INSOL WORLD

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INSOL 2017

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

Early Bird Deadline 12 December 2016

The Early Bird deadline is fast approaching so do ensure that you register to guarantee your place. The registration brochure and registration form are available online.

The Main Organising Committee conducted a site visit of the new International Convention Centre in Sydney in October. The main building works have been completed and the interior is currently being finished in time for the December opening. We will report further when we return.

The Welcome Reception on Sunday evening will take place on the balcony overlooking the harbour. There will be no formal sit down dinner as it will be a more relaxed networking evening with the Chef preparing a roaming feast of mouth-watering dishes. We will have a sit down dinner on the Wednesday evening when we say farewell to each other and can all relax and enjoy some more good food and wine.

There are a number of additional events taking place that you may wish to consider building into your programme.

Prior to the main Congress, the INSOL Academics Group will meet on Saturday, 18th March and Sunday, 19th March. The Twelfth Multinational Judicial Colloquium, held jointly with UNCITRAL and The World Bank, will take place on the same dates. This is a closed meeting for judges, regulators and judicial officials. We are also holding an Offshore Ancillary Meeting on the Sunday. Details of these meetings can be requested from Penny Robertson at **pennyr@insol.ision.co.uk**.

Smaller practitioners will be able to attend a lunch on Sunday, 19th March followed by an afternoon programme. This will provide the opportunity to meet early on at the Congress and discuss topics of particular interest to that group which will, as usual, hold a dinner for smaller practitioners on the Monday evening. Please contact Jelena Wenlock, Membership Manager, for more information at **jelena@insol.ision.co.uk**.

Fellows of the Global Insolvency Practice Course are holding a function on the Saturday evening and a Fellows Refresher Programme the next day. For details of these events please contact Heather Callow at **heather@insol.ision.co.uk**.

On Monday, 20th March there will be a special lunch hosted by the President's wife, Kylie Robinson, and Joint Congress Chair's wife, Jude Billingham, for accompanying persons (AP) held at the Manly Pavillion Restaurant. This will give the APs the opportunity to meet up and enjoy the beautiful scenery on route to Manly and whilst at the restaurant overlooking the water.

The plans for the technical case study have progressed over the last few months. The script, written by Samantha Bewick, Fellow, INSOL International, KPMG and Craig Martin, Fellow, INSOL International, DLA Piper, has been finalised, actors cast and filming completed. Editing is now underway of what will be a highly entertaining and educational film that will be the centrepiece of the Monday technical programme.

Tuesday will be a half-day morning programme and Wednesday will be another full day culminating in the Gala Dinner. There will be some optional sessions on Tuesday afternoon on areas of special interest which will be circulated before the end of the year.

So, don't forget to book this time out of the office and join us in Sydney in 2017.

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Editors' Column

Ken Coleman
Allen & Overy LLP, USA

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

This Edition of INSOL World focuses on a number of interesting developments in Africa, as well as offshore jurisdictions. The restructuring tools in Bermuda, Cayman and BVI are being tested by the plunge in energy and commodities markets. The broad consequences of this decline have been particularly harsh in Africa where offshore vehicles were used widely as investment vehicles. An article by Andrew Thorp, Lachlan Greig and Jayson Wood of Harneys provides excellent insight to these difficult problems.

There has now been some experience with South Africa's efforts to facilitate rehabilitations with a more company friendly insolvency legislation. Two articles, one by Dr Eric Levenstein of Werksman and the other by Piers Marsden of Matuson & Associates, takes us through the developments.

In addition, we report on the seventh Africa Round Table held by INSOL in partnership with the World Bank Group, which this year took place in Accra, Ghana. We had ninety delegates attending from seventeen African countries plus OHADA. As you will see, the programme was intensive and very well received.

Jersey has not had the benefit of robust restructuring legislation, but Richard Brown of Carey Olsen shows how corporate rescue can be achieved for Jersey companies through English schemes of arrangement. In a similar vein, Randall Arthur abd Rebecca Hume of Kobre & Kim discuss some of the advantages and potential pitfalls in looking to legislation outside the home jurisdiction.

Disputes in ancillary proceedings over recognition and other relief for foreign proceedings continues to multiply and expand the cross-border case law. It seems parties have become more comfortable mounting challenges as courts in some jurisdictions are more comfortable applying greater independent scrutiny rather than simply deferring to the foreign court. The Cayman liquidators of Caledonian Bank were successful in getting recognition in a number of key jurisdictions. But they were refused entry in Bahamas. An INSOL Fellow Sophia Rolle-Kapousouzoglou of Lennox Paton explains why.

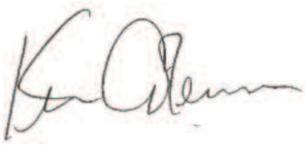
Laura Hall, my partner at A&O, writes about Judge Martin Glenn's decision in the Hellas Telecommunications Chapter 15 case in the Southern District of New York. The case involved litigation claims in the US and England. Laura explains the tactical issues the parties had to navigate, how Judge Glenn resolved the issues and the implications for other companies considering Chapter 15 relief.

As restructurings become more litigious, there greater demand for innovation in the means to fund the cases. Rosemary Ioannou of Vannin Capital discusses the tremendous growth in both the value and products available to fund litigation claims, cases and creditor distributions.

Reform and innovation has also affected fraud cases. Michael Pearson of Fund Solution Services Limited explains a recent Cayman Islands decision which eliminated "fictitious profits" in Ponzi scheme cases.

And finally, our INSOL Fellowship Feature article by Mark Craggs of Norton Rose Fulbright and Ivo-Meinert Willrodt of PLUTA Rechtsanwalts GmbH/ BTG Advisory, discusses the impact of Brexit on cross-border restructurings.

On behalf of the INSOL and the Editorial Board, thanks to Mourant Ozannes for sponsoring INSOL World and to David Rubin & Partners for sponsoring the monthly electronic news updates, which keep members up-to-date with the latest developments in between the INSOL World editions.



Ken Coleman

President's Column

By Mark Robinson
PPB Advisory
Sydney, Australia

Dear Friends and Colleagues,

I am surprised how rapidly I am approaching the end of my two year term as President of INSOL International that will occur at the Quadrennial Congress in Sydney in March 2017. 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. Hopefully I have successfully shared my journey with you through my President's Column and conversations with many of you during my travels.

INSOL Strategic Review – Taskforce 2021

In my last column, I provided a comprehensive update on the work of Taskforce 2021, including an overview of the Taskforce's highly successful meeting in New York. I have since received a further update from the Taskforce Chair and am pleased to share with members the news that the strategic review process is ahead of schedule. The INSOL Board received, for its consideration, the draft strategic plan for review at our October 2016 Board meeting in Hong Kong. There will then be a further round of engagement with stakeholders before the plan is finalised and signed-off by the INSOL Executive and the Board.

While there is much anticipation surrounding the Taskforce's work, I can share that many of the proposed strategic initiatives are bold and, if successfully implemented, will take INSOL into new frontiers as we move towards 2021. I look forward to sharing our new strategic vision and plan at the March 2017 quadrennial.

INSOL International One Day Seminar – Jakarta

On 14 September I had the pleasure of participating in INSOL's inaugural one day seminar in Jakarta. It was well attended with more than 120 registered delegates from Indonesia, Singapore, Hong Kong, Japan and Malaysia. The presenters comprised an excellent balance of key local debtor advisors, banks, foreign creditor representatives and other stakeholders. The programme was very well received and enabled attendees to familiarise themselves with the unique features of the restructuring landscape in Indonesia. The stimulating technical programme included sessions on:

- Major recent developments in the Indonesian Bankruptcy Court decisions – are creditors in a better or worse position?
- Domestic issues important to foreign creditors;
- Trustee and Bondholder claims in Indonesia suspension of debt payment proceedings (PKPU);
- Restructuring of Bond debt by way of Singapore and/or UK schemes of arrangement;
- Working capital challenges and solutions in Indonesian workouts.

Insolvency Practitioner's' Association of Singapore (IPAS) Conference – Singapore

I attended the 3rd Regional Insolvency Conference held in Singapore on 16 September, where I learnt of the country's ambitious plans to leverage off its status as a major financial, legal, and business hub, to provide businesses with a convenient base in the Asia Pacific region to restructure their debts.

To accomplish this, reforms to make Singapore's restructuring framework more attractive to users are expected in the near future. Some of these enhancements are an automatic moratorium for restructuring, prepacks, super priority for rescue financing and cram-down provisions similar to the US Chapter 11 process. Cases will also be heard by specialists insolvency judges who will ensure these new processes are used effectively to facilitate quick and costs-efficient restructurings with a high certainty of outcome.

I eagerly await developments in this area, including the adoption of the UNCITRAL Model Law. Should Singapore be successful in its goals, I expect the creation of new and significant growth opportunities for insolvency professionals in the Asia Pacific region.

Other interesting sessions included comparing and contrasting civil law and common law perspectives of cross-border insolvency in Asia and a senior all-female seven member panel that provided valuable insights into financing and effecting successful restructuring in Asia.

Group of 36 Reception – London

On 20 September I enjoyed attending the Group of 36 Reception held at the London Riverside offices of Norton Rose Fulbright. The guest speaker was Nick Rowles-Davies, author of *Third Party Litigation Funding* (Oxford University Press 2014) and an expert in litigation finance. Given the increasing popularity and profile of litigation funding, and the engaging nature of the speaker, a lively and informative Q&A session then followed.

INSOL Europe Conference – Lisbon (Cascais)

I had the pleasure of presenting at the INSOL Europe annual conference in Cascais, near Lisbon on 24 September. The technical programme was very strong and extensive, the venue and weather were superb and the hospitality very warm.

I was also delighted to be able to personally congratulate Dr Steffen Koch on his appointment as the new President of INSOL Europe and to applaud Alberto Nunez-Lagos on a job well done during his term as President. INSOL Europe is a very important member association of INSOL International and a good friend. I look forward to working together on new initiatives of value to our members.

INSOL International Half-Day Seminars - PRC China

INSOL continues its mission and educational work in China, and this year we ran two half-day seminars again – for the fifth time in Beijing and third time in Shanghai. We are pleased to see the seminars grow from strength to strength, resulting in larger attendance by the local practitioners, judges and academics, and more active involvement by the delegates in the discussions.

The educational programme covers the issues important to the local practitioners, as well as carries a cross-border element. Full report on the seminar can be found further in this issue on pages 32-33.

INSOL 2017 – Sydney

The International Convention Centre in Sydney is undergoing the final completion stages for opening at the end of 2016 and a full site visit was planned for the end of October. Initial reports are very encouraging. Registrations for the Congress have started and the early booking deadline is the 12 December so we would advise everyone to book early to guarantee your place. We are pleased to announce that David Gonski, Chairman of ANZ Banking Group and the leader of the Australian Financial Review Magazine's list of the 15 most powerful business people in Australia, will be our Keynote Speaker at the Congress. We have a superb technical programme packed with excellent speakers from around the world and I look forward to seeing you all in Sydney next March.

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

As advised in my last column, the INSOL Lenders' Group has worked to review and update INSOL's seminal publication *Statement of Principles for a Global Approach to Multi-Creditor Workouts,* first published in 2001. I am pleased to advise that endorsement of the Principles in their revised form has recently been received from the World Bank. Endorsements are also being sought from other major financial organisations including the Bank of England and the FED. The revised Statement of Principles will be launched in March 2017 at INSOL Sydney.

Stephen Adamson CBE

It is with great sadness that we report on the passing of Stephen Adamson CBE. The insolvency profession owes a huge debt of gratitude to Stephen who devoted his working life to the profession. Formerly of EY, Stephen was instrumental in the reform of the English insolvency profession and the institution of INSOL International. He was Treasurer before becoming President (1993-1995) and has been a loyal servant to INSOL International ever since. Stephen received the INSOL Scroll of Honour in 2005.

We will be publishing a more detailed memorial to Stephen in our next edition.

If you would like to drop me a line please do so through my email account at **mrobinson@ppbadvisory.com**

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South Africa's Business Rescue Regime – Firing on all Cylinders …?

By Dr Eric Levenstein[1]
Werksmans Attorneys
Sandton, South Africa

The downturn in world economies has placed business under severe pressure in the last few years. In South Africa, the knock-on effect has been felt, with several businesses going out of business, filing for liquidation and with many turning to the South African business rescue procedure as a possible lifeline.

Chapter 6 of the Companies Act No. 73 of 2008 (the 2008 Companies Act) introduced intervention mechanisms to rescue companies that are in financial distress. The test set out in the 2008 Companies Act is that if it appears to the board of a company that it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable (commercial test) within the immediately ensuing six month period; or if it appears to be reasonably likely that the company will become insolvent (factual test) within the immediately ensuing six month period, then such company would be "financially distressed". A business rescue practitioner would be appointed to supervise the company on a temporary basis with the aim to develop and implement a rescue plan for such company.

The outcome of a plan would be to ensure that the company could continue to exist on a solvent basis, or, if it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders then would result from the immediate liquidation of the company.

When a South African company is in financial trouble but the potential still exists to rescue it, various rescue options can be considered other than a formal liquidation process. If management recognises the signs of financial distress early enough, it is possible to negotiate with the company's creditors in an attempt to reach some kind of informal compromise that would assist the company in overcoming its financial difficulties[2]. Such an informal compromise or workout may in certain instances yield a positive outcome, but in some instances, creditors are not willing to cooperate, with the company facing a potential liquidation. In such event, there is a need for a moratorium or stay of liquidation procedures in favour of a formal statutory procedure such as business rescue.

The business rescue process has provided South Africans with the opportunity to move corporate restructuring from a "pro-creditor" system to one of "pro-debtor". The need for a sustainable recognition of creditors' claims being compromised and being forced (if in the minority) to take "the restructured deal" has now been generally accepted by creditors.

For many years, South Africa was left in the doldrums of an archaic judicial management system[3], with few alternatives other than liquidation. Drawing from the best that international restructuring regimes had to offer, Chapter 6 found its way into the South African Company Law Statute in 2011, bringing South Africa, belatedly, into line with standards set by international corporate rescue regimes.

There is a recognition that companies that are already insolvent must be placed into liquidation, and those capable of being rescued must be saved. Clearly, if there is no chance of rescuing the company, then there is no need to continue to "flog the proverbial dead horse". If liquidation is the only alternative, then the practitioner and the creditors must release the company from its rescue proceedings and place it into liquidation.

