INSOL INTERNATIONAL

4TH QUARTER 2021

INSOL WORLD

The Quarterly Journal of INSOL International

Highlights...

- Outer Space – The New Frontier For Restructuring And Insolvency
- Litigation Funding Finally Confirmed In Turks And Caicos Islands
- Electric Vehicles Are Coming – And So Is Insolvency For Many Suppliers

Also in this issue:

- Alternative Dispute Resolution Supplement

EDITOR'S COLUMN

One of the most interesting things about working as an insolvency practitioner is the sense that, whilst not every day is different, every appointment or case brings something new, some novelty. Even "routine" cases throw up something new to chew on. You learn industry jargon or production processes, and with each learning you take this forward into your next appointment. Sometimes a decade or more will pass before you are called to tap into that reserve of knowledge ("yes, I do actually know who would be able to help us sell that chain of gas stations in Ukraine" or "actually yes, I do know what how to go about getting a mega-yacht arrested in the Philippines").

I think of all the different thousands of companies I have help restructure or lay gently to rest, and there have been some very unusual industries. From fast fashion chains in supermarkets to high-end fashion labels and boutiques off Sixth Avenue, game reserves in South Africa to fish-processing factories in Yorkshire, gold mines in Burkina Faso and ilmenite mines in Australia, you name it, I think at some stage in my career I have probably come across it. I think those of us who are active in the fields of restructuring and insolvency, enjoy the challenge of the journey of reaching the destination without necessarily having it all mapped out. We thrive on uncertainty and applying our highly developed technical skills and experience with just a little bit of unscientific good old fashioned common sense. With due respect to our friends in the audit field – we have to do a lot more than simply tick boxes.

Over the many years of reading INSOL World I have learnt a lot about different case studies and scenarios and enjoyed learning about how my fellow INSOL members have tackled these situations. In this quarter's edition of INSOL World, Scott Atkins – President of INSOL International and Australian Chair and Head of Risk Advisory at Norton Rose Fulbright and Dr Kai Luck, Executive Counsel of Norton Rose Fulbright, have excelled all expectations and are taken us "To Infinity and Beyond". They set out a fascination article pondering the legal and practical difficulties an insolvency practitioner might face making recoveries for stakeholders from space industries. And to paraphrase, this may be one small step for man but a giant leap for insolvency practitioners. The mind truly boggles, and I can't help but think this may really up-end and ideas about working on site in a "trading" appointment.

This issue also features a new addition to INSOL World; an Alternative Dispute Resolution supplement, housing a collection of articles on the topics of arbitration and mediation. This is of particular interest as these are tools of growing importance for insolvency practitioners as the industry evolves to meet the changing needs of businesses large and small. You will find the supplement following on from the end of the main journal.

As ever, we are very grateful to all our authors, contributors and sponsors.

All the best,

Charlotte Caulfield

Charlotte Caulfield
Kalo
BVI

Mark Craggs
INSOL Fellow
Norton Rose Fulbright LLP
UK

"Over the many years of reading INSOL World I have learned a lot about different case studies and scenarios and enjoyed learning about how my fellow INSOL members have tackled these situations"

PRESIDENT'S WELCOME

Leadership on the ESG front is one of the three critical priorities and focus areas I announced in June 2021 upon becoming President. The global shifts since then have been nothing short of seismic.

"Right here is where private finance draws the line," said Mark Carney, the United Nations Special Envoy for Climate and Finance at the recent COP26 meetings in Glasgow. Carney said that as he announced the US$130 trillion in assets across 450 financial institutions which are now firmly committed to net zero under the Glasgow Financial Alliance for Net Zero. "We now have the essential plumbing in place to move climate change from the fringes to the forefront of finance so that every financial decision takes climate change into account."

Banking industry leaders are clear about the leadership role of the banking sector towards net-zero as they join forces and are mobilising capital at scale to tackle climate change, which is without doubt the defining issue of the 21st century.

Equally, for INSOL International members, never has there been a more urgent need for restructuring, turnaround and insolvency professionals across the globe to bring their collective expertise and skill to the table in advising upon and leading the work to achieve the necessary business transition.

Drastic and systemic transformation of the world's real economy – including food production, energy generation, transportation and infrastructure – and replacement of outmoded technology with low-emissions alternatives is required in order of magnitude and unparalleled speed to address the climate crisis.

By working together, INSOL International members can build a common language and share best practices on technical developments including carbon accounting issues, offset management, scenario modelling. Plus, we can project a common voice of the restructuring, turnaround and insolvency industry, enabling collective engagement with standard setting agencies, policy-makers and other stakeholders shaping and enabling the policy environment at the international level.

On this front, we need your help. Please get in touch to express your interest in INSOL's special projects directed toward ESG initiatives.

As we look ahead, our sights are firmly focused on 2022 and the celebration of INSOL International's 40th anniversary – a remarkable milestone, celebrations of which will carry across the year ahead.

It is thrilling to have announced INSOL London (26-28 June 2022) with a comprehensive ancillary programme running either side of those dates. Please do not delay in registering and of course booking your travel and accommodation at Grosvenor Houses given this will be an in-person conference.

INSOL London 2022 will be a brilliant way for INSOL members to reunite, establish new connections, to network and to learn and be challenged through the many events and activities on offer. INSOL London 2022 is likely to be our most anticipated and exciting conference, especially given the long time since we have been able to gather in person. And where better to meet than in London – one of the world's most beloved cities, a global financial centre, and a launchpad for broader European exploration.

On the theme of INSOL International's future, you will have seen the launch of *INSOL Reimagined* - our strategic planning initiative for the next phase of INSOL's growth and development. This follows the ambitious and successful *Towards 2021* Strategic Plan which resulted in significant reshaping of INSOL, including the establishment of the INSOL Asia hub which opened in August 2019.

INSOL Reimagined will frame INSOL's ambitions through to 2025 and, boldly, well beyond to 2030. The strategic planning process is well underway, with INSOL Member Associations, G36 firms, members and stakeholders across the globe invited to share their ideas through an initial consultation and research phase. I will share more details about *INSOL Reimagined* as it takes shape into the new year.

In September, we launched a new and innovative initiative inviting members to volunteer their time to undertake 1-2 consultations for MSMEs in financial distress. We have had excellent take up of this programme, with some 160+ INSOL members from over 50 countries registering their interest to participate. This Global Consultation Network will help deliver real improvements and opportunities for MSMEs, and through them deliver benefits for legal systems, economies and communities across the world.

There have been a series of successful seminars and courses held over the past few months, including the successful Channel Islands seminar and the People's Republic of China Seminar – which you can read more about in this edition. Perhaps into the future, we might convene a seminar in … space. Far-fetched? Maybe not. I hope you enjoy reading the article on the near and present reality of restructuring and insolvency in outer space.

The Global Insolvency Practice Course class of 2021-22 has now commenced with a remarkable 30 participants joining from 17 countries. The Foundation Certificate with 128 participants has also started – both signature global education programmes with strong recurring demand and aimed at equipping future leaders with the skills they need. In an exciting development, the inaugural INSOL-SARIPA Joint Programme in South African Insolvency Law and Practice will commence on 1 January 2022.

On behalf of the INSOL Board, our CEO and staff, I wish you the very best as we make our way toward the holiday season and the end of 2021. And in the words of Alfred Lord Tennyson, hope smiles from the threshold of the year to come, whispering, "it will be happier".

Thank you for your support of INSOL International.

Scott Atkins

Scott Atkins
INSOL Fellow
Norton Rose Fulbright
Australia

" Never has there been a more urgent need for restructuring, turnaround and insolvency professionals across the globe to bring their collective expertise and skill to the table in advising upon and leading the work to achieve the necessary business transition to achieve net zero "

IN THIS ISSUE:

INSOL INTERNATIONAL PRC SEMINAR REPORT

Seminar Co-chair,
Andrew Koo
INSOL Fellow
EY, PRC

"the experts in China made various recommendations on the amendments of the Chinese Bankruptcy Law, aiming to equip the law with tools to deal with pre-pack processes, bankruptcy consolidation and schemes of arrangement"

On 24 September, INSOL International, in association with the BLRRCC, its Member Association in China, successfully organized the ninth China annual seminar combining online and on-site participation. The seminar brought together experts and judges from around the world and spread over three judicial systems, including the Chinese Supreme Court, Hong Kong High Court and UK Official Receiver's Office. At the end of the day, the audience felt like they had traveled around the world over a short 8-hour period.

The seminar was opened by Professor Li Shuguang, Bankruptcy Law & Restructuring Research Centre of China University of Political Science and Law in China. Professor Li and his panel speakers, Judge Lin Yu, Second Civil Division of the Supreme People's Court of PRC, Yangling Liu, Partner, King & Wood Mallesons and Beiping Zuo, Reanda CPA, updated the audience on the latest developments of the Chinese Bankruptcy Law in China. In 2021, the experts in China made various recommendations on the amendments of the Chinese Bankruptcy Law, aiming to equip the law with tools to deal with pre-pack processes, bankruptcy consolidation and schemes of arrangement.

The second session introduced the latest cross-border insolvency recognition rules between Mainland China and Hong Kong and the interpretation to the Pilot Programme. The panel was chaired by Kevin Song, Kroll and the panel speakers included Judge Si Yanli, Supreme People's Court of PRC, Look China Ho, Counsel of Des Voeux Chambers. The pilot programme establishes a cooperation arrangement for mutual recognition between Mainland China and Hong Kong. Insolvency practitioners are allowed to perform some of their duties under the local bankruptcy court across the borders, potentially increase the protection of creditors.

The audience then met our guest speakers from Hong Kong and the UK to gain an insight of the first restructuring case under the new Part 26A and how it was adopted successfully in the Virgin Atlantic case. Viola Jing, Allen & Overy, chaired this session together with our speakers, Jennifer Marshall, Allen & Overy, Jo Hewitt, Alvarez & Marsal, and Adrian Cohen, Clifford Chance. Part 26A potentially allows cross class cram down and could attract more distressed companies to apply the UK jurisdiction to improve the chance of a complex restructuring.

During the last session of the day, the seminar committee invited David Chapman of the UK Official Receiver's Office to meet our audience on-line. The panel chairman, Andrew Koo, EY and speakers, Sam Woodward, EY EMIE shared with us some tips on disposing a bankrupted asset to Chinese investors. In the British Steel case, David Chapman was appointed as the Receiver and he engaged Sam Woodward and Allen Hudson from EY as Special Managers. The business and its assets were eventually sold to Jingye Group from China Hebei Province.

The audience flew on-line to the US and learnt from James Sprayregen, Kirkland & Ellis about other similar transactions between the US and China. Some of the cases, such as A123 and Fisker were all sold to the Chinese investors under the US bankruptcy process.

We would like to thank the Main Organising Committee and our Sponsor, Fangda Partners, for putting together this event. Despite the global challenges, we were able to provide a programme for our local members, whilst offering cross-border knowledge from our international speakers online.

We look forward to sharing the full content of this Seminar with our membership on our website soon.

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INSOL INTERNATIONAL CHANNEL ISLANDS SEMINAR REPORT


Seminar Co-Chairs, Mathew Newman

Ogier, Guernsey

and David Wilson

Oben Law, Jersey

"The seminar was attended by over 140 delegates in person, including a good representation of Insolvency Practitioners and lawyers from the UK, the Channel Islands and elsewhere."

INSOL's annual Channel Islands' seminar took place in September in Jersey, postponed from 2020 because of COVID-related restrictions.

The seminar was attended by over 140 delegates in person, including a good representation of Insolvency Practitioners and lawyers from the UK, the Channel Islands and elsewhere.

Alastair Beveridge, AlixPartners UK LLP, Vice President, INSOL International, opened the seminar on INSOL's behalf. This was followed by an interview with Sir Oliver Letwin PC FRSA, a consultant for Teneo, who offered his insights into a post-Brexit, post COVID world, and how the UK and the Channel Islands might survive and prosper. He focused in particular on the ability of small jurisdictions to offer stability and good regulation, combined with dynamism and innovation.

A panel session on real estate restructuring followed, chaired by Mark Dunlop of Bedell Cristin, with contributions from Marcus Pallot of Carey Olsen Simon Clarke of Bryan Cave Leighton Paisner and Tim Perkin of CBRE.

The panel considered how the various real estate sectors were faring, what types of restructuring were taking place, the nature of offshore security, and problems that arise in the enforcement of offshore security against UK real estate, and potential alternatives to enforcement.

A panel of judges and court officers then put a case study to the audience. The discussion was chaired by Mark Shaw of BDO with the panel comprising Sir Alastair Norris (ret.), High Court of England & Wales, Lt Bailiff Hazel Marshall, Royal Court of Guernsey and Elaine Millar, Viscount of the Royal Court of Jersey.

The case study considered the remedies and options open to office-holders on the insolvency of an offshore structure, and the extent to which the apparent incompetence of directors will ultimately lead to liability and a net recovery for creditors.

The panel session before lunch involved a summary and discussion of developments in cross-border insolvency and recognition in light of Brexit and the global pandemic. Devi Shah of Mayer Brown International LLP chaired the discussion, with contributions from Raquel Agnello QC of Erskine Chambers, Sarah Brehaut of Walkers and Jared Dann of Appleby. The panel was particularly keen to stress the need for reasoned judicial decisions, which take account of all potential arguments, in order to promote cross-border recognition.

The afternoon session began with a more light-hearted look at the world, given by Hugo Rifkind, the political commentator and journalist, under the broad heading, Out of the frying pan and into the fire!

This was followed by a further panel session which considered recent changes and proposed changes to the insolvency processes in Guernsey and Jersey. The session was chaired by Andrea Harris, INSOL Fellow, of Grant Thornton, with contributions from Stuart Gardner of EY, Alex Horsbrugh-Porter of Ogier, Julie Nettleton, INSOL Fellow, of Grant Thornton and Hermione Williams of New Square Chambers. It highlighted both the similarities of the Channel Islands' insolvency processes with those available in the UK as well as some important differences, and the opportunity for further reform in the coming months.

The day's final session was a test of persuasive skills: a competition between panellists, chaired by Marcia Shekerdemian QC of Wilberforce Chambers, to see who could persuade the audience that their case was the most important. Each panellist had the opportunity to pitch for ten minutes. This was then followed by questions, which were posed by the session chair, fellow panellists and the audience.

Luke Olivier of Mourant advocated for the Jersey case of *In re Smith & Ors* [2021] JRC 47, a case involving the collapse into administration of fashion retailers, Arcadia Group, and the application brought by the administrators to the Jersey Court to preserve the Jersey stores owned by the group, despite the lack of an administration process in Jersey. *In re Smith* was presented as a case where the court, in ordering a moratorium, demonstrated its flexibility and willingness to ensure consistency of approach with that of other jurisdictions.

James Tee of Collas Crill championed the Guernsey case of *Canargo Limited (In Liquidation)* [2020] GRC064, a case which considered the extent of the circumstances in which an insolvency practitioner can properly apply to the court for directions, the particular circumstances being that the liquidators were proposing to take a course of action which was opposed by creditors. Canargo was said to have provided clarity and guidance regarding the principles that the court would apply when considering such an application.

Charlotte Møller, INSOL Fellow, of Brown Rudnick advocated for *Amicus Finance PLC (In Administration)*, an English High Court case which gave rise to judgments ultimately sanctioning a restructuring plan (RP). Amicus was proposed for reasons including that it was the first RP proposed by an administrator, the first RP to involve the cramdown of a secured creditor, and only the second fully opposed RP.

William Willson of South Square Chambers championed *Hunt v Transworld Payment Solutions UK Limited (In Liquidation)* [2020] SC (Bda) 14 Com, a case involving the application of an English liquidator for cross-border common law recognition/assistance from the Bermuda court. Ultimately, the orders initially obtained on Mr Hunt's behalf in Bermuda were discharged, the Bermuda court determining that Transworld did not have any assets in the jurisdiction of the Bermuda Court, and that the purpose of the recognition application by Mr Hunt was to obtain documents and information for use in litigation that Mr Hunt had already determined to bring in England. *Transworld* was said to demonstrate the limits of common law cross-border assistance, and to reinforce the judgment of Lord Sumption in *Singularis Holdings Ltd v Pricewaterhouse Coopers* [2015] AC 1675.

The audience voted for the Transworld case.

The seminar then closed, but was followed by drinks and dinner at The Grand Hotel Jersey.

The next INSOL Channel Islands seminar will be held in Guernsey on Wednesday 7 September 2022.

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OUTER SPACE – THE NEW FRONTIER FOR RESTRUCTURING AND INSOLVENCY

Scott Atkins
INSOL President and Fellow
Norton Rose Fulbright, Australia

and Dr Kai Luck
Norton Rose Fulbright , Australia

> "Space mining is expected to be the most significant future growth area in space activity, with the global demand for more resources beyond those offered on our own planet Earth."

Introduction

Activities in outer space have increased significantly over the last few years. Governments across the globe have launched new space strategies and policies which identify investment in new space law projects, in both the public and private sector, as an important component of future economic growth. This 'space economy' is seen as a river of untapped potential.

While outer space activities were traditionally limited to state-based activities, a rapid technological and digital change over the last decade has seen a marked shift towards the commercialisation of space activities and the pursuit of those activities by private sector entities.

Currently, the main commercial outer space activities relate to the use and operation of satellites – satellite television and communications services, as well as satellite imagery and surveillance and satellite navigation. Indeed, the marked increase in satellite capability and activity from private enterprises globally has caused NASA to express concerns over the level of 'space junk' from operational and defunct satellites, as well as other space debris, and the safety risk to people and property in space and on Earth from this so-called 'orbital graveyard'.[1]

However, there have also been progressions in space mining. For example, Russia and the European Space Agency have established a programme, PROSPECT,[2] to explore resource exploration potential in outer space and to work together to develop new technologies that may be used to extract those resources in future. The Chinese National Space Administration has also successfully collected moon samples under a series of Chang'e lunar missions designed to investigate the potential for a viable commercial resource exploitation programme in outer space.

Space mining is expected to be the most significant future growth area in space activity, with the global demand for more resources beyond those offered on our own planet Earth.

