INSOL Hong Kong

INSOL International
Annual Regional Conference

23rd – 25th March 2014

Hong Kong

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President's Welcome

Fellow restructuring and insolvency professionals,

I am glad to welcome you to Hong Kong for this year's INSOL International Annual Regional Conference. Hong Kong – a vibrant cultural hub and an important centre of global business and finance – is an ideal venue for this week's sessions on international restructuring and insolvency. The conference will focus on the Asia Pacific region but will address issues important to principals and practitioners around the world. This week will offer learning and networking opportunities and insight into the very latest developments in restructuring and insolvency.

On behalf of INSOL International and our local Member Associations, The Insolvency Faculty of the Hong Kong Institute of Certified Public Accountants and the Bankruptcy Law and Restructuring Research Centre of China University of Politics and Law, I hope you enjoy the technical programme, and I thank you for being here. By participating in the conference, you will help INSOL to continue to forge the best practices of the international restructuring and insolvency community.

We at INSOL pride ourselves on high standards, and I am proud of the work that has gone into organising this week's conference. Thanks go to the Conference Co-Chairs, Ian Carson of PPB Advisory and Neil McDonald of Hogan Lovells, and to the Technical Co-Chairs, David Cowling of Clayton Utz and Derek Lai of Deloitte, along with the Organising Committee and the Technical Programme Committee and their members. I also thank our panellists and speakers for preparing what are certain to be interesting and important sessions for the conference.

I would also like to thank our sponsors for their support. Special thanks go to our main sponsors BMC Group, Borrelli Walsh, FTI Consulting, and PPB Advisory. Thanks also to AlixPartners LLP, BDO, DLA Piper, hww wienberg wilhelm, KLC Kennic Lui & Co, Lipman Karas, Madison Pacific, Maitland Chambers, Norton Rose Fulbright, Oxford University Press, RSM, and South Square.

I look forward to seeing as many of you as possible over the coming days, and, again, welcome to Hong Kong.

James H.M. Sprayregen
Kirkland & Ellis LLP
President, INSOL International

Conference Chairs' Welcome

On behalf of INSOL International we are very pleased to welcome you and your accompanying guests to Hong Kong.

We are delighted to welcome a record breaking number of delegates to INSOL's Annual Conference. Over 650 delegates from the region and around the world have gathered together, providing us with the opportunity to renew business contacts and build new relationships within the profession. We are particularly pleased with the attendance of many hedge funds and financial institutions.

We extend a heartfelt note of thanks to the members of the Main Organising Committee for their tremendous effort in organising the conference, to the Technical Committee for their excellent work on the engaging programme that we will participate in over the next two days, and to the many excellent speakers who will take part in the plenary and breakout sessions.

We look forward to seeing you at this evening's Welcome Reception and Dinner, the reception will be held in the Orchid Room and Orchid Room Foyer, starting at 7.00pm.

Ian Carson
PPB Advisory
Conference Co-Chair

Neil McDonald
Hogan Lovells
Conference Co-Chair

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Technical Co-Chairs' Welcome

A warm welcome to INSOL International's Annual Regional Conference in Hong Kong - Dong Fong Zhi Zhu - The Pearl of The Orient or, in a few days time, the Home of the Hong Kong Sevens!

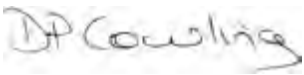
It is traditional, in this type of conference, to observe that insolvency practice has never been more complex, rapidly changing, multinational, just plain exhausting, etc. All that is true, of course, but a conference like this is not about making sure that we become ever more efficient at chasing our own tails. As insolvency practitioners (indeed, as members of INSOL, the world's leading insolvency practitioners association), it is our job to take the lead and to provide direction to clients, other professionals and governments.

That objective has driven the planning of this conference. In order to be leaders, we need both solid knowledge and an understanding of where current trends are headed. As befits its status as a regional conference, INSOL Hong Kong fulfils both needs, with a major focus on what's happening and what's possible in our region.

At the same time, it would be a mistake to think the term "Regional Conference" is some sort of limitation. The Asia Pacific is not isolated from events and developments elsewhere. For that reason, this conference covers a number of issues from other parts of the world, as well as topics that are truly multi jurisdictional.

Even the structure of the conference is influenced by events overseas: following the highly successful lead of last year's INSOL Ninth World Congress in The Hague, this conference includes a working lunch and follow-up discussion based on a current hot topic. Given the high profile of the controversial movie, The Wolf of Wall Street, you will not be surprised to hear that that topic is fraud.

We hope that you will avail yourself fully of all the opportunities that this conference provides - both the excellent learning possibilities offered by the technical sessions and the opportunity to exchange ideas, make new professional contacts and renew longstanding friendships.



David Cowling
Clayton Utz

Derek Lai
Deloitte

Ancillary Programme

Saturday 22 March 2014

	INSOL Academics' Colloquium
8.30am – 9.00am	Delegate Registration: Grand Ballroom Foyer, Lower Level I Welcome Breakfast: Kowloon Room II
9.00am – 5.00pm	INSOL Academics' Colloquium: Kowloon Room I
1.00pm – 2.00pm	INSOL Academics' Lunch: Kowloon Room II
7.00pm – 10.00pm	Academics' Dinner: Harbour Room

7.00pm – 9.00pm	**INSOL Fellowship Alumni Reception** *Sponsored by Dentons* (By invitation only)

Sunday 23 March 2014

	INSOL Academics' Colloquium
8.00am – 8.30am	Welcome Breakfast: Kowloon Room II
8.30am – 5.00pm	INSOL Academics' Colloquium: Kowloon Room I
12.30pm – 1.30pm	INSOL Academics' Lunch: Kowloon Room II

	Offshore Ancillary Meeting *Sponsored by South Square*
8.00am – 9.00am	Delegate Registration: Grand Ballroom Foyer, Lower Level I Welcome Breakfast: Rose/Peony Foyer *Sponsored by Walkers*
9.00am – 5.00pm	Offshore Ancillary Meeting: Rose/Peony
12.00pm – 1.30pm	Offshore Ancillary Lunch: Magnolia/Camomile *Lunch sponsored by PwC*

4.00pm – 5.00pm	**Small Practice Issues Meeting** Meeting Room: Jasmine, Lower Level I

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Technical Programme

INSOL Hong Kong

Main Sponsors:

Sunday 23 March 2014

12.00pm – 8.00pm **Delegate Registration**
Grand Ballroom Foyer, Lower Level I

6.30pm – 7.00pm **New Members Reception**
Orchid Room, Lower Level II

7.00pm – 10.00pm **Welcome Reception & Dinner**
Sponsored by BDO
Orchid Room & Foyer, Lower Level II, for Reception
The Grand Ballroom, Lower Level I, for Dinner
For delegates and registered accompanying persons

Monday 24 March 2014

8.00am – 4.00pm **Delegate Registration**
Grand Ballroom Foyer, Lower Level I

8.30am – 9.00am **Welcome Breakfast**
Grand Ballroom Foyer, Lower Level I
Sponsored by South Square