Modern rescue culture (which started all those years ago in the UK and the US) supports the notion that there is always a need to save debtor companies that are candidates for rescue and which have genuine recovery prospects. These companies are entitled to receive the protection of the moratorium and the opportunity to have

1 Eric Levenstein recently graduated with an LLD (Doctorate of Laws) in Business Rescue at the University of Pretoria.
2 The section 155 compromise procedure is available to financially distressed companies but it does not have the comfort of a moratorium (stay) of creditor claims. Thus, the Chapter 6 business rescue process is often favoured.
3 Judicial management was not successful for various reasons. One of the features which led to its downfall was the expectation that all claims of the company be paid (in full) as an outcome of the judicial management process.

the business restructured, rationalised and to exit into a solvent trading position.

The fact that the voluntary entry into business rescue occurs by the mere passing of a board resolution, reflects the South African legislature's intention to make rescue and restructuring an easier mechanism to secure a "fresh start", and supports a shift to a more debtor-friendly (company focused) approach.

The current shift in mind-set was best stated by Judge Claassen in *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others; Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events and Exhibitions (Pty) Ltd and others*:[4]

> "The general philosophy permeating the business rescue provisions is the recognition of the value of the business as a going concern rather than the juristic person itself. Hence the name "business rescue" and not "company rescue". This is in line with the modern trend in rescue regimes. It attempts to secure and balance the opposing interests of creditors, shareholders and employees. It encapsulates a shift from creditors' interests to a broader range of interests. The thinking is that to preserve the business coupled with the experience and skill of its employees, may, in the end prove to be a better option for creditors in securing full recovery from the debtor."

The mind-shift remains work in progress. Most South African companies, directors and bankers need to resist the temptation of "sinking the Titanic" and placing the financially distressed company into liquidation. Of course, the historical notion of "becoming insolvent" and the sense of failure and shame which goes with it, must be considered by management when they choose business rescue as an alternative. However, as time goes on and we continue to see significant companies being rescued, confidence in the process will increase and no doubt business rescue will gain traction in the South African distressed market place. The banks will play a significant role here.[5]

The successes of business rescue in the cases of Pearl Valley Golf Estate in the Western Cape,[6] Advanced Technologies and Engineering Company in Gauteng (ATE),[7] Meltz Success, Moyo Restaurants[8], ODM, President Stores, Southgold[9], Ellerines and more recently Optimum Coal Mine[10] have all contributed to a renewed vigour in the business rescue space and in renewed confidence in the possibility of successful outcomes.[11]

The ability to achieve a strategic acquisition of a distressed company within a short time frame by using the business rescue process, is one which requires an early identification of the distressed asset, the immediate availability of cash to fund an acquisition, as well as a commitment to propping up the company by introducing post-commencing funding to pay ongoing expenses and overheads, while the company is undergoing its restructuring and/or its acquisition process in business rescue.

Despite initial reservations, South Africa has embraced the opportunity to resuscitate companies in distress that, without Chapter 6, would have been placed in liquidation with all of the negative outcomes flowing therefrom.

4 *Oakdene Square Properties (Pty) Ltd and Others v Farm Bothasfontein (Kyalami) (Pty) Ltd and Others; Farm Bothasfontein (Kyalami) (Pty) Ltd v Kyalami Events and Exhibitions (Pty) Ltd and others* 2012 (3) SA 273 (GSJ) 438 at para 12.

5 South Africa has a stable, well-managed and well-regulated financial sector, which is a great asset. There is a limited range of banks able to lend against strong security and at lower risk. When a company is in financial distress, banks often believe they have sufficient security and that they do not need to throw their weight behind the business rescue process. In some instances, they seem to regard business rescue as an irritating obstacle blocking the path to an orderly recovery.

6 Standard Bank of South Africa Ltd acquired Pearl Valley Golf Estate (Pty) Ltd out of a business rescue plan which was successfully implemented, in January 2013.

7 ATE was acquired by the Paramount Group out of a business rescue proceeding in March 2013.

8 Moyo restaurants (in business rescue) were acquired by Fournews in 2013.

9 Southgold (in business rescue) was acquired by Witsgold in 2012.

10 In September 2016 Optimum Coal Mine exited from business rescue after being acquired by Tegeta, a subsidiary of Oakbay.

11 The latest statistics reflect an increasing trend towards business rescue being on the increase and liquidations on the decrease – see http://www.statssa.gov.za/publications/P0043/P0043June2016.pdf where it has been reported that in June 2016, the total number of liquidations had decreased by 22,8 per cent year on year when compared with the same period in 2015. Further, in the University of Pretoria report (UP Report available at http://www.cipc.co.za/files/9614/6857/6141/Status_of_Business_Rescue_Proceedings_in_ South_Africa_March_2016.pdf) published in March 2016, reports that there were 310 successful filings for business rescue (out of 1911 filings) – a success ratio of 14 per cent – although this figure is fairly low, it does indicate that the South African rescue industry is hard at work in an effort to save failing companies in the South African economy.

Business Rescue Growing Pains:

Some of the Practical Issues/Challenges Arising out of the First Few Years Implementation of Business Rescue in South Africa

Piers Marsden
Matuson & Associates
(A member of BTG Global Advisory)
Johannesburg, South Africa

As the Business Rescue industry heads into its seventh year, we explore the effectiveness of the process and look to the future as the industry comes of age.

There are currently two formal processes which are widely used in the restructuring of companies, being Liquidation (in terms of the Companies Act 61 of 1973) and Business Rescue (in terms of the Chapter 6 of the Companies Act 71 of 2008). Unlike Liquidations, there is limited case law and precedent relating to Business Rescue which creates an uncertainty around key issues.

The primary objective of Business Rescue is the development and implementation of a plan that either rescues the company by restructuring its debt and equity in a manner that maximizes the likelihood of the company continuing its existence on a solvent basis; or if that is not possible, results in a better return for the company's creditors or shareholders than would result from the immediate Liquidation of the company.

Based on statistics for the first five years since the New Companies Act became effective:

There have been 1,911 filings for Business Rescue (Approx. 39 per month compared to an average of 164 Liquidations per month). Of the 1,911 flings for Business Rescue, only 310 have been successful (or 14%).[1] Given this low success rate, I often refer to the parable of the father and son walking on the beach. Hundreds of newly born turtles are making the treacherous journey to the sea, with all manner of predators using the opportunity to prey on the young turtles. The boy hurriedly shepherds one baby turtle to the safety of the sea. The dad comments that the son cannot make a difference, to which the son replies he made a difference to that turtle.

In a country with unemployment of 26,6% and anaemic forecast growth for 2016 of 0% to 0,4% we have a joint responsibility to save as many viable businesses as possible.

There is however always a desire to improve the success rates.

One of the most significant reasons for the low success rate of Business Rescue is the difficulty in raising Post Commencement Funding (PCF). With limited PCF available, companies under Business Rescue soon run out of money to continue trading and pay salaries.

In terms of the Business Rescue dividend payment waterfall per the Companies Act, unsecured PCF creditors rank behind practitioners fees, costs of business rescue, pre-commencement secured claims in respect of their assets, employee post business rescue claims and secured post commencement creditors in respect of their secured assets[2]. There are often very little, if any, unencumbered assets that would be available as security for potential funders. The practitioners in operational control of the business are often unknown to the providers of funding with limited track record of success. Consequently, it is more common for existing stakeholders to provide the funding in order to maximise value on their existing debt or equity exposure.

In my view the industry has remained relatively insular and has not sufficiently promoted the success stories to the wider economy. As the benefits of the Business Rescue regime become more widely known and the negative stigma associated with the formal recovery processes diminishes, Business Rescue will become an ever more widely used tool for companies showing signs of financial distress.

We have seen an increasing trend of companies recognising the opportunity Business Rescue presents during the early stages of financial distress. The ability to apply to court to terminate onerus contracts (in terms of S136) as well as compromise the company's liabilities can be fundamental to the swift restructure of the company's affairs with a return to viability before the company becomes terminal.

Some of the key initiatives that would improve the success rate of Business Rescues would be centred on the raising of PCF. In this regard, clarifying the ranking of PCF providers in the Business Rescue dividend payment waterfall, and tax write-off incentives for providing PCF (much like the S12J incentive for Venture Capital), are just two possible initiatives.

Despite its challenges, the Business Rescue process has seen a steady increase in uptake amongst companies that are showing signs of distress, and to date there have been some significant success stories, including the Dial-a-Bed, Beares and African divisions of Ellerine Furnishers, International Ferro Metals, Optimum Coal Mine, African Bank Investment Limited, Highveld Steel and Vanadium, amongst many others.

In the appropriate circumstances, the Business Rescue regime is the optimal solution for companies that are financially distressed. Its many benefits can include the preservation of jobs as well as the preservation of value and maximising of recovery for creditors.

As the industry works through its growing pains, new case law, possible regulatory changes and entrance to the market of internationally recognised industry players, will ensure a bright future for Business Rescue within the turnaround and workout ambit.

1 Companies and Intellectual Property Commission ("CIPC") March 2016.

2 This represents the current understading, however there is still uncertainty regarding the rankings in the Business Rescue dividend payment waterfall, in spite of various Court judgments in this regard.

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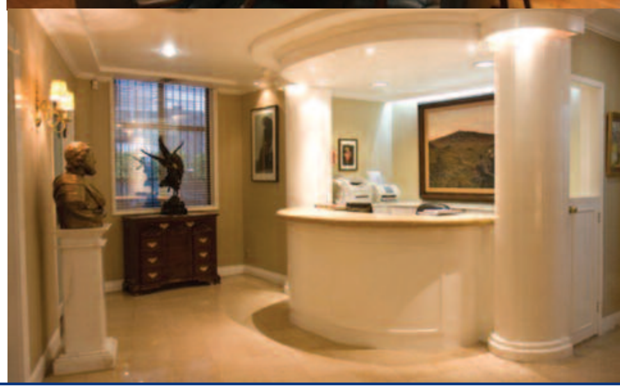

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Sharing the Pain Down in Africa?

By Andrew Thorp
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Harneys, Cayman Islands
and
Jayson Wood
Harneys, Bermuda

Introduction

Utilising investment structures domiciled in international financial centres such as the Cayman Islands, Bermuda and British Virgin Islands have long been a popular entry point for foreign investment into Africa.

Tax neutral and safe, billions of dollars have been pumped into African projects via offshore vehicles. Not only facilitating investor realisation of the attractive commercial opportunities presented by the energy (and other) industries but also attracting vital investment in circumstances where direct 'on the ground' investment comes with an enhanced risk profile.

The plunge in oil prices over the past two years, however, has placed great stress not only on that market but beyond. In 2015, the coal, oil and natural gas sector accounted for approximately $15.7 billion of the foreign investment into Africa – while this was an impressive 24% of the market share, it was also a staggering 52% decrease from the previous year. Public spending cuts, currency weakness, rising inflation, and falling investment all point to a weaker outlook for the region's oil-exporting economies. The pinch is beginning to be felt: Seven Energy Finance Limited, a British Virgin Islands company that is part of the leading integrated gas group in south east Nigeria, announced on 11 October 2016 that it was seeking to reach an agreement with senior secured note holders on a restructure of its financial obligations.

Given that so much debt is held by offshore structures, this article takes a look at why they have been so popular, whether the extant flexible creditor friendly regimes are suitable for Africa's current dynamic and how Courts are adapting to factor in cross-border restructuring initiatives.

Why use an offshore intermediary rather than investing directly into Africa?

Rightly or wrongly, many investors consider '*on the ground*' investment into Africa unsuitable or, at least, undesirable. There are justifiable concerns, varying from region to region, about political stability, the reliability and independence of financial and legal institutions all of which are factors affecting the region's risk profile. The use of investment vehicles from international finance centres, such as the BVI, mitigate the perceived *on the ground* risk. Investors take comfort in the long standing economic and political stability of those jurisdictions, their commitment to international transparency and co-operation and the ready availability of credible and efficient dispute resolution processes. All are common law jurisdictions, with a sophisticated and experienced specialty court to deal with commercial matters and with ultimate recourse to the Privy Council in the United Kingdom.

Certainty and stability are, of course, characteristics shared with many other financial centres. Investors are likely to turn to the offshore jurisdictions because they offer an array of flexible investment vehicles, created and regulated by commercially driven legislation, which can be formed and incorporated quickly and cost effectively. They provide access to the benefits of the alternative investment funds industries of those jurisdictions (including portfolio diversification, economies of scale and access to larger scale opportunities through the pooling of funds).

And, of course, there is the much touted and often criticised tax neutrality offered by those jurisdictions. The availability of a tax neutral environment ensures that investors do not incur an additional layer of tax at the investment vehicle level (noting tax will usually be payable at the investor and target jurisdiction levels in any event).

These advantages are, for obvious reasons, attractive to investors when seeking investment opportunities and are not typically available in African target or on shore jurisdictions.

Are offshore restructuring regimes ready?

The use of offshore investment vehicles does not, however, insulate investors from the adverse effects that decreasing energy prices are having on the African operating environment. Typically, group debt (often through notes of various seniority, and bonds) resides at the investment vehicle level rather than only the operating entity level, or otherwise the investment vehicle is tied in by way of parent guarantee. While investors may be reticent in considering the occurrence of an insolvency scenario when choosing a jurisdiction for investment, taking advantage of the generally creditor friendly restructuring opportunities at the investment level is, of course, one of the attractions of deploying offshore vehicles.

The key tools available in the Cayman Islands are the provisional liquidation regime and the scheme of arrangement. Used together, a Cayman investment vehicle may undergo a financial restructure under the supervision of qualified and experienced insolvency practitioners and with the benefit of a moratorium on creditor action. These paths are well trodden by Cayman lawyers, insolvency practitioners and the courts.

One criticism made of the provisional liquidation procedure is that it may be difficult for a company to access the regime on a timely basis (or potentially at all) because it requires, as a pre-requisite, the company to file a winding up petition, which in turn requires shareholder sanction (or, for companies incorporated after 1 March 2009, an express provision in the company's articles). It is certainly a curious (and perhaps unintended by the legislature) feature of the regime that the directors be unable to instigate a restructure without a shareholder resolution at a time where the risk of continuing operations transfers from equity holders to creditors.

