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Editors' Column

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What difficult times we face and how quickly can things change!

The world is facing a crisis the likes of which we have not seen in our lifetimes. The enormous challenges we face in protecting public health and the lives of the vulnerable must be our primary focus. We all support and appreciate the difficult decisions facing our political leaders, the dedication of our front line health workers and the sacrifices required of our populations in working to bring the pandemic under control.

There is, however, no avoiding the economic damage wrought around the world as we take the necessary steps to bring the pandemic under control. As restructuring and insolvency professionals, we have a critical part to play in the management of this economic fall-out. Our turnaround and restructuring skills will be critical in both nursing business through the current lock-down period and readying them for re-emergence once the situation starts to improve.

Almost every business is having its resilience tested. In short order, we have had to move to a distributed workforce, to rely on technology to deliver our services, to reorganise supply lines, and to re-scale our operations because of the crisis.

As a profession, the high level of intellectual and technical leadership we can contribute will be invaluable in getting our economies through this crisis. Our clients will look to us to help them protect value, manage their legal rights, find pragmatic solutions and reposition their business to thrive in the "new-normal" they will find themselves in when we emerge.

Many of you will be managing these issues in relation to your own practices. As people businesses, professional services are particularly vulnerable to disruption. Managing the health and wellbeing of our people, servicing our clients and preserving our financial resources are challenges we all must face and endure.

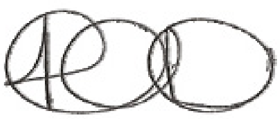
We should also not ignore the broader challenges facing society. Issues of mental health, domestic violence and protecting the vulnerable. We should all be thinking about what we can do to reach out to those around us who may be suffering and doing what we can to help those in need.

Mark and I hope and trust that you are all keeping well in these most difficult of times. Our thoughts go out to those of you impacted directly by the pandemic. To those of you who are ill or have family and friends who are suffering we wish a speedy recovery. We especially feel for those of you who may have lost loved ones to COVID-19 and wish you the strength to carry on.

My thanks to all the contributors to this edition of INSOL World. We hope members will enjoy new digital format and we welcome your views, comments and suggestions for new features you'd like to see.

We would also like to thank Mourant for their continued support and sponsorship of the publication.

Stay well, stay strong and stay safe!



Peter Gothard

President's Column

By Julie Hertzberg
Alvarez & Marsal
USA

"These are very much unprecedented times". Words that we have heard all too often over the past few months in virtually every media, digital and print forum. The challenge that COVID-19 has brought to our professional and personal lives cannot be understated and we can't be complacent by virtue of the fact that this message becomes old news. No single event in our lifetimes has had such universal negative impact and it is no exaggeration to say that the world as we know it will never be as it was just a few short months ago. As I reflect on these themes, I know personally I simply took too much for granted in my everyday life.

Many of you will have been indirectly impacted by the Coronavirus. Those less fortunate will have been impacted directly, and our thoughts are with everyone who have lost loved ones, friends and colleagues.

At the end of February, the INSOL Board made the heart-breaking decision to cancel our conference in Cape Town. While we were all conscious of the concerns around gathering together over 600 delegates from around the world, the scale and speed at which this situation has developed has been the "stuff of nightmares". With most, if not all of us, now working from home and socially distancing ourselves from those we would be accustomed to spending time with.

But challenges bring out the best in us, and technology enables us to do so much from the comfort of our homes. With no in-person seminars or conferences being held, the thirst and appetite for information and a social connection is just as great (if not greater) than before, and we find ourselves tuning into webinars wherever possible. I am proud to say that INSOL has been able to bring together a talented and creative group of members to form a "Webinar Organising Committee" which has in record time developed a weekly webinar programme. Interest in this has been impressive with just less than 400 registrants for the first of these 45 minute "INSOL Quick Takes". Initially these will look at country specific responses to COVID-19 with Australia, Singapore, United States and Brazil having been covered in the first two webinars. Future panels will cover industries such as aviation and tourism and the long-term impact of COVID-19.

While our weekly webinar programme seems to have been welcomed positively, INSOL is developing further ways it can engage with its members virtually in this digitally dependent world and we look forward to announcing new endeavours in the coming weeks and months.

You may have already seen the COVID-19 country-by-country guide that INSOL has created in partnership with the World Bank Group. This was launched in April and re-released recently with updates and additional country chapters. We are very proud of this initiative and thankful to all who have contributed. Its form is dynamic and a change in the way INSOL delivers its "technical publications", something it shares with this INSOL World digital-only publication.

You may remember in our last issue of INSOL World I mentioned that it would be the last that would be received in printed form. With this new digitised version, optimised in particular for tablets and PCs/laptops, INSOL has listened to calls from its members to improve its environmental credentials and, as such, we hope that you will find it easy to read and user-friendly.

While its form may have changed, the substance of INSOL World continues to be of the high standard you have come to expect, filled from cover to cover with topical, relevant, and informative articles.

I would like to take this opportunity to thank our Editors, Editorial Board, contributors, sponsor and advertisers, and staff whose efforts make this possible.

In these challenging times I wish you good health.

Stay safe and well.

Julie M Hertzberg

Julie Hertzberg

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Why is Value Creation and Operational Improvement Important?

By Sophie Graetz
KPMG
Australia

Private Equity has experienced increasing emphasis on value creation in M&A deals. This means that there are lessons to be learnt from Private Equity that can be equally applied to insolvency and restructuring situations. Value creation is becoming increasingly important in today's competitive M&A market. The average deal size has increased by 22% since 2015, and while the number of deals has decreased by 5%, spend on those deals has increased by 16.7% since 2007[1].

This change has been accompanied by a shift in how value is created in Private Equity deals. The 1990's was the era of multiple arbitrage, but today we see Operational Improvement accounting for over 50% of the value created in Private Equity deals[2]. Furthermore deals are becoming more operationally complex.

All this means that Private Equity have had to increase their focus on value creation and we can see best-in-class value creation activity from how Private Equity drive operational improvements to create value from their deals. Private Equity are not waiting until deal completion to look at value creation, but are instead identifying, quantifying and validating potential value creation areas in the pre-deal stages. This means that the market is increasingly pricing forward looking subjective value into the deal. This is helping Private Equity to prioritise these areas of value creation and include quick wins as part of their first 100 day plan for the acquisition. In addition, areas will be identified pre-deal for longer-term transformation and built into acquisition plans.

So how are Private Equity doing this? Best in class practice takes a data led approach to gain insight into a target business and its performance to understand the key operational drivers for that business. Initially, only limited data may be available on the target business, possibly only annual accounts. However, these can be used with peer benchmarking to allow a quick assessment of the business and whether it is performing in line with key peers. This benchmarking will allow the quick identification of key operational levers that are of interest for further investigation. The key areas can then be validated and refined as part of the diligence process. Large Private Equity houses have been developing these in-house capabilities, for example, KKR have developed their Capstone team. Other Private Equity firms are looking to consulting to provide these insights, which will often inform the decision on whether or not to make an initial bid or continue with the bidding process.

This approach to identifying areas of value creation can be applied to assist distressed businesses. The rapid assessment of financial performance combined with benchmarking can be completed within a couple of days. This can help a distressed business to prioritise the key operational levers for immediate action that can unlock value quickly. The business will then have space to plan and create a longer term transformation programme to drive sustainable value and change in the organisation. Value creation techniques can improve outcomes for insolvency clients such as banks or funds as less capital injection may be required and it can lead to better exit realisations.

We were recently asked to assist a Private Equity House who had bought a business in a turnaround situation. We take a hypothesis based approach to identifying the key levers for improvement and then supplement this with data analytics using proprietary tools and market leading analytics tools such as Alteryx. Our rapid analysis of the key operational levers of the business identified various cost out opportunities along with a cash release opportunity through optimising working capital practices.

This initial identification was then followed with a diagnostic over 3 weeks that utilised transactional level data to test the businesses working capital performance against a number of key hypotheses. This involved some immediate quick wins that could be actioned in week one, such as moving to a fortnightly supplier payment run and ensuring there were no early supplier payments being made. This allowed an immediate cash release for the business that alleviated some of the immediate pressure it was facing.

The detailed analysis against our full suite of working capital improvement hypotheses identified further cash release opportunities from customer collections processes allowed the business to then focus efforts on a transformation programme for sustainable change. This involved cost reduction initiatives such as digitising the back office, enhancing the supply chain and procurement activities of the business and an evidence based approach to developing future growth initiatives to enhance revenue and margins for the business.

1 Source: CapIQ, Preqin, PitchBook
2 Source: KPMG research, Commercial Due Diligence; the Key to Understanding Value in an Acquisition. P. Howson 2006

Some key tips for how an insolvency practitioner can leverage value creation and operational improvement techniques from Private Equity are:

1. Use external data to identify and prioritise areas of value – publicly available accounts can be used to benchmark performance against peers and identify areas of value creation for the business.
2. Use internal data to identify quick wins from aligning processes with best practice – these can help to alleviate pressure in the short term.
3. Use these early wins to stabilise the business – following these quick wins, focus on remaining areas of value for sustainable change across the business.

The Necessity of Parallel Schemes of Arrangement in Cross-border Insolvency

By Ian Mann, ***Fellow, INSOL International*****, Chai Ridgers and Andrew Thorp**

Harneys

In response to the turbulent economic times seen of late, there has been a significant growth in the use of schemes of arrangement to compromise creditors' claims by companies facing financial difficulties. Whilst each restructuring should be uniquely designed to respond to the commercial and financial realities faced by the company, offshore incorporated companies seeking to restructure debt obligations governed by another jurisdiction should consider implementing restructuring through parallel schemes of arrangement. In many cases, a parallel scheme is necessary or desirable to give practical effect to an onshore restructuring and simply seeking recognition of a foreign scheme in an offshore jurisdiction may expose the restructuring to being attacked.

In order to give practical effect to a cross-border restructuring of an offshore company, the risk that needs to be addressed was succinctly summarised by Mr. Justice Lawrence Collins (as he then was) in *Re Drax Holdings Ltd* [2003] EWHC 2473 (Ch): *"In the case of a creditors' scheme, an important aspect of the international effectiveness of a scheme involving the alteration of contractual rights may be that it should be made, not only by the court in the country of incorporation, but also (as here) by the courts of the country whose law governs the contractual obligations. Otherwise dissentient creditors may disregard the scheme and enforce their claims against assets (including security for the debt) in countries outside the country of incorporation."* This is an important issue not only because it makes commercial sense to have a restructuring that is effective, but also the court, in exercising its discretion whether to sanction a scheme, must be satisfied that there is reasonable prospect of the scheme having effectiveness. The starting point is the application of the "rule in Gibbs", which helps to demonstrate examples of cases where parallel schemes are required in order to ensure schemes promulgated in one jurisdiction are effective in another jurisdiction.

The "rule in Gibbs" was derived from the Court of Appeal decision in *Antony Gibbs & Sons v La Societe Industrielle et Commerciale de Metaux* (1890) LR 25 QBD 398. It refers to the general proposition that (i) a debt governed by English law cannot be discharged or compromised by a foreign insolvency proceeding; and (ii) discharge of a debt under the insolvency law of a foreign country is only treated as a discharge in England if it is discharged under the law applicable to the contract. The rationale underpinning the "rule" reflects the general principle of private international law - the discharge or modification of a contractual liability is treated in English law as being governed by its proper law. The rule is recognised and applied in Hong Kong and, as far as we are aware, its application has not been doubted by the Courts in the Cayman Islands, Bermuda or the BVI.

To illustrate how the operation of the "rule in Gibbs" means that certain cross-border restructuring must be implemented through parallel schemes, we set out five scenarios below:

Scenario 1: A Hong Kong scheme seeking to vary only Hong Kong law governed debts of a company incorporated in the Cayman Islands.

