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Editors' Column

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One of the fascinating features of comparative law is that seeing how legal issues and practical problems are resolved in other jurisdictions makes you better informed not only about these other jurisdictions but also your own system. As you read the articles in this issue you will, I'm sure, reflect as I do, both on the approaches of the local judges and practitioners and also on how your own home jurisdiction deals with similar problems.

In this issue we focus on Latin America and the offshore jurisdictions. We have combined pieces that provide an update on the local economic and restructuring environment with articles that analyse cases of interest.

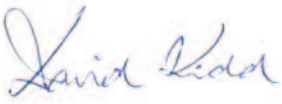
As regards updates and overviews, we have an article that reviews the challenges to restructurings in Brazil caused by Brazil's economic difficulties as well as an update on the provisions in Chilean law that deal with cross-border insolvencies. We also have an article which explains the rules in Latin America which require steps to be taken before documents can be used in local proceedings.

As regards recent judicial decisions, we have updates on a number of major cases involving cross-border litigation and recognition disputes. The OAS Group involves insolvency proceedings and litigation in Brazil, New York and the BVI – and multiple (and continuing) applications to court. One aspect relates to applications in the Bankruptcy Court for the Southern District of New York for Chapter 15 recognition of a number of judicial reorganisation proceedings commenced in Brazil. The Bankruptcy Court adopted a supportive and impressively internationalist approach. In one decision the Court held that a legal officer appointed by the directors of a Brazilian debtor after the appointment by the court of judicial administrators could still be treated as a foreign representative (because the directors retained the requisite power to make the appointment under Brazilian law). In another decision that will be welcomed by offshore practitioners, the Court held that an Austrian incorporated SPV had its COMI in Brazil. In a further case the Court is being asked to decide whether to recognise a provisional liquidator appointed over a BVI affiliate or to allow the Brazilian management of the affiliate to control the reorganisation under the Brazilian proceeding. In the equally significant and complex case of Baha Mar, there have been Chapter 11 proceedings in the Delaware Bankruptcy Court and winding-up proceedings (with the appointment of provisional liquidators) in the Bahamas. Once again the Bankruptcy Court adopted an approach that was sensitive to the international context (by taking account of the concerns of a number of Bahamian stakeholders and creditors and respecting the offshore proceedings) by deciding to dismiss the Chapter 11 case and abstain in favour of the Bahamian proceedings.

We also have articles that consider important case law developments in Cayman, Guernsey, Ireland and Australia. The Grand Court in Cayman has considered again the status and treatment of shareholders in Cayman funds who have exercised the right to redeem their shares but not been paid before the commencement of the winding up. In Guernsey the court rejected an attempt by a trustee in bankruptcy appointed in England to obtain an order compelling parties resident in Guernsey to provide information to the trustee without first obtaining from the English Court a letter of request. In Ireland the High Court refused to accept that Mr Quinn, who resided in Ireland, had his COMI in Northern Ireland by virtue only of carrying out the administration of the majority of his affairs from the north. In New South Wales the court held that a secured creditor who was subject to a deed of company arrangement remained able to appoint an administrator even though the deed had resulted in the discharge of the secured creditor's personal rights as a creditor.

So do enjoy your quarterly opportunity to devote some quality time to catching-up on comparative and cross-border developments!

As always I would like to conclude by expressing our thanks to Mourant Ozannes for sponsoring INSOL World and to David Rubin & Partners for sponsoring the monthly Technical Electronic Newsletter.



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President's Column

By Mark Robinson
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Dear Friends and Colleagues,

Developing regions - Asia

One of my aims as President is to grow INSOL International's footprint in developing Asian countries. I am pleased to inform you that we are now planning events over the next few years around the Pan Pacific Rim to work to help establish new Member Associations; to strengthen our membership and to provide technical seminars of cross-border interest to local practitioners in those countries. The precedent that we have used is the short seminar programme successfully implemented in the Latin America region, that created strong INSOL membership in the region.

Initially, in October this year we assisted with a training programme in Vietnam, at the invitation of the Ministry of Justice. The programme was delivered by Neil Cooper and Sijmen de Ranitz, Past Presidents of INSOL International, and Peter Gothard, Fellow, INSOL International, Ferrier Hodgson. We are very grateful for their efforts and expertise.

Further, we are planning a series of seminars in Indonesia, Malaysia, Thailand and Cambodia with additional events to take place in Vietnam. I am delighted that we are moving forward with this initiative and I look ahead to reporting further news from the region in future issues of INSOL World.

New Member Associations

I am very pleased to announce the acceptance of KORIPA (Korea Restructuring and Insolvency Practitioners Association) as a member association of INSOL. This is an excellent development, particularly in light of our efforts to develop membership in the Asia Region.

We would also like to welcome the Recovery and Insolvency Specialists Association of Bermuda, as INSOL continues its growth in the offshore region.

Attendance at Member Association events

The INSOL Executive have been busy attending Member Association events. The Finnish Insolvency Law Association (FILA) held its annual conference on 25 to 26 August. The conference started with the opening remarks in Helsinki, followed by the technical programme delivered on a ship round-trip to Tallinn, Estonia. Richard Heis, INSOL Executive Committee, KPMG, attended the opening on behalf of INSOL International and gave a presentation titled *What makes a good insolvency regime?*, that was well received by the delegates.

INSOL Vice-President, Adam Harris of Bowman Gilfillan, was delighted to be able to attend the Canadian Association of Insolvency and Restructuring Professionals' (CAIRP) Conference in Whistler.

Adam and I also attended INSOL Europe's annual conference in Berlin and look forward to joining the South African Restructuring and Insolvency Practitioners Association (SARIPA) for their annual conference in Johannesburg on 26-27 November.

World Bank Africa Roundtable

Since 2010 INSOL International and World Bank Group have jointly hosted an Africa Roundtable (ART) on insolvency reform. This year's ART explored the role that insolvency regimes play in contributing to financial sector stability and the protection of creditor rights, with the theme Restoring Financial Sector Stability: the role of insolvency regimes.

For the first time, this year we opened up the second day to all those interested in and affected by insolvency reform in

Africa. This was to provide a greater forum for all stakeholders to engage in discussion and to learn from international best practice. The preceding day was a closed meeting for policy makers, regulators and the judiciary who also attended the Open Forum on 13 October. A full report on ART 2015 will follow in the next edition of INSOL World.

INSOL Dubai

I look forward to welcoming you back to the beautiful Madinat Jumeirah Resort that our conference delegates enjoyed so much in 2010. Apart from the amazing conference venue we also have a very strong technical programme running from 24 to 26 January 2016, which is contained in the registration brochure available on INSOL's website.

INSOL 2017 - Tenth World International Congress

Plans are well under way for INSOL's Tenth Quadrennial Congress which will take place in 2017 against the dramatic back-drop of Sydney's Darling Harbour, currently being transformed into one of the most distinctive and dynamic new waterfront, business and leisure districts in the world.

We look forward to welcoming accountants, lawyers, turnaround experts, judges, regulators, academics, lenders and alternate capital providers from around the world to the Congress, where our technical programme will support INSOL members' role as leaders in international turnaround, insolvency, restructuring and related credit issues.

INSOL New York

I am pleased to announce that we have just confirmed the destination for our Annual Americas Conference in 2018 which will be New York, from 29 April to 1 May 2018. The conference will be held at the stunning Waldorf Astoria in the heart of New York City. A very strong technical programme will be developed to compliment this remarkable location, to make it a conference not to be missed.

INSOL Board changes

On behalf of the Board of Directors of INSOL International I would like to thank the outgoing Board Directors – Jim Luby of McStay Luby, Ireland and Melissa Kibler Knoll of Mesirow Financial, USA and welcome Catherine Ottaway, Hoche Societe d'Avocats, France and Ron Silverman, Hogan Lovells US LLP, USA as representatives of INSOL Europe and ABI respectively on the Board of Directors of INSOL. We are also pleased to have Nick Edwards of Deloitte, UK representing R3, who joined the Board earlier in March, on the appointment of Richard Heis, KPMG, UK on to the Executive Committee of INSOL International as Treasurer.

I look forward to seeing many of you at the above mentioned Member Association events and elsewhere. If you would like to drop me a line, please do so through either my LinkedIn account at **https://au.linkedin.com/in/markjulianrobinson** or my email **mrobinson@ppbadvisory.com**

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Argentina – Recent Case Development: Involuntary Bankruptcy Petition based on an International Arbitral Award

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Argentine insolvency law is governed by Act No. 24,522 of July 20, 1995, as amended in 2002 (Act 25,589) 2006 (Act 26,086) and 2011 (Act 26,684), the Argentine Insolvency Law (the "AIL"). The AIL outlines three types of court-supervised proceedings that may voluntarily be commenced by a distressed company: (i) a reorganization proceeding, referred to as a *Concurso Preventivo;* (ii) an *Acuerdo Preventivo Extrajudicial*, a restructuring proceeding which is similar to a US "prepackaged" Chapter 11 proceeding; and (iii) a *Quiebra*, or liquidation proceeding, comparable in goals to a US Chapter 7, performed under court control and supervision, seeking to liquidate the bankrupt company's assets and distribute the proceeds among its creditors in proportion to their respective claims and/or credit.

As happens in many other insolvency systems, there are two ways to open a liquidation process: the voluntary proceeding, filed by the debtor, and the involuntary proceeding, filed by a creditor.

In a recent case, the National Court of Appeals in Commercial Matters, Chamber A (the "Upper Court") issued a ruling dated August 18th, 2015 (the "Ruling") which unanimously rejected a challenge to an involuntary petition for bankruptcy based on an arbitration award of the International Centre for Settlement of Investment Disputes ("ICSID").

In *re* "*CCI- Compañía de Concesiones de Infraestructura S.A. bankruptcy petition (Republic of Peru)*", the creditor was the Republic of Peru which had filed the petition in bankruptcy of the debtor based on a 2013 final award (the "Award") for the costs of the arbitration proceedings.

The Award expressly stated that CCI was required to pay the fees and costs of the proceedings to the Republic of Peru, which amounted to USD 2,117,489.27.

The Republic of Peru relied on Section 54 of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention"), an international treaty approved by the enactment of Act 24,353 of Argentina.

In Argentina, the ICSID Convention, has full force and effect since under the constitution (Section 31 of the National Constitution), international treaties take precedence over domestic laws – including the other provisions of the national constitution itself (Section 75 subsection 22 of the National Constitution). Section 54 of the ICSID Convention enumerates the general provisions applicable to all arbitration awards. In relation to this case, it states the following:

"Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state."

"A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General."

Although under the ICSID Convention sovereigns can only be defendants but not plaintiffs, in this particular case, after deciding against the CCI, the award determined that all the fees and costs of the arbitration proceeding should be paid to the Republic of Peru by CCI.

Section 61 of the ICSID Convention (relevant with respect to the relation between the award and the costs of the arbitration proceedings) provides the following: "In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award".

Based on the award in this case which required CCI to pay the costs, the sovereign filed an involuntary

bankruptcy petition against CCI.

At first instance, and without even hearing CCI, the lower Court denied the involuntary petition on the ground that the Republic of Peru could not rely on the award in the absence of a previous *exequatur* (which acknowledges foreign rulings and awards in Argentina and makes them enforceable). The award alone could not be considered a valid title to prove the existence of a liquid and payable debt, and thus, it could not prove the insolvency attributed to the defendant.

However, on appeal this approach was rejected. The Ruling makes a distinction between on the one hand merely foreign awards or ruling and on the other international awards and rulings, based on Section 54 of the ICSID Convention. The Upper Court held that it was unnecessary to subject the award to the acknowledgment process set forth in the Code of Civil and Commercial Procedure (Sections 517 *et seq*, of which set forth the legal basis for recognition of foreign courts' orders in Argentina).

Subsection 4, Section 517 of the Civil and Commercial Procedure Code provides, in substance, that a foreign judgment will not be executed, or given effect, if the judgment is contrary to Argentine laws of public policy. In the opinion of scholars, public policy consists in "the body of principles established in defense of the local legislative policy, which are in an underlying state and are intended to prevent foreign laws from distorting such principles. This is the system adopted by our legislation, which authorizes judges to decide, prior to applying a foreign legislation, whether or not such foreign legislation is suitable for governing a legal issue, without violating the general principles of the local body of laws".

Specifically with respect to foreign arbitration awards, Section 519 of the above mentioned Civil and Commercial Procedure Code states that the awards rendered by foreign arbitration tribunals may be executed according to the procedure established and meeting the *exequatur* requirements set forth in Section 517 *et seq*.

But in the present case, the Upper Court, distinguished between a foreign arbitration award (subject to the *exequatur* proceeding) and an international arbitration award (directly enforceable in Argentina pursuant to Section 75, Subsection 22 of the National Constitution), and decided in favor of the sovereign and allowed the involuntary bankruptcy proceeding to proceed.

The Upper Court decided that a legalized copy of the international award itself, without any need for the *exequatur* process gave sufficient title to prove not only that the creditor had an enforceable claim (Section 80 AIL) but also that the lack of payment of such claim constituted summary proof of that the debtor was insolvent (Section 83 AIL).

Even within its limited scope, the Ruling is – to the best of our knowledge - the first case in which an Argentine court allowed direct enforcement of an international arbitration award within a bankruptcy environment by granting the most expeditious track to such award. It shows that at least part of our national judicial system clearly states that international treaties and contracts are meant to be respected and that investment, whether national or international, must be protected.

OAS Group: A Tale of Two Chapter 15 Cases in the United States

By Mark D. Bloom and Vitor Araujo
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Introduction

Until recently the Brazilian economy experienced a period of significant growth, attracting substantial foreign investment and leading many to believe that Brazil was poised to make the leap from emerging economy to world economic power. However a series of dubious economic decisions, coupled with rampant government spending and troubling corruption scandals, have halted Brazil's growth and dragged the country again into financial uncertainty.

Critical to this scenario has been the so called "Car Wash" operation of the Brazilian federal police, which has been investigating well-publicized corruption involving Petrobras, Brazil's state-controlled oil company, public officials and several of Petrobras' contractors. As a result, a number of these contractors, including some of Brazil's biggest construction companies, have been facing significant financial problems.

Among such troubled companies is the OAS Group, a major Brazilian conglomerate which filed for judicial reorganization under Brazilian law in March of 2015, after a series of unsuccessful efforts to restructure out of court. In the course of those efforts the OAS Group engaged in a series of transactions that made changes to the overall corporate structure and transferred assets among members of the group.