The BVI has traditionally been seen as a creditor friendly jurisdiction and, whilst having versions of the model-law on cross-border insolvency and an English style administration regime on the statute books, neither have been enacted. Schemes of arrangements however are deployed although outside of the provisional liquidation regime favoured in Cayman to provide a moratorium. The reluctance of the BVI Courts to embrace provisional liquidation as a restructuring tool, may well bring pressure to bear for legislative change and tailored, short term relief providing a stay for companies seeking to restructure their debt.

In a restructuring context, the Bermuda regime mirrors that of the Cayman Islands. A scheme of arrangement is the preferred vehicle, and in the case of a debt restructuring, a proposed scheme is normally accompanied by the appointment of 'light touch' provisional liquidators so as to impose a level of oversight over the process, and more importantly, to trigger the statutory stay on proceedings being commenced against the company whilst the scheme is being promoted and implemented. Bermuda has also shown great foresight in extending its common law jurisdiction to recognise foreign schemes of arrangement.[1]

Globalising restructuring

Coordinating restructurings across a number of jurisdictions can be of significant importance to ensure consistency and ward off unilateral action by creditors.

Much of the lending into off shore vehicles bound for African investment is funnelled through New York law governed instruments. The strain on Africa has already seen a considerable uptick in restructuring work with more coming. The availability then of complimentary Chapter 15 proceedings to African restructuring is often an essential element and likely to increase in importance.

For example, within a scheme of arrangement that seeks to alter contractual rights, the effectiveness or 'efficacy' of the scheme internationally may require that the debtor seek not only the sanction of the court in its country of incorporation, but also of the court in the country whose law governs the contractual obligations, to ensure that dissenting creditors cannot enforce their claims against the debtor's assets in countries other than that of its incorporation. This often requires debtors to look to the US for recognition of the foreign proceeding. Recognition under Chapter 15 and the protection of the automatic stay is possible where the scheme takes place in a jurisdiction where the Company has either (i) its centre of main interest (COMI) or (ii) an establishment. The issue that faces many

1 In the matter of Contel Corporation Limited [2011] BDA LR 13

holding companies incorporated in offshore jurisdictions is that those companies tend not have their COMI or even an establishment in those jurisdictions in order for the foreign representative of those companies to avail themselves of the benefits of Chapter 15 protection. Failure to obtain Chapter 15 recognition can have a material and disastrous effect on the outcome of a global restructuring: the Courts in common law jurisdictions will question whether to sanction a scheme of arrangement if the effectiveness of the scheme has no substantial effect i.e. it does not bind creditors, including binding creditors outside the jurisdiction where the scheme is being promulgated.

Looking ahead

Whilst many African states are introducing sophisticated restructuring regimes, the choice as to what arrangements are deployed and in what jurisdictions will certainly be an interesting dynamic over the next decade. In the meantime, it is essential that a gap is not left and that relevant Courts worldwide take a pragmatic approach to COMI and the recognition of foreign insolvency proceedings. Companies doing business in Africa, wherever incorporated, should have access to Chapter 15 in the US where appropriate. This can often be achieved through deft utilisation of parallel schemes of arrangement between COMI and incorporation jurisdictions when they diverge to restructure onshore and offshore debt. The appropriate scheme can then be advanced into the US and recognition sought. Schemes of arrangement advancing side by side has been successfully deployed recently in a number of successful Asian restructuring projects such as *Kaisa* and *LDK Solar*.

Sensing the ground swell, there has been a Judge led initiative through the Judicial Insolvency Network to reinvigorate court to court cooperation. The proposed *Guidelines for Communication and Cooperation Between Courts in Cross-Border Insolvency Matters 2016* are an exciting example, with a focus on facilitating parallel proceedings. Eased Court access for appropriate persons, joint hearings and protocols are all aimed at maximising estate value and respecting stakeholder interests. Interest from the Courts of Singapore, BVI, Cayman, Bermuda, New York and Delaware should mean that more effective and efficient cross-border cooperation for restructurings flowing from Africa can be effected.

The World Bank estimates that constrained public capital and limited private funding mean Africa faces an infrastructure funding deficit of almost $100 billion a year. It is essential that all jurisdictions play their part through the harder times to ensure a future appetite for foreign investment to a region that needs investment but still shoulders a risk profile.

Landmark Ponzi Scheme Ruling in the Cayman Islands - Justice or First Among Equals?

By Michael Pearson

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A recent first instance decision from the Grand Court of the Cayman Islands is set to become a landmark judgment in the treatment of fraudulent investment schemes where investors have suffered a common misfortune. The Grand Court has for the first time ordered a liquidator to restate the share register so as to remove the effects of the fictitious profits when paying dividends from the estate.

The misfortune of investors associated with Bernard L Madoff Investment Securities LLC (BLMIS) is sadly too well known. It is also widely understood that the BLMIS trustee succeeded in paying out victims based on their net equity invested (the Net Investment Method). This is a common approach in US Ponzi scheme frauds whereby distributions are calculated by reference to the difference between the cash amounts invested and the cash withdrawn, thereby removing the so-called element of false profit, a typical feature of Ponzi schemes which are really nothing more than a work of pure fiction. This approach, whilst one of many, is perhaps the least unfair on the victims.

What is less understood is that thousands of Madoff victims had invested indirectly into BLMIS, often via so called feeder funds based in offshore jurisdictions. This has set up a collision course of distribution methodology and ideology. Although the Trustee was able to pay out on a net equity basis under US law, feeder fund investors in many offshore jurisdictions have been restricted by outdated legislation that typically only permits liquidators to pay investors on the basis of their (incorrect) shareholdings at the date of the liquidation. In other words, liquidators are ordinarily required to effectively continue implementing the effects of the fraud via the liquidation process as they have no power to do otherwise.

Readers may recollect that back in 2009 there were some substantive revisions to the Cayman Islands Companies law and the introduction of the Company Winding Up Rules, designed to make our insolvency regime directly relevant for the investment schemes (typically open ended mutual funds with redeemable shares) for which the Cayman Islands are so well known. Perhaps surprisingly, given the Cayman Island's reputation as the offshore jurisdiction of choice for investment funds, up until now the new revisions and rules with respect to rectification had not been tested.

One Cayman domiciled feeder fund that was entirely exposed to BLMIS is Herald Fund SPC, of which I am a liquidator. Although Herald's records reflected an investment of some $1.9bn with BLMIS, after stripping out its fictitious profits, investment losses and repayment of clawbacks, the estate is expected to ultimately receive approximately US$750m by way of distribution from the BLMIS Trustee.

In July 2016 the Grand Court heard the final part of my application seeking to restate the share register of Herald to strip out the so called fictitious profit, with the objective of producing a fairer result for investors. Although Herald had a relatively short lifespan of about 5 years, among its 200+ investors were a variety of net winners (including its largest investor, Primeo Fund (in Official Liquidation), which was sitting on fictitious gains of over $300m) and net losers (including one that invested tens of millions in cash the week before the fraud was uncovered). Predictably my approach was very popular with the net losers, and less so with Primeo. Accordingly, the Court appointed me as the representative of one side, and Primeo as the representative of the other.

In its ruling in September the Grand Court has given valuable guidance regarding the circumstances of both internal and external fraud under which the power to rectify will be granted to a liquidator, as well as setting out the process which should be adopted. The Honourable Mr Justice Jones QC held that "there could be no clearer case in which the power [of restatement] ought to be exercised" and gave detailed guidance on how the true Net Asset Value should calculated in a manner which is "both cost effective and fair and equitable as between the shareholders". The Grand Court held that the NAVs reported to investors were binding as a matter of contract, and that the liquidator had a power, but not a duty, to restate the NAV, and rectify the register so as to accurately reflect the relative position of investors among themselves. The Grand Court went on to consider various methodologies put forward, namely the Last Statement Method (the fictitious one), the Net Investment Method (the BLMIS Trustee's method) and the Rising Tide Method (my preference), whereby pre-liquidation distributions are deducted from liquidation distributions. The Grand Court held that neither the Net Investment Method nor the Rising Tide Method were legally admissible under Cayman Islands law, but went on to provide an alternate methodology which is arithmetically the same as the Net Investment Method. Accordingly, all investors, with the exception of one, will have that element of fictitious profit in their investments removed for the purposes of calculating distributions. In this sense it is a landmark ruling.

The investor which the Grand Court is seemingly treating quite differently is Primeo. Herald had commenced operations in 2004 and Primeo had, until May 2007, a directly held managed account at BLMIS. In May 2007, Primeo switched the remaining balance of its managed account, then valued at approximately $465m, from BLMIS to Herald via an in kind/in specie subscription and received shares in Herald as a result. Although Primeo's investment was worth dramatically less than the $465m it subscribed as a result of the Ponzi scheme and notwithstanding that Herald, the Trustee and Primeo had entered into a settlement agreement recognizing that Primeo's net investment in BLMIS in May 2007 was worth just $150m, the Grand Court found that there was no legal basis to reduce the value of Primeo's $465m subscription. This was on the basis that its contract for subscription was found at an earlier trial to be not void for common mistake and the May 2007 NAV was binding upon Herald. The Grand Court pointed out in its ruling that in treating Primeo as having paid the equivalent of $465m in cash, Primeo will succeed in realizing fictitious profits of $315m, in contrast to other investors who are left to subsidise Primeo's gain.

Where this leaves the parties in terms of appeals remains to be seen, but notwithstanding the perhaps unusual treatment of Primeo, it does demonstrate the appetite of the Grand Court to adopt a progressive and reformist approach to difficult issues, and reinforces the jurisdiction's adherence to the investment industry's expectations of pragmatism and professionalism.

Insolvency in Jersey: Administration via the Back Door?

By Richard Brown
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Jersey has been a prominent jurisdiction for international banking for over 50 years, but the sophistication in the selling side of the finance industry is not always reflected in the tools at a creditor's disposal when a deal goes bad. One such lacuna is the lack of a corporate rescue procedure, equivalent to English administration, which might turnaround a going concern or trade on an asset to maximise long term value.

There have been a number of cases where a substantially better result for the creditors of a Jersey company is likely to be achieved through English administration. This is particularly the case for companies which, despite cashflow insolvency, hold valuable assets which may be realised more effectively through a corporate rescue procedure. Since 2002, in order to compensate for the lack of a domestic corporate turnaround procedure, the Royal Court has confirmed and developed a jurisdiction to issue letters of request to the English High Court seeking administration orders in respect of Jersey companies.

This administration request process has become an essential tool for creditors of Jersey companies which hold all or the majority of their assets in the UK, and administration request applications are regularly granted by the Royal Court. But any suggestion that this is a rubber stamp process has now been rebutted.

In *Re. Orb a.r.l.* (September 2016), the Royal Court refused to exercise its discretion to issue a letter of request for the first time. This seems to establish the limits of the process and serves as a reminder that creditors cannot impose administration via the back door unless they can show good reasons for doing so.

The factual background to the application is complex, but in short the application was brought by a secured creditor of an allegedly insolvent company on the basis of a significant unpaid debt. The creditor stated that the location of the company's centre of main interests ("COMI") was unknown, but asserted that the vast majority of the company's assets were in England, that it was otherwise substantially connected to England, and that an English administration would best serve the interests of the company's creditors.

In response, the company argued that the debt was disputed and that it was not insolvent. The company also denied that the majority of its assets were in England and denied that it was otherwise substantially connected to England.

The framework for the decision

The Royal Court was satisfied that the creditor had a liquidated claim, and that the company's failure to repay the debt on demand evidenced cashflow insolvency. Also, the dispute raised by the debtor was rejected as fanciful.

It also confirmed that the administration request procedure should be available to applicants who are uncertain as to whether the company's COMI is in England. The significance of this issue is that the English Court has statutory jurisdiction to make an administration order in respect of a foreign company whose COMI is in England[1], and so the Jersey administration request procedure is not required in such cases.

Despite needing to show that the debtor's COMI is either not in England, or that there is sufficient uncertainty as to the debtor's COMI, the Royal Court ruled that it was essential to show, at a minimum, a "substantial connection" with England. Whilst this would often mean showing that there are substantial realisable assets in England, the Royal Court concluded that this was not necessarily a pre-requisite.

In this case, however, the Court found that there was no evidence that the majority of the company's assets were in England. Rather, it appeared that the company either had no assets at all, or if it did, the majority of them were outside England. The substantial connection test was therefore not satisfied.

The applicant also failed to articulate how the purposes of administration could be achieved, or why an English administration would achieve a better result for creditors

1 The out of court appointment procedure might also be available to a qualifying floating charge-holder but it is open to question whether such an appointment would be recognised in Jersey because the concept of a qualifying floating charge is alien to Jersey law.

than a Jersey domestic bankruptcy process. Given the findings about the company's assets, the case for administration was weakened further.

An opinion from English leading counsel filed in support of the application concluded that the English Court would grant an administration order, but that opinion was premised on the flawed assumption that the company had substantial connections to England.

There was also no proper evidence from the applicant creditor or the proposed administrator as to how the purposes of administration could be achieved, only unsupported assertions that those purposes could be achieved and that administration would achieve a better result for creditors than any other available insolvency procedure[2].

But the Royal Court found that the creditor had no intention to rescue the company as a going concern. It appeared that the first action of any English administrator would be to seek recognition and assistance in Jersey, following which the administrator would then need to pursue asset recovery proceedings in various jurisdictions, of which England was but one. The Royal Court concluded that the effect of the order would simply be to import an administration regime "by the back door". In those circumstances, the Court found that administration would not afford any advantages over a Jersey bankruptcy, and declined to issue the letter of request.

Lessons learned

The administration request procedure remains an exceptional jurisdiction, and not one to be exercised lightly. The *Orb* decision was made on a fairly unique set of circumstances, and the outcome was not surprising. The majority of applications for administration requests have been made on a broadly consensual basis, without strong opposition from any of the debtor's stakeholders, and where the advantages of administration were not in question.

In more marginal cases, the Royal Court will therefore require good evidence as to how the purposes of administration can be achieved, and why administration will lead to a better result for creditors, before it abandons its own insolvency jurisdiction in favour of that of a foreign court.

An opinion of English counsel is a prerequisite for an administration request application, but this must not be an abstract box-ticking exercise. The opinion should be rooted in the facts of the particular case.

