INS L WORLD

3RD QUARTER 2019

FOCUS: Europe

The Quarterly Journal of INSOL International

US$25

CAREY OLSEN

We offer a broader perspective that is founded on a unique mix of legal insight, commercial understanding and a global view.

Our 200-strong team of lawyers has built long-standing relationships with the top international law firms, insolvency practitioners, accountancy and forensic practices, government bodies and industry regulators ensuring our advice is always commercial, comprehensive and timely.

BIGGER PICTURE

Wide-angle thinking

OFFSHORE LAW SPECIALISTS

BERMUDA BRITISH VIRGIN ISLANDS CAYMAN ISLANDS GUERNSEY JERSEY
CAPE TOWN HONG KONG LONDON SINGAPORE

careyolsen.com

Editors' Column

Mark Craggs
Fellow, INSOL International
Norton Rose Fulbright LLP, UK

Peter Gothard
Fellow, INSOL International
KPMG, Australia

Welcome to the latest issue of INSOL World. In this issue we focus on the multitude of recent developments in Europe.

We kick off with an excellent article from my co-editor and INSOL Fellow, Mark Craggs in cooperation with his colleagues, Guillaume Rudelle and Koen Durlinger, examining the new **EU Restructuring Directive** aimed at developing a common framework for pre-insolvency restructuring. The article takes us through the provisions of the Directive and examines the position of France, the Netherlands and the UK in respect of the reform. It will be very interesting to see what approaches Member States will take to implementation. I agree with the authors that there will certainly be plenty of developments to occupy restructuring professionals across Europe in the near future!

Not content with the feature article, Mark has also conducted an interview with another INSOL Fellow, Judge Nicoleta Mirela Năstasie of the Bucharest Tribunal in Romania on **Judicial Communication in Cross-Border Insolvency**.

The Netherlands has taken a big step towards its goal of becoming a restructuring hub with the introduction of the bill on the **Court confirmation of extrajudicial restructuring plans** ("CERP" or "WHOA" for our Dutch friends). INSOL Fellow Ferdinand Hengst & Reinout Vriesendorp give us the run-down on the new Dutch Bill.

Sticking with the European focus we have articles on recent law reforms in **Guernsey** (Todd McGuffin), the **Ukraine** (Olha Stakheyeva-Bogovyk), **Portugal** (Paulo Valério & Carlota Paes de Andrade), **Russia** (INSOL Fellow Pavel Novikov & Yulia Skiteva) and **Finland** (Salla Suominen). Thanks to all for their excellent contributions!

Moving away from Europe we have:

- an update on the **Indonesian PKPU** process from Daniel Ginting and Ian Chapman;
- an excellent article from Farid Assaf SC (INSOL Fellow) exploring the potential impact of the **Singapore Convention on Mediation**;
- an overview of the changes to the **DIFC Insolvency Law** which came into effect earlier this year by Bill Gambrill;
- a report from another of our INSOL Fellows, Sophia Rolle-Kapousouzoglou together with Brian Simms QC on a recent decision in the Bahamas dealing with the **Extra-territorial reach of clawback claims**; and
- an examination of the **sale of assets under the Brazilian Bankruptcy code** from Salvatore Milanese, Bruno Carvalho and Wolney Netto.

Rounding things out we have an excellent examination of the question that has crossed many a practitioner's mind from time to time – **Should professional services firms list?** Greg Tucker and Robert Miano from here in Australia take us through the pros and cons!

My thanks to all the contributors and the tireless efforts of the Editorial Board for producing such a wonderful edition.

Peter Gothard

Sponsor of INSOL World

mourant

Leading offshore law firm Mourant Ozannes advises on all aspects of complex corporate restructurings, providing pragmatic, commercial solutions for our clients who include major financial institutions, trust companies, legal and accountancy firms, regulatory and public bodies, and high-net-worth individuals.

BVI | CAYMAN ISLANDS | GUERNSEY | HONG KONG | JERSEY | LONDON mourant.com

President's Column

By Julie Hertzberg
Alvarez & Marsal
USA

It is difficult to believe six months has passed since many of us were in Singapore together and I became President of INSOL International. The time has simply flown by. The last few months have seen INSOL embarking on new initiatives which I will go into in more detail. Importantly, there will be no reduction in activity over the next six months. Exciting times indeed.

So, am I enjoying my term as President? Absolutely. It is an honour and privilege to represent INSOL. As we continue to implement our Task Force 2021 initiatives whilst at the same time looking further into the future, I see this as an opportunity to add my perspective and help shape INSOL for the years ahead.

Since 2017, it has been a pleasure to be involved with the Ian Fletcher International Insolvency Moot. Produced in partnership with the International Insolvency Institute (III) and Queensland University of Technology (QUT), it has been wonderful to see the teams (representing universities from across the globe) bring their passion, knowledge and skills to this competition. The next Moot will take place in London from the 7th to 9th February. We have a record number of 28 teams registered from 14 countries in 7 regions: North America, South America, Europe, Africa, SE Asia, Asia and Oceania. After the first round of written submissions, 8 teams will qualify further for the oral rounds held in London. We would like to sincerely thank PwC, EY and Norton Rose Fulbright for supporting Moot and hosting the competition in their offices. Most critically, I would encourage those of you who are interested to serve as a judge for the competition to contact INSOL [by email to Jelena.Wenlock@insol.org] to express your interest. The success of this event has been built on the willingness of our members to be so generous with their time and expertise and it is a great opportunity for law students to meet and interact with seasoned practitioners and judges.

I was fortunate to be invited to attend the INSOL Europe conference which took place in late September in Copenhagen. I enjoyed addressing the delegates and introducing myself to those who don't know me, and providing an update on INSOL International. I would like to take this opportunity to congratulate the INSOL Europe team and organising committee for producing such a high calibre and well received event. The conference itself was first rate as expected and I am already looking forward to attending next year.

Attending INSOL Europe's conference also afforded me the opportunity to meet Odwa Ngxingo from ASOC Management Company (Pty), South Africa – this year's winner of the Turton Award, and though he is mentioned later in this issue of INSOL World, I would like to personally congratulate him again on his success and look forward to reading his technical paper.

For me, our relationships with local member Associations is of paramount importance to the success of INSOL. Attending annual conferences allows us to articulate the value of INSOL and encourage engagement. I am happy to say that in recent months we have had a new addition to our Member Associations – Associação Portuguesa de Direito da Insolvência e Recuperação (Portuguese Association for Insolvency and Recovery Law). It is exciting to see this expansion and we welcome them and look forward to engaging with them in the future.

INSOL is / has been running a number of events over the October/ November / December period and I am happy to say that these have attracted record numbers and, for those that have already taken place, garnered impressive feedback. Though our last annual conference (held earlier this year in Singapore) seems like it took place only yesterday, we are already preparing for our 2020 conference which will take place in Cape Town. The Technical Committee and MOC have worked hard over the last five months to put together an impressive programme of panels and keynote speakers. Registration is now open and I encourage you to join us in March 2020. We are excited about it and the changes we have in store for you!

Something that I have found personally satisfying is the successful launch of our Foundation Course in early September. 120 candidates have registered and form the class of 2019/2020. This self-modulated online course has attracted interest from all over the globe. 35 countries are represented, and the gender split is close to 50/50. This is such an exciting offering and along with the GIPC displays INSOL's commitment to education.

David Rubin & Partners

Chartered Accountants • Licensed Insolvency Practitioners

Specialists in: Corporate Recovery
Forensic Accounting • Insolvency & Bankruptcy
Cross Border Insolvency • Litigation Support

For practical and confidential advice about insolvency, corporate and business recovery, contact:

Paul Appleton, David Rubin & Partners
26 - 28 Bedford Row
London WC1R 4HE
Telephone 020 7400 7900
email paul@drpartners.com

David Rubin, David Rubin & Partners
Pearl Assurance House
319 Ballards Lane
Finchley, London N12 8LY
Telephone 020 8343 5900
email david@drpartners.com

David Rubin, David Rubin & Partners (C.I.) Limited
Ground Floor
Elizabeth House
Les Ruettes Braye
St Peter Port
Guernsey GY1 1EW
Telephone 01481 711 266
email david@drpartners.com

www.drpartners.com

I won't go into too much detail as its genesis is covered later in this issue, but I would like to remind you that in early August we opened our Asia Hub in Singapore. One of the key deliverables from the Task Force report, this confirms our commitment to the region. The office is now open and run by Clare Wee, whom some readers may have met at our conference or seminars this year. It's an exciting time for INSOL with membership in this part of the world on the rise and increased requests for educational support. The support which has been demonstrated, not just in Singapore, but across the region has been humbling and I look forward to further positive developments resulting from the opening.

I'd like to welcome our new G36 Co-chairs – Angela EE of EY (Singapore), Mark Craggs, *Fellow, INSOL International*, of Norton Rose Fulbright (UK) and Dan Moss of Jones Day (USA). I'd like to wish them and all the new Committee Chairs the best of luck for their term of office and express my thanks in advance for the time they will be devoting to INSOL.

Furthermore, I'd like to welcome two new G36 firms – Sullivan & Cromwell LLP and Harneys who joined as of October.

Lastly, I do hope you enjoy this issue of INSOL World and would like to express my thanks to the Editors, Editorial Board and contributors and the staff who make this possible.

Julie M Hertzberg

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

INSOL World Editorial Board

Co-Editors

Mark Craggs, *Fellow, INSOL International,* Norton Rose Fulbright LLP, UK
Peter Gothard, *Fellow, INSOL International*, KPMG, Australia

Editorial Board

Farid Assaf SC, *Fellow, INSOL International,* Banco Chambers, Australia
Daniel Carnio Costa, Sao Paulo Court of Justice, Brazil
Hadley Chilton, FFP, BVI
Leonard Goldberger, *Fellow, INSOL International,* Stevens & Lee PC, USA
Anneli Loubser, Emeritus Professor and Research Fellow, Department of Mercantile Law UNISA, Republic of South Africa
Mungo Lowe, *Fellow, INSOL International*, Calibre Law, UK
Andres Martinez, *Fellow, INSOL International,* The World Bank Group
Todd McGuffin, Babbé LLP, Guernsey
Meiyen Tan, Oon & Bazul LLP, Singapore
Reinout Vriesendorp, De Brauw Blackstone Westbroek N.V. / Leiden University, The Netherlands
Richard Woodworth, Allen & Overy, Hong Kong

Editorial comments or article suggestions should be sent to Jelena Wenlock **jelena.wenlock@insol.org**.

For advertising opportunities and rates contact Christopher Robertson **christopher.robertson@insol.org**.

www.insol.org

IN THIS ISSUE: ***page***

Editors' Column 3

President's Column 4

Task Force 2021 – Delivering an Asian Hub 6

Focus: Europe 10

The New EU Restructuring Directive 10

The Amended Finnish Bankruptcy Act – What Has Changed? 14

Application of Russian Bankruptcy Rules to Foreign Citizens 16

Preventive Rescue Procedure on the Spot of the New Bankruptcy Code of Ukraine 17

Major Changes to Guernsey Corporate Insolvency Laws 18

Preventive Restructuring within the Portuguese Legal Framework 20

INSOL Cape Town 21

G36 Feature 22

Court Confirmation of Extrajudicial Restructuring Plans (CERP) – What You Need to Know about the New Dutch Bill 22

Building Bridges: Judicial Communication in Cross-border Insolvency 24

Richard Turton Award 2019 25

The Use of Mediation in Cross-border Insolvency and Restructuring – Possible Implications of the Singapore Convention on Mediation 26

The Dubai International Financial Centre Insolvency Law 2019 27

Indonesian Bankruptcy and PKPU – the Current Trends 29

Successful Sale of Assets under the Brazilian Bankruptcy Code and DIP Finance Structures 30

Should Professional Services Firms List? 31

Extra-territorial Reach of Clawback Claims 34

Fellow of INSOL International 38
Global Insolvency Practice Course

INSOL International – INSOL Europe – Stockholm One-Day Joint Seminar 40

INSOL Channel Islands One Day Seminar, Guernsey 41

Conference Diary 43

Member Associations 43

Task Force 2021 – Delivering an Asian Hub

By Jason Baxter
CEO, INSOL International

In March 2017, at its Quadrennial Congress held in Sydney, INSOL launched the findings of its strategic review. This was the culmination of over 18 months of preparation. Christened "Towards 2021" – this paper sought to begin the implementation and investigation process that would ensure the relevance of INSOL to its members, local members associations and other stakeholders, for many years to come.

Among the many initiatives that were a result of the strategic review was the ambition to increase the profile of INSOL in the Asia Pacific region. This region is not only home to a significant percentage of INSOL's members, it is also an area where we believe there is significant scope for increasing membership. Countries such as India and China have already seen a big increase in membership in recent years and we believe this is just the tip of the iceberg. Increasing INSOL's profile at a local level is seen as the best way to capitalise on this potential. Furthermore, the region itself is also seeing major changes in local laws – e.g. India, Singapore etc – which makes it the right time to develop INSOL's presence in the region and promote "on the ground" relationship building as opposed to relying on remote methods rooted to London.

From March 2017 until the end of that year work was done to a) establish what the makeup of an Asian hub would be in terms of manpower and what would be expected of its staff, and b) what would be the most suitable location.

After some significant consideration it was decided that the "Head of office" would have to be a credible individual from the region with a comprehensive knowledge of insolvency issues. That individual would also be required to have excellent contacts throughout the region across a range of INSOL stakeholder groups – e.g. the judiciary, academics, legislators, firms and member associations. The person themselves would be expected to introduce INSOL to contacts it did not have whilst building rapport with existing contacts. Furthermore, the individual in question would be expected to have the gravitas to represent INSOL in an ambassadorial way and look to sow the seeds that would lead to significant increases in membership over the next decade. Additionally, they would be expected to assist in enhancing numbers (from this region) attending existing or new INSOL events, seminars, conferences or training. Given the requirements of the role it was concluded that the ideal candidate would be in the latter part of their career, highly respected and with a real interest in working for INSOL and promoting its initiatives. Whilst it was agreed that the head of office would require support, the number of support staff was expected over a three-year period and would in time include an events and a membership manager.

Long referred to as the "Asia Hub", one of the first requirements was that the office would be situated in a place that provided easy access to the rest of Asia. Whilst Sydney and New Delhi were certainly considered at the early stages, it soon became apparent that the most realistic locales were Hong Kong and Singapore. Both provided excellent transportation links to the region and both already had contact with INSOL through their local member associations. Whilst Hong Kong was attractive in that it already had a significant number of INSOL members, Singapore was also attractive in that whilst it had notably less members, it had scope for a substantial increase.

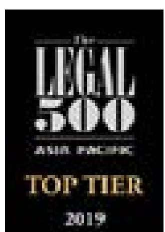
With both destinations proving attractive in different ways and with some highly detailed work being done that investigated the cost of setting up an office – rent charges, human resource costs, ease of setting up an office, favourable laws etc, it was decided in Q2 2018 that appropriate contacts in both locales would be contacted and asked to submit an RFP (request for proposal) in order to help make the decision as to where INSOL should open its first satellite office outside the UK.

The RFP asked questions of local support, both financial and non-financial as INSOL wished to confirm that wherever it was situated it could count on the support of locally based stakeholders. Furthermore, as the initiative itself was deemed to be quite costly with obvious benefits restricted to the region in question, INSOL was keen that there was

We know Hong Kong from every angle.

"They have the greatest breadth of experience in terms of the insolvency corporate recovery market, more than any other firm in Hong Kong."
Band 1, Chambers and Partners 2018

"Well-established independent Hong Kong firm with a strong reputation, particularly in relation to high-stakes contentious insolvency cases."
Band 1, Chambers and Partners 2017



"An expert in the field of insolvency-related matters."
Tier 1, The Legal 500 Asia Pacific 2017

For more information, please contact:
Ian De Witt *(iandewitt@tannerdewitt.com)*
Robin Darton *(robindarton@tannerdewitt.com)*

Established. Independent. Hong Kong Law.
17th Floor, Tower One, Lippo Centre, 89 Queensway | Tel +852 2573 5000 | Fax +852 2802 3553
www.tannerdewitt.com

a significant level of financial support / assistance in order that member associations / members from around the globe did not feel that they were "paying for this project." It was expected that this support / assistance would take the form of government grants, tax incentives, favourable rent terms etc.

In Q3 2018, representatives of both Hong Kong and Singapore received an invitation to respond to INSOL's RFP and both replied in good time making highly credible arguments for their own locale. Local assistance with INSOL's initiatives including promoting INSOL in the region, suggestions regarding office premises, support with rent, support regarding staff costs was examined rigorously and after thorough consideration a decision was finally reached.

In early November 2018 the INSOL Executive met and agreed that it would recommend to the INSOL Board that based on responses to the RFPs, its own investigation into the cost of doing business in the area, geographical position and local support, Singapore was the most appropriate place to open an office and establish a permanent presence in Asia. When the Board met it agreed this position in principal but acknowledged that some further investigation would be required before the decision would be ratified. In January and February 2019, final conversations were had with the Singaporean Economic Development Board and Ministry of Law regarding support and in March 2019 the INSOL Board on consideration of new information ratified the decision.

This then led to the announcement made by INSOL on the 3rd April at the INSOL Conference (held in Singapore) that after careful consideration and lengthy investigation, INSOL would be opening an office in Singapore.

On the 5th August 2019, INSOL's Asia Hub, located in Singapore's Maxwell Chambers Suites, was formally opened by Mr K Shanmugam, SC, Singapore Minister for Home Affairs and Minister for Law. Speaking at the opening, INSOL President Julie Hertzberg said "INSOL International has a long-standing commitment to its members and stakeholders across Asia. The official opening of the INSOL Asia Hub at Singapore's Maxwell Chambers Suites is further testament to our commitment and our determination to broaden and deepen our engagement in the region. Establishing a continuous presence in Asia is the realisation of a core initiative which we first identified in 2016 as part of our Toward 2021 strategic plan. We have been delighted by the enthusiastic response to our initiative from members across the globe, and especially in Asia."

With Clare Wee, INSOL's Regional Head (Asia) now running the Asian office and an Asian Advisory Council formed to provide guidance and shape the priorities of this initiative, there is great excitement for the future and with a number of events taking place in the region in October and November of this year it seems that INSOL is indeed showing its commitment to the region and delivering on the ideas and recommendations from its Strategic review (Task Force 2021).

