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Editors' Column

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Well ... it's a new year ... and the U.S. seems, at least for now, to have avoided driving off the "fiscal cliff". However, it seems pretty clear we are collectively not out of the woods yet in terms of bringing sound fiscal policy and management to many economies around the world.

With all this activity (and a good dose of political rhetoric) in Washington, it seems only fitting therefore, that the focus of our first issue of INSOL World for 2013 is on the Americas. In this vein, we have included several articles with a foreign or cross-border insolvency component: Melanie Cyganowski and Lloyd Green's article on the Public Policy Exception in Cross-Border Insolvencies under the U.S. Bankruptcy Code; John Tillman and Joe Bannister's article on the U.K. Supreme Court's decision in the *Rubin* case and its impact on the enforcement of foreign insolvency judgments; and Charlotte Cooke's review of Anthony Dessain and Michael Watkins' book on asset tracking in Jersey and its interaction with U.S. bankruptcy proceedings.

We are also pleased to receive the report of Luis Guillermo Velez Cabrera, the Superintendent of Companies, Colombia, on the very interesting and well attended INSOL Colombia Seminar held in Cartagena on 4th October, as well as the report by Helena Huang of King & Wood Mallesons in Hong Kong on INSOL's first one-day seminar in China on 1st November 2012.

With the New Year, we are also pleased to introduce the new members of our Editorial Board. The new members of the Editorial Board are: Daniel Bryant, Fellow, INSOL International, PPB Advisory, Australia; Juanitta Calitz, University of Johannesburg, South Africa; Gabriel Gomez-Giglio, Baker & McKenzie, Argentina; Jim Luby, McStay Luby, Ireland; and Helena Huang, King & Wood Mallesons, Hong Kong. We wish a warm welcome to one and all.

We also express our thanks and gratitude to the following Editorial Board members who have retired from the Board: Peter Gothard, Fellow, INSOL International, Ferrier Hodgson, Australia; Ruud Hermans, De Brauw Blackstone Westbroek, The Netherlands; Ariel Kiperman, Kiperman & Asociados, Argentina; Eric Levenstein, Werksmanns Attorneys, South Africa; Luiz Fernando Valente de Paiva, Pinheiro Neto Advogados, Brazil; and Kathleen Wong, Allen & Overy LLP, UK. Thank you for your contributions to INSOL World.

Finally, we would again like to specifically acknowledge and thank BMC for their continued sponsorship and support of INSOL World.

Happy New Year to one and all!

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President's Column

By Gordon Stewart
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The current state of play

Over the years, I have found myself receiving ever more bulletins on economics and finance issues. So much so that I currently receive three *daily* updates. Others come on a weekly, monthly or quarterly basis. Of course all these analyses could be wrong. Much of my reading in the field of popular science suggests that luck plays a key role in many situations (however reluctant we are to admit it) and I incline to the view that in the case of economics no individual (or computer) is up to predicting the future with any degree of accuracy. But I think that I do at least have a feel for current sentiment among the 'experts'.

The focus of recent attention has been the US's success in avoiding falling off its 'fiscal cliff'. Less featured has been the view that the US has rather cleverly spent the last few years resolving the balance sheets of its banks and the personal balance sheets of its population such that these are now both in respectable shape, while the US Government on the other hand has, if anything, increased its debt burden. This is thought clever even if it sounds counter-intuitive. The argument runs that the Government debt has to come down eventually but it is hard to see how tight austerity would achieve that if the result of the austerity would be to reduce activity and hence GDP (and the tax take) and make many workers unemployed: they would then not be contributing to GDP but instead would be a social security cost. The advantage of bank balance sheets being resolved is that the banks are better placed to start lending again and the plus side of individual balance sheets being resolved is that individuals can spend, leading to the possibility of a consumer-led recovery. So no Government would try to do things the other way round – that is decide to cut Government spending during a double- (or possibly a triple-) dip recession while not resolving bank and personal balance sheets - would they…?

Well, consider the United Kingdom. Personal balance sheets remain problematic and this has led to reduced spending and increased saving with the inevitably damaging consequences for retail. And the UK Government set itself the target of massively reducing Government debt within the lifetime of a parliament. It has recently had to admit that it has failed to achieve the milestone reductions it set itself and so is extremely unlikely to achieve what it set out to do by 2015. As I mentioned above, austerity can lead to unemployment which leads to increased social security costs. But as if to illustrate my point about the complexities being too great to understand and to enable predictions, while the UK Government has been talking about austerity, public spending has in fact risen by a small amount over the last few years and, despite recessions, unemployment has *gone down*. Can all this be explained away? Well it seems that the majority of the austerity cuts are only now about to bite which perhaps explains Government spending to date. Further, certain areas are ring-fenced – health, education and, effectively, pensions. And while unemployment has not risen and has as I said gone down, it appears that employee productivity in the UK over the last period has reduced by some 15% which is no doubt part of the mix and of course a material and worrying development.

And so all the talk in the UK – and indeed across Europe - is about *zombie* companies. Historically unprecedentedly low interest rates have allowed many businesses to continue – bumping along the ocean floor as it were – servicing their debts but doing little else. They are failing to invest and develop but by surviving they take market share from more dynamic companies who might otherwise have been able to lead a revival. And if their European lenders are unwilling to take the pain of a full blown restructuring through their balance sheets, there is no impetus creditor-side for a change of approach.

In the past it has been usual for some part of the world to boom and lead the world economy out of the doldrums but what I read currently suggests that there are no tiger economies out there, merely a feedback loop of difficulties across the whole world.

Perhaps the most alarming aspect of the current position is the inevitable muttering of the territorialists advocating tariffs and other barriers to free trade to protect home markets: one way to ensure that the world economy will remain stagnant is for inefficiency and incompetence to be protected the world over.

My travels

Having established a suitably gloomy economic note, I will turn to my travels and, in particular, shortly share with you some of my recent hotel experiences which have been equally downbeat. Before that, however, I wish to highlight again the huge enthusiasm there is in many many parts of the world to improve their restructuring laws and systems. In a number of addresses I have made in different parts of the world, I have referred to what I see as the four pillars of restructuring – the law, the culture, the practitioners and the courts. I have sensed a real desire on the part of many nations to assess the strength of their own pillars and to seek real change and improvement. I spoke at a World Bank conference in Cairo in November. The Minister of Justice addressed the conference. This was despite the fact that the day before the Egyptian President had made his announcement regarding a proposed extension of Presidential powers and the Minister of Justice could have been forgiven if he had cried off saying he had other things on his plate. After all, his fellow countrymen and women were by this stage making a habit of turning up in numbers in Tahir Square to indicate their displeasure at recent developments. I certainly twigged that the cameras and microphones were not there to record my talk about the four pillars… The Minister's remarks included the comment that the conference had helped him appreciate how important the whole subject of restructuring and insolvency was. It was an excellent conference with attendance from right across the MENA region and I had many fascinating conversations with delegates from countries such as Tunisia, Lebanon, Jordan and Egypt itself. Many of their questions were both pertinent and detailed.

The light of reform burns brightly in other places too:

- our annual Latin American seminar continues to be well attended;
- I observed myself, in Stellenbosch, the impressive way South African insolvency practitioners are throwing themselves into grappling with their new rescue law despite teething problems;
- congratulations are due to Pia N. Thompson from Gould & Ratner LLP (Chicago, USA) who has won a free

registration to our 2013 congress in The Hague. Pia entered the draw at the National Conference of Bankruptcy Judges held in San Diego on 24-27 October 2012; and

- we held an INSOL seminar in Beijing in November for local practitioners for the first time with an encouraging number of delegates; later in November, Bob Sanderson, one of my predecessors as President of INSOL International, kindly agreed to deputise for me and spoke at the annual conference of the Beijing Bankruptcy Law Society – the 5th China Bankruptcy Law Reform Forum – the date of this conference clashing with G36, executive and board meetings in London which I was required for. The Society has indicated it wants us to address them again next year.

But turning to the important matter of hotel accommodation. Your President is, in all honesty, a simple soul and easily pleased on the hotel front. A bed, a pillow and a shower – how bad can a hotel room be? Recently I have been more than adequately looked after on the hotel front in Canada, South Africa, Dubai, Egypt, Germany and Belgium. Turning, however, to the UK…

In connection with the November G36/executive/board meetings, I found myself for the first time in a very long while staying overnight in a hotel in London. The hotel had better remain nameless. It was certainly faceless. I turned up in the early evening of a Friday, having to go straight out to dinner. I got my key and rushed to the room to put on a tie and head out. There was something odd about the room that I couldn't quite place but I didn't have time to consider it further. When I returned in the late evening, desperate for sleep, I was struck by a very odd smell when I got out of the lift. For a moment, I thought it was cigar smoke. Then I realised, it *was* cigar smoke. I went to my room and saw the tell-tale ashtray on a table. I had been put in a room on the smoking floor. Then the all-pervasive smell of stale smoke hit me. I later shared my experience with another board member who comes from the States. "Oh yes" he said, "I've stayed here before. They didn't put you on the fourth floor did they?". Oh yes they did. The only comfort I got from this whole saga – and I should hasten to add that it was not the fault of my PA or the INSOL Secretariat who had, as always, requested a non-smoking room – was to learn that having a smoking floor gives hotel operators a real problem. Apparently it concentrates all the noxious and poisonous chemicals from the cigarettes on one floor and the 'smoking floors' in hotels are slowly crumbling away.

But just after this, my assertion that all I need is bed, pillow and shower was further tested. I had to stay in Glasgow for a funeral and for logistical reasons found myself staying in an admirably 'no frills' hotel near to my parents' home. (My sister had taken the spare room at my parents' if you were inclined to ask.) Everything was super-efficient and keenly priced. The only issue arose the next morning when I was unable to make the combined shampoo and soap dispenser work. And of course in a no frills hotel that was all there was for cleaning oneself. Also, the single towel afforded quickly got wet as I exited the shower to try to find someone to deal with the soap problem. I went to phone reception. Now of course no frills hotel rooms do not have a telephone. So there I found myself ringing reception from my mobile phone to explain – no I will be honest, *com*plain – about the soap. In the absence of a bath robe I managed to make the small single towel cover my modesty sufficiently to allow a lady from reception to investigate the problem with the soap dispenser. She agreed that it was indeed deficient but managed to extract the polythene bag of soap/shampoo from inside the dispenser and enquired whether I could make do with that or did I want the full dispenser repair service. I confirmed that I could get by with manipulating the plastic bag. However, I did put my foot down and require a second (dry) towel. I may have few requirements of a hotel but there are limits!

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INSOL Colombia One Day Seminar, 4 October 2012

Report by Luis Guillermo Velez Cabrera

Superintendency of Companies
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Last October, in the city of Cartagena, Colombia, we had the honor of hosting the fourth INSOL one day seminar held in Latin America. As has been the case in the past, these events provide a unique opportunity for members to exchange knowledge and technical updates on the most relevant insolvency and restructuring issues.

The Cartagena event was a resounding success. With over 120 delegates, about half of the them from the host nation and many coming from the United States, Brazil, Argentina, México and Chile, the meeting provided a varied number of jurisdictions, professions, backgrounds and experiences. Additionally, this year we had very important participation from the Caribbean states, with delegates from the British Virgin Islands, Cayman Islands and Panama. The Cartagena seminar was organized by INSOL with the cooperation of the Colombian Superintendency of Companies, a government agency which I have the honor of directing.

After opening remarks by INSOL Board Director Howard Seife, the delegates were greeted and we acknowledged the generous sponsorship of the seminar by Deloitte, Greenberg Traurig LLP, Epiq Systems Inc, FTI Consulting and prietocarrizosa, a Colombian law firm.

The educational program started with a very current topic: Latin American companies seeking protection in the US under Chapter 11 and Chapter 15. It was chaired by Mr. Seife and included Hon. Allan Gropper, from the US Bankruptcy Court, Southern District of New York, Javier Lorente, NTMDALL and Luis Rubio from Greenberg Traurig Mexico. It touched upon many relevant topics including an in depth discussion of the public policy exception contained in Chapter 15 of the US Bankruptcy Code as it is being currently interpreted by US courts. As a preliminary conclusion, participants agreed that there is a convergent path in many of the insolvency systems of the region driven by increased economic integration and the implementation by many jurisdictions of the UNCITRAL model law for cross-border insolvency.

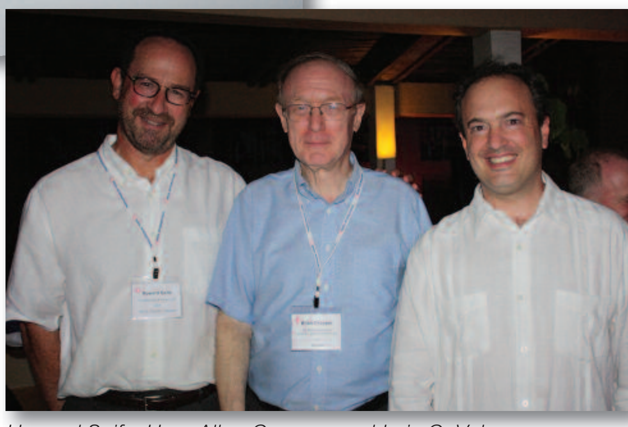
Recent Developments Panel

The second panel dealt with the topic of out-of-court-restructurings and how the process differs from country to country. It was chaired by Brock Edgar from FTI Consulting with the participation of Felipe Cuberos from prietocarrizosa, Jose Garrido from the World Bank and Luiz Fernando Paiva of Pinheiro Neto Advogados. After a brief presentation of the different alternatives offered in the various jurisdictions, panelists discussed the importance of offering a “menu” of options for the resolution of insolvency situations, some of which encompass non-judicial alternatives.

The third panel dealt with the very practical problem of tracing and recovering assets across national borders. Keiran Hutchison from Ernst & Young, Cayman, chaired this panel of experts that included Annette Escobar, Astigarraga Davis, Ken Krys, KRyS Global and Andrés Otero, of Kroll-LA. Asset tracing and recovery is a challenging and difficult task. However, insolvency practitioners need to understand that with expert advice and a proper working strategy, together with local knowledge, successful results can be obtained.

The fourth panel evolved from the DIP financing panel held last year in Buenos Aires. This time the topic was “Investing in Distressed Assets in Latin America”. The panel was chaired by James Bromley, Cleary Gottlieb Steen & Hamilton LLP with the participation of Guilherme Ferreira, Jive Investments, Philip Mindlin, Wachtell, Lipton, Rosen & Katz LLP and Jorge Castellanos, Darby Private

Paul Keenan and Mark Bloom, Greenberg Traurig at the cocktail reception



Howard Seife, Hon. Allan Gropper and Luis G. Velez

Out-of-court proceedings panel

Recognition of Latin American proceedings in US courts panel

Equity. Panelists discussed several cases of distressed asset investment in the region. Mr. Castellanos conducted a presentation of the 1999 Colombian financial crisis, which provided a good illustration of an effective response to such an event. The panel concluded, however, that for distressed asset investment to really take off in the region, jurisdictions must take steps to provide investors with a secure and predictable legal environment.

Finally, Professor Francisco Reyes chaired a panel on recent insolvency developments in the region. Alejandra Anguita from the Superintendency of Bankruptcies of Chile presented her country's proposed reform of the outdated 1982 law and Juan José Rodriguez discussed Colombia's new and advanced legislation for insolvent enterprise groups. Jorge Sepúlveda, Bufete García Jimeno S.C. presented a critique of Mexico's insolvency regime, concluding that it is handicapped by excessive protections for labor. The panel concluded with Miguel Urriola, Mizrachi, Davarro & Urriola from Panama discussing the challenges faced by practitioners as they try to juggle antiquated laws and modern commerce in many countries in the region.

Overall, the seminar was very successful. The seminar would not have been possible without the conference sponsors and the members of the Organizing Committee who helped in its preparation, together with the efforts of the individuals who presented at the various sessions. It also owed much to the hard work done by Penny Robertson from INSOL and by Diana Talero from the Superintendency of Companies and Fellow, INSOL International in organizing the seminar itself. Thank you all very much.

2013 INSOL Latin American seminar will be held in Sao Paulo, Brazil on 13 June 2013.

Rubin, and the Enforcement of Foreign Insolvency Judgments

By John Tillman and Joe Bannister[1]
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The number of complex international insolvencies continues to increase steadily, and in that context the UK Supreme Court's ruling in *Rubin*[2] was eagerly awaited. The decision considered the enforceability of foreign insolvency judgments in England in non-EU Insolvency Regulation cases. It provides important guidance for the conduct of cross-border insolvency litigation.

The Issue

In its judgment, the Supreme Court ruled on two separate cases - *Rubin and New Cap Re*.

In *Rubin*, Chapter 11 proceedings had been initiated in New York in respect of a trust entity called TCT. Those administering the insolvency brought a number of claims in the US Bankruptcy Court against parties that had been involved with the trust prior to its insolvency, including claims under the US Bankruptcy Code seeking to avoid prior fraudulent transfers. The claims were served, but none of the relevant parties defended and in due course judgment was entered against them for approximately US$10m.

New Cap Re concerned an Australian insurance company which had been placed into liquidation in Australia. Prior to its collapse, it had made commutation payments to a Lloyd's of London syndicate. The liquidator issued a claim against the syndicate in the New South Wales Supreme Court, relying on Australian statutory provisions which provide for the avoidance of certain transactions entered into by a company within 6 months before its insolvency. The Australian Court granted leave to serve the claim out of the jurisdiction, but the syndicate did not defend the claim and judgment was entered against it for around US$8m.