This immense appetite for increased public and private investment in new activities in outer space, backed by multi-jurisdictional partnerships as well as continued enhancements in technological capability, will inevitably drive space-related restructuring in coming years as existing resources and technology entities reallocate and transition their operations towards new investments and activities in outer space. This can be expected to result in continued innovation from businesses, and necessarily will also see an increase in start-up ventures and greater corporate risk-taking – which itself may spark further restructuring and insolvency activity.

The purpose of this article is to explore the intersection between outer space activities and restructuring and insolvency. We outline some of the challenges that may face insolvency practitioners in the context of an appointment to an entity conducting outer space activities, as well as the restructuring opportunities we are likely to see as the pace of global investment in outer space activities continues.

Key challenges

In this article, we focus on two key challenges that will arise for insolvency practitioners as the scale of outer space commercial activity increases in future years: collision liability and ownership rights.

Collision liability

As identified above, the increase in satellite and other outer-space based technology to support communications systems on Earth has resulted in more outer space 'clutter' in recent years. In turn, this has enhanced the risk of collisions in outer space.

A very difficult issue for an insolvency practitioner appointed to a satellite operator in this context is how to deal with collision claims against the debtor company or alternatively how to progress collision claims against other entities in discharging the practitioner's investigatory and reporting obligations and overarching duty to act in the best interests of creditors.

1 NASA, 'Space Debris', NASA Headwuarters Library, available at https://www.nasa.gov/centers/hq/library/find/bibliographies/space_debris/. See also NASA's supporting Policies and Standards, including NASA-HDBK-8719.14 (NASA Handbook for Limiting Orbital Debris), NASA-STD-8719.14 (Process for Limiting Orbital Debris) and NPR 8715.6B (NASA Procedural Requirements for Limiting Orbital Debris and Evaluating the Meteoroid and Orbital Debris Environments).

2 The ePackage for Resource Observation and in-Situ Prospecting for Exploration, Commercial Exploitation and Transportation.

There are currently five United Nations international space treaties which set out a framework to govern legal rights and obligations in outer space[3]. Of those treaties, the Outer Space Treaty – which as at 1 January 2021 had been ratified by 110 countries, with another 23 having signed but not yet ratified the treaty – outlines the general principles for liability that may arise in a collision context, stating:

- Each state has international responsibility for the activities undertaken by governmental agencies and non-governmental entities from that state in outer space (Article VI).
- The activities of non-governmental entities in outer space require the authorisation and continuing supervision of each state (Article VI).
- Each state that 'launches or procures the launching of an object' into outer space and each state 'from whose territory or facility an object is launched' is internationally liable for damage to another state that is a party to the Outer Space Treaty or its natural or juridical persons (Article VII).

This is expanded on in the Liability Convention, which as at 1 January 2021 had been ratified by 98 countries, with another 19 having signed but not yet ratified the treaty. The Liability Convention crystallises the level of liability referred to in Article VII of the Outer Space Treaty. It divides that liability into two classes – that arising from damage which occurs on the surface of the Earth or an aircraft on the one hand, and damage which is caused to another object in outer space on the other hand. The latter is relevant to the context of a satellite collision in outer space considered in this article. In that regard, according to Article III of the Liability Convention, the relevant state from which a satellite is launched is liable to another state from which another satellite is launched for any damage that is incurred, but only in the event of 'fault'.

The standard of 'fault' is not delineated in the Liability Convention, and this creates considerable uncertainty in assessing the nature and scope of liability.

Moreover, the liability framework established by the Outer Space Treaty and the Liability Convention does not provide direct enforcement remedies to private entities, despite non-state activity in outer space overtaking the traditional government-focused space initiatives of previous decades.

To obtain a remedy under the international framework embodied in the United Nations treaties, it would be necessary for a private entity to request and obtain the agreement of its national government for that government to prosecute a claim on the entity's behalf through diplomatic channels.[4] Even if acceptance was secured, there would be significant delays in securing an outcome via those diplomatic channels, or the alternate 'Claims Commission' framework established under the Liability Convention.[5]

Given the uncertainty in relation to the scope of liability for an outer space collision, and the means for private entities to enforce any potential claim, international arbitration has been seen as a viable solution for disputing parties. There has been a focus in the industry on designing appropriate arbitral rules that could be adopted by disputing parties to guide the arbitral process specifically in a space law context, such as the Permanent Court of Arbitration's Optional Rules for Arbitration of Disputes Relating to Outer Space Activities. There is also the potential for a standalone international arbitral centre to be established in relation to outer space collision liability and other disputes, as distinct from the conduct of an arbitration through existing general commercial arbitral institutions such as the International Chamber of Commerce, the International Centre for Dispute Resolution and the London Court of International Arbitration.

In an insolvency context, a practitioner would need to be aware of these limitations – both procedural as well as in assessing and quantifying substantive liability. Significant costs, delays and uncertainty could, in turn, undermine the achievement of efficiency and maximum returns for creditors during the insolvency process, and also inhibit a potential restructure which relies on speed, simplicity and the preservation of an entity's scarce capital.

That said, there is a possible role for the UNCITRAL Model Law on Cross-Border Insolvency, at least in terms of achieving greater procedural certainty and multi-state cooperation where an outer space collision involves a corporate debtor and one or more third parties in other jurisdictions.

Specifically, Articles 25 and 26 of the Model Law require courts to cooperate 'to the maximum extent possible' with their foreign counterparts in connection with the conduct of a recognised insolvency proceeding and to investigate and pursue appropriate forms of communication.

Possible forms of cooperation and communication are identified in Article 27, with the final choice of those mechanisms left to the discretion of the relevant courts in each jurisdiction. Notably, Article 27(a) states that a possible form of cooperation is 'the appointment of a person or body to act at the discretion of the court'. This is apt to include an arbitrator or mediator.

Thus, where an insolvency practitioner appointed over a satellite operator seeks recognition of the insolvency proceeding in a jurisdiction that has adopted the Model Law, and the practitioner is also faced with an outer space collision claim (whether the satellite operator is the plaintiff or the defendant), there would be an avenue for the practitioner to apply to the relevant courts in that jurisdiction and seek an order for cooperation via the appointment of a mediator or arbitrator to assist in the resolution of the dispute. The parties would then be invited to make submissions on the manner in which the arbitration or mediation would proceed.

3 The Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies (1967) (Outer Space Treaty), the Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space (1968), the Convention on International Liability for Damage Caused by Space Objects (1972) (Liability Convention), the Convention on Registration of Objects Launched into Outer Space (1975) and the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies (1979) (Moon Agreement).

4 Liability Convention, Articles VIII-IX.

5 Liability Convention, Articles XV-XX.

Nevertheless, while helpful from a procedural certainty and efficiency perspective, the lack of consistency in international approaches to the determination of substantive liability for a satellite collision in outer space remains. This is a matter that an insolvency practitioner would need to assess in determining the viability of bringing a claim as the plaintiff on behalf of the satellite operator undergoing the relevant insolvency process, and in determining the viability of a restructuring designed to rescue the operator as a going concern when the operator is faced with a potential collision claim as the defendant.

Ownership rights

While the Outer Space Treaty is clear that objects *launched* into outer space, such as satellites, remain under the ownership of the launching state (or private entities within the launching state, as the case may be), the existing international framework is not clear about the ownership of assets taken *from* outer space.

This is another challenging area that insolvency practitioners will need to be mindful of as the scope of mining operations in outer space continues to be investigated and expanded both publicly and privately. In the event that a practitioner was appointed over an entity that engaged in those operations, it would become necessary – as an incident of the practitioner's duty to collect and distribute assets and resolve creditor claims – to determine the entity's ownership of any resources appropriated from outer space, and any competing claims to those resources that may be asserted by the entity's creditors.

The Outer Space Treaty only touches on ownership rights in relation to resources acquired in outer space peripherally, with Article II stating:

> Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.

Yet there is no explicit denial of ownership rights by private entities – only an inability to acquire objects in outer space by means of 'national appropriation', and only by states. It is also arguable that mining resources acquired from outer space are not 'outer space' in their own right.

The ownership of resources acquired from outer space is more explicitly dealt with in the Moon Agreement. In relation to resources on the moon (but not other celestial bodies), Article XI states not only that the moon is not subject to national appropriation by any claim of sovereignty (the language adopted in the Outer Space Treaty), but also that 'the moon and its natural resources are the common heritage of mankind.' Further, Article XI provides:

> Neither the surface nor the subsurface of the moon, nor any part thereof or natural resources in place, shall become the property of any state, nor any entities or natural persons.

Article XI also provides a framework for signatory states to 'establish an international regime … to govern the exploitation of the natural resources of the moon', which is to include a process for the 'equitable sharing' of benefits from the resources.

However, apart from the fact that the Moon Agreement is limited to resources acquired from the moon (and does not extend to resources from other celestial bodies), it is notable that the instrument had, as at 1 January 2021, only been ratified by 18 countries and signed without ratification by four others. The 'common ownership' of resources mined from outer space is accordingly far from having the status of an international norm.

Already, some jurisdictions have enacted domestic provisions which are intended to provide a framework for private ownership rights. For example, the United States, which has not ratified or signed the Moon Agreement, enacted the *Commercial Space Launch Competitiveness Act 2015* (US), which recognises the right of private United States companies to engage in the exploration and extraction of space resources from celestial bodies. An Executive Order issued by the former Trump Administration in April 2020[6] reiterates this position, with an express disavowal of the Moon Agreement ownership framework and the notion that outer space, and resources in it, are a 'global commons'. The Executive Order also states the United States' position that the existing international framework has, unsatisfactorily, discouraged commercial exploration activities to recover and use outer space resources, and reiterates:

> Americans should have the right to engage in commercial exploration, recovery and use of resources in outer space, consistent with applicable law.

The United States position is that this framework is not inconsistent with its obligations under the Outer Space Treaty because it is not seeking to 'assert sovereignty or sovereign exclusive rights or jurisdiction over, or the ownership of, any celestial body', as distinct from permitting its citizens to engage in activities and acquire ownership resources in a private capacity.

The extent of private ownership rights in outer space resources will be a matter that will come to a head in future years, as more countries test the boundaries of international law in pursuit of domestic policies that, as noted above, clearly position space exploration and the recovery of space mining resources as an important component of economic growth and expansion beyond the finite resources of planet Earth. As technological advancements continue, the prospect of space mining will become even more tangible and this will give greater impetus for this tension to manifest.

In this context, there will again be a significant area of complexity for insolvency practitioners whose appointments cover space mining assets in future years, and there will likely be an increase in complex cross-border disputes, and an inevitable interplay between competing incidents of insolvency law, private domestic law and international law.

6 United States Government Executive Order No 13914, 'Encouraging International Support for the Recovery and Use of Space Resources', Federal Register, vol 85, no 70.

Restructuring opportunities

The substantial investments being made by governments globally in relation to space law commercial capability is also likely to support the reallocation of capital by private entities seeking to take advantage of the new opportunities on offer. This will especially be the case for resources entities seeking to explore new mining potential in outer space to mitigate the impact of a transition towards a lower carbon economy on planet Earth, as well as for technology companies seeking to develop new communications and digital enhancements supported by satellites and other infrastructure launched and embedded in outer space. For these entities, reallocation of capital and other resources will be necessary to support new outer space commercial activities.

In that sense, there is a clear synergy between space law restructuring opportunities and two of the most defining global trends we are now seeing: ESG (and the necessary transition towards net zero emissions by 2050) and rapid digitisation.

The investment of new capital in still emerging areas in outer space technology and mining opportunities will of course be high risk, and this will likely see the proliferation of new start-up ventures, and something of a 'boom or bust' cycle in which some entities will inevitably become insolvent and will be prime candidates for restructuring.

A recent example is the successful restructuring of OneWeb, a global broadband satellite constellation company which began as a start-up but came to operate over 650 low Earth orbit satellites. OneWeb emerged from a Chapter 11 reorganisation in the United States in November 2020 following the Bankruptcy Court's approval of a $1 billion sale to Bharti Global and the United Kingdom Government, which each secured a 42.2% stake in OneWeb. In explaining the investment, United Kingdom Business Secretary Alok Sharma said that the OneWeb stake reflected the Government's 'commitment to the UK space sector in the long-term and our ambition to put Britain at the cutting edge of the latest advances in space technology'.

This kind of immense public-private investment potential, across multiple jurisdictions, will be a clear driver of not only further commercial space law companies and activities in future years, but also the underling restructuring opportunities that are a necessary adjunct to the level of activity we will see.

LITIGATION FUNDING FINALLY CONFIRMED IN TURKS AND CAICOS ISLANDS

Tim Prudhoe and Yuri Saunders
Prudhoe Caribbean, Turks & Caicos

"the TCI continues to face a learning curve on these topics, but the decision of 23 July 2021 is certainly tangible progress"

Although the beaches and azure waters of the Turks and Caicos Islands ("TCI") are at least as good as those of other British Overseas Territories in the Caribbean, the jurisdiction has lacked clarity on the issue of litigation funding. Until, that is, the decision of 23 July 2021 (Simons J) in the combined judgment CL86/2019 and CL8/2021 *In the Matter of Regent Grand Ltd. (in Liquidation); Kajeepan Paintamilkavalan and others v. Director of Immigration, Derek Been and others.*

The *Regent Grand* case is in the context of a members' voluntary insolvent liquidation. The *Kajeepan* case addressed a claim in the tort of false imprisonment for illegal immigrants freed by way of writs of habeas corpus and an appellate finding of unlawful imprisonment of several months. Unlikely candidates, one might fairly think, for a consolidated judgment. The common denominator being issues of litigation funding. Getting them before the court at the same time (in a consolidated hearing) reflects intentional timing by a law firm headed by the licensed Insolvency Practitioner appointed as liquidator in *Regent Grand*. In a statutory regime that expressly allows legal representation of the liquidator from within an associated firm, the TCI continues to face a learning curve on these topics, but the decision of 23 July 2021 is certainly tangible progress.

Although lacking the obvious strengths that the *Kajeepan* case displayed in terms of issues of access to justice for indigent litigants with near-certain prospects of success in proceedings against prolonged abuse of immigration legislation, *Regent Grand* illustrated the not uncommon problem of lack of funding within an insolvent liquidation and which had stymied a viable recovery. The recovery itself was "marginal" as to the cost / benefit thereof, and although court permission was not *required* as to the bringing the claim, it had been sought before a predecessor judge and on which application the liquidator had not received sanction on the intended action. Nor in the context of that sanction application did that judge offer any indication of view as to whether the intended claim should instead be abandoned.

In those circumstances, the liquidator was between the proverbial rock-and-a-hard place. Potential criticism if the claim on which he had been advised had viable merits was pursued, and the same if the claim *was* pursued. Repeated (and documented) requests to creditors who had submitted a proof within the liquidation for *Regent Grand* for either funding for the purposes of bringing the claim or suggestions as to a law firm who might consider doing the work on a conditional fee resulted in no proposals by which to make any progress on behalf of the insolvent estate. Even though some of the submitting creditors were themselves law firms, with significant litigation and insolvency expertise and therefore presumably well-placed to make recommendations. With the overlap of the law firm and the Insolvency Practitioner, the fallback was that firm to take up the cudgels. Doing so on a conditional fee basis was the only way that such instruction was economically viable, and this would break new ground in TCI.

An application was made for court approval of the terms of the conditional fee agreement ("CFA") as contained within the proposed engagement letter. That application was issued in September 2020 and was opposed, but only by submitting creditors who would themselves be the defendants in the proposed recovery proceedings. The primary argument in opposition was that the prior (non-CFA) sanction having been sought and not granted, the CFA sanction sought was to be treated as if an attempt to, in effect, re-argue the earlier (unsuccessful) application.

The CFA approval application proceeded based on a decision on both (a) the cost / benefit to creditors and – crucially from a lasting, impactful, jurisprudential perspective – whether what was being proposed was champertous and / or would be contrary to TCI public policy.

The judge on the CFA approval application expressly rejected any micro-management of the liquidation by the Court and deferred to the liquidator on the basis of (in this liquidation) his discretion under the applicable insolvency legislation.

Shortly before the listing of the contested hearing the TCI Bar Council had involved itself on an *amicus* ('friend to the Court') basis. Although the timing of this caused delay that would have otherwise been avoided, from the perspective of the value of the precent-making decision across the legal profession and for the jurisdiction as a whole this involvement was plainly of beneficial effect. On maintenance, champerty and public policy, the position made on behalf of the Bar Council was that without legislation, the CFA approval application could not and therefore should not be allowed.

There was zero mystery as to the specific detail of the proposed CFA agreement: for the simple reason that it was put into evidence by way of an exhibit.

The TCI Bar Council rejected first instance decisions from across the Caribbean Region made by courts arguably much more experienced in the commercial issues of and impact from insolvent estates and the issues that a lack of available resources inevitably cause in terms of viable recoveries.

Champerty and maintenance as a crime in TCI had been abolished in 1967 but arguments as to its viability in the face of public policy concerns lingered from the Privy Council decision on appeal from the TCI Court of Appeal in the *Kellar and Another v. Williams* [2005] 1 LRC 582. Lord Carswell in his speech in *Kellar* delivering the judgment of the Privy Council expressly declined to state a view on whether a conditional fee agreement was permissible and therefore enforcement. What Lord Carswell did state at [21] was that "[t]he content of public policy can change over the years, and it may now be time to reconsider the accepted prohibition in the light of modern practicing conditions". Having had the Privy Council deliberately leave that issue open specifically as it relates to TCI, the fact pattern in *Regent Grand* offered the opportunity sixteen years later for clarity at last.

In the context of *Kajeepan* at [62] the Court not only rejected the argument that the CFA was contrary to TCI public policy "but rather conducive to public policy in that indigent plaintiffs who would otherwise be shut out from the seat of judgment, are afforded access to justice; and this in a jurisdiction where the Executive is bound by its Constitution to afford just cases access."