INSOL INTERNATIONAL FORTHCOMING SEMINARS

INSOL International
Bahamas Offshore One Day Seminar
5 December 2019

SPONSORS:

Registration Deadline: 21 November 2019
More Information: danielle.timmons@insol.org

INSOL International
New Delhi One Day Seminar
17 January 2020

SPONSORS:

Early Booking Deadline: 22 November 2019
More Information: zeenat.edah-tally@insol.org

INSOL International
Mexico City One Day Seminar
Thursday 13th February 2020

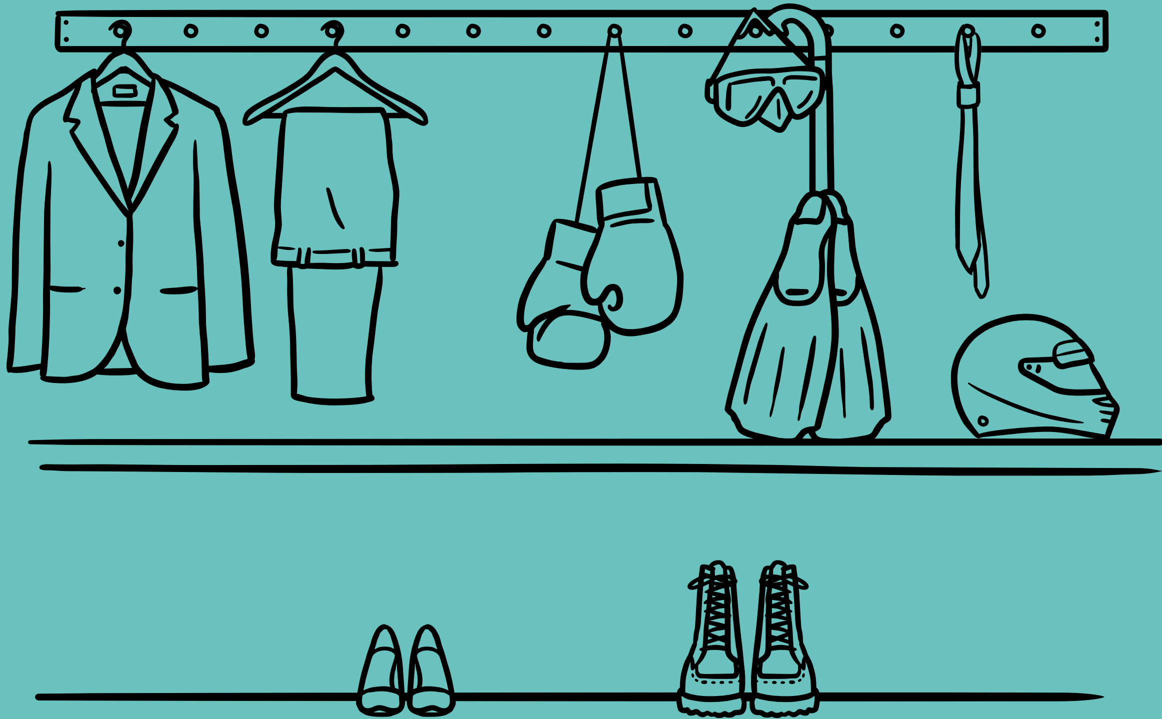
SPONSORS:

Early Booking Deadline: 6 January 2020
More Information: danielle.timmons@insol.org

INSOL International
Tel Aviv One Day Seminar
4 May 2020

SPONSORS:

Early Booking Deadline: 23 March 2020
More Information: danielle.timmons@insol.org



Imagine lawyers who talk the talk and walk the walk.

When it comes to solving difficult issues, our team is prepared for all eventualities. With the largest global offshore litigation and insolvency practice, we're ready to fight your corner. Determined, reliable and versatile, we go out of our way to achieve our clients' goals.

We're Harneys, a global offshore law firm with entrepreneurial thinking.

harneys.com

HARNEYS

The New EU Restructuring Directive

By Mark Craggs
Fellow, INSOL International
Guillaume Rudelle and Koen Durlinger
Norton Rose Fulbright's London, Paris and Amsterdam offices respectively

On 20 June 2019, the European Parliament and the Council published in the Official Journal of the European Union the text of Directive 2019/1023 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, and amending Directive (EU) 2017/1132 (the **"Restructuring Directive"**). Member States must implement the Restructuring Directive by 17 July 2021, although it is possible for them to require an extension of the implementation deadline of up to one year. In this article, we will focus on preventive restructuring frameworks relating to corporates rather than considering the provisions of the Restructuring Directive that deal with the discharge of entrepreneurs' debts.

We begin by providing an overview of the key provisions of the Restructuring Directive before considering the position of each of France (which has existing restructuring legislation that will need to be adapted in light of the Restructuring Directive), the Netherlands (which is leading the charge on implementing specific legislation to implement the Restructuring Directive) and the United Kingdom (which has existing restructuring legislation and is expected to have left the EU prior to the implementation deadline, but which is nonetheless likely to introduce its own similar reforms). We conclude with some observations on the nature and significance of the Restructuring Directive and the approaches likely to be taken by EU Member States in implementing the Restructuring Directive.

A common framework for pre-insolvency restructuring

The primary objective of the Restructuring Directive is to ensure that minimum restructuring measures are available in each Member State of the European Union, allowing debtors in difficulty to resolve their financial difficulties at an early stage and, in so doing, avoid the opening of formal insolvency proceedings. At a macro level, the Restructuring Directive aims to reduce the risk of loans becoming non-performing and mitigating the impact of "problem loans" on banks.

The discussions around implementing a common restructuring framework started with a Commission recommendation in 2012, which evolved into a Commission proposal submitted on 22 November 2016. Several changes have since been introduced in the course of the EU legislative process to produce what is now the final version of the Restructuring Directive.

It is the lawmakers' objective to make the Restructuring Directive complementary to, and compatible with, the (Recast) EU Insolvency Regulation.

The Restructuring Directive requires Member States to implement at least one preventive restructuring framework in their national law with the following characteristics:

- Debtors facing "likely insolvency" are able to restructure, in order to prevent insolvency and ensure their viability.
- The debtor initiates, or consents to, the opening of the preventive restructuring framework and remains in control of its day-to-day operations, possibly under the supervision of a practitioner in the field of restructuring, appointed to facilitate negotiations with relevant stakeholders and help in drafting a restructuring plan.
- A stay on individual enforcement actions for a period of up to 4 months, extendable up to a maximum period of 12 months if certain conditions are met, is available to the debtor. Such stay may be automatic or ordered by the court, and be general or specific, targeting certain creditors. It should also be capable of being refused or subsequently lifted in appropriate cases. As a result of the stay, creditors are to be prevented from withholding performance, terminating, accelerating or modifying essential executory contracts, which are necessary for the continuation of the debtor's day-to-day operations (subject to exceptions in respect of netting and close-out arrangements in the financial markets).
- The submission of a restructuring plan providing for

restructuring measures that can include changes of the debtor's capital structure, the sale of assets or the debtor's business, as well as any desired operational changes. The plan may be proposed by the debtor, its creditors or any appointed restructuring practitioner. It is also possible to pre-negotiate and file the plan at the outset, for the court's approval (as opposed to being filed subsequent to the initial request for a stay).

- The restructuring plan should explain the reasons why it has a reasonable prospect of preventing the insolvency of the debtor and ensuring the viability of the business.

- In general terms, the restructuring plan must be adopted by parties that are affected by it, although it is possible to exclude certain persons from participating in the vote for the adoption of the plan (e.g. equity holders). Separate classes of affected parties should be formed according to their commonality of interests, with, as a minimum, separate classes for secured and unsecured creditors. The majorities required for the adoption of a restructuring plan are to be determined by individual Member States, but are not to exceed 75% of the amount of claims in each class or of the number of affected parties in each class.

- A restructuring plan involving dissenting parties, new finance, or the reduction of the workforce by more than 25% is only binding on the parties if it is confirmed by the relevant judicial or administrative authority.

- In the event that certain classes vote against the plan, it may still be confirmed by the judicial or administrative authority (i.e. "cross-class cram-down") so long as the dissenting classes are treated similarly to other classes of the same rank and more favourably than more "junior" classes, and no party receives more than the full amount of its claims.

- Equity holders are not permitted unreasonably to prevent or create obstacles to the implementation of the restructuring plan. Member States are permitted to choose the mechanisms to implement this provision.

- Workers' rights under national and EU laws must not be affected by the preventive restructuring frameworks, and should have the right to be informed and consulted on the situation and possible restructuring mechanisms being considered by the company.

- New and interim financing for the purpose of the restructuring plan should be protected from being declared void or enforceable. Further, creditors advancing such financing should be protected from incurring liability and may benefit from new money priority in the event of a subsequent insolvency of the debtor. Other transactions which are reasonable and necessary and entered into for the purpose of the restructuring plan are to be protected from being declared void or enforceable.

While its main provisions are mandatory, the Restructuring

DISPUTE RESOLUTION

There is always more than one route to a commercial resolution

Leading the way in offshore law

Our tier one ranked dispute resolution practice is a proven market leader in contentious insolvency, restructuring and trust litigation, with a track record of acting in Guernsey's leading and landmark cases. From risk assessments, alternative dispute resolution to trial and appellate advocacy, we are recognised for the provision of pragmatic and commercially driven solutions. We provide our clients with an integrated and seamless service with whom we have formed genuine partnerships built over 100 years of practice.

Babbé

THE ACCENT ON EXCELLENCE

Telephone: +44 1481 713371 Email: dr@babbelegal.com Website: www.babbelegal.com

Banking & Finance | Corporate | Dispute Resolution | Employment | Financial Services Regulation
Insolvency & Restructuring | Investment Funds | Property | Trusts & Pensions | Wills & Estates

Directive does not adopt a one-size-fits-all approach and significant flexibility is reserved to Member States in its implementation into national legislation. Significantly, Member States have the flexibility to provide that debtors that are not "viable" will not be able to avail themselves of the framework, which may go some way towards allaying concerns with the Commission's original recommendation that the framework is potentially open to abuse by debtors that are more natural candidates for liquidation.

Preventive restructuring frameworks available in France

As matters stand, French law provides for several preventive restructuring measures with features relevant to the provisions contained in the Restructuring Directive. The existing provisions, however, will need some minor adjustments in order fully to comply with the new EU-wide common rules.

The French Commercial Code (article *L.611-1 et seq.*) provides for two frameworks allowing for a debtor that anticipates difficulties to negotiate with creditors and workforce to resolve those difficulties before any formal insolvency proceedings: the Ad hoc mandate, which is extremely flexible and does not necessarily involve a judicial authority, and the Conciliation, which is a more structured process.

During the Conciliation, which can last for up to four months, there is no automatic stay on creditors (the stay can however be granted by the court on a case-by-case basis). The Conciliation can ultimately lead to a restructuring agreement confirmed by the court, protecting creditors from subsequent clawback actions.

As part of both preventive frameworks, which are meant to be confidential in order to avoid any adverse impact on the business, the debtor will be assisted by a restructuring practitioner but remains in possession of its day-to-day operations.

In addition to the above proceedings, articles *L.620-1 et seq.* of the Commercial Code provides for a restructuring framework called judicial safeguard (*sauvegarde judiciaire*). Safeguard is more akin to formal insolvency proceedings (for example, its features include an automatic stay on creditor actions, the appointment of an administrator and official publicity of the opening of the proceedings).

Safeguard is intended for companies that are facing financial difficulties they are not able to overcome but that are not yet insolvent (i.e. unable to pay their debts as they fall due). Its main purpose is the implementation of a restructuring plan.

At the end of a period of six months, possibly extendable to eighteen months, a safeguard plan may be adopted by the creditors, which can be divided into different classes (banks, suppliers, bondholders), with a two-thirds voting majority. If the plan is rejected by creditors, the court will be able to impose a plan on all creditors that may involve a ten-year rescheduling of all debts (which is without prejudice to any agreed maturity dates which are longer in duration).

While the debtor technically remains in possession of the day-to-day operations, its activities will be supervised by the court and the negotiations with creditors will follow a formal and structured process.

It is expected that the French government will introduce reforms to the existing restructuring measures available under French law in order to ensure that the appropriate provisions of the Restructuring Directive are fully implemented into national law.

Proposed restructuring framework in the Netherlands

The Dutch Ministry of Justice submitted a legislative proposal to the Dutch Parliament in July of this year, which, if adopted, will represent the introduction in the Netherlands for the first time of an effective out-of-court restructuring mechanism. The proposal seeks to provide for a legal basis for a fast, efficient and flexible restructuring mechanism, which is based on elements of both the US Chapter 11 and the UK scheme of arrangement. This restructuring mechanism is referred to as the Dutch scheme or the WHOA (the *Wet homologatie onderhands akkoord*).

The WHOA is the first proposed wholesale implementation of the Restructuring Directive by a Member State into national law, so far as preventive restructuring frameworks are concerned. It may be, therefore, that the approach taken in the Netherlands becomes the blueprint for those Member States which do not currently have detailed restructuring legislation in place. It is expected that the WHOA will enter into force in 2020. Detailed consideration of the WHOA is outside the scope of this article, but we will touch upon some highlights of the proposed law with the Restructuring Directive in mind.

Under the WHOA, not only the debtor but also each creditor, shareholder or statutory works council or workplace representation of the debtor (through a court-appointed restructuring expert) may propose a restructuring plan.

Although the restructuring plan does need to contain certain information in order for the creditors to be able to make an educated decision as to whether to vote in favour or against its adoption, the WHOA allows for great flexibility as to the arrangements laid down in the restructuring plan.

Where at least one (in the money) class of creditors votes in favour of the restructuring plan, the plan can be submitted to the court for confirmation. The WHOA permits cross-class cramdown, provided that the creditors belonging to the class which is proposed to be crammed down (a) receive their appropriate share of the distribution value under the plan in accordance with their rank (whether in cash or non-cash), or (b) will have the ability to opt for a "cash-out" by reference to the value such creditor would have had obtained in case of a bankruptcy of the debtor.

Further, amendments to obligations of third parties (such as parent guarantees) can be included in the restructuring plan, facilitating – to a certain extent – the restructuring of group companies.

Lastly, the WHOA provides for two types of restructuring mechanisms, one confidential and one public. Should the public route be taken, the plan will be eligible for automatic recognition and enforcement across the EU under the Insolvency Regulation. In the case of the confidential route, recognition and enforcement abroad would, if desired, need to take place according to default rules of private international law.

The position in the United Kingdom

The UK is expected to leave the EU on 31 October 2019, following the result of the Brexit referendum in June 2016. Accordingly – and subject to any transitional or other arrangements that may be put in place which require the UK to adhere to EU law beyond that date (however unlikely that may seem at the time of going to press) – it seems likely that the UK will have left in advance of the deadline for implementation of the Restructuring Directive into national law. As such, the UK will likely not be subject to any requirement to transpose the Restructuring Directive.

Notwithstanding the “Brexit effect”, however, it seems likely that the UK will itself seek to introduce additional restructuring reforms of existing legislation, in order to help protect its status as a major forum for cross-border restructurings – both within and outside of Europe – and to maintain its competitive position vis-à-vis other European jurisdictions. In this regard, the UK government conducted a public consultation on certain insolvency law reforms in 2016 and published its response to that consultation last year. The main features of the original proposals which seem likely to form part of the legislation – and which have clearly parallels in the Restructuring Directive – are the introduction of a restructuring moratorium (albeit with a shorter, 28-day duration, in the first instance) for “prospectively insolvent” companies, a restructuring plan (akin to a scheme of arrangement but with the facility to effect cross-class cramdowns, which are not presently available in the UK), and restrictions on reliance on “*ipso facto*” clauses (which, again, echoes the Restructuring Directive provisions).

It is not currently clear what form the draft legislation to give effect to the remaining proposals will take or, indeed, where it sits in the overall scheme of legislative priorities, which will almost certainly be dominated by Brexit-related issues in the coming months.

Conclusion

The Restructuring Directive is laudable in its aims and represents a significant step forward in the provision of a level playing-field for preventive restructuring measures in EU Member States. It is perhaps not as ambitious in its scope as it might have been – notably, it does not attempt to harmonise substantive insolvency laws and it avoids other political “hot potatoes” such as interference with workers’ rights under existing legislation.

Given the culture of forum-shopping that has emerged between Member States – including under the Insolvency

Regulation – it is foreseeable that there will be a degree of competition between Member States in the approach they take to implementation, with certain Member States vying to provide a "best-in-class" framework to establish themselves as a venue of choice for restructurings. In this regard, since the Restructuring Directive does not prescribe any precise means of transposing its provisions into national law (as is common), it can be expected that Member States will take different approaches to implementing its terms; for example, by enacting new legislation (the Dutch approach) or by amending existing legislation dealing with restructuring-related issues (the likely French approach). This, together with the large degree of optionality that Member States have as to the features of the Restructuring Directive to be adopted, means that the implementation of the Restructuring Directive in particular Member States may lack the consistency, transparency and accessibility that might have been desirable, particularly from the perspective of foreign debtors.

More fundamentally, as illustrated by the experience under the Insolvency Regulation to date, the cultural disparities and variances in practice between Member States (including their national courts) in their approaches in insolvency matters means that the pan-EU harmonisation of restructuring and insolvency laws will remain a distant goal following implementation of the Restructuring Directive. That said, though, the Restructuring Directive is a significant and necessary first step towards that goal.

It will be clear from the matters discussed in this article that there will be plenty of developments to occupy restructuring professionals across Europe in the coming months and years!

The Amended Finnish Bankruptcy Act – What Has Changed?

By Salla Suominen
Avance Attorneys
Finland

The Finnish Bankruptcy Act (120/2004) came into effect in September 2004. After 14 years it became evident that certain amendments to the Act were needed.

The government bill (HE 221/2018) concentrated on two main issues. First, the significant question of how to deal with environmental liabilities during bankruptcy proceedings was covered in detail and secondly, the aim to simplify and streamline the process for faster results which was handled by proposing solutions to various practical unclarities.

The Act was amended with effect from 1 July 2019. This article outlines the key amendments to the Act as set out in the government bill.

Environmental liabilities in bankruptcy

The government bill included detailed provisions of environmental liabilities within bankruptcy. However, the Parliament refused to accept the proposed provisions and sent the bill back to the Ministry of Justice for further preparatory work. According to the parliament, the bill did not take the interests of the environment into account sufficiently.

There is not yet information available on how the Ministry of Justice is going to take the matter forward.

The reaction by the Parliament was unexpected as the vast majority of the legal and other experts heard during the process they had supported the new provisions, due to the significant uncertainties linked with environmental issues within insolvency. The current Act has proven to be insufficient to handle the complex questions related to, for instance, bankruptcies of mining companies and the proposed amendments to the Act had been thoroughly prepared to find an acceptable compromise for these challenging issues.

Determination of claims in insolvency

The process of settling of debts (*velkaselvittely*) was simplified. From 1 July 2019 onwards, it is sufficient to declare in an estate inventory only the largest creditors and their receivables. In addition, the estate inventory should include a list of the debtor company's other significant undertakings while only an estimate of total amount of other debts and undertakings will suffice.

The simplified process will save significant time from the estate administrator but also simplify the process from the minor creditors' perspective as most of the creditors would not have to declare their receivables until it is certain that the bankruptcy in question will continue and not lapse because of the lack of assets.

If a large number of creditors have claims related to the same or similar cause, and the cause and value of such claims are clear, the administrator of the bankruptcy estate will from 1 July 2019 onwards have a duty to take these types of claims into account in the proposal for distribution list (*jakoluetteloehdotus*) without an official proof of debt (*konkurssivalvonta*). Also in other cases, if a claim is clear, the administrator of an estate may upon his/her discretion, consider the claim without proof of debt.

In addition, also prematurely (i.e. before deadline for filing has been ordered) declared claims will give rise to a right to the dividend (*jako-osuuteen*) if the declaration fulfils the content requirements of a proof of debt. In this respect the amendment is of clarifying nature, because, in practice,

prematurely proved debts have been considered in the distribution list proposal also before the amendments.

The deadlines within the proceedings

The amendments aim to speed up the process with less administrative costs and with less court interference. For this purpose, for instance the provisions concerning various filings during the bankruptcy process have been amended.

Earlier, the Act set a two months' deadline for the preparation of the estate inventory (*pesäluettelo*) and the report of the debtor company (*velallisselvitys*). If the administrator was not able to follow the schedule set on the Act, he/she needed to file a separate application at the court to receive an extension to the deadline.

The process is accelerated so that, from 1 July 2019 onwards, the administrator may independently extend the schedule and only inform the creditors via Kosti case processing system about the estimated date of completion and the reason of the delay of proceedings. Such information would also need to be separately informed to the court.

Having this information filed to Kosti system will improve the ability of the bankruptcy ombudsman to supervise the progress of the bankruptcy proceedings.

Similar obligations to inform the creditors about the reasons of the delay also apply to the filing of the proposal to annul the process (*raukeamisesitys*) and setting the deadline for proofs of debts. In this respect, the amendments would also include a shorter default deadline of one month to file the proposal to annul the process or to set the date for proofs of debts. Such timelines would be counted from the completion of the estate inventory and the debtor report. In addition, the deadlines regarding the distribution list proposal are reduced to half.