Plenary Sessions Grand Ballroom, Lower Level I

9.00am – 9.30am **Conference welcome & opening remarks**
Grand Ballroom

President INSOL International
James H.M. Sprayregen, Kirkland & Ellis LLP

Conference Co-Chairs:
Ian Carson, PPB Advisory
Neil McDonald, Hogan Lovells

Technical Co-Chairs:
David Cowling, Clayton Utz
Derek Lai, Deloitte

9.30am – 10.30am	Keynote address **The global financial crisis, the Asian century and the transformation of finance** Michael Smith, Chief Executive Officer Australia and New Zealand Banking Group Limited (ANZ) Ali Moore International TV Broadcast Journalist
10.30am – 10.45am	Delegate discussion
10.45am – 11.15am	Networking Coffee Break Grand Ballroom Foyer, Lower Level I & Orchid Room Foyer, Lower Level II *Sponsored by RSM*
11.15am – 12.15pm	**Breakout Sessions**
Magnolia/Camomile Live broadcast in Kowloon Room	**A1 Making something out of nothing: deficient trust funds** Chair: Steven Palmer, Norton Rose Fulbright Corinne Ball, Jones Day Andrew Koo, EY Ian Mann, Harney Westwood & Riegels
Rose/Peony Live broadcast in Harbour Room	**A2 A tale of two ancient economies (China and India) – similarities and differences in bankruptcy and restructuring** Chair: Alan Tang, SHINEWING Specialist Advisory Services Limited Sajeve Deora, Integrated Capital Services Limited Kirtee Kapoor, Davis Polk & Wardwell LLP Prof. Li Shuguang, Bankruptcy Law and Restructuring Research Centre, China University of Politics and Law Dr. Yin Zhengyou, W&H Law Firm
12.15pm – 12.30pm	Delegate discussion
12.30pm – 12.45pm	Delegates to go to lunchroom
12.45pm – 2.00pm	Networking Lunch, Grand Ballroom *Sponsored by hww wienberg wilhelm*

2.00pm – 3.00pm	**Breakout Sessions**
Rose/Peony	**B1 Hedge funds and distressed debt investing: the past, present and future**
Live broadcast in Harbour Room	Chair: Jesse Hibbard, Fulcrum Capital Peter Declercq, Fellow, INSOL International, Schulte Roth & Zabel Ted Osborn, PwC Christian Saunders, Allen & Overy LLP Tim Williams, National Australia Bank
Magnolia/Camomile	**B2 It's not all about the USA: issues in emerging and developing countries**
Live broadcast in Kowloon Room	Prof. Fidelis Oditah QC, South Square/Oditah Prof. Juanitta Calitz, University of Johannesburg Maythawee Sarathai, Mayer Brown JSM Jorge Sepúlveda, Bufete Garcia Jimeno S.C.
3.00pm – 3.15pm	Delegate discussion
3.15pm – 3.45pm	Networking Coffee Break Grand Ballroom Foyer, Lower Level I & Orchid Room Foyer, Lower Level II *Sponsored by RSM*
3.45pm – 4.45pm	**Breakout Sessions**
Rose/Peony	**C1 Restructuring in the Asia Pacific – can the role of a Chief Restructuring Officer really work?** Chair: Paul Billingham, Grant Thornton Andrew Riebe, Nomura International (HK) Ltd. William Snyder, Deloitte Jake Williams, Standard Chartered Bank Ashley Young, Kirkland & Ellis LLP

Magnolia/Camomile	**C2 A bridge over troubled waters: the current climate in maritime and shipping insolvencies** Chair: Lynn P. Harrison 3rd, Fellow, INSOL International Curtis Mallet-Prevost Colt & Mosle LLP Lisa Donahue, AlixPartners LLP Stuart Frith, Stephenson Harwood LLP Dr. Oliver Rossbach, Taylor Wessing LLP
Grand Ballroom	**C3 A Model Law on cross-border insolvency in Asia – is there any hope?** Chair: Naomi Moore, Bingham McCutchen LLP Patrick Ang, Rajah & Tann LLP Scott Barker, Buddle Findlay Neil Cooper, Zolfo Cooper LLP David Kidd, Linklaters
4.45pm – 5.00pm	Delegate discussion
5.00pm	Conference Close Free Evening
5.00pm – 6.00pm	**Younger Members Reception** Harbour Room II & III For delegates that have registered to attend.
7.00pm – 10.00pm	**Small Practice Issues Dinner** Ticketed event

Tuesday 25 March 2014

9.00am – 9.45am	**Welcome Breakfast** Grand Ballroom Foyer, Lower Level I *Sponsored by DLA Piper*
Plenary Sessions	Grand Ballroom, Lower Level I
9.45am – 10.00am	**Welcome back** Plenary Session Technical Co-Chairs: David Cowling, Clayton Utz Derek Lai, Deloitte

10.00am – 11.00am	**If it's Tuesday, this must be Portugal: the European sovereign debt tour** Peter A. Briggs, Alvarez & Marsal Nils Melngailis, Alvarez & Marsal
11.00am – 11.15am	Delegate discussion
11.15am – 11.45am	Networking Coffee Break Grand Ballroom Foyer, Lower Level I & Orchid Room Foyer, Lower Level II *Sponsored by RSM*
11.45am – 12.45pm	**Hot topics: you pick the topic** Chair: Brian Empey, Goodmans LLP Aaron Bielenberg, McKinsey & Company Inc., International Edward Middleton, Fellow, INSOL International, KPMG Gwyn Morgan, Westpac Banking Corporation Nicolaes Tollenaar, Fellow, INSOL International, RESOR N.V.
12.45pm – 1.00pm	Delegate discussion
1.00pm – 2.15pm	Networking Lunch Orchid Room, Lower Level II Harbour Room, Mezzainine Level Kowloon Room, Mezzainine Level *Sponsored by Norton Rose Fulbright*
2.15pm – 3.45pm	**Fifty shades of greed: cross-border asset recovery in the wake of the global financial crisis** Co-Chair: Martin Kenney, Martin Kenney & Co., Solicitors Co-Chair: Colette Wilkins, Walkers Dr. Alexander Stein, Dolus Counter-Fraud Advisors Rod Sutton, FTI Consulting
3.45pm – 4.15pm	Networking Coffee Break Grand Ballroom Foyer, Lower Level I & Orchid Room Foyer Lower Level II *Sponsored by RSM*

4.15pm – 5.30pm **My courtroom rules: views from the bench**

Chair: The Honourable Mr. Justice Jonathan Harris
High Court of Hong Kong
The Honourable Mr. Justice Vinodh Coomaraswamy
Supreme Court of Singapore
The Honourable Mr. Justice Fabian Gleeson
Supreme Court of New South Wales
The Honourable Mr. Justice Arjan Kumar Sikri
Supreme Court of India

5.30pm Close of Conference

7.00pm – 10.30pm **Gala Dinner**
Orchid Room & Foyer, Lower Level II, for Reception
The Grand Ballroom, Lower Level I, for Dinner
Sponsored by AlixPartners LLP
For delegates and registered accompanying persons.

The Technical Programme and speakers may be subject to change.
Please complete your Technical Programme assessment form, to enter the prize draw for a superb Mont Blanc pen.

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Details are available on page 22 on how to download the App.

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To ensure that content on the App is only accessible to registered delegates the following log-in credentials are required to enter most sections:

Username: HongKong **Passcode: 12345**
(Select by scrolling through the numbers)

For the duration of the conference the App will provide a full itinerary of conference events and provide access to the Delegate Folder and additional PowerPoint Presentations and Papers. The Itinerary section of the App will be updated with any changes to the programme. After the conference this information will be removed but the App will remain live for you to receive information about updates to content on the INSOL website.

Sections on the App

Itinerary
The Technical Programme is available in this section and includes an outline to each session and CV’s for each of the speakers.

Delegate Folder: The Final Folder contains all the information that can be found on the CD-ROM. It includes the A5 printed folder materials and any additional papers and PowerPoints. A G36 brochure is also included giving details of the members of the Group of Thirty-Six. A current delegate list can be found in this section.