The recent decision of the US Bankruptcy Court in the Southern District of New York to grant recognition of the Brazil proceedings over the fierce opposition of certain US bondholders aggrieved by those transactions sheds further light on the authority of a "foreign representative" to seek cross-border recognition under Chapter 15 and the UNCITRAL Model Law on which it is based, and on questions relating to the "center of main interests" of a foreign entity with no real business operations of its own.[2] In addition, the separate Chapter 15 case arising from the efforts of those bondholders to pursue their claims against a British Virgin Islands member of the OAS Group raises unique issues relating both to cross-border recognition and more fundamentally to the right to control over multi-jurisdictional restructurings.[3]

The OAS Brazil Reorganization and US Chapter 15 Cases

Authority of the "Foreign Representative"

In addition to Brazilian creditors, at the time of filing for judicial reorganization in Brazil the OAS Group owed approximately US$ 875 million to holders of senior notes issued by certain OAS single purpose subsidiaries and guaranteed by other companies in the group. Seeking to maintain the "structural seniority" that they and other holders of those notes enjoyed over general creditors prior to the internal restructuring process, two of the major US noteholders brought litigation against certain members of the OAS Group in the New York state courts and succeeded in attaching liquid assets located in the United States. Additional litigation followed in the state and federal courts in New York as well.

Against this backdrop, it was not surprising that these same noteholders objected to recognition of the Brazil reorganization proceedings in the Chapter 15 cases commenced in respect of four OAS Group entities in the Southern District of New York in April of 2015.[4] The noteholders challenged the recognition of the Brazilian proceedings on several bases, most significantly that the "foreign representative" who commenced the Chapter 15 cases had not been properly appointed in the "foreign proceeding," and such that application for recognition failed to comply with the requirements of section 1515(a) of the Bankruptcy Code.

This controversy arose from the fact that after the Brazilian court had appointed Alvarez & Marsal to the statutory role of judicial administrator in the Brazilian proceedings, the OAS board of directors appointed the legal officer for several of the OAS companies as OAS Group's agent and attorney-in-fact for purposes of seeking recognition in foreign jurisdictions. In support of their objection the noteholders relied on Section 101(24) of the Bankruptcy Code, which defines "foreign representative" as "a person or body, including a person or body appointed on an interim basis, authorized in a foreign proceeding to administer the reorganization or the liquidation of the debtor's assets or affairs or to act as a representative of such foreign proceeding." 11 U.S.C. §101(24) (emphasis added). Thus, the noteholders argued, the mere act of appointment by the OAS board was not sufficient, and the Chapter 15 cases were not commenced by an

[1] Mr. Bloom is co-chair of the Global Reorganization practice group and Mr. Araujo is a Brazil-licensed foreign law clerk at Greenberg Traurig, both resident in the firm's Miami, Florida office.

[2] In re OAS S.A., et al., Case No. 15-10937 (SMB) (Bankr. S.D.N.Y.) (July 13, 2015).

[3] In re OAS Finance Ltd., Case No. 15-11304 (SMB) (Bankr. S.D.N.Y.)

[4] Separately in April, the noteholders filed a petition in the British Virgin Islands and obtained the appointment of joint provisional liquidators for OAS Finance, a BVI member of the OAS Group. Upon their appointment the JPLs directed that the Chapter 15 petition in respect of OAS Finance be withdrawn. In addition, the JPLs sought recognition of the BVI proceeding by filing separate Chapter 15 case in May, which case remains pending before the same bankruptcy judge in the Southern District of New York.

REACHING THE WORLD FROM ASIA PACIFIC

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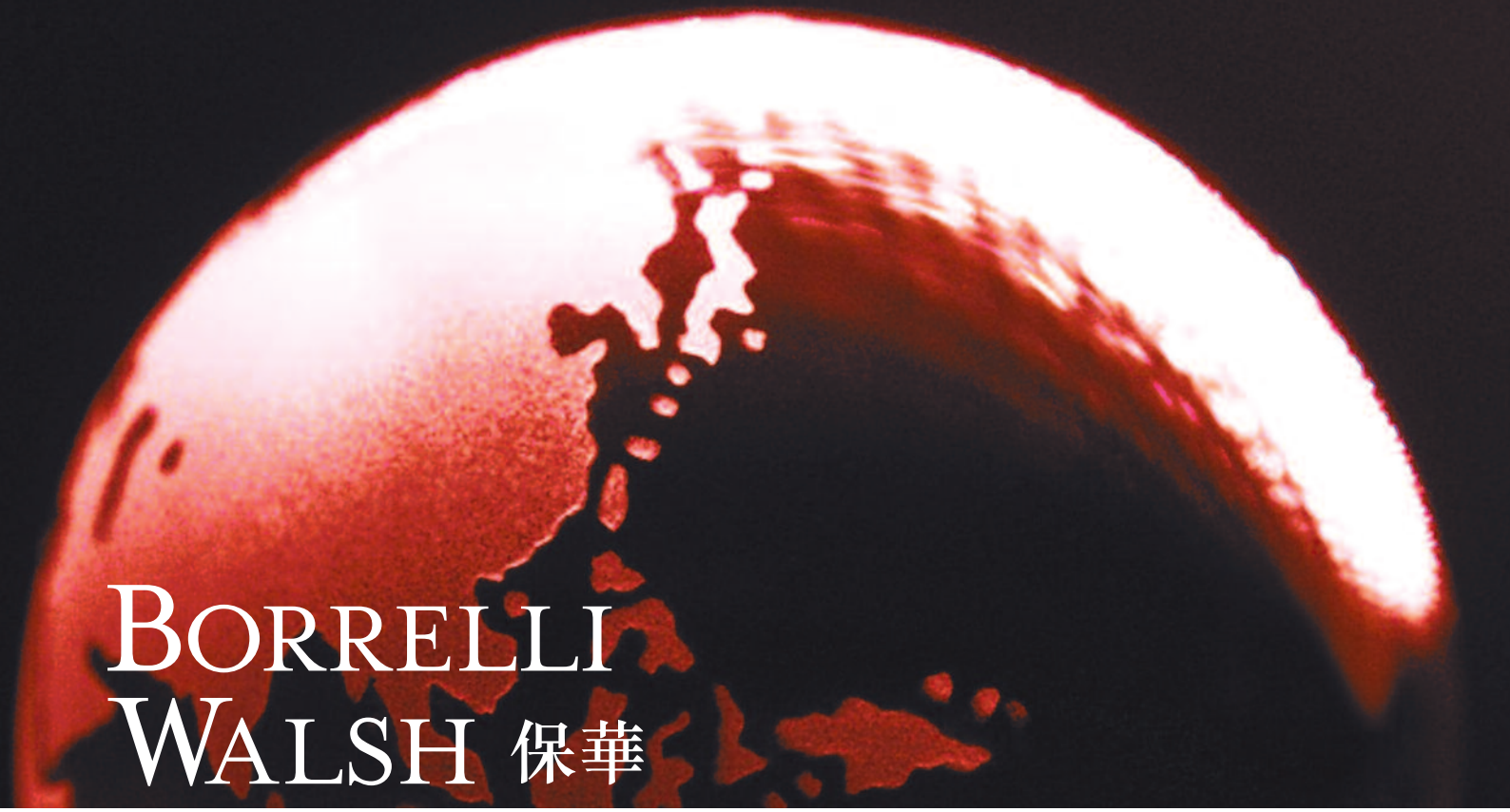

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authorized foreign representative.[5]

In overruling this objection, the Bankruptcy Court focused on the definitional language "authorized in a foreign proceeding" and relied on a previous decision by the Fifth Circuit Court of Appeals holding such language to mean "authorized in the context of or in the course of a foreign proceeding."[6] On this basis, the bankruptcy judge determined first that the Chapter 15 representative need not be appointed specifically by the foreign court — that appointment by the debtor's board of directors will suffice for such purposes when the applicable foreign law permits the company in reorganization to maintain control of its assets and affairs. Looking next to Article 64 of Brazil's bankruptcy law and an affidavit furnished by OAS Group's Brazilian bankruptcy counsel, the Court determined that the role of the judicial administrator under Brazilian law was largely supervisory and not managerial, that OAS management retained full control over the companies' business and affairs subject to the oversight of the administrator, and accordingly that OAS Group was acting in the nature of a debtor in possession. Thus, the appointment of the legal officer as "foreign representative" by the OAS boards of directors was valid and empowered him to seek recognition by filing the Chapter 15 cases in the US.

Determination of the "Center of Main Interests"

The noteholders also opposed recognition of the Brazil case filed in respect of the primary issuer of the notes, an Austrian special purpose entity that had no independent business operations, employees or assets, on the basis that this member of the Group did not have its "center of main interests" in Brazil. The facts were uncontroverted that this entity had no physical location in Brazil, that its address in that country was merely a post office box, and that all of its obligations were represented by notes issued to international investors.

Nevertheless, the bankruptcy judge rejected this argument, finding the COMI to exist in Brazil on multiple grounds, including that the Brazilian guarantors represented the only source of repayment and the Board actions undertaken by the Brazilian directors took place in Brazil. The Court also found it probative that the notes were unconditionally guaranteed by members of the OAS Group in Brazil, and that since the disclosures in the offering documents focused on the Brazilian operations and risk factors investors necessarily analyzed credit risk and formed payment expectations based upon business activities conducted in Brazil. Upon these factors, the Court found Brazil to be the center of main interests for the Austrian entity for purposes of the Chapter 15 recognition.

The OAS Chapter 15 decision showcases some important aspects of complex cross-border reorganizations. By accepting the Boards' appointment of a "foreign representative" during the Brazil reorganization proceedings, the New York court follows and lends support to the Fifth Circuit's flexible internationalist approach in lieu of a more literal reading of section 1515(b) of the Bankruptcy Code. Further, the decision regarding the COMI of the three OAS Group members obligated on the US notes offers significant precedent for investors in other special purpose vehicles utilized to raise funds in international capital markets. In both respects, the decision is consistent with the overall purpose of Chapter 15 and the Model Law on which it is based, to facilitate cross-border recognition of insolvency proceedings commenced in the distressed company's center of main interests.

The OAS BVI Proceeding and US Chapter 15 Case

While the recognition decision in the Chapter 15 cases emanating from Brazil is a matter of significant interest, it should not be lost on the reader that the OAS drama continues to unfold in the separate Chapter 15 case pending before the same bankruptcy judge in respect of the BVI provisional liquidation. At the foundation of that case is the underlying issue of whether the restructuring of the BVI affiliate should be controlled by the joint provisional liquidators in the BVI who filed the petition for recognition, or the incumbent management of the OAS Group in Brazil. More fundamentally, inasmuch as the BVI JPLs were appointed upon application of the US noteholders to begin with, this Chapter 15 case raises a myriad of issues regarding the role of activist creditors in multi-jurisdictional insolvency proceedings.

Indeed, this appears to be the precise issue with which the bankruptcy judge is wrestling as his decision on whether to grant recognition of the BVI proceeding as a foreign main proceeding remains pending. The OAS Group has objected to such recognition on multiple grounds, urging that the restructuring of the BVI entity remains under the control and direction of OAS Group management in the Brazil restructuring proceedings, such that the COMI of the BVI affiliate remains in Brazil. At the final hearing on recognition held this past August, the judge remarked that the COMI dispute arose only because the US noteholders initiated the BVI proceeding in the first instance.

In the meantime, the separate proceedings in Brazil and BVI remain pending, with little apparent coordination between them. The court in Brazil recently approved a financing package intended to provide an infusion of working capital to fuel the reorganization in that country, and the BVI court has been asked to clarify issues regarding the residual authority of the BVI company directors following the appointment of the JPLs. Ultimately, the US court will determine whether to follow the lead of the JPLs in granting recognition to the BVI proceeding commenced by the US noteholders, or uphold the view of the OAS Group directors that notwithstanding the BVI filing and appointment of the JPLs the center of main interests for the BVI affiliate remains in Brazil.

[5] The position of the bondholders finds textural support in the plain meaning of various provisions contained in section 1515(b) of the Bankruptcy Code, which among other things requires that a petition for recognition under Chapter 15 be accompanied a decision or certificate from the foreign court affirming the appointment of the foreign representative, or other acceptable evidence of such appointment. 11 U.S.C. §1515(b).

[6] *Ad Hoc Grp. of Vitro Noteholders v. Vitro S.A.B. de C.V. (In re Vitro S.A.B. de C.V.)*, 701 F.3d 1031 (5th Cir. 2013), *cert. dismissed*, 133 S. Ct. 1862 (2013). Notably, the New York court located in the Second Circuit was not bound to follow this precedent from the Fifth Circuit, but chose to do so in order to reach its result.

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Latest Amendements and Developments in Mexican Insolvency Law

By Jorge J. Sepúlveda[1]
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Mexico City, Mexico

On January 10, 2014, the Official Gazette published various amendments to the Mexican Bankruptcy Law (*Ley de Concursos Mercantiles*), that governs the insolvency process.

Many of the amendments focused on problems that occurred in previous proceedings or reorganizations processes (Mexicana Airlines, Vitro, etc). Some we can say are much needed improvements but some others will undoubtedly bring new problems to be dealt with.

The Vitro experience can be held responsible for the introduction of a new class of creditors in addition to the existing Secured and Unsecured division in Mexican Law. The new definition is of the "subordinated creditor" and it relates to those businesses or companies that have the same board of directors as the debtor or who are controlled directly or indirectly by the debtor.

According to this amendment a "subordinated creditor" cannot hold more than 25% of all the debtor's debt; if it does then it cannot be counted as part of the 50% needed for approval of the restructuring plan. This means that in practice subordinated debt must be below 25% of all debt in order to be part of the votes needed to achieve the 50% threshold.

A second amendment was due to the Mexicana Airlines case, in which the Federal judge kept stretching the conciliation period by giving extensions to the debtor to reach an agreement with its creditors, substantially exceeding the 365 days that the *Concurso* law gives to the parties. Article 7 prohibits judges from giving more extensions, which contradicts the spirit of the *Concurso* Law under which the main purpose of the Law is to keep businesses alive. Of course there are many examples of cases that continued for years as the Mexicana Airlines case did without any real investor behind a serious restructuring plan.

The amendments introduce a concept of "imminent insolvency", and create the right for a company to enter a restructuring (*concurso*) process if in fact it is inevitable that a debtor faces insolvency in a period of no more than 90 days.

Going against the Mexican Federal Civil Code's general obligations provisions in which any debt reduction would benefit a co-debtor, the amendments limit the compromise of a debt under which a co-debtor is also liable with the debtor to the debtor subject to the *Concurso* Process.

Also a very debatable and doubtful amendment was made to the automatic stay applicable if a *Concurso* process is admitted and declared, because there will be an exception to the stay and enforcement of a claim can continue, if its collateral is real estate or property that is not "strictly indispensable" for the operation of the debtor's business. This ruling to this effect could be made by the judge in charge of the *Concurso* process prior to the opinion of the Conciliator (trustee) designated in such restructure process.