In each case, the office-holder then sought to enforce the foreign money judgment against defendants in England, and in each case the defendants resisted such enforcement.

The Common Law

The "normal" rule of English common law is that an *in personam* order of a foreign court (eg. an order against a defendant to pay money) will be enforced by the English courts if:

(a) the defendant was present in the foreign country at the time when the foreign proceedings which led to the judgment were instituted; or

(b) the defendant had been the claimant, or had counterclaimed, in the foreign proceedings; or

(c) the defendant submitted to the jurisdiction of the foreign court by voluntarily appearing in the proceedings; or

(d) the defendant had, before commencement of the foreign proceedings, agreed in respect of the subject matter of the proceedings to submit to the jurisdiction of the courts of that country.

In *Rubin*, the Court of Appeal had decided – controversially – that although the US Bankruptcy Court's order was *in personam*, this "normal" rule did not apply because of the special nature of statutory insolvency avoidance actions. The Court of Appeal decided, in essence, that statutory avoidance actions are an integral part of an insolvency process, and that the English court's ability to assist foreign insolvency proceedings justified enforcement even though none of conditions (a) to (d) above were satisfied.

The Supreme Court (by a majority of 4 -1) rejected the Court of Appeal's approach, holding that there was no such special common law rule in relation to the enforcement of judgments arising from statutory avoidance actions. The fact that, in other contexts, the English courts will assist foreign insolvency proceedings did not mean that a more relaxed enforcement regime applied. Indeed Lord Collins, delivering the leading speech for the majority, noted that such a special rule would represent "*a radical departure from substantially settled law*".

Statutory Enforcement

In *Rubin*, it was argued in the alternative that the Cross-Border Insolvency Regulations 2006 (enacting the UNCITRAL Model Law on Cross-Border Insolvency) permitted enforcement of the judgment. The relevant US Chapter 11 proceedings had been recognised as foreign 'main' proceedings under those Regulations, and the office-holders pointed to Article 21 of the Model Law which permits the English courts to grant "*any appropriate*

1 John Tillman is a partner specialising in restructuring disputes and Joe Bannister is a partner specialising in restructuring at Hogan Lovells International LLP.
2 *Rubin* and another v Eurofinance SA and others; *New Cap* Reinsurance Corporation (In Liquidation) and another v AE Grant and others [2012] UKSC 46.

relief" at the request of a foreign representative. Likewise, Article 25 provides that the English courts "*may co-operate to the maximum extent possible with foreign courts or foreign representatives…*".

In a similar vein, the office holder in *New Cap Re* relied upon section 426(4) of the Insolvency Act 1986. That provision, which applies to specified countries including Australia but not the USA, empowers the English courts to assist in response to requests by foreign courts exercising insolvency jurisdiction. In *New Cap Re*, it was argued that such assistance could include the enforcement of a foreign court's judgment.

Both of these statutory arguments were rejected by the Supreme Court. Lord Collins noted that the Cross-Border Insolvency Regulations and the Model Law said nothing about the recognition and enforcement of foreign judgments, despite those being important and controversial issues. He considered that Articles 21 and 25 were concerned with "procedural matters" and did not impliedly empower the English courts to enforce a foreign insolvency judgment against a third party.

Similarly, Lord Collins considered that the assistance which could be provided under section 426(4) of the Insolvency Act 1986 did not extend to the enforcement of judgments. In doing so, he contrasted the language of that section with other provisions within section 426. Those other provisions expressly provide for enforcement – but are limited to orders made by other insolvency courts within the UK (eg in Scotland).

Submission to Jurisdiction

The Supreme Court refused in consequence to order enforcement of the US Bankruptcy Court's judgment in *Rubin*. None of the conditions for common law enforcement were met, and the Cross-Border Insolvency Regulations failed to 'save' the office holders.

In contrast, the Supreme Court ruled that the order of the Australian Court in *New Cap Re* was enforceable. This was because the Supreme Court held that the Lloyd's syndicate had sufficiently submitted to the jurisdiction of the Australian Court by lodging proofs of debt in *New Cap Re's* liquidation and by participating in creditors' meetings. Although those steps did not relate to the avoidance litigation, Lord Collins held that the syndicate "*should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding*". As noted above, in broad terms submission to the foreign court's jurisdiction suffices to permit enforcement at common law. Likewise, such submission permits enforcement under the Foreign Judgments (Reciprocal Enforcement) Act 1933, which applies to Australia. The Supreme Court considered this to be the technically correct method for enforcement in this case.

This ruling on submission to jurisdiction is important for practitioners. The syndicate's participation in the insolvency process amounted to submission even though the syndicate had been at pains expressly *not* to submit to jurisdiction when corresponding with the liquidator about the avoidance action itself.

Conclusion

Whilst some may see the *Rubin* decision as a blow to international insolvency co-operation, it is suggested that there is no reason for particular pessimism. In international cases, office holders may need to pay greater heed to the 'exportability' of a judgment delivered by their home court. A range of tools nevertheless remain available for foreign office holders to bring avoidance claims against target defendants in England in appropriate cases. Examples are claims brought under section 426 of the Insolvency Act 1986 for countries within that regime, or pursuant to Article 23 of the Model Law.

Likewise, third parties which had dealings with an insolvent company prior to its collapse and which fear an avoidance claim should consider the wisdom of submitting a proof of debt or otherwise participating in that insolvency, given that such conduct might well now amount to submission to the local jurisdiction for subsequent enforcement purposes.

Insolvency v Forfeiture

By Hugh Dickson
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and

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What happens when the United States Government and an Insolvency Practitioner both try to recover the same assets in the aftermath of corporate fraud?

This issue has arisen in high profile frauds in the last 15-20 years including BCCI, Stanford, Dreier and Madoff. All of these cases saw the United States Government[1], through the offices of the United States Department of Justice ("DoJ"), attempt to confiscate (or "forfeit") assets following the collapse of these entities, on the basis that the assets were the proceeds of a crime under US jurisdiction. In many of these cases, an Insolvency Practitioner ("IP") also sought to take control of the same assets consistent with their duties to recover assets for the benefit of creditors.

Superficially, the goals of the DoJ and the IP ought to be aligned. Both parties aim to recover assets that could otherwise be used by perpetrators of crime. On this basis, one would think that a positive, unified approach should be quickly agreed upon. Unfortunately, in many of the cases to date, a unified approach has only been achieved after significant time, cost and effort have been expended. Despite these cases, there is still a lack of clarity on the relative rights and authority of both parties, or a consensus on how these issues should be resolved. What are the causes of these differences and how can they be overcome so that creditors or other victims of the fraud do not continue to suffer whilst the two parties who represent their interests fight over what little assets remain?

What is Forfeiture?

The root of the problem lies in the fact that the forfeiture process is not primarily designed to compensate victims of crime, but instead to confiscate the proceeds of crime. Forfeiture is a weapon that has historically been used by governments to take assets from criminals so that they cannot fund their criminal activities or be seen to benefit from criminal acts. The FBI website says "Asset forfeiture 'takes the profit out of crime' by helping to eliminate the ability of the offender to command the resources necessary to continue illegal activities". In cases such as drug dealing, organised crime and tax evasion, this approach raises few fundamental conflicts with the role of an IP, whose duty is to realise assets on behalf of creditors. Surrender of confiscated assets to the authorities in the absence of immediate and readily identifiable financial victims seems entirely appropriate.

Only relatively recently has forfeiture come to be used by the United States Government in the corporate fraud arena, where victims of the crime are readily identifiable and form one of the creditor groups. However, there appears to be a fundamental philosophical difference between IPs and law enforcement agencies in how the residual assets of the estate are viewed. The DoJ, in particular, appears to consider that monies extracted from victims become the proceeds of crime at the moment they are defrauded, whereas an IP would typically consider them part of the estate under their supervision (effectively being the assets that had not yet been stolen).

Whilst the DoJ has acknowledged the nexus between proceeds of crime and victim compensation, and much publicity has been given to their attempts to protect victims, the methodology and law around forfeiture is still fairly simplistic and designed to allow for confiscation rather than distribution to creditors. It also lacks a considerable body of case law and precedent to assist in resolving complex issues. Whilst the universalist approach and UNCITRAL is far from a perfect solution to inter-jurisdictional differences in insolvency law, in the case of forfeiture there is no mechanism for resolving these differences in approach.

The Forfeiture Process

The DoJ identify assets that they believe are derived from the fraudulent activity (taking the holistic view on criminal proceeds set out above)and the DoJ uses its local powers and Mutual Legal Assistance Treaties (MLAT's) extraterritorially to freeze the assets. They typically seek to have foreign assets remitted to the United States immediately to be held under their control pending forfeiture.

Forfeiture requires a final finding of fraud and a subsequent Order of forfeiture by the relevant US Court. It is only at that time, and when all appeals are exhausted,

1 The DoJ is not the only law enforcement agency that has challenged the authority of IPs to deal with assets in insolvencies involving allegations of criminal conduct, but the most high profile and problematic cases have typically involved the United States Government seeking to impose its forfeiture powers outside of the United States. The focus of this article is therefore on the United States Government's forfeiture regime.

that the assets can be treated as forfeited. Once the assets are forfeited they become property of the United States Government. Following the forfeiture, the DoJ then serves its forfeiture orders on the countries in which any frozen assets that have not already been remitted to the United States are located. The DoJ relies on local law enforcement counter-parties in these countries to assist with their efforts to forfeit these funds.

Once the assets have been forfeited, the procedures for distribution to the victims are set out in regulations governing the remission of forfeitures[2]. These procedures grant broad discretion to the DoJ to determine whether an applicant for remission is considered to be a 'victim', raising the potential for fundamentally different outcomes between that compensation process and that of an insolvency proceeding. For example, there is no requirement for *pari-passu* distribution, and there is discretion to make different payments to victims depending on the individual circumstances of each victim. There is also no definition of a "victim" – for example, there is no guidance as to whether claims by the Government of the United States for taxes assessed on the illegal activity or penal orders against the fraudster and his accomplices are eligible for compensation, nor is there any requirement for the equal treatment of foreign nationals and US domestic creditors. The process is not subject to the oversight of a court, and the only appeal to a determination is to another department of the DoJ.

The Insolvency practitioner's position

The IP's claim to the remaining assets derives from their powers as an office holder of one of the entities connected with the fraud, either in the jurisdiction in which the assets are located or through cross-border recognition of their appointment. Given the inherent uncertainty over the distribution of the frozen assets under the forfeiture regime, the potential for a significantly different distribution than that which would prevail under the insolvency law governing the estate, and the likelihood of material delays in distribution under a forfeiture process, the IP may have good reason for contesting the seizure of the assets by the DoJ.

The DoJ has been slow to accept the role of IP's in utilising the seized assets for the benefit of creditors. Perhaps this is due to concerns as to the differing approaches to claim assessment and processing in foreign jurisdictions, or reluctance to accept the precedent that in an insolvency, their ability to confiscate the proceeds in crime is limited.

In the absence of clear law and precedent, further complicated by the cross-border nature of such disputes, the ground is laid for a time consuming and expensive dispute.

Consequences?

Arguments over title to the assets can seriously delay distribution to the victims/creditors. There is always going to be a time lag for the DoJ because they need a conviction for forfeiture to occur and in a complex fraud that could typically take 2-3 years following the discovery of the fraud, perhaps longer taking into account the appeals process. Any claims lodged under a remission process will only be dealt with subsequent to forfeiture. An IP, on the other hand, is capable of dealing with claims adjudication at any point, and typically only defers such a process pending realization of assets. Conviction and appeal are irrelevant to an IP's compensation process. Similarly, litigation over access to the frozen funds can be costly as well as time consuming, and those costs may have to be borne by the estate.
As freezing orders will typically encumber all available assets in a given jurisdiction, the estate could be starved of much needed funds to enable the IP to investigate and pursue claims.

Freezing orders can be of great assistance if the assets are 'at risk': but where the assets are not at risk, either prior to or after a freezing order has been granted, forfeiture only serves to complicate matters further, delays the ultimate transfer of assets to the victims, reduces the transparency and accountability of the claim adjudication and distribution process, and harms the recovery prospects for the creditors of the estate.

Conclusion

Whilst sometimes it will be necessary to litigate the issue in the courts of the countries in which the assets are held, that is an unfortunate result because of the time and cost required to do so. In the absence of the DoJ agreeing to only use forfeiture in cases where assets are 'at risk', the appointed officeholders and the DoJ must open lines of communication as soon as possible to work towards an amicable solution. Such agreements can be reached and there are several examples where this has occurred, including BCCI and Madoff. It is unfortunate however, that there is yet no clear policy guidelines or binding legal precedent on how to deal with such issues, leading to a very expensive and time consuming process each time these issues arise.

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2 Code of Federal Regulations Title 28, Part 9 – Regulations Governing the Remission or Mitigation of Civil and Criminal Forfeitures.

The Evolving Application of the Public Policy Exception in Cross-Border Insolvencies

By Hon. Melanie L. Cyganowski (ret.) and Lloyd M. Green[1]
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Introduction

The debate over the reach of the public policy exception to Chapter 15 of the Bankruptcy Code is very much alive. To be sure, under Chapter 15, initial recognition of a foreign insolvency proceeding and requests for subsequent assistance will be denied where the relief sought is manifestly contrary to a public policy of the United States. Recent decisions by the Court of Appeals in *Vitro* and the Bankruptcy Courts in *Elpida, Sivec,* and *Qimonda* show, however, that courts will continue to scrutinize applications for relief for consistency with United States law and that they are willing to defer to domestic judicial doctrine, Acts of Congress or to public policy. Comity and deference are no longer akin to automatic approval.

The public policy exception should be narrowly construed.[2] However, these recent decisions illustrate the tension between the purpose of Chapter 15 — providing an effective mechanism for dealing with insolvency cases involving more than one country — and the difficulty that may ensue in harmonizing rules of foreign legal systems with domestic law. In *Vitro*, the Bankruptcy Court applied Section 524 of the Bankruptcy Code[3] to render a non-debtor discharge contained in a reorganization plan unenforceable on the grounds, among others, that such a discharge would be manifestly contrary to American public policy.[4] On direct appeal, the Fifth Circuit declined to reach the issue of whether the doctrine limiting non-consensual third party releases constituted a fundamental public policy. However, the Fifth Circuit affirmed the Bankruptcy Court's determination based upon the lower court's alternate holding that such relief was unavailable under Chapter 15 and decisional precedent which held such releases to be non-enforceable. The court in *Elpida* analyzed a proposed sale of patents located within the United States and determined that the sale was subject to de novo review in light of Section 363.[5] In *Sivec*, the court declined to grant comity to an Italian insolvency proceeding on the grounds that under Italian law, an American creditor seeking to exercise its right of set-off against retainage property would be deprived of the status of a secured creditor.[6]

The question of "what" is "manifestly contrary to the public policy of the United States" is evolving. For example, absence of a right to jury trial has been held not to render a foreign dispute resolution process void.[7] This article endeavors to set forth the state of the law and to describe lines of analysis concerning the public policy exception of Chapter 15.

Section 1506 and initial recognition

The public policy exception contained in Section 1506 applies to both the initial recognition of a foreign proceeding and to requests for additional assistance after the foreign proceeding has been recognized. In *In re Gold & Honey, Ltd.*,[8] the court declined to recognize certain Israeli bankruptcy proceedings because those proceedings had been commenced in violation of the automatic stay contained in Section 362 as the companies were already the subject of a consolidated Chapter 11 bankruptcy. The court explained that the public policy operates where "fundamental policies of the United States are at risk."[9]

Still, the public policy exception generally does not thwart the grant of relief under Section 1517, which governs initial recognition. Thus, in *In re Ernst & Young, Inc.*,[10] the court recognized a Canadian receivership proceeding involving an investment. The court rejected the contention that litigation costs would deplete assets otherwise available to satisfy investor claims and observed that American and foreign investors would share from the same recovery fund.[11] In *In re British Am. Isle of Venice, Ltd.*,[12] the court recognized a British Virgin Islands insolvency proceeding, and disregarded differences in the conflicts of interest.[13]

Public policy and granting assistance

Courts are more inclined to grant post-recognition relief where no specific American statute would be violated and the potential diminution of property rights appears minimal. Significantly, post-recognition relief has been granted in instances where the relief in question would not have otherwise been available in a domestic bankruptcy case. Faced with no objection, the court in *Metcalfe*[14] recognized restructuring orders and non-party releases approved in Canada.[15] That the "Second Circuit imposes significant limitations on bankruptcy courts ordering non-debtor

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2 *Ad Hoc Group of Vitro Noteholders v. Vitro SAB De C.V. (In re Vitro, S.A.B. de C.V.)*, 2012 U.S. App. LEXIS 24443, at *104 (5th Cir., Nov. 28, 2012); *Armada (Singapore) Pte Ltd v. Shah (In re Ashapura Minechem Ltd.)*, 480 B.R. 129,139 (S.D.N.Y. 2012).

3 Unless otherwise specified, section references are to the Bankruptcy Code, U.S.C. Title 11, et seq..

4 *Vitro, S.A.B. de C.V. v. ACP Master, Ltd. (In re Vitro, S.A.B. de C.V.)*, 473 B.R. 117 (N.D. Tex. 2012), *affirmed*, 2012 U.S. App. LEXIS 24443 (5th Cir. Nov. 28, 2012).