Very different underlying facts as *Kajeepan* had, the confluence of issues, the overlap in legal representation and the timing of these issues all arising was plainly a helpful contributing factor. Thank you, in effect, TCI Bar Council for causing a last-minute delay *Regent Grand* such that in the meantime *Kajeepan* could 'ripen'.

The combined effect of the two cases being argued together had the welcome and lasting effect that the Court stated expressly its view that the issues on the CFA approval applications has been fully argued before him. Leave to appeal was granted in *Kajeepan* of the Court's own volition. It was not needed in *Regent Grand* but was granted anyway to avoid any satellite issues. The time limit within which to appeal has long since passed without any sign of an appeal in either proceeding. To some extent, the decisions are weaker than they would have been if confirmed on appeal, but the involvement of the TCI Bar Council to oppose the applications bolsters their lasting effect. Plus, the absence of any appeal in *Regent Grand* avoids precisely the type of resources issue that led to the CFA approval application in the first place.

Overall, the TCI business community should be relieved that it now has clarity on the issue. Impacting issues remain, of course: such as any need for insurance against costs-shifting ('loser pays') in respect of indigent or at least impecunious plaintiffs (as they are still called in TCI).

The approval of a CFA even *outside* of insolvency would itself have been useful in TCI's charting of a course through this developing area. That the decision in *Regent Grand* was both within an insolvent liquidation and heard on a contested basis (with the TCI Bar Council one of the unsuccessful opponents to its approval) further strengthen the benefit that the decision has brought.

ELECTRIC VEHICLES ARE COMING – AND SO IS INSOLVENCY FOR MANY SUPPLIERS

Daron Gifford,
Tim Weed,
Jason Winters
Plante Moran, USA

"All major manufacturers have shut down investment in new internal combustion engine (ICE) programmes and have shifted capital to development of battery electric vehicles (BEV) platforms."

The automotive industry has been talking about battery electric vehicles (BEVs) for over a decade, but the recent shift in momentum towards an all-electric future threatens to leave many mid-market automotive suppliers in the crosshairs of insolvency.

Some suppliers are clinging to the belief that BEVs are a fad that will soon disappear as consumers keep buying ICE vehicles; others claim that this future is still decades away and there's plenty of time to shift. Why could the luddites and naysayers be doomed? Several changes in the direction of the automotive industry are converging now to accelerate this dramatic shift.

Major original equipment manufacturers (OEMs) are *responding to the regulatory bodies' lead* and committing to an all-electric, zero-emission future. All major OEMs have shut down investment in new internal combustion engine (ICE) programmes and have shifted capital to development of BEV platforms. Current product plans indicate that ICE platforms are "refresh-only" for the next five years, but likely even longer. ICE-related work to quote on is diminishing. Perhaps some existing programmes will have a longer life than predicted, but these programmes are not generating new business. Unless a supplier is capable of pivoting and responding quickly, it's only a matter of time until they're overtaken by the BEV revolution.

In a move to strengthen the United States regulatory environment addressing climate change, the Biden administration is *fast-tracking updates* to the corporate average fuel economy (CAFE) standards. Alongside this effort the administration released an *executive order* setting a target of 50% zero-emission vehicles (including battery electric, plug-in hybrid electric, or fuel cell electric vehicles) by 2030, and has ordered the EPA and departments of Commerce, Labour, and Energy to collaborate "on ways to accelerate innovation and manufacturing in the automotive sector, to strengthen the domestic supply chain for that sector, and to grow jobs that provide good pay and benefits." In addition, the administration has given credibility back to the California Air Research Board (CARB) whose stated goal is 100% zero emissions vehicles by 2035. These CARB standards have been adopted by 14 other high population states, providing significant impact on OEM sales. And globally, the emissions standards are generally even more aggressive than the United States.

The challenge for suppliers

These industry changes are already being felt by suppliers in the form of reduced ICE component volumes, and the future is dimming for those that make powertrain parts such as engines, transmissions, fuel injectors, exhaust systems and turbochargers.

However, it's not just powertrain suppliers who will be impacted. By nature of the overall conversion occurring there will be fewer opportunities for all suppliers. Why? BEVs use fewer parts. Breaking it down to the sub-assembly level, there's over 10,000 parts in an ICE vehicle compared with 2,500- 3,000 parts in a BEV vehicle– approximately 25% of the current number of parts per vehicle. Given the expected volumes in a future BEV world there simply won't be enough component volume to go around for all the existing suppliers. Many companies may go out of business, and hundreds of thousands of existing jobs will be impacted, potentially disappearing as a result of this transition.

Quick pivoting to BEVS: How, why, and 'what if'

To avoid insolvency many suppliers are now planning or attempting a pivot to BEVs. They're looking at their assets and skills, seeing what they can do, and evaluating their ability to make the switch. Unfortunately, many don't have a very clear view of the future marketplace in order to plan or fund a solid transition; and that's compounding their problems.

Suppliers most likely to be successful are those who can transition existing competencies; for example, those that machine precise metal parts may be able to shift over to making electrical drive components, and makers of fuel, brake, or cooling systems may be able to switch to heating and cooling fluid systems for BEVs. Interiors won't likely see a big impact in the near term since they're not key to the drivetrain. Similarly, exterior components such as body panels, fascias, tires, and wheels aren't expected to change drastically either. But there won't be nearly as many engine, transmission, and driveline parts to make, so companies need to be aggressive about making the quick pivot or be left behind.

Strategies for those that can't pivot

What options are available for those who can't make the pivot? Only three strategic alternatives are likely to be available:

- **Downsizing**: Many ICE-dependent companies will try to downsize or shrink their cost structure to maintain profitability. Many won't be able to do it fast enough, and others will have fixed costs they can't easily reduce, creating a financial "point of no return." Meanwhile market pressure from too many suppliers will be likely to create a situation where companies may propose unprofitable prices to maintain volumes, irrespective of potential profit margins. Eventually funding sources will lose confidence in management's strategy and will pressure ownership to make dramatic reductions or risk losing their support. When faced with these risks, shrinking the company is an interim solution at best.

- **"Last one standing" or rollups of distressed businesses:** Some suppliers will hope for a slower transition in the future market, ride the downturn, and increase their market share as their competitors go out of business. Those with available capital may "roll up" firms similarly situated along the way, banking on cost savings from the combinations. There aren't extensive rollups happening in the middle market at this at this point in time, but large mergers such as the *Hitachi Astemo* combination – aimed at economies of scale – are occurring. The question for companies considering rollups is whether this strategy is the best use of their capital versus putting the capital into building a BEV-related product or simply "cashing out." For suppliers choosing rollups, it will come down to their inherent management talent, cost reduction, and integration abilities.

- **Government handouts:** Some declining sectors – particularly those involving union workers – may seek government support to ease the pain of transition and help prevent massive unemployment. In the United States the likelihood of significant government support is less today, even with union influence, because of the hesitation to support industrial activities that are not in alignment with government policies on climate change. There may be similar dynamics at play in European countries – but government policies are even more aligned with accelerating BEV adoption – probably with the same result of no government backstop.

In summary

Automotive suppliers are currently at a crossroads and need to decide which direction to go. They can go down the path of trying to drive costs down, outsource more, vertically integrate, carve out more business, and look for good deals to roll-up soon to be distressed competitors; then figure out the long-term game plan down the road. Or they can be aggressive and try to make the pivot into some of the new components with the skills they have today, using their available capital to build new BEV product lines. But doing nothing is the sure bet for failure.

AS THE YEAR COMES TO AN END...

Professor Juanitta Calitz
Chair, INSOL Academic Group
University of Johannesburg
South Africa

INSOL Focus Group
ACADEMICS

"Despite our many challenges I am extremely proud of this year's achievements."

The word "unprecedented" comes to mind when describing 2021. I would like to thank the Academic Steering Committee, the INSOL Executive Committee, the staff members of INSOL, and the members of the INSOL Academic community, for helping to make another COVID year bearable. Despite our many challenges I am extremely proud of this year's achievements.

In September, the INSOL ERA (Early Research Academics) sub-committee launched the INSOL Talks podcasts series. This project offers a unique opportunity to listen and learn from leading international insolvency and restructuring law scholars and practitioners. Each episode explores the stories, tools, and methods of thought leaders. I would like to congratulate and thank Dr Eugenio Vaccari and the members of his committee, as well as al the interviewees for their time and effort. This is truly a brilliant initiative!

On the 23rd of November the INSOL Academic Group in collaboration with the INSOL Asia Hub and SMU-SGRI, presented the 3rd webinar: *Decentralised Finance, Smart Contracts and the Future of Lending Markets*, as part of the INSOL: 4IR Round Table series. In the past year(s), a new form of blockchain-based finance (Decentralised finance or DeFi) has emerged as a significant source of finance, creating new challenges and opportunities for regulators, companies, and individuals. The webinar explored the concepts, challenges, and opportunities of DeFi, including the mechanism thereof. The webinar also explored the implications of DeFi for the insolvency and restructuring profession. Professor Aurelio Gurrea-Martinez, (SMU) led a distinguished panel and it was another successful event.

The Ian Fletcher Insolvency Law Virtual Moot Court will take place on Saturday 12 March 2022 and Sunday 20 March 2022. INSOL International and the International Insolvency Institute are pleased to host universities from around the world participating in a mooting competition dealing with international insolvency litigation. The competition provides the opportunity to experience real-world court proceedings before international panels of prestigious judges and is truly one of the highlights on the INSOL calendar.

Last but certainly not least… We are excited to announce that INSOL International will be hosting its Annual Conference in London from 26 to 28 June 2022, with an Ancillary Programme available on 25, 26 and 29 June.

It is therefore my pleasure to invite you to the 22nd INSOL International Academic Colloquium that will take place on 25 and 26 June. Keep an eye on your inbox as we'll be sending you the call for papers soon. I also invite all members of the group to contact Tina McGorman, tina.mcgorman@insol.org or myself, jcalitz@uj.ac.za, with ideas for topics as well as suggestions for innovative and interesting projects.

Recently one of my colleagues used the term "to generously listen", and it resonated with me. "May we endure the coming months as a circle of people with common as well as diverse interests and needs, by deliberately living out our values and listening generously..." (Nicola Smit).

INSOL INTERNATIONAL

GLOBAL INSOLVENCY PRACTICE COURSE

GIPC GRADUATES 2021

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

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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 face 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.

For further information please contact
Heather Callow **heather.callow@insol.org**

FOUNDATION CERTIFICATE

INSOL International is delighted to announce the names of the recipients of the Foundation Certificate in International Insolvency Law for the class of 2020/21, as well as those from the 2019/20 group who elected to complete the course over a period of two years. The Foundation Certificate is an entry-level self-study course aimed at practitioners with less than five years' experience in the insolvency and restructuring field.

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FROM WHOA TO THE DRA – DEVELOPMENTS IN THE NETHERLANDS

Vincent Vroom, INSOL Fellow and Kim de Bruijn
Loyens & Loeff NV
The Netherlands

"Some would say that the Dutch scheme/ WHOA is the flavour of the month in the European restructuring landscape"

The Netherlands is historically perceived to be an internationally attractive jurisdiction for holding and financing structures. This is helped by an effective legal framework, where secured lenders can enforce on security rights in an efficient manner. As of the first of January 2021, a new restructuring tool came into effect in the Netherlands; the *'Wet homologatie onderhands akkoord ter voorkoming van faillissement'* (the WHOA or the Dutch Scheme). To capitalize on this development, on 8 July 2021 the Dutch Restructuring Association (the DRA) was incorporated. The aim of the DRA is to play a leading role in continuously improving the quality of national and international restructurings carried out in the Netherlands. Given the role of the Netherlands in many international restructurings, the DRA will develop strong relationships with the international restructuring community (including INSOL International) to foster cross-border communication and cooperation and facilitate cross-border restructurings.

Why the Netherlands? Secured creditor friendly jurisdiction

There is a proven track record in particular on Dutch share pledge enforcements in high profile international cases. Most share pledge enforcements in the Netherlands are done via the court, whereby the pledgee (Security Agent) receives permission to transfer the shares to a third party purchaser or a NewCo controlled by the in the money lenders. The out of the money debt is left behind in the issuer and/or can be resolved via the arrangements in the Intercreditor Agreement. In 2020 this is the way in which Dutch retailer HEMA, the most high profile restructuring in the Dutch market, was restructured. In addition to HEMA, other high profile international restructurings that made use of a share pledge enforcement were ship building/offshore group IHC and Dummen Orange.

Why the Netherlands? The Dutch scheme

Some would say that the Dutch scheme/WHOA is the flavour of the month in the European restructuring landscape. There has been a lot of publicity on the Dutch scheme for the past couple of years in the international market. Why is that? Because it is perceived to be a serious alternative to an English scheme of arrangement, that can be widely used in cross border restructurings. The law picks the best elements from US Chapter 11 and the UK scheme of arrangements, including cross class cram down possibilities. On paper it looks a very useful new restructuring tool, but the big question was to what extent it will be used in practice.

So what is the Dutch scheme?

- It is a debtor in possession proceeding, that aims to achieve a debt restructuring outside of a formal bankruptcy process.
- Like with a US Chapter 11 and UK scheme, which heavily influenced the WHOA, creditors can be separated in different classes. If two thirds of the amount of creditors vote in favour, the class of creditors has adopted the plan.
- There is flexibility on the contents of the plan: debt for equity swaps, maturity extensions, partial payments etc. are all possible
- Guarantees of group creditors can be affected
- Amendments of agreements can be imposed on counterparties (eg lease agreements), subject to an opt out.

The plan can be declared binding on all creditors by the court. If all classes have voted in favour, the "no creditor worse off rule" still applies: the court will reject the plan in case the creditors would be better off in bankruptcy. If not all classes voted in favour, cross class cram down is possible, but amongst others a "relative" absolute priority rule will apply. At least one in the money class will need to have voted in favour.

The expectation in the market was that the WHOA would be used perhaps mainly as a stick behind the door in larger complex restructurings, but the good news is that there are already a handful of court judgments. These judgments have been (widely) covered in the international legal press, but it should be noted here that all cases so far contain SME-type debtors. Accordingly, one has to be careful in deriving too much from the judgments we have seen so far, although it is worth noting that:

- the Dutch courts are very open towards these WHOA cases, they want to make it a success;
- timelines are quite short: the Dutch scheme process can

be wrapped up in about a month if no issues come up, and this is supported by the judgments so far;

- the new "functionaries" like the restructuring expert and the observer have been appointed in a number of cases;
- all cases so far have been started by the debtor. Creditors have the possibility to start a WHOA by requesting for the appointment of a restructuring expert.

It is still early days but the Dutch scheme promises to offer a very useful new tool for cross-border restructurings that practitioners are actively considering in live material cross-border cases.

Time for the DRA

The incorporation of the DRA can be seen as another step in the right direction for the Netherlands as an internationally attractive jurisdiction for restructuring and insolvency matters. The DRA brings together a broad global group of leading restructuring experts including lawyers, judges, financial advisors, interim managers, bankers, investors, policy makers and academics. The DRA also invites international restructuring professionals to join the association. It plans to achieve its goals by amongst others (i) providing a platform for all restructuring participants to connect and share their knowledge and experience, (ii) offering a world-class educational programme and (iii) developing best practices through the systematic assessment of cases.

The Dutch Scheme has broad grounds for jurisdiction and was designed to provide speed and flexibility which are key assets for a successful cross-border restructuring framework. The DRA is convinced that Dutch restructurings will become more commonplace for both, in- and out-of-court, domestic and cross-border restructurings. The DRA will promote cooperation between the Netherlands and the wider restructuring community, in order to ensure that it offers a speedy, reliable and cost-effective platform for resolving international cases.

For more information please visit the Association's web site at https://dutchrestructuringassociation.com.

THE NEW RULES ON CRIMINAL LIABILITY FOR INSOLVENCY VIOLATIONS IN RUSSIA



Pavel Novikov, INSOL Fellow, Andrey Bogdanov and Fedor Bugaytsov
Baker McKenzie, Russia

"From a practical standpoint, courts often use the controlling person test to hold factual beneficiaries of the insolvent company secondarily (personally) liable for unpaid creditors' claims, if such beneficiaries' actions caused the insolvency. Despite certain statutory landmarks, this test is very broad and may apply to the management of foreign holding companies."

Introduction

The insolvency regulations in Russia are subject to constant amendments by the legislature. This is largely because of the permanent growth in corporate insolvencies and personal bankruptcies. For instance, in the first half of 2021, the number of corporate insolvencies increased by 9.2% (up to 4,918 cases), while instances of personal bankruptcies also increased by 2.1 times (up to 88,046 cases). At the same time, in 2021 only 3-4.4% of creditors received recovery of their debts within insolvency/bankruptcy proceedings, while the majority of creditors' claims remained unsatisfied.[1]

The correlation between the permanent increase in the number of insolvency proceedings and the low effectivity of such proceedings stimulates the legislature to introduce new regulations aimed at, among other things, providing insolvency practitioners with useful mechanisms to return dissipated assets, while discouraging debtors and their beneficiaries from concealing such assets.

After introducing substantial amendments to the secondary (personal) liability rules in 2017, the legislature proceeded with harshening criminal liability for insolvency violations. Consequently, in July 2021, the President of the Russian Federation approved the amendments proposed by the State Duma of the Russian Federation, which introduced more detailed and complex regulation of criminal liability for crimes connected to insolvency proceedings.

This article contains an overview of the significant amendments to the criminal liability rules and maps out the consequences that these rules may have on raising the effectivity of local insolvency proceedings.

Controlling persons

The amendments broadened the criminal liability for insolvency violations to controlling persons.

Federal Law No. 127-FZ on Insolvency (Bankruptcy) ("Bankruptcy Law") and relevant clarifications from the Supreme Court of the Russian Federation[2] largely define a controlling person as an individual or legal entity entitled to give mandatory instructions to the debtor or otherwise direct its actions.

From a practical standpoint, courts often use the controlling person test to hold factual beneficiaries of the insolvent company secondarily (personally) liable for unpaid creditors' claims, if such beneficiaries' actions caused the insolvency. Despite certain statutory landmarks, this test is very broad and may apply to the management of foreign holding companies.