Trying to create the momentum for DIP Financing, which is currently almost non existent in Mexican restructuring processes, article 75 authorizes the debtor in a *concurso* process to enter into new debt if its "indispensable" to continue the operation of the debtor's business. Such DIP Financing is entitled to priority in repayment over all or most all other claims of general unsecured creditors.

The amendment also incorporates a new requirement that any voluntary petition of *Concurso* be accompanied by a restructuring Plan Project and all (voluntary or involuntary petitions) must be done in the IFECOM[2] forms. This amendment tried to make the petitions simple and easy but gives rise to a new practical problem for the petitioner.

A new requirement is needed for voluntary *concurso* proceedings to begin, as this reform imposes an obligation on the debtor to present as an exhibit the deed of the shareholders meeting in which the authorization was given to the legal representative.

This amendment to the Mexican *Concurso* law also introduces a section of responsibilities and duties of directors and managing officers of a debtor that has been declared in *Concurso*, that make them liable for actions before the commencement of the process. The benefit of any compensation payable as a result of any action (losses and damages) will become part of the estate of the company subject to the *concurso* process.

At the upcoming INSOL One Day Seminar to be held in Mexico City in March 2016, we will address the problems arising from these amendments and recent cases that continue to demonstrate the need for a more effective insolvency process.

1 Partner at Bufete Garcia Jimeno, S.C. Head of Insolvency Litigation. Professor of Insolvency Law at Universidad Iberoamericana in Mexico City. Founding member of IIDC. Member of INSOL, Latin American Committee. Chair of the MOC for INSOL Mexico One Day Seminar to be held in March 2016.

2 IFECOM stands for Instituto Federal de Especialistas Concurso Mercantiles, a federal jurisdictional arm of the Judiciary, responsible for the designation of the trustees in any Concurso Process.

Vietnam Insolvency Administrator Training

By Neil Cooper,
Past President INSOL International

In 2014, Vietnam introduced a new insolvency law including, for the first time, the concept of licensed, regulated insolvency practitioners. This reform was achieved under the guidance of the IFC, part of the World Bank Group. To assist in understanding what is involved in the development of such a regime, a high level delegation from Vietnam comprising delegates from the Vietnamese Ministry of Justice, the Supreme Peoples Court and the Ho Chi Min Bar Association came to London in July 2015. In the course of the meetings at INSOL International, the delegation requested the assistance of the IFC and INSOL in training the first newly licensed insolvency professionals.

Assurances of support in response to requests of this nature are easy to give but the requests often disappear. Not in this case. No sooner had the delegation returned home than dates were set for the training – two months away! In almost record time, INSOL International, in conjunction with the World Bank Group, agreed a syllabus and format of the basic training.

Training was delivered to over 100 lawyers, accountants and judges in Hanoi and Ho Chi Minh City in October over two consecutive days in each city by past-presidents Neil Cooper and Sijmen de Ranitz and Peter Gothard, Fellow, INSOL International, Ferrier Hodgson, member firm of G36, under the watchful eye of Susannah Drummond Moray of INSOL who is leading the charge in developing INSOL's presence in this region. The training covered the thorny issues of ethical conduct and professional standards; engagement management; assessment of the debtor's business and case strategy; maximizing the value of the debtor's assets; and agreeing and paying claims.

The training included case studies and was generally highly participative in both locations. Overall, we have had a very positive response from those who attended the training with a clear appetite for further courses.

It has been requested that the first stage training be rerun next year to cope with Practitioners who could not attend the first course and a second round of training to cover more complex insolvencies; restructuring and cross-border issues will take place next Spring.

INSOL is delighted to be able to work with the World Bank Group on such matters and to further develop connections with this fast growing economy that is of interest to many INSOL members in developed economies. We have our first INSOL individual members from a leading local law firm and there is enthusiasm to establish a national association. INSOL is delighted to support them going forward.

Cross-border Insolvency Regulation in Chile

By Nicolás Rodrigo Velasco Jenschke
Superintendency of Insolvency and Entrepreneurship
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In recent years, trade across the world has been globalized to such an extent that globalization is now the norm in economic trade and investments. For this reason most modern bankruptcy laws have adopted insolvency rules aimed at dealing with and regulating cross-border cases, i.e., cases when the bankruptcy of a debtor transcends borders or boundaries of the country that opened the insolvency procedure, in order to include creditors and assets located abroad. However, the former Chilean bankruptcy law, contained in Book IV of the Commercial Code, did not include any regulation on cross-border insolvency cases, except for rules regarding the giving of notice to foreign creditors.

Nonetheless Book IV of Title IX of the Convention on Private International Law (the Bustamante Code) includes some provisions dealing with cross-border insolvencies. The Convention has been ratified by 15 countries, (usually with some reservations) including Chile, which ratified it in 1933 and published it in 1934.

The Convention contains a number of provisions dealing with bankruptcy matters. There are eight provisions scattered in three chapters, namely: (i) the unity of the bankruptcy or insolvency; (ii) the universality of bankruptcy or insolvency and its effects; and (iii) the agreement and rehabilitation of the debtor.

The Convention and its application give rise to the following problems:

1. Chile ratified the Convention with general reservations, so that it is necessary to reconcile and integrate the Convention's rules with domestic law. For example, provision 415 of the Convention establishes the plurality of bankruptcy or territoriality by providing that if a person or company has commercial establishments in more than one country it may have as many preventive and bankruptcy trials as the commercial establishments it possesses. This contrasts with the position under domestic law. Giving effect to the Bustamante Code would require that a person who has several commercial establishments can be declared bankrupt in each of them. Thus, the debtor in an insolvency proceeding could be the commercial establishment and need not be a natural or legal person, as required by provision 1 of Book IV of the Commercial Code. This result is inconsistent with the requirement, contained in provision 2 of Book IV of the Commercial Code, for the universality of the bankruptcy which requires the indivisibility of the proceeding so that the bankruptcy proceeding covers all assets and liabilities of the debtor

2. Because the Bustamante Code is an international treaty, its effectiveness is restricted to the signatory states. This involves a number of practical shortcomings in the implementation of its rules, resulting in an increase in the workload of Chilean judges. They are required to determine whether the Bustamante Code is applicable for cross-border cases in accordance with the legal reservations adopted by Chile. In addition, judges have to distinguish whether the country of origin from which the *exequatur* issued has also adopted the Convention on Private International Law, whether it was made with or without reservations, and the content and effect of any such reservations.

3. The requirement that judgments of foreign courts must undergo the *exequatur* procedure before they can be enforced in Chile involves obvious delay, thereby damaging efficiency to the bankruptcy process. In insolvency cases, speed in the redistribution of the debtor's assets to creditors will produce a higher recovery and, therefore, a greater benefit to creditors.

4. Provision 16 of the Chilean Civil Code provides that assets located in Chile are subject to Chilean law, even if their owners are foreigners and reside abroad. Provision 420 of the Bustamante Code however states that actions and rights "*in rem*" remain subject to the law of the location of assets and the competence of local judges. However the Chilean Supreme Court has held that the Bustamante Code should not be applied in cross-border insolvency cases and has required that a foreign creditor must satisfy Chilean law (by satisfying the requirements of and establishing the grounds under Book IV of the Commercial Code) in order to be able to commence a universal liquidation procedure in Chile.

5. Finally, the Bustamante Code does not regulate certain basic procedural aspects of bankruptcy such as foreign creditors notifications, the way in which assets should be liquidated, how creditors should verify their claims and the order in which the foreign claims should be paid.

Based on the situation explained above and the significant increase in cross-border insolvency cases all over the world in the decade of the 90s, it was necessary to update the Chilean Bankruptcy Law through the adoption UNCITRAL Model Law on Cross-Border Insolvency in the Law N.° 20,720 on Insolvency and Entrepreneurship – in force since October 9th 2014.

The UNCITRAL Model Law was adopted in order to clarify the position and improve predictability and transparency. The new law created the necessary rules instrument to resolve disparities and conflicts that may arise between national and foreign laws.

We are certain that the incorporation of this uniform text secures efficiency, expedition and procedural transparency, legal certainty and clarity regarding the actions and measures to be applied, and the effects resulting from the different procedures where the law is applied. Such uniformity is essential to the implementation of equal standards in the different legislation at judicial and administrative coordination in insolvency procedures. Today, almost a year after enforcement of the Law No. 20,720 which incorporates the UNCITRAL Model Law, our courts have not yet received any applications concerning cross-border insolvency cases. When such applications are made, we trust that our judges and authorities will take advantage of and use the new tools to good effect.

Restructuring Solutions in a Scenario of Economic Depression and the Challenge for Everyone involved in These Processes in Brazil

By
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Brazil's economic outlook for the next twelve months appears to be less rosy than predicted by some pro-government politicians. The latest forecast is that of a recession that may take GDP into negative territory for 2015 in the order of -2.5%, and -1.5% for the first half 2016, and currency devaluation against US$ picking 60% in 2015.

The problem is compounded by a series of features that have an adverse impact on microeconomic issues. The crisis was already in the air a few years ago, caused by a series of misguided fiscal policies that were unable to reduce the effect of unproductive interventionism and only amounted to political proclamations. In addition, long-term policies capable of giving impetus to the battered industrial park were never discussed leaving it in a very critical condition.

Today many companies in the textile sector, sugarcane, automotive parts, oil and gas, civil construction industry, heavy construction industry are in deep crisis, in bankruptcy protection or shut down. Added to this is the widespread paralysis triggered by the bribery and corruption scandals, which began and continue as a giant domino to hit companies in sectors involved in the investigations and in all its supply chain, including small and large suppliers.

In this climate of turmoil, financial institutions tend to be more conservative and rigid in their lending activity, reassessing the situation in many sectors and / or in relation to their clients in order to reduce or control their exposure. In Brazil banks are subject to very strict controls by the Central Bank of Brazil, which imposes precise and objective rules relating to provisions for risks inherent to the credits granted.

In this very gloomy scenario, many financial institutions are trying to avoid surprises from customers that may think of filing a judicial reorganization proceeding, or RJ (local Chapter 11). This refers to companies from various sectors showing a still limited deterioration in their business fundamentals, but with an unbalanced capital structure, needing the extension of short-term funding in order to allow greater operational and structural adjustments and / or reduction of financial leverage by selling assets via M&A transactions.

Anticipating these developments, banks are adopting solutions which grant companies the time to work on a turnaround and / or seek partners by selling part or all of their business to reduce debt. In this situation standstill agreements are becoming quite common in Brazil, provided that certain parameters of corporate governance and accountability are met. By doing this outside of a bankruptcy, they are avoiding the destruction of value that normally occurs in lengthy and costly bankruptcy procedures, and, if the agreements are reached very quickly, they also allow the company to start down a recovery path without major disruption to its operations.

This approach is very practical and aims to preserve value to both parties: lenders and borrowers. The question is how to answer a series of issues facing the stakeholders of typical family business in Brazil, such as:

1. Are there enough unencumbered assets left behind to support the raising of new money necessary to deal with the liquidity constraints the business is facing?
2. How to convince shareholders of a typical family business in Brazil to adopt a "flexible" solution in the M&A process?
3. How to sell assets or the whole business in a scenario of economic depression that can last for long periods during which prices remain low and below the desired value?
4. Who is going to manage the turnaround process? and last but not least,
5. How to bring together all creditors, sometimes with conflicting interests, around quick solutions?

The most critical point issue is how to preserve value that would be destroyed by confrontation between debtor and creditors. Brazilian law provides for an out-of-court pre-packed alternative (REJ) that has been seldom used and has become quite a forgotten chapter of the law. A REJ consists in the court approval of a restructuring agreement with creditors representing 3/5 of all credits of a given class. The REJ however is not applicable to tax credits and to secured credits. In other words, the RJE would extend, in the form of a cram-down, a standstill agreement and the subsequent terms and conditions of a negotiated agreement to all creditors of a given class.

The downside of an REJ *vis a vis* an in-court restructuring is the absence of a stay-of-execution until the court confirms the agreement and the impossibility of the debtor selling assets free and clear. On the other hand, the RJE does not require the appointment of a judicial administrator to follow-up on the activities of the debtor with related costs. The priority given by Brazilian law to post-petition credits in an in-court restructuring as a matter of practice is useless because experience shows that as a debtor approaches an in-court restructuring most, if not

all, of its assets are already encumbered by a fiduciary assignment to keep the credit insulated from the effects of a such a restructuring. The priority given to post-petition lenders is subordinated to the rights of fiduciary creditors.

Tough out-of-court negotiations may not be an option in the context of Brazilian small and mid-size companies, but it is an alternative in dealing with Brazilian companies issuing notes abroad under Article 144A / Regulation S rules. This is because such companies are bound to corporate governance and accountability standards and creditors may have a better understanding of the problems that resulted in an insolvency situation. As such, not only financial institutions but also international bondholders have been pursuing such alternative as an option to avoid the pitfalls of in-court restructuring.

Historically court restructurings tend to result in poor recovery because of the deterioration of the operations of the debtor. The fact that creditors cannot propose reorganization plans concurrently with the debtor increases debtor leverage in the process. In addition, in-court reorganizations involve costs relating to the judicial administrator whose role has not been balanced by creditor's committee. As such, in many instances, the role of judicial administrators is carried out in a sub-standard fashion with a total lack of regard to creditors' interests, particularly in those jurisdictions with non-specialized bankruptcy courts which are available only in major city capitals. The creation of creditors' committees would be useful to bring some balance to the authority of the judicial administrator but such an alternative has been disregarded in all major cases in Brazil for lack of proper understanding of the possibilities and the absence of creditor activism. A creditors' committee under Brazilian law enjoys much broader prerogatives than those available to ad-hoc creditors' committees.

These conditions appear to motivate debtors to resort to in-court solutions as opposed to a negotiated agreement with creditors. In the case of OAS – one of the most high profile cases in Brazil to date - the company filed for bankruptcy protection after an attempted corporate restructuring intended to consolidate all creditors of different companies to the detriment of international creditors. Moreover, OAS requested approval of a controversial DIP financing collateralized by its most valuable asset (shares of the São Paulo airport operator) without proper information being given on the need for and allocation of funds. Nevertheless, the request received a favorable opinion from the judicial administrator. So far, nevertheless, a creditors' committee has not been put together by creditors.