Case processing system (Kosti)

Finnish insolvency proceedings have for many years now involved a case processing system called Kosti which is administered by the bankruptcy ombudsman and used by all bankruptcy estate administrators and corporate restructuring administrators. However, only certain soft-law guidelines about Kosti have been issued and there has been some uncertainties regarding the use of Kosti. The amendments include legally binding provisions of Kosti and the parties' obligations and rights thereto.

Kosti can be used to provide information to the bankruptcy ombudsman needed on the supervisory tasks but also to distribute other relevant information to the creditors. Kosti is divided into two unconnected parts according to its data content and its purpose of use. In relation to personal data saved into Kosti, the requirements of GDPR have been taken into account.

The amendments also include other provisions of the possibility to service information electrically.

mourant

Law | Governance

We look at things differently and see the world through a truly global lens.

Find a new perspective.

mourant.com

BVI | CAYMAN ISLANDS | GUERNSEY | HONG KONG | JERSEY | LONDON

BVI
Eleanor Morgan
Partner
eleanor.morgan@mourant.com

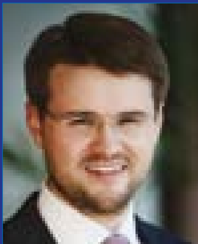
Cayman Islands
Simon Dickson
Partner
simon.dickson@mourant.com

Guernsey
Jeremy Wessels
Partner
jeremy.wessels@mourant.com

Hong Kong
Shaun Folpp
Partner
shaun.folpp@mourant.com

Jersey
Bruce Lincoln
Partner
bruce.lincoln@mourant.com

Application of Russian Bankruptcy Rules to Foreign Citizens



By Pavel Novikov
Fellow, INSOL International
and
Yulia Skiteva
Baker & McKenzie - CIS, Limited
Russia

Retrospective review

Previously, Russian legislation did not provide for the possibility of personal bankruptcy, however in 2015, the the Bankruptcy Law was amended to enable individuals to be recognized as bankrupt. The amendments have raised many questions in judicial practice, including the issue of application of Russian bankruptcy rules to foreign citizens.

The Russian Bankruptcy Law does not contain any direct provisions with regard to the application of Russian bankruptcy rules to foreign citizens. Hence, the majority of Russian courts dismissed bankruptcy petitions against non-citizen debtors (individuals) at first. Judges' decisions were based on the approach that, within the meaning of Russian Bankruptcy Law, only Russian citizens can fall under the definition of a "debtor." Therefore, foreign citizens are not subject to bankruptcy proceedings in Russia.[1]

Bankruptcy of foreign residents in Russia

However, further court practice reconsidered such approach regarding this issue and took a different course. Russian courts concurred that it is possible to initiate bankruptcy proceedings against foreigner individuals (those without Russian citizenship). The first court who applied Russian bankruptcy rules to a foreign citizen was the Arbitrazh [State Commercial] Court for Yamalo-Nenetsky Autonomous Region. The court accepted a bankruptcy petition against a Ukrainian citizen who had a residence permit in Russia.[2] To substantiate such decision, the court applied the following universally recognized principles and standards of international law:

- The "center of main interests"[3] (COMI) concept, under which a bond between an individual and a particular state might be taken into account when determining jurisdiction.

- The rule of reciprocity, under which Russian courts are entitled to initiate bankruptcy proceedings against citizens of foreign states given that foreign states initiate such proceedings against Russian citizens.

This position was well received by other courts, which began to actively accept claims against foreign debtors with reference to the absence of a legal prohibition of recognizing such debtors as bankrupt under Russian law and the existence of a bond between a foreign citizen and the Russian Federation.

As confirmation of a strong connection between a foreign citizen and the Russian Federation, courts usually take into account the following circumstances:

1) *Whether the foreign individual has a residence in the territory of Russia.*[4]
   This circumstance serves as a central indication of a bond and such residence should be current. Some courts consider a bond when a foreign citizen has lost his/her residence but who had it for a significant period or when the last known place of residence is in Russia. Keeping in mind that a change of place of residence shortly before the initiation of bankruptcy proceedings may be considered as an abuse of rights to avoid liability.[5]

2) *Whether the foreign citizen is engaged in occupation or business activities in Russia.*[6]
   To substantiate such engagement, the applicant may provide employment contracts, a state pension insurance certificate, confirmation of membership of or participation in a commercial legal entity, registration with the tax authority, etc.

3) *Whether most of the foreigner's assets (including property rights, e.g., shares in the statutory fund) are situated in Russia.*[7]
   Assets or properties held in foreign countries cannot be an obstacle to initiate bankruptcy procedures in Russia. Such assets are to be included in the general mass of a bankrupt's estate according to the special procedure (the court shall issue a ruling in respect of "overseas" assets, which will be executed according to foreign law).

4) *Whether the foreign citizen has an account with a Russian bank.*[8]
   This circumstance itself cannot be sufficient evidence of a strong connection with the Russian Federation. However, it may prove such connection in conjunction with other circumstances.

5) *Whether a significant amount of debts of the foreign citizen arose out of contracts concluded in the territory of Russia.*[9]

---

1 See case #AA40-186978/2015, Arbitrazh [State Commercial] Court for Moscow City.
2 See case #A81-6187/2015, Arbitrazh [State Commercial] Court for Yamalo-Nenetsky Autonomous Region.
3 Said concept was enshrined in Article 17 of UNCITRAL Model Law on Cross-Border Insolvency and Article 3 of Regulation (EU) 2015/848 of the European Parliament and of the Council of 20 May 2015 on insolvency proceedings.
4 For the relevant approach, see also case #A28-8319/2016, Arbitrazh [State Commercial] Court for the Volgo-Vyatsky Circuit.
5 See case #A40-248865/16, Ninth Arbitrazh [State Commercial] Court of Appeal.
6 See case #A81-6187/2015, Arbitrazh [State Commercial] Court for Yamalo-Nenetsky Autonomous Region.
7 See case #A46-16764/2016, Eighth Arbitrazh [State Commercial] Court of Appeal.
8 See case #A40-201656/17, Ninth Arbitrazh [State Commercial] Court of Appeal.
9 See case #A56-77369/2018, Thirteenth Arbitrazh [State Commercial] Court of Appeal.

6) *Whether Russian courts have already delivered judgements against the particular foreign citizen and if the enforcement proceedings were conducted in Russia.*[10]

Thus, Russian courts may initiate bankruptcy procedures only against a foreign debtor, which is closely connected with the territory of the Russian Federation. In that regard, the applicant who filed a claim for declaring the non-citizen debtor bankrupt must provide evidence of such connection so that the bankruptcy case may be recognized as subject to the jurisdiction of a Russian court.

The applicable law to such bankruptcy procedure is determined under the rule of lex fori concursus. According to this rule, bankruptcy procedure is to be carried out under the law of the state in which the procedure is conducted. Therefore, Russian law must be applied to the procedure of bankruptcy of a foreign citizen in the Russian Federation.

It is notable that, in the courts' opinion, the interests of potential foreign creditors cannot be violated by bankruptcy procedures held outside the country of the debtor's citizenship. Such creditors may not only participate in the bankruptcy proceedings of the debtor in Russia, but can also raise objections to an enforcement of a Russian court judgement abroad.

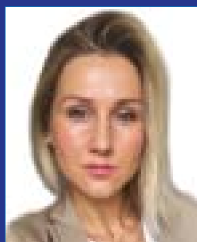
Practical conclusions

Consequently, court practice overcame such formal criterion of jurisdiction as citizenship and paved the way for foreign individuals' bankruptcies in Russia. This may significantly influence the development of cross-border insolvency and attract foreign debtors to declare themselves bankrupt under the law of the Russian Federation. To initiate such procedure, it is necessary for an applicant to collect a good evidence base of the debtor's close connection with the territory of the Russian Federation.

This concept of cross-border insolvency may be extrapolated for legal entities. However, the issue of the possibility of foreign corporations' bankruptcy procedures in Russia remains unresolved, which, so far, excludes potential forum shopping.

[10] See case # 56-94121/2018, Thirteenth Arbitrazh [State Commercial] Court of Appeal.

Preventive Rescue Procedure on the Spot of the New Bankruptcy Code of Ukraine



By
Olha Stakheyeva-Bogovyk, PhD
Hillmont Partners
Ukraine

It is a recognized legal trend of nowadays to promote a culture of an early rescue of business in distress and to address its financial difficulties before it becomes insolvent. While the EU and other countries across the globe are effectively pushing forward this strategy, Ukraine, in its turn, also tries to keep pace with such developments.

The Ukrainian preventive rescue framework, a so-called *'pre-trial rescue'* procedure ("preventive rescue procedure" or "PRP"), is not a new notion for the national legislation. It was enacted in 2013 with the new edition of the currently effective law of Ukraine 'On Restoring the Solvency of the Debtor or Recognizing it Bankrupt' ("Law of Ukraine"). Unfortunately, deficiencies within the PRP have impeded the effective use of this procedure in practice.

With the recent adoption of the first ever Code of Ukraine on bankruptcy procedures ("Bankruptcy Code" or "BCU") , the PRP has undergone some important changes that should translate into the increase of practical usage of this procedure by distressed businesses in the future. The new law shall have its full effect on 21 October 2019 and replace the current Law of Ukraine.

The PRP under the BCU looks relatively standard and straightforward. However, the real flavour of the Ukrainian PRP is hidden in its details, which are the subject of this analysis.

1. *When to initiate a PRP?*

   The mere likelihood of insolvency obliges the debtor's directors to notify the management and shareholders so that the necessary rescue steps are taken at an early stage.

2. *Who can initiate the PRP?*

   The debtor can initiate the PRP with the shareholders' approval. The debtor is the one who develops a preventive rescue plan ("PR plan").

3. *Who is affected?*

   There is a separate 'affected parties' definition under the BCU or the previous regime. The BCU introduces the concept of 'creditors who participate in the rescue' ("affected creditors"), without defining it though.

   Before, the Law of Ukraine envisaged that the PR plan extended to the claims of all creditors, which appeared before the Court's confirmation of the PR plan, which in fact questioned the essence of the PRP itself.

Now, the BCU has given the debtor a discretion to determine the affected parties when developing the PR plan and classify them into classes. The PR plan shall be binding on all affected creditors, if confirmed by the Court. The terms of non-voting or dissenting affected creditors should be no worse-off than the terms of the affected consenting creditors.

At the same time, the BCU sets a general 'bar' on the claims of I and II priority ranking (i.e. wages, insurance claims, claims related to the administration of the bankruptcy case, damage to life and health reimbursement claims etc.) flagging them as claims which are to be left 'untouched' by the PR plan.

4. *What are the pre-requisites for putting a PR plan in place?*

   Under the BCU, the debtor is to provide a liquidation analysis along with the PR plan. The debtor must set out the benefits of the PR plan for the affected creditors, comparing it against the anticipated returns in a liquidation. Also, a financial analysis evidencing the ability of the debtor to implement the PR plan can be added.

5. *Approval of the PR plan: voting thresholds*

   Previously, to approve the PR plan was a challenge. The Law of Ukraine required the unanimous support of secured creditors and the consent of unsecured creditors holding more than 50% of all unsecured claims (i.e. accounts payable under the bookkeeping accounts).

   The requisite voting threshold to approve the PR plan has been lowered to secured creditors holding 66 2/3% of the aggregate value of affected secured claims, and 50% of the aggregate value of affected unsecured claims. No cross-class cramdown is, unfortunately, envisaged.

6. *Moratorium*

   Previously, a moratorium was imposed on all of the creditors whose claims existed before the Court's confirmation of the PR plan. The moratorium was triggered upon the Court's confirmation of the PR plan and lasted for the whole period of the PR procedure (i.e. no more than 12 months).

   Under the BCU, the moratorium gets imposed only on the affected creditors and gets triggered earlier than before – upon acceptance by the Court of the application for Court's PR plan confirmation. As such, the moratorium 'gets into play' only at the stage when the debtor has already negotiated the PR plan. No 'breathing space', as under the EU Directive on Preventive Restructuring Frameworks or Chapter 11 of the US Bankruptcy Code, is envisaged for the negotiation period. This is a shortcoming that can impede the effectiveness of the future PRP. Moreover, the moratorium does not extend for the whole duration of the PRP and is cancelled with the Court's confirmation/ rejection of the PR plan.

7. *Automatic lift of a moratorium for secured creditors*

   This is a new progressive provision of the BCU, which the Law of Ukraine lacked. Should the Court fail to consider the PR Plan on merits within 60 days of Court's acceptance of the application for PR, the moratorium to foreclose on the collateral gets lifted automatically for secured creditors.

8. *Debtor-in-possession*

   The existing management can stay in place while the PRP is pending. The PR plan may involve the appointment of a trustee upon Court's confirmation.

9. *Third-party release from obligations*

   The BCU can allow for a third-party release from obligations, should the creditor have voted for the approval of the PR plan.

Takeaways

The new BCU purports to promote a more efficient rescue-oriented culture to prevent insolvency. Let's see how it works.

Major Changes to Guernsey Corporate Insolvency Laws

By Advocate Todd W McGuffin
Babbé LLP
Guernsey

The last major update of Guernsey corporate insolvency law was in 2008 with the commencement of the *Companies (Guernsey) Law 2008* ("the Law"), which introduced schemes of arrangement and the process of administration into Guernsey law for the first time. Since that time such processes, especially administration, have grown in popularity and the Guernsey courts and the local insolvency community has been required to deal with an increasing number of multi-billion-pound distress situations including Carlyle Capital Corporation, BSG Resources Limited and Joannou & Paraskavaides (Overseas) Limited.

Whilst such matters have had the benefit of highly

experienced insolvency professionals, difficulties have arisen from the lack of detailed local insolvency legislation. After a consultation process spanning a number of years, further major changes in this area are expected to come into force in by the end of Q4 2019.

Administration

The political desire for more transparency in the process of administration has resulted in a statutory obligation being placed on officeholders to call at least one initial creditors' meeting soon after appointment. Further to this is an obligation (albeit already undertaken in most cases) to send notice to creditors of the appointment with an explanation as to the process and its objectives. A very important improvement is a new discretion to administrators to make distributions if such is likely to assist the achievement of any of the statutory purposes for such the administration order was made. With a view of seeking efficiencies in the process and to thereby (hopefully) facilitating a better return to creditors, the Royal Court of Guernsey will be able to permit the dissolution of the relevant company on the discharge of the administration order. This will avoid the current need for the company to be subsequently placed into liquation and then dissolved.

Independence of officeholders

Currently under the Law, there is no limitation on who can be appointed an officeholder except court appointments are subject to scrutiny. Therefore, directors and shareholders can wind up their own structures via a voluntary liquidation (even an insolvent voluntary liquidation). As rightfully identified in the consultation, this situation increases the risk of creditors being disadvantaged due to conflicts of interest. Rejecting the introduction of a regulated register of insolvency practitioners on a costs/benefit analysis, the new legislation will instead prohibit certain connected entries (directors, members and their family members) from being officeholders with respect to insolvent voluntary liquidations. In addition, a statutory duty will be imposed to give notice of appointment to creditors, to hold at least one creditors' meeting (as per administrations above) and to provide for an ongoing duty to report to creditors and members.

Winding up of foreign companies

Given Guernsey's status as a major offshore financial centre, a significant number of foreign companies carry on business in Guernsey and/or have assets under control here. Noting that some other onshore and offshore jurisdiction allow for foreign companies to be wound up in certain circumstances, a new power will be introduced to give the Royal Court the power to order the winding up of such entities. It is anticipated that the "*sufficient connection*" test will be prescribed in this context to allow the Court to have the benefit of the development jurisprudence in England and Wales (see *Re Latreefers Inc* [1998] EWHC 1203 (Comm)).

More powers for officeholders

Whilst the current legislation addresses the need to deal with preference payments in liquidation, the new legislation will permit officeholders to "claw back" transactions at an undervalue (similarly to section 238(2) of the Insolvency Act 1986 in the UK). Further, officeholders will be able to apply to the Court to request extortionate credit transactions be set aside. These are credit transactions, which a company enters into in the run up to insolvency. For example, where a company takes out a loan at an extortionate rate of interest, allowing that loan creditor a greater recovery than they would be entitled to have the loan been on reasonable market terms. To facilitate a more rapid understanding of the company's financial position, liquidators (like administrators) will have statutory powers to compel the production of a statement of affairs from the officers of the company. Additionally, the Court can order production documents from officers and former officers, employees and others. Liquidators will also have the power to apply to Court to examine officers including former as to the affairs of the company. These provisions should result in greater compliance requests made by liquidators of information.

New reporting requirements

The new regime will require officeholders to report any breach of the Law by any officer of the company to the relevant local regulator. Whilst this amendment generally reflects the current position that a liquidator should bring such matters to the Court's attention in his report before a company is dissolved, requiring such reports being provided to a statutory body (such as the Guernsey Financial Services Commissions re regulated entries) is likely to an increase in investigations of such conduct.

The reforms will also include:

- a power to liquidators to disclaim onerous property and an exemption to the requirement for audited accounts for companies in liquidation;
- the introduction of a statutory scheme for dealing with unpaid dividends;
- the establishment of an Insolvency Rules Committee and introduction of formal insolvency rules,
- such rules are to deal with creditor claims in winding up, with provision for a "proof of debt" procedure, advertisement, submitting claims, and factors the liquidator should consider in determining a claim.

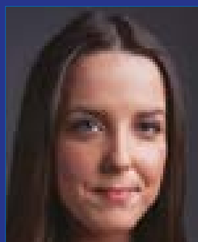
The proposed reforms provide a welcome and timely evolution of the Guernsey corporate insolvency regime. Whilst the political policy driving the changes is for greater transparency to creditors to facilitate an improvement in the quality and flow of credit in the jurisdiction, as can be seen the changes will be extremely useful to insolvency practitioners and their advisors in dealing with the increasing complex distress scenarios arising this jurisdiction.

Preventive Restructuring within the Portuguese Legal Framework

By Paulo Valério and Carlota Paes de Andrade

Valério, Figueiredo & Associados

Portugal



Portugal's insolvency laws have been subject to many changes in recent years. While the Insolvency and Corporate Recovery Code has been in place since 2004, it was only as we entered this century's second decade that insolvency related issues truly arose among the Portuguese legal community, in the context of the financial and economic crisis in 2012 and again in 2017.

Back in 2012, the introduction of a new preventive restructuring procedure became the greatest star of the renewed legal framework. Established as a pre-insolvency regime, the "Special Revitalization Procedure" (*Processo Especial de Revitalização*) allowed soon-to-be-insolvent debtors to undertake a financial recovery process with minimum court intervention.

The Insolvency Code in place before that time, already had the ability to provide a recovery plan to insolvent debtors, but the excessive length of the insolvency procedure and the stigma associated with a (necessary) bankruptcy petition were consistently reported as obstacles to true and effective restructuring.

In 2017, against a background of economic recovery, the government approved the "Capitalize Program" (*Programa Capitalizar*), which greatly impacted the overview of economic recovery measures – namely, by reviewing the "Special Revitalization Procedure" and by creating the "Extrajudicial Company Recovery Regime" (*Regime Extrajudicial de Recuperação de Empresas* or *RERE*).

The use of the "Special Revitalization Procedure" had raised certain critical issues over the years, including amongst other things, a concern that debtors could access it all too easily. Between 2012 and 2017, the procedure could be accessed on the declaration from a single creditor – even a minority one or a related party – triggering an automatically stay of individual enforcement actions of up to three months. The procedure was much criticised as too "laid-back and complacent". Debtors who were clearly insolvent were misusing it, in order to gain protection from creditors, while having no serious prospect of a turnaround.

A review of the procedure in 2017 resulted in two additional requirements:

a) Support in the opening statement of a non-subordinated creditor that represents, at least, 10% of the debtor's global debt; and

b) The issue of an official statement by a registered auditor or certified public accountant (depending on the case) confirming that the debtor is not insolvent at the time.