5 *In re: Elpida Memory, Inc.*, 2012 Bankr. LEXIS 5367 (D. Del. Nov. 16, 2012).

6 *In re Sivec SRL*, 2012 Bankr. LEXIS 3324 (Bankr. E.D. Okla., July 19, 2012). The bankruptcy court's decision is on appeal to the District Court.

7 *In re RSM Richter Inc. v. Aguilar (In re Ephedra Prods. Liab. Litig.)*, 349 B.R. 333, 335-36 (S.D.N.Y. 2006).

8 410 B.R. 357 (E.D.N.Y. 2009).

9 410 B.R. at 371.

10 383 B.R. 773 (Bankr. D. Colo. 2008).

11 383 B.R. at 781.

12 441 B.R. 713 (Bankr. S.D. Fla. 2010); see also *In re Fairfield Sentry Ltd.*, 2011 U.S. Dist. LEXIS 105770 (S.D.N.Y. Sept. 15, 2011), at *24.

13 441 B.R. at 718.

14 421 B.R. 685 (Bankr. S.D.N.Y. 2010).

15 421 B.R. at 697.

releases and injunctions in confirmed Chapter 11 plans" was not determinative.[16] The court reasoned that non-party releases are not entirely precluded under American law, and that the laws of a foreign legal system need not be identical to those of the United States to merit comity. In *Vitro*, both the Bankruptcy Court and Court of Appeals distinguished *Metcalfe* on the basis of the lack of opposition to the release of the non-debtors.[17]

Public policy and denying assistance

In *Qimonda*,[18] the Bankruptcy Court initially recognized the German insolvency proceeding as the main bankruptcy proceeding, and the German Insolvent Company Administrator as the representative.[19] However, the Bankruptcy Court also expressly subjected the foreign administrator to various Bankruptcy Code provisions, including Section 365, which governs the termination of executory contracts.[20] Of note, Section 365(n) specifically protects the rights of patent licensees.

Thereafter, the foreign administrator successfully moved to remove Section 365(n) as a source of binding legal authority with regard to termination of license agreements, and the bankruptcy court granted the motion of the foreign administrator to "elect nonperformance" of certain intellectual property cross-licensing agreements under a section of the German Insolvency Code.[21] On appeal, the District Court vacated the Bankruptcy Court's order. The District Court held that the Bankruptcy Court did not adequately consider whether comity should have been granted to the German law governing the cancellation of the licensing agreements.[22] The Court stated that although comity was "mandatory", comity was to be read in the context of the public policy exception of Section 1506.

After remand, the Bankruptcy Court announced that it would enforce Section 365(n) and denied the request of the foreign representative.[23] The Court posited two factors to be considered in determining whether relief was "manifestly contrary" to public policy. The first concern was procedural fairness. The second concern was "whether the application of foreign law or the recognition of a foreign main proceeding under Chapter 15 would 'severely impinge . . . a U.S. statutory or constitutional right, such that granting comity would 'severely hinder United States bankruptcy courts' abilities to carry out . . . the most fundamental policies and purposes' of these rights."[24] After examining the legislative history of Section 365(n), the Court held that industrial and competitive concerns are fundamental policy interests, and that failure to apply them would "undermine a fundamental U.S. public policy promoting technological innovation."[25]

Vitro was decided in the aftermath of *In re Toft*,[26] where the Court denied the application of a representative of a German insolvency proceeding who had sought access to internet servers purportedly containing emails of the debtor. In *Toft*, the Court determined that American electronic privacy laws reflected a fundamental public policy concern that warranted judicial protection, notwithstanding German law to the contrary.

In *Vitro*, the Bankruptcy Court declined to enforce provisions of a plan of reorganization that would have extinguished guarantees of the indebtedness of the debtor that were executed by non-debtor subsidiaries. Although the Court found the Mexican insolvency process to be fair, it determined that Sections 1506, 1507 and 1521 were not so broad as to empower the court to give effect to a release of liability on a non-party guarantee. Importantly, the Bankruptcy Court determined that such a release violated a fundamental tenet of public policy. The Court observed that "[g]enerally speaking, the policy of the United States is against discharge of claims for entities other than a debtor in an insolvency proceeding, absent extraordinary circumstances not present in this case."[27] On appeal, the Fifth Circuit upheld the Bankruptcy Court's rejection of non-party releases on the grounds that such relief was unavailable under Sections 1521 and 1507, without determining that the relief sought violated fundamental public policy.

The Court in *Elpida* reiterated the holding of *Ephedra* that grants of comity in cross-border insolvency proceedings under Chapter 15 were subject to the public policy exception and determined that the transfer of patents domestically located remained subject to the review under Section 363. Significantly, the Court declined to automatically defer to the main Japanese reorganization proceeding. Instead, it performed a detailed analysis of the text of Chapter 15 as enacted by Congress and examined the difference between Chapter 15 as enacted and Article 20 of UNICTRAL Model Law on Cross-Border Insolvency.

In *Sivec*, the Court lifted the stay against the assets of the debtor to allow the judgments entered in an American action to offset each other. As a result, the creditor was allowed to keep retainage funds it was holding, while pursuing the remainder of its claim against the debtor as an unsecured creditor in Italy. The Bankruptcy Court also denied requests for comity and a request by the Italian tribunal for the turnover of funds because the Bankruptcy Court was not satisfied with the protections provided to a judgment creditor under Italian law.

Conclusion

Vitro, *Elpida*, *Sivec* and *Qimonda* present a new phase in the application of domestic law in the context of Chapter 15's public policy exception. It appears that foreign policies and practices that are at odds with express statutory provisions of U.S. law or established case law will be subject to greater scrutiny. How this development will impact on cross-border insolvency remains unclear. But, these cases illustrate that national interests and values will impact cross-border insolvencies and may signal a greater willingness on the part of American courts to give force and effect to Congressional enactments, even in Chapter 15 cases and cross-border insolvencies.

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16 *Id*. at 694.

17 In *In re Sphinx Group of Companies*, [2010 (1) CILR 234] (Cayman, Feb. 12, 2010), the Grand Court Financial Services Division (a Cayman commercial court) expressly rejected the proposition that an American bankruptcy court would automatically accord comity to a non-consensual non-party release issued by a Cayman court. Instead, the Cayman court adopted the opinion proffered by one of the authors of this article, Melanie Cyganowski, that such recognition was a matter of discretion. 2010 (1) CILR at 240.

18 *In re Qimonda AG*, 462 B.R. 165 (Bankr. E.D. Va. 2011).

19 470 B.R. 374 (Bankr. E.D. Va. 2011). The bankruptcy court's decision is presently on direct appeal to the Fourth Circuit.

20 Section 365 is not among the provisions of the Bankruptcy Code automatically imported into a Chapter 15 case by 11 U.S.C. § 1520.

21 *Qimonda*, 2009 Bankr. LEXIS 3786 (Bankr. E.D. Va. 2009), *vacated and remanded*, 433 B.R. 547 (E.D. Va. 2010).

22 *Qimonda*, 433 B.R. 547 (E.D. Va. 2010).

23 *Qimonda*, 462 B.R. 165 (Bankr. E.D. Va. 2011).

24 462 B.R. at 183.

25 *Id*. at 185.

26 *In re Toft*, 453 B.R. 186 (S.D.N.Y. 2011).

27 *In re Vitro*, 417 B.R. at 131.

River Road - Important U.S. Decision on Credit Bidding for Secured Creditors

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Significant asset sales by a debtor subject to a Chapter 11 bankruptcy case can be effectuated either by a sale of assets outside the ordinary course of business under section 363 (a "363 Sale") of the Bankruptcy Code or pursuant to a confirmed plan of reorganization (a "Plan Sale"). Although a secured creditor's right to credit bid in a 363 Sale has long been undisputed, when the collateral is being sold pursuant to a Plan Sale, Circuit Courts have previously questioned a secured creditor's right to credit bid. A secured creditor's right to credit bid in a Plan Sale arises from a circuitous statutory scheme – known as "cramdown" – that allows a debtor to confirm a plan of reorganization (including one that mandates the sale of collateral) over the objection of nonconsenting classes of impaired creditors. Section 1129(a) of the Bankruptcy Code specifies the statutory requirements a debtor must satisfy in order to confirm a cramdown plan of reorganization. One such requirement is that impaired classes of creditors must vote to accept the plan; however, this requirement can be avoided and the plan "crammed down" on the nonconsenting class if the debtors are able to show that the plan does not discriminate unfairly and is fair and equitable with respect to such class.

Specifically, pursuant to section 1129(b)(2)(a) of the Bankruptcy Code, a debtor's plan of reorganization is deemed "fair and equitable" and can be confirmed over the objection of a secured creditor whose collateral is proposed to be sold pursuant to a Plan Sale if the plan of reorganization provides:

(i) (I) that the holders of such claims retain the liens securing such claims, whether the property subject to such liens is retained by the debtor or transferred to another entity, to the extent of the allowed amount of such claims; and

(II) that each holder of a claim of such class receive on account of such claim deferred cash payments totaling at least the allowed amount of such claim, of a value, as of the effective date of the plan, of at least the value of such holder's interest in the estate's interest in such property;

(ii) for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale, and the treatment of such liens on proceeds under clause (i) or (iii) of this subparagraph; or

(iii) for the realization by such holders of the indubitable equivalent of such claims.

In other words, a debtor's proposed plan of reorganization is statutorily deemed to be "fair and equitable" to an objecting class of secured creditors as long as those creditors are provided one of the following: (1) replacement liens and repayment over time at market rates based on a judicially determined value of the collateral; (2) an opportunity to credit bid their claim at a sale of the collateral; or (3) the "indubitable equivalent" of their claim. While a secured creditor's right to credit bid was traditionally applied to all cramdown Plan Sales, the Fifth and Third Circuit Courts of Appeal uprooted this tradition by permitting Plan Sales to go forward without permitting a credit bid, relying, instead, on the indubitable equivalent prong of the cramdown standard.[3] The problem is: "indubitable equivalent" is not a defined term in the Bankruptcy Code.

In *RadLAX Gateway Hotel v. Amalgamated Bank*,[4] the debtor advanced the argument that if the secured creditor was provided what it determined to be the indubitable equivalent, specifically, that the secured creditor's liens would attach to the cash proceeds received at auction, the secured creditor would be denied the right to credit bid its claim. The debtor argued that the "or" in clause (ii) of the 1129(b)(2)(A) cramdown standard provided it with the ability to sell its assets without providing the secured creditor its 363(k) credit bid right so long as the secured creditor received the "indubitable equivalent" of its claim in accordance with clause (iii). In recent years, a split among the Circuit Courts of Appeal had developed regarding this issue, resulting in the *RadLAX* case reaching the Supreme Court of the Unites States.

Much to the anticipation of the bankruptcy community, on May 29, 2012 the Supreme Court of the United States issued a decision in *RadLAX* and put an end to the split among the Circuit Courts of Appeal on the issue of whether a secured creditor has the right to credit bid its claim when its collateral is being sold pursuant to a plan of reorganization.[5] Writing for a unanimous Court,[6] Justice

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3 *See In re Pacific Lumber Co.*, 584 F.3d 229 (5th Cir. 2009) (holding that cramdown plan was confirmable notwithstanding the lack of a credit bid because the three prongs of "fair and equitable" test should be read as alternatives and could be satisfied if the creditors received the "indubitable equivalent" of their secured claim); *In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010) (holding that the "indubitable equivalent" prong does not itself require allowing secured creditors to credit bid their claims).

4 *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. ___ (2012).

5 *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. ___ (2012).

6 Justice Kennedy took no part in the *RadLAX* decision.

Scalia found *RadLAX* to be "an easy case" and, in ten succinct pages, definitively established that a secured creditor must be afforded its right to credit bid on collateral that a debtor proposes to sell free and clear of the creditor's liens pursuant to a cramdown plan of reorganization.

In *RadLAX*, both the Bankruptcy Court and the United States Court of Appeals for the Seventh Circuit – after a direct appeal from the Bankruptcy Court – declined to follow *Pacific Lumber* and *Philadelphia Newspapers* and instead denied the debtors' proposed bidding procedures for the Plan Sale of collateral that did not provide the agent of a $142 million prepetition secured loan a right to credit bid its claim. Rather, the secured creditor would be required to bid with cash at the auction against a stalking horse bidder who ultimately offered $55 million for the collateral. The Debtors contended that the treatment proposed under the plan – the liens of the secured creditors attaching to the cash proceeds derived from the auction of the collateral – constituted the indubitable equivalent of their claim and, *inter alia*¸was "fair and equitable" for purposes of satisfying the Bankruptcy Code's cramdown requirements.

Prior to *RadLAX*, the secured lending community found ways to work around a bankruptcy court's refusal to provide a right to credit bid by, among other ways, providing an absolute right to credit bid in DIP and cash collateral orders. Additionally, because a secured creditor's lien attaches to the cash proceeds of an auction, secured creditors have successfully submitted cash bids for assets and, in turn, received the very same cash proceeds to pay down their prepetition debt. However, this workaround to a credit bid denial was often difficult to implement. For instance, a secured lending syndicate could have difficulty apportioning and collecting the necessary cash for a bid, especially if certain members of the syndicate refuse to put up cash for a bid. Additionally, there remained the risk that the debtor's plan of reorganization that governs the secured lender's treatment is never confirmed (or the confirmation delayed). In such a situation, the secured lender has already made a cash outlay for its own collateral and the cash is now locked in the estate, subject to the plan confirmation process. The *RadLAX* Court noted that it made no sense for the secured creditor to cash bid when they had already lent the debtor money. Additionally, Justice Scalia expressly recognized the problem with such a workaround in situations where the secured creditor was the Federal Government.[7]

With the credit bid right definitively established as one that exists in both the 363 Sale and Plan Sale contexts, secured creditors are now afforded a mechanism to minimize the potential for a debtor to liquidate collateral at depressed prices. However, secured creditors can expect debtors' counsel to craft creative arguments to support denial of a secured creditor's credit bid right "for cause" as expressly contemplated by section 363(k) of the Bankruptcy Code, an area with little developed case law and plenty of room for judicial manipulation when coupled with the broad equitable powers given to a bankruptcy court under section 105(a) of the Bankruptcy Code.

Additionally, because the statutory credit bid right is predicated on the secured creditor holding an "allowed claim," a debtor or another party in interest could hamper a credit bid right by filing an objection to the claim. Such objection, however, would have to be based on a good faith belief that the amount or priority of the secured creditor's claim was subject to dispute. In these situations, a secured creditor's right to credit bid may be predicated on the posting of a bond of sufficient size to cover the amount of its bid in cash if its secured claim is ultimately disallowed. As such, secured creditors must still be vigilant in monitoring a bankruptcy proceeding to ensure its credit bid right remains exercisable. Mechanisms may also be included in syndicated loan documents in order to address these situations if they arise by requiring that members of the syndicate to fund any bond that is required to be posted.

While *RadLAX* is a case which is determative under the Bankruptcy Code, it could have international implications as secured lenders around the world attempt to protect their interests in collateral located in the United States and amend the underlying loan documentation accordingly.

7 *See RadLAX*, 566 U.S. at 4 n.2 ("That right [to credit bid] is particularly important for the Federal Government, which is frequently a secured creditor in bankruptcy and which often lacks appropriations authority to throw good money after bad in a cash-only bankruptcy auction.").

White Birch Paper – Canadian Developments in Credit Bidding and a Creative Approach to Pension Plan Issues

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Introduction

White Birch Paper Company and its affiliates (collectively, "White Birch") were involved in the paper product sector in North America. Through subsidiaries, White Birch owned and operated three pulp and paper mills and a saw mill in Québec, Canada, and a fourth pulp and paper mill in Virginia, United States. In 2009, White Birch began to struggle financially with a deterioration of the market for newsprint, together with the weight of its secured debt and its pension obligations in Canada. In addition to a revolving credit facility secured against the current assets of the business, there were 2 tranches of term debt secured against the fixed assets (approximately $400 million of first lien debt and approximately $100 million of second lien debt), and pension deficits in the Canadian mills totalling over $200 million at that time.

On February 24, 2010, all of the Canadian White Birch entities filed for creditor protection in the Québec Superior Court under the federal *Companies' Creditors Arrangement Act* ("CCAA"). Concurrently, the United States operating entity, Bear Island Paper Company LLC ("Bear Island"), filed under Chapter 11 of the *United States Bankruptcy Code* (the "Code") in the State of Virginia. In the Canadian CCAA proceedings, Ernst &Young Inc. was appointed as monitor. The Canadian White Birch entities also filed for protection in the Virginia Court under Chapter 15 of the Code.

The pre-filing revolving lenders would not agree to provide debtor-in-possession financing to White Birch. Ultimately, a group of parties who were also lenders in the first lien loan facility agreed to provide a DIP term loan of $122 million, which was approved in both jurisdictions.

Credit bidding

In April, 2010, a sale and investment solicitation process for the White Birch business was approved by both the Canadian and U.S. courts. This process resulted in a stalking horse bid being made by BD White Birch Investment LLC ("BD White Birch"), which had been formed by parties holding a majority of the first-lien loan – Black Diamond Capital Management LLC, Credit Suisse Group AG, and Caspian Capital Advisors LLC. This bid was approved as a stalking horse by both the Canadian and US courts in August of 2010, which orders also approved an auction process. Other parties holding a minority of the first-lien loan submitted a qualifying offer through an entity named Sixth Ave. Investment Co., LLC ("Sixth Ave"). An auction was held in New York on September 21, 2010 between BD White Birch and Sixth Ave. BD White Birch was declared the winning bidder with a bid for total consideration of approximately US$236-million, made up of a cash amount of US$94.5-million, a credit bid of US$78-million allocated to the fixed assets in Canada, and certain assumed liabilities and cure costs.