One more reason to justify an out-of-court approach by creditors is the absence of financing for companies filing for bankruptcy protection which results in the deterioration of operational capacity and the impairment of a proper turnaround. The only alternative in such cases turns out to be an asset sale or a mere balance-sheet restructuring. Brazil has got a reasonable track record in such types of "turnaround". Sales of assets have

traditionally occurred in sectors facing deep crisis and thus affect strategic investors and the pricing of the asset. In addition, the legal requirements of an acquisition tend to keep strategic purchasers away. As such, many cases initially greeted as astounding successes in practical terms have resulted in the dismantling of the debtor's operations and a poor credit recovery. This is the case of *Parmalat Holding, Agrenco* and *Margen*, which are all bankrupt. It is also the case in relation to Independência, Arantes and Frialto, which all ceased to operate following asset sales. In other words, these were also disguised liquidation procedures under the control of a judicial administrator and the judicial branch where creditors played secondary roles.

These circumstances should also raise questions about the advantages granted by Brazilian law to fiduciary creditors, i.e., secured creditors. The deterioration of operational capacity of the debtor tends negatively to impact the value of the assets subject to the security or lease. Moreover, the outstanding unsatisfied portion of the credit will either be treated as an unsecured credit and paid according to the conditions set forth in the approved restructuring plan for such class of credits (in the case of a lease agreement) or be deemed extinguished even if only partially paid (in the case of a security interest). As to trade finance credits (known as ACC), the privilege granted by Brazilian law will not be effective until the exportation is made. (so that the priority granted by law to trade finance credits is not effective if the Brazilian borrower/exporter does not actually export the products). The same applies to receivables if operations are interrupted (since if a debtor interrupts operations receivables given as collateral will not materialize).

Brazilian experiences all show that cases conducted in the form of a court restructuring could have been conducted out of court with better results. This is true in the cases of *Celpa* and *Rede Energética*. In both situations, controlling shareholders sold their equity interest to third parties. The same applies to Infinity Bio Energy (also sold to third parties) and to OGX where creditors agreed to a debt into equity conversion. *In none of these cases* did the benefits that might have justified a court restructuring materialize. In all these cases there were no asset sales and all financing was provided by the grant of security over the assets thus prevailing *vis a vis* post-petition credits. Moreover, significant fees were due incurred to the judicial administrator in all such cases.

Accordingly, a change in creditors' strategy towards debtors does not come as a surprise. Nevertheless, in the recent cases discussed below, all involving international creditors, bondholders have had to bear major losses mostly because of a lack of appropriate security or no security at all while Brazilian and international banks have been structuring their financing packages to reduce their exposure to a bankruptcy protection filing by creating a security interest over the main assets of borrowers.

In January 2015 GVO, a sugar cane and ethanol producer, missed a coupon interest payment relating to secured notes of USD135m, senior secured notes due 2020 and also to senior secured notes of USD300m due 2019, all issued by Luxembourg-based Virgolino de Oliveira Finance Limited. The company had also issued USD300m unsecured notes due 2022. Since then, the company has been struggling because of a lack of working capital to finance its crop and recently it had to sell certain assets for funding the 2015/16 crop. Negotiations have been dragging on since the default indicating a lack of alternatives for bondholders.

In May 2015 *Tonon Bioenergia* missed a coupon payment of USD12m in connection with an issuance of secured

bonds in the amount of USD 230M due 2024. Despite a default with secured bondholders in July 7, 2015 the company announced the completion of an exchange offer relating to 96.45% of an outstanding USD300m unsecured notes due 2020 and for unsecured notes due also 2020, but with lower interest rates. In addition, some unsecured creditors provided an additional USD70m in new money for working capital though collateralized by certain assets. The case illustrates the lack of alternatives for unsecured creditors in a scenario of depressed prices for the ethanol industry. Following the default on the coupon payment due to secured bondholders, unsecured bondholders were forced into the exchange offer.

In May 2015 Ceagro Agricola, a trading company dealing with soybeans and corn, missed a USD5.5m coupon payment due in connection with an issuance of USD100m senior notes due 2016. Bondholders had a lien on a collection account and a security interest on the quotas of Ceagro. While the value of a security interest on the equity of a distressed asset is debatable, the collection accounts were empty by the time of the default. The majority of the company's total indebtedness of approximately USD 225m was arranged with Brazilian banks in the form of trade finance transactions (known as ACC) which are not affected in the event of a bankruptcy protection filing. However, because the security accounts were emptied, creditors may be constrained to provide additional financing to keep the company operating as the only recovering alternative. An attempt to negotiate a standstill with major creditors failed, among other reasons, for it failed to release the 2014 financial statements. The case indicates a combination of improper collateral structuring and management impairing bondholders ability to foreclose on the receivables guarantee.

Finally, the execution of the M&A process is also a critical piece of this type of solution, because in the end, the effort of the parties involved is focused on preservation of value to sell at the best price and solve the problem of over leverage. However, in a depressed macroeconomic environment an asset sale might not be possible in the short term. Therefore, the M&A solution requires an enormous focus in its execution and great flexibility on the part of all: the shareholders in relation to the various solutions presented by the advisors; and creditors because the chances of getting low bids, in a scenario of economic depression, is much more than a mere probability.

However, while restructuring solutions focusing on divestments would not be favorable to the Brazilian economic climate because of depressed prices and still unpredictable future scenario, it could represent an opportunity for international investors. In fact, in Brazil we see today plenty of very cheap assets due to the crises itself and the deep currency devaluation.

We are convinced that in sectors such as agribusiness, oil and gas, infrastructure and civil construction for example, extra judicial reorganization would be the solution for international financial or strategic investors to look at the beautiful opportunities emerging throughout Brazil.

Baha Mar, Cross-Border Conflict or Cooperation: Provisional Liquidators Appointed in The Bahamas as United States Chapter 11 Proceedings Are Dismissed

By David J. Molton*
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A year ago, the future of the group of entities collectively referred to as "Baha Mar" looked bright. Baha Mar owns a 3.3 million square foot resort complex located in Cable Beach, Nassau, The Bahamas (the "Project"), the development of which is funded by The Export-Import Bank of China ("CEXIM"). If and when finished, the Project will include four new hotels, a Las Vegas-style casino, a convention center, and an 18-hole golf course, and will be one of The Bahamas' largest employers.[2]

Trouble struck the Project in March of 2015, however, when its general contractor, CCA Bahamas, Ltd. ("CCA") — a unit of the Chinese government-owned China State Construction Engineering Corp. Ltd. ("CSCES") — failed to finish construction by the pledged deadline (who was to blame for this failure would prove to be just one of the hotly-contested issues among Baha Mar, its Chinese backers, and the Bahamian government). Although the Project was then estimated to be 97% complete, Baha Mar, lacking both a definitive construction completion date and any meaningful revenue generation, encountered a severe liquidity crisis. On June 29, 2015, Baha Mar and its affiliates simultaneously filed Chapter 11 cases in the United States Bankruptcy Court for the District of Delaware (Carey, J) and sought from the Supreme Court of the Commonwealth of The Bahamas both recognition of the United States proceedings and an extension of the automatic stay triggered upon the Chapter 11 filing to Bahamian legal proceedings involving Baha Mar.[3]

Each of the Bahamian government, CEXIM, and CCA (among others) vehemently opposed recognition. The government claimed that recognition would harm the financial reputation of The Bahamas, already allegedly facing a credit downgrade from S&P as a result of the ongoing problems with the Project. For their part, CEXIM, and CCA argued that recognition and the grant of the requested stay would be against public policy in The Bahamas. On July 22, 2015, the Bahamian Supreme Court issued an oral ruling denying recognition of the US proceedings, reasoning that none of Baha Mar's stakeholders — including its employees, creditors, CSCES, and CEXIM — could have anticipated that US insolvency laws would govern in the event of Baha Mar's insolvency.[4]

The Bahamian government's formal hostility to Baha Mar's Chapter 11 proceedings did not end at its objection to recognition. On July 16, 2015, in stark contrast to Baha Mar's stated intention to reorganize pursuant to a Chapter 11 plan, the government petitioned the Bahamian Supreme Court to order the winding up (i.e., the liquidation) of the Bahamian Baha Mar entities' business and to appoint provisional liquidators for those entities. The latter request was granted weeks later, when the Bahamian court issued a ruling appointing joint provisional liquidators — AlixPartners and KRyS Global — for seven of the Baha Mar entities.[5] The orders, however, constrained the powers of the liquidators to those necessary to preserve Baha Mar's assets pending a hearing on the wind-up petition.[6] Baha Mar quickly issued a press release celebrating the orders, stating that severe restrictions on liquidators' powers indicated that, notwithstanding its earlier denial of recognition to the Chapter 11 cases, the Bahamian court was now willing to allow Baha Mar to proceed in the US with a Chapter 11 plan of reorganization if the US court so allowed.[7] Although Baha Mar's reading of the Bahamian court's orders was not unreasonable, its optimism would suffer a severe check just weeks later in the Chapter 11 cases.

While the Bahamian Supreme Court was considering the provisional liquidators' appointment, the parties continued to battle in Delaware, with CCA and CEXIM each seeking to dismiss the Chapter 11 cases (arguing among other things that the cases were filed in bad faith to allow Baha Mar to maintain control over the Project, rather than submit to a Bahamian liquidation) and hotly resisting Baha Mar's attempts to take depositions and obtain discovery related

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1 See *Declaration of Thomas M. Dunlap in Support of Chapter 11 Petitions and First Day Pleadings of Northshore Mainland Services Inc. and its Affiliated Debtors and Debtors in Possession*, In re Northshore Mainland Servs., Case No. 15-11402 (Bankr. D. Del. June 29, 2015).

2 The Chapter 11 cases were consolidated under the caption In re Northshore Mainland Servs., Case No. 15-11402 (Bankr. D. Del.) (KJC).

3 *In re Northshore Mainland Servs. Inc.* [2015] COM/Com/00039 (Bah. Sup.Ct. July 31, 2015), at ¶ 58. Baha Mar is currently appealing the Bahamian court's ruling.

4 *Status Report Regarding Bahamian Proceedings*, In re Northshore Mainland Servs., Case No. 15-11402 (Bankr. D. Del. Sept. 10, 2015).

5 Id.

6 *Baha Mar Comments On Bahamian Supreme Court Ruling* (Sept. 4, 2015), available at http://www.prnewswire.com/news-releases/baha-mar-comments-on-bahamian-supreme-court-ruling-300138441.html

7 *See* Letter to Carey, J. From Counsel to CCA Bahamas, Ltd., In re Northshore Mainland Servs., Inc., Case No. 15-11402, (Bankr. D. Del. Aug. 6, 2015)

to the Project, and Baha Mar, in turn, accusing the Bahamian government, CCA and CEXIM of engaging in an unspecified conspiracy against Baha Mar.[8]

On September 15, 2015, Judge Carey dismissed the Chapter 11 cases of all but the sole US-incorporated Baha Mar entity. Rejecting CCA and CEXIM's "bad faith" argument, Judge Carey instead found that dismissal would best serve the interests of Baha Mar's creditors, agreeing with the Bahamian Supreme Court that the stakeholders in the Bahamas-incorporated debtors could not have expected that the Project's main insolvency proceeding would take place in the United States.[9]

Importantly, Judge Carey also found that it was proper for him to abstain in favor of the Bahamian proceedings under principles of comity.[10] Judge Carey's decision to defer to those proceedings was plainly influenced not only by general principles of cooperation between courts, but by the fractious relationship among the parties, which was sure to result in contentious, cross-border, multi-forum litigation in two plenary insolvency proceedings if the Chapter 11 cases were allowed to proceed in tandem with the Bahamian liquidation proceeding. Indeed, Judge Carey explicitly noted that he may have decided against dismissal (leaving Baha Mar free to continue prosecuting a reorganizing Chapter 11 plan in the US) if he believed that decision would have brought CCA,CEXIM and the Bahamian government "back to the bargaining table" (to negotiate a resolution that would have resolved both of the pending insolvency proceedings) — however, under the circumstances, he perceived "no greater good to be accomplished" by exercising jurisdiction over the cases.[10] Simply put, the US Bankruptcy Court employed its discretion not to exercise jurisdiction and abstain in favor of the Bahamian proceeding (where Baha Mar's center of main interest indisputably was sited) when it concluded that proceeding with the US case would, under the present circumstances, only result in a free-fall Chapter 11 case and provide no immediate benefit to all the stakeholders. What started out as an apparent conflict between the two courts in effect became cooperation.

Negotiations are said to be ongoing between Baha Mar's executives, the Bahamian government, CSCES and CEXIM regarding if and when the Project will fully open. Hearing on the Bahamian government's petition for orders directing the liquidation of Baha Mar's business is scheduled for November 2, 2015 before the Bahamian Supreme Court. In the meantime, international insolvency observers — to say nothing of Baha Mar's 2,400 staff members — continue to await a resolution.

[8] *Memorandum Regarding Motions to Dismiss Cases*, In re Northshore Mainland Servs., Inc., Case No. 15-11402 (Bankr. D. Del. Sept. 15, 2015), at 21-22.
[9] Id. at 23.
[10] Id.at 21-22.

INSOL Dubai

24th – 26th January 2016

Madinat Jumeirah, Al Sufouh Road, Dubai, United Arab Emirates

Final booking deadline 15 December 2015

We are delighted to announce that by the early booking deadline we had over 400 registrations to attend INSOL Dubai our Annual conference representing the Europe, Africa, Middle East region. We have a limited number of delegate places at the conference so we do advise not to wait until the last minute to make your booking.

The Main Organising Committee are in the final stages of preparation for what will be an exciting technical programme with many different presentation styles and opportunities for interaction with the speakers and delegates.

We are delighted to announce that our keynote speaker is Mrs. Al-Ghunaim who is the Vice Chairman and Group Chief Executive Officer of Global Investment House. She Co-founded Global in 1998 and has been managing the company since then to become a prominent asset management and investment banking firm in the region.

Mrs. Al-Ghunaim was involved in several milestone transactions including one of the largest M & A transactions in the telecommunications sector for USD10.7bn, the raising of USD10bn in equity capital, and USD3bn in conventional & Islamic debt, and the management of USD4bn on behalf of clients, she has over 31 years of experience in the financial sector mainly in asset management and investment banking.

She has been recognized as a role model for Arab women and women in the Islamic world. She has received several accolades from industry leaders including the "Banker Middle East Industry Award" (BME) for her outstanding contribution to the financial industry. The Wall Street Journal has named her on its list of 50 "Women to Watch". Forbes (US) ranked her for three consecutive years as one of the World's 100 most influential women. We look forward to welcoming Mrs. Al-Ghunaim to our conference and hearing her insight into the region in her keynote address.

The technical programme will include a vibrant mix of topics with speakers from around the world including our immediate Past President James H.M. Sprayregen, Kirkland & Ellis LLP; Patrick Ang, Raja & Tann Asia, Eric Lalo, Lazard Ltd, Anke Heydenreich, Attestor Capital LLP and Glen Davis QC, South Square to name just a few of those taking part in the technical programme covering subjects such as "What next for Middle Eastern restructuring and what role will Islamic financing play?; View from the Islands: how does common law compare with statutory principles? and Directors duties revisited; fight or flight.