After the amendments, controlling persons[3] became special subject to criminal liability for certain insolvency-related crimes: (a) dissipation/concealment of debtor assets; (b) unlawful repayment of creditors' claims aimed at the detriment of other creditors; and (c) obstruction of the insolvency proceedings (failure to transfer financial records, assets, etc.) (Art. 195 of the Criminal Code).

For such violations, controlling persons may now be subject to a fine of up to RUB 2 million (approximately USD 30,000) or community service/imprisonment for up to four years. These sanctions may be accompanied by disqualification (i.e., restriction against holding certain positions or carrying out certain activities) for up to three years.

The amended Criminal Code (Art. 196) envisages more severe penalties for premeditated bankruptcy (i.e., deliberate actions caused the inability to recover creditors' claims and material loss[4]) orchestrated by controlling persons: (a) a fine of up to RUB 5 million (approximately USD 70,000); or (b) imprisonment for up to seven years and disqualification as an additional penalty.

Insolvency practitioners

In Russia, qualified insolvency practitioners administer almost all insolvency proceedings. Such practitioners are appointed by the court supervising the insolvency case in order to balance the interests of creditors, debtors and public policy. From a practical standpoint, insolvency practitioners play a

1 Statistical Bulletin of the Federal Bankruptcy Register dated 30 June 2021 (available in Russian: https://download.fedresurs.ru/news/Статистический%20бюллетень%20ЕФРСБ%2030%20июня%202021.pdf).

2 The Plenary Resolution of the Supreme Court of the Russian Federation of 21 December 2017 No. 53.

3 Under the Criminal Code of the Russian Federation, only individuals are subject to criminal liability (Art. 19). Therefore, criminal liability for insolvency violations applies to officials of controlling companies, rather than to the controlling companies themselves.

4 Under Art. 170.2(2) of the Criminal Code, the material loss is equal to the detriment exceeding RUB 2,250,000 (approximately USD 32,000).

key role in insolvency proceedings, especially in the course of an insolvency liquidation/assets sale (i.e., final stage of personal bankruptcy), since they compile the bankruptcy estate and secure orderly and proportionate disbursements to creditors.

Despite such important influence, for a long time insolvency practitioners bore no criminal liability for the unlawful repayment of creditors' claims that caused a material detriment to other creditors of the distressed debtor. Such exemption contradicted the significant authority of the insolvency practitioners over the debtors' assets.

Now, the scope of Art. 195 of the Criminal Code includes insolvency practitioners, as well as liquidators. For the unlawful repayment to a certain creditor, the insolvency practitioner may be subject to a fine of up to RUB 2 million (approximately USD 30,000) or community service/imprisonment for up to four years. These sanctions may be accompanied by disqualification for up to three years.

The amended rules are designed to increase insolvency practitioners' compliance with the insolvency regulations, especially with respect to the creditors' priority set forth by the Bankruptcy Law.

Limitation period

Before the amendments, bankruptcy-related violations (i.e., dissipation/concealment of debtor assets, unlawful repayment of creditors' claims and obstruction of insolvency proceedings) covered by Art. 195 of the Criminal Code qualified as minor offenses.

This approach complicated the prosecution of relevant violations, as the limitation period for such offenses was only two years. In practice, the average period of corporate insolvency reaches almost three years, while it takes the court approximately 1.5 years to complete a personal bankruptcy case[5]. Therefore, the prosecution of bankruptcy-related crimes often led to full dismissal of the criminal charges based on expiration of the limitation period.

Now, since the criminal sanctions were significantly toughened, violations by insolvency practitioners/controlling persons listed in Art. 195 of the Criminal Code are considered medium offenses, which automatically increases the limitation period to up to six years.

This amendment is likely to increase the number of criminal sentences for bankruptcy-related crimes, as the prosecution will have more time to investigate relevant violations. Accordingly, this may trigger the active involvement of the defendants in the prosecution, since the defense referencing the expiration of the limitation period is less likely to become available.

Exemptions

Despite strengthening the criminal sanctions, the amended Criminal Code introduces an opportunity to avoid criminal liability for bankruptcy-related crimes (Art. 195) and premeditated bankruptcy (Art. 196) by means of so-called inside trading.

According to the annotation to Art. 195(5) of the Criminal Code, in order to avoid criminal liability, a defendant must: (a) commit the relevant crime for the first time; (b) actively assist the prosecution; (c) voluntarily reveal the beneficiaries of their unlawful actions; and (d) report the assets of such beneficiaries; while (e) such assets must be sufficient to recover losses caused by the criminal offense.

This test for exemption from criminal liability appears to be complicated. So far, there are no clarifications regarding whether the defendant should comply with all of the requirements set forth in the annotation to Art. 195(5) of the Criminal Code.

However, similar exemption provisions were introduced in 2017 for secondary (personal) liability of controlling persons.[6] Consequently, the court practice detailed an approach limiting secondary liability of a nominal controlling person if they: (a) revealed the real beneficiary; and (b) this led to restoration of creditors' rights.[7] Accordingly, the new exemption rules of the Criminal Code are likely to be construed the same way.

Conclusion

The amended rules of the Criminal Code on insolvency violations are yet another step toward more effective insolvency/bankruptcy proceedings in Russia. The tightened criminal sanctions and expansion of liability to controlling persons/insolvency practitioners are likely to prevent instances of asset dissipation/unlawful payments and increase the amount of recovery to local and foreign creditors of distressed business.

In this context, the introduction of the exemption from criminal liability by means of so-called inside trading demonstrates that the key idea of the amendments was to increase the total amount of recovery to creditors, rather than criminal prosecution of prudent businesses.

At the same time, the expansion of criminal liability rules will require consistent and predictable application by the authorities, enabling prudent investors/beneficiaries to see red flags and avoid the risk of being criminally liable solely for commercial decisions.

5 Statistical Bulletin of the Federal Bankruptcy Register dated 30 June 2021 (available in Russian: https://download.fedresurs.ru/news/Статистический%20бюллетень%20ЕФРСБ%2030%20июня%202021.pdf).
6 Art. 61.11(9) of the Bankruptcy Law.
7 The Plenary Resolution of the Supreme Court of the Russian Federation of 21 December 2017 No. 53 (Sec. 6).

CHANGE IS ESSENTIAL: ESSENTIAL SERVICES UNDER SECTION 600F OF THE CORPORATIONS ACT NEED TO BE CLARIFIED IN THE CONTEXT OF THE SUPPLY OF INTERNET SERVICES

Jonathon McRostie and Jordana Komesaroff
Clayton Utz, Australia

"The definition of carriage service in Australian law is unclear as it has not been updated to account for modern usage of internet services"

Introduction

As Australia's insolvency laws continue to evolve, it has never been more important for those laws to be clear. The continued supply of utilities, such as gas, water, telecommunications and electricity (defined as "essential services" in the Corporations Act 2001 (Cth) (Act)) following the appointment of an external administrator or a receiver is protected under section 600F of the Act. The justification for that protection is that the continued supply of "essential services" is critical to the successful ongoing trading of a company's business and the preservation of assets, despite the company being indebted to the provider. However, advances in technology and, in particular, reliance on information technology puts in issue what comprises an "essential service" and whether the scope of the protection under section 600F is broad enough to meet the advancements in the proliferation, complexity and reliance by businesses on that technology.

Australian law: section 600F

Section 600F of the Act provides that if:

- a company is in liquidation, provisional liquidation, administration, receivership or subject to a deed of company arrangement or restructuring plan (each, an Insolvent Event);
- the relevant insolvency practitioner requests a supplier of electricity, gas, water or a "carriage service" to supply that service to the company; and
- the company owes money to the supplier in respect of the supply of that service before the relevant Insolvency Event occurred,

the supplier must not refuse to supply the service only because that amount is owing and must not make it a condition of the supply that the amount owing is to be paid.

The meaning of "carriage service" under the Act adopts the definition from the Telecommunications Act 1997 (Cth): "*…a service for carrying communications by means of guided and/or unguided electromagnetic energy*" and includes internet services (see definition of "internet carriage service" which is a subset of "carriage service").

The critical question is what constitutes "internet" services for the purposes of the protections provided in section 600F.

The problem with the Australian law

The scope of the definition of "carriage service" in the context of the provision of internet service is unclear.

Whilst it is apparent that an internet service provider (ISP) must continue the supply of internet pursuant to section 600F, arguably that service ends at the port - in that case, the wall of the business. However, the supply of internet services by an ISP is often part of bundled services and broader contractual offerings to the business. For example, a retail business may obtain, in addition to the supply of internet, intranet infrastructure, data hosting, supply of hardware and support services. A narrow interpretation of section 600F and the definition of carriage services potentially means an ISP could assert that it is not required to continue to provide those other services as part of the contract and purport to comply with the Act by simply continuing the supply of internet to the port.

If that were to occur, without access to the bundled additional services and assuming the external administrator or receiver was unable to readily secure those additional services from another provider, the actions of the ISP may undermine the ability to continue to trade the business and lead to value destruction and diminished stakeholder returns. It may be open to an external administrator or receiver to argue that such interpretation would render the protections provided pursuant to section 600F of the Act futile. In light of the lack of any reported authority on the issue, it is currently unclear which interpretation is the intended operation of the Act.

United Kingdom perspective

The United Kingdom has a similar provision requiring the continued supply of essential services to insolvent companies which is contained in the Insolvency Act 1986 (UK) (UK Act) as amended by the Insolvency (Protection of Essential Supplies) Order 2015 (UK) (the Order).

Under the UK Act, suppliers of essential services must provide those services if requested by an insolvency practitioner who has been appointed to a company. However, the UK provisions provide a more expansive list of "essential services".

While the UK Act includes the supply of communications services as an essential service (which is similar to the Australian definition of "carriage service"), the UK Act goes one step further to also include the supply of goods or services "*where the supply is for the purpose of enabling or facilitating anything to be done by electronic means*" as an essential service. The relevant goods and services are listed as:

a) point of sale terminals;

b) computer hardware and software;

c) information, advice and technical assistance in connection with the use of information technology;

d) data storage and processing; and

e) website hosting.

The Explanatory Memorandum to the Order provides that "*[t]he law is…being modernised to ensure essential IT supplies and related support services, which are now invariably critical to business continuity, are added as essential supplies…*", to provide insolvency practitioners with certainty of continued supply. The Explanatory Memorandum continues to provide that the Order "*… will build upon and modernise the existing provisions to ensure they work as originally intended in the utilities sector, [and] that they reflect developments in commercial practice…*".

Need for reform

As it stands, the definition of carriage service in Australian law is unclear as it has not been updated to account for modern usage of internet services. The definition of "carriage service" or "essential service" should be revisited, and possibly subject to amendment to provide clarity to external administrators, receivers and ISPs as to the scope of their competing rights and obligations. This might be achieved through an amendment to include goods and services required to enable anything to be done by electronic means, akin to the position under the UK Act. As the Explanatory Memorandum to the Order alludes, essential IT supplies and related support services are critical to the operation of modern day business. On the other hand, if it is intended by the legislatures that the supply of internet ends at the port, this needs to be specified to resolve the ongoing uncertainty. The Order was introduced in the UK in 2015 to clarify the UK position and goes some way to doing so. Australia ought to similarly revisit its position in order to ensure that insolvency practitioners and ISPs have no doubt as to their rights and obligations, and with the aim of keeping pace with modern internet usage and the expectations of business.

A LOOK AT PRE-PACKAGED SCHEMES OF ARRANGEMENT IN SINGAPORE

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"The pre-packaged scheme procedure is a helpful restructuring mechanism as it results in "significant time and cost savings" by virtue of its expedited procedure."

Introduction

First introduced in May 2017, pre-packaged schemes of arrangement ("pre-packaged scheme") differ from traditional schemes of arrangement because they may be approved by the court without the need for a creditors' meeting.

Pre-packaged schemes have gained popularity recently among companies seeking to restructure their debts in light of the negative economic impact caused by COVID-19. The pre-packaged scheme procedure is a helpful restructuring mechanism as it results in *"significant time and cost savings*" by virtue of its expedited procedure.[1]

This article explores:

a) the legal requirements that need to be satisfied for the sanction of a pre-packaged scheme,

b) recent cases in Singapore where companies undertook pre-packaged schemes, and;

c) a comparison between the Singapore pre-packaged scheme and US pre-packaged plan.

Legal requirements for the sanction of pre-packaged schemes

The statutory requirements that must be complied with before the Court would consider approving a pre-packaged scheme are set out in section 71 of the Insolvency, Restructuring and Dissolution Act 2018 (the "IRDA"):

(i) The company must provide each creditor meant to be bound by the arrangement with a statement setting out certain information prescribed under sections 71(3a) and 71(6) of the IRDA.

(ii) The company must publish a notice of the application for the pre-packaged scheme in the *Gazette* and in at least one English local daily newspaper, and send a copy of the notice published in the *Gazette* to the Registrar of Companies (section 71(3b), IRDA).

(iii) The company must send a notice and a copy of the application for the pre-packaged scheme to each creditor meant to be bound by the pre-packaged scheme (section 71(3c), IRDA).

(iv) The Court must be satisfied that had a meeting of the creditors been convened, a majority of the creditors, representing no less than three-quarters in value of debts owed, would have approved the scheme (section 71(3d), IRDA read with sections 210(3AB) (a) and (b) of the Companies Act Cap 50 ("CA")).

As requirements (ii) and (iii) are relatively self-explanatory, this article will provide further elaboration on requirements (i) and (iv).

i. Requirement (i): Disclosure requirements

Generally, the company must provide a statement that:

a) discloses all necessary information "*to enable the creditor to make an informed decision whether to agree*" to the compromise or arrangement,[2]

b) discloses information on how the arrangement may "*affect the rights of the creditor*";[3]

c) discloses information concerning the company's property, assets, business activities, financial condition and prospects;[4] and,

d) explain the effect of the compromise or arrangement and in particular, disclose the any material interests prescribed under section 71(6)(a), IRDA.

The Singapore Court in the recent decision of *Re DSG Asia Holdings Pte Ltd* [2021] SGHC 209 ("*Re DSG*") observed that this entails disclosing all *material information* to the scheme creditors to enable them to make informed decisions on whether to support the scheme.[5] In assessing whether the information is '*material*', the Court observed that creditors need information that enables them to assess "*whether the allocation of loss and the division of benefits is fair and in their commercial interests*".[6] An example provided by the Court was where creditors who would rank *pari passu* in a liquidation are treated differently under or excluded from the scheme, this should be fully disclosed and explained.[7]

1 Committee to Strengthen Singapore as an International centre for Debt Restructuring 2016 Report at [3.33]
2 section 71(3)(a)(iii), IRDA.
3 section 71(3)(a)(ii), IRDA.
4 section 71(3)(a)(i), IRDA.
5 *Re DSG Asia Holdings Pte Ltd* [2021] SGHC 209 at [34].
6 *Re DSG Asia Holdings Pte Ltd* [2021] SGHC 209 at [38].
7 *Re DSG Asia Holdings Pte Ltd* [2021] SGHC 209 at [38], citing *Re Virgin Atlantic Airways Ltd* [2020] EWHC 2376 (Ch) at [63].

Additionally, the Courts are likely to require disclosure of "*the commercial viability of the scheme as a whole*" and information that will "*enable creditors to determine their expected returns under the scheme*"[8]. These requirements are mandated under the traditional Scheme of Arrangement (section 210, CA) and will likely also apply to a pre-packaged scheme, given the material similarity of these statutory provisions.

ii. Requirement (iv): A requisite majority of creditors would have approved the scheme

Section 71(3)(d), IRDA does not specify how the court is to be satisfied that had a meeting been called, the pre-packaged scheme would be approved by the requisite majorities.

Nonetheless, it appears that a possible way to show that the requisite majorities would have approved the scheme is to invite creditors to vote on the proposed scheme via a signed ballot. The company can then submit the tabulated results to court to prove that the requisite majority of creditors would have approved the scheme.

This method is common in US pre-packaged plan, such as in the case of *re Electrical Components International* [2010] WL 3350305. Further, many bankruptcy courts (including the Eastern District of New York), provide a prescribed ballot form for creditors to accept or reject pre-packaged plans[9]. A similar method was adopted in the case of *Re DSG* as well.[10]

Importantly, the Court in *Re DSG* observed that in determining whether the votes in a hypothetical creditors' meeting satisfies the statutory majority requirements, the Court will consider how the creditors are classified, since classification affects how the votes will be tallied[11]. Creditors should be classified in accordance with the classification test set out in *The Royal Bank of Scotland NV (formerly known as ABN Amro Bank NV) and others v TT International Ltd and another appeal* [2012] 2 SLR 213 (at [131]): those creditors whose rights are so dissimilar to each other's that they cannot sensibly consult together with a view to their common interest must vote in different classes.[12]

Recent cases where pre-packaged schemes were undertaken

This section will discuss three companies that have sought to restructure their debts by way of pre-packaged schemes in Singapore, two of which were successful in doing so.

PT MNC Investama

In 2020, PT MNC Investama ("PT MNC"), an investment company listed in the Indonesian Stock Exchange, successfully obtained the Court's sanction of a pre-packaged scheme to restructure US$231 million (S$311 million) worth of Senior Secured Notes due in 2021. These notes were listed on the Singapore Stock Exchange.

PT MNC sought to restructure its notes because the COVID-19 pandemic gravely affected its business, "*engendering a significant decrease in income and increasing the repayment burden under the Notes*"[13]. The increased repayment burden was attributed to the fact that PT MNC's income was "*primarily denominated in Indonesian Rupiah*", "*while its liabilities are in US Dollars*", with the latter having inflated against the former during the COVID-19 pandemic.[14]

The article will now briefly explain how PT MNC satisfied the various statutory requirements in obtaining the pre-packaged scheme.