In this scenario it is not strictly necessary to promulgate a parallel scheme in the Cayman Islands to ensure that the restructuring has practical effect because a variation under Hong Kong law of Hong Kong law governed contractual rights will be effective in the Cayman Islands by virtue of the operation of the "rule in Gibbs". It may nevertheless be desirable for the scheme company to promulgate a parallel scheme in the Cayman Islands for commercial or strategic reasons (e.g. taking a proactive step rather than relying on the "rule in Gibbs" as a defence against a disgruntled party taking steps in the Cayman Islands).

Scenario 2: A Hong Kong scheme seeking only to vary New York law governed contractual obligations of a company incorporated in the Cayman Islands and the company obtains recognition of the scheme in New York pursuant to Chapter 15 of the US Bankruptcy Code.

The variation of New York law governed contractual obligations by a Hong Kong scheme will not be effective in the Cayman Islands by virtue of the operation of the "rule in Gibbs". However, the Chapter 15 recognition in New York varies the New York law governed obligations as a matter of New York law and as such, it will not be strictly necessary to promulgate a parallel scheme in the Cayman Islands to ensure that the restructuring has practical effect. As set out in Scenario 1 above, it may still be desirable for the scheme company to take further steps in the Cayman Islands for commercial or strategic reasons.

Scenario 3: A Hong Kong scheme includes a variation of English law governed contractual obligations of a company incorporated in the Cayman Islands.

In this scenario, it will be necessary to promulgate a parallel scheme in the Cayman Islands or England. This is because the variation of English law governed obligations by a Hong Kong scheme will not be effective in the Cayman Islands or England by virtue of the operation of the "rule in Gibbs". Disgruntled parties will be able to thwart the restructuring process by, for example, presenting a winding up petition against the scheme company in the Cayman Islands or England.

Scenario 4: A Hong Kong scheme includes a debt for equity swap in relation to a company incorporated in the Cayman Islands.

A debt for equity swap raises issues of the laws of the country of incorporation irrespective of the law governing the compromised debt. For example, in order to give practical effect to a debt for equity swap it may be necessary to vary or suspend certain rights (such as pre-emption rights) arising under the scheme company's constitutional documents. It is also market practice to seek confirmation from the court in the Cayman Islands for capital reductions in a Cayman-incorporated company.

Scenario 5: A Hong Kong scheme seeks to vary or compromise the rights of members of a company incorporated in the Cayman Islands.

A scheme between a foreign company and its members (i.e. a members' scheme rather than a creditors' scheme) is essentially a matter for the courts of the place of incorporation. Even if a Hong Kong court is willing to exercise its jurisdiction in relation to a scheme which purports to vary or compromise the rights of members of a Cayman-incorporated company, it would be necessary to promulgate a parallel scheme to give effect to those variations / compromises as a matter of Cayman law.

The alternative to implementing a restructuring through parallel schemes is to seek recognition of a foreign scheme in the company's country of incorporation. However, as discussed below, the doctrine of "cross-border co-operation" or any rule of "recognition" (whether under the common law or under statutory regimes applicable in the relevant offshore jurisdictions) do not presently provide an effective substitute for the use of parallel schemes.

Whilst the common law recognises a principle of "modified universalism" applying to foreign insolvency proceedings, the Supreme Court in *Rubin v Eurofinance* [2013] 1 AC 236 held that there are no special rules for recognition and enforcement of foreign judgments in insolvency proceedings. Accordingly, the "rule in Gibbs" and ordinary private international law rules continue to apply. Foreign schemes in relation to offshore companies may receive some form of limited common law assistance (particularly in jurisdictions such as the Cayman Islands and Bermuda where there are no statutory basis for recognising foreign insolvency proceedings), but any form of "recognition" achieved through these general principles of modified universalism cannot override the "rule in Gibbs" and the ordinary private international law rules concerning the recognition and enforcement of foreign judgments. In other words, common law "recognition" alone cannot bind dissenting parties to the proposed restructuring and cannot, therefore, provide an effective substitute for the use of parallel schemes.

Aside from "recognition" under common law is the recognition under a statutory regime, for example the UNCITRAL Model Law on Cross-border Insolvency (the **Model Law**).

None of the Cayman Islands, Bermuda or the BVI has adopted the Model Law and it appears that each of those jurisdictions does not have the statutory framework to recognise foreign schemes. In Bermuda, there are no provisions at all in the Bermuda Companies Act 1981 specifically directed towards cross-border assistance in insolvency. The Cayman Companies Law (2018 Revision) contain a regime for international co-operation in insolvency but it does not apply to a foreign proceedings in respect of a Cayman company.

In the BVI, Part XIX of the BVI Insolvency Act 2003 contains provisions for co-operation in bankruptcy matters between the courts of the BVI and the courts of certain other countries (including Hong Kong). However, it appears that Part XIX cannot be relied on to recognise a foreign scheme to override the "rule in Gibbs" for the following two reasons.

Under section 467(2) a *"foreign representative"* may apply for an order in aid of the *"foreign proceeding"* in respect of which he is authorised. However, the definition of *"foreign proceedings"* is unlikely to include a foreign scheme. It includes only *"a <u>collective judicial or administrative proceeding</u> in designated foreign country… pursuant to a law relating to insolvency in which proceeding the property and affairs of the debtor <u>are subject to control or supervision by a foreign court</u>…"*.

Second, whilst section 467(3)(h) confers broad powers on the court to grant *"such…relief as it considers appropriate"*, the court is unlikely to grant a relief that will circumvent the operation of the "rule in Gibbs" particularly in light of the recent English Court of Appeal decision in *OJSC International Bank of Azerbaijan v Sberbank of Russia* [2018] EWCA Civ 2802.

Accordingly, a well advised scheme company is likely to reach the view that the additional costs of a parallel scheme in the jurisdiction of incorporation represent a relatively modest price to pay for the delivery of day one execution certainty for the proposed restructuring.

Cross-border Restructuring Involving Assets in the PRC – Are Onshore Assets Still out of Reach?

By Jane Jiang, Viola Jing, Joanne Lau and Ella Richards
of **Allen & Overy** with the assistance of
Allen & Overy Lang Yue (FTZ)
Joint Operation Office on matters of PRC law

Cross-border restructuring involving assets in the mainland of the People's Republic of China (the **Mainland**) has always been an area of interest to creditors outside the Mainland given the challenges they face in getting access to and control over those assets.

Recent developments have given creditors additional options of gaining access to assets in the Mainland. These developments include how arbitration can be used in cross-border restructuring, changes in enforcement and insolvency proceedings in Hong Kong and the Mainland and the ground-breaking decision on recognition of Mainland administrators in Hong Kong. The market is yet to react to these developments, but the approach adopted will have major implications for the way in which creditor-led insolvency proceedings will proceed in future.

Background

In cross-border financing involving assets in the Mainland, offshore creditors are often structurally subordinated to onshore creditors, or have unsecured claims against Mainland entities. Prior to the recent developments, the typical recourse has been to commence a claim against the debtor in accordance with the dispute resolution provisions in the debt instrument, or if the debtor is hopelessly insolvent, to seek to recover payment of the debt through the collective insolvency regime.

Both of these options have had their limitations. In dispute resolution, it takes time for an offshore arbitral award or judgment to be recognised and enforced in the Mainland, resulting in little incentive on the part of the Mainland debtors to engage in restructuring discussions with the offshore creditors. Insolvency proceedings carry considerable uncertainty as to whether an offshore liquidator can be recognised in the Mainland in order to gain access to and control over the debtor's Mainland assets[1].

Possibility of Mainland Chinese interim measures in a Hong Kong Arbitration

On 1 October 2019, the "Arrangement Concerning Mutual Assistance in Court-ordered Interim Measures in Aid of Arbitral Proceedings by the Courts of the Mainland and of the HKSAR" (the **Arrangement**) came into effect, for the first time allowing parties to a Hong Kong-seated arbitration to seek interim measures from the Mainland courts.

Now claimants in certain Hong Kong-seated institutional arbitrations, most notably, the Hong Kong International Arbitration Centre (the **HKIAC**), the International Chamber of Commerce – Hong Kong, and the China International Economic and Trade Arbitration Commission, will be able to apply for property, evidence or conduct preservation measures against a respondent to the Intermediate People's Court in the Mainland in which the respondent is resident in or where the property or evidence is situated[2].

In this regard, it is worth noting that:

(a) There is a mechanism for the enforcement of a final judgment issued by the Hong Kong court that satisfies the requirements under the Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong Special Administrative Region (the **Arrangement on Recognition and Enforcement of Judgments**) in the Mainland[3].

(b) There is also a mechanism for the enforcement of a final award issued in Hong Kong that satisfies the requirements under the Arrangement concerning Mutual Enforcement of Arbitral Awards between the Mainland and Hong Kong Special Administrative Region (the **Arrangement concerning Enforcement of Arbitral Awards**) in the Mainland[4].

(c) However, a Mainland interim relief is not available to claimants in Hong Kong court proceedings.

Although there are challenges to using the interim

[1] This does not fully apply where the relevant asset is equity interest in an enterprise in the Mainland, in which case, it is relatively effective law (albeit in a jurisdiction with no formal system of precedent) that an offshore liquidator is entitled to change the legal representative of an onshore subsidiary although dealing with the equity interest in the subsidiary remains challenging.

[2] Article 1, Article 2, and 26 September 2019 Supreme People's Court of China and Department of Justice announcement.

[3] A people's court of the Mainland may refuse to recognise and enforce a Hong Kong judgment on the grounds as set out in Article 9 of the Arrangement on Recognition and Enforcement of Judgments, or if it considers that the enforcement of the Hong Kong judgment is contrary to the social and public interests of the Mainland.

[4] A people's court of the Mainland may refuse to recognise and enforce a Hong Kong award on the grounds (which mirror the New York Convention grounds) as set out in Article 7 of the Arrangement concerning Enforcement of Arbitral Awards, or if it considers that the enforcement of the Hong Kong award is contrary to the public interests of the Mainland.

relief measures (such as the need to identify the property to be preserved and provide security in order to be granted the requested order) the Arrangement is now a powerful tool for creditors. Unlike a *Mareva* injunction in Hong Kong, there is no specific requirement to prove risk of dissipation under the Arrangement. It provides a ground-breaking opportunity for parties to resolve their dispute via the tried and tested method of a Hong Kong-seated arbitration, while still being able to take advantage of the asset and evidence preservation measures available in the Mainland. As of 16 December 2019, the HKIAC already received eleven applications under the Arrangement, of which at least four were granted for preservation of assets in the total value of approximately USD 243 million[5].

The arbitration option – a means precluding an end?

That being said, there is one important limitation to be considered.

Traditionally, although section 20 of the Hong Kong Arbitration Ordinance requires the court to refer parties to arbitration if the matter is the subject of an arbitration agreement or clause, in the case of winding up petitions, the court would not dismiss or stay a petition merely because there is an arbitration clause in the agreement from which the debt arose[6]. Instead, in order to decide whether a winding up petition should be dismissed, the court would need to determine whether there was a *bona fide* defence to the debt on substantial grounds, although there was space for the court to exercise its discretion[7].

In recent years, however, this position has been thrown into question. Notably, although under English law the equivalent mandatory stay provisions in the English Arbitration Act 1996 similarly do not apply to winding up petitions, the English Court of Appeal in *Salford Estates (No 2) Ltd v Altomart Ltd (No 2)*[8] (***Salford Estates***) unanimously held that where a petition relies on a disputed debt that is subject to an arbitration clause, the court ought to exercise its discretion and dismiss or stay the petition to compel the parties to arbitrate the dispute relating to the debt.