Our conference will give our members the opportunity to meet new members in this dynamic region through our growing network and learn more about our work in the region. It will also be a superb opportunity to meet up with old friends as well as hearing about all the latest cross-border developments that have taken place since INSOL San Francisco.

It promises to be a very interesting programme where we will be using interactive voting methods and providing an updated improved App for the conference so all this combined with the venue of Dubai it is a conference not to be missed.

We still have a number of sponsorship opportunities available and if you would like further information please contact Claire Broughton, Executive Director, INSOL International on **claireb@insol.ision.co.uk**

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International Association of Restructuring, Insolvency & Bankruptcy Professionals

Cross-Border Insolvency Proceeding.

The Devil is in the Details: Legal Requirements for Incorporating Documents in Latin America

By Rodrigo Callejas,
Fellow, INSOL International

Fabian Zetina
and
Emanuel Callejas
Carrillo y Asociados
Guatemala

In the matter of cross-border insolvency proceedings involving Latin America jurisdictions, in which the assets and affairs of the debtor are subject to control and supervision by a foreign court for the purpose of reorganization or liquidation, foreign representatives and their counsel face the challenge of two or more different converging legal systems, which in turn involve two or more different legal cultures as well.

Providing quality service to our international clients in the area of insolvency and asset recovery in the region of Latin America has involved channeling letters rogatory between judicial authorities, authorizing and registering Powers of Attorney, and enforcing judgments such as requests for collaboration or recognition of foreign proceedings. In certain cases, certain evidentiary means such as expert reports on foreign law, witness testimony, and accounting certifications have also been gathered in compliance with strict legal requirements that vary among jurisdictions.

Despite the fact that many local and international efforts have been made in order to improve the efficiency of proceedings involving two or more jurisdictions, achieve standardization and efforts to create consistent case law and legislation, there are still situations, that may seem minor to practitioners, that create legal barriers and obstacles to Administrators/Receivers and Liquidators in the performance of their duties.

In Latin America, one difficulty arises from the need to comply with certain formalities in order to give effect to and incorporate legal documents from certain jurisdictions. It is a general rule applicable to civil law jurisdictions that documents originating abroad, especially in cases where these are produced in different languages, have to be "legally" incorporated if they need to be registered locally or used by local counsel. In the case of Guatemala for example, for documents originating abroad that are intended to have effects in the country, the Foreign Affairs Ministry must legalize them. If the documents are in a foreign language, these must be translated into Spanish by a qualified translator in the country; in cases where a translator is not available for a certain language, these will be translated under a sworn declaration by two persons that speak and write both the foreign language and Spanish, and whose signature will be legalized by a notary. In addition to these requirements, powers of attorney and documents intended to be publicly registered must be inserted to a notarial protocol, and the corresponding authorities will act upon copy of such deeds.

Additionally, Guatemala law states that when Guatemalan tribunals are to apply foreign law, the party invoking such law, or the party objecting to their application, must justify its text, date of enforcement and nature, by means of a certification from two qualified attorneys in the country of the foreign law and legislation in question, certification that must be legalized in order to be filed. Without prejudice to this, a national tribunal may question these facts, on its own initiative or by means of a request, by diplomatic means or others recognized by international law.

Guatemalan civil procedural law also states that documents issued abroad may produce effects in Guatemala, only if: 1) all local requirements are met, or the documents have been issued before diplomatic or consular authorities; and 2) the acts or contracts are not contrary to Guatemalan law. In fact, one of the specific criteria for enforcing a foreign judgment in Guatemala is that it meets all necessary requirements for it to be considered authentic.

As will thus be clear, from the Latin America perspective, notaries or public notaries as they are also known, may assume an important role, critical to the incorporation of documents pertaining to a cross-border proceeding, such as commonly required powers of attorney, accounting certifications, and foreign judgments. This shows a contrast between civil-law tradition and common-law tradition.

By comparing their roles, we see that notaries in common law jurisdictions main role is to authenticate signatures, affidavits and the preparation of wills. Civil law notaries, many also qualified as attorneys, are however empowered

to witness acts and circumstances in their presence, and authorize contracts, locally and abroad, which are required to create effects locally. Common actions include acting as witnesses, authorizing deeds, and authenticating signatures and copies of original documents.

Complementary to the involvement of notaries in legalizing documents the Convention Abolishing the Requirement of Legalization for Foreign Documents was concluded on 5 October 1961. The Convention applies to public documents executed in one territory that have to be produced in another. States party to the Convention are required only to comply with the formality of a certificate (commonly referred to as the "apostille") placed on the document in the form of a model there provided, and issued at the request of the person who has signed the document or of any bearer. The Convention seeks to accelerate the incorporation of foreign public documents by establishing an international certification comparable to a notarization or legalization in domestic law. According to the Hague Conference on Private International Law as of September 2015, there are 108 contracting states who are parties to this Convention[1]. In the case of Guatemala, a non-signatory party, the incorporation of a foreign document may take up to 10-15 business days, depending on the origin of the document, which increases the expense involved and creates delays.

In addition to the role of notaries and the process of legalization of documents through the various routes that may be applicable, one last hurdle is to be met prior to authenticating documents locally, namely legal translation to local language. This process also involves time and costs to consider, as well as confidentiality assurances on the procedure and sharing of documents to a third-party.

Experience has shown our team that our international clients require a clear step-by-step guide when coming to Latin American jurisdictions as regards the completion and preparation of necessary documents to achieve their goals. Once documents comply with said "international" requirements, a local handling and follow up with institutions on the final steps for authentication are needed. Most public offices have specialized departments handling international matters, we have had experience dealing with the Ministry of Foreign Affairs, the Registry of Powers, the General Mercantile Registry, the Supreme Court of Justice and the Public Ministry.

Foreign representatives and their counsel are required to be aware of these details. Even if they appear to be only administrative details they can cause significant time considerations and expenses to foreign proceedings. These are just a few examples that show how apparently minor legal barriers can have a legal, economic and operational effect on the enforcement of legal proceedings in Latin America. The conclusion is that foreign representatives and their counsel need to be aware of these compliance issues, and on a macro level, more efforts need to be made both in the local and international arena in order to simply the processes involved and reduce costs.

[1] http://www.hcch.net/index_en.php

RICHARD TURTON AWARD, 2015

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 Conference and have a technical paper published.

In recognition of those aspects in which Richard had a special interest, the award for 2015 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.

Applications 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 Waiswa Abudu Sallam from Uganda. Waiswa works for the Uganda Revenue Authority in the Debt Collection Department. He is currently studying for a Master of Laws in Corporate and Insolvency Law at Nottingham Trent University, UK (by distance learning). This is the first time we have had a winner from Uganda. Previous winners have come from Belaruse, India, Latvia, Lithuania, Poland, PRC, Romania, Russia and Serbia.

As part of the award, Waiswa was invited to attend the INSOL Europe Conference which was held on the 1-4 October in Berlin, Germany. He will be writing a paper that will be published in summary in one or more of the Member Associations' journals and in full on their websites. We would like to congratulate Waiswa for his excellent application and also thank all the candidates who applied for the award this year. There were many excellent submissions and the judges task was very difficult this year.

Sponsored by:

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Association of Business Recovery Professionals R3 Rescue Recovery Renewal

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Primeo v Herald – More Certainty for Unpaid Redeemers

By Nicholas Fox
Fellow, INSOL International
Mourant Ozannes
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The recent decision of the Grand Court of the Cayman Islands in the case of *Primeo Fund (in Official Liquidation) v Michael Pearson as an Additional Liquidator of Herald Fund SPC (in Official Liquidation)* has brought some welcome clarity as to how liquidators will treat the claims of redeemed, but unpaid former shareholders of Cayman companies (Unpaid Redeemers).

Until now, it had not been clear whether Unpaid Redeemers would rank as creditors and therefore be paid in full before any monies are distributed to unredeemed shareholders, or whether, in certain circumstances, they would fall to be paid *pari passu* with unredeemed shareholders.

Other offshore jurisdictions have grappled with the same question in the relatively recent past. For example, in the 2013 BVI case of *Somers v Monarch Pointe*, the BVI High Court analysed the operative sections of the Insolvency Act 2003 and held that the claims of Unpaid Redeemers should rank alongside the claims of unredeemed shareholders. The Eastern Caribbean Court of Appeal disagreed, holding that Unpaid Redeemers were, in fact, deferred creditors and as such entitled to have their claims against the company satisfied in priority to any claims by unredeemed shareholders.

In the Cayman Islands, the question is also governed by statue, namely section 37(7) of the Companies Law. The operative parts of this statute (which are very different from their BVI counterparts) are:

- section 37(7)(a), which states:

  where a company is being wound up and, at the commencement of the winding up, any of its shares which are or are liable to be redeemed have not been redeemed… the terms of redemption… may be enforced against the company.; and

- subjections (i) and (ii) which contain carve-outs from this enforceable right, including if the company was insolvent between the period on which the redemption was to have taken place and the date of winding up; and

These sections were first enacted in 1987 and have not changed materially since then. They were based on (now repealed) equivalent sections of the English Companies Acts 1981 and 1985. As a consequence, they were drafted well before the Privy Council clarified precisely at what stage a redemption would be completed, which it did in the 2010 case of *Culross v Strategic Turnaround*.

In *Strategic Turnaround*, both the Cayman Grand Court and Court of Appeal had held that a redeeming shareholder remains a member of a company until he has received payment for his shares and his name has been removed from the company's register of members.

The Privy Council disagreed, concluding that the issue depended entirely upon the construction of the individual company's Articles, and that it was *not to be approached on the basis of any a priori view that, until payment of the redemption proceeds, a shareholder must or should necessarily remain a member of a company…* For the company in question, the Privy Council determined that the redemption had taken place on the Redemption Date, with the remittance of redemption proceeds being treated as a matter of supplementary procedure.

Similarly, in *Herald* it was common ground between the parties that the relevant redemptions had taken place before the commencement of the company's winding up. On that basis, the Grand Court held that because the shares in question had been redeemed, the claims fell outside section 37(7), which only applied to shares *which have not been redeemed*.

As a result of this decision, it is now clear that the claims of Unpaid Redeemers fall outside section 37(7). Therefore, they will always be paid in priority to any claims by unredeemed shareholders, even if the company was insolvent when the redemptions took place and, therefore, the claims could not have lawfully been paid prior to the company's liquidation.

Unredeemed shareholders may well feel that such an approach is harsh and that it unfairly relegates their interest behind that of any Unpaid Redeemers. However, the rationale for the approach is investor certainty, and the benefit all investors have from knowing in advance that their contractual bargain will be given effect by the Courts. In that respect, the decision in *Herald* builds on the previous decisions of the Privy Council in *Strategic Turnaround and Fairfield*, which have stressed the desirability of certainty and giving effect to a fund's constitutional documentations.

The decision also considered the circumstances in which liquidators can rectify a company's register of members in the event of fraud. This is an issue that the Grand Court will consider in more detail on a subsequent occasion. However, one noteworthy part of this decision was that the Grand Court stated that the power to rectify would only apply to *those recorded as shareholders as at the commencement of the liquidation*. Therefore, unless they still held other shares, the power would not affect Unpaid Redeemers, as by the commencement of the liquidation they had already become creditors and were no longer shareholders.

This decision is subject to appeal.

DOCA Held to Extinguish Secured Debts

By
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Introduction

The Supreme Court of New South Wales in *In Re Bluenergy Group Limited (Subject to DOCA) (Administrator Appointed)* [2015] NSWSC 977 (*In Re Bluenergy*) recently had cause to consider whether a secured creditor who did not vote in favour of a proposal for a deed of company arrangement (DOCA), was able to rely on its security to appoint administrators to the company after the DOCA had been executed.

Background

In September 2013, Keybridge Capital Limited (Keybridge) advanced $300,000 to Bluenergy Group Limited (Bluenergy) and took a charge over its assets.

In April 2014, Bluenergy was placed into administration.

In July 2014, Bluenergy's creditors voted to adopt a DOCA proposal and in August 2014 the DOCA was duly executed. Keybridge did not vote in favour of the DOCA, preferring to abstain.

In March 2015 while Bluenergy was still subject to the DOCA, Keybridge appointed an administrator to Bluenergy pursuant to section 436C of the *Corporations Act 2001* (Cth) (Corporations Act).

The deed administrators of the DOCA challenged the appointment of the administrator on several grounds. One argument advanced was that the DOCA had extinguished Keybridge's secured debt and consequently Keybridge was unable to rely on section 436C of the Corporations Act to appoint an administrator to Bluenergy.

Keybridge contested the assertion that its secured debt had been extinguished by the DOCA, relying on section 444D(2) of the Corporations Act which provides that a DOCA does not prevent a secured creditor from realising or otherwise dealing with its security interest, unless the secured creditor has voted in favour of the DOCA or the court otherwise orders.

The decision

Justice Black held that section 444D(2) of the Corporations Act operated to preserve Keybridge's right to realise or otherwise deal with its security interest in the secured property.

However His Honour found that the section did **not** preserve Keybridge's secured debt, which had been extinguished by the DOCA. This meant that after execution of the DOCA Keybridge was no longer a creditor of Bluenergy irrespective of the fact that Keybridge had not voted in favour of the DOCA.

In reaching this conclusion, His Honour drew a distinction between: (a) Keybridge's personal rights (that is, the debt owed by Bluenergy) which were extinguished by the DOCA; and (b) Keybridge's proprietary rights (that is, its interest in Bluenergy's property pursuant to its charge) which were not extinguished by the DOCA.

Importantly, Justice Black's decision finding was made in relation to a current secured debt – it was not limited to the future or contingent debts of a company subject to a DOCA as was the case in *Australian Gypsum Industries Pty Ltd v Dalesun Holdings Pty Ltd* [2015] WASCA 95 (*Australian Gypsum*)[1].

His Honour rejected submissions made on behalf of Keybridge that it was meaningless to preserve Keybridge's proprietary interest if there was no underlying debt to recover, and that there could sensibly be no "security interest" (as defined by the Corporations Act) if there was no associated debt in existence.

Justice Black's decision was guided, at least in part, by the majority's judgment in *Australian Gypsum*, together with considerations of the "practical difficulties" which His Honour considered would arise if secured debts survived the execution of a DOCA. Justice Black was concerned to ensure that companies coming out of voluntary administration have a "fresh start" unburdened by debts (either unsecured or secured). This is an outcome which His Honour considered was consistent with the general policy of Part 5.3A of the Corporations Act.