Most importantly, a fundamental requirement is clear and cogent evidence of a substantial connection to England, which in the vast majority of cases will mean assets in England. In *Orb* the Royal Court made clear that the administration request procedure does provide a back door route to administration simply because a creditor does not favour a désastre. Rather, it exists to ensure that in appropriate cases, creditors are not unduly prejudiced by the lack of a corporate rescue procedure in Jersey.

2 It should be noted that the English Court has held that unless cogent evidence is adduced to explain how each of the three purposes of administration can be achieved, an administration order should not be made: see *Data Power Systems Ltd & Ors v Safehosts (London) Ltd & Anor* [2013] EWHC 2479 (Ch).

Refusal of Recognition to Liquidators of Caledonian Bank

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In June 2015 Keiran Hutchison and Claire Loebell, the Joint Official Liquidators (JOLs) of Caledonian Bank (*'In Official Liquidation under the Supervision of the Grand Court of The Cayman Islands'*) ('the Company') petitioned the Bahamian Supreme Court for recognition as foreign representatives[1] seeking declarations that they be recognized to act in The Bahamas on behalf of the Company and for the Cayman proceedings to be recognized as foreign proceedings[2] within the meaning of *Section 253* of the Bahamian *Companies Winding Up Amendment Act 2011* ('CWUA') to collect monies and/or to take possession of property belonging to the Company.

Liquidation proceedings were first commenced in the Company's place of incorporation, the Cayman Islands on 23 February 2015. The Cayman Winding-Up Order empowered the JOLs to inter alia, commence winding up bankruptcy and/or recognition proceedings in the United Kingdom, Australia, Switzerland and any other jurisdiction where the Company has assets. At the time of the petition the Cayman proceedings had already been recognized in England, Australia, the United States of America and Ireland.

Moree J. (Actg.) refused recognition and held, neither the Cayman proceedings nor the Cayman Liquidators fell within the statutory definition of *'foreign proceedings'* and *'foreign representatives'* since the Cayman Islands had not been designated as a 'relevant foreign country' (and no countries at all had been designated)."

Assistance was denied to the JOLs since they were not appointed for the purpose of *'a judicial or administrative proceeding in a…'* country designated by the Liquidation Rules Committee as *'…a relevant foreign country…'*. The Cayman proceedings were held not to be a *'foreign proceeding'* in the absence of a list of designated foreign countries.

The JOLs also applied for recognition at common law appealing to the Court's inherent jurisdiction in accordance with the principle of modified universalism. The Court accepted the power to recognize a foreign office-holder and grant assistance is not restricted by reference to the country, territory or jurisdiction in which he/she was appointed under the common law and, *'In this regard it is an open gate subject only to local law and local public policy'*. The Court also agreed the principle of modified universalism is a recognized and established principle of the common law, and the statutory powers of liquidators in the Cayman Islands are generally equivalent to The Bahamas. However, in considering whether the common law power to grant recognition and assistance to foreign-officeholders survived the enactment of the statutory scheme in insolvencies with an international element, the Court determined it did not.

Although in England common law principles, the statutory provisions of s. 426 of the Insolvency Act 1986 and the EC Insolvency Regulation co-exist alongside the Model Law, the Court determined there are no provisions within the Bahamian Statute comparable to *Article 7* of the *UNCITRAL Model Law*[3] which supplemented and did not supersede the common law.

The Court held the application to a designated class of persons would be undermined if persons who did not fall into the class could nonetheless apply for the same relief which the statute intended to restrict. Thus, the statutory power and common law power could not co-exist as the common law power to grant recognition to persons outside the statutory class of foreign representatives was *'repealed'* or *'abolished'* by the statute.

Ancillary winding-up proceedings of Caledonian Bank

Following the refusal of recognition, a Petition was filed to wind up the Company as a foreign company. At that time the Company had outstanding loans in the region of USD$16 million within The Bahamas.

The Bahamian court has statutory jurisdiction[4] to make winding up orders in respect of a foreign company which (i) has property located in The Bahamas (ii) is carrying on business in The Bahamas, or (iii) is registered under Part VI.

Under the CWUA, a *'foreign company'* is *'any body corporate incorporated outside The Bahamas.'*

In the judgment the Court considered the ancillary winding up jurisdiction which developed over the years by judicial practice based on the principle of universalism. Winder J. held, notwithstanding the law governing the ancillary winding up is Bahamian law, *'for an ancillary winding up to be effective it calls for a level of judicial comity and co-operation between the Courts of the respective countries in which winding-up proceedings are pending'*.

The Court acceded to the Petition and determined the Bahamian Court will have jurisdiction over the conduct of the ancillary winding-up and any directions as to the winding-up must be directed to the Bahamian court who will determine all issues according to Bahamian law. The Court agreed to have regard to the wishes of creditors whose interests must be considered as a whole, *vis-à-vis* each other and all of the assets of the company.

Remittal of assets to the principal liquidation

The Liquidators in the ancillary liquidation subsequently applied under the inherent jurisdiction of the Court and pursuant to the CWUA[5] for an Order directing the remittal of funds to the principal liquidation. Since the Company is

1 ***"foreign representative"*** *means a trustee, liquidator or other official appointed in respect of a debtor for the purposes of a foreign proceeding;*
2 ***"foreign proceeding"*** *means a judicial or administrative proceeding in a relevant foreign country, including an interim proceeding, pursuant to a law relating to liquidation or insolvency in which proceeding the property and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation, rehabilitation, liquidation or bankruptcy of an insolvent debtor;*
3 Which provides, *'Nothing in this law limits the power of a court or British insolvency office-holder to provide additional assistance to a foreign representative under the other laws of Great Britain.'*
4 Under *Section 185* of the CWUA
5 *Sections 254* and *255 of the Companies Winding Up Amendment Act 2011*, ('Part VIIA')

a Bank and many of its creditors deposit holders, the Court had to consider their treatment under Cayman Law. It was contended that Cayman law is the applicable law for distribution of the Company's assets.

Under Cayman Law, deposit holders of Bank Accounts up to a limit of $20,000 (in which the bank holds a class 'A' licence issued under the Banks and Trust Companies Law (2009) Revision) are entitled to be paid in priority to a distribution of the remainder of the Estate on a *pari passu* basis. This is not the case under Bahamian law.

The Court had an opportunity to determine whether remittal could be ordered where the category of preferred creditors is distinct given that the two schemes of distribution were substantially the same, ie. *pari passu*. In *Re HIH Casualty and General Insurance Ltd. [2008] 1 WLR 852* at 74, the House of Lords noted, in no case where the court has been asked to exercise its power to remit assets to liquidators in another jurisdiction has it refused to do so on the grounds that the categories of preferential creditors, or other aspects, of that other jurisdiction's insolvency regime differed from England. However, that point had not been raised in any case where the court has been invited to remit assets, and even if the court would have had power to remit in such circumstances at some point in the past, it seems that, absent s 426[6] of the 1986 Act, it would not have such power now, per Lord Neuberger.

By comparison, *Section 254*[7] of the CWUA expressly provides for remittal by permitting the turnover of property to a foreign representative of a Company in liquidation in its country of incorporation.

The Court granted the relief sought directing the remittal of assets to the principal liquidation and intends to give reasons in due course as to whether the power to order remittal was exercised under the common law or statute, as the ruling has not been delivered at the time of writing.

Designation of relevant foreign countries

Following the refusal of recognition in the Caledonian Bank case, the *Foreign Proceedings (International Co-Operation) Relevant Foreign Countries) Liquidation Rules, 2016* were enacted. An extensive list of 142[8] relevant foreign countries to whom the Bahamian Court will extend assistance in insolvency proceedings was thereby designated.

6 In England the assistance to provide for remittal of assets to the principal liquidation has been held to exist pursuant to s. 426 of the Insolvency Act.

7 *S. 254 of the CWUA* permits the making of ancillary orders upon the application of a foreign representative for the purposes of— *(a)* recognising the right of a foreign representative to act in The Bahamas on behalf of or in the name of a debtor and, in the court's discretion, to do so jointly with a qualified insolvency practitioner; *(b)* enjoining the commencement or staying the continuation of legal proceedings against a debtor;…*(e)* ordering the turnover to a foreign representative of any property belonging to a debtor; and *(f)* granting such other relief as it considers appropriate.

8 Afghanistan, Algeria Anguilla, Antigua and Barbuda, Argentina, Armenia, Australia Austria, Azerbaijan, Bahrain, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bermuda, Bhutan, Bolivia ,Bosnia and Herzegovin, Brazil, British Virgin Islands, Brunei Darussalam, Bulgaria, Burkina Faso Burundi, Cameroon, Canada, Cape Verde, Cayman Islands, Chad, Chile, Colombia, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, Fiji, Finland, France, Gambia, Germany, Ghana, Gibraltar, Greece, Grenada, Guatemala, Guinea-Bissau, Guernsey, Guyana Haiti Honduras, Hong Kong, Isle of Man, Italy, Ivory Coast, Portugal, Qatar, Romania, Russia, St. Christopher and Nevis, St Lucia, St Vincent and the Grenadines, Sao Tome and Principe, Saudi Arabia, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Thailand, Togo, Touga, Trinidad & Tobago, Tunisia, Uganda, Ukraine, United Arab Emirates, United Kingdom, Tanzania, United States of America, Uruguay, Uzbekistan, Venezuela, Yemen, Yugoslavia, Serbia and Montenegro, Zambia, Zimbabwe.

Dispute Resolution Funding: How, What and Why

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Introduction

Knowledge and experience of dispute resolution funding by insolvency practitioners and insolvency lawyers across the globe has grown exponentially in recent years. There is now a general acceptance of the benefits of funding for the right claims. This is particularly the case in the context of insolvency, where valuable claims can often form a substantial part of the insolvent estate but there are no funds to pursue them and the creditors are reluctant to contribute to the costs.

This article sets out the key considerations for professional funders when assessing claims for funding and provides examples of innovative funding arrangements that are particularly relevant in an insolvency context.

What funders look for

As a first step a funder will look at:

a) Anticipated costs: Before any professional funder will invest in a claim they will usually expect to see a budget for anticipated costs to trial. It may be that the funder is not being asked to fund all such costs. If that is the case, especially in an insolvency context, the funder will need comfort as to how the proportion of the costs it is not being asked to fund will be paid (whether by CFA, DBA, creditor commitment or otherwise).

b) Quantum: Funders will expect the claimant to present a reasoned and realistic assessment of the likely quantum of their claim and will undertake their own detailed review of the expected quantum, including, where such assessment is not straight forward, instructing their own experts to provide a view.

Unsurprisingly, costs and quantum are fundamental to every funder – they are the two key metrics which, generally, form the basis of commercial terms offered to fund a claim and, indeed, will be decisive as to whether or not the case meets the individual funder's investment criteria and therefore whether they will fund the case at all.

In terms of the broader claim, a funder will look at a variety of factors, including (*inter alia*):

Governing law and jurisdiction: Funders are nervous about funding claims in jurisdictions where the rule of law is not stable or where political instability may impact the progress of the claim. This does not mean that funding won't be provided to bring claims in such jurisdictions. However, if funding is sought, the claimant and their legal team will have to be able to explain and reassure the funder as to the path to success of the claim.

Liability: On the basis of their legal review of the claim and, in most cases, subsequently, an independent legal review of it (by a QC or equivalent), the funder needs to be comfortable, from a liability perspective, that the case is more likely than not to win (for example, most UK based funders require the case to have a 60% or more chance of success). This is often difficult to predict at the outset of a case (if it is from that stage the funder is being asked to fund). However, every professional funder will require detailed documentation and information about the case to enable them to undertake an informed analysis of the legal merits of the claim.

Enforcement: In the normal course, a funder's investment will be 100% non-recourse, i.e. they will only be repaid their investment and make a return if / when a damages payment is received from the defendant. As such, the funder needs to be comfortable that the defendant has the resources to meet any damages award or judgment that may be made against them; that the defendant is domiciled in a jurisdiction where the applicable judgment or award is enforceable against them; and / or, to the extent they are not held in the same jurisdiction as the defendant, that the defendant's assets are held in a jurisdiction in which the applicable judgment or award is enforceable. This does not mean that the path to enforcement has to be straight forward. Indeed, proficient and experienced funders are increasingly funding complex enforcement matters for insolvency practitioners, frequently involving a number of off-shore jurisdictions. However, what is necessary, is that there are (or are very likely to be) identifiable assets against which enforcement may be achieved.

Funding: how, what and why

Funding of insolvency disputes is now very common. The number of claims being funded is increasing exponentially every year. These range from straight forward breach of directors' duties or breach of contract claims to complex cross border fraud investigations with equally complex enforcement considerations. With the evolution in the number and types of insolvency claims being funded, there has been an evolution in the funding offerings available, enabling funding to become a strategic tool in the armoury of insolvency practitioners.

At a basic level, the fact of funding takes away the costs advantage that defendants often have when defending claims brought by insolvent entities. By using funding, insolvent entities bringing claims are no longer impecunious. They have the resources to pursue the best litigation strategy for their claim and well-capitalised defendants cannot use their stronger financial status as a tactic in the litigation. Indeed, we have had experience of a defendant acknowledging that the fact the insolvent claimant was funded, brought them to the settlement table far quicker than would otherwise have been the case.

Similarly, security for costs applications, which are, so often, an additional hurdle for insolvent claimants to overcome, can be addressed head on and prevented from being a barrier to bringing a claim. The funder will either fund the security for costs itself or pay the insurance premium providing a security for costs indemnity.

Looking at the more innovative funding arrangements on offer, providing the commercials work, funding can now be provided to fund whole administrations, liquidations or bankruptcy estates, funding, not just the lawyers' fees relating to the particular claim, but also the insolvency practitioners' costs and the wider fees for the administration of the estate.

Similarly, historically, funding was only used to fund claimant fees. However, in an insolvency context, where there may be claims being brought both by and against the estate, it is now possible to fund both the bringing and defence of claims with any wins / losses netted off against each other.

Most recently, there is now the option for us to provide investment funding to enable creditors to be paid out all or part of the debt owed to them before the conclusion of the claim, with repayment of our capital and our return contingent upon a successful recovery in the funded claim. While this is a novel and developing area, provided the commercials work (as between the value of the debts owed to the creditor and the value of the claim being brought), this can be particularly attractive.