This freshened outlook granted the "Special Revitalization Procedure" new-found credibility, elevating it to a serious tool for *viable enterprises and entrepreneurs that are in financial difficulties to have access to effective national preventive restructuring frameworks*.

Interestingly, the use of the regime fell markedly following the amendments, indicating that the changes either did have the intended effect (of avoiding abuse); or that they unintentionally put the procedure out of practical reach of viable debtors who now have no other choice but to apply for insolvency.

By crafting the "Extrajudicial Company Recovery Regime", the Portuguese government has created a completely out-of-court option, which naturally increases the possibility of negotiating and concluding timely agreements between the debtor and all or only few of the creditors. Within certain conditions, this scheme also provides debtors with the chance to apply for court confirmation and therefore bind all creditors to the overall settlement. The costs associated with the "Extrajudicial Company Recovery *Regime*" are limited to those resulting from service contracting consultants or experts involved in the negotiations.

The *RERE* bears some resemblance to the "Special Revitalization Procedure", in that it includes a safeguard against the termination of the essential public services, so as to to maintain the debtor's economic activity. It also provides tax benefits identical to those suitable for the recovery plans drafted in an insolvency process.

Perhaps the most controversial topic on the subject is the fact that this legal framework does not encompass a real moratorium. This feature may have condemned the regime to low take-up by its main target: companies. The absence of a moratorium means that this procedure holds no significant difference when compared to any deal or transaction that the company carries out on its own, outside the regulatory or institutional "box".

This being said, the "Special Revitalization Procedure" and the "Extrajudicial Company Recovery Regime" are the closest national options to those provided for by the Directive (EU) 2019/1023, which Member States should introduce within the next 2 years.

One may conclude that Portugal already provides enough tools to achieve preventive restructuring of debtors, prevent insolvency and assure debtors' viability. Although the current requirements constraining the access to the "Special Revitalization Procedure" and the absence of a moratorium in the "Extrajudicial Company Recovery Regime" may compromise the end result. A critical analysis of these procedures by the Portuguese legislator should be the *plat du jour* against the background implementation of the Directive.

SENIOR RESTRUCTURING COMMUNITY NETWORKING

THE HOTTEST ISSUES DISCUSSED

FANTASTIC LOCATION AND VENUE

INSOL CAPE TOWN

SUNDAY 15TH – TUESDAY 17TH MARCH 2020
CAPE TOWN INTERNATIONAL CONVENTION CENTRE, CONVENTION SQUARE,
1 LOWER LONG STREET, CAPE TOWN, 8001, SOUTH AFRICA

REGISTRATION BROCHURE AVAILABLE NOW

THE FUTURE OF RESTRUCTURING

THE ISSUES THAT COUNT

Let us invite you to INSOL's Annual Conference 2020, hosted in the dramatic city of Cape Town, where our theme is 'Learn. Unlearn. Relearn.'. We have a technical programme that will challenge your thinking, help you acquire new skills, build new connections and allow you to spend 'thinking time' considering the significant issues of our day. Book now to take advantage of the early bird registration fee.

Asset recovery in the digital age	Learning from failure – CEOs retell their stories	Aftermath of Brexit	Crisis communication – managing stakeholders	Neuroscience of leadership

REGISTER TODAY

Delegate Early Bird rate available now until 12 December 2019

Visit our website for full conference details, topics, ancillary programmes and more: **WWW.INSOL.ORG**

Our Sponsors:

Borrelli Walsh 保華
LK Lipman Karas A SPECIALIST LEGAL PRACTICE
Norton Rose Fulbright
RSM
BDO
AlixPartners
aj capital
maitland CHAMBERS
Davis Polk
South Square
Gordon Brothers
brownrudnick
WERKSMANS

DE BRAUW BLACKSTONE WESTBROEK

Court Confirmation of Extrajudicial Restructuring Plans (CERP) – What You Need to Know about the New Dutch Bill

By Ferdinand Hengst
Fellow, INSOL International
and
Reinout Vriesendorp
De Brauw Blackstone Westbroek,
The Netherlands

Introduction

The Netherlands took a giant leap forward as a restructuring hub when recently, the bill on Court confirmation of extrajudicial restructuring plans (CERP, or in Dutch: WHOA) was sent to Parliament. The legislative proposal introduces a new restructuring framework that will undoubtedly prove very useful for the restructuring of domestic and foreign distressed companies. CERP has many key elements to make it a practical tool for both debtors, creditors and shareholders alike. This contribution discusses four of these key elements, all of which are relevant for cross-border and group restructurings. Firstly, the type of proceedings CERP provides for; secondly, in what ways CERP supports a restructuring effort; thirdly, how debt can be restructured through CERP proceedings and finally, in what ways creditors' interests are safeguarded.

CERP proceedings

CERP proceedings are open to any debtor that conducts a profession or business who expects that it will not be able to continue to pay its future debts as they fall due. CERP proceedings do not require any formal insolvency procedure and do not involve any administrator or supervisor, other than the court to a very limited extent. The debtor stays in full control (debtor-in-possession) throughout the entire restructuring. Moreover, if the debtor is a legal entity, it does not require any shareholder consent for the restructuring, not even if this would normally be required by law, its by-laws or any other set of (contractual) rules. Only public companies that wish to amend their share capital are excluded.

A restructuring in accordance with CERP can be initiated by any debtor, regardless of whether its centre of main proceedings (COMI) is located in the Netherlands. The CERP framework may be used as long as the Dutch court has jurisdiction under CERP. The range of jurisdiction will be broad, as CERP provides two variations. One version is open to any debtor with COMI in the Netherlands and will be added to annex A of the European Insolvency Regulation recast (EU 2015/848; the EIR version). The other is open to any debtor - both with and without a COMI in the Netherlands - as long as the restructuring has a sufficient nexus with the Netherlands (the non-EIR version). A valuable aspect of the non-EIR version is that it will be undisclosed proceedings, therefore keeping the restructuring outside of the public's eye. Notably, the court confirmation resulting from the EIR version will be automatically recognized within the EU. The court confirmation obtained through the non-EIR version may be recognized in jurisdictions that have adopted the UNCITRAL Model Law or, within the EU, under the Recast Brussels Regulation (EU 1215/2012).

CERP restructuring options

CERP allows the debtor to tailor the restructuring plan exactly to its needs. A restructuring plan may be offered to all creditors and shareholders, or some of them. The restructuring plan may target debt as well as equity. It may also provide for the issue of new shares, for instance in a debt-for-equity swap. Creditors and shareholders can be placed in various classes. Voting takes place per class. Every creditor or shareholder whose rights are affected by the restructuring plan is eligible to vote in its class. Approval of the restructuring plan requires favorable votes of creditors representing at least two-third of the debt on which votes have been cast in a certain class, or shareholders representing two-third of the amount of issued capital in a class. Court confirmation may be requested if at least one class of creditors has approved the restructuring plan. With the court confirmation, the restructuring plan becomes binding on all creditors and shareholders eligible to vote. This way, CERP provides for a cross class cram down.

In terms of the restructuring plan, there is no set timeframe either for the drafting process or for negotiations regarding the restructuring plan or trying to achieve the required majorities for the plan. However, once the voting process starts, strict short deadlines apply. At least eight days before a vote is set to take place, the restructuring plan needs to be made available to creditors and shareholders eligible

to vote. Within seven days after the vote, a voting report must be presented to those same creditors and shareholders. If the restructuring plan is approved and submitted for court confirmation, the court will hear the request within 14 days. The court's decision will follow as soon as possible. None of the court's decisions under CERP are open to appeal. This all results in a strict timeframe of no more than two months, allowing for a speedy restructuring process as well as for deal certainty. Given the speed of the voting process and court confirmation, the costs of execution of a CERP restructuring plan will be limited.

CERP is especially suited to cater for multinational group restructurings. Obligations of group members towards the creditors of the debtor in restructuring may be included in the restructuring plan. This only requires that the group company satisfies the light insolvency test set out above and that the Dutch court has jurisdiction in accordance with CERP over this group company based on a sufficient nexus. Examples of sufficient nexus are: the debtor's COMI or a branch is located in the Netherlands, a substantial amount of the debtor's assets are located in the Netherlands or the debtor is part of a group of companies of which several are organized under Dutch law. As a result of the option to include group company obligations in the restructuring, intercompany claims and parent guarantees can be compromised, stimulating group restructuring.

Finally, early unilateral termination can be applied to onerous contracts. Under CERP, the debtor may propose an amendment or termination of any contract except for employment contracts. If the other party does not accept the proposal, the debtor may terminate the contract with court consent. The court will provide consent at the occasion of its confirmation of the restructuring plan. The damages to which the other party may be entitled due to the termination, if any, can be integrated in the restructuring plan.

Restructuring support offered by CERP

As CERP aims to provide debtors with a true second chance, the restructuring efforts are supported in many ways. As soon as the debtor formally starts its restructuring, legal acts performed in relation to the restructuring and the continuation of the debtor's business during the restructuring are protected against avoidance claims based on fraudulent preference, as long as the court provides prior authorization. This protects DIP financing and accompanying security from claw-back by any subsequent insolvency practitioner. Business continuity is further supported by a stay, that may be granted by the court at the debtor's request. Clauses providing for suspension or early termination of any obligation towards the debtor are void, whereas *ipso facto* clauses are deactivated.

CERP furthermore provides for deal certainty. For instance, any procedural or substantial aspect of the restructuring plan and its realization may be presented for a court order before the vote is held. The court will consist of an expert pool of judges who will hear all CERP issues as one and only body (no appeal). The court may take any measure and make any provision required for the restructuring. Finally, the principle of CERP is that the restructuring plan will indeed be confirmed by the court (also without appeal). The request for court confirmation will only be refused on limited grounds, all of which are in keeping with global market practice.

CERP safeguards for creditors

A new and very powerful tool for creditors provided by CERP is the power assigned to creditors to initiate their debtor's restructuring. Under CERP, any creditor or shareholder (as well as a works council or employee representative body established at the debtor's business) may request the court to appoint a plan expert, who will offer a restructuring plan on behalf of the debtor. The requirements detailed above for the debtor (light insolvency test and jurisdiction of the Dutch court) as well as all options the restructuring plan may include, apply mutatis mutandis. The only restriction applies to SME's. If the debtor qualifies as such, a plan expert requires the debtor's consent for presenting a restructuring plan to those eligible to vote or submitting a restructuring plan for court confirmation.

Furthermore, the absolute priority rule included in CERP balances the cross-class cram down and court confirmation mechanism. Subject to the reasonableness (fairness) exception, the court will not confirm a restructuring plan if the allocation of the restructuring value deviates from statutory or contractual priority rules to the detriment of a class of creditors or shareholders that did not approve the plan. In addition, the court will not confirm a restructuring plan that does not meet the best interest of creditors test.

Finally, the court may appoint an observer who will act in the interest of the creditors and who will monitor the design and realization of the restructuring plan. The observer will be heard on most court requests and may inform the court at any point in time if he believes the restructuring will not be successful, which, for instance, may result in the termination of a stay.

Conclusion

With the introduction of the bill on CERP to Dutch Parliament, the Netherlands is on its way to receive the valuable restructuring framework it has awaited for quite some time. Not just Dutch companies will benefit from the new extrajudicial restructuring option provided by CERP; international restructurings with a nexus to the Netherlands are served as well. This way, the Netherlands has everything to become a major international restructuring hub, faster and cheaper than UK and US but with similar effects.

Building Bridges: Judicial Communication in Cross-border Insolvency

INSOL World Co-editor, Mark Craggs (Fellow, INSOL International) of Norton Rose Fulbright in London speaks with Nicoleta Mirela Năstasie (Fellow, INSOL International), Judge, Bucharest Tribunal, Romania, about the ways in which judges in different jurisdictions can promote increased communication and cooperation in cross-border insolvency cases.

How would you characterise communication between judges in different jurisdictions cross-border insolvency cases?

I like to think of "communication" in terms of building a bridge over a river, over which judges from different jurisdictions are able to cross and meet each other in the middle. The river represents the fast-moving flow of information and developments in international insolvencies that we are seeing in today's world and financial markets. Judges are faced with a choice: they can stay at one side of the river or the other, waiting for someone else to build the bridge for them; or, alternatively, they can become engaged in the process and take active steps themselves to build the bridge and communicate effectively with their counterparts in other jurisdictions.

What, in your view, are the main drivers for a more international approach in insolvency matters?

Businesses worldwide are growing quickly and becoming increasingly interconnected across international borders. This presents judges with new perspectives, occasional challenges, crucially, and an appreciation of the need for urgent relief in insolvency cases, to help preserve value for all affected stakeholders. Both within and outside Europe, judges are dealing more and more with international aspects of insolvency proceedings; for example, foreign creditors or foreign debtors and insolvency office-holders asking for assistance, requests for recognition for foreign proceedings, as well as applications for secondary and territorial insolvency proceedings.

As a result, the outlook of judges and practitioners alike is becoming progressively less territorial. From the perspective of the judiciary in different jurisdictions, this brings into sharp focus the importance of specialisation of judges, the rapidity and correctness of judgments, and the fair and predictable application of both substantive and procedural law. It also provides opportunities to consider the degree to which fundamental values such as procedural efficiency, accessibility and confidence can be promoted.

Why do you see the role of the judiciary as being so important in promoting cross-border communication?

In my view, the judiciary's role is not limited to providing decisions in ongoing litigation in a purely reactive way. In appropriate circumstances – such as where the meaning and effect of existing laws is unclear or laws are in conflict – it is open to the judiciary to act as law-makers and proactively create mechanisms for cooperation. In this respect, it is important to appreciate to appreciate the social role of the judiciary and the need for confidence in the judicial system among the participants in the insolvency process. Such participants are dependent on the judiciary continuing to be at the forefront of developments in the insolvency arena, in the interests of the public at large; in this respect, it is important that judges do not regard themselves as having a limited or parochial role as mere interpreters of the law.

Contrary to the perceptions of some practitioners, there are few boundaries between the judiciary in civil law systems and common law jurisdictions so far as judicial communication in cross-border insolvency is concerned. Since direct and efficient communication is desirable in a growing number of cases, my view is that judges should work proactively to promote it wherever possible.

Increased judicial communication is often championed at international insolvency conferences and it is common for individual judges to advocate the judiciary generally taking a more proactive approach. On a practical level, however, what steps can judges take to help ensure that meaningful and lasting progress is made?

First of all, the efforts of individual judges should not be considered in isolation. Rather they should be viewed against the backdrop of numerous international measures and initiatives which provide frameworks, tools and guidelines for cross-border cooperation and communication in the field of insolvency and restructuring. In that regard, different international and/or intergovernmental organisations have now – for over twenty years - sought to develop general principles, standards or recommendations for the conduct of international insolvency cases. Examples at a global level include the UNCITRAL Model Law on Cross-Border Insolvency, the UNCITRAL Legislative Guide on Insolvency Law and the World Bank Principles for Effective Insolvency and Creditor/Debtor Regimes. Regionally, there have been initiatives such as the American Law Institute General Principles of Cooperation and Guidelines Applicable to Court-to-Court Communications in Cross-Border Cases, as well as the Asian Development Bank Good Practice Standards for Insolvency Law.

In this general context, the judiciary in many cases has the tools to assist in the development of solutions that remove or reduce obstacles to communication and cooperation in cross-border insolvency proceedings, and to seek to facilitate direct communication whenever the need arises.

In order to promote efficient judicial communication in everyday practice, certain objectives should be targeted and prioritised by governments and international professional bodies. These include the creation of specialized courts for insolvency proceedings. Also,

judicial training is essential to the development of expertise in international cases. Judges should also meet personally with their counterparts from other jurisdictions, wherever possible, to share professional experiences and practical insights. As to the latter, initiatives are particularly important:

1. first, the INSOL International Judicial Group – which brings together sitting judges, regulators and judicial officials – provides an excellent opportunity to heighten international cooperation among common law and civil law judges worldwide, through both attending the Judicial Colloquia and facilitating direct communication between judges; and

2. secondly, the Judicial Insolvency Network, formed in 2016, is an ambitious project by members of the judiciary from across the world. In particular, JIN's Guidelines for Communication and Cooperation between Courts in Cross-Border Insolvency Matters provide a framework for not only common law judges, but also potentially the European Continental judiciary, to become actively involved in the process of judicial cooperation in the field of cross-border insolvency. Within the EU, the JIN Guidelines have so far been adopted in the UK and the Netherlands. I hope that further EU courts will in future embrace the ideas promoted by the JIN Guidelines for international communication and cooperation.

As well as having the required "tools" available, what are your final thoughts as to how judges, practitioners and stakeholders can succeed in "building the bridge"?

At a basic and fundamental level, better communication has to be both wanted and needed in order for progress to be made. In other words, there needs to be the will on all sides to improve communications between the different national courts. If only one side is in favour of open communication, the process will be reduced to being akin to a monologue and the prospects of establishing a productive dialogue will be minimal.

Finally, it is important not to lose sight of the fact that judicial communication occurs between individuals. In this regard, judges should be viewed not as abstract entities or homogenous in nature; rather, they are natural persons with different levels of knowledge, life and professional experience, and mental and emotional characteristics. As a result, it is necessary for relevant stakeholders in any case to know and understand the particular judges, to the extent possible. In this respect, it is important to leverage the legal and procedural tools available to increase the chances that the message of a foreign practitioner or court – and the relief being sought – is accurately and efficiently conveyed to a particular judge and is correctly understood.

RICHARD TURTON AWARD 2019

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

In recognition of those aspects, in which Richard had a special interest, the award for 2019 was open to applicants who fulfilled all of the following:

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

Applicants for the award were invited to write a statement detailing why they should be chosen, and a brief synopsis of their proposed paper.

A panel representing the four associations adjudicated the applications. The panel members are as follows: Robert van Galen – INSOL Europe, Neil Cooper – INSOL International, Patricia Godfrey – R3 and Maurice Moses – IPA.

The committee received outstanding number of applications for this year's award and it was a very close run decision. We are delighted that the award has attracted such enthusiasm and response from the younger members of the profession, and know that Richard would also be extremely pleased that there had been such interest.

The committee is delighted to announce that the winner of this year's award is **Odwa Ngxingo** from South Africa. Odwa is currently working at ASOC Management Company (Pty) Ltd. as a portfolio manager dealing with business rescue and distressed private equity funds, and is active in promotion of insolvency and business rescue awareness in South Africa.

He will be writing a paper on "*Attitudes towards investing capital in restructuring and turnaround situations, and the multiplier effects deriving therefrom*", which will be published in summary in one or more of the Member Associations' journals and in full on their websites.

As part of the award, Odwa was invited to attend the INSOL Europe Congress on 26-29 September 2019 in Copenhagen, Denmark.

We would like to congratulate Odwa on his excellent application, and also thank all the candidates who applied for the award this year and wish them successful career in their chosen field.

The details of the Turton Award and papers of the previous winners can be found at **https://www.insol.org/turton-award**.

Sponsored by:

INSOL International

The Use of Mediation in Cross-border Insolvency and Restructuring – Possible Implications of the Singapore Convention on Mediation

By Farid Assaf SC
Fellow, INSOL International
Banco Chambers
Australia

Introduction

In recent years, the use of alternative dispute resolution techniques and in particular, mediation, have become increasingly popular in the context of insolvency and restructuring matters. In the United States, for example, it has been said that 'the use of meditation to reach consensual plans of reorganisation, while not standard protocol in cases, has become common and is no longer controversial.'[1] In Europe, mediation in insolvency and restructuring matters is used in some Member States including Belgium, England, France, Greece and Spain.[2] Despite the success of the use of mediation in Lehman Brothers and other cross-border insolvencies such as MF Global, the use of mediation in cross-border insolvencies and restructuring (and cross-border disputes generally) has been relatively limited. One reason for the modest use of mediation in the cross-border context is the difficulty in which a settlement agreement generated during a cross-border mediation can be recognised and enforced in multiple jurisdictions. The recent United Nations Convention on International Settlement Agreements Resulting from Mediation aims to alleviate that major impediment.