Interestingly, His Honour concluded that notwithstanding that Keybridge was no longer a creditor of Bluenergy, section 444D(2) of the Corporations Act meant that it retained the right to appoint an administrator to Bluenergy pursuant to section 436C of the Corporations Act. However, His Honour was persuaded to terminate the administration under section 447A of the Corporations Act because, among other things, there was no utility in it where Keybridge's debt had been extinguished.

Implications

Since the introduction of Part 5.3A of the Corporations Act almost 25 years ago, it has been accepted that secured creditors, subject to their express contrary agreement, stood outside the DOCA process. Justice Black's decision, together with that of the Western Australian Court of Appeal in *Australian Gypsum,* fundamentally alters this position.

[1] In *Australian Gypsum*, a majority of the Court of Appeal held that section 444D(2) of the Corporations Act did not prevent the extinguishment by a DOCA of future and contingent secured claims.

If correctly decided, *In Re Bluenergy* and *Australian Gypsum* mean that for the first time secured creditors will have been brought squarely within the ambit of a DOCA and their secured debts will be subject to extinguishment in the same way as applies to the debts of ordinary unsecured creditors. The only right preserved will be the secured creditor's ability to, in effect, enforce its security and then only in relation to secured debts which had crystallised as at the "relevant date" (usually the date of appointment of administrators).

Policy considerations, in particular the rehabilitative policy underlying Part 5.3A of the Corporations Act, seemed to weigh heavily on Justice Black and the Western Australian Court of Appeal, warranting interference in the rights of the secured creditor. However, we respectfully note that Part 5.3A has been operating effectively for close to 25 years on the basis that it did not extinguish secured debts.

Further, there may be a number of unintended consequences flowing from the decision in *In Re Bluenergy*. By restricting secured creditors (post execution of a DOCA) to their proprietary rights, secured creditors could possibly be deprived of rights arising outside the ambit of the security agreement which may not be of a proprietary nature.

There may also be implications for property acquired after the relevant date. In *In Re Bluenergy,* Justice Black framed the test for identifying proprietary rights which survived a DOCA by reference to the position of the secured creditor as at the relevant date. It arguably follows that if an insolvent company acquires property after the relevant date, the secured creditor's proprietary interest in that property will not be preserved by section 444D(2) of the Corporations Act, ie because the interest did not arise until *after* the relevant date.

Questions also arise concerning the de-coupling of secured debts from their accompanying securities. There is authority dating back to the 1800s that the release of a secured debt automatically releases the accompanying security.[2] This line of authority would suggest that upon a DOCA discharging a secured creditor's debt, there will be an automatic discharge of the secured creditor's associated security. *In Re Bluenergy* does not address or seek to reconcile this established line of authority with the operation of section 444D(2) of the Corporations Act. This may be, in part, because Counsel for both parties in *In Re Bluenergy* proceeded on the basis that if the DOCA extinguished the secured debt, no right of enforcement by the secured creditor was possible.[3]

Another issue is the interplay between the judgment of Justice Black and the High Court of Australia's decision in *Willmott Growers Group Inc v Willmott Forests Ltd* (*receivers and managers appointed*) *(in liquidation) & Ors* [2013] 304 ALR 80 (*Willmott*). In that case a majority of the High Court held that the disclaimer of a lease operated to bring to an end the tenant's proprietary interest in the land as lessee. Fundamental to this outcome was a rejection by the High Court of the de-coupling of contractual rights arising under the lease from the lessee's associated proprietary interest in the land. This was because the High Court considered that the existence of the latter was dependent on the continuing rights of the tenant arising under the lease. An analogy would seem to exist with the position of a secured creditor whose ongoing rights as chargee depend on the continuing efficacy of the underlying security agreement. Viewed this way, Justice Black's judgment may sit somewhat uneasily alongside the High Court's decision in *Willmott*.

Concluding observations

We anticipate that as a result of the decisions in *In Re Bluenergy* and *Australian Gypsum* secured creditors will become far more proactive in responding to DOCA proposals and potentially more interventionist in their approach towards voluntary administrations. This may include secured creditors voting against DOCA proposals which do not expressly or adequately protect their interests, and the pre-emptive appointment of receivers and managers to realise secured assets.

We expect that the interaction of DOCAs and secured debts will be the subject of further consideration by the courts and may well require the High Court's imprimatur, or legislative intervention, before being finally resolved.

[2] See for example *Cowper v Green* (1841) 7 M&W 633.
[3] See at [35]-[36].

"Too Big to Fail" Intersects Chapter 15: Recognition Granted to Irish Bank Resolution Corp.

By Van C. Durrer, II

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As a consequence of the global financial crisis of 2008, two huge Irish financial institutions, Anglo Irish Bank Corporation Limited and Irish Nationwide Building Society were forced to liquidate in an insolvency proceeding under Irish law. The assets of those companies, measuring over €25 billion, included approximately €5 billion in the United States. In September of 2013, the Special Liquidators of these financial institutions sought relief under Chapter 15 of the US Bankruptcy Code in order to facilitate the disposition of the US assets. Only recently, in August of 2015, did the Special Liquidators receive final recognition of the Irish liquidation proceeding. This article examines two unique aspects of the Irish liquidation and how they impacted recognition in the US.

Background

By the end of September 2008, the collapse of the share price of Anglo Irish was so severe that its very survival was in jeopardy. INBS was in no better condition, and the Irish government was forced to intervene. Specifically, the Irish government (a) issued a blanket guarantee for the liabilities of both companies, (b) provided funding to recapitalize the companies, and (c) issued promissory notes to both, which they could then pledge in order to obtain additional emergency financing from the Central Bank of Ireland. Unfortunately, none of these measures were sufficient to stabilize the Irish financial market. By January 2009, the Irish government determined that the only solution was to nationalize Anglo Irish, which was accomplished by statute. The Irish government later nationalized INBS in 2010.

In 2010 the Irish government passed the Credit Stabilisation Act, and on July 1, 2011 Irish Bank Resolution Corp., a state-owned banking entity, was created. IBRC was specifically created as a successor to Anglo Irish and INBS, and the companies were later both merged into IBRC. It subsequently became clear that the exposure of the Irish government to the liabilities of IBRC was far greater than anyone had anticipated, and as the severe effects of the 2008 global financial crisis continued to ripple through the Irish economy, the Irish government determined that it was necessary to wind down IBRC in order to restore the financial position of the state and re-establish Ireland's access to the international debt markets.

Accordingly, on February 7, 2013, the Irish Parliament passed the Irish Bank Resolution Corporation Act of 2013 which was signed into law immediately thereafter. On February 7, 2013, pursuant to the authority granted under the IBRC Act, the Irish Minister for Finance appointed two Special Liquidators to assume control of and liquidate the assets of IBRC under the IBRC Act. That appointment also marked the commencement of an Irish liquidation proceeding with respect to IBRC. Under the IBRC Act, the operations of IBRC were controlled by the Special Liquidators, subject to the supervision of the Finance Minister and the High Court of Ireland. Absent the IBRC Act, the Irish Companies Act of 1963 would have determined the liquidation of IBRC. Although the IBRC Act adopted the priority and distribution schemes set forth in the Companies Act, the IBRC Act did make modifications peculiar to IBRC's liquidation, including with respect to the level of High Court supervision of the liquidation process. In addition, the IBRC Act expressly precluded any challenge of IBRC's pledge of the notes from the Irish Government to the Central Bank of Ireland.

Chapter 15 recognition

On August 26, 2013, the Special Liquidators of IBRC filed a petition in the US Bankruptcy Court for the District of Delaware for recognition of the Irish liquidation proceeding in the US under Chapter 15 of the Bankruptcy Code. The petition soon drew a number of objections on two primary grounds, among others. First, objectors argued that the *sui generis* aspects of the IBRC Act and the resulting liquidation in Ireland were motivated to protect the Irish government and that such motives precluded recognition. Second, the alleged control by the Finance Minister as well as the prohibition on any challenge of the pledge to the Central Bank of Ireland were inconsistent with US public policy.

The IBRC Act expressly provides that one of its purposes is "restoring the financial position of the Irish State" in addition to the more obvious purpose of winding up IBRC. In addition, insolvency statutes drafted for one specific legal entity are, by any measure, rare. Nonetheless, the US Bankruptcy Court was unpersuaded that alleged motives underlying the IBRC Act would serve as a bar to recognition, assuming that the required elements of recognition were otherwise present.

The US Bankruptcy Court therefore analyzed each element necessary for recognition and found that, although the IBRC Act "changed a substantial portion" of the Companies Act (which would ordinarily apply to the liquidation of an Irish company), the Irish liquidation nonetheless retained characteristics sufficient to qualify for recognition. Specifically, the US Bankruptcy Court found that the Irish liquidation allowed for sufficient due process and was consistent with the principles of universalism and a collective, uniform process which were the hallmarks of global insolvency process.

Likewise, the US Bankruptcy Court discounted the *alleged*, potential influence of the Finance Minister and determined that such influence did not violate US public policy. In other words, the US Bankruptcy Court found that the IBRC Act was not in conflict with the efforts of the US Congress to contain the 2008 financial crisis. Rather, the US Bankruptcy Court found that Ireland had deployed many of the same techniques (treasury, rather than court, oversight and insulation of key transactions) as had Ireland such that Ireland's fiscal policy was *aligned* as opposed to *in conflict* with US public policy.

Ultimately, in the face of one of the greatest financial crises of all time, the US Bankruptcy Court determined that foreign sovereignty should be respected, universalism was a hallmark of Chapter 15 and regulators charged with oversight should receive appropriate deference. Although certain objectors appealed, the US District Court for the District of Delaware determined that the decision of the lower court should be affirmed. No further appeal was taken.

INSOL International Insolvency and Trusts One Day Seminar – 9 September 2015

Report by Simone Fitzcharles
Lennox Paton
Bahamas

On 9 September 2015 INSOL International hosted 127 guests for the Insolvency and Trusts One Day Seminar, a much-anticipated event. This was our second seminar in the Channel Islands held in association with our member association ARITA.

The focus of the day's sessions was on topical insolvency and trust issues and particular instances in which tension exists between the two areas of the law. Naturally, the event attracted delegates from many jurisdictions including the UK, Jersey, Guernsey, the US and the Caribbean, including a delightful blend of judges, insolvency practitioners, regulators and academics. I was pleased to encounter not only persons working in the area of insolvency but pure trust practitioners as well, who were equally keen to hear the discussions on the well-chosen topics.

Seminar Chairs, Tim Le Cornu and Anthony Dessain

At the outset, the delegates and speakers were warmly welcomed by Tim Le Cornu of KRyS Global, a Fellow of INSOL International followed by opening remarks by Anthony Dessain of Bedell Cristin, both of whom ably co-chaired the seminar.

Justice Norris, Alan Binnington and John Greenfield

The first session launched into a lively discussion on 'insolvent trusts' with an overview of the traditional English position in relation to personal liability of trustees by Sir Alastair Norris, Justice of the Royal Courts of Justice, UK. He explained why liability for transactions entered into on behalf of a trust rests personally with the trustee and that the only means of access to a trust fund for a counterparty creditor is the individual trustee's right of indemnity. Justice Norris felt that it is possible for a trustee to limit his liability to a counterparty in the original contract with that third party, but he advised that care should be taken in drafting such terms so as to ensure that the trustee will be able to draw upon the full value of the trust assets to satisfy his liability. John Greenfield of Carey Olsen and Alan Binnington then discussed and compared those statutory provisions in Guernsey and Jersey which removed the traditional personal liability of the trustee and placed recourse firmly against the trust assets in certain circumstances. These provisions were enacted to facilitate the Trust industry and to assuage the anxieties of professional trustees in the Channel Islands. The panel engaged in a vigorous examination of recent case law in Jersey and Guernsey which concerned the applicability and interpretation of Article 32 of the Jersey Trust Law and Article 42 of the Guernsey Trust Law in situations where trustees incurred liability in carrying out transactions on behalf of trusts.

Rob Gardner, Alan Roberts, Catherine Newman QC.

Robert Gardner of Bedell Cristin chaired Session 2 which featured panelists, Catherine Newman QC of Maitland Chambers and Alan Roberts, Grant Thornton for an engaging review of a specific scenario in which trustees in bankruptcy would have to seek to access the assets of a trust of which the bankrupt is a beneficiary with important trust powers. Alan Roberts took the role of the trustee in bankruptcy and thoroughly explained all of the steps he would take from the beginning through to a successful settlement with all of the parties, while Catherine Newman explored the position of the trustee and expertly dealt with any case law which would affect the progressing positions between the parties. Session 2 was instructive as panelists gave delegates ideas for solving the seemingly insurmountable issues posed.

In Session 3, all attendees had the pleasure of being informed and entertained by a mock court application for a freestanding injunction to freeze the assets of a trust in order to prevent their dissipation by a debtor who was both settlor and beneficiary of the trust. The scenario hinged upon a refusal by the trustees to give an undertaking to the creditors that they will not deal with the trust assets pending determination of the creditor's claim. The application was heard and determined by Justice Norris who very kindly served as the 'court'. Advocating for the injunction was renowned barrister Elspeth Talbot Rice QC of XXIV Old Buildings, London. The application was ably countered by Ian Swan, head of the dispute resolution team at Babbé Advocates, Guernsey. The presenters were well-matched and kept delegates on the edge of their seats. Justice Norris interjected with astute observations based on his vast experience on the Bench, while delegates attempted to guess which way he would rule. The session drew out the requirements for obtaining a freestanding freezing injunction in Guernsey to assist foreign legal proceedings, not the least of which was to show exceptional factors where no substantive cause of action was brought against the defendant in the jurisdiction. The presentation demonstrated that the exercise of the court's discretion in such matters requires a fine balance of several factors to be gleaned from the particular circumstances of each case.

The second part of the Seminar commenced with 'Hell Hath

No Fury – Divorces, Bankruptcy and Trusts'. Positioned to carry on the theme of the tension between trusts and insolvencies, Paul Smith, Conyers Dill & Pearman moderated the discussion/debate between Alex Carruthers of Hughes Fowler Carruthers and Steven Kempster of Withers World Wide. The panel posed a problem which enabled them to consider the respective rights of a husband and wife who are going through a divorce where there are trusts with lucrative assets. Delegates were made aware of factors which a family court might consider in weighing the entitlement of parties in a divorce to marital assets, inclusive of the overarching concept that the couple is deemed to have created the wealth together. There was clearly an issue whether the trusts settled by the husband could be considered "nuptial settlements" thereby giving the wife some entitlement to share in the assets. Much information was shared by this panel concerning who should be sued by the wife, methods by which she can access information about the trusts and chances of success in some of the trust-friendly jurisdictions. The trustees' perspective was also fully discussed in relation to all points.