Conclusion

At its core, dispute resolution funding is a strategic financial tool which, if deployed correctly, can be used to maximize returns for creditors with little or no cost risks for them. Key to every funder's investment decision in respect to funding insolvency claims, and, indeed, disputes more generally, are the fundamental metrics of anticipated costs as compared to the likely damages recovery in the claim, as well as the prospects of success of the claim.

If these key points are viewed favourably by the funder, the funding tools now available to insolvency practitioners and lawyers - whether it be straight forward funding of individual claims or more complex portfolio funding or investment funding - can be effectively deployed to achieve a successful resolution of claims for the benefit of the creditors of the insolvent estate.

US Bankruptcy Court Grants Rare Dismissal of Adversary Proceeding in Chapter 15 for Forum Non Conveniens

By Laura R. Hall
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On August 22, 2016, Judge Martin Glenn of the US Bankruptcy Court for the Southern District of New York (the "US Court") stayed an adversary proceeding brought by the liquidators of Hellas Telecommunications (Luxembourg) II SCA ("Hellas II") on the basis of inconvenient forum (*forum non conveniens*). The US Court held that the liquidators' claims had to proceed in the English court where the liquidation was pending and the same claims had been filed against related defendants. This is only the second case granting a *forum non conveniens* motion in a case commenced under Chapter 15 of the US Bankruptcy Code, which provides for recognition of foreign bankruptcy proceedings.[1] Other courts, including the Fifth Circuit Court of Appeals, have held that Section 1334 of the Bankruptcy Code bars *forum non conveniens* dismissal in Chapter 15 cases. Although not addressing the Section 1334 issue, Judge Glenn stayed, rather than dismissed, the adversary proceeding because his authority to enter a final order was uncertain in light of the US Supreme Court's decision in *Stern v. Marshall*. If Judge Glenn's analysis is accepted by other bankruptcy courts, it presents a new tool for creditors to remove litigation to more convenient, and potentially more favorable, venues.

Hellas II was part of a corporate family created by private equity firms Apax and TPG (the "Sponsors") to invest in Greek mobile telecommunications assets. Hellas II acquired TIM Hellas in June 2005 and Q-Telecom in January 2006 in leveraged buyouts in which the Sponsors received convertible preferred equity certificates ("CPECs") with a par value of approximately €77 million. The liquidators claim that the redemption of those CPECs for more than €1 billion in transactions in April and December 2006 violated their terms and left Hellas II deeply in debt. The redemptions were funded by Hellas II's issuance of subordinated notes and guarantee of senior secured notes issued by an affiliate. Deutsche Bank, which held CPECs that were redeemed in these transactions, served as an underwriter of certain of the bonds.

In February 2007, the Sponsors sold the Hellas companies to the Weather Group, who renamed the business WIND Telecom. In November 2009, Hellas II entered administration in England and sold its interest in WIND Telecom to the Weather Group for €10,000, the assumption of obligations on the senior secured notes, and a fund for costs of administration. Potential claims against third parties represented the only source of recovery for Hellas II's creditors, including the holders of €1.24 billion in subordinated notes. In December 2011, liquidators were appointed to pursue such claims.

In February 2012, the liquidators successfully petitioned the US Court for recognition of the liquidation proceeding under Chapter 15 of the US Bankruptcy Code, and in March 2014, they commenced an adversary proceeding for avoidance of the April and December 2006 transfers. The US Court dismissed certain claims under New York fraudulent transfer law and all claims against foreign-domiciled Apax and TPG entities for lack of personal jurisdiction, leaving only an unjust enrichment claim against the US-domiciled Apax and TPG entities, Deutsche Bank and a proposed class of subsequent transferees.

On March 19, 2015, the liquidators sought to add additional defendants and claims under UK and Luxembourg law. The defendants opposed the motion on the basis, *inter alia*, of *forum non conveniens* – that is, that the US Court was an inconvenient forum in which to litigate foreign law claims arising from foreign transactions. The US Court rejected the argument because the US-domiciled defendants had not consented to the jurisdiction of the English court, so there was no alternative forum available to the liquidators. The US Court recognized, however, that Deutsche Bank was subject to jurisdiction in England and suggested that *forum non conveniens* dismissal might be appropriate if the liquidators commenced proceedings in the English court against the previously-dismissed foreign defendants. The liquidators represented that they had no intention of filing such a proceeding.

On November 26, 2015, however, having been unable to convince the foreign defendants to execute a tolling agreement, the liquidators sued them in the English court

1 The other is *Bancredit Cayman Ltd. v. Santana (In re Bancredit Cayman Ltd.)*, Adv. No. 08-1147, 2008 WL 5396618 (Bankr. S.D.N.Y. Nov. 25, 2008).

and sought a stay in favor of the US proceedings. On January 16, 2016, defendants in the US Court moved for dismissal on the basis of *forum non conveniens*, with the US-domiciled defendants for the first time agreeing to submit to the jurisdiction of the English court.

The US Court granted the motion, holding that the filing of the UK proceeding was a reason to re-evaluate its prior deference to the liquidators' choice of forum. A significant element of the US Court's analysis was the proper relationship between its role in a Chapter 15 case *vis-à-vis* the court overseeing the foreign main proceeding. It concluded that promoting the consolidation of litigation in that court was most consistent with the purpose of Chapter 15. Although the US Court had found it could hear the liquidators' claims under UK statutory law, it held the application of UK law to also weigh in favor of dismissal.

The US Court gave little weight to the proposed transferee class, even though the class members had not consented to the jurisdiction of the English court and class claims could not be pursued there, finding that the liquidators had failed to timely seek class certification. The liquidators filed their motion for class certification only after the *forum non conveniens* motion was filed, and the US Court denied the motion as moot in light of its grant of a stay.

At oral argument, the liquidators revealed what was likely the most significant reason for selecting the US forum – the American rule that parties to a litigation generally bear their own costs. The liquidators argued that they did not have the financial resources to proceed in the UK. In the UK, unlike the US, unsuccessful litigants typically are liable for some or all of the costs incurred by the successful party, and parties may be required to post security for that potential obligation at the outset of litigation.

This decision highlights the tactical issues plaintiffs face where they cannot obtain personal jurisdiction over all defendants in a single forum. The US courts are attractive to plaintiffs because of the wide discovery afforded, availability of contingency fees, rare fee-shifting, class actions and judgments entitled to full faith and credit in every state. The bankruptcy courts, moreover, often present a favorable venue for debtors pressing claims that will result in funds for distribution to creditors. Now, chapter 15 debtors considering whether to commence parallel actions in its main and ancillary proceedings must weigh the risk of having the US proceedings dismissed or stayed, thus losing the benefits US courts can offer.

Fellow of INSOL International

International Association of Restructuring, Insolvency & Bankruptcy Professionals

Brexit and its Impact on Cross-Border Restructurings[1]

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Introduction

Although there was an initial shock in the financial markets following the result of the Brexit referendum in the United Kingdom on 23 June 2016, the position stabilised shortly afterwards and the UK economy has in fact been reasonably resilient over the summer months. As the UK and Europe comes to terms with what Brexit might ultimately mean for business and politics generally, this article considers what impact Brexit could have on the restructuring and insolvency landscape.

Following an initial period of uncertainty, the UK government has now indicated that it will notify the European Council of its intention to withdraw from the EU by the end of March 2017.

Legal impact of Brexit

In the short- to medium-term, the effect of the Brexit referendum result will be limited, certainly from a strictly legal perspective. Until the exit mechanic under Article 50 of the Lisbon Treaty becomes effective, that treaty and the Treaty on the Functioning of the European Union will continue to apply as between the UK and other member states. For so long as those treaties continue to apply, EU Regulations will continue to have direct effect in the UK and the objectives ordained in EU Directives will continue to apply to the UK. Once the treaties cease to have effect, that will not be the case and, absent the UK having agreed with remaining EU member states some continuation or replication of existing legislative measures, such measures will fall away.

Within the UK, the European Communities Act 1972 ("ECA") and other primary and secondary domestic legislation enacted to implement EU legislation will continue to apply until they are repealed or appropriately amended, which means, too, that decisions of the Court of Justice of the European Union ("CJEU") will apply up until that point. Clearly, not all EU-derived legislation will need to be amended, however, and it appears likely that the UK government will enact saving legislation wherever necessary to preserve the *status quo*.

Impact on cross-border restructurings involving the UK

It appears that one of the main risks of Brexit from a restructuring and insolvency perspective is that the UK loses its lustre and appeal as a destination of choice for the implementation of cross-border restructurings. Over the period for which the EC Insolvency Regulation ("EIR") has been in force, the UK, its practitioners and courts have repeatedly and consistently demonstrated a willingness to produce innovative and cutting-edge solutions to pan-European complexities arising in cross-border situations, including those involving groups of companies. Examples include the MG Rover, Collins & Aikman and Nortel cases.

With the heightened emphasis in the recast EIR (much of which will be effective as from June 2017) on the coordination of proceedings and group insolvencies, it may be that foreign debtors and their advisers engaged in forum-shopping for the purpose of finding the environment most conducive to consummating the desired restructuring proposals will be less inclined to opt for the UK in circumstances in which it stands outside the new and improved EU-wide regime. It is difficult to predict whether this is a realistic concern and time – and the shape of the deal ultimately struck in relation to Brexit – will inevitably tell.

The European Insolvency Regulation and other cross-border insolvency measures

The EIR has an impressive track-record. Generally speaking, it has helped courts, debtor companies, insolvency office-holders and their professional advisers deliver effective EU-wide restructuring and insolvency solutions, thereby helping to maximise returns for the benefit of all stakeholders. The same can be said for the Insurers (Reorganisation and Winding Up) Regulations 2004 and Credit Institutions (Reorganisation and Winding Up) Regulations 2004, implemented so as to transpose the relevant underlying EU Directives, in their respective areas of application; and the Financial Collateral Arrangements (No.2) Regulations 2003 represent an important concession to qualifying creditors operating in the financial markets, allowing them to benefit from the

1 Full version of this article is available online at https://www.insol.org/page/373/fellows-papers

relaxation of certain rules and restrictions which are otherwise of mandatory application in insolvency situations. On its face, therefore, the prospect of such measures ceasing to apply does not seem appealing. It may be considerations of this nature which militate in favour of a solution which seeks to put in place equivalent measures as between the UK and remaining EU member states going forward rather than seeking to reinvent the wheel.

The EIR forms one of a number of cross-border insolvency measures currently available in the UK. It operates differently to other such measures, however, in that it principally lays down mandatory jurisdictional (including conflict of laws-related) rules and exceptions thereto relevant to the opening and conduct of insolvency proceedings, as well as prescribing certain automatic and multilateral consequences of the opening of such proceedings (including, crucially, recognition of those proceedings across the EU), whereas other measures are typically request-based forms of assistance. Those other measures are the Cross-Border Insolvency Regulations 2006 ("CBIR"), section 426 of the Insolvency Act 1986 ("Section 426") and the common law. CBIR is Great Britain's enactment of the UNCITRAL Model Law on Cross-Border Insolvency; its equivalent in Northern Ireland is The Cross-Border Insolvency Regulations (Northern Ireland) 2007.

In broad terms, whereas recognition of insolvency proceedings commenced in third countries is automatic under the EIR (in the case of EU member states other than Denmark), in the case of the other forms of assistance, debtors and/or appointed insolvency office-holders must identify and specifically request from the UK courts, on a case-by-case basis, the forms of relief desired within the UK prior to the courts being satisfied that that relief is appropriate and ought to be granted in the circumstances, in the exercise of their discretion. Apart from the fact that the use of request-based forms of assistance involves additional complexity and cost, they are far less effective than the EIR in dealing with the immediate consequences of "free-fall" insolvencies; that is, insolvencies which are the result of last-minute or knee-jerk filings by directors, debtors themselves, or creditors, and which are not commenced on a pre-planned basis or in a manner calculated to optimise returns to creditors and other stakeholders. A further drawback is that the UK could not be confident that any assistance provided under CBIR would be reciprocated in many other member states: to date, only Poland, Greece, Romania and Slovenia have implemented the Model Law (although see below for the position in Germany).

If the EIR were to cease to apply, and absent the granting of permissible forms of relief under the request-based forms of assistance, there is a line of authority in England which suggests that English courts might not give effect to the compromise of English law-governed claims in the context of foreign insolvency proceedings. The leading case is *Antony Gibbs v La Société Industrielle et Commerciale des Métaux* (1890) 25 QBD 399, which has been followed in the context of an Indonesian reorganisation plan in *Global Distressed Alpha Fund 1 LP v PT Bakrie Investindo* [2011] 1 WLR 2038. It is to be hoped that this parochial and territorialist line of authority is reviewed again at the appellate level at the earliest opportunity. The risk, if it is followed in future cases, is that contracting parties globally may seek to have their agreements governed in accordance with laws other than English law, which will likely have a negative knock-on impact on the choice of England as a forum for the resolution of disputes.

It may be that, in certain cases, there will be pre-existing arrangements in remaining member states which are capable of operating between the UK and that other state so as to mitigate the effects of the EIR falling away, so far

as recognition is concerned. In Germany, for example, the position would fall to be regulated under § 343 of the German Insolvency Code. For these purposes, however, the German courts would need to be satisfied, as a matter of German law, that the courts in the UK have jurisdiction over the insolvency proceedings commenced in relation to the debtor, and that the recognition does not lead to a result which is manifestly incompatible with material principles of German law (in particular, a result which is incompatible with basic rights). In circumstances in which insolvency proceedings have been opened in the UK following a shift in the COMI of the debtor, it is likely that the German courts will be less inclined to accept that courts in the UK have jurisdiction than they have been to date in accepting that such jurisdiction exists under Article 3 of the EIR. It may be, therefore, that there will be fewer instances post-Brexit of UK insolvency proceedings being recognised in Germany.

Effect of Brexit on schemes

Given the prominence of English schemes of arrangement in cross-border restructurings, it is understandable that a great deal of attention among international turnaround professionals has been focused on whether or not Brexit will impact the wide use of schemes as a restructuring tool. The short answer is that the effects of Brexit on the use of schemes are likely to be limited.