Overview of the Singapore Convention

The new treaty became open for signature on 7 August 2019 during a signing ceremony hosted at Singapore (hence the designation 'Singapore Mediation Convention'). The Convention was adopted by the UN General Assembly on 20 December 2018 following several years of work by UNCITRAL Group II which involved participation by eighty-five member states. It is expected to come into force six months after it has been ratified by at least three UN member states. In addition to Singapore, it is anticipated that the United States, Israel, Colombia, Thailand, Turkey, Mexico, China, Kuwait, Sri Lanka and Canada will become early signatories given those countries strongly advocated a convention from the commencement of the project.[3] The European Commission for the Efficiency of Justice has recommended members states of the Council of Europe to 'consider ratifying' the Singapore Convention.[4]

The Convention aims to provide a unified framework for the enforcement of cross-border settlement agreements arising from mediation. Currently, the enforcement of settlement agreements of international disputes is an arduous task unless those agreements are contained in a consent award (which are capable of being enforced under the New York Convention on arbitral awards). The Singapore Convention aims to attenuate this difficulty by providing a mechanism for the enforcement of mediated international settlement agreements in the jurisdictions of States party to the Convention. The proposed benefits of the Convention according to UNCITRAL include that it will 'bring certainty to the international framework on mediation' and facilitate 'the promotion of mediation as an alternative and effective method of resolving trade disputes'.[5]

Main operative parts[6]

Article 1 provides that the Convention applies to agreements resulting from mediation and concluded in writing by parties to resolve a commercial dispute which is 'international.' A settlement agreement is international if either the parties to the settlement agreement have their place of business in two different countries or the country where the events which are the subject of the settlement agreement primarily occurred is different from the country which is the parties' place of business. Mediation is defined broadly as a process whereby the parties to the dispute voluntarily reach an agreement facilitated by a third-party mediator who assists the process but does not have the authority to impose any particular outcome. The Convention explicitly excludes court ordered settlement agreements and agreements that are enforceable by courts as an arbitral award, as well as agreements involving individual consumer transactions for personal, family or household purposes.

Under Article 3, each party to the Convention shall enforce a settlement agreement in accordance with its rules of procedure and under the conditions laid down in the Convention. Article 5 sets out grounds for refusal to grant relief. Those grounds include the settlement agreement is null and void, not binding or has been modified since initial agreement; the obligations in the settlement agreement

[1] Jack Esher, 'Recent Use of Mediation for Resolution and Effective Management of Large Case Insolvencies', in International Corporate Rescue 2015-6, 349ff. See also Allan L. Gropper, 'The Mediation of Bankruptcy Disputes in the United States', in Laura Carballao Pineiro and Katia Fach Gomez (eds), TDM 4 (2017) Special Issue on "Comparative and International Perspectives on Mediation in Insolvency Matters."
[2] Prof. Bob Wessels, 'Mediation in Restructuring and Insolvency', Eurofenix, Spring 2016, 24-25.
[3] Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements', 19 Pepperdine Dispute Resolution Law Journal 1 (2019), 8.
[4] European Commission for the Efficiency of Justice (CEPEJ), *European Handbook for Mediation Lawmaking* (2019) 29.
[5] UNCITRAL. United Nations Convention on International Settlement Agreements Resulting from Mediation (the 'Singapore Convention on Mediation'), United Nations Commission on International Trade Law. [online] Uncitral.un.org.
[6] Unfortunately there is no guide to enactment of other explanatory material published by the UN. For a detailed analysis see Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements', 19 Pepperdine Dispute Resolution Law Journal 1 (2019).

have already been performed or are not clear; or if there are reasonable doubts about the mediator's impartiality. Two additional grounds for refusing relief are found in Article 5(2) namely, where relief sought would be contrary to the public policy of the State where relief is sought or the subject matter of the dispute is not capable of settlement by mediation under the law of the State where relief is sought. Importantly, the Convention can be relied upon by parties as both a 'shield' (by a party seeking to invoke a settlement agreement in response to an inconsistent claim by the opposing party) and a 'sword' (by Courts of ratifying States being required to enforce the mediated settlement agreement).

Significance for insolvency and restructuring in the EU

Under Article 12(4), the Convention is not to prevail over conflicting rules of a 'regional economic integration organization' (such as the European Union), whether such rules were adopted or entered into force before or after the Convention: (a) if under article 4, relief is sought in a State that is member of such an organization and all the States relevant under article 1, paragraph 1, are members of such an organization; or (b) as concerns the recognition or enforcement of judgments between member States of such an organization. The effect of these provisions is that on the assumption that the EU and all of its member states adopt the Convention and a mediated settlement agreement between two EU based companies is considered by an EU member state court, the Convention would still apply provided a substantial part of the obligations under the settlement were to be performed in a non-EU member state.[7] Further, if relief under the Convention is sought in one EU member state which results in a judgment granting or denying relief, other EU member states may be obliged to recognise that judgment rather than considering a subsequent application under the Convention *de novo*.[8] It should also be noted that the Singapore Convention goes further than the EU Directive on Mediation (2008/52/EC) in the sense that under the Convention, consent of the parties is not required for enforcement of a settlement agreement arising from mediation (which is the case under Article 6 of the EU Directive).[9]

Conclusion

The Singapore Convention has the potential for profound change in the area of cross-border insolvency and restructuring. The existence of a streamlined process of enforcement of mediated settlement agreements is likely to provide increased confidence in relation to the use of mediation. This increased certainty is likely to provide a significant impetus to the use of mediation to resolve disputes in cross-border insolvency and restructuring matters.

[7] Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements', 19 Pepperdine Dispute Resolution Law Journal 1 (2019), 59.
[8] Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition and Enforcement of Mediated Settlements', 19 Pepperdine Dispute Resolution Law Journal 1 (2019), 59.
[9] Eunice Chua, 'The Singapore Convention of Mediation – A Brighter Future for Asian Dispute Resolution', Asian Journal of International Law, 9 (2019), pp. 195-205, 198.

*The Dubai International Financial Centre Insolvency Law 2019**

By Bill Gambrill
Barrister and Solicitor
(New Zealand)
everys legal consultancy
UAE

On 30 May 2019 His Highness Sheikh Mohammed bin Rashid Al Maktoum, as Ruler of Dubai, enacted a new DIFC Insolvency Law, Law No. 1 of 2019 of the Dubai International Financial Centre (DIFC) (the 2019 Insolvency Law)[1]. The 2019 Insolvency Law came into effect on 13 June 2019 and, together with the Insolvency Regulations 2019 (which also took effect on 13 June 2019), governs insolvency in the DIFC.

Dubai is one of seven emirates which comprise the federal union of the United Arab Emirates (UAE). The DIFC is a financial free zone which was established in 2004 in Dubai[2]. Physically, the DIFC is an area of 110 hectares located in central Dubai. More than 2,000 legal entities have been established in the DIFC, and approximately 22,000 people work there[3]. Legally, the DIFC has been created, pursuant to Dubai and UAE federal law, as a separate jurisdiction, with its own legal system, based on a common law model (the UAE is principally a civil law jurisdiction); the DIFC has its own governing civil and commercial laws and independent courts. Unsurprisingly, the DIFC has its own regime governing insolvencies in the DIFC.

The first insolvency law to have effect in the DIFC was the DIFC Insolvency Law of 2004[4]; that law was replaced in 2009, although the 2009 law contained very few substantive amendments. Like its predecessor, the 2009 Insolvency Law

* The views expressed in this article are the personal views of the author and are not necessarily those of his employer. The contents of this article are not and should not be considered to be legal advice.
[1] https://www.difc.ae/newsroom/news/dubai-international-financial-centre-enacts-new-insolvency-law/.
[2] Similar models have been used to establish other financial free zones in the region: a similar free zone, the Abu Dhabi Global Markets, was established in the neighbouring emirate of Abu Dhabi in 2013; while Qatar established the Qatar Financial Centre in 2005.
[3] https://www.difc.ae/files/8615/4676/1615/About_DIFC_-_English.pdf.
[4] DIFC Law No. 7 of 2004 (all DIFC laws and regulations are available on https://www.difc.ae/business/laws-regulations/).

governed DIFC-incorporated companies; it also governed the insolvency of branches of foreign companies registered in the DIFC, limited liability partnerships, and other legal entities created under DIFC law or registered in the DIFC. Both laws were based on elements of the United Kingdom Insolvency Act 1986. The DIFC insolvency regime provided for company voluntary arrangements, receivership and administrative receivership, and windings-up, including both voluntary windings-up (by the members of a company or by its debtors) and compulsory windings-up (pursuant to court order). The laws also made provisions for the protection and recovery of company assets in insolvency, and for the regulation of insolvency practitioners. The DIFC Authority also enacted the Insolvency Regulations and other subsidiary legislation. There have been relatively few formal insolvencies in the DIFC; and, while there have been some high-profile corporate failures, there has been only a limited volume of insolvency litigation before the DIFC Courts (as many DIFC-registered entities are regulated by the DIFC's financial services regulator, that regulation has also influenced the nature of insolvency in the DIFC).

While the 2009 Insolvency Law (and its predecessor) were recognisable as being derived from the United Kingdom, the DIFC law was not as comprehensive as the United Kingdom legislation; arguably, the most notable difference was the limited availability of any statutory rehabilitation regime.

While, legally, the DIFC is a separate jurisdiction within the UAE, the DIFC does not operate in a commercial vacuum. Before 2016, there was no functioning insolvency system in the UAE; but, in that year, the UAE enacted the federal Bankruptcy Law[5], creating a reasonably comprehensive commercial insolvency regime (albeit there appears to have been limited use of the insolvency procedures to date[6]). In particular, the Bankruptcy Law created legal mechanisms for debtor rehabilitation, as well as for liquidation.

Against that backdrop, in 2018 the DIFC Authority reviewed the 2009 Insolvency Law and the Insolvency Regulations, "[c]*onsider*[ing] *international best practice and comparable models in other jurisdictions, focusing specifically on the United Kingdom … and Singapore* [and] *the standards set by international standard setting bodies, such as the World Bank and the International Association of Restructuring, Insolvency and Bankruptcy Professionals …*"[7]. The outcome of that review is the 2019 Insolvency Law and 2019 Insolvency Regulations.

In very brief terms, the principal changes introduced by the 2019 Insolvency Law are as follows:

- Part 3 of the 2019 Insolvency Law introduces "Rehabilitation": Rehabilitation provides for a moratorium and a Court-sanctioned "Rehabilitation Plan", together with the appointment of a Rehabilitation Nominee, although the debtor remains in control during the Rehabilitation. Any plan proposed must be approved by creditors and shareholders (by way of a 75% majority), and then sanctioned by the Court. However, any plan so approved becomes binding on all creditors and shareholders. The law also makes specific provision for a debtor to obtain priority funding as a part of any such plan[8].

- Part 4 of the 2019 Insolvency Law introduces "Administration": if a debtor proposes a plan for Rehabilitation, and there is evidence of the debtor's "misconduct" (which is not defined), a creditor can apply to the Courts for the appointment of an Administrator, who, from the date of his or her appointment, takes responsibility for the management of the debtor (including managing any rehabilitation process)[9]. Any Administrator must be an insolvency practitioner and he or she has the powers and duties prescribed in the law.

- The 2019 Insolvency Law makes changes to the previous winding up provisions, albeit that these changes are largely by way of simplification and clarification; they do not create any fundamental changes to the processes.

- The 2019 Insolvency Law makes changes to the general "asset protection and recovery" provisions, to make those provisions more effective.

- The 2019 Insolvency Law provides for amendments to the provisions governing insolvency practitioners under Part 10, including by way of introduction of financial bonding arrangements[10]. Regulations 7.4-7.9 of the 2019 Insolvency Regulations put the bonding arrangements into effect in relation to the fraud or dishonesty of any insolvency practitioner.

- The UNCITRAL Model Law on cross-border insolvency proceedings has been incorporated into the 2019 Insolvency Law[11]. It is arguable that these cross-border provisions also apply in relation to insolvency proceedings being conducted elsewhere in Dubai and in the UAE, although it does not appear to be stated explicitly in the law (there is some ambiguity in Schedule 4, given the references to such proceedings being those conducted in "foreign States").

The 2019 Insolvency Law provides rehabilitation options as part of a comprehensive insolvency framework, which have not hitherto existed in the DIFC; along with the UAE Bankruptcy Law, and with similar insolvency legislation in the ADGM, the UAE now enjoys are far more extensive legal regime for the recovery of distressed debtors than had previously existed.

[5] Federal Decree Law No. 9 of 2016.
[6] Arabian Business, 17 October 2017 (https://www.arabianbusiness.com/industries/banking-finance/381252-lawyers-report-low-take-up-of-uae-bankruptcy-law).
[7] DIFC Authority, Consultation Paper No. 8 September 2018, Insolvency Law, paras 11-13. (https://www.difc.ae/files/9215/3857/3859/Consultation_Paper_-_Insolvency_Law.pdf).
[8] 2019 Insolvency Law, article 31.
[9] 2019 Insolvency Law, article 32.
[10] 2019 Insolvency Law, article 124(2).
[11] 2019 Insolvency Law, article 117(3) and Schedule 4.

Indonesian Bankruptcy and PKPU – the Current Trends

By Daniel Ginting
Ginting & Reksodiputro in association with Allen & Overy LLP[1]
Indonesia

and Ian Chapman
Allen & Overy
Hong Kong

It has been 15 years since Indonesia enacted Law No. 37 on Bankruptcy and Suspension of Payment (PKPU – *Penundaan Kewajiban Pembayaran Hutang*). Although the Law has not been amended since its introduction, there is increasing talk about doing this, and in a way which would be bound to spark controversy. A white paper recently submitted to Indonesia's Ministry of Law and Human Rights proposes (among other things) that the right to file for protection should be exactly that: a shield for the debtor – and a creditor should no longer have the right to petition for a company to be placed into PKPU.

The argument in support of this, championed by leading debtor-side lawyers, is to the effect that a court supervised rehabilitation process is by its nature not an enforcement and recovery procedure and, if an aggrieved creditor cannot obtain satisfaction from the company and its management, then the bankruptcy process in the Law provides a perfectly adequate creditor-side remedy. Further, so the argument goes, the ability of a creditor to petition for the company's bankruptcy should overcome any reluctance on the part of the company to enter PKPU, but even if it doesn't, once bankruptcy has been commenced the Law, quite properly, allows management a second chance to file for PKPU. The amendment would be no more than a way to ensure that the Law is not abused and that the threat of a PKPU petition is not used by creditors as a device to force unfair settlements, while preserving the right of creditors to seek the bankruptcy of truly insolvent debtors.

To put this in context, there seems to be an increasing trend of debtors voluntarily going into PKPU. When the Law was first introduced there was very little confidence in the Law and in the ability of debtors and creditors alike to get fair treatment, particularly as debt claims were often declared null and void by the courts for various not necessarily consistent or particularly persuasive reasons. This obviously raised serious doubts in the minds of many financiers and advisers as to the effectiveness of the Law in providing a level playing field on which to base consensual, court supervised restructurings. The recent trend does however indicate that debtors have somewhat moved away from the "take it or leave it" approach in restructuring their debts for which they were becoming famed, and are now working with their creditors to find solutions.

So why is the proposal to make filing for PKPU the sole prerogative of the debtor so controversial, when a debtor would presumably choose to file for protection rather than accede to bankruptcy, except in the most hopeless of cases? One answer may lie in the control of the process. If only the debtor can file, then the choice of administrator (or curator) is that of the debtor. In practice, this choice is often significant as, amongst other things, the administrator is responsible in the first instance for admitting or rejecting claims for voting purposes and, given the apparent flexibility in this process (as discussed below), the administrator can play a crucial role in determining the success or failure of a rehabilitation proposal.

Interestingly this leads to another trend we are seeing in PKPU: creditors seeking the appointment of an additional administrator. While the nomination of a sole administrator by the debtor remains by far the most common approach, the Law does provide for the possibility, subject to court approval, for more than one administrator to be appointed. While creditors do not have a direct right to seek the appointment of a second administrator, increasingly, and particularly in complex cases, pressure from the creditors is leading to the judge supervising the PKPU case or the company itself applying for the appointment of a second administrator, who is acceptable to activist creditors. The timing for this nomination is however key, as the Law does not specify clearly when the nomination of the second administrator can be made, so the recommended approach is for this to be made immediately before or immediately after the temporary PKPU is granted by the court.

Even so, ease of access and consistency of outcome in the overall bankruptcy processes remain key issues, each in turn highlighted by the, seemingly now abandoned, proposal that a creditor must "prove" the insolvency of the debtor in order to commence bankruptcy action, and the recent decision in *Royal Standard* in which claims thought previously admitted were rejected for voting purposes and an extension of the PKPU granted apparently without the requisite creditor class consent. Clearly any requirement for proof of insolvency would significantly impede the ability of a creditor to seek bankruptcy of a debtor, and if this were to have been followed through and were coupled with a removal of the ability of a creditor to petition for a PKPU, then the Law would effectively be inaccessible to creditors in all but the most egregious cases.

The *Royal Standard* case also highlights the critical importance of ensuring that creditors have all original documentation, registrations and translations and that all update requirements and other formalities are complied with. Almost invariably a failure to do this gives rise to discrepancies which affect, often materially and irretrievably, the rights of creditors whether in claims admission negotiations and voting in PKPU or in recovery action in bankruptcy. An interesting practical point arises when dealing with claims governed by a foreign governing law which may be validly transferred without a formal written agreement. Notwithstanding that the transfer is valid under the foreign law, a lack of formal documentation may well lead to difficulties in having a transferred claim

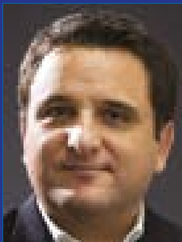
[1] Allen & Overy has an exclusive association agreement with Ginting & Reksodiputro (G&R), based in Jakarta. G&R is a top tier Indonesia law practice and its lawyers provide first class Indonesian legal advice and are well established leaders in the local market.

admitted in a PKPU process and accordingly transferees should be aware of the importance of original executed documents in any claims transfers involving an Indonesian debtor.

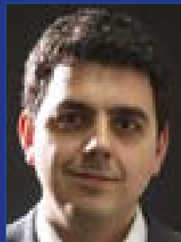
One more key trend is the increased focus on swift enforcement of collateral in a bankruptcy; whether through a direct bankruptcy process and a failed composition, or a bankruptcy process arising from a failed PKPU rehabilitation plan vote. In bankruptcy, it is important for secured creditors to have enforced their collateral before it is handed over to the curator (bankruptcy administrator) for enforcement. Under the Law, if within two months of the enforcement period (which commences once the composition or rehabilitation vote fails) the collateral held by a secured creditor remains unsold, the enforcement process must be handed over to the curator. The difference in priority of payment between the two is a major issue. If a secured creditor enforces its collateral, the enforcement proceeds, net of enforcement costs, will rank ahead of employees unpaid wages and other unpaid entitlements, tax claim, preferred creditors (by law) and unsecured creditors. In often stark contrast, if the enforcement is done by the curator the secured creditor will rank behind the bankruptcy costs, employees' unpaid wages and outstanding taxes. The lack of original documentation and non-compliance with applicable formalities in the enforcement and sale process can result in significant delays in security realisation by a secured creditor and as can easily be seen a significant reduction in recoveries.

So where from here? It is certainly true that navigating Law No. 37 of 2004 remains challenging, yet recent research at the Commercial Court in Central Jakarta shows there are some 80 to 100 debtors going into PKPU every year. Although it is probably too early to tell, the uptick in the number of debtors seeking formal protection suggests that PKPU is increasingly becoming an "acceptable" procedure: and whether the proposed amendment to limit the ability to file for PKPU to debtors goes through and how applications for additional creditor-side administrators fare remains to be seen, overall, the signs are that PKPU is developing and maturing as a rehabilitation procedure and this can only be encouraging.