In the fifth Session the question whether insolvent trusts should be subject to a statutory regime was explored. The discussion was relevant since increasingly some propound the view that there should be such a regime because (1) trustees enjoy limited liability in Guernsey and (2) there is uncertainty as to the priority of creditors sharing in insolvent trusts. This session was chaired by Jeremy Wessels of Mourant Ozannes, while Charles Thomson of Baker & McKenzie and James Gleeson of Dickinson Gleeson gave opposing views on the issue. The creditor-friendly position was put forward that there should be a statutory regime for insolvent trusts so as to promote certainty and fairness and to make financial institutions more accountable. It was argued that at minimum there should be a model code governing these questions and to which jurisdictions could subscribe (similar to the UNCITRAL Model Law). The trustee-friendly approach (against a statutory regime) included the argument that a creditor who fails to consider whether his counterparty had the authority to enter into a transaction did not act prudently, so the beneficiaries of a trust should not have to suffer for the creditor's carelessness. In lieu of a statutory regime, directions from the court could be sought on these issues. This discussion provided delegates with an in-depth look at both sides of the debate with commentary on the effect of recent case law and a lively question and answer session afterwards.

Cross-border mutual assistance and enforcement was the subject of the final Session of the Seminar. Samantha Keen, Chair, EY, Rod Attride-Stirling, ASW Law, William Callewaert, KPMG and Nigel Sanders, Ogier examined the scope of mutual assistance as defined by recent case law at the highest level. The panel discussed the *Cambridge Gas*[1] decision (thought to be the high-water mark for mutual assistance) the scope of which was significantly narrowed by later decisions like *Singularis*[2]. The legal

[1] ***Cambridge Gas Transportation Corporation v. Official Committee of Unsecured Creditors of Navigator Holdings plc*** [2006] UKPC 26. In this case, the Privy Council found that jurisdiction at common law was derived from the principles of universality and assistance. This enabled the Isle of Man to assist in recognising and giving effect to US Bankruptcy proceedings. Lord Hoffman stated that such recognition would give the foreign officeholder those remedies to which he would have been entitled if the equivalent proceedings had taken place in the domestic forum.

[2] ***Singularis Holdings Ltd v PricewaterhouseCoopers*** [2014] UKPC 36. In this case the Privy Council recognised universalism as a part of the common law but declined to agree with Lord Hoffman's dictum; instead they found that any relief which may be obtained by a foreign officeholder in a domestic court must be subject to the law and public policy of the local jurisdiction. As such, it was found that Bermudan courts could not apply statutory provisions which were applicable to Bermudan liquidations, to sanction production of documents and information to assist a Cayman liquidation. The common law could not make statutory provisions which are applicable in a domestic liquidation accessible to a foreign insolvency.

Samanthan Keen, Rod Attride-Stirling, Nigel Sanders, Will Callewaert

positions in Guernsey, Jersey, Bermuda and the UK were discussed in detail. It was also aptly observed that in relation to the small jurisdictions such as Bermuda, the scope for mutual assistance could be broadened by legislative reform but this does not happen quickly. Generally, identified means of obtaining mutual assistance were by letters of request, the inherent jurisdiction of the court, the English statutory regime (as available in Guernsey and Jersey) and the local laws of a particular jurisdiction. The discussion was particularly interesting as well because first-hand accounts were given by panelists who had been directly involved with key cases on this topic.

The Insolvency and Trusts One Day Seminar provided significant value for all attendees in terms of enhancing their knowledge, encouraging ideas to flourish and networking with others who practice in the insolvency and trust fields. Big thank you to the sponsors of the event – Platinum Sponsors – Bedell Cristin and Carey Olsen; Gold Sponsor – Calunius Capital; Coffee Break Sponsor – KRyS Global; Lunch Sponsor – Grant Thornton; and Dinner Sponsors – EY and Ogier. All in all, the event was a resounding success.

The Singular Minority - In the Matter of X (a Bankrupt)

Alasdair Davidson and Jasmin Semlitsch
Bedell Cristin Guernsey Partnership
St Peter Port, Guernsey

In the recent case of *In the matter of X (a bankrupt)*[1], Lieutenant Bailiff Hazell Marshall QC sitting in the Royal Court of Guernsey declined an invitation to invoke a supposed inherent jurisdiction to grant an order to an English trustee in bankruptcy compelling third parties located in Guernsey to provide information as to the affairs of an English bankrupt.

To compel third parties under possible threat of sanction is a draconian course and can be found to exist usually only under statutory powers. The English Court has those powers (section 366 Insolvency Act 1986) and the usual course would be for a trustee to use the "gateway" of Section 426 of the Insolvency Act 1986 (which has been directly extended to Guernsey by virtue of the *Insolvency Act 1986 (Guernsey) Order 1989)* via a letter of request route to enable the English courts' powers (or equivalent powers of the Guernsey courts) in Guernsey.

The Lieutenant Bailiff confirmed that the Royal Court had jurisdiction to exercise equivalent powers, as long as it was requested to do so by the formality of letters of request from the English Courts. Such a course would have allowed the trustee to obtain exactly the relief she sought. Indeed, longstanding Guernsey authorities would have all but guaranteed the grant of such an order.

The trustee, though, took a different course. She apparently perceived this usual path as cumbersome and inconvenient (requiring the English bankruptcy to be transferred to the High Court) and had concerns that it might increase the risk of evasive measures being taken by the bankrupt. However, these were not compelling reasons to allow a distinct statutory mechanism to be circumvented by relying on what the Lieutenant Bailiff described as "*a combination of usefulness, a generous assessment of analogy and resort to a supposed beneficial principle of 'modified universalism' of insolvency law*".

Amongst an array of creative and "ambitious" submissions, the trustee sought unsuccessfully to draw analogies with the Guernsey corporate insolvency regime, as well as personal insolvency legislation dating back to 1929 (the Loi Ayant Rapport aux Débiteurs et à la Renonciations 1929), and even argued that the English Bankruptcy Act 1914 was in wholesale operation in Guernsey. These lines of argument were rejected roundly by the Court. The split decision of the Privy Council in *Singularis*[2], was also addressed which the trustee submitted supported a more pragmatic approach to cross-border insolvencies. The Lieutenant Bailiff, however, was minded to side with the minority judgment to find against any customary law or inherent jurisdiction. This view is also in keeping with local law previously established in the Guernsey context, which the judgment in *Singularis* suggests no intention of overruling.[3]

As a result, the trustee's approach was rejected, and the decision re-affirms the well-trodden and certain procedural route where requests for the assistance are made to the Royal Court by the courts of the UK, Jersey or the Isle of Man. It remains to be seen, though, whether Guernsey practitioners consider dusting down their copies of the 1929 Loi in future applications.

1 Royal Court, 4 August 2015
2 *Singularis Holdings Limited v PriceWaterhouseCoopers* [2015] 2 WLR 971.
3 *Bird v Meader (ReTucker (a Bankrupt))* (Court of Appeal No 23/1989); *Slinn v The Official Receiver and Liquidator of Seagull Manufacturing Co Limited* (Court of Appeal No 69/1991).

Global Insolvency Practice Course

International Association of Restructuring, Insolvency & Bankruptcy Professionals

INSOL Global Insolvency Practice Course Welcomes Eighth Class

G. Ray Warner,
Course Leader, St. John's University, USA

The successful INSOL Global Insolvency Practice Course started its eighth year with a class of 17 prospective Fellows. The diverse group consisted of insolvency professionals from 11 different jurisdictions and included the first sitting judge to take the training. The first of three intensive multi-day training sessions, Module A, was presented at the Hotel Russell in London from 6 through 9 September 2015.

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

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

The current participants for the class of 2015-16 are Farid Assaf (Banco Chambers, Australia), Vicki Bell (Minter Ellison, Australia), Erin Broderick (Baker & McKenzie, United States), Barry Cahir (William Fry, Ireland), Christel Dumont (Bonn Steichen & Partners, Luxembourg), Lee Hart (KRyS Global, Cayman Islands), Jeremy Hollembeak (Kobre & Kim LLP, United States), Michael Hughes (Minter Ellison, Australia), Ivan Ikrényi (Ikrényi & Rehák, s.r.o, Slovakia), Kabiito Karamagi Kenneth (Ligomarc Advocates, Uganda), Mungo Lowe (Harneys Westwood & Riegels, British Virgin Islands), Elizabeth McGovern (Reed Smith LLP, United Kingdom), Pierre Jean Neijt (Ministry of Justice, District Court Midden-Nederland, The Netherlands), Ida Nylund (Simmons & Simmons LLP, The Netherlands), Sean Pilcher (RBS, United Kingdom), Sophia Rolle-Kapousouzoglou (Lennox Paton, Bahamas), and Jeffrey Stower (KPMG, Cayman Islands).

The feedback by way of formal evaluations was very positive. While the instructional sessions were intensive and demanding, the programme also provided opportunities for socializing and networking. Module A opened with dinner at the Hotel Russell, where Neil Cooper, Past-President of INSOL, regaled the group with his usual wit and command of both insolvency practice and history. The second evening was spent at Pescatori, an Italian and seafood restaurant, where Felicity Toube QC, South Square, London, delivered an entertaining and informative talk about the English common law approach to cross-border assistance in insolvency cases. Both dinners provided an opportunity for the Fellows to become acquainted with each other and to network with program alumni and faculty.

Lectures for Module A were André Boraine (University of Pretoria, RSA), G. Ray Warner (St. John's University, USA), Jan Adriaanse (University of Leiden, The Netherlands), Bob Wessels (University of Leiden, The Netherlands), Ian Fletcher (University College London, UK), Nicolas Segal (Freshfields Bruckhaus Deringer LLP, UK), Janis Sarra (University of British Columbia, Canada), Simon Appell (Alix Partners LLP, UK), Dolf Bruins Slot (Ernst & Young, The Netherlands), Bob Rajan (Alvarez & Marsal LLC, Germany), and Russell Downs (PwC, UK).

The participantss will complete research papers prior to Module B, which is scheduled for January 2016, immediately prior to the INSOL International Annual Regional Conference in Dubai. Module B includes additional case studies, further study of the Model Law and different national insolvency systems. At the conclusion of Module B, the participants will sit for their oral examinations. The programme culminates with Module C in March 2016, where the participants will apply the information learned in the prior two modules in a one-week intensive insolvency workout simulation that includes a video conference court hearing before a US and a UK judge.

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




Changes in the Bankruptcy Regime in Ireland to not Prevent Forum Shopping

By Mark Woodcock
McDowell Purcell
Dublin, Ireland

Introduction

Ireland now has new bankruptcy legislation which reduces the period of bankruptcy from twelve years to only three years. However, this is still considered a lengthy bankruptcy period by debtors and so many have looked to other jurisdictions with more favorable bankruptcy regimes for a solution to their financial woes. For example, in the USA and the UK, the period for discharge from bankruptcy is twelve months and in some countries such as Switzerland, the bankruptcy regime is not as restrictive as it is in common law jurisdictions. This can provide an attractive alternative (also known as forum shopping) to a debtor's position in this jurisdiction where he may face multiple legal actions and a possible bankruptcy application.

The Law

The law in Ireland is currently governed by the Bankruptcy Act of 1987 and recently amended by the Personal Insolvency Act 2012 which provides that a creditor can apply to the High Court for an order of bankruptcy against a debtor which remains in place for three years.

The law as it is in respect of different jurisdictions in the European Union is governed by the Council Regulation (EC) No 1346/2000 (also known as the Insolvency Regulation) which provides that there should be limitations on the ability of debtors to transfer assets or judicial proceedings from one member state to another seeking to obtain the most favorable position. The reason for this is that if debtors can enter and exit bankruptcy in a short period in one jurisdiction it becomes an attractive alternative to remaining in a jurisdiction where they will remain insolvent indefinitely or be forced into bankruptcy for many years.

In order for a debtor to demonstrate that he is entitled to the benefit of an insolvency regime in a particular jurisdiction he must satisfy a court that his "centre of main interest" or "COMI" is in that jurisdiction. The Insolvency Regulation provides that a debtor's COMI should be the place where:

(1) the debtor conducts the administration of his interest on a regular basis, and

(2) is therefore ascertainable by third parties

In a clear attempt to encourage enterprise, the law in this area in the UK was amended by the Insolvency Act 1986 and provides for a period of bankruptcy of twelve months. This means that a debtor (and of course a creditor) can apply for bankruptcy, wherein all the debtor's assets vest with an Official Receiver, a civil servant and officer of the court who will realize the assets and distribute them among creditors in accordance with the normal priority of payments. The debtor can then emerge from bankruptcy twelve months later having cleared his debts.

This process in the UK has traditionally been a simple one costing the applicant less than £1,000 in legal fees and court duties. There is no authority specifying a minimum period of residence, but a period of six months is regularly accepted by the UK courts as being sufficient. The courts have held that a debtor is at liberty to change his COMI and that the country in which the debts were incurred is not a relevant consideration. Neither is the fact that the debtor's residence appears temporary or rented. The applicant must file a petition and a statement of affairs setting out all assets and debts with the names and addresses of creditors. Although the debtor should notify creditors of his move to the UK they are not notice parties to the application for bankruptcy.

Recent judgment

The well known businessman Sean Quinn recently applied for bankruptcy in Northern Ireland (NI). The High Court considered the competing arguments for and against the proposition that Mr Quinn's COMI was in NI. Case law and commentators have confirmed the general principle that the COMI for a company is the registered address, for a professional is his professional address and for an individual his habitual/residential address.

Mr Quinn argued that although he resided in Ireland, his COMI was in NI on the basis that he carried out the majority of the administration of his affairs from an address in NI. In addition he argued that he had been born in NI, began his working life there, kept the headquarters of his group there and indeed paid tax there.

Against this argument the Court found that he had resided in Ireland for 32 years, had an Irish passport and voted there. Interestingly, one of the more persuasive factors considered by the Court was the fact that Mr Quinn had no sterling loans with Anglo Irish Bank (which was contesting the bankruptcy) and that the main interest of Mr Quinn in the months preceding the application for bankruptcy was in litigation with Anglo in which he was embroiled in

salvaging what he could from his circumstances in the Republic of Ireland. The Court also found that Mr Quinn had made no attempt to make the office in NI from where he was claiming to conduct his business affairs a matter of public knowledge and so it was not possible for him to argue that his COMI was ascertainable by third parties. In actual fact, the Court was satisfied from evidence provided by witnesses, that Mr Quinn was conducting a considerable amount of his business affairs from an office in Belturbet, County Cavan.

Conclusion

The Quinn Bankruptcy judgment is important because it demonstrates awareness in the UK Courts of what may be a growing trend by Irish debtors to forum shop. It is arguable that Mr Quinn made a rather speculative attempt for bankruptcy and that if he had moved to NI for a reasonable period and notified creditors of the move he would have made it more difficult for the Court to refuse the application.