The jurisdictional hurdles for the approval of a scheme are notoriously easily satisfied, since all that is required for scheme purposes is a "sufficient connection" with England and Wales, and English law-governed agreements suffice for this purpose. (That said, there has been evidence of a tightening-up of this approach in recent cases and, in any event, the English court's determination in sanctioning any particular scheme will involve a more thorough enquiry as to whether the proposed scheme is likely to achieve its purpose.) Significantly, for present purposes, the location of the debtor's COMI – which is the touchstone for grounding jurisdiction for the opening of main proceedings under the EIR – is irrelevant for these purposes. Accordingly, if, following Brexit, the EIR has ceased to have effect and it has not been replaced with equivalent legislation, the COMI test assumes lesser importance for cross-border insolvency purposes within the UK (accepting that it remains applicable for the purposes of the CBIR), it could not be said that the English court's ability to sanction a scheme will be affected one way or the other. This is a view shared by many turnaround professionals in other member states, although it may become more difficult in a post-Brexit world for advisers to persuade corporates in continental Europe to use English schemes as a means to restructure their indebtedness, particularly given the concerns around recognition (which are dealt with below).

Schemes are not strictly insolvency proceedings and, therefore, fall outside of the EIR. The debate continues, however, as to whether they are within the Judgments Regulation and therefore benefit from EU-wide recognition under that Regulation. Unhelpfully, there is conflicting authority on the point in the UK and in certain other member states. Following Brexit, assuming that the Judgments Regulation will cease to apply to the UK, the issue will be beyond doubt: the Judgments Regulation will not apply to schemes. In those circumstances, in the case of schemes relating to foreign companies, difficult questions may arise in relation to jurisdiction and the recognition of UK court-sanctioned schemes (accepting that the position is not clear-cut even as matters stand). In any event, it is likely that there will be heightened emphasis on the expert evidence adduced to the English court in the course of the scheme approval process as to whether or not a scheme will be recognised in the jurisdiction of incorporation of the debtor (and potentially other key jurisdictions), as a matter of private international law.

Any fallout from the Judgments Regulation ceasing to apply to the UK might be mitigated so far as the recognition of judgments is concerned by the UK acceding separately to the Lugano Convention or The Hague Convention (it is currently a party to both, albeit in its capacity as a member of the EU).

However, the effectiveness of schemes to date typically has not been blighted by a lack of recognition in other jurisdictions and it may be unrealistic to suggest that Brexit will make any difference in that respect. That said, there is a risk – particularly amongst remaining member states – that any exit from the EU by the UK may serve as a catalyst for foreign courts to exercise particular scrutiny and develop territorialist tendencies when considering the implications domestically of the English court's long-arm jurisdiction to approve schemes for foreign companies.

The post-Brexit landscape

There have been a number of potential solutions posited to date in terms of the measures which might be introduced, or considered as viable alternatives, in the event that Brexit happens and the EIR ceases to apply to the UK. The main – and probably most attractive – possibility is that the EIR (and other key legislation) is replaced with equivalent legislation. Immediate difficulties with that course are that either it will involve one-way legislation introduced by the UK which depends for its utility on being accorded reciprocal effect by remaining EU member states or that it will require the unanimous agreement by all other 27 member states. As to the latter, and unless this solution is rolled into some more general arrangement encompassing a number of policy areas, it is unlikely that any such agreement would be reached between the various governments on the issue of insolvency in isolation. The key concern, though, would be the status of the CJEU. It is difficult to conceive of an EIR-like measure being able to operate without the possibility of recourse to the CJEU, yet accepting that the CJEU continues to have jurisdiction to resolve disputes is likely to be politically untenable in a post-Brexit UK. There would also be thorny questions to address in terms of the application of future reforms of the EIR to the UK (noting that the recently-recast EIR contemplates further future amendments).

Whilst it is, of course, constructive to consider potential solutions, much will depend on the form which Brexit takes. It does not appear that there will be clarity in that respect for some months or even years to come. In the meantime, it is not inconceivable that there will be a slew of victims of the prevailing environment of uncertainty. Come what may, therefore, it appears that there are interesting and challenging times ahead for restructuring professionals.

Home is Not Always Best – Importance of Forum to Maximize Asset Recovery

By **Randall Arthur and** **Rebecca Hume**

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When you are involved in an insolvency proceeding that is likely to have or has a cross-border component, it can be tempting to focus on the jurisdiction in which the insolvent entity or group is located. Familiarity with local rules and a sense of a "home-field advantage" can overshadow consideration of the bigger picture. However, through careful planning and familiarity with foreign insolvency laws, there can be massive strategic advantages to utilizing insolvency procedures of foreign jurisdictions in addition to, or instead of, the home jurisdiction.

Several recent cases highlight the importance of considering jurisdictional issues, both pre- and post-appointment, and how such issues may impact a party's strategy for maximizing recovery.

Pre-Appointment Considerations: Comity, Abstention, and the Power of the Home Court to Frustrate Efforts to Proceed in a Foreign Jurisdiction

Often, there are perceived benefits to commencing an insolvency proceeding in a foreign jurisdiction, because, for example, the procedural rules and/or substantive law of that jurisdiction may be more favourable than that of the insolvent entities' country of domicile. Two recent cases illustrate the importance of understanding issues of comity, the discretion of a foreign jurisdiction to abstain, and the power of the home court to frustrate efforts to proceed in a foreign jurisdiction when deciding where to commence an insolvency proceeding.

In *In re Northshore Mainland Services, Inc.*, 537 B.R. 192 (Bankr. D. Del. 2015) — which centered on Baha Mar, a 3.3 million-square-foot resort and casino in the Bahamas — a group of primarily Bahamian debtors involved in the development of the resort sought Chapter 11 relief in the U.S. after lenders refused to turn over the funds remaining in their secured financing facility. This resulted in construction being brought to a halt. The debtors wanted to proceed in the U.S. to take advantage of the debtor-in-possession financing available in Chapter 11 proceedings, thereby allowing them to reorganize and thereafter be in a position to finalize construction, open, and operate the resort.

The Bahamian government, however, contested the Chapter 11 proceeding and petitioned the Bahamian court for the appointment of a provisional liquidator, arguing that the main insolvency proceeding should be conducted locally in the Bahamas. The U.S. Bankruptcy Court agreed, held that considerations of comity supported abstention, and dismissed the Chapter 11 proceeding. Given the Bahamian government's strong interest in seeing the resort eventually open, the court considered it best to follow the government's wishes.

Northshore demonstrates the importance of understanding whether bringing insolvency proceedings in a foreign court will protect you from steps taken at home to derail the foreign insolvency proceedings. Without clear consensus among key stakeholders in the foreign insolvency proceedings, there is a risk that, if the home court refuses to recognize the foreign insolvency proceeding, the foreign court will defer to the local jurisdiction.

Similarly, in *L v. G Limited* [2016] 1 HKLRD 167, a Hong Kong court dismissed a petition to wind up a Cayman-incorporated company listed on the Hong Kong Stock Exchange in favour of an action pending in the Cayman Islands, finding no reason to usurp the authority of the Cayman court. While the petitioner held genuine concerns about the affairs of the company in Hong Kong, it was not for the petitioner to decide whether there was a need for a Hong Kong liquidation when there was already a petition on foot in the company's place of incorporation. The court held that, following their appointment in the Cayman Islands, the provisional liquidators could take steps to seek recognition in Hong Kong (through a letter of request) and, if they considered it desirable in due course, apply for their appointment in Hong Kong.

Post-Appointment Considerations: Ability to Utilize Favorable Procedural Rules of a Foreign Jurisdiction to Maximize Recovery Efforts

In the U.S., bankruptcy courts have increasingly shown a willingness to apply foreign laws in the Chapter 15 context. This can be advantageous for foreign liquidators because of the ability to take advantage of U.S. procedural rules, including generous powers of discovery, and the fact that the U.S. is not a cost-shifting jurisdiction.

While the U.S. Bankruptcy Code's avoidance and clawback provisions are not available to a foreign representative under Chapter 15, similar claims may be permissible under foreign law. This was highlighted by the recent case of *In re Hellas Telecommunications (Luxembourg)* II SCA, 535 B.R. 543 (Bankr. S.D.N.Y. 2015).

In *Hellas*, English liquidators of a telecommunications company incorporated in Luxembourg sought Chapter 15 recognition in the U.S. Bankruptcy Court for the Southern District of New York. The liquidators then attempted to claw back proceeds of alleged fraudulent transfers from various defendants subject to U.S. jurisdiction. The liquidators brought claims under the English Insolvency Act, as fraudulent transfer claims under the U.S. Bankruptcy Code were unavailable to them. This meant that they were able to take advantage of beneficial U.S. procedural rules, including generous powers of discovery, while pursuing English clawback claims.

The U.S. Bankruptcy Court initially denied motions to dismiss and allowed these claims to continue. Subsequently, however, the liquidators filed clawback claims in the UK, asserting the same English law claims that had been commenced in the U.S. Bankruptcy Court. The defendants in the U.S. action filed a *forum non conveniens* motion, consenting to the jurisdiction of the English courts. Since there were now English avoidance claims afoot in both the English and the U.S. bankruptcy courts, the U.S. Bankruptcy Court decided that the most beneficial course of action for all parties would be for all of the English avoidance claims to be resolved by the English, and so it stayed the U.S. proceedings pending the determination of the English proceedings.[1] Hellas highlights the fact that the

1 T*n re Hellas Telecommunications (Luxembourg) II SCA*, 555 B.R. 323 (Bankr. S.D.N.Y. 2016).

U.S. Bankruptcy Court can apply foreign law in U.S. bankruptcy proceedings. However given similar proceedings had been commenced by the liquidators in the English courts, and consistent with the goals of Chapter 15 to provide assistance and cooperation to foreign main proceedings, it deferred to the foreign court in the main proceeding to decide matters of its own law.

The recent decision of the British Virgin Islands Commercial Court in *Fairfield Sentry* is an example of liquidators seeking to have "another bite of the cherry," as they were able to take advantage of the U.S. Bankruptcy Court's willingness to allow clawback and avoidance claims under the laws of the jurisdiction of the foreign liquidation to be brought in the U.S. through Chapter 15 proceedings.

Fairfield Sentry (a British Virgin Islands fund) was the biggest feeder fund that invested in Madoff. It was placed into liquidation in July 2009, following the discovery of the Madoff Ponzi scheme. The liquidators subsequently sought and obtained Chapter 15 recognition in the U.S. After unsuccessfully bringing common law restitutionary claims in the BVI against the former shareholders of the funds, who had redeemed their shares prior to discovery of the scheme, the liquidators commenced unjust enrichment and clawback actions against former shareholders in the Southern District of New York.

The liquidators sought another attempt at recovering the monies through the U.S. proceedings. They maintained that the BVI proceedings were not binding because they were formulated before the liquidators discovered evidence that was not available to them at that time. This opened the gate for the Fairfield Sentry funds to pursue — for a second time — with the sanction of the BVI court, restitutionary claims in the U.S.

The U.S. proceedings were stayed pending the outcome of an application by the former shareholders in the BVI court seeking to stop the liquidators from pursuing the U.S. proceedings. The former shareholders failed in their application. The BVI court held that it should be slow to substitute its judgment for the liquidators' decision to commence the proceedings. The former shareholders had no standing, and it was therefore not appropriate for the BVI court to interfere. It was a matter for the U.S. Bankruptcy Court to decide whether the liquidators could pursue claims in the U.S.

The U.S. Bankruptcy Court appears poised to lift the stay and allow the clawback and avoidance actions to proceed, although the ultimate course of action remains to be seen. Nevertheless, Fairfield Sentry sends a signal that parties may, when new evidence has come to light, be able to take advantage of Chapter 15 to bring fresh proceedings against a party in the U.S., notwithstanding the fact that similar proceedings in their home court have been unsuccessful.

RICHARD TURTON AWARD, 2016

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

In recognition of those aspects in which Richard had a special interest, the award for 2016 was open to applicants who fulfilled all of the following:

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

Applicants for the award were invited to write a statement detailing why they should be chosen in less than 200 words. A panel representing the four associations adjudicated the applications. The panel members are as follows: Stephen Adamson – INSOL Europe, Neil Cooper – INSOL International, Patricia Godfrey – R3 and Maurice Moses – IPA. The committee received outstanding applications for this year's award and it was a very close run decision. We are delighted that the award has attracted such enthusiasm and response from the younger members of the profession and know that Richard would also be extremely pleased that there had been such interest.

The committee is delighted to announce that the winner is **Dr. Róbert Muzsalyi** from Hungary. Róbert works as a judicial clerk in the Supreme Court of Hungary. He is currently studying for his PhD his research topic: The Impact of EU Law on Hungarian Procedural Law at the Doctoral School of Law and Political Sciences at Pázmány Péter Catholic University, Budapest, Hungary. This is the first time that we have had a winner from Hungary. Previous winners have come from Uganda, Belarus, India, Latvia, Lithuania, Poland, PRC, Romania, Russia and Serbia.

As part of the award, Róbert was invited to attend the INSOL Europe Congress on the 22-25 September 2016, which was held in Lisbon, Portugal. He will be writing a paper on "Directors' liability: what should be the minimum harmonisation in the EU", that will be published in summary in one or more of the Member Associations' journals and in full on their website. We would like to congratulate Róbert for his excellent application and would also thank all the candidates who applied for the award this year.

Sponsored by:

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INSOL International Jakarta One Day Seminar – 14 September 2016

Report by Tandip Singh and Lex Lazatin,
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and
Graham Martin,
KPMG, Singapore

The first INSOL International Jakarta One Day Seminar was held on 14 September 2016 at the Fairmont Hotel in Jakarta. As is expected from an INSOL International event, the who's who of Indonesian restructuring and insolvency participated in the seminar as speakers and delegates. There was a good balance of international professionals, investors and lenders included in both the panel sessions and the audience. The seminar was attended by more than 100 delegates comprising key players in the industry, with creditors, investors and borrowers represented.

The seminar programme included five panel discussions which covered various important current topics in the restructuring and insolvency sphere. Where the panels presented case studies, the discussions were enriched by the fact that there were speakers and delegates in the audience who had first-hand experience acting for the parties in such cases.

Apart from attending the very informative panel sessions, the delegates were also able to exchange knowledge, expertise, and stories during networking sessions held throughout the day.

The President of INSOL International, Mr Mark Robinson (PBB Advisory, Australia), opened the seminar with the welcome address, and the Seminar Chair, Mr Tandip Singh (RPC Premier Law, Singapore) gave the opening remarks.

Session 1: Major recent developments in Indonesian Bankruptcy Court decisions – are creditors in a better or worse position?