Note: All documents are provided as PDF’s that can be viewed in App and navigated through the main content page. Alternatively, open documents in your preferred eReader such as Adobe Reader for additional functionality.

Networking: Register your details in this section in order to view those of other delegates and communicate and network with like-minded members.

About Us: Further information about the App and INSOL International

Updates: Updates to the INSOL website will be publicised here. You will also receive a pop-up “push” notification informing you of any updates should you have elected to receive these.

Social Media: **Coming Soon**

INSOL International
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The Group of Thirty-Six features some of the most prominent and influential firms within the insolvency and turnaround profession. The aim of the Group of Thirty –Six is to work with INSOL to develop best practice guidelines and develop legislation to enhance the ability of practitioners globally to save businesses throughout the world.

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For those delegates who are required by their professional associations to achieve minimum levels of continuing education, certificates of attendance will be available on request.

The Law Society of England and Wales
The Law Society of England and Wales has accredited this conference for 11 hours of CPE. The relevant form is in your delegate pack. The reference number is BXZ/INSO. Please complete your form and leave it in the boxes at the back of the plenary room at the end of the conference. A prize draw will be announced at the Gala Dinner.

New York and many US states have adopted procedures to extend comity to jurisdictions whose CLE accreditation standards meet their standards. The Law Society of England and Wales is one of these approved jurisdictions.

IPAS

The **IPAS** has accredited this Conference 12 hours of CPD.

CAIRP

The Canadian Association of Insolvency and Restructuring Professionals (CAIRP) have approved the Conference for their Mandatory Professional Development Credits.

We are currently seeking accreditation from The Law Society of Hong Kong.

General Information

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IMPORTANT – Your name badge **MUST** be worn throughout the Conference. Entrance to all Conference functions both technical and social will be by name badge. Should you lose your badge, please enquire at the registration desk, where you will be issued with a replacement. Accompanying Persons need to wear their badges to allow them access to the social functions.

Dress Code
Delegates are requested to wear smart casual clothes to the Conference technical sessions. Speakers are requested to wear business attire. Social functions, Welcome Reception & Dinner smart casual, no jacket required, Gala Dinner jacket & tie required.

Messages
It will not be possible to leave messages with the Conference Office.

Mobile Telephones
Please ensure mobile telephones and BlackBerrys are switched off during all technical sessions as they lead to interference with the technical equipment.

General Information

Disclaimer

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- provide insolvency services to companies and individuals.

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The Corporate Finance/Restructuring practice of FTI Consulting provides complete support in turnaround and restructuring, transaction advisory services and corporate recovery. The practice has a reputation for taking on challenging and complex assignments that require exceptional strategic and technical capabilities. Our regional and international coverage, combined with the depth of our specialist team and results focused approach, means we are uniquely placed to meet our clients' needs.

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INSOL INTERNATIONAL

International Association of Restructuring, Insolvency & Bankruptcy Professionals

INSOL International is a world-wide association of national associations of accountants and lawyers who specialise in turnaround and insolvency. There are currently 44 Member Associations with over 9,500 professionals participating as members of INSOL International. Individuals who are not members of a member association join as individual members.

INSOL also has ancillary groups that represent the judiciary, regulators, lenders and academics. These groups play an invaluable role within INSOL and provide valuable forums for discussions of mutual problems.

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

INSOL'S Mission
INSOL with its Member Associations will take the leadership role in international turnaround, insolvency and related credit issues; facilitate the exchange of information and ideas; encourage greater international co-operation and communication amongst the insolvency profession, credit community and related constituencies.

Our Goals:

- To work with and involve our Member Associations in our activities
- To implement research into international and comparative turnaround and insolvency issues
- To participate in Government, NGO and intergovernmental advisory groups and to liase with these institutions on relevant issues
- To assist in developing cross-border insolvency policies, international codes and best practice guidelines
- To provide a leadership role in international educational matters relating to turnaround and insolvency topics
- To facilitate the exchange of knowledge amongst our Member Associations through our conferences and publications

For further information on INSOL International please contact:

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INSOL International Toronto
One Day Seminar, TBA November 2014

For further details regarding the Toronto one day seminar please e-mail Tina McGorman at **tina@insol.ision.co.uk**

Global Insolvency Practice Course

International Association of Restructuring, Insolvency & Bankruptcy Professionals

The INSOL Global Insolvency Practice Course is now in its sixth academic year. Launched in October 2007 as a result of the large interest that the INSOL membership demonstrated for an advanced educational qualification focusing on international insolvency the course is now firmly established within the industry.

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

G. Ray Warner, St John's University, USA, Course Leader and Chair of Core Committee, states that: "The on-going global financial crisis and the globalization of business have dramatically increased the complexity of insolvency practice. Few enterprises are purely domestic and almost all significant restructurings involve operations in multiple jurisdictions and present creative opportunities to use different restructuring regimes. This course gives the insolvency practitioner the tools necessary to be successful in the new world of global insolvency practice."

The Fellowship programme provides the perfect backdrop against which insolvency professionals can build a valuable theoretical framework and gain useful practical insights in order to deal with cross-border insolvency issues more confidently. At the same time, the course offers a unique opportunity to establish an international professional network that will prove invaluable to participants in years to come. A number of leading insolvency practitioners and academics present the course under the auspices of INSOL International.

On successful completion of the course the qualification of Fellow, INSOL International is conferred, thereby gaining membership of the Fellowship Group for each recipient. INSOL International is delighted to recognise our Fellows on the following pages.

The Fellows meet regularly and have a forum for discussion. The INSOL Fellows Committee work with INSOL to involve the Fellows in future projects and programmes. We now have 70 active members. The Fellows are holding a reception for all Fellows who are present at INSOL Hong Kong which is kindly being sponsored by Dentons.

.

If you would be interested in participating in the course in the future, please contact Heather Callow at **heather@insol.ision.co.uk**.

Fellow of INSOL International

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INSOL Fellows Class of 2013

Listed below are the students from the Class of 2013 who qualified and will be presented with their certificates at the Gala Dinner.

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Patrick Ang is the Deputy Managing Partner of Rajah & Tann LLP. He is also the Head of the firm's Regional Practices. He has been a partner with Rajah & Tann since 1995, became an Executive committee member in 2003 and he was previously the Head of the firm's Business Finance & Insolvency practice group.

He has 20 years of experience handling both litigation and corporate transactions. One of his key areas of expertise is in corporate restructuring and insolvency, acting for financial institutions and companies in many major and publicised cases. He has been consistently recognised as a leading lawyer internationally, in Asia and in Singapore in his field in consecutive years by various top-tier ranking publications. Patrick is the independent director of several companies including SMRT, Esplanade Theatre and SDIC. He is also a lecturer in Insolvency and Civil Procedure at the Post Graduate Practice Law Course.

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Corinne Ball has 30 years of experience in business restructuring, and acquisitions, both court-supervised and extra-judicial, including matters involving multijurisdictional and cross-border enterprises. In addition to New York, Corinne leads the European Restructuring and Distress Investing Practices.

Corinne led a team of attorneys representing Chrysler LLC in its successful chapter 11 reorganization and has orchestrated numerous complex reorganizations for debtors and investors, including most recently, Detroit, Dana Corporation, FGIC, Jefferson County and Hostess, as well as representations of investors, including WL Ross and American Greetings.