In satisfaction of statutory requirement (i), PT MNC provided a comprehensive explanatory note to creditors which disclosed, *inter alia*, the following information:

A. Comprehensive details of the Company including its financial position and latest financial statements;

B. The background to the pre-packaged scheme;

C. The proposed terms of the pre-packaged scheme, including how noteholders had the option to exchange the existing notes for new shares in PT MNC or new notes issued by PT MNC due 2026;

D. The proposed timelines under the pre-packaged scheme;

E. The noteholders expected return under the pre-packaged scheme;

F. Risks associated with participating in the pre-packaged scheme;

G. Voting instructions for the pre-packaged scheme; and,

H. The material interests of the Company's management.

In satisfaction of requirements (ii) and (iii), PT MNC notified Noteholders of the application and published notices of the application at the prescribed organisations.

Finally, in satisfaction of requirement (iv), PT MNC requested all noteholders who would be bound by the proposed pre-packaged scheme to submit a voting form to approve or reject the scheme. The noteholders were given 21 calendar days to vote and 82.69% of the total Noteholders representing approximately 91.39% in principal amount of the Existing Notes, voted to approve the scheme.

PT Modernland Realty

PT Modernland Realty Tbk ("PT Modernland"), a renowned property developer incorporated in Indonesia, is another company seeking to restructure its debts via a pre-package scheme. In 2020, PT Modernland and its subsidiaries proposed restructuring US$150 million worth of notes, issued by JGC Ventures Pte Ltd that were due in 2021 and US$240 million worth of notes, issued by Modernland

8 *SK Engineering & Construction Co Ltd v Conchubar Aromatics Ltd and another appeal* [2017] 2 SLR 898 at [88].
9 Justice Carla E. Craig, *"Procedural Guidelines for pre-packaged and pre-negotiated Chapter 11 cases in the United States Bankruptcy Court for the Eastern District of New York"* <https://www.nyeb.uscourts.gov/sites/nyeb/files/general-ordes/ord_645_0.pdf> (accessed 27 September 2021) at page 9.
10 *Re DSG Asia Holdings Pte Ltd* [2021] SGHC 209 at [9].
11 *Re DSG Asia Holdings Pte Ltd* [2021] SGHC 209 at [44].
12 *Re DSG Asia Holdings Pte Ltd* [2021] SGHC 209 at [47].
13 *Re PT MNC Investama TBK* [2020] SGHC 149 at [3].
14 *Re PT MNC Investama TBK* [2020] SGHC 149 at [3].

Overseas Pte Ltd that were due in 2024. On 30 August 2021, the Singapore Court granted orders sanctioning the schemes of arrangement proposed by JGC Ventures Pte Ltd and Modernland Overseas Pte Ltd.

DSG Asia Holdings Pte Ltd

In Singapore's first reported decision on a pre-packaged scheme, the Singapore Court in *Re DSG* dismissed DSG Asia Holdings Pte Ltd's ("DSGA") application to sanction a pre-packaged scheme pursuant to s 71 IRDA on two grounds. *First*, the Court found that DSCGA did not adequately disclose all material information to the scheme creditors to enable them to make an informed decision on whether to support the pre-pack scheme pursuant to s 71(3)(a) of the IRDA. In this regard, the Court found that the purchase price (which was not disclosed), was information necessary to enable creditors to make an informed decision whether to agree to the new scheme.[15] *Second*, he Court was also not satisfied that the voting requirements in s 210(3AB) of the CA (the statutory majority requirements) would have been met had a creditors' meeting been summoned to approve the proposed scheme upon proper classification of the creditors.

As an aside, the Court in *Re DSG* also considered whether the use of a deed poll structure would be a basis to decline the prepacked scheme. Essentially, the Court in evaluating the deed poll structure would consider whether the structure has been created as a matter of '*mere artifice*' or whether it is one '*grounded in commercial necessity*'.[16] In *Re DSG*, the Court eventually decided that DSGA's use of the deed poll was less artificial than the structures in the cited UK cases, and that the deed poll structure was not in itself a basis for declining to approve DSGA's scheme.[17]

DSGA has appealed, but the High Court decision, as it stands, sets out important guidelines as to the requirements for court sanction of a pre-pack scheme.

Pre-Packaged Schemes: Comparing Singapore's approach with the US' approach

The successful cases of PT Modernland and PT MNC Investama Holdings demonstrate that Singapore is an attractive destination for foreign companies to undertake pre-packaged schemes. Meanwhile, as the case of *Re DSG* highlights, the applicant scheme company must be mindful of the statutory disclose requirements in its application. At this juncture, it is worth considering similarities and differences between Singapore's pre-packaged scheme and other jurisdictions.

USA

Singapore's law on pre-packaged schemes is heavily influenced by the US equivalent (under Chapter 11, section 1126, US Bankruptcy Code ("BC")), and there are many similarities between a Singapore pre-packaged scheme, and a US pre-packaged plan. For instance:

a. The US pre-packaged plan obviates the need to call for a creditors' meeting (under Chapter 11, section 341, BC);

b. The company must adequately disclose all material information relating to the proposed scheme to creditors;[18] and

c. The company may apply for court approval of the proposed pre-packaged plan after already obtaining the requisite creditor support.[19] Much like the Singapore regime, US law provides that a majority of the class of creditors must approve the plan. The minor difference between both regimes is that US law only requires the approval of creditors, representing no less than two-thirds in the total claim amount.[20]

Given these similarities, the US pre-packaged plan much like its Singapore equivalent, offers financially distressed companies an expedited and more cost-efficient procedure to obtain approval for their Chapter 11 plan.

However, both the US pre-packaged plan and Singapore pre-packaged scheme differ in several notable aspects.

First, Singapore's pre-packaged scheme does not expressly contain the US requirement that a creditor's vote on a pre-packaged plan may not be counted if an "*unreasonably short time*" was prescribed to accept or reject the pre-packaged plan (US Bankruptcy Rule 3018(b)). It is noteworthy that the US Bankruptcy Act does not specify what constitutes an "*unreasonably short time*". [21] Nonetheless, one can take reference from the US case of re Station Casinos [2011] WL 6813604 (at [52]), which held that a "*21-day period for voting*" was "*not … unreasonably short*" and complied with the requirements of US Bankruptcy Rule 3018(b).

While this guideline is not formally provided for in the IRDA, Ms Debbie Lim, a leading practitioner in Singaporean insolvency law, suggests that this requirement may be applicable in Singapore's pre-packaged scheme.[22] Arguably, the company may fail to prove that a requisite majority of creditors would have approved the scheme (under section 71(3)(d), IRDA), if it fails to provide creditors with sufficient time to consider whether to approve the scheme. With that said, until the Singaporean court provide further guidance on how the IRDA should be interpreted, the minimum amount of time companies must provide creditors to approve the proposed pre-packaged scheme, remains unclear.

Secondly, Singapore's pre-packaged regime (under the IRDA) does not expressly contain the US statutory provision that the vote of a creditor (whether in favour or opposition

15 *Re DSG Asia Holdings Pte Ltd* [2021] SGHC 209 at [38].
16 *Re DSG Asia Holdings Pte Ltd* [2021] SGHC 209 at [71].
17 *Re DSG Asia Holdings Pte Ltd* [2021] SGHC 209 at [72] – [73].
18 See Chapter 11, section 1126(b)(1), BC.
19 Dennis F Dunne, Dennis C O'Donnell and Nelly Almeida, *"Pre-packaged Chapter 11 in the United States: An Overview"* <https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack/edition-1/article/pre-packaged-chapter-11-in-the-united-states-overview#footnote-138-backlink> (accessed on 27 September 2021).
20 Chapter 11, section 1126(c), BC.
21 Dennis F Dunne, Dennis C O'Donnell and Nelly Almeida, *"Pre-packaged Chapter 11 in the United States: An Overview"* <https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack/edition-1/article/pre-packaged-chapter-11-in-the-united-states-overview#footnote-138-backlink> (accessed on 27 September 2021).
22 Debby Lim, "Singapore's First *"Pre-Packaged" Scheme of Arrangement* <https://ccla.smu.edu.sg/sgri/blog/2021/02/05/singapores-first-pre-packaged-scheme-arrangement> (accessed on 27 September 2021).

to the plan) may be disregarded if they were "*not solicited or procured in good faith*" (Chapter 11, section 1126(e), BC). Instances of bad faith include: (i) a creditor using *"obstructive tactics"* to extract better treatment for its claim than the treatment afforded to the claims of other creditors within the same class or (ii) a creditor voting for an ulterior purpose to secure advantages it would not otherwise be entitled to.[23]

Singapore's traditional scheme of arrangement contains a similar requirement that - the statutory majority attending the creditors' meeting must *"not coerce the minority in order to promote interests adverse to those of the class whom the statutory majority purported to represent*".[24]

Given the IRDA is silent on the applicability of the obligation of good faith on creditors voting in a pre-packaged regime, it is unclear whether this obligation exists and the scope of its application. That being said, the Court in *Re DSG* observed that there is an implied requirement that the application (for a pre-packaged scheme) be clearly made *bona fide*, and not to skirt around opposition.[25]

UK, Hong Kong & Australia

Unlike Singapore, notable common law jurisdictions including UK, Australia and Hong Kong do not provide a formal procedure for courts to approve a scheme of arrangement without the calling of a creditors meeting.

Conclusion

The introduction of pre-packaged schemes in Singapore is a welcome development in Singapore's insolvency regime. It provides companies with a quicker and more cost-efficient means to restructure their liabilities. This introduction of pre-packaged schemes thus increases Singapore's attractiveness as an international restructuring hub. Nonetheless given that Singapore's pre-packaged regime remains relatively new, several important legal aspects require further clarification.

23 Dennis F Dunne, Dennis C O'Donnell and Nelly Almeida, *"Pre-packaged Chapter 11 in the United States: An Overview"* <https://globalrestructuringreview.com/guide/the-art-of-the-pre-pack/edition-1/article/pre-packaged-chapter-11-in-the-united-states-overview#footnote-138-backlink> (accessed on 27 September 2021).
24 *The Oriental Insurance Co Ltd v Reliance National Asia Re Pte Ltd* [2008] SGCA 18 at [43(b)].
25 *Re DSG Asia Holdings Pte Ltd* [2021] SGHC 209 at [66].

IN MEMORY

Robin Dicker QC

It is with profound sadness that we announce that our great friend and colleague Robin Dicker QC recently passed away peacefully in the arms of his family.

Robin joined our set in 1986, from which time he has been a central and valued member of Chambers. His rise to the top of the profession was meteoric. Having arrived at the very pinnacle, he stayed there with seeming Olympian ease for decades, his calm and assured presence masking his enormous industry and dedication, until struck down by illness earlier this summer.

Over the last 35 years, Robin's contribution to the law he loved so much, especially restructuring and insolvency law as well as to financial law more generally, to the everyday life and standing of South Square, and to the lives and progress of others, has been truly inspirational. We are immensely grateful for all that he did.

The untimely passing of this calm, kind, carefully-spoken, dry-humoured, brilliant man has taken a great lawyer and good friend from our midst. This loss is, and will long continue to be, keenly felt by us all. We will remember him with enormous admiration, affection and gratitude.

Our thoughts and sympathies are with Lindsay and Jacob and other members of Robin's family at this sad time, and we send them our heartfelt condolences.

William Mackinlay
Chambers Director

MINING FOR RED FLAGS IN BSGR'S FAILED PROJECT IN GUINEA: PRACTICAL STEPS FOR INVESTORS TO AVOID CORRUPTION-RELATED EXPOSURE



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"A Swiss court found that Steinmetz and Cilins paid or arranged to pay millions in bribes to President Conté's wife to win the Simandou rights and that BSGR used shell companies, and later attempted to destroy evidence, to cover up the scheme."

Mining for red flags in BSGR's failed project In Guinea

Israeli diamond magnate Beny Steinmetz, founder of natural resources company Beny Steinmetz Group Resources (BSGR), has come to notoriety as details from his failed development of Simandou iron ore deposits in Guinea have emerged. Caught in the crosshairs of the alleged corruption scandal is Brazilian mining company, Vale SA, which invested heavily in a joint venture with BSGR to develop Simandou. In 2019, Vale was awarded $2 billion in an arbitration against BSGR for fraudulently inducing Vale to buy 51% of its stake in Simandou. But BSGR has thus far skirted payment to Vale, having filed for receivership in London in 2018 and for bankruptcy in the US in 2019. In January 2021, a Swiss court found Steinmetz guilty of bribing a government official to secure the Simandou deal and Steinmetz was sentenced to five years in prison. Despite Vale's paper victory, it is unlikely to see a penny of this reward for years to come (if ever).

Looking at BSGR and Vale's failed endeavor at Simandou, this article will provide practical steps – informed by explicit guidance from the enforcement authorities[1] – for investors to minimize exposure by addressing corruption risk when engaging in transactions in higher-risk regions.

BSGR's "too good to be true" deal

Guinea's Simandou mountain range is home to one of the world's largest and most valuable iron ore deposits. Guinea first granted exploration rights to Simandou's four blocks to mining company Rio Tinto in 1997. In 2008, then-Guinean President Lansana Conté revoked (by Presidential Decree) two of Rio Tinto's four licenses. Shortly thereafter, Conté awarded those licenses to BSGR—a relatively smaller mining company.

BSGR appears to have paid far under value for the rights. Some sources reported it paid nothing, while others reported that BSGR invested $160 million for the Simandou rights as well as other Guinean projects. Fully developed, the blocks were valued at over $100 billion. In April 2010, BSGR entered into a joint venture with Vale, selling just over half its stake for approximately $2.5 billion and agreeing to develop the blocks together.

In 2012 and 2013, significant corruption allegations surfaced. Among other things, a BSGR advisor Frédéric Cilins was arrested in the US and later pleaded guilty and was sentenced to two years in prison for obstructing an investigation into violations of the US Foreign Corrupt Practices Act (FCPA). By 2014, a new Guinean administration revoked the BSGR/Vale JV's exploration rights based on significant evidence that BSGR obtained the rights through corruption. The events triggered an international web of litigation and enforcement actions involving BSGR, Vale, and Rio Tinto that continues today. Most recently, a Swiss court found that Steinmetz and Cilins paid or arranged to pay millions in bribes to President Conté's wife to win the Simandou rights and that BSGR used shell companies, and later attempted to destroy evidence, to cover up the scheme.

Practical steps to identify red flags to avoid corruption-related liability

The FCPA makes it illegal for individuals and entities subject to US jurisdiction to offer, promise, pay, or authorize giving anything of value to a foreign government official (including a family member) with the intent to obtain or retain business, or for any other improper business advantage. Other countries have enacted comparable anti-corruption laws, like the Swiss anti-corruption law under which Steinmetz was convicted. Violations of the FCPA and other anti-corruption laws can result in severe penalties. Individuals may face significant fines and imprisonment, and companies may face large fines, reputational harm, the loss of export and other privileges, and the confiscation of any benefits derived from the offense, all of which could put many companies on the brink of insolvency. Companies may also be held liable for violations by third parties acting on their behalf. Finally, in the M&A context, acquiring companies can be held liable for the acts of the newly acquired entity particularly if the acquiring entity

1 *A Resource Guide to the U.S. Foreign Corrupt Practices Act, Second Edition* (July 2020); *Evaluation of Corporate Compliance Programs* (June 2020); *9-47.120 – FCPA Corporate Enforcement Policy* (March 2019).

fails to stop the misconduct from continuing.

With these laws in mind, here are some concrete actions for companies to mitigate the ill effects of corrupt transactions or business ventures.

1. **Conduct thorough pre-close anti-corruption due diligence.** For transactions involving higher-risk countries and/or stakeholders, companies should conduct more than the standard transactional due diligence. Companies should conduct comprehensive anti-corruption due diligence to identify misconduct and red flags. Depending on risk, companies should consider engaging anti-corruption counsel to guide the diligence process, which may incorporate forensic analysis of accounting records and "boots-on-the-ground" site visits and interviews with employees and third parties.

   i. **Know the region.**

      a. RED FLAG: Transactions involving higher-risk jurisdictions that are notorious for corruption.

      b. Guinea's corruption risk was high. The country has experienced a series of military coups. The country also has historically ranked low on Transparency International's Corruption Perceptions Index. [2]

      c. For transactions in higher-risk countries, particularly where government entities are involved, companies should engage anti-corruption counsel to conduct enhanced anti-corruption due diligence and take steps to independently test the information the counterparty provides about relationships (or lack thereof) with government officials.

   ii. **Know your business partners and third-party intermediaries.**

      a. RED FLAGS:

         - The involvement of third-party intermediaries (e.g., agents, advisors, consultants, brokers, distributors)–nearly 90% of FCPA enforcement actions involve third parties;
         - The use of shell companies.

      b. In this case, third-party adviser, Cilins, made a series of payments on BSGR's behalf to President Conté's wife to win the mining rights. Cilins made the payments via a shell company that was created by a former BSGR Director.

      c. Investors should gain a comprehensive understanding of the business partner's organizational structure (e.g., associated companies, holding companies, and subsidiaries), know the partner's third parties, and identify government touch points, their credentials and experience, and the business justification for third-party relationships. Due diligence may include:

         - Engaging an intelligence firm to conduct a public-records and human-source investigation to identify associated companies, significant third-party relationships, and significant assets and government players;
         - Reviewing third-party contracts and transactions to understand business justifications, with a particular focus on third-party payments near-in-time to government interactions;
         - Conducting in-person interviews and site visits with significant third parties.

   iii. **Know how the asset was obtained.**

      a. RED FLAG: The asset was obtained through transactions with the government – e.g., where permits or licenses are necessary.

      b. Here, testing the justification behind and the legality of President Conte's decree to strip Rio Tinto of its exploration rights and soon thereafter award them to relatively inexperienced BSGR may have raised a red flag.

      c. It is crucial to verify how opportunities involving government entities originated to ensure the process was transparent and legal. If an opportunity sounds too good to be true or does not add up–follow that instinct. Consider these steps:

         - Engage local counsel to provide an opinion on the legality of the deal under local law;
         - Require documents related to negotiations, bidding process, payment records, and governmental decrees.