The *Salford Estates* approach has since been followed in Singapore[9] and, in 2018, it was adopted by Harris J in the Hong Kong Court of First Instance in *Lasmos Limited v Southwest Pacific Bauxite (HK) Limited*[10] ***(Lasmos)***.

Departing from previous Hong Kong authorities and instead following *Salford Estates*, Harris J held that the courts should generally dismiss a winding up petition if:

(i) the company disputes the debt relied on by the petitioner;

(ii) the contract under which the debt is alleged to arise contains an arbitration clause that covers any dispute relating to the debt; and

(iii) the company takes the steps required under the arbitration clause to commence the contractually mandated dispute resolution process and files an affirmation in accordance with Rule 32 of the Companies (Winding Up) Rules (Cap 32H), demonstrating the foregoing.

Nevertheless, the Hong Kong court added that, as a consequence of a winding-up order's character as a discretionary class remedy, there may be circumstances in which a creditor whose debt is disputed would be justified in issuing a petition before an arbitration had been concluded[11]. For instance, a petition may be issued and stayed pending determination of the arbitration in the following circumstances:

(1) if a creditor can demonstrate a *prima facie* case for a winding up and a risk of misappropriation of assets or some other matter[12]; or

(2) if the circumstances justify early presentation of a petition in order to engage the referral back provisions for setting aside, for instance, fraudulent preferences, or to avoid dispositions of the assets of the debtor[13].

Lasmos was further considered in *But Ka Chon v Interactive Brokers LLC*[14] (***But Ka Chon***), in which the Court of Appeal suggested (albeit obiter) a step back from the position adopted in *Lasmos*.

In the Court of First Instance, the debtor had argued that it had a defence and a counterclaim in misrepresentation and thus, following *Lasmos* and *Salford Estates*, the statutory demand should be set

[5] http://www.hkiac.org/news/hkiac-practice-interim-measures-arrangement

[6] *Re Sky Datamann (Hong Kong) Limited* (unrep., HCCW 487/2001), [12]

[7] *Hollmet AG v Meridian Success Metal Supplies Ltd* [1997] 4 HKC 343; *Re Quiksilver Glorious Sun JV Ltd* [2014] 4 HKLRD 759

[8] [2015] Ch 589

[9] *BDG v BDH* [2016] 5 SLR 977

[10] [2018] HKCFI 426

[11] [29]-[30]

[12] Section 193 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32)

[13] Pursuant to section 182 of the Companies (Winding Up and Miscellaneous Provisions) Ordinance (Cap. 32), in a winding up by the Hong Kong court, any disposition of the property of the company and any transfer of shares (or alteration in the status of the members) of the company, made after the commencement of the winding up (i.e., after the presentation of a winding up petition), shall, unless the court otherwise orders, be void.

[14] [2019] HKCA 873

aside so that the matter could be arbitrated as per the arbitration clause contained in the underlying agreement. The presiding judge decided to follow the pre-*Lasmos* approach. Finding against Mr But's defence and counterclaim on the facts, the judge ruled that Mr But had failed to show the *bona fide* defence required to set aside the statutory demand. He did, however, note that even if *Lasmos* applied, he would not have set aside the demand since Mr But had failed to take the steps under the arbitration clause to fulfil the third requirement under *Lasmos*.

The Court of Appeal dismissed the appeal, agreeing with both the findings of fact and the rationale of the judge at first instance. However, "in view of the importance of the issue to insolvency proceedings", the Court went on to provide obiter comments on the *Lasmos* approach. Most notably, the Court suggested that, although *Lasmos* had not totally precluded a creditor's statutory right to petition for bankruptcy or winding up, it was a "substantial curtailment" of such rights and the Court had "reservations" as to whether discretion should only be exercised one way if the three *Lasmos* requirements were met.

Although the Court acknowledged that "considerable weight should be given to the factor of arbitration" in such proceedings, it is noted that their comments were only obiter and that *But Ka Chon* leaves open the question of how the Court of Appeal would rule on such an issue in future and, as such, whether creditors will be depriving themselves of the powerful class remedy of insolvency proceedings by including exclusive arbitration clauses.

Accordingly, the position in Hong Kong remains unclear and therefore, when opting for arbitration as a dispute resolution mechanism, creditors may be impeding their ability to promptly have a liquidator appointed. This uncertainty reflects the international division over such pro-arbitration approaches: as noted in *But Ka Chon,* the Eastern Caribbean Court of Appeal declined to adopt the *Salford* approach in *Jinpeng Group Ltd v Peak Hotels and Resorts Ltd*[15], and despite adopting the *Salford* approach in *BDG v BDH*[16] and again in *BWF v BWG*[17], the Singapore High Court has also recently rejected it in *VTB Bank (Public Joint Stock Company) v Ana Group (Singapore) Pte Ltd*[18]. Both *BWF v BWG* and *VTB Bank* are due to be heard before the Singapore Court of Appeal shortly.

Possibility of recognition of Hong Kong liquidators in the Mainland

Any impediment to the ability to appoint a liquidator quickly takes on increased significance, in light of the recent decision in *Joint and Several Liquidators of CEFC Shanghai International Group Ltd* ***(CEFC Shanghai)***[19]. This case suggests that the uncertainty as to whether an offshore liquidator can gain access to and control over a debtor's assets in the Mainland will be removed in a not very distant future.

On 18 December 2019, the Hong Kong court made an order for recognition of the appointment of administrators of CEFC Shanghai International Group Limited in the Mainland and for judicial assistance to them at common law for the first time.

Whilst there have been on-going discussions between the Hong Kong government and the Mainland government on mutual recognition and assistance of insolvency-related proceedings, it is noted that no formal arrangement has yet been entered into between Hong Kong and the Mainland. Nevertheless, Article 5 of the Enterprise Bankruptcy Law of the People's Republic of China has already provided for the possibility of foreign insolvency proceedings being recognised in the Mainland in accordance with the principle of reciprocity.

Given the decision in *CEFC Shanghai,* it would appear that the Court has now demonstrated this reciprocity, and as such, makes it significantly more likely for Hong Kong insolvency officeholders to be recognised in the Mainland going forward. It is yet to be seen whether it will become standard practice for Mainland courts to recognise Hong Kong liquidators, and potentially even provisional liquidators; however, this does open up possibilities for creative creditors and their advisors when considering options on how they might access and preserve assets in the Mainland.

Where does this leave the creditors?

In light of all these recent developments, creditors are now left with a tricky decision:

(a) the ability to pursue a readily available asset preservation measure, but a risk of losing the flexibility to have officeholders appointed and recognised in the Mainland quickly with a view to accessing and realising assets for distribution in a collective way; or

(b) retaining the flexibility to pursue the insolvency option, but losing the leverage that may be created from an interim asset preservation measure in the Mainland.

Wherever the marker ends up on this issue, one thing is clear – the traditional approach to PRC restructurings with an assumption that Mainland assets are insulated from offshore creditors no longer applies. As such, onshore debtors and their advisers need to monitor this issue closely and adjust their strategy accordingly.

[15] BVI HCMAP 2014/0025 and 2015/0003, 8 December 2015
[16] [2016] 5 SLR 977
[17] [2019] SGHC 81
[18] [2018] SGHC 250
[19] [2020] HKCFI 167

Brexit Wars: Cross-border Restructurings and Insolvencies

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The story so far…

Despite the late 2019 wobble, Brexit was 'done' at the end of January 2020. But from a practical perspective the UK's future relationship with the EU Member States is far from settled. So what's next? In many ways the progress of Brexit since 2016, has followed a typical restructuring, where stakeholders may be happy to kick the can down the road in hope that their problems will eventually disappear, only to find that it was much more complex than they had originally thought and the business required more than an amend and extend to its credit facilities. The distress concerned a plethora of different stakeholders all with a myriad of objectives, seemingly unable to come to a consensus. So whilst the parties involved have agreed to negotiate in good faith, the implementation of any long-term deal seems more like a hope than a realistic option at this stage.

The only hope…still in a galaxy far away?

Hope however remains, most recently in the form of the negotiating mandates published by the European Commission[1] and adopted by the EU and the UK[2]. But even these opening gambits as the Eighth Report of EU Union Select Committee published

[1] The Recommendations for a Council Decision authorising the opening of the negotiations for a new partnership with the United Kingdom of Great Britain and Northern Ireland (COM (2020) 35 Final).

[2] UK Written Ministerial Statement published on 3 February 2020 and the Command paper 'The Future Relationship with the EU: the UK Approach to negotiations' published on 27 February 2020.

on 5 March 2020[3] reflects "the lack of agreement on even the overarching structure of the future UK-EU relations, quite apart from specific policy issues leave us in no doubt that there are challenges ahead". Notwithstanding these challenges, both sides of the negotiating table are keen to keep to the ambitious timetable of reaching an agreement before the end of October/November so that it can be ratified in keeping with the transition period longstop date of 31 December 2020 (unless extended further).

The Force of the EUIR continues?

But what does this mean in respect of restructuring and insolvencies? At the moment nothing has changed, and the UK is treated as if it were an EU Member State and vice versa for insolvency and restructuring purposes. The Recast European Insolvency Regulation (Recast EUIR)[4] continues to apply to cases commenced on either side of the channel before the end of the transition period and after the end of the transition period, the Recast EUIR shall apply to insolvency proceedings commenced before that date.

The British (Empire) strikes back

For those proceedings commenced after the transition period comes to an end, the European Union (Withdrawal Agreement) Act 2020 states that the statutory instruments devised in the event of a "no deal" will come into play unless replaced by alternative arrangements. For example in relation to insolvency proceedings for ordinary corporates or individuals, the Insolvency (Amendment) (EU Exit) Regulations 2019 (the Exit Regulations) provide for a retained form of the Recast EUIR (the Retained EUIR). The Exit Regulations include modified jurisdictional tests for debtors who have their centre of main interests (COMI) or an establishment in the UK. In such cases, the Retained EUIR gives the UK jurisdiction to open insolvency proceedings where there is a COMI or establishment in the UK. Of course, the Retained EUIR does not oblige EU Member States to automatically recognise such proceedings, nor does it limit those jurisdictions from commencing proceedings themselves against the same debtors.

In addition, the Exit Regulations provide for the UK's own domestic provisions on jurisdiction contained within the Insolvency Act 1986 to be free from any COMI/establishment requirement for entities incorporated in the EEA. As a result of these jurisdictional changes, the UK court's jurisdiction will be wider than is presently the case in respect of EEA incorporated entities. Interestingly, it appears from the amendments to the Insolvency Act 1986 that a company incorporated outside of the EEA must still have a COMI in a Member State or in the UK for administration proceedings or a company voluntary arrangement to be available. It is unclear from the Exit Regulations whether this difference in treatment between EEA incorporated companies and non-EEA incorporated companies was intended.

The return of Jurisdictions Exercising Different Inclinations (JEDI)?

For foreign insolvency proceedings seeking recognition in the UK, even if the benefits of the Recast EUIR were to fall away completely, there are existing mechanisms which by and large should provide a predictable basis for foreign insolvency proceedings to be recognised and be able to seek assistance from an English Court. They are accessible via a variety of mechanisms, namely: the Cross-border Insolvency Regulations 2006; section 426 Insolvency Act 1986 (only in relation to a defined list of countries and territories); and to a lesser extent based on common law principles.