Successful Sale of Assets under the Brazilian Bankruptcy Code and DIP Finance Structures



By Salvatore Milanese, Bruno Carvalho and Wolney Netto
Pantalica Partners
Brazil



The objective of this article is to present a case of the acquisition of UPIs (Isolated Productive Units) by creditors in a bankruptcy proceeding of a large group in the sugarcane industry in Brazil. These creditors, mostly international investment funds, were successful in recovering their money by acquiring a business, bidding through their own credit rights and taking over the assets free and clear from potential hidden liabilities. It could be considered an example of a complex case that proved that DIP Financing works in Brazil, as well as the process of credit bidding and the protection against hidden liabilities provided by the UPI structure.

Introduction

The main purpose of the New Brazilian Bankruptcy Code (in Portuguese, *Nova Lei de Falências e Recuperação de Empresa, NLFR*), which came into force in mid-2005, is to maintain the business in operation. This is achieved by protecting jobs at the expense of the shareholders of the company in crisis, which are subordinated to the social objective of the Law. For this reason, the NLFR introduced a previously unthinkable provision in Brazil's insolvency proceedings: the possibility of selling assets or independent business units without the buyer being liable for past tax and labour liabilities. By allowing the sale of assets or isolated units without risks of tax and labour succession, the NLFR virtually eliminates the need for lengthy due diligence processes.

The sale of assets or UPIs can be provided within the reorganization plans submitted by the debtor to the creditors in the context of the bankruptcy proceeding and must be expressly approved by most of the creditors. The sale of subsidiaries, assets or separate production units is provided for in Article 60 of the NLFR. The sale should occur when possible as provided in Article 142 of the NLFR, which defines three types, including auction by oral bids, closed bids and trading floor. The Law is also flexible, as seen in Article 144 which provides different alternatives for the sale, provided that the trustee and the bankruptcy court approve the proposed context.

Through the sale of UPIs, the NLFR has created a shield against potential labour and/or tax liabilities, creating incentives for companies undertaking bankruptcy proceedings to sell their assets to raise money for the reorganization process and attract potential investors.

It is important to note that this "shield" does not exist when the buyer is an individual (or individuals) close to the debtor or a parent company.

Another important innovation for distressed asset investors, introduced by the NLFR, is the concept of DIP or "Debtor-In-Possession Financing".

The NLFR essentially includes two new provisions to protect creditors and suppliers offering financing after the petition for a bankruptcy proceeding:

1. Post-petition claims are considered super-priority rights.

2. Pre-petition and unsecured credits become a priority when the creditor continues to provide goods and services or to finance the company. In this case, priority is granted only when a reorganization that has been approved fails and the proceeding turns into a bankruptcy liquidation.

About the case

The case presented below does not disclose the name of the company due to confidentiality reasons, however it deals with a Brazilian group founded in the 2000s in the sugar, ethanol and bio-energy business.

In 2009, after a period dedicated to capital raising, acquisition and integration of new units, the group started to face economic and financial difficulties that compromised honoring obligations to financial institutions and suppliers. In order to reorganize the over-levered business, the owners decided to file for a reorganization proceeding, called judicial recovery in Brazil (Chapter 11 in the US). The reorganization plan submitted by the group and negotiated with the creditors was approved by most of the stakeholders and the group successfully raised new finance in the form of DIP financing. However, a few months later, the company defaulted again on obligations related to the restructuring plan as well as to the DIP financing. Thus, the group of creditors initiated procedures against their collateral, aiming to recover the money invested.

After a long period of litigation and negotiation, in order to avoid further disruption to the business, the creditors and the DIP financiers agreed to approve a new version of the reorganization plan, which included a proposal to pay the debt through the creation of UPIs and allowing the DIP financiers, as well as other potential bidders, to "credit bid" and be assigned the assets free and clear from potential liabilities.

The auction of the UPIs allowed the DIP financiers to get two mills through credit bidding, instead of several worthless assets. They were able to get those plants simply by repossessing their collateral package. The rest of the mills were kept in the group to satisfy the remaining balance of creditors.

The DIP financiers were assigned assets free and clear, started a process of revitalizing the assets, and subsequently sold the mills to investors, recovering part of their money.

Conclusion

The Law introduced two provisions essential to conceiving and implementing solutions in complex restructurings. The first concept is DIP Finance. The second provision relates to the possibility of selling assets free and clear, ring fencing buyers from hidden liabilities, and allowing debtors involved in restructuring to monetize part of the business and somehow preserve business units.

In recent years, at least a dozen cases of DIP Financing involving agribusiness, pharmaceutical, construction, mining and oil and gas companies have been structured in Brazil. Analogously, judicial recovery plans have provided for the constitution and sale of UPIs more often.

Therefore, among established and growing businesses, such as investments in bad credit portfolios and new business (DIP Finance) and purchase of assets/companies in crisis, a market for specialized investors has been established in Brazil and is expected to grow enormously in the coming years.

Should Professional Services Firms List?

By Greg Tucker
Maurice Blackburn Lawyers
Australia

and Robert Miano
RSM
Australia

Introduction

Recent discussion of whether professional services firms should list has been raised in the context of the recent financial performance of Slater and Gordon, the world's first listed law firm.[1] Clearly, technically, professional services firms can list; however, does this suit businesses where the major assets are people and goodwill?

Over the last thirty years there have been several listed accounting firms in Australia, namely, Harts, Crowe Horwath, Stockford and Kelly + Partners with only one of them still publicly listed.[2] There are several listed law firms[3] and a number of listed consulting engineering firms.[4]

This article explores the pros and cons for public listing and speculates why so few professional services firms, particularly accounting firms, have elected to list.

Why list?

Some would regard listing as the Holy Grail for corporate growth and value creation through access to cheaper capital

---

[1] This included at least one senior member of the judiciary '*Judge highlights pitfalls that await listed lawyers*', Australian Financial Review, 3 February 2016 p40.
[2] Note FTI Consulting Inc is listed on the NYSE, its services overlap with accounting firms but with no audit work. Evans Dixon Ltd is also listed however it provides corporate and financial planning services.
[3] Slater and Gordon Ltd and Shine Corporate Ltd. There are three IP firms listed in Australia (IPH Limited, Xenith IP Ltd and Qantm IP Ltd) and several listed commercial law firms in the UK.
[4] These include AECOM, Worley Parsons (recent purchase of Jacobs Engineering) and the Wood Group.

rather than through private equity and/or debt facilities. Does listing actually create long term value generally and if so for whom: foundation shareholders, all shareholders, employees?[5]

Listing can provide companies with the capacity to increase enterprise value through consolidation of their sector including acquisitions. In addition it allows existing shareholders or partners to unlock the company's enterprise value; this is not always easy to achieve in private structures and particularly partnerships which assign value to partners' equity. This is discussed further below.

Whilst access to cheaper public capital is often a motivator for listing, the greater disclosure requirements arising from audit standards, corporations' law and listing rules create a new set of obligations and, sometimes, challenges.[6] The company's results will be public and result in a level of external scrutiny that partnerships have previously kept in house and private. The flip side of this may be a greater level of oversight and protection for the investing public in this elevated level of compliance.

Considerations for listing

1. The primacy of culture

Undoubtedly one of the most important challenges when listing is a cultural one.[7] What is the company's purpose and what motivates staff to come to work every day? Will listing impact the existing culture? These questions require considered answers without a confirmation bias towards listing for other reasons.

Cultural challenges have often been underestimated, they are a significant factor in the cases where the listed vehicle has failed to realise its potential and create a sustainable business.[8]

Success is usually measured in short term financial metrics, however, these do not provide insight into whether an acquisition will be value accretive longer term which, amongst other things, turns on the management of pivotal cultural issues. Will value be created through management structures increasing the discretionary effort from the leadership team and staff? This factor is largely ignored.

Arguably the culture of any listed firm must be impacted by the financial reporting cycle. The consequences of not meeting forecasts are more significant as the share price is likely to be adversely impacted as will the brand of the firm, the mood within the company and employee shareholders and so on.

So the culture will change; ignore this at your peril; it is not a secondary consideration.[9]

2. A robust long term strategy is crucial but not sufficient

Of course having an appropriate long term strategy is necessary for any company; however it must be combined with short term strategy/performance for listed companies. With market reporting cycles even a robust long term strategy may not be sufficient if the company misses its short term earnings targets with the consequent adverse impact on its share price. Short term execution of components of a longer term strategy is a key skill and is imperative for a public company.

3. The market demands growth

Successful listed companies typically have well-defined growth strategies. For professional services firms this often means the acquisition of competitors or diversification into associated businesses with some organic growth of the underlying business.

Consider how a listed professional services firm would fare without a strong growth strategy. Presumably for investors this is unlikely to realize the financial outcomes they are seeking from their capital. In the absence of barriers to entry such an approach would lead to competitors entering the market in order to take these growth risks in search of superior returns driven, at least in part, by the efficiencies ascribed to building scale.

So the proposition is that boards of listed companies are unlikely to support a strategy that provides for year on year organic growth only. Impatient investors are more likely to invest in companies that have a more dynamic growth strategy in the quest for superior returns.

4. "Selling the furniture" on listing

The often unstated truth in listing-related discussions is that existing owners list the firms to make more money; otherwise why would they do it? In many cases the shareholders transfer the existing assets and goodwill of the business into a listed structure with the intention of gaining a once-off financial benefit which forecloses access to this capital for any up and coming staff. It rules off the past.

The existing shareholders might get some cash immediately on listing, however it is usual that the bulk of the consideration is foundation shares. Usually these shares cannot be traded for several years so foundation investors might have to wait for some time to realise any gains. The potential PE multiples for a successful listing, and therefore the capital gains, are potentially far more attractive than any private equity raising[10] which will be at higher cost of capital and stricter terms reflecting the inability to readily trade privately held shares.

Listing immediately changes the motivation of the foundation shareholders with at least some of them drawn more to the short to medium term performance of the company rather than the longer term with a view to realizing at least some of the value of their investment.

5. Employee shares and options in the listed company

It is tempting to think of this alignment of shares with employees in only a positive way and that discretionary effort will increase as staff feel they are contributing to the success of the company in which some are part owners. All of which is fine and true until the share price falls, and keeps falling, for whatever reason. If bonuses are partly paid in shares and/or options then they may become worthless and loans taken out for equity purchases may be triggered if the share price fall is

---

5 Studies of listed professional services firms are needed to determine the truth of these views including analysis of the long term share price fluctuations.
6 There are other forms for external financing of growth, for example, see Doorway Capital's financing of Simpson Millar in the UK and Plexus Law by Origin Equity in the UK.
7 The cultural challenge of listed companies was squarely raised in the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry see the *Interim Report*, Vol1, Ch12, September 2018 and by APRA see: the *Prudential Inquiry into the Commonwealth Bank of Australia (CBA) -.Final Report*, APRA, 1 May, 2018 see ch9 *Culture and Leadership*.
8 Ibid.
9 Other business structures will also have cultural issues, this article seeks to demonstrate that they can be amplified in a listed environment by the nature and impact of listing itself.
10 For example see performances of Slater and Gordon Ltd, Shine Corporate Ltd and Intellectual Property Holdings Ltd in their immediate period post listing.

significant enough.The impact of this on staff would be difficult to manage.

6. The uncertain future of the professional services

It is hard to imagine that this sector could be more volatile than it is with major interrupters including large numbers of small, nimble new entrants, overseas firms entering the market and large companies building their own multi-pronged professional services groups.

Furthermore clients are demanding more for less and will change legal or accounting providers as more professional services become commoditised. Any public company must be agile enough to meet these challenges. Agility does not always accompany listed structures.

7. Staff retention

A key test for a listed professional services firm will be long term levels of staff retention. It may be that in addition to the usual market pressures to change firms, the strictures and cultural issues associated with a listed professional services firm may be an impetus to staff departures. Of course this is inextricably linked to the point made about culture earlier.

If so it would lay bare the fragility of listing particularly where the clients or referrers follow staff out the door. If this occurred on any significant scale, it would be likely to cause of loss of investor confidence and consequent volatility in the share price. Any major event like this may need to be reported to the market under the relevant disclosure obligations.

The need to pay commercial rates to staff and continue to pay forecast dividends to shareholders while growing the business, may lead to difficult trade-offs.

8. The market itself

Finally, the impact of market sentiment should not be underestimated. Should it become negative it is very difficult to reverse.[11]

As part of this environment, short sellers operate looking for opportunities where listed companies appear to be overvalued and then set about highlighting the deficiencies. There are several recent examples of how short sellers can impact a listed entity with perhaps Slater and Gordon being the most spectacular of these.[12]

Accounting firms and listing

Although there have now been a number of listed law firms, it is interesting to speculate why more accounting firms haven't listed. Harts Australasia listed in May 2000, however, this was short lived with its shares falling from listing at $1 to four cents within less than two years and the company being placed into liquidation in October 2001. Following on from this was the collapse of the accounting and financial planning aggregator, Stockford Ltd, around 2003 and then the listing of Crowe Horwath Australasia in 2013 and its subsequent delisting in early 2015 when it was acquired by Findex Australia Pty Ltd. There is also Hayes Knight (NSW), a microcap listed in 2005 and more recently Kelly + Partners, a small accounting practice based in Sydney, listed in 2017. Apart from these instances, the most high profile example of a listed accounting related practice is H & R Block Inc in the USA, which listed in 1962.

It is interesting that there hasn't been a rush to adopt the public structure for accounting service providers, particularly the Big Four. These firms would be perceived to have significant unlocked value that a listing would realise potentially for their current partners.[13]

However whether unsustainable growth takes place within a listed structure or otherwise, it is still problematic as it will lead to turbulence as the organisation meets or fails to meet its growth expectations. Of course, being unlisted will not stop this from happening, it just may not be as open to external scrutiny.[14]

No clear answer

So there is no definitive answer to whether listing is appropriate for professional services firms. However, it is interesting to note that there are now six listed commercial law firms in the UK: DWF Group PLC, Gateleys (Holdings) PLC, Gordon Dadds Group PLC, Keystone Law Group PLC, Rosenblatt Group PLC, Knights PLC and DWF Group Limited.

In mid-2015 Gateleys became the first listed law firm in the UK. If share price is an indicator, it seems to be doing well to date. It may turn out to be the exemplar of a well-managed, listed professional services company.

In Australia a listed intellectual property firm, IPH Limited, has had some share price volatility since it listed in November 2014 with some comparisons to the Slater and Gordon experience[15]. There are two other listed IP firms in Australia: Xenith Ltd and Qantm Ltd. Again it will be interesting to observe their market trajectory over the longer term.

Conclusion

There are many things to consider before the decision to list is made. Firms need to maintain a strong culture that gives rise to sustained discretionary effort by staff while navigating the difficult waters of periodic reporting and relevant disclosure requirements.

There is an imperative, beyond organic growth, for an aggressive plan that portrays a trajectory that is attractive to investors.[16] In this regard the proposition is that professional services firms that aggressively aggregate will inevitably face a cultural crisis, whether listed or not, where the growth imperative supplants the need to nurture a robust, healthy, integrated culture.

This article does not rule out the potential successful listings of professional services firms, rather it points out the dangers inherent in this choice. As for accounting firms there appears to be little appetite to list; instead they have typically elected to grow through private acquisitions including extending their service offerings into adjacent markets.

---

[11] See Stockford Ltd which grew from a small accounting firm to a large listed entity then into receivership within four years. The share prices of Slater and Gordon Ltd and Shine Corporate Ltd have also reacted to adverse market sentiment over the last few years.

[12] 'Hedge Fund VGI says there are 'more cockroaches in Slater & Gordon's kitchen' *Australian Financial Review*, 26 June 015 (digital copy only). 'Few Options for Slater', *The Australian*, 30 December 2016 p19.

[13] Note that there have been spin-off listings from the Big Four, for example, KPMG sold KPMG Consulting which listed in 2001 on the NASDAQ and changed its name to Bearing Point in 2002. In this context it should be noted that in Europe, for example, there are legal restrictions on ownership, see the Eighth Company Law Directive 2006/43/EC on *Statutory Audits of Annual and Consolidated Accounts*, article 3.4(b).

[14] For a recent account of the expansion of the Big Four: see Gow, I and Kells, S *The Big Four, The Curious Past and the Perilous Future of the Global Accounting Monopoly*, Latrobe University Press, 2018.

[15] See Lawyers Weekly 19 February, 2018 *Listed IP firm weathers share price nosedive*, https://www.lawyersweekly.com.au/biglaw/22760-listed-ip-firm-weathers-share-price-nose-dive.

[16] In this context the spectacular fall of Arthur Andersen in 2002 should be mentioned; of course, it was not listed. This article is not suggesting that corporate collapses are confined to list companies.

Extra-territorial Reach of Clawback Claims

By Sophia Rolle-Kapousouzoglou
Fellow, INSOL International
and
Brian Simms QC
Lennox Paton
Bahamas

In a judgment handed down by the Privy Council on 29 July 2019 in the case of *AWH Fund Ltd. (In Compulsory Liquidation) v ZCM Asset Holding Company (Bermuda) JCPC 2018/0033* it was held that fraudulent preference claims under the insolvency law of the Bahamas have extra-territorial effect and, therefore, may be served outside of the jurisdiction.

Background

AWH Fund Ltd (AWH or the Company) was incorporated under the Bahamian International Business Companies Act 2000 (IBC Act) as a mutual fund to deal in securities listed on the Asian markets. The Appellant, ZCM Asset Holding Company (Bermuda) Ltd. ('ZCM') invested in AWH as agent on behalf of American Express Alternative Offshore Fund (AMEX). AWH registered the shares invested by ZCM in the name of ZCM "for the benefit of Amex." In July 2002 ZCM made a request to redeem the shares invested in the sum of approximately $13million. AWH approved the request and paid ZCM. In October 2002 AWH went into liquidation. It was claimed by the Liquidator some six years later that since the payment to ZCM was made within 3 months prior to the commencement of the Company's insolvency the payment should be set aside as a fraudulent preference.

The fraudulent preference application

On 1st July 2008, the Liquidator of AWH applied by way of interlocutory summons pursuant to *Order 11 Rule 8(4)* of the Bahamian Rules of the Supreme Court (the Bahamian RSC) seeking a declaration pursuant to Section 160[1] of the IBC Act that the payment to ZCM was wrongful by reason that it constituted an undue and/or fraudulent preference of ZCM and was invalid accordingly. When ZCM was served in Bermuda with the summons, it contested jurisdiction mainly on the basis that the Court did not have jurisdiction to grant an Order for leave under *Order 11 Rule 8(4)* to serve a fraudulent preference claim out of the jurisdiction, arguing that *Order 11 Rule 8(4)* applied only to originating proceedings commenced by Originating Summons, or Writ, and not to interlocutory applications.

At first instance it was held that the summons ought to be set aside, however on appeal the Court of Appeal determined that the IBC Act was intended to have extra-territorial effect and therefore ZCM could be served with the fraudulent preference claim outside the jurisdiction.

The test adopted by the IBC Act as to whether a payment made to a creditor constitutes a fraudulent preference is contained in *Section 72 of the Bankruptcy Act 1870*[2]. That section requires an intention to prefer a creditor over other creditors in making the payment within three (3) months of the bankruptcy. The Board was required to consider the *Bankruptcy Rules of 1871* which did not allow service of a fraudulent preference claim outside of the jurisdiction.

Express provision was introduced in England for service out of clawback claims in 1986 by the introduction of Rule 12.12 of the Insolvency Rules 1986, which was delegated legislation under the Insolvency Act 1986. This legislative change relieved liquidators from having to establish a claim under an Order 11 gateway under the English Rules of the Supreme Court (the English RSC). No equivalent or similar provisions are to be found in the *IBC Act, the 2012 Companies Winding Up Rules (2012 WUR), the Bankruptcy Act rules, the Bahamian RSC (the equivalent to the 1978 English RSC), or the Bahamian Companies (1974 WUR)*. The Privy Council had to consider each of these legislative provisions in addition to the 1870 Bankruptcy Act as well as numerous cases decided prior to the change of the legislative landscape in the England since 1986.