Corinne has received numerous honors, notably the 2013 winner of the "Outstanding Achievements in Restructuring" by M&A Advisor, Law Dragon 500 Leading Lawyers in America, National Law Journal's Most Influential Lawyer of the Decade.

Corinne serves as a director of the American College of Bankruptcy, the American Bankruptcy Institute and Catholic Charities.

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Scott is an insolvency and litigation partner at Buddle Findlay.

Scott has been actively involved in insolvency law reform issues for over a decade. He was a member and convenor of the Joint Insolvency Committee of the New Zealand Law Society and ICANZ. He is also a representative on the Australian Treasury and New Zealand Business Ministry Cross-Border Insolvency Working Group. Scott has advised and presented on a range of cross-border insolvency issues.

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Aaron Bielenberg is a Senior Vice President with McKinsey's RTS Practice responsible for EMEA. Aaron has more than 10 years' experience advising on complex cross-border restructurings and financings as a consultant, attorney and investment banker.

Aaron regularly advises banks, corporates and sovereigns in distressed situations in developing innovative structures to facilitate large scale financial and operational turnarounds. He was a lead advisor on some of the largest financial restructurings in the Middle East and on award winning bank and bond project financings globally.

Paul Billingham, Grant Thornton
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Paul Billingham is the Managing Partner for Advisory at Grant Thornton Australia. He has worked for Grant Thornton for the past 24 years and is responsible for leading the national Corporate Finance, Recovery and Reorganisation, Forensic Consulting and Operational Advisory business units.

Paul is widely recognised in Australia as a leading recovery and reorganisation practitioner specialising in providing advisory and support services to individual lenders, syndicates and investors in larger private and public organisations. Paul is regarded as an expert in Real Estate Investment Trusts and has undertaken a variety of lender and stakeholder advisory roles in respect of many of the recent major Australian insolvencies and restructurings.

He is a Fellow of the Institute of Chartered Accountants in Australia and a member of the Australian Restructuring Insolvency & Turnaround Association. Last but not least, Paul is Director and Treasurer of the Cruising Yacht Club of Australia, home of the Rolex Sydney to Hobart Yacht race.

Peter A. Briggs, Alvarez & Marsal
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Peter A. Briggs is a Managing Director and Global Practice Leader of A&M's Financial Industry Advisory Services (FIAS) division. He previously led A&M's restructuring practices in the UK, Germany, CEE, and Russia/CIS, and brings more than 30 years of financial and operational restructuring experience to A&M with over 20 years as an expatriate. Prior to A&M, Mr. Briggs spent 16 years with Citibank in both the US and Europe and 7 years as an entrepreneur.

Mr. Briggs managed the $46B Global Loan Portfolio of Lehman Brothers during its bankruptcy. His important restructuring cases include Arthur Andersen, Visteon, European Directories, Vitopel Group, Treofan Group, HP Pelzer, and Spiegel Group, among others. A&M's FIAS practice includes Regulatory and Performance Improvement advisory in addition to Bank Restructuring services for both individual banks and for central banks and regulators.

Mr. Briggs has a BA from Middlebury College and an MBA from NYU's Stern School.

Prof. Juanitta Calitz, University of Johannesburg
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Juanitta Calitz is an Associate Professor of Law at the University of Johannesburg. She specialises in insolvency law and presents undergraduate; postgraduate and extra-curricular courses in insolvency law as well as corporate insolvency law.

She is currently the Head of Department of Public Law and is also a member of the Dean's Committee. She is a member of the Academic Steering Committee of INSOL International; serves on the Editorial Board of INSOL World and also serves as a national councillor of SARIPA (the South African Restructuring and Insolvency Practitioners Association, formerly known as AIPSA).

Juanitta graduated from the University of Pretoria with a LLD degree in 2009 and the objective of her LLD thesis, "A Reformatory Approach to State Regulation of Insolvency Law in South Africa", had been to investigate certain aspects of state regulation with the view ultimately to propose a framework within which the legislator could pursue legal reform based on comprehensive policy objectives in this field of law.

Ian Carson, PPB Advisory
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Ian is sought out by Boards and organisations seeking advice on strategy, governance, and crisis. For over 30 years, he has been instrumental in turning around organisations in crisis and helped clients to protect their financial positions and reputations.

Ian's specialist skills include balancing stakeholder views and ensuring highly collaborative outcomes. He is considered a leader in governance after building a quantitative model of governance and management bringing together 30 years' experience. It is currently being tested by Melbourne University. Ian founded Carson and McLellan prior to it merging with PPB in 2000. Ian is currently a Board member and Chairman of Partners of PPB Advisory, a Melbourne Cricket Ground Trustee and a Victorian Premier's Business Round Table member. He has completed the "Owner President Manager" course, Harvard Business School, a Bachelor of Economics, Monash University, Post Graduate Diploma of Accounting, LaTrobe University and is a Fellow of the Institute of Directors and an Official Liquidator.

The Honourable Mr. Justice Vinodh Coomaraswamy
Supreme Court of Singapore

Justice Vinodh Coomaraswamy was appointed a Judicial Commissioner of the High Court of Singapore on 1 August 2012 and appointed a Judge of the same court on 24 June 2013.

Justice Coomaraswamy came to the bench from the Singapore bar, where he practised with the firm of Shook Lin & Bok LLP for 20 years, the last 7 years as Senior Counsel. In addition to admission to the Singapore bar (1992), he was also admitted to the bar of England & Wales (winner, first prize 1991), New South Wales (2005) and New York (2007). At the bar, his speciality was complex domestic and international commercial disputes including cross-border insolvency and fraud and asset-tracing matters. On the bench his concentration is on company, insolvency and trusts disputes as well as on complex commercial disputes involving the banking and finance sector and the securities industry.

Neil Cooper, Zolfo Cooper LLP
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Neil has been a specialist in asset recovery and cross-border insolvency issues since early in his career, when he joined a major international accountancy firm. He has undertaken cases worldwide and has been involved with the development of insolvency laws and systems in a large number of transition and developing countries.

Neil is Life President of INSOL Europe and past President of INSOL International. In 2003, he was presented with the INSOL International Scroll of Honour for services to international insolvency. He was heavily involved in the formulation of the United Nations Commission for International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency. He has assisted the World Bank developing global insolvency principles and guidelines.

He has reviewed the extensiveness and effectiveness of the insolvency laws of 30 transition economies of Eastern Europe for a development bank and the insolvency laws of 11 MENA countries for the World Bank. He is currently engaged in the development of out of court debt restructuring guidelines and of the insolvency professions in a number of countries.

David Cowling, Clayton Utz
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David Cowling is not just one of the most world's entertaining presenters on insolvency law and practice (no mean feat, when you think about it).

Nor is he just a leading commentator whose views on insolvency are regularly sought in Australia and overseas. He is also widely recognised as one of Australia's leading insolvency lawyers, and has been retained in virtually every large insolvency administration in Australia in the past 20 years.

His practice covers all areas of insolvency, reconstruction, property enforcement and asset recovery, with both Australian and transnational administrations. David's talents and expertise are evidenced by high-profile appointments to INSOL International and to the Insolvency and Reconstruction Committee of the International Bar Association. David served as Technical Co-Chair for INSOL Shanghai 2008 and has been appointed the Technical Co-Chair to INSOL Hong Kong 2014.

Peter Declercq, Fellow, INSOL International
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Peter J.M. Declercq is a partner in the London office where his international practice focuses on cross-border insolvencies, restructurings and distressed mergers and acquisitions. He provides advice to distressed investors, including hedge funds, private equity funds and investment banks and he has a wealth of experience in leading formal and ad hoc creditor groups in connection with multinational in-court and out-of-court restructuring transactions.