The same cannot be said for English proceedings seeking assistance from an EU Member State as only four have adopted the UNCITRAL Model Law on Cross-border insolvency Proceedings (Greece, Romania, Poland, and Slovenia) and so absent an equivalent to the reciprocal arrangements under the Recast EUIR being agreed, English proceedings requiring recognition and assistance in the EU Member States will be dependent upon a patch work of local law rules, none of which are automatic and will require an application to be made to the local court. This of course comes with additional time, cost, and elements of potential uncertainty all of which are pretty unwelcome in distressed or insolvent scenarios. It should not be forgotten however, that this is how cooperation in cross-border insolvency proceedings in Europe worked before 31 May 2002 and the introduction of the Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings (EUIR). Of course, it could be argued that international trade has changed significantly since that date with more businesses operating across borders.

The rise of a new order

For the UK government, there are three principal options in terms of the recognition of English proceedings elsewhere: (i) it could take no action and rely on the local law rules for any co-operation needed; (ii) it could seek to enter into bilateral arrangements with each of the EU Member States individually to try to ensure a continuation of the co-operation that exists now; or (iii) it could seek to enter into a single agreement with all the EU Member States, which replicates the Recast EUIR. Similar approaches have been recommended by the Commercial Bar Association in relation to the Judgments Regulation (Brussels I)[5]. Options (i) and

[3] Report pursuant to section 29 of the European Union (Withdrawal Agreement) Act 2020.

[4] Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings (recast).

[5] Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast Brussels Regulation).

(ii) are dependent on the co-operation of either some or all of the Member States[6].

Clone Laws: is preserving the status quo a good thing?

In assessing the options, one needs to consider first whether the Recast EUIR (and its predecessor) has been beneficial and successful in cross-border cases? There is not a significant amount of statistical data, perhaps the most comprehensive review was carried out by the EU Commission and detailed in its Report on the application of the EUIR on 12 December 2012. The report concluded that the EUIR was functioning well overall but suggested further enhancements by way of the Recast EUIR. So generally speaking, it is widely considered that the EUIR and now the Recast EUIR has delivered in terms of providing a regime that allocates insolvency jurisdiction in a uniform and predictable manner across the EU Member States and allows for the automatic recognition and effect of those proceedings commenced in one Member State, across all the others.

Sith or Jedi: does it depend who you are?

So if the UK does decide to pursue either a single agreement replicating the Recast EUIR or individual agreements with all or some member states, what should be the starting point of any agreement. Should it mirror the Recast EUIR in having automatic reciprocal arrangements for recognising insolvency procedures, including the listing of the procedures in the other Member States included in Annex A (and keep those up to date) and should it take into account decisions for the CJEU in how it interprets provisions in any new agreement? If nothing is put in place, the UK may be treated much like any existing third country in relation to insolvency proceedings for example in the US or Asia-Pacific (such as Hong Kong and Singapore). One could argue that jurisdictions in these third countries do not seem to suffer much from any lack of automatic reciprocal arrangements, although certainly from the US perspective the purported effects of the worldwide automatic stay may assist, as those with a presence in the US will be careful not to fall foul of it. It may also be a factor that these jurisdictions do not share the geographical proximity to the UK as EU Member States and therefore there may be less likely to overlap and share business connectivity that requires as much co-operation.

The final order?

Come what may, the UK will continue to have a tried and tested insolvency and restructuring regime with respected courts and practitioners. More generally English law governed agreements will continue to be effective in EU Member States in accordance with Rome I (which will continue to apply even after the end of the transition period)[7]. From a cross-border

[6] References to the COMBAR approach and advocating this approach – see INSOL Essays on Brexit: The Implications of Brexit for the Restructuring and Insolvency Industry in the United Kingdom written by G McCormack and H Anderson.

[7] Regulation 593/2008 on the law applicable to contractual obligations (Rome I) which contains rules for determining the governing law of contractual obligations and does not depend upon EU membership.

insolvency and restructuring perspective, the future may involve additional proceedings to gain recognition and co-operation for UK proceedings in Europe. As European jurisdictions continue to develop more sophisticated preventive restructuring frameworks as a result of their obligations to implement nationally the new EU Directive for Preventive restructuring frameworks (e.g., the new Dutch scheme or refinements to the Spanish homologation proceedings). As a result forum shopping may in theory become less likely and therefore the rules on the allocation of jurisdiction may hypothetically become less of an issue. In a bid to ensure that it remains attractive for restructuring cases in the future, the UK too seems to be developing its own proposals for restructuring reforms which includes a new restructuring plan (with cross class cram down) a standalone moratorium; and ipso facto provisions.

In this article we have focused on the recognition and assistance for cross-border proceedings provided by the Recast EUIR. Of course one of the fundamental tools of the UK restructuring regime is the scheme of arrangement. At present, English schemes fall outside of the scope of the Recast EUIR but it is assumed they instead benefit from the Recast Brussels Regulation and the application of domestic private international law (including the provisions of the Rome I Regulation). After the transition period, absent any alternative arrangements being put in place, the Recast Brussels Regulation will also no longer apply in the UK with a greater reliance on principles of private international law.[10] However, the UK indicated on 31 January 2020, that it intends to deposit a new instrument of accession to the Hague Convention on Choice of Court Agreements of 30 June 2005 prior to the termination of the transition period. The accession will benefit English schemes (provided certain conditions are satisfied) in terms of seeking recognition and effectiveness in EU Member States.[11] So on this front at least a ready solution seems to be within reach and certainly within the control of the UK, even if the remainder of the post Brexit cross-border restructuring and insolvency landscape is a (Hans) solo affair.

[8] Directive (EU) 2019/1023 of the European Parliament and of the Council of 20 June 2019 on preventive restructuring frameworks, on discharge of debt and disqualifications, and on measures to increase the efficiency of procedures concerning restructuring, insolvency and discharge of debt.

[9] See "A Review of the Corporate Insolvency Framework: A consultation on options for reform" (2016); "Insolvency and Corporate Governance" (2018) both published by the Department for Business, Energy and Industrial Strategy (BEIS) and; the BEIS Response published in August 2018.

[10] Rome I will continue to apply after the transition period, as it applies whether or not the law that governs the contract is the law of an EU Member State or another law.

[11] In addition to Mexico, Singapore and Montenegro.

The Changing Nature of Insolvency Disputes

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Introduction

In this article, we review the changing nature of insolvency disputes by taking a look at several trends within the insolvency litigation market in the UK, including the increasing convergence of insolvency and fraud cases; the continued development of the means to deal effectively with cross-border disputes; the innovative use of well-established remedies to assist asset recovery; the impact of big data and AI software on investigations; the expansion of the litigation funding market; the trend towards risk sharing by legal advisers; and a growth in claims against office-holders themselves.

The convergence of insolvency and fraud and increasing specialisation among insolvency practitioners

Insolvency and fraud have always been linked but we have observed an increasing convergence of insolvency and fraud litigation. International corporate structures are often used by fraudsters to perpetrate scams and/or as a means to conceal assets. The convergence arises in two ways. First, in many cases, companies which are used to perpetrate fraud are ultimately left as an empty shell, no doubt considered to be "judgment-proof". But this state of insolvency opens the door to the appointment of an insolvency office-holder who may then takes on the responsibility for investigating and pursing the underlying "bad actors" on behalf of the creditors/victims. Secondly, if the primary target of a claim has concealed its assets using offshore corporate vehicles and other devices, leaving itself apparently insolvent, the insolvency office-holder's role will be to locate and recover those concealed assets on behalf of the creditors.

Unravelling complex international fraud and pursuing assets across borders has become ever more difficult and expensive and increasingly requires specialist skills and experience. To some extent as a response to this, we have observed that a growing number of accountancy firms (from which English insolvency office-holders are usually drawn) have developed specialist multi-disciplinary teams, set up and run specifically to investigate and pursue claims involving complex cross-border frauds and asset recovery projects arising out of insolvency appointments. These teams tend to comprise a mix of licensed office-holders (liquidators and administrators), experienced investigators and forensic accountants, spread across both onshore and offshore jurisdictions. They will also typically handle "plain vanilla" and domestic insolvency litigation, not involving fraud, such as claims based on wrongful trading, preferential treatment of creditors or undervalue transactions.

Internationalism

As mentioned above, insolvency investigations and asset recovery claims often involve businesses that operated internationally or assets that flowed across borders. Litigation has inevitably had to follow this trend, with any large insolvency claim likely to involve court applications in jurisdictions outside of the home court of the office-holder.

Whilst English common law has wavered somewhat in its approach to cross-border co-operation, a debate which has taken up many column inches in magazines and journals such as this, supra-national initiatives such as UNCITRAL's Model Law on Cross-Border Insolvency (implemented into English legislation via the Cross-Border Insolvency Regulations 2006) have superseded the common law and streamlined the process for office-holders to achieve recognition in foreign jurisdictions in order to carry out investigations, freeze assets and pursue defendants in their local courts. To date, the Model Law has been implemented in almost 50 countries.

The Model Law has been found to have gaps, however, most notably in relation to the enforcement of insolvency judgments across borders. In response, in 2018 UNCITRAL adopted a second Model Law, Model Law on Recognition and Enforcement of Insolvency-Related Judgments, which, as its name suggests, is specifically aimed at the recognition and enforcement of insolvency-related judgments. In countries where this is enacted it will mean that, for example, judgments reversing asset stripping will be enforceable notwithstanding that the court issuing the judgment did not have jurisdiction over the defendant according to the normal rules in the enacting state (subject to various safeguards built into the new Model Law to ensure that the local courts can refuse to enforce a judgment where, for example, the defendant was not given an opportunity to defend the claim). Despite common law set-backs, progress towards modified universalism in international insolvencies looks set to continue.

Innovative use of remedies

When the evidence permits, English courts have recognised the difficulties inherent in pursuing complex international asset recovery exercises and have shown flexibility in the application of interim remedies. For example, we have seen freezing injunctions obtained against "persons unknown" and non-parties and a willingness on the part of the courts in some cases to "look through" nominees and declare the beneficial ownership of an asset to be in the hands of the defendant. There has also been a resurgence in the use of court-appointed receivers in the most intractable cases where freezing orders have been consistently ignored and assets are in jeopardy.

Electronic data and AI

Access to emails and other digitally stored documents has transformed the ability of office-holders coming fresh into a defunct company to obtain a picture of the events leading up to the failure of the company and assess whether claims are appropriate. One of the key tasks on day one of an appointment is to take an image of the IT systems and take possession of any back up tapes. Indeed, as a result, the office-holder is usually able to retrieve documents which directors or other officers or employees of the company may have thought were deleted or destroyed.

Reviewing huge amounts of electronic data can of course present challenges to insolvency practitioners who will have cost constraints in most cases, especially at the investigation stage, but the increasing sophistication of AI is enabling office-holders to carry out massive document review exercises in a fraction of the time that it would have taken just a few years ago. AI software is not yet a complete solution, and it comes with its own costs, but the functionality of this technology is only going to improve and it has undoubtedly become a permanent feature of large scale investigations and disputes. Going forward, the question now is only how much more it can do?

Streamlining court processes

Technology is having an impact within courts as well. Court filings in the English High Court are now made electronically and court hearings by telephone or video conferencing facility are more common. The Covid-19 crisis has greatly accelerated this process, with court hearings now commonly taking place using video conferencing facilities. This trend may well continue when the crisis abates, given the significant cost savings and the reduction of time spent travelling to, and waiting at, court.

Third party funding of claims

In the last few years there have been multiple new entrants to the market for litigation funding, driven largely by a realisation among funds that litigation can give rise to attractive returns when compared with investments in traditional asset classes. This has in turn led to greater competitiveness in the funding market, cheaper money, a greater chance of funding approval and an increase in the range and sophistication of funding products.

For their part, third party funders are keen to work with insolvency office-holders, who are professional and experienced claimants. Office-holders, like funders, generally only pursue claims which have a reasonable prospect of success and they are pragmatic when it comes to settlement. They are also "repeat customers" for the funders.