White Birch sought approval of the BD White Birch bid from the Quebec Superior Court on September 24, 2010. Sixth Ave objected and argued that the credit bid should not be accepted at full value and the bids should not be compared by looking at the total consideration in each. Sixth Ave.'s objections were rejected and the BD White Birch bid was approved by Justice Mongeon of the Quebec Superior Court on September 28, 2010.[1] Among other things, Justice Mongeon's ruling made it clear that a dollar of credit bid is equal to a dollar of cash bid. Sixth Ave. sought leave to appeal, but the Quebec Court of Appeal dismissed their motion on October 25, 2010.[2] The sale was approved by the U.S. court by order entered on November 3, 2010.

While credit bidding has been accepted for years in Canada, this was the first instance of its use in a contested auction scenario, and the Quebec Superior Court's decision was the first case to really explore the issues of valuing the credit bid in such a context. This decision effectively brought the law in Canada in line with that in the United States under Section 363(k) of the Code.

Pension plan issues

The closing of the transaction was delayed due to a number of conditions in the sale agreement, the most significant of which was the entering into of new collective agreements and pension arrangements with the Communications, Energy and Paperworkers Union ("CEP") union.

The Canadian mills of the White Birch business are largely unionized. At the date of the CCAA filing, there were 7 defined benefit pension plans in Canada, all of which were in a deficit position. The deficits are expected to exceed $300 million in total at closing. The purchaser was not prepared to assume that liability.

With respect to the unionized workforce, negotiations with the CEP took more than 18 months, and new collective bargaining agreements were executed on July 13, 2012 at

1 *White Birch Paper Holding Company (Arrangement relatif à)*, 2010 QCCS 4915 (CanLII).
2 *White Birch Paper Holding Company (Proposition de)*, 2010 QCCA 1950 (CanLII).

each of the 3 Canadian mills. Those new collective agreements provided for, among other things, the termination immediately before closing of the 4 old White Birch pension plans for its unionized employees, and the creation after closing of new pension plans for those unionized workers, which would be effective from the closing date. The new pension plans will be "target" benefit plans[3] with respect to the future service of employees. In addition, subject to certain conditions being met, the new pension plans will provide some new benefits for past services.[4]

This represented a new way of approaching a resolution of defined benefit pension issues in Canada. A buyer of assets would ordinarily either assume the pension plans, or require that they be terminated in which case the pension beneficiaries would then suffer the losses in the old plan due to the deficit on wind up – Canadian law prevents the termination in an insolvency proceeding of collective agreements and, by extension, any pension plans tied to those collective agreements. The approach taken by BD White Birch was fresh and new. The old pension plans were terminated with their deficits remaining as liabilities of the vendor companies, while the purchaser is creating new pension plans. These new pension plans do not assume liabilities from the terminated plans but will, if a number of conditions are met, create a new liability to provide some new benefits for past services.

Indalex style motion

Before an agreement was reached with the CEP, the CEP brought a motion in the Quebec Superior Court seeking relief based upon an Ontario case, *Indalex*, which is under appeal before the Supreme Court of Canada.[5] The CEP motion sought a declaration that the pension deficits were subject to statutory deemed trusts and had priority over the DIP (based on the Ontario Court of Appeal decision in *Indalex*), as well as a reversal of the first day order provisions to require special payments to be made on the pension deficits going forward. This involved a 2 day hearing, during which the CEP withdrew its request for the Court to apply the statutory deemed trusts to the pension deficits as had been done in *Indalex*. On April 20, 2012, Justice Mongeon of the Quebec Superior Court ruled that *Indalex* did not apply to the Quebec legislation, and refused to order the debtors to begin making special payments again.[6]

On September 13, 2012, BD White Birch successfully completed the acquisition of the assets of White Birch. The completion of the acquisition represented the successful culmination of a more than 2 year restructuring process.

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3 Traditional defined benefit pension plans provide a set of benefits for beneficiaries and the employer or plan sponsor is obligated to ensure that they are provided, including funding a deficit if the plan assets are not sufficient to pay the promised benefits. Traditional defined contribution plans merely obligate the employer or sponsor to pay certain contributions and the beneficiaries then get whatever benefits their share of the funds can generate. "Target" defined benefit plans are new creations and are a sort of hybrid. They provide a proposed set of defined benefits and the employer or sponsor has to fund set current service contributions. But, if the assets in the plan fund are not sufficient to fund the full level of proposed benefits, the level of benefits is scaled back to what the plan assets can afford and the employer or sponsor has no liability for a pension plan deficit.

4 The 3 old non-unionized defined benefit pension plans were terminated by White Birch before closing. New arrangements are being implemented in respect of those workers by their new employers.

5 SCC file no. 34308, appeal was heard on June 5, 2012, awaiting decision. This is an appeal from the Ontario Court of Appeal decision in *Indalex Limited (Re)*, 2011 ONCA 265 (CanLII), which overturned the decision of the Ontario Superior court (Commercial List) in *Re Indalex*, 2010 ONSC 1114 (CanLII).

6 *White Birch Paper Holding Company (Arrangement relatif à)*, 2012 QCCS 1679 (CanLII).

Overview of the New Insolvency Regime in the Bahamas

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As a part of a legislative initiative to support the financial services industry and modernize the infrastructure of commerce the Bahamas Law Reform Commission directed by former Attorney General, John F.K. Delaney, QC, significantly revised the insolvency legislation of the jurisdiction.

The project involved a study of insolvency legislation in other offshore and onshore jurisdictions, and widespread consultation with industry practitioners. It gave birth to the Companies (Winding Up Amendment) Act, 2011 ("the Act"), International Business Companies (Winding Up Amendment) Act, 2011 ("the IBCWA"), the Companies Liquidation Rules 2012 ("the CLR"),the Foreign Proceedings (International Cooperation) Liquidation Rules, 2012 and the Insolvency Practitioner Rules ("the IPR"), which came into force in 2012.

These reforms are significant because previously the Bahamas had relied upon insolvency laws (save for parts of the former International Business Companies Act) which largely resembled pre-1950 English legislation. Moreover, the former Rules directed practitioners to utilize court forms of the English Companies (Winding-Up) Rules, 1949, which necessitated adaptation to suit the context of Bahamian proceedings. There were also English forms (e.g. the Statement of Affairs) not prescribed for use in the Bahamas, which could have improved the practice of winding up companies, if employed.

In the new regime the Act is the primary statute since the IBCWA adopted the provisions of the Act relating to winding up and dissolution for liquidating International Business Companies ("IBCs"), but did not disturb the existing provisions governing voluntary liquidations of IBCs. As a result the CLR, with 36 new court forms, will apply in IBC liquidations, too.

While the opportunity for reform did not include consolidating the bankruptcy and corporate insolvency regimes, the Act repealed and replaced the entire Part VII of the Companies Act, Chapter 308 which governed company liquidations. Further, a new section – Part VII A – was introduced which gives directives for cooperating with foreign liquidators and others appointed in respect of a foreign company, and specifies that certain ancillary orders may be made by the Bahamian court in aid of foreign representatives and proceedings[1]. The Foreign Proceedings (International Co-operation) Liquidation Rules correspond to applications made under Section 254 of Part VII A of the Act and contain several court forms.

Practical innovations and codification of Common Law

There were no changes to the basic modes of liquidation (voluntary, compulsory and court-supervised), but the court's jurisdiction was expanded to include making an order to wind up a foreign company[2]. Also, the range of possible petitioners now includes regulators (governmental agencies "vested with regulatory oversight or power").

An application to set aside a statutory demand (a method of proving a company unable to pay its debts) may now be heard separately from the winding up petition[3]. Depending on the outcome of the hearing this could obviate proceeding with a winding up petition. Before this, challenges to statutory demands could only be heard at the same time as the petition.

A practical change empowers the court to make, on a contributory's petition[4], orders alternative to dismissing or granting the application. Alternatives include regulating the conduct of the company's affairs, ordering the company to do or cease doing an act complained of, authorizing a derivative action or ordering the purchase of shares of a member by other members or the company[5].

Welcomed by insolvency practitioners is the new provision that a liquidator (provisional or otherwise) may require directors, officers, prior liquidators, professional service providers[6] and employees (current and former) of the company to provide a statement of affairs[7] which discloses their knowledge of essential information concerning the company's assets and liabilities[8]. The aim is to significantly assist the liquidator's investigation into the company's affairs through the co-operation of persons who may have relevant information.

By an innovative, and potentially controversial, section the liquidator may, with the approval of the creditors or contributories and the court, pay "out of the assets of the

1 See Section 254 and 255 of the Act. Under Section 254 those ancillary orders include (i) recognizing the right of a foreign representative to act in the Bahamas for a "debtor" (a foreign corporation subject to foreign proceedings in its country of incorporation), and (ii) ordering a person to disclose information or provide documents or the property of the debtor, to the foreign representative, amongst other useful orders.
2 Under Section 185(d), in the event the foreign company has property or is carrying on business or is registered, in the Bahamas.
3 Section 189
4 The petition must be one brought on the ground that it is just and equitable to wind up the company. Section 191(3).
5 Prior to this Section 193 of the former Act specified that the Court could dismiss or adjourn the petition, make an interim order or any other order it deems just. Therefore, it is arguable this section, in enumerating what orders can be made on this type of petition, has thereby restricted or curtailed the Court's power to make any other order not specified. It may be contended that the new section lacks the generality of the former Section 193.
6 Under Section 183 this is "a person who contracts to provide general managerial or administrative services to a company on an annual or continuing basis". The definition does not include persons such as legal advisors.
7 Section 196(3)
8 Section 196(2)

company" "the costs of investigation and prosecution" in relation to the company's failure or affairs[9]. The company will fund the efforts of *inter alia* the police to investigate the conduct of persons suspected of committing an offence[10].

While the utility of the provision is understood, it may raise concerns. Historically, the Police Act[11] authorised private funding and use of a police officer to be stationed for duty in a particular place and for a specific period of time[12]. Typically, the section was used to permit posting policemen for security at large events hosted by private persons, to which the public was invited. Questions of whether this provision may cause interference with the independence and impartiality of the police in conducting their official duties may be raised. Moreover, one wonders who will be legally and financially responsible for any misdeeds committed by the policeman while he is acting for the liquidator. The application of this provision may be eventful, at least for Bahamian constitutional / administrative lawyers.

Shadow directors[13], now included as "officers", can be required to give statements of affairs, co-operate with a liquidator's investigations, be privately examined in relation to company property or documents[14], and along with other specified persons are subject to sanctions where they commit fraud or misconduct in anticipation of winding-up, engage in fraud against creditors or make material omissions from the statement of affairs[15]. Fraudulent trading has also has been added to the fraud regime. Previously there was only a single provision on fraud[16]. Further, insolvent trading has been introduced so that short of dishonesty, gross negligence and mismanagement are sanctioned, and the wrongdoer must contribute to the assets of the company[17]. Also, the claw-back period for voidable preferences has been doubled from 3 months to 6 months immediately before the liquidation.

There are redefined provisions on the removal of the liquidator and challenges to his exercise of powers. New sections enabling him to disclaim onerous property, somewhat similar to the English Companies legislation have been included. There is recognition of contractual set-off and netting of claims in the application of the company's property[18]. These, along with clear directives for the closure of the liquidation and disposal of remaining property assist to modernize the Act.

Amongst changes to the Act which codify practice and the common law is a provision[19] which permits a liquidator to draw remuneration, with the court's approval, from trust assets held by the company in liquidation, where the liquidator's activities are allocable to identifying, recovering, protecting or distributing those assets[20]. Also, it is stated in the statute that a liquidator's remuneration may either be fixed at an hourly rate or on a percentage basis[21]. It may have been even more helpful if the reformers had defined the asset to which the "percentage" should correspond (e.g. paid dividends or the realized property of the company).[22]

Insolvency Practitioners Rules

Previously, the approval of persons to act as official liquidators (foreign and local) was largely governed by practice. Now, the IPR definitively requires a qualified insolvency practitioner to have certain professional[23], residency, independence and insurance qualifications in order to be appointed[24]. Further, a foreign practitioner who meets the independence and insurance requirements may act jointly with a qualified insolvency practitioner. Prior to this, it had been the practice to allow foreign practitioners to act jointly with local ones, but in the absence of any set rules on this area, it was quite conceivable that a foreign practitioner might be disallowed or alternatively might act alone as an official liquidator[25]. These Rules have therefore brought certainty to the practice.

Overall, the reforms herald a vast improvement of the legislation. Perhaps the best yardstick of their success shall be the degree of expeditiousness with which future Bahamian liquidations are conducted. Moreover, it is anticipated that future revision of the Rules will not be neglected. The mechanism of a Rules Committee[26] (not comprised of politicians) has been built into the legislation to promote the ease of future revision.

9 Section 197(3)

10 This provision apparently came about as it was recognized that the resources of the public service are limited.

11 Chapter 205, Section 103, Statute Laws of The Bahamas.

12 There are also older regulations which appear to contemplate that a private engagement of a policeman shall not be of an official nature but rather for entertainment or profit purposes, eg. parades or concerts. Arguably this excluded official business of the police and, as such, the duties contemplated under this new section.

13 Defined in *Re Hydrodam (Corby) Ltd* [1994] 2 BCLC 180 by Lord Millett as one who "does not claim or purport to act as a director…" but who shelters "behind others who he claims are the only directors of the company to the exclusion of himself. He is not held out as a director by the company." However, note that it has been stated (by Lord Walker dissenting in *Holland v. Revenue and Customs Commissioners & Another* [2010] UKSC 51) that hiding (lurking 'in the shadows') is not a necessary element in the definition of 'shadow director' for he could "openly give directions to the board of a subsidiary company on which he does not sit".

14 Section 198

15 Sections 228 through 231

16 The new Sections 228 through 231, 242 and 243 comprise the laws on fraud in the Act. In the old Companies Act, Section 262 was the single fraud provision. It dealt with fraudulent preferences and was somewhat cumbersome to apply in that it required one to determine whether the transaction was such that, if done by or against an individual trader (an undefined term in that Act), it would be one deemed to have been done by way of undue or fraudulent preference of the creditor of such trader in the event of the trader's bankruptcy. Now the provisions on fraud have been expanded and simplified to provide clarity and broader application.

17 Sections 243 and 244

18 Section 236(2)

19 Section 204

20 Previously, cases such as In the Matter of *Dominion Investments (Nassau) Ltd (In Liquidation)*21and other authorities cited in the case had to be relied upon solely as authority in support of an application for such remuneration.

21 Section 204(2). This was previously only set out in the common law, e.g. Re Banco Ambrosiana Overseas Ltd. (In Liquidation) [1984] BHS J. No. 87.

22 However, that this issue has not been dealt with in the Act is not necessarily disadvantageous as it enables the Court to be flexible in retaining the power to decide.

23 See Rule 4(1). It is interesting to note that one of the accepted qualifications in the Rule is an insolvency practitioner's licence from England and Wales, Scotland, Northern Ireland, The Republic of Ireland, Australia, New Zealand and Canada per Rule 4(4). Although several other major jurisdictions are not amongst these countries, the provision has recently been applied by the Court so as not to preclude a licensee of an unnamed jurisdiction from being appointed as a liquidator insofar as he has other stated professional qualifications and meets the other requirements.

24 Rules 4 through 7

25 This was possible where a temporary work permit could be obtained by that foreign practitioner.

26 Section 251 and 252 of the Act.

Staying Environmental Regulators in Canada[1]

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In a long-awaited decision, the Supreme Court of Canada held that orders made by a government regulator requiring a CCAA debtor to perform environmental remediation work were, in substance, monetary claims that were subject to stay and compromise under the principal federal law governing restructuring proceedings by insolvent companies - the *Companies' Creditors Arrangement Act* (the "CCAA").

In 2008, within days of AbitibiBowater Inc. announcing the closure of its last operation in the Province of Newfoundland and Labrador, the Province expropriated most of Abitibi's property in the Province for no compensation. In 2009, Abitibi obtained protection under the CCAA in the Quebec Superior Court. Newfoundland's environmental regulator subsequently issued orders under the Province's *Environmental Protection Act* (the "EPA") requiring Abitibi to submit remediation plans and to complete remediation actions for five industrial sites it had previously occupied (the "EPA Orders"). That same day, the Province sought a declaration that the CCAA did not bar enforcement of its EPA Orders because, among other grounds, the EPA Orders are regulatory in nature and are not monetary "claims" that can be subject to stay and compromise in an insolvency process.

Abitibi's CCAA filing preceded the enactment of amendments to s.11.1 of the CCAA that specifically protect regulatory proceedings from being stayed except where the regulator is seeking to enforce a payment. However, this Canadian version of the US "police power" regulatory exception continues to allow a Court to stay regulatory action where the regulator is found to be "seeking to enforce its rights as creditor".[2]

In Abitibi, the lower Court found that the EPA Orders were, in substance, an attempt by the Province to assert monetary claims as a creditor of Abitibi. It therefore dismissed the Province's motion. The Quebec Court of Appeal denied the Province leave to appeal *(cert.)* but, in an unusual procedural twist, the Supreme Court of Canada granted leave to appeal despite the intermediate appellate denial of leave.