Peter also advises both financial and strategic buyers and sellers in the acquisition or divestiture of distressed assets across Europe.

As an INSOL International Fellow, Peter is a recognised expert in global insolvency and is qualified to practise law in The Netherlands as an advocaat, England and Wales as a solicitor, and New York as a counsellor-at-law. He earned a Propaedeutic in Law, cum laude, as well as a J.D. from Erasmus University Rotterdam. He then attended New York University School of Law as a Fulbright Scholar where he received his LL.M.

Sajeve Deora, Integrated Capital Services Limited
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Mr. Sajeve Deora is a Fellow Member of the Institute of Chartered Accountants of India. He completed his training with Price Waterhouse (Delhi). He has more than 29 years of experience in practices of Reconstruction and Rehabilitation in India and Appearances before Statutory and Regulatory Tribunals. His particular experiences include strategic investments as means of revival, settlement of claims and counter claims, reorganising corporate structures for operational improvements, work force rationalisation, and asset stripping or sales. He has worked across a wide array of industrial sectors including Metals, Pharmaceuticals, Infrastructure, Retail, Automobile, Food and Beverages, Information Technology, Media and Publishing.

He is listed on the panel of Arbitrators maintained by the Institute of Chartered Accountants of India and acts as Arbitrator and represents before Arbitral Tribunals.

Lisa Donahue, AlixPartners LLP
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Lisa Donahue of AlixPartners LLP is Managing Director and Global Head of the Turnaround and Restructuring Group.

Lisa offers more than two decades of successful outcomes in areas of both financial and operational turnarounds, reorganizations, and corporate transformations. Her assignments cover many industries, including energy, oil & gas, shipping, financial services, manufacturing, consumer products, and retail. Over the years, Lisa has been successful as both an interim executive and as an advisor.

Her assignments include serving as CFO at Atlantic Power Corporation, Financial & Restructuring Advisor to TBS Shipping, Restructuring Advisor to TORM, CEO of New World Pasta, CFO of Calpine Corporation, CRO of SemGroup, CRO and CFO of Exide Technologies, and CFO of Umbro International.

Brian Empey, Goodmans LLP
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Brian Empey is a partner in the Corporate Restructuring Group at Goodmans. He practices in the areas of bankruptcy and insolvency, restructuring, creditor remedies, secured transactions and structured financings, including derivatives and asset-backed securitizations, with particular expertise in cross-border corporate restructurings under the Companies' Creditors Arrangement Act and insolvencies of financial institutions.

Brian advises debtors, creditors, regulators, court-appointed officers, committees, suppliers and bidders. Recognized as a leading restructuring and insolvency lawyer by Chambers Global Guide to the World's Leading Lawyers, Euromoney's Guide to the World's Leading Insolvency and Restructuring Lawyers and BV Peer Review Rated by LexisNexis Martindale-Hubbell, Brian has published and presented locally and internationally on a number of issues relating to insolvency.

He is a former Chair of the Insolvency Section of the Ontario Bar Association and is a member of INSOL International, the Insolvency Institute of Canada, Canadian Bar Association, American Bankruptcy Institute and the Turnaround Management Association.

Stuart Frith, Stephenson Harwood LLP
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Stuart Frith is a partner in the Restructuring and Insolvency team at Stephenson Harwood LLP in London. For over 30 years he has been involved in acting on behalf of stakeholders involved in all types of insolvency process. Recent assignments have included advising in the multi-jurisdictional insolvency of the Dawnay Day conglomerate and advising the directors of the trading entities of EMI. He has also been dealing with insolvent sporting clubs, most notably Glasgow Rangers, Leeds United and Coventry City. Cross-border insurance and maritime insolvencies have also been a regular feature in his practice, together with providing advice in relation to high value individual insolvent estates. He is a past president of the Insolvency Lawyers Association and sits as a deputy registrar in the Companies and Bankruptcy Courts of the High Court of Justice.

Away from the office, he is married to Anne, has two children, (both of whom are pursuing careers in accountancy) and enjoys sport, particularly devising new and unusual routes around Pannal Golf Club in North Yorkshire.

The Honourable Mr. Justice Fabian Gleeson
Supreme Court of New South Wales

The Hon Justice Fabian Gleeson was sworn in as judge of the Supreme Court of NSW and a judge of appeal in April 2013.

Justice Gleeson began his legal career as a solicitor in 1980 at Freehill, Hollingdale & Page. He was made a partner in 1985.

He also served as a part time lecturer in Insolvency and Business Finance Law courses at the University of Sydney.

His Honour was called to the Bar in 1991. In 2005 Justice Gleeson took silk.

Over his 22 years at the Bar, Justice Gleeson specialised in corporations law, insolvency, equity and commercial law, insurance and reinsurance and professional liability. He appeared and advised in relation to many insolvency matters, including proceedings relating to the liquidation of HIH Insurance, MF Global Australia and Lift Capital Partners, as well as creditors schemes of arrangement such as Centro Properties and cross-border applications under the Model Law.

The Honourable Mr. Justice Jonathan Harris
High Court of Hong Kong

Jonathan Harris was appointed to the High Court of Hong Kong in December 2009 and shortly thereafter he became the Judge in charge of Hong Kong's Companies Court. Judge Harris came to Hong Kong in 1983 and practiced as a solicitor prior to joining the Hong Kong Bar in 1993. He was appointed senior counsel in 2006. Judge Harris's practice consisted primarily of corporate finance, corporate insolvency and securities related matters.

Lynn P. Harrison 3rd, Fellow, INSOL International
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Mr. Harrison is co-chair of Curtis, Mallet-Prevost, Colt & Mosle LLP's Restructuring & Insolvency Group. He has experience in insolvency proceedings, workouts and liquidations on behalf of debtors, creditors, administrators, liquidators and trustees. Clients include foreign and domestic, public and private corporations, financial institutions, underwriters and governmental creditors in reorganizations, structured financings, distressed trades, asset and stock sales and acquisitions.

Mr. Harrison lectures and writes on international insolvency issues throughout the United States, Europe, Latin America and the Far East.

Mr. Harrison holds a J.D., New York University School of Law, and a B.A., Morehouse College. He is a Merrill Scholar and a Thomas J. Watson Fellow. Legal 500 USA cited Mr. Harrison as a top lawyer in the Corporate Restructuring category. He is listed in Best Lawyers, U.S. News & World Report.

He is a member of INSOL International and is the Vice Chair of the Inter-Pacific Bar Association Insolvency Committee.

Jesse Hibbard, Fulcrum Capital
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Jesse Hibbard is the Chief Investment Officer of Fulcrum Capital and has over 15 years of experience in the global distressed market. Prior to joining Fulcrum, he deployed capital in distressed investments at Och-Ziff Capital Management. Prior to joining Och-Ziff, Mr. Hibbard was the Portfolio Manager for the U.S. Corporate Credit business at HBK Capital Management where he also focused on distressed investments. He has sat on creditors' committees in numerous cases including Adelphia Communications, Calpine Corporation and Owens Corning. Mr. Hibbard began his career at Donaldson, Lufkin and Jenrette.

He graduated summa cum laude from the Wharton School of the University of Pennsylvania.