The increased availability of funding has also had a sting in the tail for insolvency office-holders, who are now seeing increasing numbers of claims against them by disgruntled shareholders, creditors and subsequent office-holders, alleging negligence or breach of duty.

However, just as the market has seen an inexorable expansion, so it has also suffered setbacks. Some entrants to the market have gone out of business and in 2019 the English High Court held that in some circumstances the third party funder could be liable for the whole of the defendant's adverse costs if the claim is unsuccessful (disapplying the usual cap at the level of the funding).

Notwithstanding these setbacks, it is probably fair to say that the growth in the availability of third party funding is probably the single most significant factor driving insolvency-related claims. Funders look set to continue to play a central role and have shown that they are more than ready to evolve and innovate in the search for returns. Perhaps the next step will be to morph from funder to owner, increasingly buying claims and judgments, releasing funds for distribution to creditors earlier and taking full control of proceedings.

Rocking the Boat – Pension Schemes Bill Proposals May Risk Destabilising Future Restructurings

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Among the amendments proposed to the Pensions Act 2004 (**Act**) by the Pensions Schemes Bill [HL] 2019-21 (**Bill**) are new criminal offences, an expansion of the moral hazard powers and an extension of the 'notifiable events' framework. The Government's stated intention is to *"ensure that those who put pension schemes in jeopardy feel the full force of the law"*. Unfortunately, the scope of the amendments is such that if enacted in their current form, they may increase the likelihood of underfunded schemes entering into the Pension Protection Fund (**PPF**), rather than support the restructuring of financially distressed employers facing significant exposure to defined benefit pension scheme liabilities.

Background to the Bill

Since its introduction in 2005, one of the key roles of The Pensions Regulator (**TPR**) has been to intervene to ensure that defined benefit (**DB**) pension schemes are sufficiently funded by their sponsoring employers to meet their liabilities as they fall due. TPR also has a statutory objective to reduce claims on the PPF, the statutory body which provides compensation to members of insolvent employer's underfunded pension schemes.

The multimillion pound DB pension scheme deficits involved in the high profile insolvencies of BHS in 2016 and Carillion in 2018 exposed perceived limitations in TPR's ability *"proactively to prevent harm to pension schemes and punish reckless behaviour"*. The Government confirmed in its White Paper *"Protecting Defined Benefit Pension Schemes"* published March 2018 its intentions to (i) to give tPR the power to punish those who deliberately put their pension schemes at risk, (ii) to impose criminal sanctions on those found to have committed *"wilful or grossly reckless behaviour in relation to a pension scheme"* and (iii) to extend the existing notifiable events framework and voluntary clearance regime to enable employers to have appropriate regard to pension considerations in any relevant corporate transactions. Following public consultation in June 2018, the Government confirmed these proposals would be taken forward into legislation.

The Bill

The Bill, originally published on 16 October 2019, was re-introduced before the House of Lords on 7 January 2020 and reprinted with amendments on 4 March 2020. The following amendments to the Act proposed by the Bill are of central interest to the restructuring community:

S. 75 Debts and the Expansion of the Moral Hazard Regime

A "**s.75 debt**" will arise under s.75 Pensions Act 1995 where, among other circumstances, the employer enters an insolvency process and immediately prior to the commencement of the insolvency process the value of the pension scheme's assets is less than its liabilities (calculated on an annuity buy-out basis). The anti-avoidance regime currently contained the Act extends liability for any DB scheme deficit to the scheme employer and persons *"connected with, or an associate of, the employer"*. Pursuant to s.38(5) (a) of the Act, tPR may issue contribution notices (**CNs**) against such persons including where:

- the target is a party to an act, or a deliberate failure to act, which *"detrimentally affected in a material way the likelihood of accrued scheme benefits being received"* (known as the *"material detriment"* test under s.38(A)); or
- where the main purpose, or one of the main purposes, of the act or failure to act was to (i) prevent the recovery of the whole or any part of a s.75 debt, (ii) to prevent such a debt becoming due or (iii) to compromise or reduce the amount of such a debt which would otherwise become due.

The recipient of a CN is required to contribute financially to any shortfall and the amount required can be any amount up to the s.75 debt.

The Bill introduces two new limbs to the 'material detriment' test:

Employer insolvency test (s38(C)): met in relation to an act or failure to act if TPR is of the opinion that (a) immediately after the relevant time, the value of the assets of the scheme was less than the amount of the liabilities and (b) if a s.75 debt had fallen due from the employer to the scheme immediately after the relevant time, the act or failure would have materially reduced the amount of the debt likely to be recovered by the scheme.

Employer resources test (s38(E)): met in relation to an act or failure to act if TPR is of the opinion that (a) the act or failure reduced the value of the resources of the employer and (b) that reduction was a material reduction relative to the estimated s75 debt in relation to the scheme.

These new grounds are likely to cause difficulties in employer restructurings since they focus on the strength of the employer's covenant i.e. its ability effectively to underwrite the scheme (which may of necessity be reduced by the terms of any restructuring). While defences are available to the target, these rely on the target evidencing that the act or failure to act would not materially reduce the amount of the debt likely to be recovered by the scheme or reduce the value of the resources of the employer relative to the estimated s.75 debt in relation to the scheme. It may be inherently difficult to achieve this outcome when structuring a deal. Given the risk of stakeholders incurring criminal and civil liabilities if the new grounds do arise (as detailed further below), it is anticipated that parties may be unwilling to proceed with restructurings without first seeking assurances, via the existing voluntary clearance regime, that TPR will not use its anti-avoidance powers to issue applicants with CNs.

Sanctions

The Bill proposes three new criminal offences derived from the moral hazard regime. Failure to pay the debt due under a CN without reasonable excuse will be punishable by unlimited fines (s42A). Seven years imprisonment and/or unlimited fines awaits a person who does an act or engages in a course of conduct without reasonable excuse which (i) detrimentally affects in a material way the likelihood of accrued scheme benefits being received (s58(B)) or (ii) whose act or failure prevents the s75 debt (including a contingent debt) becoming due, being recovered or being compromised (s58(A)).

However, in contrast to the moral hazard regime which applies to employers and those 'connected or associated' with them, the criminal offences under s58(A) and s58(B) may be committed by any person (subject to limited carve-outs for insolvency practitioners). Therefore, parties involved in a proposed restructuring including lenders, professional advisors and purchasers risk incurring criminal liability. While defendants must be acting "without reasonable excuse", to be convicted, the Bill offers no clarification of what may constitute "reasonable excuse".

Even where criminal liability is not attributed, parties to transactions may also run the risk of incurring civil liabilities of up to £1,000,000 under the new financial penalty regime proposed by the Bill if they are party to any of the circumstances under sections 42(A), 58(A) or 58(B).

The prospect of directors facing increased risks of criminal or civil liability for supporting restructuring plans which expend company resources for trading purposes may make those directors decide that it is safer to cease trading, rather than taking the calculated gamble of continued trading in the hope of implementing a rescue.

Extension of the Notifiable Events Framework

Pursuant to s.69 of the Act, 'appropriate persons' must give notice to TPR of any 'notifiable event' which occurs relating to an eligible pension scheme or employer. They must do so as soon as reasonably practicable after the event. 'Appropriate persons' include trustees or managers of pension schemes and employers and 'notifiable events' include any decision by the trustees or managers to take action which will result in any debt which is or may become due to the scheme not being paid. Failure to notify may result in civil penalties of a maximum of £5,000 for individuals and £50,000 in all other cases.

The Bill proposes to replace the existing regime with a new penalty scale under s88(A) of the Act, which broadens the range of 'notifiable events' and the scope of 'appropriate persons' who may be held liable for any failure. The new scale would enable TPR to issue penalties of up to £1,000,000 for any failure to notify against all or any of the employer, a person connected with the employer, an associate of the employer and any other prescribed person.

The details of the further notifiable events are not contained in the Bill and will be set out in secondary legislation. Based on the White Paper consultation, it is anticipated that they will include all or any of the sale of a material proportion of the business or assets of a scheme employer which has funding responsibility for at least 20% of the scheme's liabilities and the grant of new security on a debt to give it priority over the scheme debt. If prior notice of such events is required, this could delay actions which might otherwise preserve value in the employer for the benefit of the scheme.

Conclusion

The amendments to the Act proposed by the Bill introduce further elements of uncertainty into an already complex area of restructuring. Given the significant risks for the parties involved, it is possible that rather than serving to improve levels of protection for DB scheme members and reduce the level of claims on the PPF, the amendments enacted in their current form could instead promote increased levels of formal insolvency on the basis that this route poses fewer risks to stakeholders than attempting a rescue through continued trading.

Modernising Insolvency in Myanmar: Opportunities and Challenges[1]

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Overview

Myanmar is a Southeast Asian nation of 53 million people. It is strategically located between the two economic giants of China and India and has in the last decade begun to emerge from five decades of military rule. Amid a challenging global environment, Myanmar's democratically elected Parliamentarians are committed to the development of a market economy; determined to reform an economy which had been centrally planned for decades. Among its package of commercial law reforms, insolvency was identified as a key priority by both the Myanmar government and the Asian Development Bank (**ADB**) to improve the economic environment in Myanmar. In 2016, Norton Rose Fulbright (**NRF**) Sydney Office was engaged by the ADB to draft a new insolvency law. On 14 February 2020, more than three years of education, consultation, and drafting resulted in the Insolvency Law becoming Union Hluttaw Law 1/2020 (**Law**). It will come into effect on a date soon to be promulgated.

Background – Myanmar's changing economic circumstances

Myanmar has for some time restricted lending to the form of 'English mortgage' of land with duration limited to one year. Access to credit has been, and largely remains, extremely limited. People resort to informal lending market for financing needs. However, the Central Bank has recently allowed banks to lend according to their own credit management plan and grants loans of up to three years in duration. Myanmar banks are also now able to accommodate basic necessities in international trades, such as issuing letters of credit or bank guarantees without requiring full cash deposits. Myanmar had shut its door to foreign banks in the past but the Central Bank has gradually allowed foreign banks to enter the Myanmar market. International lenders with branches in Myanmar are now permitted to serve both domestic and foreign companies in Myanmar.

Personal credit, in the form of credit cards and home mortgages, has also become increasingly common in Myanmar. With these significant reforms in banking and financial sectors, the once closed Myanmar economy is ready to embark on expansion based on sustainable credit growth.

Insolvency before the new Law

The *Burma Companies Act 1914* was repealed in 2017 and replaced with a new *Companies Law*. The 1914 Act was a colonial-era statute that contained unreformed 19th century provisions for winding up, receivership and schemes of arrangement. These provisions were incapable of accommodating the needs of a modern economy. They are particularly unsuited to addressing the needs of Myanmar's small businesses: the backbone of the economy. As broader reform of Myanmar's insolvency laws was anticipated, the *Myanmar Companies Law 2017* maintained the old winding up provisions of the former *Companies Act* without change as an interim measure. Despite their British origin and Myanmar's common law tradition, these provisions were hardly ever used. We are not aware of any reported judgment in respect of Myanmar's existing insolvency laws in the past 50 years.

Personal insolvency was governed by *Rangoon Insolvency Act 1910* and Burma Insolvency Act 1920, which might similarly be described as colonial anachronisms.

Insolvency law in Myanmar was in a dire state in need of urgent reform.

NRF and the new Law

Myanmar's Insolvency Law 2020 was drafted by NRF under instructions from the ADB and the Union Supreme Court of Myanmar. It is intended to strengthen and modernise legal and institutional frameworks of insolvency and restructuring regimes in Myanmar.