Deschamps J., writing for a 5-2 majority of the Supreme Court of Canada, quickly dismissed a preliminary constitutional issue, finding that the determination of whether a provincial environmental order amounts to a monetary claim that can be stayed and compromised in a CCAA proceeding clearly falls under Parliament's exclusive legislative jurisdiction over matters related to bankruptcy and insolvency and does not interfere with provincial regulation of the creditor's activities.

Deschamps J. held that the real issue was the determination of whether the EPA Orders amounted to "claims" under the CCAA. She emphasized the importance of looking at the substance of the EPA Orders over their form and assessing whether, in substance, the EPA Orders amounted to impermissible attempts by the Province to re-order federally mandated priorities.

To assess whether the EPA Orders were monetary claims, Deschamps J. referred to the treatment of claims in the provisions of the CCAA and the *Bankruptcy and Insolvency Act* that were in force at the time of the commencement of Abitibi's proceedings. From a review of those provisions, Deschamps J. held that regulatory orders must meet three requirements to qualify as claims subject to the CCAA process:

(1) there must be a debt, liability or obligation to a creditor;

(2) the debt, liability or obligation must be incurred before the debtor becomes subject to the CCAA proceedings; and

(3) it must be possible to attach a monetary value to the debt, liability or obligation.

Deschamps J. found the first two requirements were easily satisfied and therefore focused on the third requirement. In the context of environmental orders specifically, she concentrated on s.11.8(8) of the CCAA, which provides that where a regulator performs environmental work for a debtor, the regulator has a claim for its costs and a priority charge against the debtor's contaminated real property. Deschamps J. reasoned that if Parliament had intended an insolvent debtor to be responsible to satisfy all remediation costs, it would have granted the regulator with priority over all of the debtor's assets. In light of the limitation of governments' environmental priority under s.11.8(8) of the CCAA, the legislative history, and the rehabilitative purposes of the CCAA process, Deschamps J. concluded that exempting environmental orders from the insolvency process would be inconsistent with the CCAA.

Deschamps J. then considered the fact that, if recognized, the EPA Orders would amount to a "contingent claim"; that is, a claim whose existence depends upon the contingency of whether the Province incurs environmental remediation

1 Adapted by permission of Carswell, a division of Thomson Reuters Canada Limited from Wagner, Melaney: "AbitibiBowater Inc., Re", (January 7, 2013) Bankruptcy & Insolvency Law Newsletters – Houlden & Morawetz On-Line Newsletter, ed. Geoffrey B. Morawetz, Insolv. L. Nws. 2013-01, on Westlaw® Canada's InsolvencySource.

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2 CCAA, subsection 11.1(4)

costs in relation to the debtor at some time in the future. The criterion used in bankruptcy cases historically to determine whether a contingent claim will be provable is whether the contingent event is "too remote or speculative" to allow it to be meaningfully evaluated *(Confederation Treasury Services Ltd. (Bankrupt), Re* (1997), 96 O.A.C. 75). In the context of environmental remediation orders, Deschamps J. held that orders issued by a regulatory body will constitute monetary claims where it is "sufficiently certain" that in future the regulatory body will perform the remediation work itself and assert a monetary claim for reimbursement of its costs (i.e. under s.11.8(8) or s.11.8(9) of the CCAA).

Deschamps J. held that factors guiding a court in assessing whether it is sufficiently certain the regulatory body will perform the remediation work include: whether the debtor's business activities at issue are ongoing; whether the debtor is in control of the property; and whether the debtor has the means to comply with the order(s) made. If the debtor is still operating the site, the court may conclude that the regulatory orders cannot be compromised under the CCAA because the activities will continue after the reorganization is completed. If the property is not under the debtor's control and the debtor does not, and realistically will not, have the means to perform the remediation work, the court may conclude it is sufficiently certain that the regulatory body will have to perform the work itself. The court may also consider the effect that requiring the debtor to comply with the order would have on the insolvency process. Since the appropriate analysis is grounded on the facts of each case, these indicators need not all apply and others may also be relevant.

Deschamps J. rejected the policy argument that subjecting an environmental order to compromise extinguishes the debtor's environmental obligations. If the debtor carries on operations, it will be subject to applicable laws, including environmental laws. Deschamps J. also noted that requiring compliance with orders that are found to be monetary in nature would shift the costs of remediation to third party creditors, including involuntary creditors (like tort victims or employees whose employment was lost on insolvency). If orders that are monetary in substance are not included in the insolvency process, this would result in not only a super-priority but in the acceptance of a "third-party pay" principle in place of the "polluter-pay" principle advanced by the Province.

In the result, Deschamps J. applied the principles discussed above and held:

(1) The Province identified itself as a creditor by resorting to the EPA enforcement mechanisms;

(2) The damage occurred before the commencement of the CCAA proceedings; and

(3) Although the judge at first instance did not base his decision on a "sufficiently certain" test, the Court should defer to his findings of fact (including that Abitibi's operations were funded through DIP financing, its access to funds was limited to funding ongoing operations, and most targeted sites were no longer in Abitibi's possession). The majority held that the facts as found by the lower Court, particularly the finding that the EPA Orders were the first step towards performance of the remediation work by the Province, led to no conclusion other than that it was sufficiently certain the Province would perform remediation work and therefore fall within the definition of a creditor with a monetary claim subject to compromise under the CCAA.

The two dissenting Judges focused only on the third requirement enunciated by the majority, although in different ways. McLachlin C.J. considered environmental obligations as owed to the public, which generally survive restructuring. Therefore, they are too remote and uncertain to amount in substance to contingent claims that can be compromised under the CCAA unless there is a proven "likelihood approaching certainty" that the Province would perform the work itself. In her view, courts should not overlook the obstacles governments may encounter in deciding to remediate environmental damage a debtor has caused. The Province's decision to clean up a site is discretionary and in some cases legislative. It may be influenced by competing political and social considerations and by the fact that remediation may be expensive. McLachlin C.J. found that the CCAA judge never asked himself the critical question of whether it was sufficiently certain the Province would do the work itself. She found the record devoid of evidence capable of establishing that it was sufficiently certain the Province would remediate the properties, even on the majority's more relaxed standard.

LeBel J., in his dissent, agreed with the legal test adopted by the majority and expressly rejected the more stringent test propounded by the Chief Justice. However, he too found that there was no evidence before the lower Court to prove that there was sufficient certainty the Province would perform the remediation work itself. In his view, the lower Court did not assess the key factual question but was instead concerned that the restructuring would fail if Abitibi was not released from its environmental obligations.

In the result, the lower Court's order staying the EPA Orders and subjecting them to the CCAA claims process was upheld.

INSOL Beijing One Day Seminar, 1 November 2012

Report by Helena Huang
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On November 1, 2012, INSOL hosted its first one-day seminar in China. The event was hosted by the Beijing office of King & Wood Mallesons, a leading regional international law firm in China and Australia. The Seminar was co-organized by King & Wood Mallesons, China University of Politic Science and Law, Bankruptcy Law and Restructuring Research Centre (the "Research Centre") and the Hong Kong Institute of Certified Public Accountants. The purpose of the Seminar was to offer local practitioners access to INSOL's international network and to facilitate the exchange of knowledge and experiences on insolvency and restructuring matters.

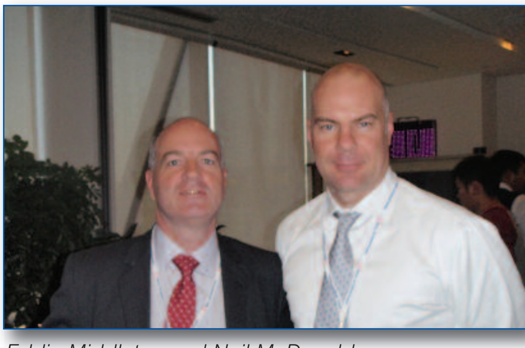
INSOL invited around 60 leading insolvency and restructuring practitioners from the PRC, Hong Kong, the U.S., UK, and Australia to participate in the whole-day seminar. Speakers included James Sprayregen, INSOL Vice-President and the head of the restructuring practice at Kirkland & Ellis LLP, Prof. Li Shuguang, executive director of the Research Centre, Eddie Middleton, Fellow, INSOL International and head of restructuring of KPMG Asia, and Neil McDonald, head of insolvency practice of Hogan Lovells Hong Kong. The primary focus of the seminar was to review the latest practices and developments in China since the implementation of its Enterprise Bankruptcy Law in 2006 (the "PRC Bankruptcy Law"), and to share the experiences in insolvency and restructuring work of practitioners from other jurisdictions.

To provide further insight into local legislation, two sessions of the seminar were devoted to PRC-related restructuring issues. One panel updated the audience on the latest restructuring cases of listed companies and non-public companies. The speakers noted that increasingly, A-share companies are moving away from the dominant back-door listing model that has been commonly used in restructuring, to a true restructuring of the existing business. The speakers also commented on the first restructuring in China by an H-share company. This complicated process involved the coordination of securities regulators from both the PRC and Hong Kong, the reconciliation of the disclosure rules of different exchanges, and the enforceability of the court orders approving the restructuring plan against the holders of the H shares.

Other timely topics that local insolvency lawyers highlighted included the different treatment shareholders' claims have received in different courts and the lack of a legal basis for a PRC court to grant substantive consolidation under the PRC Bankruptcy Law. Detailed analysis of the latest delisting rules of public companies in China compared with those issued by the Hong Kong Stock Exchange was also covered in the seminar. Panel speakers expressed hope that with new delisting rules and the current bearish A-share market, there might be fewer investors using shell companies to shortcut the IPO process and instead, more public companies in China might then resort to the bankruptcy mechanism to restructure their businesses.

From the international insolvency community, two Hong Kong insolvency practitioners shared their recent

Marcus Ayres, James Sprayregen and Joe Bannister



Eddie Middleton and Neil McDonald

Helena Huang and Kathleen Wong

Alan Tang, Zheng Zhibin and Prof. Li Shuguang experiences in restructuring financial institutions around the world, including the high-profile restructurings of Lehman Brothers and HIH. The speakers noted that post-GFC, financial institutions in Asia (and commercial banks in China, in particular) are performing better than their counterparts in the U.S. and Europe. Notwithstanding that, it is clear that there are lessons to be learned by PRC banks from the experiences of Lehman Brothers and alike. The panel suggested that implementing early risk warning mechanisms and strict monitoring of stress testing might help to avoid the collapse of financial institutions, this is particularly so in light of the significant role that PRC regulators play in financial markets.

A comprehensive comparison of the similarities and differences in the insolvency laws between the U.S., U.K. and Australia, on the one hand, with those of China on the other, was also considered. The panel discussed the pros and cons of the insolvency regime of the these jurisdictions; in particular, the panel compared the benefits and practical issues of an out-of-court restructuring and a formal insolvency proceeding in their home jurisdictions. Interestingly, one panellist pointed out that although certain distinctions exist, the PRC Bankruptcy Law was modelled after the Chapter 11 law of the U.S. Bankruptcy Code, yet, in practice, those implementing the law have adopted much from the U.K. administrator system and inherited the traditional liquidation mentality.

The speakers also expressed concern that, due to the inexperience of PRC judges and the administrators in overseeing bankruptcy matters, and the lacking of guidance from the Supreme People's Court, the number of bankruptcy filings since the implementation of the PRC Bankruptcy Law has not been as high as one might have expected.

The speakers also shared with the audience their first-hand experience in advising PRC buyers in acquiring distressed businesses in western jurisdictions. This discussion explored the rationale for using different mechanisms to acquire foreign distressed business, such as utilizing a 363 sale in a U.S. Chapter 11 proceeding, loan to own strategies and secured lending enforcement. They also shared their observations of some common challenges faced by Chinese companies in their outbound investments, such as a lack of understanding of the foreign investment environment, inexperience in working with professional advisors and difficulties faced by management teams in operating businesses.

The Seminar was well received by both the local community and international practitioners alike and feedback from local delegates has been very positive.

NAMA, Austerity, and Exports - Ireland's Path to Repair and Renewal

David Van Dessel
kavanaghfennell
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Economic indicators published at the end of the year indicate that Ireland is on the road to recovery having dealt head on with the biggest financial crisis in the history of the State. This article outlines a number of key components which have contributed to the economic recovery thus far.

NAMA: What/Why/How?

The National Asset Management Agency (NAMA) was established in 2009 as one of a number of initiatives taken by the Government of Ireland to address the serious crisis in Irish banking which had become increasingly evident over the course of 2008 and early 2009.

Growth in the Irish economy from 2000 onward, during the so called "Celtic Tiger" period was fuelled by the largest property bubble in the country's history. The Irish banking system had engaged in excessive lending to the property sector and, with the significant decline in the Irish property market from 2007 onwards, loan impairments had begun to rise substantially. This caused a rapid depletion in bank regulatory capital and required appropriate remedial action to remove uncertainty and to repair the balance sheets of a number of financial institutions of systemic importance to the Irish economy.

NAMA acquired loans with a book value of €74 billion at a discount of 57% and was assigned two primary tasks;

- To acquire land and development loans from five financial institutions, so as to remove this systematic risk to the Irish banking system.
- To obtain the best achievable financial return to the State from these acquired loans.

While the challenges facing Ireland's bad bank could not be understated, Ireland was praised for a solution which dealt with the economic crisis head on. The establishment of NAMA, coupled with sweeping cuts to the public sector and a raft of austerity measures introduced by successive budgets sent a clear message to the International business community of a country prepared to face up to the harsh fiscal reality post Celtic Tiger.

Targets hit by NAMA

NAMA's end of year review for 2012 was published in early January 2013, and it states that the agency has generated €10.5 billion in cash since its inception. The income has come from asset disposal as well as recurring non disposal income, such as rent. NAMA has made debt repayments totalling over €5 billion to date, and remains firmly on course to hit the senior bond redemption target of €7.5 billion by the end of 2013. NAMA should be commended for these results particularly when one considers that NAMA must deal with two somewhat conflicting objectives; namely, dealing expeditiously with acquired assets, while enhancing the value of acquired assets.

NAMA therefore must continue this balancing act of generating cash flow from the disposal of assets, while preserving value and not disposing of assets by way of a fire sale.

NAMA contends that while there is significant investor interest in NAMA's portfolio, the availability and cost of finance are major constraints both in Ireland and Internationally. In the NAMA annual statement, which outlines the objectives, strategies, and policies to be implemented in the financial year 2013, a number of measures to address this liquidity issue have been outlined to increase the transactional activity in 2013 and beyond. These measures, some of which have already been introduced, include a vendor finance programme under which loan finance of up to 70% of the purchase price is available to suitable purchasers, and a Deferred Payment Initiative (DPI) which offers an element of price protection to buyers for five years. The DPI has been offered on a pilot basis for a small number of properties, but it is expected to be extended in 2013.

Loan book sales

Another significant development for NAMA, and indeed for the Irish Economy in general, is the increasing presence of private equity fund investors in the property market. In 2012, we saw a significant increase in the sale of loan books by domestic and non domestic banks. Banks such as Lloyds, Allied Irish Bank and GE Money have all sold loan portfolios ranging in par value from €360m to €2bn, with more of these transactions anticipated in 2013 and beyond. The sale of these loan books is an important step for banks, who must continue to de-leverage over the next seven years in order to comply with new banking rules. However, as this is a fairly new development in the Irish economy, the effects are not easily predicted. It is thought that the new investors may apply more aggressive tactics to realise assets than the previous owners of the loans. This may cause alarm amongst some borrowers who had been dealing with pillar banks, who had a long term strategy and therefore were prepared to recoup these loans over a longer period. However, one must also assume that were these funds to adopt an aggressive approach, they might also be willing to cut deals with borrowers in the interest of realising capital in the shorter term. For the economy at large, there is a note of concern that just as the property market appears to be stabilising, we may see an increase in the number of properties put to market, which are priced to sell, which in turn could force property values down again.

Signs of stabilisation in the property market

The property market results of the final quarter of 2012 have indicated that the market in Dublin is showing signs of stabilisation. The rate of decline in the Dublin market for 2012 was 12%, the lowest in 4 years. For the final quarter, asking prices in Dublin were just 2% lower than a year previously. The stabilisation is occurring in Dublin, and other cities in the main, with rural areas lagging behind, however, the figures will certainly be welcomed as a positive start to 2013. One of NAMA's key objectives is to stabilise the property market, and it does appear that this is being achieved.

Exports and austerity, elements helping to reduce the budget deficit

Ireland currently boasts the highest trade surplus relative to GDP in the EU (according to figures from Eurostat). During 2012, the trade surplus ranged from €3.7bn to €4.4bn per month according to the most recent figures published by the Central Statistics Office.

Ireland has performed strongly in areas of long term growth such as medical devices, pharmaceuticals, and IT. Ireland is also a major exporter of zinc, lead and alumina. However, the biggest success stories are coming from the Agri Food sector. The Department of Agriculture, Food and the Marine (DAFM) currently reports the Agri-food sector in Ireland contributes €24 billion to the national economy, generates 6.3% of gross value added, accounts for almost 10% of Ireland's exports and provides 7.7% of national employment. When employment in inputs, processing and marketing is included, the Agri-food sector accounts for almost 10% of employment.

90% of the food manufacturing companies in the country are small and medium sized businesses (SMEs) and there has been a concerted effort by the Irish Government to aid these SMEs. The Government jobs initiatives have introduced a number of measures, including the Credit Guarantee Scheme, the Microfinance Fund, and the recent proposed amendments to the Companies' Act pertaining to the Examinership process (Ireland's version of the USA's Chapter 11 Bankruptcy). The proposed amendment was announced in late 2012 and it is aimed at extending the process of Examinership to smaller firms. It remains to be seen how soon this Bill will be introduced, however, it is not likely to be passed in the first half of 2013.