Kirtee Kapoor, Davis Polk & Wardwell LLP
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Mr. Kapoor is a member of Davis Polk's Corporate Department, concentrating in Pan-Asian and U.S. M&A, corporate finance and restructuring / workout transactions. He represents clients in investments and exits around the world in both public and private companies and has extensive experience doing deals in United States, China, India, Hong Kong, Korea, Philippines, Taiwan, Singapore, Indonesia, Sri Lanka and other countries. Mr. Kapoor is consistently recognized as a leading lawyer by legal publications such as Chambers and IFLR1000. Mr. Kapoor also leads Davis Polk's India practice.

Mr. Kapoor has worked on many transactions in Asia (including India) for clients such as CNOOC, China Investment Corporation, COFCO, Oracle, Far Eastern Textiles, Reliance Industries Limited, Smith & Nephew, Morgan Stanley, Goldman Sachs and Warburg Pincus.

In October 2007, The New York Times listed Mr. Kapoor as one of the leading dealmakers on Wall Street under 40 years of age ("Facebook of Wall Street's Future," NYT, Oct. 3, 2007).

Martin Kenney, Martin Kenney & Co., Solicitors
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Martin Kenney is a specialist fraud investigation and asset recovery lawyer. He is the managing partner of Martin Kenney & Co, solicitors in the British Virgin Islands. The firm's work lies at the intersection of cross-border insolvency, creditors' rights, and complex commercial litigation. Leading a specialist team of lawyers, investigators and forensic accountants, Martin Kenney is widely regarded as a ground-breaker in the use of pre-emptive remedies, multi-disciplinary teams and professional litigation funding in response to global economic crime to uproot bank secrets and freeze hidden assets in multiple jurisdictions.

Offshore Alert of Miami has said that Martin Kenney "is perhaps the best-known fraud and asset recovery lawyer in the world, having worked on a number of high profile cases." The Financial Times (US edition) has deemed him a "top international asset chaser". Who's Who in Asset Recovery says that "Kenney is internationally hailed as a dean of asset recovery."

David Kidd, Linklaters
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David is a partner in Linklaters' Hong Kong office responsible for the firm's AsiaPac restructuring and insolvency practice. He has advised on restructurings in Europe and the US (based in London) and for the last 15 years in Asia Pacific (based in Hong Kong). David acts for creditors, debtors and other stakeholders in relation to the restructuring of the debt and operations of underperforming companies. His recent experience includes advising Japanese shipper Sanko Steamship in dealing with its international creditors, lenders to Vinashin, the financiers of Dubai World/Nakheel, the lenders to a substantial Korean white goods manufacturer, the lenders to a leading Taiwanese telecommunications company, lenders in the pre-IPO restructuring of one of China's largest real estate companies and the PIK Holders of Asia Aluminum.

David is a member of the International Insolvency Institute, the Hong Kong Deposit Protection Board, the technical committee of the HKICPA Restructuring and Insolvency Faculty and the HKICPA Insolvency Specialist Designation Vetting Committee.

Andrew Koo, EY
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Andrew is a partner with EY Greater China and specialises in Corporate Restructuring and Chinese Bankruptcy procedures. With more than 17 years of experience, he has worked in various jurisdictions, including Australia, Singapore, Hong Kong and China. Andrew is fluent in both Chinese and English.

In China, Andrew has participated in various court appointed restructuring cases. He also assists clients in distressed situations and advises on turnaround management. His experience includes business evaluation, working capital management, cashflow monitoring and distressed supply chain management.

His industry experience includes renewable energy (ie solar), automotive parts, telecommunication device, silicon smelter, textile and food manufacturing. He has provided services to clients including Ferretti, Ya Hsin, Global Flex, Sanlu, Adaltis, Sunshine, CHT, DCC, Chrysler, LSG, etc.

Andrew earned a bachelors degree in accounting and finance from the Melbourne University in Australia. He is a member of the Institute of Chartered Accountant of Australia.

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Mr. Derek Lai is the Managing Partner of Deloitte China's Financial Advisory Services which provides Corporate Finance, Merger & Acquisition Transaction Services, Project Finance, Forensic, Restructuring and Valuation Services in Greater China.

Derek is also the Asia Pacific Head of Restructuring Services and has been specializing in the restructuring field for over 25 years. He has worked on many corporate restructuring, receivership, liquidation and closure management engagements involving entities incorporated in Hong Kong, China and various other international jurisdictions.

Derek has worked on formal restructurings and informal workouts. He acted as joint and several provisional liquidator of numerous Hong Kong listed companies including, but not limited to, Ocean Grand Holdings Limited, FU JI Food and Catering Services Holdings Limited, The Sun's Group Limited, Far East Pharmaceutical Technology Co, Ltd and Ocean Grand Chemicals Holdings Limited, all of which have been successfully restructured.

Ian Mann, Harney Westwood & Riegels
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Ian Mann is head of Harneys' BVI and Cayman Litigation and Restructuring Department in Hong Kong servicing Asia based clients involved in BVI and Cayman litigation. He joined Harneys in 2009 and became a partner in 2011.

Ian specialises in insolvency, restructuring, shareholders' disputes and contentious trusts (Ian is also a TEP). Ian is an experienced advocate who has a number of reported cases in the High Court and Court of Appeal in England. He continues to appear regularly as advocate in the Commercial Division of the Eastern Caribbean Supreme Court and Court of Appeal. Prior to moving offshore, Ian practised as a barrister at 13 King's Bench Walk, chambers of Roger Ellis QC, London.

Ian has regularly appeared in ex parte applications seeking interim relief in support of multi-jurisdictional litigation to preserve assets and is accustomed to working in large onshore and offshore teams.

Ian is one of the general editors of British Virgin Islands Commercial Law, Sweet & Maxwell, now in its second edition.

Neil McDonald, Hogan Lovells
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Neil McDonald is a partner of Hogan Lovells in Hong Kong and the head of Business Restructuring and Insolvency practice in Asia. He has been involved in a wide range of matters in Asia in respect of the restructuring and insolvency of distressed companies. Neil acts for financial institutions, insolvency appointment holders, turnaround management firms, hedge funds and private equity firms.

Neil advises clients on all aspects of financial distress including consensual workouts, shareholder disputes, liquidations, receivership's and other enforcement options including litigation. He also advises clients on the proprietary acquisition of distressed businesses and assets.

Neil is widely recognised as a leading individual for Restructuring and Insolvency by Legal 500 Asia Pacific, Chambers Asia Pacific, International Financial Law Review 1000 and PLC Which Lawyer? yearbook.

Øystein Meland, Wikborg, Rein & Co
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Mr. Meland is a Partner at Wikborg Rein's Bergen office, and until 2013 he was head of the firm's Shipping Offshore Group.

He worked with shipping matters for more than 20 years for Norwegian and foreign clients, including competition law related to maritime transport. He successfully argued an international shipping cartel case before the EC, where the case was closed in May 2008 without any sanctions.

Mr. Meland is admitted to the Norwegian Supreme Court. He is a Member of Wikborg Rein's Maritime law group and Competition law group. He is also Manager of the Bergen Shipowners Association, and member of the BIMCO documentary Committee and the Legal Committee of the Norwegian Shipowners' Association.

Mr. Meland drafted and negotiated the Norwegian Standard Shipbuilding Contract ("Ship 2000"), and is the author of an extensive commentary on Shipbuilding Contracts based on the Norwegian Standard.

He is a frequent speaker at international conferences, and Honorary Consul to the Kingdom of Spain.

Nils Melngailis, Alvarez & Marsal
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Nils Melngailis is Head of Bank Restructuring at Alvarez & Marsal. He has advised banks and governments on restructuring strategies throughout Europe. He led the project to establish the country-wide asset management company in Spain, developed resolution strategies for several banks in Greece and was part of a team which recently restructured the Cypriot banking industry.