2. **Define minimum contractual provisions and operational requirements.** Your ability to obtain a counterpart's agreement on deal provisions may vary. Strive to incorporate the following contractual provisions and operational requirements:

   i. Audit rights, including access to compliance audits, investigations, personnel, and financial records;

   ii. Representations, warranties, covenants, or certifications related to anti-corruption compliance, and related indemnification provisions;

   iii. Involvement and oversight in third-party screening, approval, onboarding, and management;

   iv. Designate a primary governing body (e.g., Board of Directors) with appropriate number of seats or observer rights (particularly if, like Vale, you own more than 50%) to ensure adequate control over partnership spend;

   v. Implement robust anti-corruption compliance policies and procedures.

3. **Conduct post-transaction integration, diligence, and remediation.** Following an acquisition, an investor

2 See https://www.transparency.org/en/cpi/2020/index/nzl. In 2008, Guinea ranked 173 out of 180 countries, with a score of 1.6 out of 100.

should move quickly to implement a robust anti-corruption compliance programme, and even minority investors should use good faith efforts to do so. Promptly identifying and remediating corruption issues involving newly acquired partner entities will mitigate successor liability and earn credibility with enforcement authorities (even a presumption of a declination in the US, should your company make the decision to voluntarily self-disclose the wrongdoing). Integration should include:

i. A process for tracking and remediating misconduct or risks areas identified during pre-acquisition diligence;

ii. Prompt rollout of robust anti-corruption policies and procedures, and associated training;

iii. To the extent pre-acquisition due diligence was limited (e.g., if due to antitrust restrictions):

  a. Promptly conduct any necessary post-acquisition corruption due diligence;

  b. Examine existing third-party relationships and act to (1) dissolve those that should end, and (2) revise contracts as necessary to include appropriate provisions (e.g., anti-corruption provisions, audit rights).

iv. To the extent you are unable to obtain agreement on the operational requirements noted above, exercise audit rights as soon as practicable to promptly identify and remediate potential corruption issues.

Conclusion

We didn't discuss all red flags of corruption, nor the due diligence steps Vale did or did not take prior to transacting with BSGR. Documents from the arbitration show Vale commissioned external investigation and accounting firms to help inform their process. The arbitration award against BSGR found the despite Vale's due diligence efforts, BSGR made multiple misrepresentations and omissions related to the third parties and shell company that were ultimately involved in the corrupt scheme[3]. Regardless of the ultimate success of Vale's due diligence, it appears at this stage that it was at least enough to keep Vale out of the crosshairs of a DOJ enforcement action, which illustrates how robust anti-corruption diligence can earn companies credit with enforcement authorities (even if it still cannot win them back the money lost by investing in a corrupt scheme).

3 See https://jusmundi.com/en/document/decision/en-vale-s-a-v-bsg-resources-limited-award-thursday-4th-april-2019#decision_5198.

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CONSIDERATIONS IN RELATION TO COMMERCIAL LANDLORDS (A JERSEY PERSPECTIVE)

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"Jersey structures are often used to acquire and hold interests in UK real estate, including shopping centres. Often 'part and parcel' of such acquisitions is third-party bank financing, with such loans requiring servicing and requisite financial covenants to be met."

The UK government attempted to ease the financial strain of the COVID-19 pandemic with, among other things, rent 'holidays' for tenants and the opportunities for loans for certain businesses. While some businesses were able to avail themselves of such measures, not all were eligible or able to utilise such schemes. It seems that commercial landlords have been one of the sectors that have been hit hard, especially with some commercial tenants not surviving the downturn.

Jersey structures are often used to acquire and hold interests in UK real estate, including shopping centres. Often 'part and parcel' of such acquisitions is third-party bank financing, with such loans requiring servicing and requisite financial covenants to be met.

Amid this backdrop, the Jersey solvency test is established by the 'cash flow' test, being *'the inability of a debtor to pay their debts as they fall due'*. Understandably, many facility agreements look to both cash flow and balance sheet solvency in relation to triggering a default. However, the cash flow test is paramount in relation to the potential trigger of any Jersey insolvency procedure.

Understandably, directors of Jersey companies have to continuously keep in mind the provisions of their company's finance documents, with loan to value covenants in particular causing concerns during the uncertainty of the pandemic. However, with income levels being at an all-time low due to rent payments being minimal and the company's debts still payable (including capital and/or interest payments due each quarter along with all other outgoings), if the outlook is that the company may not be able to pay its debts as they fall due, directors have more fundamental considerations than just the loan documents.

When the directors know or should know that the company is or is likely to become insolvent, the directors of a Jersey company have a duty to act in the best interests of the company's creditors (rather than the shareholders). Prior to an insolvency event (being a declaration of *en désastre* or creditors' winding up in Jersey), if a director of a company knew that there was no reasonable prospect that the company would avoid an insolvency event or was reckless as to such avoidance and the directors of that company continue trading, there could be personal liability attached to such 'wrongful trading'. A director has a defence to such action if they take reasonable steps with a view to minimising the potential loss to the company's creditors. Unlike England and Wales, such wrongful trading measures have remained in place throughout the COVID-19 pandemic, as the Jersey defence is broader (Jersey company directors are not required to take "every step" to minimise the loss to creditors). In practical terms, in such circumstances Jersey directors should be demonstrating prudent business management, including (without limitation), sensible cashflow models, being proactive and having open lines of communication with creditors, considerations as to how to improve cashflow, taking relevant professional advice (for instance, accountants, lawyers and/or other related advisors) and ensuring frequent meetings of the board of directors to monitor the situation. It goes without saying that all of such steps should be documented to ensure they can be evidenced.

To add some colour in relation to the solvency of Jersey property unit trusts (JPUT) (being a prevalent holding vehicle for UK real estate), such entities are not subject to the same rules as companies in relation to insolvency (including wrongful trading). A Jersey trust is not a legal person but acts through its trustee(s), so a trust cannot *itself* as a matter of law be 'insolvent', more that the trust will be considered to be 'insolvent' if the trustee (as trustee of the trust) is unable to pay the debts of the trust as they fall due (hereon this will be referenced as a trust's insolvency).

Where a trust is *solvent*, a trustee owes its duties to, and must exercise its powers in the interests of, the beneficiaries of that trust (in the case of a JPUT, its unitholders). However, insolvency brings about a shift towards the interests of the creditors of the trust as a whole and the trustees of a trust that becomes insolvent should thereafter exercise their powers in the interests of the trust's creditors as a whole. What limited Jersey case law there is, suggests that when faced with an insolvent trust the Royal Court of Jersey would generally expect an interested party (including the creditor(s) and/or the trustee(s)) to seek directions as to how the assets of the trust should be distributed.

During the past two years, there has not been a significant increase in insolvencies or enforcements in Jersey, rather creditors appear to have been willing to take a flexible and pragmatic in relation to cash flow issues. What we have seen is a number of restructurings and facility amendment involving payment deferrals, loan term extension, grace period extension and waiving breaches of financial covenants. In terms of Jersey solvency, where payment deferrals (and breaches of covenants and waiving any relevant defaults) have been agreed, Jersey borrowers should be able to continue to meet the cash flow test, however these entities should still be mindful of the future and being able to pay their debts going forward.

With such a backdrop, it is not surprising that there has been little appetite from creditors to enforce security or instigate insolvency procedures, as this could be counter-productive; with valuations falling, a depreciating asset is not an attractive prospect for a lender to obtain full recovery of its loan.

With most of UK lockdown restrictions now lifted, valuations stabilising, footfall increasing and the UK moratorium on evictions and winding-up orders (albeit implemented with temporary amendments) being lifted, if the lenders continue to support their borrower customers, there is hope that the market can be cautiously optimistic that the commercial landlords may be able to get back onto an even keel. There are still some 'wrinkles', as the ban on the use of rent arrear to place relevant tenants into insolvency proceedings does remain in place until at least next year, and the lower property valuations could pose continuing a problem into the future.

DOES THE NEW GREEK INSOLVENCY LAW 4738/2020 ECHO THE DIRECTIVE (EU) 2019/1023?

Maria Kilteni

Professor of University of West Attica, Greece

"The European Union legislation for the first time introduces officially the idea of the existence and function of mechanisms of "timely warning", before the emergence of the financial difficulties"

This article refers to the detection of the general characteristics, common issues and differences between the new Greek Law 4738/2020 and the Directive (EU) 2019/1023 and consists of three Parts. In the First Part there is a Description and Analysis of the basic parts of the EU Directive. The Second Part contains a short Presentation of the main parts of the Greek Law. In the Third Part a comparison of the two Statutes takes place, followed by the conclusion.

The Directive

First of all, the Directive promotes the scheme of debtor-in-possession and therefore the most efficient control of the assets of the enterprise by its owner, without excluding the possibility of the practitioner – in – possession scheme.

The European legislator for the first time introduces officially the idea of the existence and function of mechanisms of timely warning, before the emergence of the financial difficulties. In other words, the debtor has a free and immediate access to one or more transparent tools for a timely warning of the signs of a premature incapacity of non payment.

What is more, the European legislator recognizes as a safety valve the 'best-interest-of-creditors test', the organization of creditors into groups, the provision of obligatory certain majorities for the acceptance and ratification of the restructuring plan and the avoidance of the scenario of abuse of the above majorities by the minority of the creditors.

The Law 4738/2020

In reference to the structure of Greek Law, this article is limited to the First Book, as it refers to the preventive restructuring frameworks of the debtors entrepreneurs whereas the Second Book deals with Insolvency (liquidation and sale). To be more precise, the First Book refers to the Prevention of Insolvency and consists of two Parts. The First Part has the title "Warning of Insolvency - Warning on time" and the Second Part has the name "Pre-insolvency Proceedings". The Second Part contains two Capitals, the First Capital under the title "Out of Court Mechanism of Settlement of Debts" and the Second Capital with the title "Pre-insolvency Procedure of Business Rescue".

In the First Part of the First Book, the Greek legislator refers to the targets and tools of Warning of Insolvency and the fact of warning on time. Furthermore, in article 2, the legislator presents the "Electronic Mechanism of Warning" and how it works. In the First Capital of the Second Part of the First Book, the "Out of Court Mechanism of Settlement of Debts" is regulated, where the application is filled either by the debtor or by the creditors.

In the Second Capital of the Second Part of the First Book, the legislator refers to the official "Pre-Insolvency Procedure of Business Rescue". In this Procedure the debtor has to apply for two basic reasons, namely: i)simple possibility of insolvency and ii) already present or almost certain to happen situation of not being able to pay all the debts.

Afterwards, the rescue agreement can be ratified with the consent of the debtor and creditors. Regarding the creditors' consent, a double majority is essential, namely majority of the creditors that represent more than 50% of the claims with a special privilege and majority of the creditors that represent more than 50% of the other claims and are harmed by the agreement. As to the consent of the debtor, even when it is absent, the agreement can be validated if certain preconditions are satisfied, namely: (a) if the debtor is at the stage of cessation of payments or (b) if the debtor is a société anonyme or a limited liability company, if the total of its capital is less than 1/10 of the share capital, or (c) if the debtor has not submitted financial statements at least within two successive accounting periods or (d) if the debtor is a limited liability company and there is loss of half of the capital of the company.

However, if one of the above categories of creditors do not consent, the court can validate the agreement under certain preconditions, namely: (i) creditors that represent more than 60% of the total of the claims of the debtor vote for the agreement and also creditors that represent more than 50% of the claims with special privilege, (ii) creditors that do no consent and are harmed by the agreement receive more than those with smaller claims and follow in the order of payment, (iii) none category of harmed creditors cannot receive through the agreement of business rescue more than the value of its claim, (iv) the agreement is considered to bring reasonable perspective of the viability of the enterprise, in the way that the enterprise is restructured according to the rescue agreement, (v) there is no violation of the principle of no deterioration of the position of the creditors, (vi) the agreement is not the result of fraud and do not violate the provisions of compulsory law and law of competition, (v) the principle of equality between the creditors of the same category of claim is not infringed and (vi) the debtor consents to it.

Comparison

i. Similarities

Both Statutes give the initiative to the debtor to start the procedure, in court or out of court. Even when a bilateral or multilateral agreement is promoted, the debtor has to initiate the process, because the whole spirit of the two Statutes is to prevent unsatisfying economic situations and there is no other person to know and assess the facts better than the debtor himself.

What is more, another common element is the not equal recognition of the two opposite objectives in an insolvency proceeding, namely the conservation and rescue of the business or company and the full satisfaction and protection of the interests of the creditors. And that is because both legislators do not give equal force to these goals, but depend the conservation and rescue of the business on the non deterioration of the position of the creditors.

However, the above observation does not cancel two basic novelties on European and national level. The first is that the debtor has an immediate access in one or more tools or mechanisms of timely warning and judicial or non judicial, preventive restructuring frameworks, where the first choice does not exclude the next one. The second innovation is that both legislators recognize the existence of an earlier stage of financial difficulties, before the official pre-insolvency stage, in which measures can be taken to prevent the deterioration of the financial situation of the company.

Two other common elements that share the two texts are the obligatory process of voting within groups of creditors for approval and the cross-class cram down as a method for a successful process of voting. Furthermore, both of them forbid the activation of *ipso facto* clauses, due to the stay of enforcement measures.

ii. Differences

First of all, the Directive recognizes the necessity of giving a second chance to the debtor, but the L. 4738/2020 in the end fails to give it despite his title. That is because the deadlines are very short, the necessary (double) majorities are too many and too big in order to validate the agreement and there is always the principle of "non deterioration of the position of the creditors" to be applied, in almost every step pf the process.

In the same way the "forum shopping" is reinforced in Greece, although the Directive wants to reduce it.

What is more, in the Greek text there is no satisfying recognition and protection of financing like in the Directive. Moreover, although in the Directive the representatives of the employees can fill in the application, there is no equal or at least significant participation of them in the two Greek Pre-Insolvency Schemes.

Regarding the content of the Restructuring Plan, more extensive and lengthy seems to be the Greek solution in comparison with that of the Directive. However, the length of the content of the Out of Court Mechanism of Settlement of Debts is the same with that of the Directive.

Conclusion: Echo or not?

Taking into account all the above observations, the Greek Law seems to echo in basic terms the Directive. It is considered to be a sort of "macro-insolvency law" that aims at dealing with massive insolvencies with many "systemic" creditors involved and harmed. Nevertheless, this harmonization of the new Greek Insolvency Legislation is considered to be superficial and not so successful: strict majorities, big percentages of claims that the creditors have to represent, full absence of the representative of employees, no flexibility in both Pre-Insolvency Proceedings and too much dependence on platforms.

So, although the Greek legislator wanted theoretically to protect in this "macro-economic perspective" the debtor, in the end leaves him fully unprotected. What is more, the New Code is just a repetition of the previous "quasi" rescue regime with a huge disadvantage, namely the absence of "reorganization plan" after the declaration of insolvency.

YOUNG MEMBERS' SPOTLIGHT

Oksana Tyusina

Baker & McKenzie,
Russia

"It is very important to encourage legal education among current and prospective students. I admire people and organizations that support educational initiatives"

What made you decide to embark on a career in restructuring and insolvency?

There were two main reasons. Firstly, restructuring and insolvency have always been and always will be "on-trend" and in demand. The economy may evolve, the world order may change, but there will always be companies facing financial distress and insolvency. The second – and even more important – reason is variety. Restructuring and insolvency cases are usually complex and multi-faceted. They allow you to dig into different areas of law, ranging from contract law to financial or land law, and to deal with different stakeholders in multiple industry sectors.

If you hadn't been a lawyer, what would you have been, and why?

I would have been a chef, as I am really into cooking! To me, cookery is a very creative process and, more importantly, I love the collective joy people feel when they gather together for dinner or even simply a cup of coffee with dessert.

Do you think that practising lawyers should get involved in educating or mentoring law students?

In my opinion, it is very important to encourage legal education among current and prospective students. I admire people and organizations that support educational initiatives and I'm proud to know so many brilliant practitioners who conduct practice-oriented courses for students, provide scholarships and mentor teams of students with an interest in mooting.

From my perspective, being a lawyer is not only about working and constant self-development, but also about improving our wider social environment, and helping young lawyers to grow and develop. I taught in my university (HSE Moscow) for several years and was a coach for several mooting teams. It was a great experience all-round, and I will continue to participate in similar activities in future.

I always encourage practising lawyers to get involved in the professional development of law students. From a practitioner's perspective, doing so helps you to better understand the younger generations who will, soon enough, become your colleagues, as well as enabling you to take an active role in enhancing the quality of the education on offer and – hopefully – to inspire students. There are many opportunities for insolvency lawyers, for instance, becoming a coach or advisor for students participating in the Ian Fletcher International Insolvency Law Moot sponsored by INSOL International and International Insolvency Institute.

In your opinion, what woman in a position of power – whether a public figure or celebrity – acts as an appropriate role model for young women? What is it they do that makes the difference?

I strongly believe that everyone has an inner core and something special to contribute to the world. It increasingly seems that, in the modern world, the idea of being a successful woman means simultaneously being an outstanding and successful professional, effortlessly managing family commitments, combining the best human qualities and conforming to unattainable standards of beauty. However, it is important for young women not to allow themselves to feel overwhelmed by these kinds of pressures and to appreciate that no-one can meet all of these unrealistic expectations. In my view, every woman is unique and has the capacity and inner confidence to achieve all that she aspires towards.

You won't be surprised to hear that I am struggling to provide any specific real-life example of the so-called role model!

What is your favourite film, and why?

I do not have a favourite film, but the one I have watched the most is definitely Harry Potter! It takes me back to my childhood and always manages to lift my spirits.

You are tasked with putting together a three-day music festival in Moscow. What artists or bands would be your first choice to headline each night, and why?

I would choose crowd-pleasers! In other words, three headliners that would appeal to most music-lovers, so I would probably go for Tyler the Creator, Rihanna and Radiohead.

I am planning a night out in Moscow. Recommend a bar, a restaurant and a nightclub to me.

There are plenty of places worth visiting in Moscow. I would recommend Mandy's Caffe for lunch, Delicatessen Moscow for a drink and Belka to continue the party afterwards.

Ignoring any global travel restrictions in place as a result of the COVID-19 pandemic, if you could choose one place in the world to visit on vacation tomorrow, where would it be?