The large trade surpluses which Ireland has continued to generate over the past number of years are central to our recovery. The export driven nature of our economy make it more open and diversified, and these exports are especially important in the face of successive austerity budgets introduced in order to reduce the budget deficit.

The end of year assessments have been more positive than even the Irish Government had anticipated. The figures just released by the Department of Finance have shown that the Exchequer deficit in 2012 was €10.8 billion lower than 2011. Tax revenue was up by €2.6 billion, a 7.7% year on year increase. In addition to those figures, exporting companies recorded a net jobs gain of 3,804 last year, the highest increase seen since 2006, according to Enterprise Ireland. In presenting these figures, Minister for Jobs, Enterprise and Innovation Richard Bruton said that 2012 was "a very important year for Ireland and for the Irish economy" which had witnessed "a very significant fightback."

Replacing foreclosure with restructure

As the figures for the various Key Economic Indicators are released for the end of 2012, the picture that emerges is that of steady economic recovery, continued reduction in the budget deficit, impressive cash generation by Ireland's so called "Bad Bank" NAMA, a possible stabilisation of the property market and the continued success of Irish exports.

The climate has changed significantly since the days of the Celtic Tiger. The economy is no longer fuelled by construction and property sales and a new picture emerges. NAMA acquired loans worth €74 billion, at a discount of 57%. It has realised €10.5 billion in the 33 months since those loans were transferred, and signs are positive that NAMA will have continued success in 2013, ultimately achieving its objective of completing their work by 2020. Private equity funds are an increasing presence in the economy, and the role they will play and their effect on the Irish economy will become clearer as 2013 progresses.

There is a degree of optimism amongst some insolvency practitioners that we may be moving away from a predominant environment of foreclosure to restructure, as the government continue to support SMEs through various measures which aim to increase access to credit, and also by extending the process of Examinership. In October 2012, Time Magazine dubbed it the "Celtic Comeback" when referring to our recovery, and certainly Ireland is looking at a more positive economic outlook since the financial crisis struck.

INSOL Global Insolvency Practice Course

International Association of Restructuring, Insolvency & Bankruptcy Professionals

The Global Insolvency Practice Course is a postgraduate certification programme supported by many key lecturers and professionals from around the world with many years' experience in this field.

The Course leader for 2013 is Professor André Boraine, University of Pretoria, South Africa ably assisted by the Core Committee and wider Course Advisory Committee.

Applications are now open for the 2013 Global Insolvency Practice Course.

Module A will be held at the Bel Air Hotel, The Hague, The Netherlands 16-18 May 2013 prior to INSOL 2013,
Module B will be held at the St Johns' University, New York 16-19 September 2013.
Module C, the on-line virtual restructuring will be held 28 October-1 November 2013.

David J. Molton, Brown Rudnick, Fellow, INSOL International, Class of 2012:

"This INSOL Fellowship course is wholly first class. It is professionally administered by the INSOL International staff and taught by an exceptional, international faculty (comprised of academics and judges), all of whom are recognized as leaders in their fields of discipline. The course work is robust, challenging and rewarding, and provides material value to insolvency practitioners and attorneys involved in cross-border issues. The hidden treasure of the course is, of course, the interchange, camaraderie and lasting friendships of the Fellow candidates that inevitably develop during the course. I would strongly recommend the course as a "must do" for anyone who is interested in and serious about cross-border insolvency issues".

Further testimonials and a video from both participants and lecturers can be viewed on our website at www.insol.org, along with the course brochure and application form. If you require any further information please contact INSOL International on **+44(0)2072483333** or email **heather@insol.ision.co.uk**

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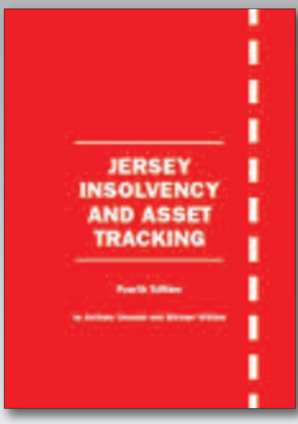

Jersey Insolvency and Asset Tracking (Fourth Edition)

Anthony Dessain and Michael Watkins, Key Haven Publications LTD, 583 pp, ISBN 978-1-901614-55-8

Review by Charlotte Cooke,

South Square
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First published in 1999, the last (third) edition of Jersey Insolvency and Asset Tracking, by Anthony Dessain (of Bell Cristin) and Michael Wilkins (Viscount of the Royal Court of Jersey), set out the law as at 31 December 2005. There having been significant legislative and case law developments since then, the timely new fourth edition of Jersey Insolvency and Asset Tracking, which is thoroughly updated, meets a definite need, providing a valuable contribution to the law of insolvency and asset tracking in Jersey.

The fourth edition of this extremely well regarded book – the Royal Court of Jersey and Jersey Court of Appeal have referred to previous editions in a number of judgments – is edited by Robert Gardner and Edward Drummond (of Bell Cristin) and Ed Shorrock (of Baker & Partners), with contributions from Alan Dart, Vicky Milner and Claudia Le Blancq (of Bell Cristin) and Deborah Gregory (of Hogan Lovells International LLP).

Part 1of the fourth edition, which is preceded by a useful glossary of key terms used in the text, contains the main text, with Part 2, a new addition, containing commentaries on the text, thereby enabling more topics (as compared with previous editions) to be covered in depth, but without the main text losing its clarity or succinctness. Part 3 (appendices) helpfully sets out in full relevant legislative materials.

Part 1 of the book follows a similar structure to previous editions, providing updated detailed analysis, of (and this list is necessarily merely a very brief overview) asset recovery and claimant's rights prior to and after insolvency procedures, directors' duties and liabilities, piercing the corporate veil, désastre and winding up, cross border insolvency and human rights, as well as scrutiny of Jersey as an international financial centre.

The main text is supplemented through the introduction of Part 2 (commentaries on the text), which contains more extensive analysis of guarantees in insolvency, enforcement in Jersey of foreign judgments, the impact of foreign taxation and trusts and estate planning, company winding up, employment law and insolvency, limited liability partnerships in Jersey, Jersey foundations and an overview of the New Security Interests (Jersey) Law. In keeping with the practical, and not just theoretical, approach of the text, Part 2 also contains a practitioners' guide to the making of applications under Article 49 of the *Désastre* Law (applications to the Royal Court for assistance in relation to insolvency or bankruptcy matters).

With the addition of the commentaries contained in Part 2, together with the thorough updating, the fourth edition of Jersey Insolvency and Asset Tracking will no doubt be of invaluable assistance to all those with an interest in the law of insolvency and asset tracking; with its detailed coverage of these areas, it is an essential tool.

The Guatemalan Cross-border Insolvency Regime – Reviewing the Present and Foreseeing the Future

By Rodrigo Callejas (Fellow, INSOL International),
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Guatemala is located in Central America bordered by Mexico to the north and west, the Pacific Ocean to the southwest, Belize to the northeast, the Caribbean to the east, and Honduras and El Salvador to the southeast. Its area is 108,890 km2 with an estimated population of 13,276,517 and an estimated GDP (2011) of $73.95 billion. Our country's political system is a republican democracy where government is divided into three branches, executive, legislative, and judicial; Guatemala's legal tradition and justice system are based on the French system of positive law.

Insolvency system

The Guatemalan insolvency system promotes piecemeal assignment and auctioning of the assets. Two types of judicial insolvency regimes are recognized, the "*Concurso*" and the "*Quiebra*", although out of court agreements are also allowed under the law.

Insolvency regulations are contained in the Civil Code, the Commerce Code, the Civil and Commercial Procedures Code (CCPC) and the International Private Law Convention (IPLC), all of whom were enacted between 1928 and 1970. The Commerce Code (1970) repealed substantive corporate insolvency regulations with dire consequences on the applicability and use of insolvency regimes.

The "*Concurso*" seeks, under the supervision of a judge, an agreement between the debtor and the creditors over assignments of assets among creditors, partial or total administration of the assets by the creditors' appointee, payment extensions and payment amount reductions. The agreement must be approved by more than half of the voting creditors that represent at least 3/5ths of all admitted claims, and sanctioned by a first instance civil judge.

The "*Quiebra*" regime is piecemeal liquidation process administered by a trustee under the supervision of a judge. Once the process begins, assets are seized, scheduled, valuated and auctioned separately. Unsold assets may be distributed, individually or jointly, among creditors at a rate of 2/3rds of their appraised value.

Guatemala has not adopted the UNCITRAL Model Law on Cross-border Insolvency but current regulation offers some basic solutions. Ratified by Guatemala in 1928, the International Private Law Convention (IPLC) – OAS treaty A-31 – that applies in 20 jurisdictions in Central, South America and the Caribbean provides regulations for jurisdictional conflicts, multiplicity of proceedings, recognition of foreign bankruptcies and cross-border trustee powers and duties.

a. COMI vs. Domicile

Under the IPLC, COMI is not a factor for disputing jurisdiction. IPLC recognizes the debtor's domicile as the main criteria for establishing jurisdiction of the main bankruptcy court. Under the CCPC, the debtor's principal place of business will establish the jurisdiction of the court. As the Civil Code's rule of domicile provides for the possibility that a corporation's domicile may be the place where its direction or its main offices are located, interpretation of the CCPC's jurisdiction rule may very well end in a conclusion that "principal place of business" equals "domicile".

b. Multiple insolvency procedures – Jurisdictional issues of the domicile system under IPLC – Are there exceptions?

IPLC considers that a corporate debtor may have domiciled operations in multiple jurisdictions, indicating that as long as there is financial separation between each domiciled operation, there can be as many insolvency proceedings as domiciled operations of the debtor. Interpretation of the "financial separation" criteria is broad, and will be subject to interpretation by each jurisdiction in which the debtor has domiciled operations subject to bankruptcy.

In Guatemala, a foreign corporation can register its local office as a branch of the main corporation, which grants recognition of the foreign incorporation and means that no new entities are created. Can financial separation be met in this case?

No. An exception to the IPLC rule is article 219 of the Guatemalan Commerce Code that states that the Guatemalan Commercial Registrar must be informed immediately of a foreign company's bankruptcy or windup, granting him powers to appear before judicial and executive authorities to request an injunction, and to publish a notice in the official gazette disclosing the company's situation to the public. Article 219 of the Commerce Code is a clear exception to IPLC as even though the debtor has a commercial domicile in Guatemala as a branch of its main operation, the branch is not considered to be financially separated from the main corporation and therefore the court with jurisdiction over the bankruptcy or windup should be the court of main corporation's domicile.

c. What happens when a foreign main comes along?

As a non cross-border model law jurisdiction, foreign main recognition in Guatemala and acceptance of the local establishment as a forum non-main within the spectrum of a cross-border insolvency case is limited. However, the IPLC, the Civil and Commercial Procedures Code and the case law address some key points in this regard.

1. Enforcement of the bankruptcy proceeding order and trustee's powers and duties under IPLC's articles 417 and 418.

Under article 417 of the IPLC a bankruptcy order issued in any of the contracting jurisdictions shall be enforceable among them through the rules of the enforcement of foreign judgments of the IPLC, pursuant to article 418 of the IPLC. Powers and duties of bankruptcy trustees appointed in foreign proceedings will therefore have cross-border effects among the jurisdictions of the contracting states needless of any local procedure.

2. The bankruptcy proceeding order and trustee's powers and duties in Guatemala in non IPLC cases.

Ratified by Guatemala in 1980, the Inter-American Convention on Letters Rogatory (IACLR) – OAS multilateral treaty B-36 – applies in 19 jurisdictions in North, Central and South America as well as in Europe, including the United States of America and Spain. This treaty offers contracting states the possibility of performing service of process, summons and subpoenas using diplomatic channels and judicial assistance through high courts in applicable jurisdictions. This includes bankruptcy proceeding orders issued by courts of the contracting states.

Pursuant to articles 81 and 83 of the CCPC, foreign bankruptcy proceeding orders issued in non-IACLR jurisdictions may also opt for the service of process, summons and subpoenas through the use of Letters Rogatory to the Guatemalan Supreme Court.[1]

3. Enforcing the stay through the rules of territorial jurisdiction – the Constitutional and Supreme Courts' rulings.

Case law from both the Guatemalan Constitutional Court (CC) and the Supreme Court of Justice (SCJ) states that even though Guatemalan courts have jurisdiction to summon a foreign entity, this power is limited to contracts and actions entered or carried out in Guatemala and furthermore, if under contract terms the claimant expressly submitted to a foreign jurisdiction, the claimant cannot request contract judicial enforcement in Guatemala.[2]

Pursuant to this rule and jurisdictional rules set in the CCPC and the Law of the Judicial Branch, no claims against a foreign entity, regardless of bankruptcy, may be brought forward if the agreement contemplates submission to a foreign jurisdiction, regardless whether the agreement was entered into in Guatemala. Since bankruptcy claims derive from a debtor's lack of payment, the debtor or trustee may indirectly enforce a stay of claims through a jurisdictional dismissal, as long as the creditors' claims are ultimately based on unfavorable treatment under foreign law and not on a previous agreement stipulating Guatemala as the applicable jurisdiction.

Foreseeing the future

Since the fresh-start doctrine has been the cornerstone of new insolvency regimes worldwide, and considerable breakthroughs have been made in the insolvency regulation front, several jurisdictions began a process of standardization of cross-border insolvency regulation, interpretation criteria and case law. According to the World Bank's Doing Business "Resolving insolvency" sub-index, Guatemala holds position 109/183. This prompted the Guatemalan Economy Ministry (MINECO)[3] through the National Competitiveness Program (PRONACOM)[4] to initiate bankruptcy reform in 2011, with the assistance of the Inter-American Development Bank (IADB) and the National Foundation for Development (FUNDESA)[5].

An initial assessment of the current regulations and a comparative law study to establish what jurisdictions constituted valid examples for Guatemala was followed by a bill drafting stage which should be completed in February 2013, when the final draft is to be presented to MINECO. Congress is expected to receive the bill between March and June 2013. If approved, this reform would be the first modern bankruptcy law to be enacted in Central America under UNCITRAL guidelines, recommendations, and Model Law.

a. Bankruptcy reform bill highlights

Under its current text the bill contemplates a corporate insolvency regime that favors reorganization and the liquidation of a debtor as a going concern as opposed to piecemeal auctioning.

Under the bill the reorganization plan is proposed by the trustee and approved by the creditors. Majorities required for the approval of the plan are considerably lower and thus more viable. Furthermore, the bill contemplates the ability to reorganize under a plan that offers among other options the use of trusts and the discharge of the debtor.

The new liquidation regime is contemplated as a last resort and seeks to sell the business as a going concern instead of a piecemeal sale. The process will favor an auction of the business as a whole at first.. Only if the sale is not possible will the individual liquidation of the assets be carried out.

The cross-border insolvency regime offered by the bill is set out in title XII, which is an adaptation of UNCITRAL's Model Law on Cross-border Insolvency. Through this new regime foreign main recognition and foreign representative powers and duties are treated as the main points of concern through international judicial cooperation. COMI is considered as the jurisdictional standard and the possibility of establishing Guatemala as a forum non-main is allowed.

1 *InRe: IN THE MATTER BANCAFE INTERNATIONAL BANK, LTD.* Order No. 2092 of 2006. Supreme Court of Justice of Barbados' Letter of Request for Assistance With Service of Court Order to the Guatemalan Supreme Court. Judicial Assistance docket No. 34-2007.

2 *InRe: Bancafe International Bank, Ltd.'s Constitutional Defense Actions against Guatemalan Courts hearing pre-bankruptcy claims (dismissal requests for lack of jurisdiction)*. SCJ docket No. 785-2007, 873-2007, 978-2007, 990-2007, 1163-2007, 183-2008, 213-2008, 351-2008, 438-2009, 734-2009, 911-2009; CC docket No. 549-2008, 665-2008, 855-2008, 1125-2008, 1292-2008, 1390-2008, 1568-2008, 2227-2008, 2477-2008, 759-2008, 2201-2008 1563-2009, 2761-2009, 3686-2009, 4811-2009, 862-2010

3 www.mineco.gob.gt

4 www.pronacom.org

5 www.fundesa.org.gt

EU Tax Harmonisation – Simply the Best?

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The tax aspects of European cross-border restructurings and insolvencies are likely to be materially simplified if, and when, a long discussed project to harmonise the corporate tax regimes of the member states of the European Union gets the "green-light".

The United Kingdom and a number of other member states generally oppose most forms of EU tax harmonisation as being a step too far in the transfer of sovereign powers to Brussels. However, the European Commission believes that the disparate tax regimes of the member states act as obstacles to the success of businesses that are active in more than one EU country. Accordingly, despite the dissenting voices, the adoption of a common basis for the calculation of corporate taxable profits has been official EC policy since 2001 although little positive progress has been made until recently.

The current economic crisis has created an opportunity for certain EU member states, led by Germany and France, to reinvigorate the campaign for tax harmonisation including proposing a Tobin tax on many cross-border equity trades and derivatives. Those proposals have hit the headlines in the UK because of the vocal opposition of the banks and the City of London but a more significant initiative for the majority of international groups is the plan to introduce a common consolidated corporate tax base ("CCCTB").