Prior to A&M he was CEO of Parex bank where he led the restructuring of the Latvian banking system as part of the IMF programme for The Baltics. He served as CEO and Chairman of the Lattelecom and was a Senior Advisor to the Blackstone Group. As Partner in PwC in the Strategic Mergers & Acquisitions division he managed a number of significant engagements across Europe and at IBM he served as head of Business Intelligence in the EMEA, where he led major transformations of banking operations.

Mr. Melngailis is a Fulbright Scholar.

Edward Middleton, Fellow, INSOL International, KPMG
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Eddie's career in insolvency and restructuring is now into its third decade. Beginning with a rigorous and robust introduction to the specialism in the UK's Midlands' industrial heartland before moving to London, the major part of his career has been spent in Asia, where he has now spent more than fifteen years, primarily based in Hong Kong but also including two years in post-Asian Financial crisis Thailand. Eddie also slipped in a year spent in Hungary working in the aftermath of the collapse of the Berlin wall.

Eddie leads a practice that undertakes the full range of corporate and personal insolvency and restructuring matters, both in court and out of court, across all industries and across borders.

Recent or current highlights include Lehman Brothers, Ambow Education, Vietnam Shipbuilding Industry (Vinashin), Titan Petrochemicals, Evergrande, Asia Aluminum and Ferrochina.

Naomi Moore, Bingham McCutchen LLP
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Naomi Moore is a partner of Bingham McCutchen LLP based in the firm's Hong Kong office. She focuses her practice on cross-border restructurings, insolvencies and workouts. With considerable experience gained in Asia, Australia and the United Kingdom, Naomi has a particular focus on solvent and insolvent schemes of arrangement. Recent engagements have included restructurings or distressed transactions in the PRC, India, Indonesia, Korea, Japan and Australia.

Naomi also has substantial insurance and reinsurance insolvency and run-off experience, including providing exit solutions to run-off companies and underwriting pools. She is experienced in all aspects of insurance and reinsurance run-off including portfolio transfers, sales and regulatory issues.

Naomi is recognised as a leading lawyer for restructuring and insolvency by IFLR1000 and Who's Who Legal. She is a member of the board of the International Women's Insolvency and Restructuring Confederation's Hong Kong Chapter. Naomi is admitted to practice in Hong Kong, England and Wales, and New South Wales.

Gwyn Morgan, Westpac Banking Corporation
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Gwyn Morgan is the Head of Credit and Asset Structuring within Westpac Banking Corporation's Institutional Bank. Leading a team of over 100 credit and risk professionals, Gwyn has had global responsibility for overseeing the credit management of Westpac's wholesale credit exposures.

In 1997/8 he fulfilled the role of Chairman of the Co-ordination Committee of Lenders to the Burns Philp & Company Limited Group overseeing that group's successful restructuring and recapitalisation.

Prior to his involvement in the restructuring of Burns Philp, Gwyn managed a number of the bank's independent credit risk and portfolio risk review field teams.

Over the past twenty years, Gwyn has had various senior management roles within Westpac's Credit Risk Management, Asset Management and Institutional Banking groups including fifteen years managing impaired corporate exposures in Australia, Canada, New Zealand, Asia, Europe, the UK and the US.

Gwyn is a Fellow of the Financial Services Institute of Australasia and is the immediate past Chair of the Australian INSOL Lenders' Group.

Prof. Fidelis Oditah QC, South Square/Oditah
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Fidelis Oditah QC, SAN was educated at the Universities of Lagos and Oxford. He practices at the English and Nigerian Bars in a broad range of areas. In England, he practices as a barrister specialising in chancery and commercial work, with emphasis on insolvency and restructuring work. He has acted and/or advised on virtually all major corporate insolvencies in the UK in the last two decades. His London Chambers – South Square Chambers – is widely acknowledged as the first port of call for all major corporate insolvencies and restructuring.

In Nigeria, his practice encompasses energy, projects, companies and general commercial law. He has advised and acted for the Federal Government of Nigeria on some of the most important energy and infrastructure projects and disputes, some state governments, many international oil companies, major international brands and smaller corporates. He has extensive commercial arbitration practice and also sits frequently as an arbitrator in a broad range of commercial disputes.

He is a Queen's Counsel in England, a Senior Advocate of Nigeria, a Bencher of Lincoln's Inn, and a Visiting Professor at the University of Oxford.

Ted Osborn, PwC
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Ted Osborn is a partner and the leader of PwC China's Business Recovery Services practice. He has been based in Hong Kong since 1995 acting for debtors, bank groups, bondholder groups and investors.

For the last several years Ted has spent much of his time providing advice in relation to China related debt restructurings, NPL acquisitions and special situations investments. In many of these situations he acted as a Receiver or Liquidator. In addition, he has acted as an Administrator on Hong Kong estate administration matters. Major recent relevant experience in Hong Kong and the PRC includes acting as one of the receivers in the FerroChina and Rightway situations in China. Both involved complex restructurings involving nearly US$1b of debt and a diverse group of stakeholders.

Formerly with PricewaterhouseCoopers in the US, Ted is also experienced in dealing with US workout related issues and Chapter 11 bankruptcies.

Steven Palmer, Norton Rose Fulbright
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Steven Palmer is based in Melbourne and leads the Restructuring & Insolvency practice at Norton Rose Fulbright Australia. Steven has extensive experience across a range of industries and his areas of expertise include corporate restructuring and insolvency with specific experience in managed investment schemes and complex financial instruments, directors' obligations and duties, advice on trusts and equitable rights and debt and security assignments and restructures.

Steven has played a key role in some of the most significant and complex insolvency and restructuring matters of recent years and has been recognised as a leading insolvency lawyer in various legal directories, including Chambers and Partners, who recently refer to him as "…incredibly commercial, switched on and street smart. He doesn't waste time and doesn't litigate for the sake of it." He is also ranked in the Who's Who Legal, APL500 and IFLR.

Andrew Riebe, Nomura International (HK) Ltd.
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Andrew Riebe has worked in distressed situations on and off since 1990. His experiences include being a bank workout officer; a distressed investor & trader; and advisor to companies in financial distress. He has worked on transactions in multiple jurisdictions including: USA, Australia, Hong Kong, Indonesia, Thailand, the Philippines, etc. He has been based out of HK since 1996.

His work experience includes 15 years at JP Morgan Chase & Co, as well as stints at Sandell Asset Management, Citigroup and his current role as a desk head for Nomura's Structured Credit Trading Group.

He is a graduate of Lafayette College (BA) and the American Graduate School of International Management (MIM).

Dr. Oliver Rossbach, Taylor Wessing LLP
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Oliver Rossbach is a lawyer in Hamburg and heads the ship finance practice of Taylor Wessing together with Stephan Goethel. Oliver Rossbach specialises in structured finance, credit restructuring as well as national and international insolvency law. He advises on new financing transactions as well as on financial restructuring and insolvency matters.

After training as a banker, Oliver studied law at the universities of Konstanz and Geneva and completed a doctorate on international insolvency law. He was admitted as a lawyer in 2001 and initially worked as a law lecturer at the Bucerius Law School until 2003. From 2003 until 2007, Oliver worked as a company lawyer at the Association of German Banks. From 2007, he then worked as a company lawyer in the legal department of Deutsche Bank AG. From 2008 onwards he advised on the Bank's worldwide shipping finance and restructuring transactions. In February 2013 he joined the Hamburg office of Taylor Wessing as a Partner.