INSOL International College of Mediation

Previous editions of INSOL World have reported on the inauguration of this exciting new resource for INSOL members and the wider insolvency, banking and judicial community. The news is that the College is up and running, the first mediator panellists have been appointed and the first case has been referred to the panel.

So, in anticipation of members' curiosity, here are the FAQs that we anticipate.

What cases will the College consider?
The College will be a unique resolving resource: we expect that most cases will have an insolvency and restructuring focus, but that covers a wide spectrum of disputes and uncertainties that arise in insolvency proceedings.

Will it only deal with cross-border cases?
Not necessarily, although the panellists are uniquely qualified to handle such matters. Moreover, reference of cross-border matters to the panel will resolve any doubt as to appropriate jurisdiction in cross-border cases. However, we also anticipate that for reasons of speed, cost, confidentiality, integrity and flexibility, a wide range of domestic conflicts will also be referred to the College.

Who will be appointed to the mediator panel?
Quite simply, the world's leading experts in this field. A list of the current panel appears below and this will be expanded to meet demands for the College's services.

Will it be expensive?
The cost will depend on the circumstances and will vary from full fees to pro bono as appropriate. The fees will be agreed with the mediator and the parties will have control over costs. All mediators are familiar with the urgency and cost constraints of insolvency matters and of course there will be no court fees.

How will the mediator be selected?
The parties may select the mediator or mediators from the list on the INSOL website or may request INSOL to identify those panel members who have particular qualifications or experience.

How is the mediator engaged?
We intend that there is complete flexibility as to manner of mediator being engaged. There is draft mediation agreement available but the parties have the ability, in conjunction with the chosen mediator, to fashion a completely bespoke procedure. The framework that we have created is extremely flexible; in substance, the draft is a series of default options. INSOL is not a party to the mediation agreement.

Why mediation as opposed to simple litigation?
The proposed system is able to work within or independent of wider litigation.
Courts around the globe are encouraging the use of mediation to avoid the costs and delays of litigation and to reduce pressure on the courts. The use of such specialist mediation is defensible to creditors as it is seldom that courts, especially lower courts, have the wealth of specialist experience of the IICoM panel members. Moreover, parties have control over confidentiality of the mediation and are not precluded from resorting to litigation if the mediation does not work. In such circumstances, the court will usually be reassured that parties have endeavoured to reach a mediated solution.

Where do I get more information about the College?
There is a section of the INSOL International web site dedicated to the College and any specific requests for further information should be addressed to Claire Broughton, Executive Director, INSOL International at claireb@insol.ision.co.uk.

The current list of members of the INSOL International College of Mediation is as follows:

Justice Indra Charles, Supreme Court of the Bahamas, Bahamas
Philip Crawford, Lawyer, Australia
Glen Davis, Queen's Council, England
Justice James Farley, (Ret) Canada
Birgit Sambeth Glasner, Attorney at Law and Commercial Mediator, Switzerland
Hon Arthur Gonzalez, (Ret) USA
Hon Allan L Gropper, (Ret) Mediator and Arbitrator, USA
Hon Mr Justice Jonathan Harris, Companies & Insolvency Judge, High Court, Hong Kong
Robert S Hertzberg, Lawyer, USA
Justice Ian R C Kawaley, Chief Justice and Senior Commercial Judge of Supreme Court of Bermuda
Justice Geoffrey W. M. Kiryabwire, Judge of Court of Appeal & Constitutional Court, Uganda
Dr Christoph Paulus, Humboldt-Universitat zu Berlin, Chair of the Academic Forum of INSOL Europe, Germany
Hon. James M Peck, (Ret) USA
Felicity R Toube, Queen's Council, England
Dr Bob Wessels, Deputy Justice, Court of Appeal, The Netherlands
Wisit Wisitsora-At, Chief Inspector-General, Ministry of Justice, Thailand.

INSOL INTERNATIONAL ACADEMICS' GROUP

By Lienne Steyn

University of KwaZulu-Natal,
Durban, South Africa
INSOL Academics' Steering Committee

As conveyed by Chairperson, Prof Rosalind Mason, after the Academics' Colloquium held in San Francisco in March 2015 (INSOL World – 2nd Quarter 2015 29), the Academics' Group has committed itself, *inter alia*, to extending engagement between members beyond its formal colloquia and encouraging and facilitating interaction and collaborations amongst academics as well as between academics and practitioners. It also resolved to improve communications not only within the Academics' Group as a whole, but also within the various INSOL regions. Recent activities reflect that some of these plans have already come to fruition.

A LinkedIn INSOL International Academics' Group has been established as an online resource. It is hoped that this will provide us with an easily accessible forum for the sharing of information and comments on developments in our respective jurisdictions and for alerting one another to insolvency-related conferences, workshops and seminars around the world. Please visit the link https://www.linkedin.com/grps/INSOL-Academics-Group-8347435/about and join the group, if you have not already done so. Please share information or comments that you believe will be of interest to other members.

A great number of academics, who participated in the INSOL Europe Academic Forum's Insolvency Conference, held on 30 September and 1 October 2015 in Berlin, are also members of our INSOL International Academics' Group. These colleagues came not only from the European continent, but also from further afield – England, Ireland, Australia and South Africa.

We would like to take this opportunity especially to congratulate Prof Paul Omar, Professor of International and Comparative Insolvency Law at the Nottingham Law School, on his award of a Certificate of Special Recognition by INSOL Europe at the conference. The award, which also comes with Honorary Membership of the organization, was bestowed in recognition of Paul's service as Secretary of the Academic Forum from 2007 to 2015.

After the INSOL Europe conference in Berlin, Prof Kathleen van der Linde and Prof Juanitta Calitz spent some time at Nottingham Trent University. An aim of their visit was to investigate opportunities for collaboration between their institutions. One of the highlights was their attendance of an LLM seminar presented by Dr Alexandra Kastrinou and Dr Rebecca Parry. While Prof Ros Mason was in Europe, she visited Prof Michael Veder at the Law School at Radboud University, Nijmegen, The Netherlands, with a view to establishing linkages and to discuss in more depth the proposed one-day pedagogical seminar, planned for 11 July 2016, in the lead-up to the 2016 Academics' Colloquium. Please note that, in 2016, the Academics' Colloquium will not coincide with the Main INSOL International Conference scheduled for January in Dubai, but will be held on 13, 14 and 15 July 2016 in London. The one-day seminar at Raboud University, Nijmegen, may be of interest to academics who are traveling in July to London as an additional university activity. Many colleagues will recall the eminently productive workshop, stemming from initiatives of Prof Ros Mason, held along similar lines in 2005 in Brisbane.

INSOL International and the World Bank Group held its annual Africa Roundtable Forum on 12 and 13 October 2015 in Cape Town[1]. Prof Andre Boraine, University of Pretoria, Prof David Burdette and Prof Juanitta Calitz, all members of the Academics' Group, chaired sessions and made presentations. Prof Lienne Steyn, University of KwaZulu-Natal attended, as well as other South African insolvency academics, who, it is hoped, may be persuaded to join our group in the near future. It was a privilege to engage in Cape Town with Mark Robinson and Adam Harris, President and Vice-President, respectively, of INSOL International and with Mahesh Uttamchandani of the World Bank Group.

In South Africa, the Faculty of Law at the University of the Free State will host its Third International Mercantile Law Conference to be held from 4 to 6 November 2015 in Bloemfontein, at which Prof David Burdette, Prof Leonie Stander and Prof Kathleen van der Linde will present papers. Another conference for which colleagues may wish to plan ahead is the Personal Insolvency Conference, scheduled for 7 to 9 September 2016 in Brisbane, which will be hosted by the Insolvency and Restructuring Group within the Commercial and Property Law Research Centre of the Queensland University of Technology.

We look forward to even more heightened regional and global academic collaboration in the future.

[1] Full report on ART 2015 meeting will be featured in the First Quarter 2016 edition of INSOL World.

INSOL INTERNATIONAL ACADEMICS' COLLOQUIUM

INSOL Academics' Colloquium

13-15th July 2016
Grange St. Paul's Hotel, London

In 2016, the INSOL Academics Colloquium will return to London. It will be a two day colloquium commencing with a Welcome Function on the Wednesday evening and two full day programmes on Thursday and Friday. The registration brochure will be online from January 2016.

While a number of academics will be attending the annual INSOL Conference in Dubai in January, this Colloquium has been convened for July in order to better align with university teaching calendars.

The last London academics gathering was held in conjunction with INSOL 2001 and proved a great success. We are looking forward to a similar high quality programme in 2016. The initial response to the Call for Papers has been encouraging and represents a diverse range of jurisdictions as well as issues.

The following topics have been selected for inclusion in the programme:

i) Law reform and policy trends
ii) Regional developments
iii) Sovereign bankruptcy
iv) Insolvency of financial institutions
v) Cross-border insolvency issues in the maritime industry
vi) Insolvency issues and small business
vii) Insolvency theory – normative insights informing research
viii) Socio-legal perspectives on personal insolvency
ix) Teaching innovations and collaborations in insolvency
x) Hot Issues

Not all of the topics listed above will necessarily feature on the final programme. Additionally, consideration can be given to proposals for papers which fall outside the list of proposed topics. So, with research on such wide-ranging issues of current significance potentially featuring, this Colloquium may well be of interest for practitioner members as well to attend.

Following the successful experiences of our past colloquia's, we once again extend a warm welcome to the Alumni of the INSOL Global Insolvency Practice Course to participate in our meeting, and we look forward to receiving offers of papers from the Fellows.

There will also be a "Research Forum" session, providing an opportunity for those currently undertaking a research project (including PhD students currently engaged in Doctoral studies) to deliver a brief account of their work, and to generate discussion. Please contact me as soon as possible (and preferably before the end of the year) at Rosalind.mason@qut.edu.au

INSOL 2017

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

Save these dates in your diary!

The Tenth World INSOL International Quadrennial Congress will take place in 2017 in Sydney. We are counting down the days with only 18 months to go before we meet in the beautiful city of Sydney.

The Technical Committee have just started working on the full day technical programme. The theme of the programme is "Embracing Change". If you have any suggestions for topics to be covered please email them to our Technical Director Sonali Abeyratne at **sonali@insol.ision.co.uk**

The programme will include a Welcome Barbecue on the Sunday followed by a full day programme on Monday, a half day on Tuesday, allowing those with little time in Sydney to enjoy an afternoon exploring or, if you have a head for heights, climbing the stunning Sydney Harbour Bridge and seeing this beautiful city from a different perspective, and a final full day on Wednesday culminating in the Gala Dinner. We are planning some pre and post tours if you have time to take a few extra days whilst in Australia and accompanying person tours during the Congress.

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

INSOL would like to thank our sponsors for their generosity:

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Monday Breakfast: South Square **Congress App:** Madison Pacific

If you are interested in sponsoring INSOL 2017 please contact Claire Broughton at **claireb@insol.ision.co.uk**

Further details about the INSOL Quadrennial Congress, 2017, can be found at **www.insol.org.**

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Conference Diary

November 2015				
2	INSOL International Beijing Seminar	Beijing, PRC	INSOL International	www.insol.org
12	TMA UK Annual Conference	London, UK	TMA	www.turnaround.org
12-14	CLLA Eastern Region Conference	New York, NY	CLLA	www.clla.org
26-27	SARIPA Annual Conference	Johannesburg	SARIPA	www.saripa.co.za
December 2015				
3-5	ABI Winter Leadership Conference	Phoenix, AZ	ABI	www.abi.org
January 2016				
24-26	INSOL Dubai Annual Regional Conference	Dubai, UAE	INSOL International	www.insol.org
February 2016				
24-26	IAIR Insolvency Workshop	Amelia Island, FL	IAIR	www.iair.org
March 2016				
3	INSOL International Mexico City One Day Seminar	Mexico City	INSOL International	www.insol.org
August 2016				
18-20	CAIRP Annual Conference	Montreal, QB	CAIRP	www.cairp.ca
March 2017				
19-22	INSOL 2017 Tenth World International Quadrennial Congress	Sydney, Australia	INSOL International	www.insol.org

Member Associations

American Bankruptcy Institute
Asociación Argentina de Estudios Sobre la Insolvencia
Asociacion Uruguaya de Asesores en Insolvencia y Reestructuraciones Empresariales
Association of Business Recovery Professionals - R3
Association of Restructuring and Insolvency Experts
Australian Restructuring, Insolvency and Turnaround Association
Business Recovery and Insolvency Practitioners Association of Nigeria
Business Recovery and Insolvency Practitioners Association of Sri Lanka
Canadian Association of Insolvency and Restructuring Professionals
Canadian Bar Association (Bankruptcy and Insolvency Section)
China University of Politics and Law, Bankruptcy Law and Restructuring Research Centre
Commercial Law League of America (Bankruptcy and Insolvency Section)
Especialistas de Concursos Mercantiles de Mexico
Finnish Insolvency Law Association
Ghana Association of Restructuring and Insolvency Advisors
Hong Kong Institute of Certified Public Accountants (Restructuring and Insolvency Faculty)
Hungarian Association of Insolvency Practitioners
INSOL Europe
INSOL India
INSOLAD - Vereniging Insolventierecht Advocaten
Insolvency Practitioners Association of Malaysia
Insolvency Practitioners Association of Singapore
Instituto Brasileiro de Estudos de Recuperação de Empresas
Instituto Brasileiro de Gestão e Turnaround
Instituto Iberoamericano de Derecho Concursal
International Association of Insurance Receivers
International Women's Insolvency and Restructuring Confederation
Japanese Federation of Insolvency Professionals
Korean Restructuring and Insolvency Practitioners Association
Law Council of Australia (Business Law Section)
Malaysian Institute of Certified Public Accountants
Nepalese Insolvency Practitioners Association
National Association of Federal Equity Receivers
NIVD – Neue Insolvenzverwaltervereinigung Deutschlands e.V.
Non-Commercial Partnership Self-Regulated Organisation of Arbitration Managers "Mercury" (NP SOAM Mercury)
Recovery and Insolvency Specialists Association (BVI) Ltd
Recovery and Insolvency Specialists Association (Cayman) Ltd
Recovery and Insolvency Specialists Association of Bermuda
REFOR – The Insolvency Practitioners Register of the National Council of Spanish Schools of Economics
Restructuring Insolvency & Turnaround Association of New Zealand
Russian Union of Self-Regulated Organizations of Arbitration Managers
Society of Insolvency Practitioners of India
South African Restructuring and Insolvency Practitioners Association
The Association of the Bar of the City of New York
Turnaround Management Association (INSOL Special Interest Group)

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