The Board held:

> *"it is now settled law that insolvency proceedings can*

[1] 160. (1) Any conveyance, mortgage, delivery of goods, payment, execution, or other act relating to property as would, if made or done by or against any individual trader, be deemed in the event of his bankruptcy to have been made or done by way of undue or fraudulent preference of the creditors of such traders, shall, if made or done by or against any company, be deemed, in the event of such company being wound up under this Act, to have been made or done by way of undue or fraudulent preference of the creditors of such company, and is invalid accordingly. (2) For the purposes of this section – (a) the presentation of a petition for winding up a company in the case of a company being wound up by the court or subject to the supervision of the court; and (b) a resolution for winding up the company, in the case of a voluntary winding up, shall be deemed to correspond with the act of bankruptcy in the case of an individual trader, and any conveyance or assignment made by any company formed under this Act of all or any part of its estate and effects to trustees for the benefit of all or any part of its creditors is void.

[2] 72. Every conveyance or transfer of property, or charge thereon made, every payment made, every obligation incurred, and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own moneys in favour of any creditor, or any person in trust for any creditor, with a view of giving such creditor a preference over the other creditors, shall if the person making, taking, paying or suffering the same becomes bankrupt, within three months after the date of making, taking, paying or suffering the same, be deemed fraudulent and void as against the trustee of the bankrupt appointed under this Act; but this section shall not affect the rights of a purchaser, payee or incumbrancer in good faith and for valuable consideration.

have extraterritorial effect", see Re Paramount Airways [1993] Ch 223, and *Bilta (UK) Ltd. V Nazir (No 2)* [2016] AC 1, and at [50] *"In the Board's judgment, the present case is close to In re Seagull Manufacturing Co Ltd. [1993] Ch 345 because, as the Board has already held, section 160 is not territorially limited in its application."*

The Board determined that:

> *"Times have moved on since the nineteenth century when the relevant provisions in bankruptcy were enacted, and it would not be surprising to find provision now being made for service out. Trade takes place increasingly on an international basis. So does fraud." (per Sir Donald Nicholls in In re Paramount Airways [1993] Ch 223, 239). Moreover, the IBC was established to create a vehicle for international investors."*

The Board also justified its finding that section 160 had extraterritorial effect because it was necessary to consider the section in a wider context. It held that:

> *"wider context includes not only the historical perspective that the Bankruptcy Act and the Bankruptcy Rules, which did not provide for service out, provide. In the opinion of the Board, it also includes the scheme of the IBCA and the companies' legislation which it mirrors."*

Oddly the reliance by the Board on the companies' legislation in the Bahamas was undermined by the Board's later conclusion as referred to in more detail below in relation to RSC Order 1 rule 2 (2) where it held that the Bahamian RSC did not apply to the winding up of Companies Act Companies. This type of proceeding, it was held, was governed solely by the 1974 WUR which did not contain a provision for service out. Additionally, the Board ignored as part of the "wider context" the fact that prior to the introduction of the IBC Act in 2000 the previous 1997 IBC Act expressly adopted the 1974 WUR with the result that up until 2000 a fraudulent preference claim could not be served out of the jurisdiction in relation to either an IBC or a Companies Act company.

In further support of its conclusion that the Act was

INSOL BOARD DIRECTORS

Executive Committee Directors

Julie Hertzberg (USA)	President
Scott Atkins (Australia) *Fellow, INSOL International*	Vice-President
Paul M. Casey (Canada)	Treasurer
Alastair Beveridge (UK)	Executive Committee
Jason Baxter (UK)	Chief Executive Officer

Board Directors

Hugh Dickson	Cayman Islands	RISA Cayman
Jane Dietrich* *Fellow, INSOL International*	Canada	
Kare Johnstone	New Zealand	RITANZ
Steffen Koch	Germany	INSOL Europe
Timothy Le Cornu *Fellow, INSOL International*	Channel Islands	ARIES
Eric Levenstein	South Africa	SARIPA
Mat Ng	Hong Kong, PRC	HKICPA
Peter Sargent*	UK	
Justice Arjan Kumar Sikri	India	INSOL India
Annerose Tashiro	Germany	ABI
Andrew Tate	UK	R3
Mahesh Uttamchandani*	The World Bank Group	
Tiffany Wong*	Hong Kong, PRC	

*Nominated Director

Past Presidents

Ian K. Strang	(Canada)
Richard C. Turton	(UK)
C. Garth MacGirr	(Canada)
Richard A. Gitlin	(USA)
Stephen J. L. Adamson	(UK)
Dennis J. Cougle	(Australia)
R. Gordon Marantz	(Canada)
Neil Cooper	(UK)
John Lees	(Hong Kong)
Robert S. Hertzberg	(USA)
Sijmen de Ranitz	(Netherlands)
Robert O. Sanderson	(Canada)
Sumant Batra	(India)
Gordon Stewart	(UK)
James H.M. Sprayregen	(USA)
Mark Robinson	(Australia)
Adam Harris	(South Africa)

Scroll of Honour Recipients

1989	Sir Kenneth Cork	(UK)
1993	Ronald W. Harmer	(Australia)
1995	Gerry Weiss	(UK)
2001	Neil Cooper	(UK)
2001	Gerold Herrmann	(UNCITRAL)
2005	Stephen Adamson	(UK)
2010	Jenny Clift	(UNCITRAL)
2013	Ian Fletcher QC	(UK)
2017	Claire Broughton	(UK)

extraterritorial the Board relied on *In re Nathan Newman & Co)* (1887) 35 Ch D1 which established that under the then Bankruptcy Acts service of notices could be served out of the jurisdiction on creditors and contributories. The basis of the reasoning in that case was:

> *"If notices of this kind could not be served abroad, it might in many cases be impossible to wind up a company at all".*

The Board went on to say that *re Nathan* was an example of being able to serve documents out of the jurisdiction where there was no express mention of it in the relevant Act. The Board distinguished the case of *Anglo-African Steamship Co* [1886] 32 Ch D 348 on which ZCM had relied. The Court appears to have ignored or confused cases which distinguished the service of notices which provided information to creditors and others out of the jurisdiction and the service of documents out of the jurisdiction which brought a person served into the position of a defendant and against whom relief was sought, the latter being prohibited; see *In Re Rathbone, Ex parte Patterson (1887) BR 270 and In re Alderson;ex parte Kirby (no 2) (1891) BR 270 and indeed Anglo African Steamship Co*.

Having concluded that section 160 IBC Act was extraterritorial it was still necessary to find an express gateway to allow service on ZCM in Bermuda under the applicable rules.

ZCM argued that even if section 160 had extra-territorial effect, a finding that a creditor had been fraudulently preferred did not, in itself, impose an obligation to repay. A separate claim was necessary for money had and received in restitution. Neither the statutory claim for a declaration of a fraudulent preference or the restitutionary claim for repayment were capable of falling within Bahamian RSC Order 11 r.1(1) which limited the gateways for service outside the jurisdiction.

The Liquidator relied on Bahamian *RSC Order 11 rule 8 (4)* which conferred a power to serve proceedings out of the jurisdiction, including an interlocutory summons. ZCM argued that the Bahamian RSC did not apply because Order 1 rule 2 (2) disavowed the application of the rules to the winding up of companies. The Board held, however, because Bahamian RSC Ord 1 rule (2) only identified Companies Act companies as companies to which the Bahamian RSC did not apply, it had the effect that the RSC could apply to IBC companies. The question then became what specific rule under the Bahamian RSC would allow service out.

The Board did not consider that the jurisdiction was constrained by Order 11 rule (1) which sets out the general gateway rules pursuant to which a writ or originating summons can be served out of the jurisdiction (which make no mention of claw back claims). The Board also held that the 1974 WUR (since repealed) did not apply to the winding up of an IBC Act company. The 2012 WUR do not provide for service of a claim out of the jurisdiction but, as previously mentioned, the Board did not address this lacuna in the law relating to these Companies Act companies. As a consequence, on their Lordships' reasoning it would appear that in so far as the Bahamian RSC are disapplied in relation to Companies Act companies it might successfully be argued that a claw back claim in the liquidation of a Companies Act company cannot be served out of the jurisdiction, but a claw back claim in the liquidation of an IBC Act company can.

The Board concluded that it was unnecessary to identify a jurisdictional gateway under *Ord 11 rule 1* (as was found to be required in *Masri v Consolidated Contractors International (UK) Ltd (No 4)* [2010] 1 AC 90 and *Aktiebolaget Robersfor and La Societe Anonyme Des Papeteries de L'AA* [1910] 2 KB 727) for the liquidator's claim that the payment of redemption proceeds to ZCM was a fraudulent preference. It was also unnecessary to show a jurisdictional gateway for the consequential claim for repayment of monies, as was required in *Rousou's Trustee v Rousou* [1955] 1 WLR 545. The Board held that Order 11 rule 8 (4) which allowed for an interlocutory summons to be served out of the jurisdiction was wide enough to allow service of both claims and this sub rule was not constrained by the limited gateways under Order 11 rule 1. While the Board distinguished the cases of *Masri* and *Aketiebolaget* on the basis of the facts and concluded that the facts of the case before it was closer to *Seagull Manufacturing Co Ltd*. [1993] Ch 345, it did not address the history of the English versions of Order 11 rule 8(4) set out in those cases which confirmed that this sub-rule was constrained by Order 11 rule 1. The Board did not explain why in the case before it the historical application of Order 11 rule 8 (4) should be ignored.

The effect of such a decision ignores the fact that the Bahamian legislation appears to have territorial limitations and currently there is no expressed public policy which alters that as noted in other recent cross-border insolvency proceedings in the Bahamas such as (i) *In the matter of an Application made under the inherent jurisdiction of the Court, alternatively pursuant to Section 254 of the Companies (Winding Up Amendment) Act 2011; And In the matter of an Application made on behalf of: Northshore Mainland Services Inc. and others v. The Export Import Bank of China and others* [2015] 2 BHS J. No. 71 ('the Baha Mar case') in which the Bahamian Supreme Court declined to recognize the Trustee Appointed in US Chapter 11 proceedings as a Foreign

Representative; (ii) *In the Matter of Part VIIA of the Companies Act Ch. 308, And In the Matter of Caledonian Bank (In Official Liquidation under Supervision of The Grand Court of The Cayman Islands) And In the Matter of the Foreign Proceedings (International Co-operation) Liquidation Rules* 2015/COM/com/00034 in which the Bahamian Supreme Court declined to grant common law recognition to Liquidators appointed in the main proceedings, and (iii) *Meespierson (Bahamas) Limited and others v Grupo Torras SA and another* 2 ITELER 29 in which the Bahamian Court of Appeal declined to exercise its jurisdiction in favour of free–standing mareva injunctions. These cases demonstrate a disinclination of the Bahamian judiciary to *"legislate"* and a preference to leave it to the Bahamian Parliament to determine the precise limit to the jurisdictional reach of the Bahamian Courts.

The Board demonstrated no such reluctance. It observed that:

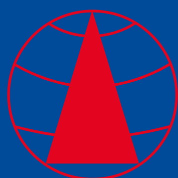
> *"while the presumption against extraterritorial effect is important, it cannot override any sufficient express provision ….. [and] while there is no parallel decision in Bahamian law, given the wide ambit of section 160 of the IBC Act, one would a priori expect procedural rules to exist to enable the court to exercise those powers".*

In finding that section 160 had extraterritorial effect and that there was a route to serve a section 160 claim out of the jurisdiction under the Bahamian RSC the JCPC made a policy choice in favour of universalism which has not been expressly endorsed by (and is not necessarily the intention of) the Bahamian legislature. While a number of cases decided by the JCPC in recent years have reflected this policy of universalism, it is questionable whether these judgments have been more reflective of the jurisprudence of England and Wales and the interpretation of the Insolvency Act 1986 than the jurisprudence of the Commonwealth, or at least of the Bahamas, which expressly did not enact legislation which mirrored the Insolvency Act 1986 and the wider territorial reach that it introduced in England and Wales.

The Bahamas is currently undergoing amendments to its RSC which no doubt may address existing challenges. The 'clarity' now given by the Privy Council on the territorial scope of the IBC Act may or may not assist.

INSOL International
GROUP THIRTY-SIX

AlixPartners LLP
Allen & Overy LLP
Alvarez & Marsal
Baker McKenzie
BDO
Brown Rudnick LLP
Clayton Utz
Cleary Gottlieb Steen & Hamilton LLP
Clifford Chance LLP
Conyers
Davis Polk & Wardwell LLP
De Brauw Blackstone Westbroek
Deloitte LLP
Dentons
DLA Piper
EY
Freshfields Bruckhaus Deringer LLP
FTI Consulting
Goodmans LLP
Grant Thornton
Greenberg Traurig LLP
Harneys
Hogan Lovells
Huron Consulting Group
Jones Day
King & Wood Mallesons
Kirkland & Ellis LLP
KPMG LLP
Linklaters LLP
Morgan Lewis & Bockius LLP
Norton Rose Fulbright
Pepper Hamilton LLP
Pinheiro Neto Advogados
PwC
Rajah & Tann Asia
RBS
RSM
Shearman & Sterling LLP
Skadden, Arps, Slate, Meagher & Flom LLP
South Square
Sullivan & Cromwell LLP
Weil, Gotshal & Manges LLP
White & Case LLP



Fellow of INSOL International

International Association of Restructuring, Insolvency & Bankruptcy Professionals

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

Flávia Moreira de Campos Andrade	Tozzini, Freire Advogados	Brazil
Paul Apathy	Herbert Smith Freehills	Australia
Andrew Eaton	Burges Salmon LLP	UK
Isabel França	Galdino Coelho Mendes Advogados	Brazil
Stephen Hair	National Westminster Bank	UK
Hamid Khanbhai	Campbells	Cayman Islands
Samantha Kinsey	King & Wood Mallesons	Australia
Marc Kish	Ogier	Cayman Islands
Andrew Koo	EY	PRC
Debby Lim	Shook Lin & Bok LLP	Singapore
Liv Machado	Tozzini, Freire Advogados	Brazil
David McIntosh	Dentons Australia Pty Limited	Australia
Sheila Ng	Rajah & Tann Singapore LLP	Singapore
Pavel Novikov	Baker & McKenzie - CIS, Limited	Russia
Jonathan Ong Shyue Wen	KRyS & Associates Ltd	Bermuda
Paul Quinn	Kirkland & Ellis	Hong Kong
Frederico A. O. de Rezende	F. Rezende Consultoria Ltd	Brazil
Jason Robinson	KPMG	Cayman Islands
Hing Lam Alexander Tang	Stephenson Harwood	Hong Kong
Jo Yu Xi Tay	Allen & Gledhill LLP	Singapore
Miguel Torres	MMT - Insolvency Practitioners and Company Rescue Experts	Portugal
Paolo Vitale	Studio Legale Vitale	Italy
Rob van den Sigtenhorst	Florent B.V.	The Netherlands
Allen Wilen	EisnerAmper LLP	USA
Maria Yiasemides	Jones Day	Australia

The Global Insolvency Practice Course is the pre-eminent advanced educational qualification focusing on international insolvency.

With the fast-growing number of cross-border insolvency cases and the adoption in many jurisdictions of international insolvency rules and provisions, the turnaround and insolvency profession faces increasing challenges in the current economic environment. The current outlook demonstrates that the practitioners of tomorrow need to have extensive knowledge of the transnational and international aspects of legal and financial problems of businesses in distress.

Admission to the course is limited, this ensures academic excellence and the opportunity for good personal contact between students and faculty. Potential candidates must already hold a degree or equivalent to be considered for this programme and must have a minimum of 5 years' experience in the field. Participants represent the different jurisdictions of the world.

Rob van den Sigtenhorst, Florent B.V., The Netherlands will be in receipt of The Stephen Adamson Award, In association with Redress Solutions PLC. This is awarded to the first in class in memory of Stephen Adamson, kindly supported by Redress Solutions where Stephen was Chairman from 2007. First and foremost, Redress is honouring Stephen's memory in a manner that reflects his connection with INSOL.

Testimonials

Laura Hall, Allen & Overy, Fellow, INSOL International Class of 2017 / 2018:

"*INSOL's GIPC broadened my knowledge of global insolvency regimes and experience negotiating with professionals of diverse backgrounds. The opportunity for professional and personal connections is the most rewarding aspect of the program.*"

Nicoleta Mirela Nastasie, Bucharest Tribunal, Fellow, INSOL International Class of 2017 / 2018:
"*I was given the opportunity to be part of the INSOL International Global Insolvency Practice Course 2017-2018, through Ronald W. Harmer Bursary.*

The Course is amazing because of the intensity of learning activities, complexity of issues analyzed and information provided, the extraordinary performances of trainers and speakers, but there a professional can find something more important: an environment encouraging people to become friends beyond possible boundaries between professions, different backgrounds and traditions.

Communications through informal mechanisms provided by the Global Insolvency Practice Course, in the attempt to develop a community of professionals connected around the world into the idea of being ''Fellow INSOL International'', along with the principles and the proposals promoted by INSOL International through Strategic review *of INSOL International - Taskforce 2021, they are ones of the most important programs and projects in the field of international insolvency.*

As a judge dealing with insolvency cases and passionate about the domain, this experience gives me the courage to increase my effort not just for developing my own skills and enlarging my personal knowledge but also for trying to bring professionals from Romania and (why not) from South-East Europe closer to international insolvency community.''

Orla McCoy, Clayton Utz, Fellow, INSOL International Class of 2016 / 2017:
"I wholeheartedly recommend the INSOL International Global Insolvency Practice Course to anyone who is interested in genuinely deepening their knowledge and experience of cross-border insolvency and, in particular, to understand better the opportunities, challenges and solutions offered by different regimes in other jurisdictions. The course provides an unparalleled opportunity (and privilege) to work with and learn from exceptional practitioners from multiple jurisdictions and, in doing so, to develop fantastic relationships both within your cohort and amongst the Fellows network more broadly. The content and structure of the course also forces you to develop a much more profound understanding of the insolvency regimes of other (key) jurisdictions than you would have the opportunity to develop on any conventional cross-border insolvency matter. My cohort were phenomenal and I thoroughly enjoyed the course."

Farid Assaf SC, Banco Chambers, Australia, Fellow, INSOL International Class of 2015 / 2016:
"*The Fellowship course offers a unique combination of practical focus and academic rigour. Taught by world-class academics and industry leading professionals, the course offers participants an invaluable opportunity to not only dramatically improve their knowledge of cross-border insolvency but also rub shoulders with the best of the best in global insolvency. Everything about the course was exemplary – from the written material, the lecturers and the tireless support staff – the Fellowship course exceeded all my expectations for a post-graduate course. I cannot recommend the course highly enough and remain forever indebted to INSOL for an opportunity to complete the course and meet new colleagues and friends from around the world."*

For further information contact INSOL International on 00(44) (0) 20 7248 3333, e-mail Heather.Callow@insol.org

Core Committee 2018 /2019:
Michael Veder, Course Leader, Radboud University Nijmegen, The Netherlands
Jan Adriaanse, University of Leiden, The Netherlands
Scott Atkins, *Fellow, INSOL International*, Norton Rose Fulbright, Australia
David Burdette, INSOL International, UK
Allan Gropper, US Bankruptcy Court, Southern District of New York (Ret), USA
Paul Omar, De Montfort University, UK
Adrian Walters, Chicago-Kent College of Law, USA

*INSOL was formed in 1982 and has grown in stature to become the leading insolvency association in the world. It is a valuable source of professional knowledge, which is being put to use around the world on diverse projects to the benefit of the business and financial communities.