In March 2011 the European Commission published a "Proposal for a Council Directive on a Common Consolidated Corporate Tax Base" which would create a framework for companies to use a common system for calculating the tax base of associated companies operating in the EU. The proposals make it clear that the scheme would be voluntary for the taxpaying corporate groups and that the member states would continue to set rates.

The real significance of the proposals is not in the adoption of a common measure of profits but in the cross-border consolidation of profits and losses. Consolidation would effectively introduce a European-wide grouping for direct tax purposes allowing, for example, UK profits to be sheltered by losses incurred in a French subsidiary or branch.

In April 2012 the European Parliament voted in favour of making CCCTB compulsory for certain types of companies. Although that vote has no direct legislative effect, the European Commission may see it as an indicator of the support for CCCTB in the member states.

Observers have been quick to note that a simplification of European corporate taxation is unlikely to be welcomed by finance professionals who derive their livings from advising companies on such matters, and international restructuring specialists may feel the same way. If widely adopted, CCCTB is likely to make the tax affairs of insolvent groups significantly more straightforward and the tax consequences of insolvency broadly the same throughout the EU.

Unfortunately, the "Proposal for a Council Directive on a Common Consolidated Corporate Tax Base" says little about restructuring and mentions insolvency only once, in Article 56 which provides:

"A company in insolvency or liquidation may not become a member of a group. A taxpayer in respect of which a declaration of insolvency is made or which is liquidated shall leave the group immediately".

As one might expect, membership of a "group" is a necessary requirement for the consolidation or transfer of losses between companies. The current position in the UK is that the liquidation of a group company usually breaks the consolidating group for companies which are below the liquidated entity in the structure but the group remains intact up the chain. The reason for this is that on liquidation a UK company ceases to be the beneficial owner of its assets including shares of subsidiary entities.

By contrast, Article 56 of the proposed Directive appears simply to remove the liquidated entity from the group which presumably locks any losses in that company and prevents them being available to shelter a parent's profits in another member state. It is not entirely clear whether the group below the liquidated entity is destroyed, as it would be in the UK, or whether the group continues to exist absent that entity.

Understandably, the focus of the current CCCTB proposals is on removing the tax complexities of cross - border group structures. But, much more will need to be done to work out the consequences of insolvency before the scheme can be taken seriously.

Given that the concept of CCCTB has been discussed since at least 2001 and it is still far from being a universally accepted idea, it is tempting to conclude that the significant opposition that exists in some of the member states will prevent the adoption of CCCTB. However, recent developments in relation to the European financial transaction tax have shown that the main proponents of harmonisation are willing to use the misleadingly named "enhanced cooperation" procedure to push ahead with harmonisation without the cooperation of all member states. Adoption of the procedure would allow a minimum of nine member states to opt to introduce CCCTB without binding the rest of the EU members to follow suit. This would raise the prospect of groups which are partially in and partially outside the CCCTB zone with the ironic result that what began as a scheme for simplification could actually create greater tax complexity.

The Australian Personal Property Securities Act – One Year On

Photo: freeimages.co.uk

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The Personal Property Securities Act 2009 (Cth) ("PPSA") took effect on 30 January 2012. The Act's purpose and impact was described in the 2012 First Quarter Issue, pp. 28-29. This article examines the emerging issues for insolvency practitioners one year from implementation.

In the first year of operation there have been over seven million registrations and over two million searches.[2] Yet there has been almost no litigation. In New Zealand, there were several early cases which tested the paradigm shift from the 'old world' of title-based claims such as leases, to the 'PPSA world' where title is irrelevant. Australia has benefited from these early lessons inflicted on unsuspecting, unregistered, lessors or suppliers. Secondly, Australia decided to provide a 'grace period' of 24 months for those with security interests existing at 30 January 2012. Thirdly, although insolvency will be the front-line of any PPSA litigation, the Australian economy has weathered the financial crisis relatively well; insolvency, particularly in the retail and construction sectors, is just beginning to throw up PPSA issues.

Whilst Australia's PPSA was largely modelled on New Zealand's, there are significant differences. Everywhere *except* New Zealand, the security interest, if not registered by time of commencement of formal insolvency, will effectively be void; the creditor becomes an unsecured creditor. Now that security interests constitute a wider class, including Retention of Title claimants and leases, insolvency practitioners will be concerned early in their appointment to check proper registration status.

A second difference is that Australia attempted to harmonise the PPSA with its Corporations Act 2001(Cth).[3] Whilst this was a laudable goal, the semantic marriage has not been entirely harmonious. These changes impact most on voluntary administration, and detract from the intended simplification. This is compounded by the transitional provisions, which translate into PPSA terminology the 'old' terms 'fixed' and 'floating' charge. Arguably this serves to perpetuate their continued use.

The PPSA replaced 40 registers. The Australian Government 'migrated' entries on most of these, so that secured parties did not have to do so. It was an ambitious project, generating major teething problems which have occupied time and resources for the Registrar and secured parties in the first six months. Whilst these have made many wonder whether migration was worth it, mostly these problems are already history.

Lastly, each PPSA jurisdiction has different registration and search criteria. Australia has chosen 'exact match' searching, as opposed to 'similar match' searching. The latter allows for retrieval of similar results (for example when the debtor's middle name is not known). But an exact match system has advantages in a large jurisdiction. The Regulations lay down a reasonably objective hierarchy of criteria, but searchers would not always be aware, for example, that generally they should look for the name on an individual's driving licence, as opposed to their passport. From an insolvency practitioner's perspective, this presents another opportunity, because if a registered name or serial number is mis-recorded, or the registration is otherwise seriously misleading, the practitioner will be able to treat it as an unsecured claim.

The 24-month 'grace period' has proved a double-edged sword for insolvency practitioners. It only applies where a security interest arises under a pre-30 Jan 2012 agreement. In the first sizeable receivership post-PPSA, the receiver of a music retailer, WOW Sight and Sound, reportedly rejected the bulk of ROT claims as unregistered security interests. Since the receivership commenced soon after the PPSA, some claimants would surely have had an argument that goods were supplied under a pre-PPSA 'security agreement'. Until the transitional period is over, insolvency practitioners will no doubt put suppliers to rigorous proof.

The two cases involving the PPSA to date are instructive. In *Barclays Bank* [4] the court allowed an application for extension of time for registration. The Corporations Act provides that registration must occur within 20 business days of the security agreement, or more than six months prior to insolvency[5]. In *Barclays*, the documentation was arranged by the London office of an Australian law firm. Whilst the junior lawyer consulted the Sydney partners, the registration did not eventuate within the prescribed period. There was clearly no prejudice to any caused by the delay, nor any evidence of insolvency, so the judge felt that it fell within the wording of 'inadvertence' in the relevant section. However, the judge remarked that during the 'transitional period', leniency could be expected. Practitioners should note that the discretion under the Corporations Act does not override the absolute effect of s267 PPSA, so an unregistered security interest at the date of commencement of formal insolvency is effectively void.

The most important, and controversial, case is *Carson, re Hastie (No.3)*.[6] The Hastie group went into voluntary administration and consisted of many companies in different divisions. A search of the PPS register revealed 995 entries against the companies in one of the sub-

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2 See www.ppsr.gov.au . Quarterly statistics are collected and currently available up to September 2012. Registrations include 4.8 million migrated entries.
3 Personal Property Securities (Corporations and other Amendments) Acts 2010 and 2011 (Cth).
4 Barclays Bank plc [2012] NSWSC 1095 (24 August 2012).
5 S588FL Corporations Act 2001(Cth).
6 *Carson, in re Hastie Group* [2012] FCA 719.

groups subject to the application. Many related to 'yellow goods'- major plant and equipment in situ at 19 construction and mining locations. Under Part 5.3A Corporations Act the Court has wide powers to make orders in relation to the operation of the voluntary administration.[7] The administrators averred that they had written to the secured parties on the register, giving them three days to state the nature of their registered security interest. This period expired, and few replied within the timeframe. They also advertised and sent an email to 3000 creditors, giving five days to respond. However, over three thousand pieces of plant and equipment were still unclaimed. They sought permission to dispose of the goods, stating that the weekly cost of rental for the sites, due to the presence of the unclaimed yellow goods, was $61,134.26.

The judge allowed the application, satisfied that the administrators had done all they could in the circumstances, and adding that the 'transitional' protection for unregistered security interests only added to the confusion. The sale proceeds were ordered to be held in a separate account for three months.

This decision is controversial. First, the PPSA contains a strict regime for insolvency practitioners and others to request information about the nature of an interest. The secured party has ten business days to supply a copy of the security agreement, failing which the applicant can seek assistance of the court.[8] If the secured party does not then supply the information, the security interest is rendered ineffective. In *Hastie*, the judge did not refer to any provisions of the PPSA. In any event, the administrators did not give the secured parties the time regarded by the PPSA as sufficient to respond.

Secondly, the judge appears to have sanctioned conversion of secured assets without consent of the security holder. It is unlikely the powers of the court under Part 5.3A extend this far, particularly as there are constitutional protections against acquisition of property without just cause.

Hastie illustrates early misunderstanding about the operation and purpose of the PPSA. The Register is a notice-based system. It does not require registration of the underlying agreement. This is a major practical difference from the previous company charges regime. This has proved to be one of the most frequent complaints from insolvency practitioners and lawyers in the first year of operation.

However, the advantages of notice-filing over instrument-filing are understood elsewhere. It facilitates expeditious, and multiple, financing transactions and these benefits outweigh inconvenience to searchers. In most cases the information on the register, or lack of any entry, will provide what the searcher needs to know for credit decisions. This may admittedly not apply to insolvency practitioners later who just want to know what assets, if any, are unencumbered.

Although the Hastie group is one of the larger recent insolvencies, the PPSA still represents a vast improvement on the jumble of previous registers and unregistered proprietary claims that faced an insolvency practitioner on Day One of a new appointment.

7 S447A.
8 S275 PPSA(Cth).

National Treatment: Utopia of Qualified Foreign Limited Partners in China?

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Private equity in China has undergone significant development in the past decade. It boomed in China largely in response to the financial needs of small and medium-sized private companies to raise funds. The growth of foreign private equity firms in China will depend on the country's policy objectives for foreign exchange control and its timeline for the *Renminbi* to become a global currency, as well as its strategy for the Shanghai international financial hub.

I. Promotion of Shanghai International Financial Center by launching the Pilot Program of QFLP

Shanghai boasts China's biggest stock exchange, the headquarters of the country's foreign exchange trading system and a major commodities futures exchange.[1] In March 2009, China's State Council formally stated that "Shanghai will be built into an international financial center in correspondence to the size of China's economy and *Renminbis* international position in 2020."[2] The State Council's announcement is significant as it marked for the first time a concrete national-level backing and recognition of the city's status as a financial hub.[3] In 2009, Shanghai hosted 133 banks, 307 insurance providers and 93 security firms. Among the total of 787 financial institutions, 170 were foreign entities.[4]

The process to build Shanghai into an international financial hub encompasses such measures as advocating the use of Yuan for international financial settlement, developing private equity and encouraging foreign investment enterprise in China. In November 2010, Shanghai was granted approval by China's financial authorities to launch a private equity pilot program involving qualified foreign limited partners (QFLP). The *Implementing Measures for the Pilot Program of Foreign-Invested Equity Investment Enterprises in Shanghai* (QFLP Program) was jointly enacted on December 24, 2010, by the Shanghai Financial Office, the Shanghai Municipal Commission of Commerce, and the Shanghai Administration for Industry and Commerce.[5] The QFLP Program took effect on January 24, 2011.

The QFLP Program allows foreign-invested private equity investment funds and fund management companies to convert their foreign currency into *Renminbi* for the purposes of making capital contributions into *Renminbi* funds,[6] from which they can directly invest in private equity funds based in Shanghai. Under the QFLP Program, qualified foreign investors should be entitled to directly invest converted funds in foreign PE and VC institutions operating in the Chinese markets, which could increase funding sources for foreign-owned *Renminbi* funds.[7] However, the amount must not be more than 50% of the ultimate size of the fund.

I. Legal framework for private equity and rules of QFLP program

Private equity offers a lens for understanding China's legal system. The development of a legal framework for private equity in China is closely tied to the growth of private equity. Private equity has undergone tremendous development in China in the past ten years and the momentum is likely to continue. A nationwide legal framework governing private equity is now gradually taking shape. The *Foreign-invested Partnership Regulation* (FIP Regulation) that came into effect in March 2010 made it easier for foreign private equity firms to set up *Renminbi* funds and directly tap into local resources,[8] and the launch of the QFLP Program marks the start of a new period in which China welcomes foreign investors to enter its vast private equity market.

The governing body of the QFLP Program is the Joint Conference for Pilot Program of Equity-Investment Foreign Invested Enterprises, which is composed of various working units that represent interests of the Shanghai Municipality and the Central Government of China.[9] The State Administration of Foreign Exchange (SAFE) has enlisted its Shanghai branch, the Shanghai SAFE, to control all issues arising from or in connection with foreign exchange matters within the QFLP Program. SAFE's presence suggests that investments made by funds formed under the QFLP Program may still have to be approved by and reported to SAFE.

With recent rulemaking such as the FIP Regulation and the QFLP Program, the Chinese financial authorities seem to be making a conscious effort to level the playing field for foreign and domestic private equity firms.

III. Quasi national treatment: legal status of QFLP in China

It would be in the best interests of qualified foreign limited partners if they were treated in accordance with the principle of national treatment and entitled to freely convert foreign currency into *Renminbi* (and *vice versa*) under the the QFLP Program. However, Chinese authorities are unable

1 Acknowledgement: Special thanks to the Research Foundation for Human and Social Sciences Project Sponsored by the Ministry of Education of China (10YJA820115), the Shanghai Research Foundation for Social Sciences Project (2010BFX004), as well as the Research Foundation for Innovation of Social Sciences Project Sponsored by Shanghai Jiao Tong University (09TS10) for their financial supports.
2 People's Daily, March 26, 2009.
3 Yang Mu and Lim Tin Seng, Why China Needs to Build Shanghai into an International Financial Centre? International Journal of China Studies, Vol. 1, No. 1, January 2010, p. 125.
4 Raph Luo, Shanghai as an International Financial Center -Aspiration, Reality and Implication, Undergraduate Economic Review, Volume 8, Issue 1, p.8.
5 John V. Grobowski,Yiqiang Li,Wendy Yan, Implementing Measures for the Pilot Program of Foreign-Invested Equity Investment Enterprises in Shanghai, available at: http://www.faegrebd.com/12742.
6 Helen H. Chan, Foreign Private Equity Braces for Rough Ride to China - Analysis, Reuters Fin. Reg. Forum (May 20, 2011), available at: http://blogs.reuters.com/financial-regulatory-forum/tag/private-equity/.
7 See news report, China Approves Shanghai QFLP Program to Boost PE Participation, available at: http://businesswatch.21cbh.com/index.php?m=content&c=index&a=show&catid=7&id=200825.
8 See Joel H. Rothstein, RMB Funds: The Evolving Role of Foreign Investors and Fund Managers in China, PH Perspectives (Paul Hastings, Los Angeles, CA), Jan. 2010, at 1.
9 Pilot Measures art. 4.

to provide such treatment for three reasons which are discussed below: 1. the flexible legal requirements for national treatment under GATS; 2. the consideration of policy objectives by currency authorities; and 3. the legal obstacles for granting national treatment to qualified foreign limited partners.

1. National treatment under GATS

The principle of national treatment, which gives foreign parties the same treatment as one's own nationals, is found in all the three main WTO agreements. The national treatment obligation under Article XVII of the General Agreement on Trade in Services (GATS) is to accord to the services and service suppliers of any other Member treatment no less favorable than is accorded to domestic services and service suppliers. Under Article III of the General Agreement on Tariffs and Trade (GATT), the national treatment principle prohibits discrimination between domestic and foreign participants.[10]

Does China have to give national treatment to QFLP now? The answer is no. From a legal perspective, the progressive or gradual opening for QFLP is allowed by GATS.

The provisions of Article XIX:2 and Article XIX:4 of GATS read as follows:

> *"2. The process of liberalization shall take place with due respect for national policy objectives and the level of development of individual Members, both overall and in individual sectors. There shall be appropriate flexibility for individual developing country Members for opening fewer sectors, liberalizing fewer types of transactions, progressively extending market access in line with their development situation and, when making access to their markets available to foreign service suppliers, attaching to such access conditions aimed at achieving the objectives referred to in Article IV."*

> *"4. The process of progressive liberalization shall be advanced in each such round through bilateral, plurilateral or multilateral negotiations directed towards increasing the general level of specific commitments undertaken by Members under this Agreement."*

The terms of Article XIX of GATS give flexibility to the developing countries - the discretion to make their policy and to decide which kind of treatment should be given to foreign investors. This flexible feature of national treatment gives Chinese authorities a legal foundation for determining the treatment of QFLP.

2. Considerations of policy objectives by authorities

The opening of the market to qualified foreign limited partners will be progressive or gradual because the Chinese authorities must take into consideration the policy objectives of (i) protecting the immature Chinese financial service industry from harm by strong foreign competitors, and (ii) controlling short term speculative capital flows, or "hot money", into China.