Chair: Mr Tandip Singh. Speakers: Dr Hotman Paris Hutapea (Hotman Paris and Partners, Indonesia), Ms Monisha Kamdar (Raiffeisen Bank International, Singapore), Mr Graham Martin (KPMG Services, Singapore), and Mr Ahmad Maulana (Assegaf Hamzah & Partners, Indonesia).

The first panel discussed the effects of the recent decision of the Indonesian Bankruptcy Court, which declined to include Standard Chartered Bank's ("SCB") claim for approximately USD 1 billion in the bankruptcy proceedings of PT Asmin Koalindo Tuhup. In particular, the panel debated whether the outcome of the case and the general landscape of the Indonesian bankruptcy regime tended to favour debtors or creditors. As the discussion went along, it became clear that the speakers were split along pro-debtor and pro-creditor lines. The pro-debtor camp argued that the Court's decision in the case was correct. As SCB could not provide simple proof of its debt, its claim had to be adjudicated outside of bankruptcy proceedings. In any event, the pro-debtor speakers argued that it was incumbent on creditors to seek comprehensive advice on the requirements of Indonesian law to ensure that their security interests are valid and upheld. Meanwhile the pro-creditor side argued that foreign creditors are at a major disadvantage if they cannot be certain that they are fully apprised of all the legal and administrative requirements for the validity of loans. They were concerned that if the goal posts keep shifting, creditors would inevitably find themselves with no viable recourse. They called for greater clarity in that regard to ease the sense of nervousness. One point that both sides could agree on was that diligence is key when dealing in Indonesia.

Session 2: Domestic issues important to foreign creditors

Chair: Mr Bertie Mehigan (Howse Williams Bowers, Hong Kong). Speakers: Mr Ben Harris (OCP Asia, Hong Kong), Mr Ajinderpal Singh (Dentons Rodyk & Davidson, Singapore), and Mr Timur Sukirno (Hadiputranto, Hadinoto & Partners, Indonesia).

The second panel discussed the importance of domestic issues in Indonesia that offshore creditors should be aware of in structuring and enforcing their debts against Indonesian debtors. One critical consideration for creditors that was raised was the effect of the choice of applicable law for the loan documents. The panel highlighted that simply choosing non-Indonesian law to govern the loan does not exclude the application of the Indonesian regime at the enforcement stage. Where foreign creditors face an impasse at that stage, one option to consider in order to bring the debtor to the negotiating table, is to apply pressure on the overseas operations of the debtors' business. Another issue raised was foreign advisers using their standard language for loan documents without taking into account that such language may not fit naturally in the Indonesian context. While the reality is that there are incentives to use standard

precedent to get the deal approved expeditiously, the panel stressed that this had to be balanced against enforcement issues in Indonesia. The panel thus emphasised the importance of foreign lawyers interacting with their Indonesian counterparts to get a better sense of the local context of their transactions and for the lawyers to customise and localise the transaction documents accordingly.

Session 3: Trustee and bondholder claims in Indonesian suspension of debt payment proceedings (PKPU)

Chair: Mr Robert Schmitz (Deloitte & Touche Financial Advisory Services, Singapore). Speakers: Mr Michael Carl (Soewito Suhardiman Eddymurthy Kardono, Indonesia), Mr William Daniel (William Soerjonegoro & Partners, Indonesia), Mr Stefanus Haryanto (Adanan Kelana Haryanto & Hermanto, Indonesia), and Mr Aji Wijaya (Aji Wijaya & Co, Indonesia).

The third panel provided a thorough exploration of the issues that arise in submitting bondholders' claims in the PKPU process. The panel dove into an in-depth discussion about the provisions of the Indonesian Bankruptcy Law which applied to determine whether the trustee and/or individual bondholders' claims could be recognised in a PKPU. In that regard, one issue highlighted by the panel was that creditors sometimes failed to ensure that their loan documents fulfilled the express requirements of the Bankruptcy Law (e.g. failing to ensure that the debtor records the debt in their books). The panel also went into the details of the restructuring of the debts of PT Arpeni Pratama Ocean Lines Tbk, PT Bakrie Telecom Tbk, and PT Bumi Resources Tbk. These cases spanned a variety of factual and legal issues, including among others, the circumstances in which a foreign trustee could be recognised as the valid representative of the bondholders, the factors a creditor should consider to decide whether it should call on a guarantee before or after a PKPU, and the situation where an SPV's claim was accepted instead of that of the trustee of the bondholders.

Session 4: Restructuring of bond debt by way of Singapore and/or UK schemes of arrangement

Chair: Mr Peter Greaves (PwC, Singapore). Speakers: Mr Joseph Bauerschmidt (DLA Piper, Singapore), Mr Ashok Kumar (BlackOak LLC, Singapore), and Mr Manoj Sandrasegara (WongPartnership, Singapore).

The fourth panel shifted the focus slightly away from the Indonesian regime and discussed the tools under Singaporean and English law that complemented Indonesian debt restructuring. The issue was how to control both the offshore and local creditors to get on-board with a restructuring plan. The panel identified that practitioners could make use of the schemes of arrangement in Singapore and the UK and recognition under Chapter 15 of the US Bankruptcy Code as means to regulate offshore creditors. Such international mechanisms could be used in conjunction with the PKPU process, which could be the basis on which the local creditors would be regulated. In particular, a scheme of arrangement could be used as the framework for a PKPU while provisions like Chapter 15 could be used to estop creditors from turning to overseas courts where there is already a fair ruling in a reciprocal Indonesian court. In that regard, the panel emphasised the need for convergence of international bankruptcy regimes and cooperation among the courts of the various jurisdictions. As an example, the panel cited the new Insolvency Act that will be enacted in Singapore, which is intended to consolidate the bankruptcy and insolvency provisions into one statute, and which would adopt the UNCITRAL Model Law on Cross-Border Insolvency with appropriate modifications.

Session 5: Working capital challenges and solutions in Indonesian workouts

Chair: Mr Geoff Sims (AJCapital Advisory, Indonesia). Speakers: Mr Tony Costa (Lautan Luas and Gunung Sewu Group), Mr Joel Hogarth (Ashurst, Singapore), Mr David Rimbo (EY, Indonesia), and Ms Ricole Tan (FTI Consulting, Indonesia).

Finally, the fifth panel talked about the issues and difficulties that arise when companies in distress try to obtain fresh capital to sustain their operations. The panel presented two case studies of such companies to illustrate the difficulties and possible solutions. The panel highlighted that while it was rare in Indonesia for a company that was already in default to raise fresh working capital, the OJK had introduced new regulations last year which were intended to promote lending by banks in such situations. However, the panel was still sceptical as to whether any financial institutions would actually issue new loans (ranking lowest in priority) given that there would be no upside for them. The panel thus discussed other solutions such as creative restructuring via PKPU and alternative methods available for a company to navigate out of a lock up of working capital and to keep the company going. The panel then went on to assess some of the differences between the current environment in Indonesia and previous distress cycles (e.g. the Asian financial crisis and the subprime crisis) as a backdrop for the working capital difficulties. In that regard, the panel thought that the conditions in Indonesia are now healthier than before.

The feedback from the attendees was that the inaugural seminar was a resounding success and some delegates have already asked to make it a regular event in Indonesia. This was all made possible by the generosity of the sponsors, the hard work of the members of the Main Organising Committee and Ms Susannah Drummond Moray from INSOL, and the enthusiastic participation of all the speakers and delegates. Our thanks go out to everyone involved.

INSOL International would like to thank the following sponsors for their generous support of the seminar:

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INSOL PRC Half Day Seminars – 20 and 22 September 2016

Report by Prof. Li Shuguang

Bankruptcy Law and Restructuring Research Centre,
China University of Politics and Law
Beijing, PRC

INSOL international PRC half-day seminars were successfully held in Beijing on September 20th, 2016 for the fifth time and Shanghai on 22nd, for the third time. With the background of advancing supply-side structural reform and addressing overcapacity, the use of bankruptcy law attracts more and more bankruptcy practitioners, scholars and officials within and out of China. There were over 70 delegates attending Beijing seminars and about 110 in Shanghai.

At the beginning, INSOL Past President James H.M. Sprayregen made a welcome speech and introduced INSOL and its mission. Seminar Co-Chair Rosalie Lui from KPMG in Beijing and Seminar Co-Chair Andrew Koo from EY in Shanghai separately welcomed attendees in the opening remarks.

For the first session, the topic was **PRC Economic Situation, Legislation Update, and "Zombie Companies" Phenomenon**. Session Chair Prof. LI Shuguang, from Bankruptcy Law and Restructuring Research Center of China University of Politics and Law, updated delegates on the current economic situation in the PRC, reviewed updated rules and analyzed typical bankruptcy cases. Prof. Li pointed that overcapacity was the main task of supply-side structural reform and the core of addressing overcapacity was coping with "Zombie Companies". Chinese government and judicial department had taken steps to use bankruptcy law to cutting off overcapacity, such as setting up Clearing and Bankruptcy Tribunals in Intermediate People's Court throughout the country and strengthening the supervision and management to the trustees. The outburst of debt crisis was the first time in past decade which was from enforcing Enterprise Bankruptcy Law. Hanjin Shipping filed for bankruptcy, which reminded us to take action for cross-border insolvency. Remarkably, it was the first time for China and the U.S. to make a consensus on bankruptcy law in G20 summit of 2016, which proved that Chinese government made a promise to use bankruptcy law as a valuable tool to advance supply-side structural reform.

In Beijing seminar, vide-director FU Jinlian from Civil Adjudication Tribunal No.2 of Supreme People's Court made a speech on the ways that the Supreme People's Court used to cope with "Zombie Companies" and the measures the Supreme People's Court took to advance supply-side structural reform, which included advancing accepting and hearing bankruptcy case quickly, improving the level of informatization to adjudicate bankruptcy cases and promoting the trial of bankruptcy cases professionalization. YANG Li from King & Wood Mallesons summarized the typical traits of "Zombie Companies" from the view of corporation law, bankruptcy law and securities law. Adam Lee from KPMG introduced the financial problems of "Zombie Companies" and shared his experience on solving tax de-registration problems. WU Zhuo, the official in legal department of People's Bank of China, talked about the practice on market-oriented dealing with non-performing loans (NPLs) in banking system. Mr. Wu pointed the People's Bank of China would insist on marketization to deal with NPLs and avoid systemic risk.

In Shanghai seminar, HAO Zhaohui from King & Wood Mallesons, and ZHOU Fangsheng, the former deputy director of Enterprise Reform Bureau of State-Owned Assets Supervision and Administration Commission, addressed the attendees. Mr. Hao held that it was important to further regulate the process of accepting bankruptcy cases and make the rehabilitation of "Zombie Companies" effectively. Mr. Zhou played section of a documentary, Rescued from Desperate Situation, in English edition. The documentary recorded the process of a Chinese state-owned company's reorganization, showing difficulties and challenges of reorganizing companies. Shinjiro Takagi, Japan's preeminent insolvency lawyer in the areas of domestic and international bankruptcy and business reorganization, asked questions on the role of creditors' meeting and the effectiveness of using bankruptcy to coping with "Zombie Companies" to Prof. Li and other panellists.

In the second session, entitled **Effective Coordinating Committees**, session chair Richard Woodworth from Allen & Overy, Bert Grisel from Moelis & Company and James Sprayregen, Kirkland & Ellis LLP shared their experiences of advising or being part of the steering committee for some of the world's largest restructurings. They discussed best practice in forming the committee, running an efficient negotiation process and then smoothly implementing an agreed deal. The panel also discussed the pros and cons of participating in a committee and how stakeholders should avoid creating liability for themselves. Bob Hedger, the head of one of the teams within RBS dealing with large corporates and leveraged finance restructurings, talked about his understanding on coordinating committees by recording. In Shanghai, Ben Fang from Moelis & Company, shared his opinion on the same topic.

The third session, entitled **Recent Trends of the Special Assets Solutions under the "New Normal"** focused on the characteristics, trends, and opportunities for dealing with special assets under Chinese New Normal. Session Chair Stan HE from KPMG introduced latest developments – attention from the media, future trends of China NPLs forecast. Mr. He also analyzed the NPLs of commercial banks from various regions. Jason Bedford from UBS talked about challenges and problems of dealing with NPLs when accounting rules changed. Kingsley Ong from Eversheds introduced securitization which was the main way of dealing with NPLs. Mr. Ong pointed out challenges of dealing with NPLs in China, especially the uncertainty of legal process. WANG Yan from EY paid attention to the assessment of NPLs. Janet GU from King & Wood Mallesons shared recent heat issues regarding NPLs dispositions from legal perspective. Ms. Gu also introduced Shanghai Qualified Foreign Limited Partner for NPL investment. In Shanghai seminar, Armstrong Chen from King & Wood Mallesons and Jackson Wei joined the panel as well. Mr. Chen shared his opinion on the same topic as Ms. Gu in Beijing. Mr. Wei introduced how to assess NPLs to satisfy different financial and legal standards.

At the end, Prof. Li made a conclusion on the features of this year's seminars, which were cutting-edge, professional and thought-provoking. As an INSOL Board Director, Prof. Li welcomed Chinese bankruptcy practitioners to attend the Tenth World Quadrennial Congress in Sydney next year.

INSOL International would like to thank the following sponsors for their generous support of the seminars:

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Beijing Seminar Chairs Prof. Li and Rosalie Lui

Shanghai Seminar Co-chair Andrew Koo

"The Freedom to Fail? Insolvency for Micro, Small and Medium Enterprises"

Report by Juanitta Calitz, University of Johannesburg,
Adam Harris, Bowmans,
Jo-Anne Marais, Barclays Africa Group,
Paul Omar, Barrister (non-practicing)
and Alison Timme, PwC

The 2016 Africa Round Table took place at the Labadi Beach Hotel in Accra, Ghana, on 6th and 7th October.

Work on the first day began with a session titled **"Comparative Lenses of Different Legal Procedures in Africa"**, the object of which was to understand some of the challenges facing insolvency frameworks on the continent, both in the use of current laws as well as transition to projected reforms. Moderated by Adam Harris (Bowmans, South Africa, INSOL Vice-President), the theme of the first intervention in the panel by Judge Eva Mappy Morgan (Commercial Court of Liberia) was restructuring. The judge spoke approvingly of the introduction of a new framework in that jurisdiction that both practitioners and courts were hopeful would lead to greater success in turning around the fortunes of entrepreneurs.