It would be South Africa, which, in my opinion, is one of the most unique and distinctive places in the world.

Across the world, there has been an increase in political activism and the promotion of global initiatives over the past ten-to-fifteen years. In your opinion, what are the principal drivers for this development? Is it a "good thing"?

The main drivers are the availability of information and the high speed with which it can be disseminated around the world. People can easily learn about alternative views to their own, observe different ways of living and participate in global discussions by sharing their own thoughts and insights. Another reason may be negative tendencies to impose constraints on civil society. Any prohibitions and restrictions invariably provoke civil activists to stand against them, as well as attracting new recruits to their causes and even inventing new forms of protest.

Activism is not only a "good thing", but also, in my view, a necessary one – as long as it stays within the law, of course. In my view, all changes that are brought about in principles and people's attitudes should start from within civil society through inspiring people with positive messages and changing their mindsets, rather than by coercive imposition. In this sense, I would say that activism and global initiatives are critical, if we are to achieve the kinds of positive change that will benefit us all.

What, in your opinion, is the single biggest difficulty facing lawyers and other advisors in the field of restructuring and insolvency from a global perspective and how can it be overcome?

From a Russian perspective, the biggest difficulty is the lack of a coordinated approach to cross-border insolvency and restructuring. This is especially noticeable and apparent when it comes to the insolvency of a cross-border group of companies. I believe that the only ways in which it can be overcome are through increased cooperation between countries and the continuation of the existing trends towards harmonization of national insolvency systems.

If you would like to nominate a young colleague for this feature, please send their CV and a short paragraph describing why they should be chosen to **jelena.wenlock@insol.org**

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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

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)

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4TH QUARTER 2021

ALTERNATIVE DISPUTE RESOLUTION SUPPLEMENT

INSOL WORLD: The Quarterly Journal of INSOL International

In this issue...

- Resolving Cross-Border Insolvency Disputes By Arbitration
- Mediation In The Context Of Cross-Border Insolvency Disputes
- The Use Of Mediation To Improve Global Restructuring Outcomes In A Post-Pandemic World

INTRODUCTION

As part of INSOL's Task Force 2021, we identified the need for a space for the development of ADR to assist in both cross-border restructuring and in insolvency litigation. INSOL has established an ADR working group, chaired by Paul Heath QC, Bankside Chambers, New Zealand (and also an Associate Member of South Square, UK), and Felicity Toube QC, South Square, UK. The working group includes Shinichiro Abe, KILO, Japan; Debra Grassgreen, Pachulski Stang Ziehl & Jones, USA; Hon. Justice Geoffrey Kiryabwire, Court of Appeal, Uganda; Prof. Stephan Madaus, Martin Luther University Halle-Wittenberg, Germany; Federica Pietrogrande, Gordon Brothers, UK, and Felicia TAN May Lian, TSMP Law, Singapore.

The inaugural ADR Colloquium will take place following the main programme at INSOL London on Wednesday 29 June 2022.

The focus of the ADR Colloquium will be on identifying the areas in which ADR should be used, and the means by which it can be used in cross-border insolvency and restructuring. The ADR Colloquium will also advocate for the deployment of ADR across the field.

We hope the following articles will be of interest. We encourage you to engage with the ADR Colloquium. For further information please contact **Penny.Robertson@insol.org**

IN THIS ISSUE:

RESOLVING CROSS-BORDER INSOLVENCY DISPUTES BY ARBITRATION[1]


Hon. Paul Heath QC and Dr Anna Kirk
Bankside Chambers,
New Zealand and Singapore

"...the difficulties of establishing international principles of law or the content of *lex mercatoria* has been raised as a cause for concern."

During a plenary "Hot Topics" session at the 2017 INSOL Congress in Sydney, Paul Heath offered some ideas for dispute resolution in cross-border insolvency. He did so with specific reference to interviews, with Justice Newbould and Judge Gross, that had been shown earlier in the Congress about their respective experiences with the *Nortel* joint trials. A potential problem in that case was the risk of conflicting decisions of the Ontario and Delaware courts. A similar issue has arisen recently in New Zealand[2] and Australia[3], where independent decisions have been given in the *Halifax* litigation by Justice Venning in New Zealand and Justice Markovic in Australia. *Halifax* differs from the *Nortel* case in that both the New Zealand and Australian decisions were appealed. A joint hearing of the Court of Appeal of New Zealand and the Full Court of the Federal Court of Australia was held last month to enable the two appeals to be heard together. Notwithstanding the efforts that have been undertaken to ensure consistency of approach, risks of differing appellate decisions remain. At the time that this article was submitted for publication, judgments remained reserved.

The parties in *Nortel* had been urged to mediate or arbitrate their dispute to avoid the uncertainty surrounding possible conflicting decisions. After mediation failed, the parties did not proceed to arbitration. At the Sydney Congress, Paul Heath floated the possibility of an arbitration agreement into which the insolvency representatives in each jurisdiction could enter empowering the arbitral tribunal to make a decision based on "generally accepted principles of cross-border insolvency" rather than adopting a particular governing law. He compared that with the way in which arbitrations had previously been used for the resolution of disputes on a *lex mercatoria* basis. The purpose of this article is to develop that idea by reference to further examples.[4]

Article 28 of the UNCITRAL Model Law on International Commercial Arbitration has been adopted in a number of jurisdictions.[5] Article 28(1) states that arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties and article 28(4) provides that the tribunal shall take into account the usages of the trade applicable to the transaction. The phrase 'rules of law' was deliberately chosen by the drafters to allow parties to specify a non-national set of rules to determine their dispute.[6] Examples of such non-national rules include the UNIDROIT[7] Principles of International Commercial Contracts, the Convention for the International Sale of Goods or a set of religious laws. The reference to trade usage (being well known and accepted business practices) requires that any ambiguity be resolved in favour of consideration of trade usages. In an international context, this is important as it helps to ensure the dispute is resolved in a manner that is consistent with general commercial expectations and practices.[8]

Similarly, the concept of an "internationalised" contract is well recognised in international arbitration.[9] These contracts tend to specify "international law" or "general principles of law" as the governing law and often arise where one party is connected to the State.

For illustrative purposes, we posit an example of cross-border insolvency proceedings that have been commenced in both New York and London. At issue is the right to a fund situated in a third country. We suggest that the insolvency representatives might consider resolving their dispute by adopting a procedure along the following lines:

A. They agree that the dispute should be referred to arbitration on terms requiring the Tribunal to determine the dispute "in accordance with the principles of cross-border insolvency common to both United States law and English law", or, "in the absence of such common

1 By Hon Paul Heath QC and Dr Anna Kirk, Bankside Chambers, Auckland, New Zealand and Singapore. Paul Heath is Co Chair of the INSOL International ADR Colloquium and an Associate at South Square. Anna Kirk is the New Zealand member of the International Chamber of Commerce Court of Arbitration. They are the joint authors of a Special Report published by INSOL International in 2020, entitled Arbitration and Insolvency Disputes: A Question of Arbitrability.
2 *Re Halifax New Zealand Ltd (in liq)* [2021] NZHC 1113.
3 *Kelly (Liquidator), in the matter of Halifax Investment Services Pty Ltd (in liquidation) v Loo* [2021] FCA 531.
4 Generally, see Redfern and Hunter on International Arbitration (Oxford University Press, 6th ed, 2015) at paras 3.192–3.197.
5 Adopted, for example, by Arbitration Act 1996 (NZ), Schedule 1, art 28.
6 H.M. Holtzmann and J.E. Neuhaus *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* (Kluwer Law, 1989), 766-768.
7 International Institute for the Unification of Private Law. The Principles were first published in 1994 and have been updated a number of times since.
8 G Born *International Commercial Arbitration* (Kluwer Law International, 3rd ed, 2021), 2985.
9 See, for example, *Texaco v Libya*, Award in the Ad Hoc Case of 19 January 1977, IV Y.B. Comm. Arb. 177, 183 (1979).

principles by such general principles of cross-border insolvency law that the arbitral tribunal deems appropriate based on those that have been applied by national and international tribunals". The parties may, if they wish, add that their agreed "governing law" provision could be subject to any manifest departure from public policy in either jurisdiction.[10]

B. A panel of three arbitrators could be appointed. The insolvency representative in New York would be likely to appoint someone from that jurisdiction, and similarly with regard to the English representative. The two arbitrators could be empowered to appoint a third, as presiding arbitrator. That would provide a panel of arbitrators experienced in the application and resolution of cross-border insolvency disputes that could hear and determine the dispute.

We have suggested (in para (a) above) a clause that follows the general thrust of those used in Channel *Tunnel Group Ltd v Balfour Beatty Construction Ltd,11 and Deutsche Schachtbau-und Tiefbohrgesellschaft mb.H v Ras Al Khaimah National Oil Co Ltd*.[12]

In *Channel Tunnel*, the House of Lords considered whether there was jurisdiction to grant a stay pending a foreign arbitration which included the following clause:

68. The construction, validity and performance of the contract shall in all respects *be governed by and interpreted in accordance with the principles common to both English law and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals*. Subject in all cases, with respect to the works to be respectively performed in the French and in the English part of the cite, to the respective French or English public policy (ordre public) provisions.

(Emphasis added)

Delivering the principal judgment in the Court of Appeal in *Deutsche Schachtbau*, Sir John Donaldson MR set out three questions that the Court had to answer when confronted with a clause that purported to provide that the rights of the parties should be governed by some system of "law" which was not that of any particular State, or a "serious modification of such a law".[13] The questions are:[14]

(a) Did the parties intend to create legally enforceable rights and obligations?

(b) Is the resulting agreement sufficiently certain to constitute a legally enforceable contract?

(c) Would it be contrary to public policy to enforce the award, using the coercive powers of the State?

The arbitration agreement, in *Deutsche Schachtbau* fell to be construed by the application of English rules for the resolution of conflict of laws as the proceedings were in the English courts. The dispute was determined under art 13(3) of the International Chamber of Commerce Rules then in force. That article provided:[15]

> The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate.

It was held that the parties (by choosing to arbitrate under the ICC Rules) had left the proper law to be decided by the arbitrators and had not, in terms, confined the choice to national systems of law. On that basis, Sir John Donaldson could see no basis for concluding that the arbitrators' choice of proper law, "a common denominator of principles underlying the laws of the various nations governing contractual relations," was outside the scope of the choice which the parties left to the arbitrators.16 Woolf and Russell LJJ agreed with the judgment given by the Master of the Rolls. The award was enforceable.

Although relatively rare, it is evident from these and other cases that the selection of a non-national system of law is permissible and will be upheld by an arbitral tribunal.[17] In one ICC case, the Tribunal stated:[18]

> Application of international standards offer many advantages. They apply uniformly and are not dependent on the particularities of any particular national law. They take due account of the needs of international intercourse and permit cross-fertilization between systems that may be unduly wedded to conceptual distinctions and those that look for a pragmatic and fair resolution in the individual case.

However, the difficulties of establishing international principles of law or the content of *lex mercatoria* has been raised as a cause for concern.

The question whether arbitration can proceed on this basis in cross-border insolvency disputes has yet to be tested.[19] The tantalising prospect of the use of an international panel of arbitrators chosen by the parties to determine international insolvency disputes in a manner that will result in an enforceable award under the New York Convention is something that will be explored in the work to be undertaken by INSOL International's ADR Colloquium.

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10 This would preserve the public policy exception set out in art 6 of the UNCITRAL Model Law on Cross-border Insolvency.
11 Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd [1993] 1 All ER 664 (HL).
12 Deutsche Schachtbau-und Tiefbohrgesellschaft mb.H v Ras Al Khaimah National Oil Co Ltd [1987] 2 All ER 769 (CA).
13 Ibid, at 779. The Master of the Rolls synthesised apparently conflicting decisions on this issue before formulating the questions and providing answers. In particular, reference was made to *Orion Cia Espanola de Segurous v Bellfort Maatchappij Aljemene Verzekgringeen* [1962] 2 Lloyds Rep 257 (Megaw J) at 264 and *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyds Rep 357 (CA) at 362.
14 Ibid, at 779.
15 Ibid, at 775.
16 Ibid, at 779.
17 See G Born *International Commercial Arbitration* (Kluwer Law International, 3rd ed, 2021), 2974 for a list of ICC cases where *lex mercatoria* has been selected as the governing law.
18 Award in ICC Case NO.8385 in J Arnaldez et al (eds) *Collection of ICC Arbitration Awards 1996-2000* 474, 479 (2003).
19 Arguments in favour of international arbitration in an insolvency context can be found in A Gropper "The Arbitration of Cross-Border Insolvencies" (2012) 86 Am. Bankr. L.J. 201.

MEDIATION IN THE CONTEXT OF CROSS-BORDER INSOLVENCY DISPUTES

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"Historically, there have been tensions in identifying applicable law and the circumstances in which the laws of one State will prevail over those of another."

As part of the Singapore Convention Week from 6-10 September 2021, INSOL International organised an event entitled "The UNCITRAL Cross-border Model Law and Mediation: Panaceas for International Restructurings?" Organised by the Singapore Ministry of Law, the Singapore Convention Week brought together top practitioners and headline makers in the international dispute resolution scene. Across the week-long series of activities, legal practitioners, business executives and government officials from around the world had the opportunity to hear from thought leaders in the field of dispute resolution, and glean practical insights on the latest innovations and trends in alternative dispute resolution to serve the fast evolving needs of businesses.

Introduction

The focus of this paper is the use of mediation as a tool to assist in the resolution of cross-border insolvency disputes. In particular, reference will be made to the use of legislation enacted by various States that has adopted the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency (the Model Law).

Problems have always arisen when a debtor has assets or liabilities in two or more different States, particularly if it has been placed in a collective insolvency regime in at least one of them. In such circumstances, there are strong policy reasons to co-ordinate the efficient realisation of assets for the benefit of all creditors, wherever they may be.

Historically, there have been tensions in identifying applicable law and the circumstances in which the laws of one State will prevail over those of another. Similar problems arose in identifying the most appropriate forum to deal with cross-border insolvency issues. While procedures were available to assist in the resolution of such disputes, they were relatively blunt instruments. In the old British Empire days, the order in aid procedure was developed[1]. On a broader basis, the doctrine of comity gained traction.[2] The underlying policy rationale for the procedures was the "equitable, orderly, and systematic" distribution of assets of a debtor in different States. The "haphazard, erratic or piecemeal" realisation and distribution of assets was to be discouraged.[3]

Over time, attempts to co-ordinate the realisation of assets and distributions to creditors in different States became more sophisticated. A series of principles were developed and statutory provisions introduced by various States with an intention to simplify the process and to promote predictability of outcome.[4] Some States began to move from a "territorialist" approach to one that has been described as "modified universalism". It is now generally accepted that there is a common law principle of "modified universalism"; at least one which provides a common law power to assist foreign winding up proceedings so far as a domestic court properly can. Recently, the Privy Council has confirmed the principle to be subject to two exceptions: first, it is subject to "local law and local public policy"; second, the court providing assistance "can only ever act within the limits of its own statutory and common law powers".[5]

In the early 1990s, attempts were made to encourage court to court communications to improve the ability to co-ordinate proceedings. The first recorded example of Judges in different States communicating with each other for that purpose seems to be the insolvency of Maxwell Group Ltd. Mr Justice Hoffmann, in London and Judge Tina Broznan, in New York, were able, with the assistance of counsel, to put together a form of protocol under which the courts in New York and London exercised specific jurisdiction. Those initial, yet tentative, steps revealed a need for something more formal to be put in place to deal with what were then large scale insolvencies arising (particularly) out of the 1987 sharemarket crashes and the enhanced ability to transfer money across-borders instantaneously through digital means.

This led to work being undertaken by UNCITRAL. Using its well-tested procedures for achieving consensus on international instruments where different States

1 For example, see Callender Sykes & Co v Colonial Secretary of Lagos [1891] AC 460 (PC).
2 For example, see Hilton v Guyot 59 US 113 (1895) and Cunard Steamship Co Ltd v Salen Reefer Services AB 773 F 2d 452 (1985) (2nd Cir).
3 Cunard Steamship Co Ltd v Salen Reefer Services AB 773 F 2d 452 (1985) (2nd Cir), at 458.
4 For example, s 304 of the US Bankruptcy Code, before adoption of Part 15 of that enactment.
5 Singularis Holdings Ltd v PriceWaterhouseCoopers [2014] UKPC 36 at paras 15–19 (Lord Sumption). See, to similar effect, Re HIH Casualty and general Insurance Ltd [2008] 1 WLR 852 (in which Lord Phillips, Lord Hoffmann and Lord Walker accepted the principle) and Rubin v Eurofinance SA [2013] 1 AC 236 (UKSC), in which it was accepted by Lord Collins, Lord Walker and Lord Sumption.

were faced with common legal problems. That led to promulgation of the Model Law.

The Model Law

UNCITRAL's project was initiated in 1995. The goal was to develop a legal instrument relating to cross-border insolvency. In the prelude to the first meeting of the Working Group on Insolvency Law (Working Group V), a series of judicial colloquia were held, the first in 1994. The Model Law emerged from that process. It was adopted by the Commission on 30 May 1997. As a Model Law (by contrast with a convention), it was open to States that wished to incorporate the model to adopt it completely, or to modify its terms or by deleting some provisions.

The Model Law is built on four pillars. They are:

A. **Access**: The right for a foreign insolvency representative to access the courts of a State that provides assistance under its provisions.[6]

B. **Recognition**: Recognition of the foreign proceeding in the State providing assistance.[7]

C. **Relief**: The ability of a court in the State providing assistance to grant relief to the foreign insolvency representative to protect assets of the insolvent entity in that jurisdiction and to facilitate the orderly realisation of those assets and distributions to creditors.[8]

D. **Co-operation**: An express obligation on all insolvency representatives and courts in different States to co-operate with each other to achieve the goals of the Model Law.[9]

This paper concentrates on those parts of the Model Law that mandate co-operation between the courts of the State that is being asked to provide assistance and foreign courts and representatives. Those obligations are set out in arts 25–27.