Being aware of the undesirable effects of wholesale transplantation of foreign law, NRF sought to address many specific needs of Myanmar's economy in drafting the new Law. The unreformed winding up provisions in the *Companies Law 2017*, as well as the *Rangoon Insolvency Act* and *Burma Insolvency Act*, were repealed upon enactment of the Law. Provisions on corporate and personal insolvency and restructuring are included in the new law.

While the Law has incorporated the best global practices in both corporate and personal insolvency regimes, it has also retained some flexibility to adjust to Myanmar's unique cultural and economic environment. Wide consultations were undertaken to ensure that Myanmar has a law that responds to its

[1] This article is an update on the original article published in Q1 2019.

legal, cultural and economic context. We believe that the new Law contains all necessary ingredients for success for Myanmar.

Introducing corporate rescue

Governments across the world have increasingly recognised benefits associated with insolvency regimes that focus on corporate rehabilitation and value-preservation rather than penalisation and stigmatisation. The Law introduces to Myanmar the concept of corporate rehabilitation. The rehabilitation process in Part V of the Law has been carefully crafted to deal with the current business environment in Myanmar. However, it also has the capacity to facilitate increasingly complex rehabilitations as Myanmar economy develops and the use of complex corporate structures and investment vehicles become more common. The Law prescribes for an independent rehabilitation manager to take control of the management of the debtor company during the rehabilitation process. This concept has never existed in Myanmar. Most importantly, the Law imposes a strict timeline for approval and implementation of a rehabilitation plan. In the case of a rehabilitation plan not being approved or implemented, there is a conversion mechanism for the company to enter into liquidation. These provisions are vital in ensuring that rehabilitation process is not caught by red tape and administrative delays which are common features in Myanmar. The availability of corporate rehabilitation will greatly assist Myanmar to expand its booming manufacturing sector where the disruption on supply chain due to insolvency can be costly and undesirable.

MSME specific insolvencies

The Law also recognises the important role of Micro, Small and Medium Enterprises (**MSMEs**) in the Myanmar economy. Part VI of the Law contains provisions for dealing with insolvency of both incorporated and unincorporated MSMEs. The use of corporate structure in Myanmar is not as widespread as in other economies and there is a very poor understanding of the concept of separate legal personality. Therefore, access to Part VI has been defined with reference to business debt, whether or not the business entity is incorporated, and excludes those enterprises that become insolvent due to personal or consumer debt. The Law provides a simplified and cheaper rescue and rehabilitation regime, where the proprietor of the business remains in control under the general oversight of a rehabilitation advisor, who will assist with the preparation of a rehabilitation plan within strict timelines.

In the event that winding up becomes necessary, the key focus of MSME specific insolvencies will be on the expedited distribution of available assets. Unless creditors consent and provide funding, a liquidator will have no obligation to investigate the affairs of the company or pursue the recovery of preferential or uncommercial transactions. However, creditors will have recourse for judicial review if they are dissatisfied. Severe delays in dispute resolution has always been a concern for investors and the new law, through imposition precise deadlines, will provide temporal certainty for creditors and other stakeholders in insolvent MSMEs.

Focus on timeliness

The Law aims to deliver quick, cheap and efficient insolvency regimes. With strict timelines, elimination of unnecessary procedures and minimal involvement of courts, the Law aims to address and overcome investors' concerns about delays in Myanmar courts and bureaucratic red tape. It is hoped that the Law will not only streamline insolvency procedures but also reduce unwanted frivolous lawsuits on minor procedural grounds. The Law aims to support and strengthen the development of commercial law in Myanmar.

NRF is also assisting Myanmar's Supreme Court to finalise Rules to be made under the new Law. We anticipate that that task will soon be competed and are confident that they will be in place when the Law comes into effect.

Assisting with capacity building

A legal regime can only be as effective as its practitioners. NRF has been actively involved in the process of capacity building in Myanmar's judiciary and insolvency profession; with a team of experienced advisors having made numerous trips to Myanmar, not only to better understand the legal and economic context in which the Law has been drafted, but also to explain modern insolvency concepts as well as the content of the Law as it has developed to various stakeholders in government, the business community and NGOs. NRF partners Scott Atkins, Fellow, INSOL International and John Martin, along with internationally prominent commercial judges (and retired judges), conducted a judicial colloquium held in Myanmar's capital Naypyitaw to educate selective judges and other judicial officers on the Bill, as well as other wider issues for judicial considerations in insolvency matters.

In a country where few judges have much commercial experience, let alone experience of international commercial realities, capacity building is not without challenge. However, NRF has been working closely with the ADB to assist the Myanmar judiciary to play a more active role in commercial law reform process.

Myanmar will also need professional insolvency practitioners to implement the new Law. Currently, only a handful of older members of the accounting and legal professions have any experience in insolvency beyond uncontested voluntary windings up, due to the scant use of existing insolvency regimes. NRF has actively worked with legal and accounting professional associations to achieve the goal of establishing a thriving profession of insolvency practitioners in Myanmar, upon which the proper function of the new law depends. There has been a particular focus on the establishment of a professional body to represent practitioners and to play an important role in the education, admission, and disciplining of insolvency practitioners, Advice on the constitution of such a body has been an important part of NRF's remit.

Some other challenges

NRF's educational efforts have included the country's law-makers. The enactment of the Insolvency Law by Myanmar's Parliament is one of the most significant milestone in commercial law reform in Myanmar since the end of military rule in 2010.

Successful integration of Myanmar's economy into the global economy requires significant commitments from its government beyond domestic law reforms. Both NRF and ADB believe that the adoption of the *UNCITRAL Model Law on Cross-Border Insolvency*, which is a significant feature of the new Law, will make Myanmar a more attractive investment destination.

Final thoughts

Myanmar's Constitution provides for a market economy and the functioning of a market economy requires sound commercial law regimes. Myanmar's new *Insolvency Law* provides for quick, cheap and effective insolvency regimes and will discourage the use of informal channels of debt recovery. The Law will demonstrate to international businesses an example of best global practices being applied to Myanmar's unique economic circumstances. The Myanmar people have long been living under extreme economic hardships that have contributed to many political and social conflicts in a nation of rich cultural diversity. NRF believes that insolvency and corporate rehabilitation regimes created by the Law will directly contribute to expansion of economy through better access to financing and lower cost of credit. Economic prosperity and improved living standards will, in turn, assist in resolving difficult social and political issues facing Myanmar society and promote the 'rule of law'. NRF is optimistic of the far reaching consequences and positive effects of Myanmar's new *Insolvency Law*.

How to Understand World Insolvency Law

By Philip R Wood CBE QC (Hon)

UK[1]

Writing a summary of the insolvency law of all the jurisdictions of the world is a bit like doing a crossword puzzle or sudoku. You have to fill in all the squares. Otherwise you live in the agony of incompleteness, the riddle unsolved, the stamp missing from the set.

The main problem is that that there are 321 jurisdictions in the world – encased in the much smaller number of about 198 sovereign states. The US technically has 51 legal jurisdictions and the British Isles have seven. Even the Monastic Republic of Mount Athos is a separate legal territory and hence a jurisdiction.

I decided that I would add a new book containing this insolvency summary of every jurisdiction when I was updating my books on the law and practice of international finance. I had given myself a year to do this – as much as I could face. That meant six weeks a book, three of them almost completely new. The update was published in 2019 in nine volumes.

I thought the summaries would be useful because insolvency law is the great driver of commercial and financial law. Practitioners in this art have an exceptionally valuable perspective on what goes on in business law.

I had already done a lot of summaries, with a respectable 25 pages on the US, 18 on Italy, 22 on France and so on.

I counted up the number still to do. 115 jurisdictions to go! My heart sank.

I looked up the first candidate. Tanzania. The Companies Act 2002 containing insolvency provisions was 360 pages long. I scrolled through and picked up my phone with its dictating app.

I had seen this before. In fact I had seen it maybe many times before – for example, various versions in Singapore, Ireland, Uganda, Malawi, even Mauritius. The insolvency provisions were based on the British Insolvency Act 1986. After an hour's dictation on Tanzania – entry completed.

I picked up the next country. Kazakhstan. Not as long as Tanzania, but the translation was hard going. 2014 legislation. Looks familiar. Bits of Ukraine 2013 (since amended), resonances with Uzbekistan 2003, with the peculiar anti-set-off provision. What was the source? Russia 2002 evidently or a previous Russian version.

Next Madagascar, 2004. Quite clear. Based on the OHADA equivalent, the organisation for the harmonisation of business law in Africa, applicable in 17 sub-Saharan African countries, in turn based on the French legislation dating from 1985.

On to Mozambique 2013. Hmm. Yes, Brazil 2005! But why? Portuguese is spoken in both countries.

What was going on was that legislators found it easier to copy from someone else rather than start again. And they choose to copy from somebody with whom they have some sort of link – a common language or shared history.

I started doing the 115 summaries on 31 October 2018 and finished dictating on 16 November 2018 – 17 days.

I accept that some entries were quite short. Libya, for instance.

I have to reveal something terrible which I hope the reader will keep secret.
The copying is much more pervasive than that. The law in around 85 per cent of the world's jurisdictions is based in its principles on the law of just three jurisdictions, with contributions from a few more.

I had been puzzled by comparative law from my earliest days as a lawyer. Within a short time of qualifying I had to do due diligence on a portfolio of ship mortgages which a bank was buying from a ship finance corporation. The mortgages were documented under many different flags. The efficacy and remedies were very different, but I did not have a theory to explain the divergences.

Later I was involved in the mayhem after the Iranian Revolution of 1979. American banks called in their loans on a Sunday so that they could set off a demand from the central bank of Iran for massive deposits held by the banks in London, payable on the Monday.

So I wrote a book on set-off. I expected that it would take a few months but it took eight years of misery. It was 1300 pages long and published in 1989, still the longest book on the subject. Towards completion, I did some research on set-off in 69 additional jurisdictions. I discovered that in France set-off

[1] Philip Wood is the author of nine volumes in the Law and Practice of International Finance series (Sweet & Maxwell, 2019). Volume 1 is the third edition of "The Principles of International Insolvency" and the summaries are contained in volume 2.

was very easy if the two mutual debtor-creditors were solvent but prohibited if one was insolvent. However, in England set-off was very difficult if both counterparties were solvent but mandatory if one of them was insolvent – exactly the opposite.

Set-off involved simply fantastic amounts – in payment systems, in the foreign exchange market, in the new derivatives market and in securities markets. If you could net and set-off, you could sometimes reduce exposures by more than 90 per cent. The question of whether banks could net and save themselves was considered existential by central banks.

The solution came in a eureka moment. England was protecting creditors. If the parties are solvent, a creditor wants to be paid in full. Pay now, litigate later. If a party is insolvent, set-off is how the creditor gets paid. The creditor wins both ways. But if the policy is to protect debtors, then debtors can set off if both parties are solvent, but creditors cannot set off if the debtor is insolvent – the creditor pays in but does not get paid. Therefore France was protecting debtors. That was the key to opening the door.