Professor David Burdette (Nottingham Trent University) followed this up with a presentation focusing on various initiatives in which he had been involved across Africa, and in which understanding local contexts and institutionalising capacity building continue to be challenges for law reformers and policy makers. Two contributions from practice illustrated the problem of practical use of existing legal frameworks, Muniu Thoithi (PwC Kenya) using the example of the Karuturi Flower insolvency, while Jacob Saah (Saah Partners, Ghana) mentioned the travails surrounding the Ghana Airways debacle, both of which have resulted in proposals addressing the perceived deficiencies of the law. Finally, Adrien Rangira (Bowmans, Madagascar) addressed the OHADA framework, revised in late 2015, and the issues of capacity building to support the new framework for preventative restructuring it has introduced.

The importance of SME's and MSME's to local economies was addressed in the much anticipated session **"The Big Story of Small Business"** chaired by Jo-Anne Marais (Barclays Africa Group). The panel dealt with the challenges experienced by MSMEs in gaining access to finance, particularly as a result of inadequate insolvency regimes. Setting the scene was Kobi Daniel of the World Bank Group who presented an overview of the characteristics and definitions of MSMEs from an international perspective. A notable feature of the discussion was the contribution by Banke Fasominu, an entrepreneur who shared her insights into the challenges faced by entrepreneurs and businesswomen in Nigeria in the context of growing a business and obtaining access to finance.

One of the highlights of the day was the address by US Bankruptcy Court Judge, Elizabeth Stong, who emphasised the role of the US court as a "second chance court" that has as its mission not just winners and losers but declaring "second chances". In her outline of the session, Jo-Anne Marais stated that the US system was a particularly pro- entrepreneur and debtor friendly regime with a much more forgiving bankruptcy system for MSMEs. This was met with the response from Judge Stong that although the US system might be perceived to be pro-company and pro-debtor, she would rather describe it as "pro–process". She continued to highlight the fact that the US procedures for reorganisations could in some senses be compared with the changing of the tides and that *"a case cannot succeed unless everyone wins at least a little bit"*. This theme fed through to the reorganisation case-study (prepared by Rick Chesley and his team from DLA Piper), which was enthusiastically undertaken by the delegates later that day.

Judge Stong also emphasised the importance of transparency of information and communication in the

bigger cases as well as every aspect of the justice system however that it was fundamental in the case of small businesses. Judge Stong concluded with the image: *"… imagine you could get everyone in one tent with a pause; everyone takes a deep breath with a judge who has the power of the federal judiciary and the ability to not only look in the rear-view mirror but also in the windshield and move everybody forward …with good case management, transparency, responsiveness, preserving value and creating value where possible and I think that's why our system works …"*. The experienced panellists had the audience captivated and finally concluded that in the context of emerging markets access to financial services by MSMEs can boost job creation, raise income, reduce vulnerability and increase investments.

The session **"Designing an insolvency Regime for MSMEs"** examined the various approaches by countries in dealing with insolvency of MSMEs, and whether this was through the development of insolvency frameworks specifically directed at MSMEs or through the modification of existing frameworks. The moderator for this panel was Fidelis Oditah QC, SAN (South Square), and panelists included Alexis Nduzuenkeu representing OHADA, Paul Omar Barrister (non-practicing) and Mahesh Uttamchandani of the World Bank Group, INSOL Board Director, which partnered with INSOL in presenting the ART.

It was estimated that there are currently over 500m MSMEs in the developing world. The audience was told that research shows that these enterprises fail faster than larger corporates and that the global credit gap for these entities is in the region $2.5bn.

There are a few considerations to take into account in the context of designing MSME insolvency frameworks. These include: the lack of sophistication in identifying early-warning signs, the incentive to access the insolvency procedure (the loss of control is a powerful disincentive), credit passivity in that lender resources are often diverted to more economically viable clients as the cost of monitoring MSMEs is significant, the limited information that is available from the debtor and lack of governance in MSMEs. Ultimately the process, speed and cost of the insolvency procedure needs to be addressed in the design of the framework.

Looking to the developed world and how those jurisdictions have accommodated MSMEs indicates that a combination of applying either a threshold to access a simplified procedure (as has been put in place in Korea); shorter deadlines for creditor approval (recently incorporated in the Japanese system) or a relaxation of regulations for MSMEs can have a beneficial impact.

Feedback from the OHADA countries was that the insolvency procedures were cumbersome for MSMEs despite such businesses accounting for 80% of the economy. This changed with the new legislation when the processes were simplified for MSMEs. The relaxation of procedures included that the provision of Annual Financial Statements was no longer a pre-requisite for filing at court, an abbreviated time frame was introduced and that creditors could opt for common law application.

Existing insolvency frameworks are typically too complex for MSMEs, and modified or MSME-bespoke insolvency procedures that address hindrances and concerns to MSMEs are far more likely to succeed.

ART was a resounding success. This was reflected in the comments from participants. As one put it:

"ART is an extremely well run meeting and provides a relevant gateway to progressing insolvency reform and assisting bankers, lawyers and practitioners alike. It has been a privilege to have had access to an incredible group of individuals and be reminded of the breadth and depth of skills and innovation in restructuring and insolvency reform now emanating from the African continent".

The reward to those who spent so many hours in organising the project was encapsulated in the comment: *"with a number of important role players focused on a common cause, the Africa Roundtable has provided an important opportunity which extends well beyond highly valuable networking to understanding the important areas of law and policy reform, the practical implications of such changes and first-hand experience of 'on the ground' issues which, if adequately addressed, can contribute to improving the lives of many people"*.

INSOL International would like to thank the following supporters of the Africa Roundtable:

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SOUTH SQUARE

Small Practice - Break the mould using technology to reduce case costs and remove risk and complexity via an Online Creditors Portal

By Kamran Beiglari
Link Market Services
Sydney, Australia

Overview

In the continuum of a stressed company falling into insolvency, creditor identification, subsequent communication, and often prolonged resolution, we have observed many junctures in the process where there is an opportunity to introduce efficiencies through technology.

The enabling technology will increase speed of information capture whilst reducing administrative and mailing costs for the case or matter.

The concept is to simply provide a virtual processing screen so creditors can self-populate the matter's database via an online facility with signature capture and uploading capabilities. The software logic will ensure minimisation of entry errors through matching of formats, matter specific numbers etc. before accepting creditor information for input into the firms' internal database systems.

This would be most effective for small matters where the Insolvency firm's personnel can focus on investigative and higher value tasks, rather than administrative mailings, processing and data entry.

In some instances, it may be extrapolated, that adopting an online approach could turn a loss making matter into a profitable case, thereby resulting in an improved bottom line for the insolvency firm.

Delivery Pipeline

Having been in the privileged position of assisting Australian insolvency firms for the past 6 years, we have noted a set of common challenges encountered by stakeholders in the insolvency delivery pipeline.

These challenges are mainly extraneous to the firm, and beyond the immediate control of the administrators and liquidators, yet have a direct impact on the time, performance and cost of the case. They range from

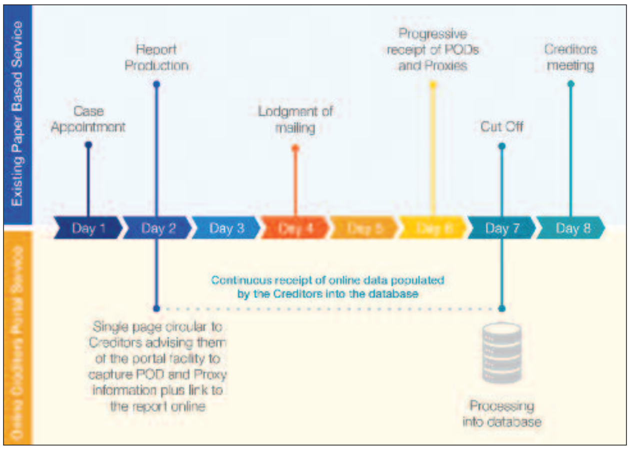

Figure 1- Delivery Timeline

jurisdictional regulatory mailing constraints, to the associated cost and time required for local postal agencies to deliver the mail, and subsequent management of returned items. These are all heavy administrative burdens for insolvency firm staff.

In our jurisdiction, once an appointment has been awarded for (example) a voluntary administration, the administrator is required to convene a creditors meeting within 8 business days in accordance with Section 436E(2) of the Australian Corporations Act 2001[1].

Considering the time required for finalisation of the report, notice of meeting, proof of debt and proxy forms by the Administrator before physically mailing known creditors of the company, there is effectively a short timeframe for creditors to gather information to accurately lodge their claim before the first creditors meeting. Equally, the same time pressures apply to the processing, and collation of claims and proxy submissions.

Online Creditors Portal (OCP)

The Online Creditors Portal is an innovative technology solution that removes costs and risks from the existing

1 See: <http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s436e.html>

insolvency delivery pipeline, and improves responsiveness for greater cost effective management of the case through:

- **Management of risk** – removes information capture risks when transcribing from a physical document, and avoids document transit time in short timeframes;
- **Cost savings** – Online lodgment removes costs associated with postage, and resources for management of physical documents and storage;
- **Valued skills** – Facilitates an environment where the Administrators' skilled resources are deployed on high value tasks rather than data entry activities;
- **Double handling** – Allows for direct import of gathered data into the firm's insolvency systems, thereby removing double handling; and
- **Fast, efficient reporting** – Allows for prompt reporting of claims and proxy information.

Conclusion

Fast, effective communication between creditors and Administrators/Liquidators is paramount to the orderly management of an insolvency case at all stages. This integrated technology ensures that creditors' information is captured in a cost effective and seamless manner for relay to the administrators.

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

By Professor Rosalind Mason

Queensland University of Technology
Chairman, INSOL International Academics' Group

Sydney Colloquium

The INSOL Academics' Group is well underway with preparations for its meeting on 18 – 19 March in Sydney immediately prior to the INSOL Congress 2017. The 19th Colloquium is drawing academics from around the globe to present and engage with registrants on their research. Practitioners are also welcome to register for the Academics' Colloquium which is an opening meeting.

The preliminary draft programme already features a wide range of topics. There are sessions on Developments in Asia; Cross-Border Insolvency Issues; Islamic Finance and Insolvency; and The Impact of Brexit. There is also a well-supported session on "Insolvency Practitioners: remuneration; regulation; recognition". This will combine well with a presentation on the use of technology in the insolvency profession. The programme once again will include some interesting Hot Topics as well as a session dedicated to presentations by Doctoral candidates and early career academics on research in progress.

It is particularly pleasing that a number of academics from the Asia-Pacific region have offered to present papers at this their first INSOL International Academics' Colloquium. If there are any academics who still wish to register an interest in presenting a research paper, I encourage them to email me at rosalind.mason@qut.edu.au as soon as possible and to copy in Tina McGorman **at** tina@insol.ision.co.uk.

Ian Fletcher International Insolvency Moot

An additional highlight of the Ancillary Programmes for INSOL 2017 will be the Ian Fletcher International Insolvency Law Moot (the Fletcher Moot) that will run from 15 – 17 March. The preliminary rounds will be held at the University of Sydney Law School, Camperdown (approximately 20-25 minutes by bus or taxi from Circular Quay), and the final in the City at the Federal Court of Australia, Law Courts Building, Queens Square.

The Moot is named in honour of Professor Ian Fletcher QC (hc), Emeritus Professor University College London and founding Chair of the INSOL Academics' Group. It is being co-sponsored by INSOL International, the International Insolvency Institute and the QUT Faculty of Law.

This exciting new project was announced at the INSOL Academic Group's 2016 Colloquium in London and then to the broader membership of both sponsoring associations. The website https://www.qut.edu.au/law/about/news-events/international-insolvency-law-moot was launched in late August with the Moot Problem posted in October. A good number of teams have registered and are now preparing their written submissions for the qualifying round. This will select the final teams for the oral rounds in March.

Mooting competitions develop the art of appellate advocacy and encourage university students' interest in, and knowledge of, a particular area of law. The Fletcher Moot provides a unique opportunity for universities to participate in a competition dealing with international insolvency law. The moot problem requires consideration of international insolvency law issue being litigated in a hypothetical jurisdiction, Nuzilia, which has adopted the UNCITRAL Model Law on Cross-border Insolvency.

One of the immediate benefits of the moot competition is that we have expanded the countries and universities with which we have contact as an Academics' Group. The competition is providing a new forum for collaboration – one that is focussed on students learning about cross-border insolvency law and practice. We hope the project will also contribute to useful cooperation among academics around research and future Colloquiums and research projects.

It is already proving to be a very productive and creative collaboration between academics, practitioners and the judiciary. Many members of INSOL International and III across the globe have volunteered their time and talents to a range of tasks required to initiate this project. In addition to leadership by the core Competition Committee, several members have already contributed in creating and reviewing the moot problem and many have offered to assist with judging the written submissions in 2016 or the oral rounds in March 2017. With the support of Justice Paul Heath, New Zealand, we have been able to draw together international benches of current and a retired members of the judiciary from Asia, Australasia, the Caribbean, North America and the United Kingdom to hear the semi-final and final rounds on Friday 17 March.

Conclusion

These are just some of the major activities to report on from the INSOL International Academics' Group. In addition, members continue to contribute to INSOL International in a range of ways - including through teaching and examining in the Global Insolvency Practice course; applying for the INSOL Scholar's Award (and for Professor Kathleen van Der Linde in 2016 undertaking her successful programme); and encouraging applicants for the Ian Strang Award – just to name a few.

Conference Diary

November 2016				
2-4	TMA Annual Conference	Lake Buena Vista, FL	TMA	www.turnaround.org
10-12	CLLA Fall Conference	New York, NY	CLLA	www.clla.org
14	ABI Cross-Border Insolvency Program	New York, NY	ABI	www.insol.org
17	INSOL International BVI One Day Seminar	BVI	INSOL International	www.insol.org
December 2016				
1-3	ABI Winter Leadership Conference	Rancho Palos Verdes, CA	ABI	www.ariworld.org
February 2017				
Date TBA	INSOL International Seoul One Day Seminar	Seoul, South Korea	INSOL International	www.insol.org
March 2017				
19-22	INSOL 2017 Tenth World International Quadrennial Congress	Sydney, Australia	INSOL International	www.insol.org
May 2017				
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

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