Credit' in the latest (2017) rankings whereas countries in the top ten appear to have remodelled their laws on US lines.

On the other hand, the current law in the UK works tolerably well and it has certainly not prevented a lot of international debt transactions from being structured in accordance with English law. Incidentally, as explained in an excellent paper in the book by Moritz Brinkmann, German law is even more of an outlier than UK law, when it comes to following US precedent in this area. One might add that Germany has not done too bad economically in recent years. Certainly, it is the EU powerhouse – a house which the UK appears committed to leaving. Negotiating the terms of this departure probably means that the UK will have to give priority to other matters in the next few years rather than secured transactions law reform.

1 Members of INSOL International can get 20% off by ordering the book via **www.hartpub.co.uk** and using the code **CV7** at checkout.



Investing in Distressed Debt in Europe: The TMA Handbook for Practitioners[1]

Consulting Editor Ignacio Buil Aldana, Globe Law Business Limited 2016, 327 pp, ISBN 9781911078104

Review by Prof. Dr. Bob Wessels, Professor em. international insolvency law, University of Leiden, the Netherlands

The European distressed debt market slowly started off in the early 90 and has grown exponentially after the financial crisis of 2007/2008. However, being in Europe, this market is far from homogeneous and legal fragmentation is the norm. *Investing in Distressed Debt in Europe: The TMA Handbook for Practitioners* is a timely and important book. It gives an overview of the legal background and the challenges and opportunities of investing in distressed debt in especially France, Germany, Italy, Spain, where in last years rescue regimes have been put in place, and the United Kingdom. 'Distressed debt' refers to those loans or credits with uncertain recovery prospects because the borrower is either in insolvency or in financial distress. It is sometimes known as 'impaired debt' or 'sub-performing debt'. As a result, this debt is being traded at (significant) discount to its face or nominal value. The main areas in the book are distressed debt trading, direct lending, the non-performing loan (NPL) portfolio market in the context of bank deleveraging and the European restructuring and workout framework. Uniformity in secondary loan trade documentation is stimulated through the use of the Loan Market Association (LMA) terms and conditions, but the overview of the countries mentioned demonstrate that many differences exist, both from a regulatory and from a legal point of view. 'Direct lending' has been on the rise, especially for SMEs, as the financial crisis has reduced availability of traditional bank lending. The analysis of the trends in the European market relating, for example, to unitranche financing or 'cov loose'/'cov lite' financings, as well as a review of the regulatory and legal regimes applicable in different European jurisdictions, is highly valuable for practitioners.

Accessible insight is given into European's financial regulatory system regarding the non-performing loans market and the phenomenon of bad banks (such as Nama in Ireland and SAREB in Spain). In the limelight also is European debtors' darling, the scheme of arrangement and its latest developments, as well as current restructuring regimes in the jurisdictions mentioned and restructuring of high-yield bonds in Europe.

Some 40 authors contributed to this book, which serves as a solid basis for practitioners, investors, such as investment banks, hedge funds, pension funds or private equity houses, regulaters and academics alike. The consulting editor acknowledges the limitation of the jurisdictions surveyed. I'll support his anticipatation that the book may move into future editions that will allow to analyse other European countries as well.

1 Members of INSOL International can get 20% off by ordering the book via www.globelawandbusiness.com/IDD/ and using the code **INSOLDDI** at checkout.

Conference Diary

April 2017				
20-23	ABI Annual Spring Meeting	Washington, DC	ABI	www.abi.org
26-28	R3 Annual Conference	Dublin, Ireland	R3	www.r3.org.uk
May 2017				
4-5	ARITA Small-Medium Practice Conference	Denarau Island, Fiji	ARITA	www.arita.com.au
12	INSOL Europe Annual Conference	Budapest, Hungary	INSOL Europe	www.insol-europe.org
25	INSOL International Sao Paulo One Day Seminar	Sao Paulo, Brazil	INSOL International	www.insol.org
June 2017				
27	INSOL International / INSOL Europe Tel Aviv One Day Joint Seminar	Tel Aviv, Israel	INSOL International / INSOL Europe	www.insol.org / www.insol-europe.org
August 2017				
9-10	ARITA National Conference	Melbourne, Australia	ARITA	www.arita.com.au
22-24	CAIRP Annual Conference	Kelowna, BC	CAIRP	www.cairp.ca
September 2017				
13	INSOL International Channel Islands One Day Seminar	Guernsey, Channel Islands	INSOL International	www.insol.org
October 2017				
5-8	INSOL Europe Annual Congress	Warsaw, Poland	INSOL Europe	www.insol-europe.org
November 2017				
2	TMA Annual Conference	Orlando, FL	TMA	www.turnaround.org
Date TBA	INSOL International Kuala Lumpur One Day Seminar	Kuala Lumpur, Malaysia	INSOL International	www.insol.org
December 2017				
30 Nov-2	ABI Winter Leadership Conference	Palm Springs, CA	ABI	www.abi.org
April/May 2018				
29 Apr-1 May	INSOL New York Annual Regional Conference	New York, NY	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

Asociacion 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)

Hungarian Association of Insolvency Practitioners

INSOL Europe

INSOL India

INSOLAD - Vereniging Insolventierecht Advocaten

Insolvency Practitioners Association of Malaysia

Insolvency Practitioners Association of Singapore

Instituto Brasileiro de Estudos de Recuperação de Empresas

Instituto Brasileiro de Gestão e Turnaround

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

Recovery 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

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