Qualified foreign limited partners and the Shanghai QFLP Program are considered major policy breakthroughs given China's longstanding policy of capital control implemented by the SAFE. China has long maintained a fully convertible current account and a selectively convertible capital account that favors liberalizing long-term capital flows while restricting short-term capital flows. For instance, SAFE's "*Circular 142*" prohibits the conversion of foreign currency into *Renminbi* for equity investment purposes. The QFLP Program portends simplification of the process and relaxation of certain restrictions, but the actual effect may depend on many variables.[11] Under the QFLP Program, the foreign currency may be converted to an amount up to its licensed quota limit without prior approval of SAFE and foreign private equity firms can launch their own *Renminbi* denominated funds using overseas capital. The QFLP Program would allow investors to bypass China's tough restrictions on bringing funds into the country for financial investments - limits that are part of China's capital control regime.[12] The established method of control is the supervision of the balance of the account under capital item. As a result, the flow of the capital would become a blind spot of supervision. Foreign private equity may easily raise foreign currency outside of China and raise *Renminbi* in Mainland China, and convert the currencies through its account to realize the flow of the capital. The policy of progressive opening of the market to QFLP is the result of the concern over hot money.

Since the QFLP Program is a pilot program, regulators and legislators will surely assess its impact with an eye towards the possibility of expanding it. National treatment for qualified foreign limited partner is still underway.

3. Legal obstacles for granting national treatment to QFLP

National treatment also has some legal obstacles. Under the *Administration of Foreign-invested Venture Investment Enterprises Provisions*, jointly promulgated by the Ministry of Foreign Trade and Economic Cooperation, Ministry of Science and Technology, State Administration for Industry and Commerce, State Administration of Taxation and State Administration of Foreign Exchange on 30 January 2003 and effective as of 1 March 2003, investment enterprises are prohibited from:[13]

- *investing in sectors that fall within the prohibited category for foreign investors;*
- *trading in shares and enterprise bonds on secondary markets (except for shares held after the listing of portfolio companies);*
- *engaging in financial derivative transactions;*
- *directly or indirectly investing in real property other than property for its own use.*

The *Administration of Foreign-invested Venture Investment Enterprises Provisions* is a legislative rule, the amendment or abolishment of which is subject to legislative procedure and debate and may take a long time to accomplish. The path to national treatment for qualified foreign limited partners is not easy.

Conclusion

The foregoing analysis illustrates the complexities of the national treatment of qualified foreign limited partners in China, beginning with the QFLP Program. The financial authorities will take into consideration many elements in balancing the interests between the control of hot money and the performance of an open-door policy to foreign investment. Although for qualified foreign limited partners the national treatment is still a Utopian dream for the moment, the new rules offer foreign qualified institutional investors a new way to invest in Shanghai, if not all of China.

10 The principle also appears in the other main WTO agreement, "Trade-Related Aspects of International Property Rights".
11 Lawrence Zhan Zhang, The Legal Environment For Foreign Private Equity Firms in China, 16 Fordham J. Corp. & Fin. L. 2011, p. 882.
12 Dinny McMahon, Shanghai Loosens Rules for Foreigners in Private Equity, Wall St. J., Jan. 13, 2011, at C2.
13 Administration of Foreign-invested Venture Investment Enterprises Provisions,Article 32.

INSOL 2013

Ninth World INSOL International Quadrennial Congress
19th-22nd May 2013, The Hague, The Netherlands

We have many very eminent practitioners and experts in their field of knowledge to engage you in debate. The session chairs include: Mark Hyde, Clifford Chance, Michael Reilly, Bingham McCutchen LLP, Don Bernstein, Davis Polk & Wardwell and Jay Goffman, Skadden, Arps, Slate Meagher & Flom LLP.

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Wednesdays proceedings will differ from our normal style with a work out session to review the facts as presented and determine the success or failure of the business. For a snippet of what is to come visit our website and view the trailer at **www.insol.org**

Although we are producing an App we will still provide the A5 folder for delegates in addition to the new technology. The Social media session is raring to show the benefits of modern media and no doubt some Tweeting will be taking place under the watchful eye of Nick Hood, BTG Global Network who will lead the session and view the pitfalls and benefits of the new communication technology that is rapidly over taking us.

Prior to the main Congress the INSOL Academics Colloquium will meet on Saturday and Sunday for a full two-day programme. Additionally there is a dedicated Insurance Insolvency Ancillary Programme on Sunday. The Tenth Multinational Judicial Colloquium held jointly with UNCITRAL and The World Bank will also take place on the 18th & 19th May 2013. This is a closed meeting for judges, regulators and judicial officials. Details of this meeting can be requested from Penny Robertson at **pennyr@insol.ision.co.uk**

On Sunday afternoon there will be an open committee meeting for smaller practitioners affording the opportunity to meet early on at the Congress and a dinner for smaller practitioners will also be hosted for those who wish to attend on Monday evening. The Younger Members Committee is hosting a lunch on Tuesday and members interested in attending can contact **jelena@insol.ision.co.uk**

Getting to The Hague from Schipol Airport is easy, just enter the railway station attached to the airport and buy a ticket to The Hague. The two-tier train will take you swiftly (about twenty minutes) through the beautiful Dutch countryside on route to The Hague, which is the third stop. You can then take a taxi to your hotel; the Congress hotels are all within a few minutes of The Hague railway station. If you go by taxi from Schipol the traffic can be quite slow and the journey time will be longer than the train.

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Consequences of the German Equitable Life - Decision for the Use of English Schemes of Arrangement in Cross-border Reorganizations

Ruud Hermans
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Introduction

On 15 February 2012, the German Federal Court of Justice (the "Federal Court") rendered judgment in a case concerning the recognition of the English court-sanctioned scheme of arrangement of UK incorporated insurance company Equitable Life Assurance Society, which scheme compromised claims held by insurance policyholders domiciled in Germany (the "Scheme").[1] The Federal Court refused to recognize the Scheme on the basis of article 35(1) Judgment Regulation,[2] ruling that the English and Wales High Court of Justice (the "English Court") had in any case violated the special jurisdictional rule for insurance matters of article 12(1) of the regulation, which exclusively allocates jurisdiction over the policyholders domiciled in Germany to the German courts. In earlier instance the German Appellate Court found the same, although its decision was overturned by the Federal Court on different grounds.[3]

Applicability of the Judgment Regulation

Whilst the Federal Court does not explicitly consider so, it can be deducted from its judgment that it finds the Scheme to fall within the scope of the Judgment Regulation in view of the following reasons. First, the Federal Court applies the Judgment Regulation when examining recognition in Germany of the (decision sanctioning the) Scheme.[4] Also, it considers the Scheme not to be insolvency proceedings (*"Insolvenzverfahren"*) in the sense of the German Insolvency Act and Act on the Supervision of Insurance Companies.[5] This could imply that the Federal Court does not regard the Scheme to be "*proceedings relating to the winding-up of insolvent companies or other legal persons*" (in German: "*Vergleiche und ähnliche Verfahren*") as defined in article 1(2)(b) of the Judgment Regulation and considers the Scheme to fall within the scope of said regulation. In addition, the Federal Court implicitly considers the Insolvency Regulation[6] not to be applicable to the Scheme.[7] One could argue the Judgment Regulation then must be applicable since both regulations are intended to dovetail each other.[8]

Consequences

The applicability of the Judgment Regulation to English court-sanctioned schemes of arrangement has two important consequences for the use of schemes in cross-border reorganizations.[9] First, it means that its recognition and enforcement is subject to the provisions laid down thereto in the Judgment Regulation – provided the decision sanctioning the scheme is regarded a 'judgment' as in article 32 or the scheme itself is regarded a 'court settlement' in the sense of article 58 Judgment Regulation.[10] This entails that the proper serving of judicial documents in accordance with the Service Regulation[11] and other international conventions[12] could become an issue in future decisions regarding recognition of a scheme.

More importantly though, this means the English Court sanctioning such a scheme must base its jurisdiction on Chapter II of the Judgment Regulation. Before *Equitable Life*, the English Court merely used to base its international jurisdiction on section 895 Companies Act 2006 (or on its predecessor: section 425 Companies Act 1985). As was the case in *Equitable Life*, it paid no consideration to the rules on jurisdiction laid down in the Judgment Regulation or found these not to be applicable to schemes.[13] This however in general did and does not affect recognition and enforcement of a scheme, as the originating court's (albeit exorbitant) jurisdiction is not subject to scrutiny by the court applied to in another Member-State on the basis of article 35(3) Judgment Regulation, and cannot be reason to refuse recognition or enforcement. However, the exception to this rule is embodied in article 35(1) and concerns the matters for which Chapter II of the Judgment Regulation lays down special rules (insurance and consumer contracts) or exclusive rules of jurisdiction. In these matters, in order for a scheme to be recognized and/or enforced in other Member-States, it is necessary that the jurisdictional rules are complied with by the English Court. Already since the *Equitable Life* decision by the German Appellate Court, English case-law shows that the English Court now seems aware of the necessity to base its jurisdiction explicitly on the Judgment Regulation when sanctioning schemes of non UK-companies compromising claims of non-UK creditors.[14]

1 Der Bundesgerichtshof (The German Federal Court of Justice) 15 February 2012, IV ZR 194/09.
2 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.
3 Das Oberlandesgericht Celle (the German Appellate Court of Celle) 8 September 2009, 8 U 46/09.
4 Decision of the Federal Court of Justice, nrs. 25-26. See also decision of the German Appellate Court, nr. II.b.dd.
5 Decision of the Federal Court of Justice, nr. 20-24. See also decision of the German Appellate Court, nrs. II.b.aa-II.b.cc.
6 Council Regulation (EC) No 1346/2000 of 29 May 2000 on insolvency proceedings.
7 Decision of the Federal Court of Justice, nr. 24. See also decision of the German Appellate Court, nrs. II.b.bb.
8 See a.o.E. Schmit & M. Virgos, *Report on the Convention of Insolvency Proceedings, (DG* V/6500/96, report d.d. 3 May 1996), Brussels: European Commission 1996, nrs. 194-197.
9 For example when a non-UK company is involved or when claims of creditors domiciled outside the UK are to be compromised.
10 See for the German Appellate Court's considerations on this matter, decision nr. II.b.dd.
11 Regulation (EC) No 1393/2007 of the European Parliament and of the Council of 13 November 2007 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters (service of documents), and repealing Council Regulation (EC) No 1348/2000.
12 For example The Hague Convention of 15 November 1965 on the service abroad of judicial and extrajudicial documents in civil or commercial matters.
13 For example see *Re Drax Holding Ltd [2004] 1 WLR 1049* and *Re Sovereign Marine [2006] EWHC 1335*.
14 For example see *Re Rodenstock GmbH [2011] EWHC 1104* and *Re Primacom Holding GmbH [2012] EWHC 164*.

Where the Value Breaks: Voting Procedures in South African Business Rescue Proceedings

By Eric Levenstein

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Judging from the numerous court hearings on the topic, Business Rescue is fast becoming part and parcel of the restructuring of South African companies that find themselves trading in a position of financial distress. Business Rescue remains an option for financially distressed companies to file for the supervision by a Business Rescue Practitioner ("practitioner") of the company's business and affairs pending the voting in of a business restructuring plan in terms of Chapter 6 of the South African Companies Act, 2008.

Once the practitioner has been appointed, he/she is obligated to consult with all affected persons, including creditors, employees, trade unions and shareholders. Once these consultations have taken place, and the first meeting of creditors held, the practitioner is obligated to draft a restructuring plan which must effectively propose the manner and form of the restructuring of the company's affairs, business, property, debt and other liabilities and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis. If it is not possible for the company to continue in existence on such a solvent footing, the practitioner must formulate a plan which would result in a better return for creditors or shareholders than would otherwise result from the immediate liquidation of the company. If neither of the options is possible, the practitioner is obligated to place the company into liquidation.

Once the plan has been formulated it is circulated and ultimately put to creditors for voting at a section 151 meeting. It is here where creditors need to "up their game" in what is a minefield of new law and opportunity.

At this meeting, the practitioner must provide details of the proposed Business Rescue plan for consideration by the creditors and, if necessary, shareholders, and attempt to persuade the meeting that the plan provides for either a reasonable prospect of the company being rescued or a payment of a larger dividend than in a liquidation. After discussion and possible suggestions on amendments to the plan, the practitioner must call for a vote to approve the plan.

In such a vote, the proposed Business Rescue plan will only be approved if it is supported by the holders of more than 75% of the creditors' voting interests that were voted (votes must include at least 50% of independent creditors' voting interests - independent creditors are those creditors who are not employees and who are not related to the company either by way of shareholding or directorship).

Shareholders will only get a vote if the plan suggests that their rights are affected in some way, such as a dilution of their position within the company's shareholding. Shareholders would have to approve the plan in this instance, by way of a majority vote.

Once the Business Rescue plan has been voted in, it is binding on the company, including shareholders, and on each of the creditors of the company.

An interesting option available to all affected persons where a Business Rescue plan has not been voted in, is the ability of any affected person or combination of affected persons to make a binding offer to purchase the voting interests of those persons who opposed adoption of the Business Rescue plan. In terms of Section 153(1)(b)(ii) these voting interests can be bought out at liquidation value, independently and expertly determined by a third party at the instance of the practitioner. This effectively results in a "cram down" on dissenting creditors and which would ensure that those creditors in favour of the plan would have the opportunity to vote in the plan at the relevant 75% threshold. Creditors who are bought out at an unfair or unreasonable liquidation value are entitled to apply to court to review, re-appraise and re-value a determination by the third party independent expert. At this stage, we have not seen any court challenges being made to these valuations but there is no doubt that this could become a litigious issue.

The nature of what is a "binding offer" is also up for debate. Generally, a party would only be bound to sell once an offer has been made and thereafter accepted. The "binding offer" concept envisages a process where the dissenting creditor is forced to sell at liquidation value - a concept quite foreign to South African law.

If creditors feel that a vote has been made inappropriately, they are entitled to apply to court to set aside the result of such vote. Grounds to be considered by a court would include a vote which is prejudicial to the interests of these creditors who are adversely affected by the implementation of the plan.

Once a plan is voted in, for any creditor that has had its claim compromised the balance of such debt is discharged.

If one considers the effect of the abovementioned mechanism, it is very important to establish, very early on in the process, where the "value breaks" when it comes to voting. If a creditor votes down a plan, it could result in such creditor's voting interest being bought out by other creditors at a very negligible amount, i.e. liquidation value. This, in principle, could result in creditors or shareholders taking control of a company where there is value, but where the company has run out of an ability to meet its debts from a cash flow perspective.

South African venture capitalists, minority shareholders and creditors, could place themselves in a very advantageous position, once they understand the voting mechanisms in Business Rescue which could ultimately be used to their advantage, resulting in them taking control of companies with the potential value upside.

Conference Diary

February 2013				
20-21	Personal Property Security Law: Local and Global Perspectives	Adelaide, Australia	University of Adelaide	www.law.adelaide.edu.au/events
20-22	ABI VALCON 2013	Las Vegas, NV	ABI	www.abiworld.org
28	CAIRP Annual Commercial Insolvency and Restructuring Program	Toronto, ON	CAIRP	www.cairp.ca
March 2013				
13-15	INSOL New Zealand Annual Corporate Insolvency Conference	Auckland, NZ	INSOL New Zealand	sian.abel@lexisnexis.co.nz
22	INSOL Europe/R3 Joint International Restructuring Conference	London, UK	INSOL Europe/ R3	www.insol-europe.org/www.r3.org.uk
April 2013				
5	INSOL Europe Eastern European Countries' Committee Conference	Bratislava, Slovakia	INSOL Europe	www.insol-europe.org
18-21	ABI Annual Spring Meeting	National Harbor, MD	ABI	www.abiworld.org
24-26	R3 Annual Conference	Cannes, France	R3	www.r3.org.uk
May 2013				
19-22	INSOL 2013 Ninth World International Quadrennial Congress	The Hague, The Netherlands	INSOL International	www.insol.org
June 2013				
13	INSOL International Sao Paulo One Day Seminar	Sao Paulo, Brazil	INSOL International	www.insol.org
July 2013				
11-13	ABI Northeast Bankruptcy Conference	Newport, Rhode Island	ABI	www.abiworld.org
18-21	ABI Southeast Bankruptcy Conference	Amelia Island, FL	ABI	www.abiworld.org
August 2013				
15-18	CAIRP Annual Conference	St. John's, Newfoundland	CAIRP	www.cairp.ca
September 2013				
25-26	INSOL Europe Academic Forum Conference	Paris, France	INSOL Europe	www.insol-europe.org
26-29	INSOL Europe Annual Conference	Paris, France	INSOL Europe	www.insol-europe.org
October 2013				
25	ABI International Insolvency & Restructuring Symposium	Berlin, Germany	ABI	www.abiworld.org
November 2013				
7	INSOL International Cayman Islands One Day Seminar	Cayman Islands	INSOL International	www.insol.org

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Asociacion Uruguaya de Asesores en Insolvencia y Reestructuraciones Empresariales (AUAIRE)
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Association of Hungarian Insolvency Lawyers
Association of Insolvency and Restructuring Advisors
Business Recovery and Insolvency Practitioners Association of Nigeria
Business Recovery and Insolvency Practitioners Association of Sri Lanka
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INSOL–Europe
INSOL–India
Insolvency Practitioners Association of Australia
Insolvency Practitioners Association of Malaysia
Instituto Brasileiro de Gestão e Turnaround
Instituto Iberoamericano de Derecho Concursal
Institute of Certified Public Accountants of Singapore
(Special Interest Group of Insolvency)
International Association of Insurance Receivers
International Women's Insolvency and Restructuring Confederation
Japanese Federation of Insolvency Professionals
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