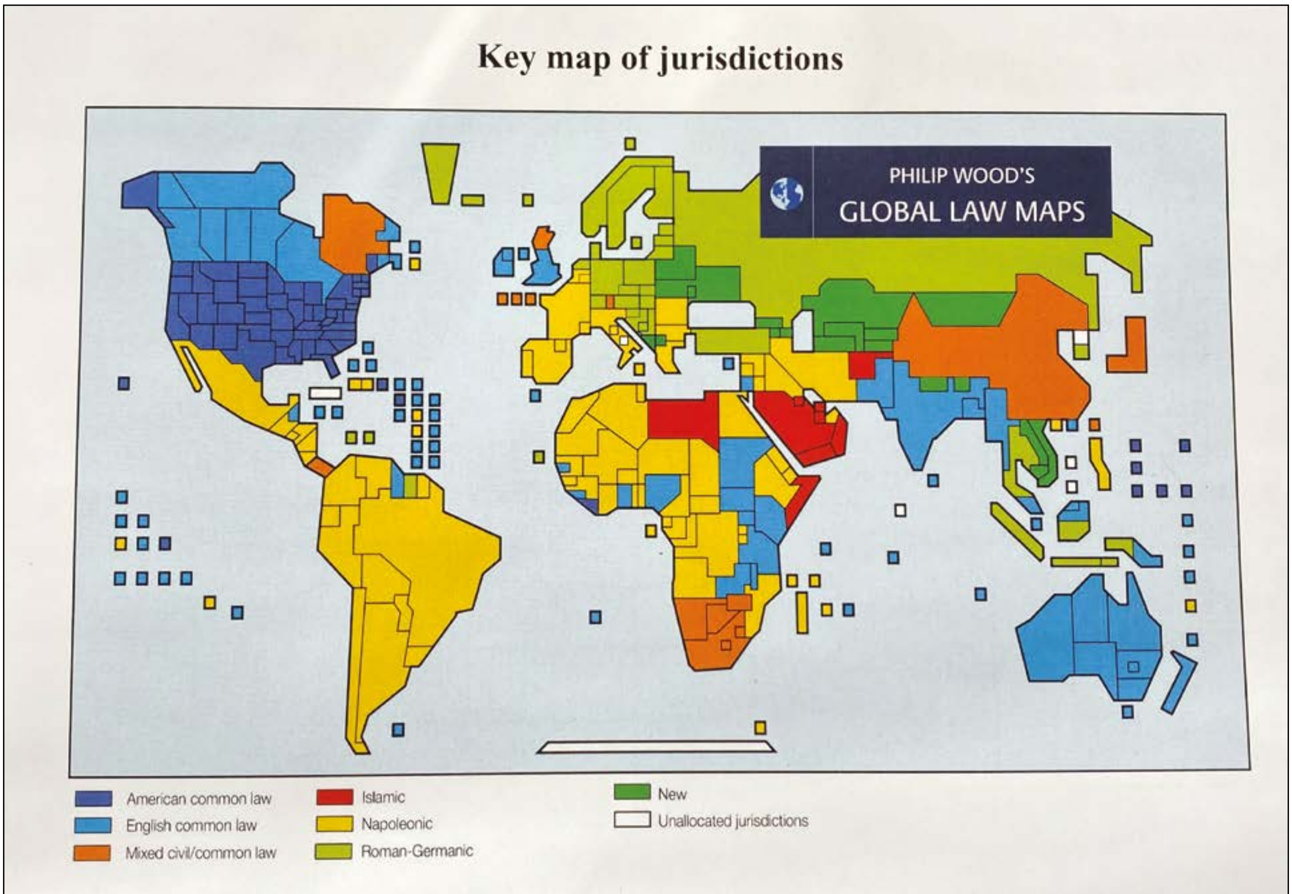
The realisation resolved the whole ship mortgage issue. England had a universal security interest in the form of the corporate fixed and floating charge, but France in those days had very poor security. From that it was a short step to construct a list of key indicators based on the pro-creditor and pro-debtor antithesis and see if the theory worked. I worked out a basic five indicators and later added quite a few more to refine the tests. Once these were developed, I could show that Germany was in the middle between the two poles on my England/France key indicators.

From that point, practically the whole world fell into place. I already knew roughly where the world got its legal systems – from imperialism and emulation (or copying, more or less). After a few years work, I labelled the three legal giants as Anglo-American common law, Napoleonic and Roman-Germanic, not just civil versus common law. All the discussion about codification, the doctrine of juridical precedent and various waffly tests used until then by comparativists went out the window. What mattered is what the law said, not how it was written down. You tested on insolvency when it really matters, when legal systems have to decide who is victor and who is victim, when passions run high. All that was sorted around 1992 and published in my books in 1995, refined in the 2007/8 edition and further refined in the 2019 edition. The tests and the methodology are documented across the world in these latest books.

The secret therefore is that, if you know the insolvency law of three jurisdictions England, France and Germany, plus New York, you have got the key to nearly the whole world. Just like that. Done.

When I started out on set-off, I wasn't planning to discover the solution to comparative law. It was just a petri dish accident.

Does that mean the end of insolvency lawyers? Absolutely not. It's only the beginning. The reasons why is a story for another day.



One of the results of this work is that I did a series of maps of world financial law. It took me two years to draw the map in a simplified form. In January this year I posted the most important map - which was the key map showing the families of jurisdictions (shown on previous page) - on a Saturday afternoon. By Monday morning it had had 120,307 views. I know that is not Beyoncé, but it was a lot for me.

The irony is that the map had been in the public domain for more than twenty years and was published in a book of maps in 2008. The international legal community was looking the other way. Why they were not interested in 2008 but are interested in 2020 is a mystery to me.

To get back to Mount Athos. This territory is historically the Orthodox Christian answer to the Vatican – the latter is the smallest jurisdiction in the world. In both entries, at first I wrote: "God alone knows what the insolvency law is in the Vatican/ Mount Athos." Then I struck that out and said nothing about insolvency.

I could have received a thunderbolt from the sky. You can't be too careful these days. But I have to live with the fact that the summaries are incomplete.

10th Anniversary Africa Round Table on Insolvency Reform

Report by Will Paterson, The World Bank Group

The 10th Africa Round Table on Insolvency Reform (ART) took place from 21-22 November 2019 in beautiful Swakopmund, Namibia. The theme was "Celebrating a decade of insolvency reform in Africa and anticipating what lies ahead." Over 126 people attended from 22 countries around the continent. This represents major growth for the Round Table – the first ART held in Abuja, Nigeria in 2010 had 20 participants from 6 countries.

Year	Location	Theme
2010	Abuja, Nigeria	Inaugural ART
2011	Cape Town, South Africa	Preserving value in distressed businesses
2012	Nairobi, Kenya in Africa	Insolvency best practices: a roadmap for reform
2013	Lusaka, Zambia	Building Africa's credit environment for growth: how insolvency regimes can improve the cost and availability of credit
2014	Kampala, Uganda	Jobs in Africa: how insolvency regimes impact economic growth
2015	Cape Town, South Africa	Restoring financial sector stability: the role of insolvency regimes
2016	Accra, Ghana	Freedom to fail? – Insolvency for micro, small and medium enterprises
2017	Mauritius	Plugging the implementation gap
2018	Maputo, Mozambique	Multinational insolvencies in an African context
2019	Swakopmund, Namibia	Celebrating a decade of insolvency reform in Africa and anticipating what lies ahead

ART is organized every year jointly between INSOL International and the World Bank Group. It has become the premier forum for dialogue on insolvency reform in the continent. Indeed, ART has helped move the needle on insolvency reform in many countries. For the past number of years, Adam Harris, Past President, INSOL International has graciously chaired the organizing committee, which includes Penny Robertson, David Burdette from INSOL as well as Antonia Menezes, Fellow, INSOL International and Will Paterson from the World Bank Group.

Since ART started in 2010, the gathering has focused on introducing delegates across the continent to the insolvency and restructuring tools that are available in an insolvency scenario, with the emphasis on encouraging and supporting insolvency reform. The themes of the events have ranged from value preservation to insolvency frameworks for micro, small and medium enterprises to examining how to encourage more effective implementation of insolvency regimes. The main objective of ART remains to develop professional ties with the goal of improving insolvency and restructuring regimes across the African continent.

Celebrating 10 years of ART provided delegates with the occasion to look back at the past decade of insolvency reform in Africa and an opportunity to pause and reflect on the potential challenges that lie ahead. Topics in Swakopmund included practical sessions critiquing corporate rescue plans, the impact of secured transactions reform on the availability of credit, stakeholder negotiations in cross-border insolvency matters, challenges faced during the insolvency reform process, non-performing loan management in Africa, asset-tracing and fraudulent transactions, practical case studies and views from the judiciary.

The first day began with Adam Harris and Antonia Menezes welcoming delegates. They emphasized the importance of multi-stakeholder dialog at the Round Table, which brings together governments, practitioners and policy makers. They also discussed 3 trends in Africa: (i) many governments are increasingly understanding link between FDI and creditors' rights; (ii) restructuring frameworks are becoming more developed, although use is still limited; and (iii) trend globally that prevention is better than a cure – increasing pre-insolvency processes. The Law Reform & Development Commission of Namibia provided an update on the Namibian insolvency framework and recent cases.

Honourable Mr Justice Mainga welcomed the participants on behalf of the Chief Justice of Namibia. Justice Mainga stated that the Round Table came at an important time in Namibia, when the country is in the process of reforming its insolvency laws. Preparations for establishing a commercial court in the country are also at an advanced stage. Setting the tone for the day, he also invited us to celebrate what countries have accomplished since the Round Table started and reflect on the challenges ahead.

Next there was a peer-to-peer session where countries highlighted some of the major reforms and cases in the region to insolvency frameworks. Delegates from Ethiopia, Kenya, Mozambique, Rwanda, Zambia and Zimbabwe provided updates and discussed some of the challenges their countries are facing in implementing the frameworks.

After the peer-to-peer session, there was a lively discussion on critiquing business rescue plans. Over the last years, many countries on the continent have revised their insolvency regimes to put in place business rescue frameworks. The session discussed the importance of business rescue regimes and perspectives of business rescue in South Africa, Mauritius and Kenya. The session focused on the practicalities of preparing a successful business rescue plan.

Before lunch, there was a panel on the emerging issue of Fintech and its intersection with insolvency. This topic will likely reoccur at future Round Tables and it will be interesting to track the thinking in this area. The panel highlighted the importance of regulatory sandboxes for Fintech. The South African example of the inter-agency Fintech working group bringing together many internal stakeholders was highlighted. A Zimbabwe Fintech example was also shared. A major challenge for policy makers is to keep pace with technology and make sure the policies enable innovation.

After lunch, a leading insolvency practitioner instructor led the group through an engaging practical workshop on insolvency practitioner skills. The practical case study focused on what steps need to be taken by a restructuring expert in the first week after appointment. The plenary discussed the action points and gave comments on other issues discovered such as staffing concerns, toxic fumes and social considerations.

The last panel of the first day provided the delegates with insight into domestic insolvency reforms – the challenges and triumphs. Delegates discussed law reform in Ethiopia, Myanmar, Namibia and Rwanda. The main challenges discussed were: (i) language – dual translation can be difficult and risky – languages may not translate perfectly, with local language sometimes too stigmatized to use; (ii) insolvency is one of the most technically complicated pieces of legislation. A lot of the concepts are new to citizens; (iii) customization of the law for local context; (iv) importance of implementation and capacity building, a good legal text is not enough; (v) need to maintain reform momentum, keep it going; (vi) communication between institutions.

The first day concluded with a beautiful dinner in the Namibian desert, which included music and a cultural component.

On the morning of the second day, Scott Atkins, the Vice-President and Fellow, INSOL International welcomed participants back to the Round Table. He expressed his appreciation for the number of delegates who attended and for the impact the Round Table has had around the continent.

For the first session, the challenges of non-performing loans (NPLs) were discussed with panelists from the International Finance Corporation, Central Bank of Namibia and a loan servicing provider. The session highlighted platforms and tools to address NPL management from both the public and private sector perspective. A lively discussion ensued, with many questions from participants on how their countries can better resolve NPL problems.

Next, a panel on asset tracing and fraudulent transactions discussed the tools, practical experiences and techniques for locating and reversing fraudulent transactions. The panelists were practitioners from Kenya, Nigeria, South Africa and the United Kingdom. They provided examples which stressed that the ability to trace and recover assets that have been moved across borders can be vital for enabling insolvency practitioners to obtain the maximum possible recovery for creditors.