INSOL's Vision
INSOL with its Member Associations will take the leadership role in international turnaround, insolvency and related credit issues; facilitate the exchange of information and ideas; encourage greater international co-operation and communication amongst the insolvency profession, credit community and related INSOL International is a worldwide federation of national associations of accountants and lawyers who specialise in turnaround and insolvency. There are currently 42 Member Associations with over 10,500 professionals participating as members.

INSOL International – INSOL Europe – Stockholm One-Day Joint Seminar, 22 May 2019

Report by Jan Lilius

Hannes Snellman Attorneys Ltd
Finland

Further to the excellent feedback received after the first INSOL seminar in the Nordic region in Helsinki in June 2018, INSOL International together with INSOL Europe hosted a one-day seminar in Stockholm on 22 May 2019. More than 80 delegates convened at the famous Grand Hotel on a beautiful and sunny day. The event was attended by delegates and speakers from Sweden, Denmark, Finland, Norway, the Netherlands, England, Estonia, and even from down under (Australia).

Seminar Chair Erik Selander (DLA Piper) and INSOL Europe President Alastair Beveridge (AlixPartners) opened the seminar by welcoming the delegates to the event.

EU Directive on preventive restructuring frameworks

The first session of the seminar addressed the topical EU Directive on Preventive Restructuring Frameworks (the "Directive"). The session was chaired by Professor of Private Law (Örebro University), Annina H. Persson. The panelists Ms. Triin Tõnisson (Estonia), Mr. Tuukka Vähätalo (Finland), and Mr. Johan Klefbäck (Sweden) were all representatives of the respective Ministries of Justice.

The panellists first briefly presented how their ministries intend to implement the Directive. It appears that even these in many respects similar Member States have quite different aims and concerns regarding the Directive, partly because of the differences in their existing insolvency frameworks. At this stage, it is still quite difficult to predict what kind of changes the Directive will lead to in the various national laws.

Ms. Tõnisson (Estonia) seemed to be quite sceptical of the prospects of harmonisation and saw many struggles ahead for instance in terms of the strict timeline of the stay, cross class cram down and debt discharge. Mr. Vähätalo (Finland) told that the Finnish Ministry of Justice has not yet decided on whether an entirely new procedure will be set up or whether the existing corporate restructuring framework will be amended. Mr. Klefbäck pointed out that the negotiations between the member states with regard to the Directive had been very complicated, but concluded that the outcome is quite balanced between various stakeholders.

Panel discussion on the EU Directive

The second session of the day was an interesting panel discussion between insolvency practitioners chaired by Mr. Matti Engelberg (Hannes Snellman). Mr. Lars-Henrik Andersson (Cirio), Ms. Piya Mukherjee (Horten), and Mr. Evert Verwey (Clifford Chance) were members of the distinguished panel. The panellists discussed the anticipated implications of the implementation of the Directive from an insolvency practitioner's point of view.

The discussion centered around topics such as early warning systems and incentivising debtors and creditors to react before insolvency, class formation, debt to equity conversions, predictability, and schemes of arrangement under English law. Just like during the first session, it became even further evident that the panellists had quite different restructuring regimes in their countries. The panellist also seemed to have somewhat divergent views on the merits of the Directive. Mr. Andersson was quite positive in terms of reform of the Swedish restructuring regime in the first place whereas on the other hand Ms. Mukherjee expressed some concern how secured creditors will be treated under the Directive. Mr. Verwey mentioned rightfully that Europe should have a competing restructuring regime of its own in order to hinder forum shopping to e.g. the UK.

A relevant question presented by the delegates is whether the Directive will lead to actual pre-insolvency proceedings or just modified insolvency proceedings. In many of the comments made, the possibility of a court-confirmed workout of a single finance agreement was considered an important tool, which is currently still missing.

Several speakers also emphasised the flexibility of the Directive. The discussion ended on a high note, as the Seminar Chair Erik Selander noted, quite justifiably, that instead of seeing the Directive as a "threat" to the existing regimes, lawmakers and practitioners should view it as an opportunity to modernise and harmonise them.

Restructuring in the region – practical issues

Mr. Hans Renman (Hamilton) chaired the third session of the day concerning practical issues of restructuring work in the Nordic region. Mr. John Sommer Schmidt (Gorrissen Federspiel), Ms. Pauliina Tenhunen (Castrén & Snellman), and Ms. Ellen Schult Ulriksen (Haavind) joined the panel.

It appears that, even though there are similarities in restructuring regimes, the actual usability varies considerably from country to country. Ms. Tenhunen told that the corporate restructuring framework is robust in Finland, and it is used much more often than in the other Nordic countries (408 proceedings commenced). At the other end of the spectrum, Ms. Schult Ulriksen stated that in Norway, restructuring proceedings are hardly ever used (7 petitions and only 1 commenced).

The differences were further emphasised when the speakers compared their practical experiences by means of two case studies: Componenta and Top-Toy. Especially the Top-Toy case was a showcase of the need for harmonisation of

existing regimes, as Top-Toy's administrator John Sommer Schmidt illustrated the difficulties in restructuring a single company (Top-Toy) with several thousand employees and branches in two other countries. It was surprising that even within the Nordic countries, significant differences in national legislation required essentially country-specific solutions, which in the Top-Toy case contributed to the eventual bankruptcy of the company. On the other hand, the cross-border restructuring of Componenta Corporation in Finland and Sweden was a success according to Mr. Renman and Ms. Tenhunen , despite certain challenges relating to e.g. the status of the parent company as a publically traded company.

Hot topics

The last session of the day focused on two "hot topics": Brexit and board liabilities. The panel was chaired by Mr. Alexander Hagberg (EY). Ms. Helena Raulus (The UK Law Societies) gave first a current update over the latest twists of the Brexit process, a seemingly never-ending saga. Ms. Raulus' presentation was followed by Professor of Private Law, Mr. Rolf Dotevall's (Gothenburg University) and Ms. Salla Suominen's (Avance) presentations on the differences and similarities in the rules and practice on board liability in the Nordic countries.

Ms. Raulus showed the seminar participants the worrying impact that a no-deal Brexit would have on civil justice matters, such as recognition of insolvency proceedings and judgments. A no-deal Brexit would lead to many procedural disputes in ongoing litigations, and it would make it impossible to enforce British judgments for instance in the Nordic countries. However, it would be possible to close the gap after a no-deal Brexit if Britain, for example, ratified the Lugano Convention, but even this would take several years. Compared to an orderly Brexit under the Brexit deal or no Brexit at all, a no-deal Brexit would be highly unsatisfactory from the point of view of cross-border insolvency.

As the last topic of the day, Mr. Dotevall and Ms. Suominen competently discussed the issue of board members' liability in the Nordic countries. As a general takeaway, board members should be particularly careful in situations where their company seems to be heading toward insolvency and seek local legal advice where necessary. The current Norwegian and Danish regime requires actions from the board of a company in the state of insolvency in order to avoid potential liability towards third parties (such as creditors). The situation is not similar in Sweden and Finland where there is not a corresponding duty.

The new Directive contains a general obligation for board members to take into consideration the interests of different stakeholders when the company is on the verge of insolvency. The implications of said provision is hard to foresee, but it is likely that national laws need to the reviewed in this respect.

An extremely stimulating day was followed by drinks at Hamilton Law firm and a delicious seminar dinner at Villa Källhagen. One can conclude that there is a genuine need for regular INSOL seminars in the Nordic region.

The organisers would like to thank the following sponsors for their support of this event:

Platinum sponsor:

Gold sponsor:

HANNES SNELLMAN

Lunch sponsor:

INSOL Channel Islands One Day Seminar, Guernsey, 20 June 2019

Report by Stuart Gardner
EY
Channel Islands

Another sunny day in Guernsey brought together 140 (definitely not shady) people from the Crown Dependencies, the Overseas Territories and the UK, for the sixth annual INSOL Channel Islands' conference in association with our INSOL member organisation, ARIES.

After some lively opening remarks from the seminar co-chairs Ed Drummond (Bedell Cristin, Jersey) and Karen Le Cras (Carey Olsen, Guernsey) exhibiting the usual competitive tension between the two neighbouring islands, a summary of the work of ARIES over the past year was provided by Tim Le Cornu (*Fellow, INSOL International*, KRyS Global, Guernsey) and Ben Rhodes (*Fellow, INSOL International*, Grant Thornton, Guernsey).

ARIES has been instrumental this year in shaping Guernsey's very effective, creditor friendly and useful insolvency law, which is going through some refinements rather than wholesale changes. Ben also made a call to arms to encourage delegates to assist the continuing work of ARIES to reform Jersey's collective insolvency regime which still requires, in court led insolvent situations, the appointment of a court official in whom all assets vest and traces their authority back to the 14th century, whilst Jersey's 140 year old immovable property enforcement rules continue to entertain the Jersey Court of Appeal.

The Honourable Justice Paul Heath QC (Bankside Chambers, New Zealand and South Square, UK) then provided an informative update from the Working Group No. 22 on INSOL's International Mediation Panel and some of the exciting forthcoming changes to drive this initiative forward, including the creation of a new panel, standard documents and exploring options with respect to smaller disputes and emerging and developing economies.

The first session, **When Crime and Insolvency Collide**, brought together panellists David Standish (KPMG, UK), Laura Hatfield (Bedell Cristin, Cayman Islands) and Patrick Crothers (National Crime Agency, UK) being chaired by Alan Roberts (Grant Thornton, Jersey). David reminded delegates that where a receivership or confiscation order has been made prior to the appointment of an insolvency office-holder this will denude the insolvency estate. He has created information sharing protocols under court order with law enforcement agencies to the benefit of both parties, but noted each case must be assessed on its merits. Laura explored some of the issues arising from the Caledonian Bank and Caledonian Securities case in the Cayman Islands (noting the Bank was wrongly targeted by the SEC) and the prevalence in the US of 'pleading the 5th'. Patrick explained the uses of Unexplained Wealth Orders, a useful tool for connecting criminal finances to crimes that may subsequently lead to confiscation orders or criminal proceedings. The panel agreed that the deregulation of pensions in the UK may unfortunately lead to many more cases in this area and that office-holders and law enforcement agencies have a very important part to play in this sphere and should continue to work co-operatively together, each within their own respected boundaries.

Jo Huxtable (Deloitte, Guernsey) and Matthew Gilbert (Maples Group, UK) were joined by James Quarmby (Stephenson Harwood, UK) to discuss **What is making waves offshore**. The conference came the day after the Crown Dependencies' joint announcement of continued commitment to the EU's Fifth Money Laundering Directive ('5MLD') and specifically the accessibility of the current beneficial ownership registers for companies (these registers have been held by the Crown Dependencies' Financial Services regulators for some time) in accordance with international standards. There was a debate on how 5MLD and accessible registers contrasted with rights given under GDPR, and, as an example, the 18th century constitutional right to privacy in France, as well as the role of the state as a data controller.

A crisis of confidence? The future of audit was chaired by Andrea Harris (*Fellow, INSOL International*, KRyS Global, Guernsey) with panellists Maurice Moses (EY, UK) and Simon Salzedo QC (Brick Chambers, UK). This was an excellent session with Simon providing a thorough analysis of the progression of cases brought against auditors and Maurice summarising the current UK position and future landscape. One particularly memorable anecdote is that the adage, 'the auditor is a watchdog, not a bloodhound' stems from an 1880 case that was considered outdated in 1924. In the 1880 case the auditor (as was practice at the time) audited stock by asking a director how much the stock was worth and putting that number on the balance sheet. Times have changed indeed.

Following lunch, the **keynote address** was given by Sandra Särav (Global Affairs Director, Government CIO Office, Estonia) who can only really be described as a visitor from the future. Sandra recounted Estonia's journey to become a truly digital country, with 99% or 2,691 government services on-line, processing 900m transactions a year. Indeed 97% of citizens' health records are digitized and immediately available to medical practitioners when needed. This staggering digital revolution has saved 1,407 working years since 2001.

Back in the world of insolvency Ben Jones (Fellow, INSOL International, BCLP, UK), David Jones (Carey Olsen, Guernsey) and (William Scott-Gail, Duff & Phelps, UK) chaired by William Callewaert (BDO, Guernsey), scanned the horizon during the **Into the Future** session. William Scott-Gail discussed some of the challenges arising in the failures of crypto exchanges, whereas David gave a masterclass on enforcement of security over intangible assets (such as shares) in Jersey and Guernsey and some of the challenges secured lenders may face and strategies to mitigate them. Ben studied the proposed UK insolvency law reforms, picking out the key aspects of the moratorium, the restructuring plan and ipso facto clauses.

The final session, **The big case round up**, saw Mathew Newman (Ogier, Guernsey) chairing Kirsten Kitt (Simmons & Simmons, UK), Abel Lyall (Mourant, Guernsey), David Wilson (Oben Law, Jersey) and Andrew Shaw (South Square, UK). The panellists gave an assured, accessible and comprehensive round up of the off-shore behemoths of Carlye Capital Corporation, Saad, Tchenguiz and the Z Trusts.

The technical sessions complete, the co-chairs Karen Le Cras (Carey Olsen, Guernsey) and Ed Drummond (Bedell Cristin, Jersey) treated delegates to some of their ideas for future innovations including their (patent pending) Trunk-based Reduction of Emissions Equipment (or TREE), before delegates enjoyed a gala dinner at Old Government House.

Yet again, the Channel Islands put on a fantastic show and I would like to express sincere thanks on behalf of the organising committee to the team at INSOL, in particular Penny Robertson and Danielle Timmons, for all of their incredible assistance.

Platinum Sponsors:

Coffee break sponsor:

Lunch sponsor:

Dinner sponsor:

Conference Diary

Date	Event	Location	Organiser	Website
November 2019				
7	INSOL International Tokyo One Day Seminar	Tokyo, Japan	INSOL International	www.insol.org
14-15	SARIPA Annual Conference	KwaZulu-Natal, SA	SARIPA	www.saripa.co.za
22	INSOL International / World Bank Group Africa Round Table Open Forum	Swakopmund, Namibia	INSOL International	www.insol.org
December 2019				
5	INSOL International / RISA Offshore One Day Joint Seminar	The Bahamas	INSOL International	www.insol.org
5-7	ABI Winter Leadership Conference	Rancho Palos Verdes, CA	ABI	www.abi.org
January 2020				
17	INSOL International New Delhi One Day Seminar	New Delhi, India	INSOL International	www.insol.org
February 2020				
13	INSOL International Mexico City One Day Seminar	Mexico City, Mexico	INSOL International	www.insol.org
March 2020				
14-15	INSOL International Academic Colloquium	Cape Town, SA	INSOL International	www.insol.org
15	INSOL International Offshore Ancillary Meeting	Cape Town, SA	INSOL International	www.insol.org
15-17	INSOL International Annual Regional Conference	Cape Town, SA	INSOL International	www.insol.org
May 2020				
4	INSOL International Tel Aviv One Day Seminar	Tel Aviv, Israel	INSOL International	www.insol.org
March 2021				
14-17	INSOL International World Quadrennial Congress	San Diego, CA	INSOL International	www.insol.org

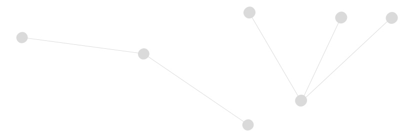
Member Associations

American Bankruptcy Institute
Asociación Argentina de Estudios Sobre la Insolvencia
Asociación Uruguaya de Asesores en Insolvencia y Reestructuraciones Empresariales
Associação Portuguesa de Direito da Insolvência e Recuperação
Association of Business Recovery Professionals - R3
Association of Restructuring and Insolvency Experts (Channel Islands)
Australian Restructuring, Insolvency and Turnaround Association
Bankruptcy Law and Restructuring Research Centre, China University of Politics and Law
Business Recovery and Insolvency Practitioners Association of Nigeria
Business Recovery and Insolvency Practitioners Association of Sri Lanka
Business Recovery Professionals (Mauritius) Ltd
Canadian Association of Insolvency and Restructuring Professionals
Commercial Law League of America (Bankruptcy and Insolvency Section)
Especialistas de Concursos Mercantiles de Mexico
Finnish Insolvency Law Association
Ghana Association of Restructuring and Insolvency Advisors
Hong Kong Institute of Certified Public Accountants (Restructuring and Insolvency Faculty)
INSOL Europe
INSOL India
Insolvency Practitioners Association of Malaysia
Insolvency Practitioners Association of Singapore
Instituto Brasileiro de Estudos de Recuperação de Empresas
Instituto Iberoamericano de Derecho Concursal
Instituto Iberoamericano de Derecho Concursal – Capitulo Colombiano
International Association of Insurance Receivers
International Women's Insolvency and Restructuring Confederation
Japanese Federation of Insolvency Professionals
Korean Restructuring and Insolvency Practitioners Association
Law Council of Australia (Business Law Section)
Malaysian Institute of Accountants
Malaysian Institute of Certified Public Accountants
National Association of Federal Equity Receivers
NIVD – Neue Insolvenzverwaltervereinigung Deutschlands e.V.
Recovery and Insolvency Specialists Association (BVI) Ltd
Recovery and Insolvency Specialists Association (Cayman) Ltd
REFOR-CGE, Register of Insolvency Practitioners within "Consejo General de Economistas, CGE"
Restructuring and Insolvency Specialists Association (Bahamas)
Restructuring and Insolvency Specialists Association of Bermuda
Restructuring Insolvency & Turnaround Association of New Zealand
South African Restructuring and Insolvency Practitioners Association
Turnaround Management Association (INSOL Special Interest Group)
Turnaround Management Association Brasil (TMA Brasil)

Copyright © INSOL INTERNATIONAL 2019. All Rights Reserved. Registered in England and Wales, No. 0307353.
INSOL, INSOL INTERNATIONAL, INSOL Globe are trademarks of INSOL INTERNATIONAL.
No part of this journal may be reproduced or transmitted in any form or by any means without the prior permission of INSOL International or any of its members associations. The publishers, editors and authors accept no responsibility for any loss occasioned to any person acting or refraining from acting as a result of any view expressed herein. Readers should seek advice on all points material to them from someone qualified to practice in the country concerned.
Published by: INSOL International Editors: Mark Craggs and Peter Gothard. Design and artwork by: Consort Communications Limited

THE BEST WAY TO PREDICT YOUR FUTURE IS TO CREATE IT

- Abraham Lincoln



INSOLVENCY / RESTRUCTURING

CROSS BORDER INSOLVENCY
RESTRUCTURING TRANSITION
DISTRESSED ASSET SALES
RECEIVERSHIPS
BUSINESS ADVISORY SERVICES

INVESTIGATIONS / FRAUD

FRAUD INVESTIGATION ASSET RECOVERY
FORENSIC ACCOUNTING
FORENSIC TECHNOLOGY SERVICES
BUSINESS INTELLIGENCE SERVICES
REGULATORY APPOINTMENTS
INSPECTIONS

LITIGATION SUPPORT

LITIGATION SUPPORT EXPERT TESTIMONY
BUSINESS VALUATIONS DAMAGES
QUANTIFICATION
PERSONAL INJURY
eDISCOVERY SERVICES

KRyS Global is an international fraud investigation and dispute resolution firm. The Firm comprises over 40 outstanding professionals working from eight offices worldwide, predominantly situated in offshore financial centres. KRyS Global has built an enviable reputation for timely, proactive and innovative solutions, particularly in situations of uncertainty, leveraging the knowledge and experience of our professionals and incorporating practical common sense in ensuring positive outcomes for our clients.

Our strength is our unwavering effort to identify the best solutions to procure and recover assets. Using a combination of local knowledge and battle-tested experience, we blaze new paths in insolvency recoveries and asset maximization. Our goal is to be the future in offshore insolvency.

For more information, visit **www.KRyS-Global.com**.

- Cayman Islands
- British Virgin Islands
- Bermuda
- Guernsey
- Hong Kong
- London
- USA

www.KRyS-Global.com