Article 25 includes the possibility of direct communication between a court of one State and the court of another. Articles 25 and 26 make it clear that co-operation is to be "the maximum extent possible". Article 27 identifies five (non-exhaustive) means by which co-operation may be implemented; namely,

A. The appointment of a person or body to act at the direction of the court;

B. Communication of information by any means considered appropriate by the court;

C. Co-ordination of the administration and supervision of the debtor's assets and affairs;

D. Approval or implementation by courts of agreements concerning the co-ordination of proceedings; and

E. Co-ordination of concurrent proceedings regarding the same debtor.

The UNCITRAL Practice Guide on Cross-border Insolvency Co-operation published in 2010, explains the purpose of art 27(a) as follows:[10]

> 2. Such a person or body may be appointed by a court to facilitate co-ordination of insolvency proceedings taking place in different jurisdictions concerning the same debtor. The person may have a variety of possible functions, including acting as a go-between for the courts involved, especially where issues of language are present; developing an insolvency agreement; and promoting consensual resolution of issues between parties. Where the court appoints such a person, typically the court order will indicate the terms of the appointment and the powers of the appointee. The person may be required to report to the court or courts involved in the proceedings on a regular basis, as well as to the parties.

How can mediation (in the broadest sense of the term) be used in a manner that will promote the goals of co-operation and co-ordination to which the Model Law refers? We consider that question in conjunction with the availability in States that have ratified the United Nations Convention on International Settlement Agreements Resulting from Mediation (the Singapore Convention), approved by the General Assembly of the United Nations on 20 December 2018.

The use of mediation

In an article published in 2017,[11] Nina Mocheva and Angana Shah surveyed a growing use of mediation in the context of insolvency proceedings. Among other things, they considered the use of mediation in support of facilitation of a restructuring plan among the debtor and multiple creditors; and to assist resolution of contested issues within a collective insolvency proceeding.

As to the latter, the article drew on examples from well known international insolvencies. Relevantly, examples were provided from the bankruptcies of Lehman Brothers, MF Global, General Motors, and Nortel. The first three demonstrate how the mediation process worked well. Nortel is a salutary reminder of what can happen when the process fails. Gratefully adopting the summaries provided by the authors of the article, the examples given are:[12]

A. When Lehman Brothers filed for bankruptcy in 2008, there were 1.2 million derivative transactions with 6,500 counterparties. Lehman obtained permission

6 Model Law, arts 9–14.
7 Ibid, arts 15–18.
8 Ibid, arts 19–24.
9 Ibid, arts 25–27. Articles 28–32 deal with the ancillary questions arising out of concurrent collective insolvency regimes.
10 UNCITRAL Practice Guide on Cross-border Insolvency Co-operation published in 2010 at page 18, para 2.
11 Nina Mocheva and Angana Shah, Mediation in the Context of (Approaching) Insolvency: A Review on the Global Upswing (2017) 14 TDM 1.
12 Ibid, at 9-10.

A. from the US Bankruptcy Court to mediate those disputes. According to a February 2013 report filed with the Court, Lehman was able successfully to reach settlement in 93 of 98 mediated cases. That resulted in a sum of $1.39 billion being made available to creditors.

B. The Bankruptcy Court judge for MF Global encouraged mediation in respect of affiliate companies in the United States and the United Kingdom that had cross claimed against each other, with the prospect of protracted litigation. The disputes were resolved following mediation with MF Global's creditors receiving a total of $1 billion in distributions.

C. A post-bankruptcy claim by a hedge fund in the General Motors bankruptcy threatened to jeopardise an approved restructuring plan. The hedge fund creditors wished to litigate a $3 billion claim, which would have had the effect of unwinding a large transaction that occurred at the time of the bankruptcy filing. The claim was referred to mediation. The plaintiffs agreed to settle for one half of their claim, allowing an increased recovery for other creditors in a sum of about $50 million.

D. Nortel's assets were sold for $7.5 billion but affiliates in the United States, Canada, United Kingdom and France could not agree on how the realisations should be distributed. Mediation was encouraged. Multiple attempts at mediation failed. In the end, the issues were determined through litigation; including decisions of the Superior Court of Ontario and Bankruptcy Court for Delaware after a joint hearing had taken place. Sadly, the entire costs of the distribution dispute was something in the vicinity of $1.9 billion.

Although all of those cases involve large enterprises and sophisticated parties, similar issues can also arise in relation to micro, small and medium size enterprises. In those cases, the ability to use mediation to resolve cross-border disputes should be the preferred option. Those involved in deciding what dispute resolution mechanism will be used should always consider the need for proportionality as between the cost of determining a dispute and the amount at stake.

Mediation in aid of a Model Law proceeding

As the examples suggest, there are a number of problems that can arise in international insolvencies which involve numerous parties in many different jurisdictions with contractual arrangements subject to varied governing laws. Some contracts may require arbitration. Others may provide for access to local courts. In circumstances where it is important to corral the disputants and endeavour to achieve prompt outcomes, the appointment of someone, under art 27(a) to facilitate resolution could lead to settlements of the type identified in the Lehman Brothers and MF Global examples. To the extent that not all disputes were resolved, it is possible that issues for resolution could be narrowed and the means by which they could be resolved in court, by arbitration or any other form of binding decision-making process.

The importance of identifying an appropriate mediator or facilitator cannot be overstated. The parties are likely to have an opportunity to make representations on this topic at a hearing convened to determine that question, by reference to art 27(a) of the Model Law. Consideration should be given to the skills of a proposed mediator and whether they should be complemented by specialist knowledge that might be possessed by someone who could act in tandem with the appointee. A court may want to take into account language and cultural considerations. Developing countries may want to encourage the skill to mediate such disputes by pairing a local mediator with an experienced one from another jurisdiction. Sometimes the use of co-mediators will assist, for example, where there are disputes about what law may apply to resolve a substantive dispute (or the forum in which it may be resolved) and appointees from the jurisdictions in question may be able to assist the parties in understanding the risks involved. A slightly more nuanced situation might arise if there were a need to appoint one or more mediators/facilitators (perhaps in different States) to encourage development of an agreed plan that could be put before the Court for approval, subject to any remaining dispute resolution processes.

An unnamed commentator to whom Mocheva and Shah refer in their article put the advantages of consensual forms of dispute resolution in this area as follows:[13]

> The field of international insolvency is ripe for intervention via mediation. The speed and flexibility of mediation makes it an ideal process for multi-national companies who are seeking to avoid the costly and time-consuming quagmire of trans-national litigation. Particularly in the current global economic climate [while the article was written in 2017, the point remains important in COVID-19 times], it [is] anticipated that the prominence of international mediation in cross-border insolvency cases is set to increase. It is possible that more alternate dispute resolution institutions may offer specialised rules and panels to administer the mediation of complex cross-border disputes.

The Singapore Convention

Although not yet ratified in many States, the Singapore Convention provides an added incentive to the use of mediation in international insolvencies. A purpose of the Convention is to enable settlements reached through a mediation process (as defined by the Singapore Convention) to be recognised and enforced in another State. If used judiciously, a proceeding under the Singapore Convention could enforce mediated settlement agreements in Convention States in a manner similar to the way in which arbitral awards are enforced under the New York Convention. That would avoid a problematic situation arising in which, for some reason

13 Ibid, at 11, with reference to a footnote that refers to an article in the Journal of the American Bankruptcy Institute.

or another, the Court exercising jurisdiction under the Model Law was unable to give effect to the negotiated arrangement.

The term "mediation" is given an extended meaning by art 2(3) of the Singapore Convention:

> … a process, irrespective of the expression used or the basis upon which the process is carried out, whereby parties attempt to reach an amicable settlement of their dispute with the assistance of a third person or persons ("the mediator") lacking the authority to impose a solution upon the parties to the dispute.

At the core of the definition is the need for the parties to achieve their own resolution of a dispute, albeit with the assistance of someone who has no power to make a decision. It is the lack of decision-making power that enables a mediator to use flexible processes to achieve resolution – including the ability to talk separately to individual parties or groups with common interests on terms that do not require him or her to disclose what was said to others, at least without approval from that group. This process is often called "caucusing".

Article 1 of the Singapore Convention is directed to the international and commercial elements of a dispute which are central to its scheme and purpose. Article 1(1) states:

> This Convention applies to an agreement resulting from mediation and concluded in writing by parties to resolve a commercial dispute ("settlement agreement") which, at the time of its conclusion, is international in that:
>
> A. At least two parties to the settlement agreement have their places of businesses in different States; or
>
> B. The State in which the parties to the settlement agreement have their places of business is different from either
>
> i. The State in which a substantial part of the obligations under the settlement agreement is performed or
>
> ii. The state with which the subject matter of the settlement agreement is most closely connected.

Article 1(2) and (3) expressly exclude from the scope of the Convention consumer transactions, disputes relating to family, inheritance or employment law, and settlements that have been approved by a Court that are enforceable as a judgment of the State in which that Court is situated. Further, settlements which have been recorded as consent orders in an arbitral proceeding do not fall within the scope of the Convention.

A way forward

INSOL International's ADR Colloquium[14] was established in 2019. The Colloquium extends to all forms of dispute resolution outside of State-established courts. One of the goals of the Colloquium is to encourage the use of mediation and other facilitated dispute resolution mechanisms to enable cross-border insolvency disputes to be resolved more efficiently and effectively. That objective takes account of the pressures on State-established courts to deal with a variety of cases and the need to narrow the nature of the disputes that the court must resolve. If that objective were achieved, it is likely that court decisions could be given in a timely and more cost-effective manner.

To encourage the use of mediation (in the broad sense defined by the Singapore Convention), it will be necessary to promote trust and confidence in the process by those stakeholders who will be most affected by it. They include large banks, other finance houses and hedge funds. Without their support, it is doubtful whether a more general use of mediation could be developed.

Ultimately, the goal is to encourage a means by which the courts exercising jurisdiction in collective insolvency proceedings can act more efficiently by using parallel and complementary mediation procedures to achieve resolution of disputes without the need for extensive and costly court involvement.

14 The original version of this article referred to the INSOL Mediation Colloquium which has been renamed INSOL ADR Colloquium.

THE USE OF MEDIATION TO IMPROVE GLOBAL RESTRUCTURING OUTCOMES IN A POST-PANDEMIC WORLD[1]


Debra Grassgreen
Pachulski, Stang, Ziehl & Jones
USA

and Scott Atkins
INSOL President and Fellow
Norton Rose Fulbright, Australia

"The costs and delays of formal insolvency processes, are often prohibitive for MSMEs and may leave little alternative to liquidation and piecemeal breakup of the business."

Simplicity and flexibility

Prior to the outbreak of COVID-19, jurisdictions across the world were already seeking to simplify their domestic insolvency processes and create flexible restructuring alternatives, to enable viable entities experiencing financial distress to have better prospects for recovery.

Those jurisdictions deemed simplicity and flexibility to be particularly important for micro, small and medium-sized enterprises (MSMEs), which commonly encounter significant liquidity constraints when in financial distress. They recognised that the costs and delays of formal insolvency processes, including reorganisation processes ranging from the Chapter 11 debtor-in-possession model in the United States, to the external administration models in Singapore (judicial management), Australia (voluntary administration) and the United Kingdom (company voluntary arrangement), are often prohibitive for MSMEs and may leave little alternative to liquidation and piecemeal breakup of the business. Such outcomes often result in lost productivity and jobs and create long-term economic instability.

The trend towards simplifying restructuring and insolvency processes and making them more flexible has been intensified by the pandemic. In addition to practitioners, policy makers and international organisations taking active steps to crisis-contain through stimulus, fiscal strategies, and insolvency prevention and mitigation measures, there has been a global push to create more efficient, effective insolvency processes particularly for MSMEs, which the World Bank estimates represent over 95% of enterprises and more than 60% of employment worldwide.

The adoption and implementation of new formal insolvency processes in jurisdictions around the world has certainly had a role to play in dealing with MSME insolvencies pre- and post-covid. For example, In Australia, with effect from 1 January 2021, a new small business restructuring (SBR) process was introduced for small businesses with outstanding debts of less than AU$1 million (US$745,000). The SBR process enables directors to appoint a small business restructuring practitioner while a restructuring plan is developed to be put to creditors. There is also now a streamlined liquidation process for those entities.

Similarly, in Singapore, with effect from 29 January 2021, a six-month trial period for a new simplified insolvency program (SIP) commenced. This has now been extended until 28 July 2022. The SIP consists of both a simplified debt restructuring program and a simplified winding up program for eligible micro and small companies, defined as companies with an annual revenue of less than S$1 million (US$745,000) and S$10 million (US$7.45 million), respectively. The simplified debt restructuring program is monitored by a restructuring adviser and dispenses with many of the usual reorganisation processes.

In the US, meanwhile, Subchapter V of Chapter 11 was introduced from February 2019 to enable small businesses to conduct a streamlined reorganisation. The original debt limit for Subchapter V was US$2,725,625, though that limit was increased to US$7,500,000 as part of COVID-19 relief legislation. However, as a number of these measures are temporary, there may be a potential wave of bankruptcy cases when the measures end.

Benefits of mediation

In the longer term, mediation can be used effectively in restructuring matters. Until recently, outside the US, little attention has been paid to the benefits mediation may offer as a core component of flexible insolvency frameworks.

But the World Bank and the United Nations Commission on International Trade Law (UNCITRAL) – which are designated by the Financial Stability Board as global standard setters for insolvency systems – recently identified some of those benefits in two key publications.

In a workout context, recommendation B4 of the revised edition of the World Bank's Principles for Effective Insolvency and Creditor/Debtor Regimes, released in April 2021, notes that workout negotiations will typically be enhanced when they leverage informal techniques, such as voluntary negotiation or mediation or informal dispute resolution.

Likewise, the UNCITRAL Legislative Recommendations on the Insolvency of Micro and Small Enterprises, adopted in July 2021 by UNCITRAL, recognise the use of mediation and conciliation to lower barriers of access to insolvency

1 First published on the Global Restructuring Review website, 10 September 2021

proceedings.

A mediator can play a critical role in building trust and consensus among disparate stakeholders and guide a financially distressed debtor and its creditors towards a quick, inexpensive and flexible outcome, including resolving complex creditor disputes and adopting a restructuring plan.

The facilitative role that a mediator can play is especially important in countries with an under-developed informal workout system. In those jurisdictions, workout negotiations are often hampered by creditor hold-outs, which arise due to a lack of trust that creditors have access to equal information about a debtor and that they will be treated equitably under a workout plan involving senior creditors and other stakeholders.

The key task for a mediator is to ensure greater transparency in the information available to creditors so that cooperative negotiations can proceed and creditors can have confidence that they are working towards a shared goal.

Cross-border insolvencies

Mediation has a critical role to play in a cross-border insolvency context too, when coordination difficulties among creditors with competing claims in multiple jurisdictions and operating under often very different insolvency regimes are even greater. A mediator may assist parties in parallel insolvency proceedings to negotiate a framework or protocol for cooperation and coordination across jurisdictions, and may also assist courts to narrow and resolve substantive disputes.

Indeed, the appointment of a mediator on that basis can be seen to fall directly within the form of cooperation contemplated by Article 27(a) of the UNCITRAL Model Law on Cross-Border Insolvency (1997): "the appointment of a person or body to act at the direction of the court". Such an appointment would satisfy the obligation that courts in Model Law countries have under Article 25 to cooperate to the maximum extent possible with foreign courts and foreign representatives.

The potential use of mediation in tandem with the Model Law strengthens the effectiveness and flexibility of the Model Law and its operation as a modern, harmonised and fair insolvency framework, and may see more courts investigating mediation as a viable means for cooperation, cost and time savings, and more successful outcomes in complex cross-border matters, going forward.

The introduction of new court procedural rules in local jurisdictions can support this process too, by providing courts with the power to refer parties to mandatory mediation at any point of an insolvency process. Rules of this kind operating specifically in an insolvency context are currently very limited globally, though.

A new tool that could facilitate the role of mediation in a cross-border restructuring and insolvency context is the United Nations Convention on International Settlement Agreements Resulting from Mediation (also known as the Singapore Convention on Mediation), which entered into force on 12 September 2020.

The Singapore Convention provides a globally-consistent framework for the cross-border enforcement of international settlement agreements reached during a mediation process involving claimants and assets in multiple jurisdictions. Mediated settlements now have "teeth", as a result, allowing mediation to be harnessed effectively in various stages of cross-border insolvency and restructuring processes.

By providing parties with a uniform and efficient framework, the Convention provides clarity and certainty of business outcomes, enhancing the possibility of an expedient resolution and giving parties in the mediation process confidence. It may even play a key role in achieving consensus among creditors.

Of course, a treaty's effectiveness and uniformity not only hinges on application and interpretation, but also on widespread adoption and acceptance. While the Singapore Convention is still in its infancy compared to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (also known as the New York Convention), its uptake from 46 signatories on the first day the Convention opened for signature, to the current 54 signatories and six parties, is promising.

Technology

Recent advancements in technology could also support the growth of mediation as an adjunct to more efficient and effective insolvency processes. COVID-19 has already sparked digital enhancements and we can expect to see a further increase in online ADR processes – including in an insolvency context – in future years.

This trend will be enhanced by a strong international enabling framework of digital dispute resolution tools, such as the APEC Collaborative Framework for Online Dispute Resolution of Cross-border Business-to Business Disputes, the European Online Dispute Resolution Platform and the UNCITRAL Technical Notes on Online Dispute Resolution.

Blockchain and AI also have the potential to achieve greater efficiency and cost savings and avoid time delays by processing the complex information of multiple creditors, bringing together hundreds of parties in a simultaneous forum and ensuring effective, clear communication and outcomes in the negotiation process.

A word of warning though: the ongoing focus must be on using technology to ensure meaningful engagement and participation for creditors, and it will be important to carefully manage confidentiality, privacy and data protection issues.

Mediation has a clear role to play in restructuring reform. It is important for this to be at the forefront of the minds of governments, regulators, policy bodies and practitioners alike across the globe in the post-pandemic recovery period ahead.

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