After lunch, a session on stakeholder negotiations in cross-border insolvency with representatives from the United States, South Africa, Germany and Kenya reminded attendees of the main elements of cross-border insolvency. This topic was the 2018 theme of the ART. The panelists used a short case study and role play to convey the main issues in cross-border insolvency, including the COMI and examining domestic cross-border frameworks.

For the last session of ART, eminent commercial judges from England & Wales, Kenya, Namibia, South Africa as well as the United States presented their views from the bench. They discussed some of the key issues they have observed in cases over the past decade and what developments they anticipate in the future.

The event ended with participants noting that they look forward to the next ten years of the Africa Round Table. That they hope ART continues to contribute to reforming insolvency frameworks across the continent and connecting the amazing people who engage in the hard work to improve those frameworks.

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www.insol.org/ART

Younger Members Spotlight

Matt Thorn
Norton Rose Fulbright
London

- **When – and why – you got into restructuring and insolvency work:**

  I started working at Russell McVeagh in Auckland, New Zealand in 2007 doing general banking work. Then Lehman went bust. New Zealand was not immune from the effects of the financial crisis; the country's mezzanine finance sector collapsed and it was a difficult time for businesses and investors. I found my work shifting from leveraged and structured finance to enforcement and insolvency procedures, with a distinctly New Zealand angle - I advised on the enforcement of security interests in livestock (and the proceeds thereof) and the receivership of a holiday resort development in Fiji.

  I found the restructuring and insolvency work interesting and challenging, and still do to this day. Every situation is different and requires a different application of skills and tools to the problem at hand. So when I moved to London in 2010 I met the restructuring and insolvency team at Norton Rose Fulbright and the rest, as they say, is history.

- **Favourite case you have worked on and why:**

  We acted for BDO as UK administrators of a Cypriot-based shipping group operating a fleet of oil tankers. The administrators were trading the tankers for a period before successfully consummating a restructuring and the sale of the group, rescuing each of the trading companies as a going concern and exiting administration – a rare instance of administration being used for its primary purpose, i.e. corporate rescue, rather than as a business sale mechanism.

  The case had interesting dynamics, unusual assets (for a trading administration!) and complex questions of law; and we were able to reach a successful outcome for the creditors.

- **Personal career highlight:**

  Making partner at Norton Rose Fulbright. We have a great team of talented lawyers doing varied and complex work. I'm excited to be a part of it and to be playing an integral role in continuing to build the practice with the support of our clients and other professionals.

- **Best attribute(s) professionally:**

  I'd have to defer to our clients on this one… But if I had to pick my best attribute it would probably be my ability to solve problems commercially and get the deal done. Ultimately, that is what clients look to us for - while protecting their interests of course!

- **Tip for young practitioners coming into the profession:**

  Restructuring and insolvency is a broad church, encompassing elements of traditional corporate, banking and litigation practice areas (among others). My advice to a young practitioner is to get as much experience as you can from across the board. An understanding of finance is helpful too!

- **If you could practice law in another discipline or practice area, what would it be and why?**

  I enjoy music and attending gigs and festivals. So if I could combine music and the law, perhaps by acting for artists and promoters or festival organisers, then that could be fun. I can imagine that the personalities would be a little different from those in the restructuring and insolvency world… or, then again, perhaps not!

- **Favourite restaurant:**

  St John in London. It's fantastic; from nose to tail.

- **Favourite drink:**

  A pint of bitter or a negroni, depending on the circumstances.

- **Last film you saw:**

  1917. If you're unfortunate enough not to have seen it yet, the film is a spectacular World War One drama by Sam Mendes, viewed as if shot in one continuous take. The one-shot take has been done well before (e.g. Birdman, Victoria) and, in this case, brings the audience on a thrilling ride through the horror that was wartime France. Highly recommended.

- **Who would play you in a film of your life:**

  Leonardo di Caprio. He would need to be paid a substantial sum of money.

- **What do you see as hot topics in the restructuring and insolvency world in the next two years?**

  Schemes of arrangement for foreign companies are an increasingly popular method of surgically restructuring a specific class of debts without the need for an all-encompassing insolvency procedure. We expect this trend to continue in the UK, Brexit notwithstanding.

  The implementation of the EU Restructuring Directive and reforms to the restructuring regime in the UK will be a space to watch. We expect to see increased competition between continuing EU member states seeking to establish themselves as cross-border restructuring hubs.

  There is significant – and mounting – uncertainty in the outlook for the global economy. Covid-19 has had a profound impact on people's lives around the world. Combined with the drop in the oil price, the health crisis has also had a profound impact on markets. Even pre-Covid-19, the prolonged bull market combined with the high levels of global debt was sounding warning bells. The reaction from governments across the world to the crisis, socially and economically (including through emergency changes to insolvency law), is unprecedented. I expect it to be a busy next few years as we help businesses recover from the downturn.

INSOL International™

Students and Practitioners Engage with Novel International Insolvency Issues in the Ian Fletcher International Insolvency Moot, London February 2020

Report by Adjunct Professor Rosalind Mason
Queensland University of Technology, Australia
2020 Moot Coordinator

On a sunny February afternoon in London, teams of law students from around the common law and civil law world gathered in Lincoln's Field for an informative walking tour of "Legal and Illegal London", exploring the Inns of Court. They had travelled to compete in the 4th Ian Fletcher International Insolvency Moot, having qualified as the top 8 from a record 22 law schools who participated in the qualifying written round. The next day began at PwC More London with a formal welcome on behalf of INSOL International and the International Insolvency Institute by Scott Atkins, Vice-President and Fellow, INSOL International. On behalf of the third foundation sponsor, QUT Law and as Moot Coordinator, Rosalind Mason also congratulated them on qualifying for this unique opportunity to practise their advocacy skills before international experts in practice and academia.

Named in honour of the late Emeritus Professor Ian Fletcher, a world-renowned scholar and author in international insolvency law, the Fletcher Moot poses a hypothetical problem on international insolvency and restructuring law and challenges students' appellate advocacy skills. The 2020 Moot problem was created by a specialist committee under the leadership of the United Kingdom's Hon. Mr Justice Richard Snowden. The scenario involved a foreign debtor which had obtained court approval in its place of incorporation for a plan of arrangement with its creditors. In the hypothetical moot jurisdiction of Nuzilia, the teams had to argue an appeal and cross-appeal against a lower court judgment on interesting issues such as a discharge under the plan and the Gibbs rule as well as the differing positions on rights of set-off and public policy. Uniquely the 2020 Moot required teams to research and apply the 2018 UNCITRAL Model Law on Recognition and Enforcement of Insolvency-Related Judgments, which is yet to be adopted by any jurisdiction. This provided an interesting challenge for law students as well as the moot benches! As Lord Justice David Richards, who presided at the Grand Final, commented "The interest [the Moot] engenders and the very high quality of the Finals teams are testament to the importance of the Moot and the part it plays in developing thinking about international insolvency issues literally around the World."

The 2020 Fletcher Moot was wonderfully supported by PwC and EY, the hosts for the Preliminary Rounds on Friday and Saturday 7-8 February. The students, who hailed from universities in Australia, Singapore, India (2), Serbia, The Netherlands, England and Canada, competed in the four preliminary rounds. Each team mooted twice as Appellants and twice as Respondents. They appeared before benches of three expert practitioners and academics from a range of common law and civil law countries and with many leading partners, professors and a Queen's Counsel as presiding moot judges.

In all, 30 moot judges from practice and academia volunteered for the 48 positions required to run the preliminaries. Many of these moot judges have themselves since commented positively on the experience of interacting with the competitors and each other. Dario U Oscos, a senior practitioner from Mexico, wrote "The case, pleadings, oral presentations and interaction among organizers, judges, practitioners and students were memorable and outstanding. how enjoyable and informative the experience had been."

The support from the LSE Department of Law was also key with the LSE Mooting Club student volunteers contributing in a very professional manner as moot bailiffs. A great aspect of the oral rounds is the way in which the competing teams and bailiffs as students with an interest in advocacy learn from the exchanges before the benches – and also learn about other jurisdictions in the process. As another moot judge, Professor Louise Gullifer QC, University of Cambridge, commented "It is a real strength of the competition that [such impressive] students … get exposure to the international legal community at this early stage of their legal career."

On Sunday 9 February, despite Storm Chiara bringing high winds and rain as it crossed the UK, the top four teams from the earlier rounds, went on to battle it out for a place in the Grand Final. Norton Rose Fulbright provided great support through hosting Sunday's proceedings at their offices overlooking Tower Bridge and the Tower of London. On Sunday morning, Singapore Management University won their Semi-

Final against National Law University Odisha, India, before a distinguished bench of The Hon. Mr. Justice Richard Snowden, High Court of Justice, England & Wales; Hon. Louise Adler, US Bankruptcy Court, Southern District of California; and Justice Daniel Carnio Costa, First Bankruptcy Court of Sao Paulo, Brazil. It was OP Jindal University, India who defeated University College London, England in the concurrent Semi-final argued before The Hon. Mr. Justice Antony Zacaroli, High Court of Justice, England & Wales; Madam Justice Nicoleta Mirela Nastasie, Bucharest Tribunal, Romania; and Mr Justice Nicholas Segal, Grand Court, Cayman Islands.

Then on Sunday afternoon, the Grand Final was argued before a prestigious bench of Lord Justice David Richards, Court of Appeal, England & Wales; Madam Justice Mincke Melissen, Court of Appeal, Amsterdam; and Justice Kannan Ramesh, Supreme Court Singapore. The enthusiastic audience who weathered the storm were treated to an exceptionally high standard of advocacy and engagement with the bench by the top two teams. The sponsors were delighted that Professor Fletcher's family could attend the Grand Final and Awards Ceremony, as Professor Fletcher had been unable to attend in 2017 and 2018 due to ill health. His widow, Letitia Crabb, commented that "We were all pleased that [Ian Fletcher] is remembered by an event in the field of education." He "would be delighted that through all of you, young people are being helped to make their way in the world of insolvency."

In the Awards Ceremony, various achievements were recognised, including Singapore Management University who took out the coveted title of Winner of the Fletcher Moot. Runner up was awarded to the OP Jindal University, India. The University of Belgrade receiving the Spirit of the Moot Award, which recognised a team that displayed qualities such as respect of fellow competitors and camaraderie whilst maintaining their competitiveness. The Best Individual Mooter in the Grand Final was awarded to Arushee Bhatnagar, Singapore Management University, and the highest ranked mooter in the preliminary rounds was Sarah Banton, University College London.

The instigator and inaugural coordinator of the Fletcher Moot, Adjunct Professor Rosalind Mason from the QUT Faculty of Law, was also thanked for her contribution to the competition. Professor Adrian Walters, Chicago-Kent College of Law is the new Moot Coordinator for the next Fletcher Moot. It is scheduled to be held in conjunction with the INSOL Quadrennial Congress on 14-16 March 2021 in San Diego, USA.

The 2020 Fletcher Moot in London proved once again to be a splendid opportunity to promote international communication and cooperation. Law students and members of the profession alike made connections and learned more about the interesting and complex area of insolvency and restructuring law, where it crosses borders. Some of the world's most highly regarded insolvency judges, professionals and academics have once again come together in a unique collaboration to raise the profile of insolvency and restructuring in the university curriculum and to mentor the next generation of insolvency lawyers.

Lord Justice David Richards and the 2020 Moot winner SMU

Justice Kannan Ramesh and the best individual Mooter in the Grand Final Arushee Bhatnagar, SMU

Madam Justice Mincke Melissen and the best individual Mooter in preliminary rounds Sarah Banton, UCL

Professor Rosalind Mason and the Spirit of the Moot Award winner University of Belgrade

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