Maythawee Sarathai, Mayer Brown JSM
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Maythawee Sarathai is a partner of Mayer Brown JSM Thailand. Maythawee has advised on all matters relating to investment in Thailand, such as merger and acquisitions, corporate structure and registration. He also advises creditors, liquidators, planners, plan administrators, special managers and debtors on all aspects of both contentious and non-contentious corporate lending, restructuring and insolvency. Maythawee also has experience in advising on distressed debt situations generally including settlement, recovery and enforcement strategies, business and asset reorganisation.

Maythawee has acted extensively for investors in negotiating and documenting multi-national cross-border investors for merger acquisitions in Thailand and for bank steering committees in negotiating and documenting multi-bank cross-border corporate workouts and court-supervised reorganisations in Thailand. He has also acted for both local and international clients in Thailand and offshore for distressed asset sale and purchase.

Christian Saunders, Allen & Overy LLP
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Christian leads Allen & Overy's Restructuring team in the Middle East and has broad experience in regional restructurings and insolvency transactions, international bank financings and bank-financed limited recourse transactions.

Christian's career with Allen & Overy spans more than seventeen years in the European, Asia-Pacific and Middle East regions, the last eight of which have been spent in the Middle East. He has also received significant external recognition from all of the leading independent legal guides.

Christian has led the team advising on many landmark transactions for the Middle East, including many firsts for the region. Highlights include advising on the Global Investment House restructuring, Dubai World restructuring, Nakheel restructuring, Dubai Group restructuring and the Al Jaber Group restructuring. He has also advised many of the region's leading financial institutions and corporations on various financings and commercial arrangements.

Jorge Sepúlveda, Bufete Garcia Jimeno S.C.
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Mr. Sepulveda is an attorney at law from Escuela Libre de Derecho, in Mexico City. He was admitted by the Mexican Attorneys Bar and by the National Academy of Lawyers and is now a partner of the law firm Bufete Garcia Jimeno, S.C. in Mexico City, specializing in complex commercial litigation. He also teaches bankruptcy proceedings and restructuring at the Universidad Iberoamericana in Mexico City.

Jorge is the co-founder and a member of the "Instituto Iberoamericano de Derecho Concursal" (IIDC), a non-profit organization that focuses on studying bankruptcy law in Latin-American countries. He has authored many essays for law magazines on various legal topics relating to bankruptcies, insolvencies and turnarounds and participated in many conferences and seminars organized by the Mexican Attorneys Bar, the Mexican Confederation of Businessman, the Mexican National Chamber of the Transformation Industry, the Mexican National Chamber of Commerce, the Supreme State Court of Yucatan and by the Public Accountants Bar of Mexico.

He has also taken part in the Annual Bankruptcy Congress of IIDC from 2005 to 2012. He acted as Chairman of INSOL International's Seminar in Mexico City in 2010. He has handled various international legal cases dealing with cross - border insolvencies.

Prof. Li Shuguang
Bankruptcy Law and Restructuring Research Centre,
China University of Politics and Law
chinainsol@cupl.edu.cn

Professor Li Shuguang obtained his doctor's degree in Law in 1991 from the China University of Politics and Law and was a visiting scholar at Harvard Law School in 2000-2001. Professor Li Shuguang is the Executive Dean of the Graduate School of the China University of Political Science and Law, the founder and the director of the Bankruptcy Law and Restructuring Research Centre, the Deputy Director of Legal Study Institute of the Supreme People's Court of China, and a member of the Public Offering Review Committee of the China Securities Regulatory Commission.

He took part in the drafting of the first Chinese Bankruptcy Law which was passed in 1986. He was the principal drafter of the New Enterprise Bankruptcy Law of the PRC which was passed in 2006, and also the principal drafter of the State Asset Law of the PRC.

The Honourable Mr. Justice Arjan Kumar Sikri
Supreme Court of India

Justice A.K. Sikri is a Judge of the Supreme Court of India. He was appointed as Judge of Delhi High Court in July 1999 and was made acting Chief Justice of the same Court in October 2011. Thereafter, he was elevated as the Chief Justice of Punjab & Haryana High Court in September, 2012 and in April 2013 he was elevated as a Judge of the Supreme Court of India.

Justice Sikri had an excellent academic record. He is a Gold Medalist in LLB & LLM. He enrolled as an Advocate in 1977. After his enrolment, he practiced in various branches of law with specialization in Labour, Commercial and Constitutional Matters. He was designated as a Senior Advocate in September 1997.

He has many articles and papers to his credit. He also bears office in various professional bodies including; Indian Law Institute (ILI), National Judicial Academy (NJA), National Law School of India University (NLSIU) and INSOL International.

He was chosen as one of the 50 most influential persons in Intellectual Property in the world by MIPA for the year 2007. Justice Sikri was conferred with Honoris Causa by Dr. Ram Manohar Lohia National Law University, Lucknow in November, 2013.

William Snyder, Deloitte
wksnyder@deloitte.com

With executive and entrepreneurial experience spanning more than 25 years, William Snyder has restructured, managed and guided a multitude of companies in a wide variety of industries.

As a broadly experienced interim executive and advisor who has participated in the restructuring of more than 70 companies, Mr. Snyder brings a results-driven leadership style to complex and crisis situations.

His recent interim-management engagements include: Court-appointed chief restructuring officer (CRO) of the Texas Rangers baseball team; Court-appointed examiner of Mirant, a $6.5 billion merchant energy company; CRO of Pilgrim's Pride a $7.6 billion integrated poultry company.

Mr. Snyder is currently the co-lead of the restructuring practice in the USA for Deloitte.

Dr. Alexander Stein, Dolus Counter-Fraud Advisors
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Alexander Stein is a specialist in the psychology of fraud and the Founder of Dolus Counter-Fraud Advisors (NY), which provides cutting-edge resources in international asset recovery and institutional fraud matters. Dr. Stein's innovative technologies include psychodynamic intelligence analysis, strategic counsel on human and organizational factors, multi-dimensional risk assessments, sophisticated soft-data and link analysis, motivation/behavioural analysis, individual and matrix profiling, forecasting, and model-building, and tactical response plans.

Dr. Stein is also a Principal in the Boswell Group (NY). His practice involves advising CEOs, senior business leaders, and entrepreneurs on the psychological underpinnings of leadership, corporate culture, and organizational governance.

He is an internationally established thought leader, keynote speaker, former monthly columnist for FORTUNE Small Business and frequent contributor to blue-chip business publications, and the author of "Warfare of the Mind: Innovations and Strategic Applications in the Psychology of Fraud" in FraudNet World Compendium of Asset Tracing and Recovery, 2nd Edition.

Rod Sutton, FTI Consulting
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Rod Sutton is Chairman of the Asia Pacific region of FTI Consulting and he is based in Hong Kong. Mr. Sutton is primarily involved in providing M&A investment advice to key stakeholders on large and complex assignments within Asia's emerging markets. With more than 25 years of corporate advisory and restructuring experience in Asia Pacific, Mr. Sutton is highly skilled in providing practical and commercial solutions to complex financial and cross-jurisdictional issues.

Mr. Sutton's counsel can be sought for a broad range of business issues, including sell mandates, reverse takeovers, selective capital reductions, re-lists, directorships, formal solutions or simply to assist financial stakeholders by providing essential due diligence services. Whether the advice required is part of an entry to, or an exit from, an investment, Mr. Sutton's key focus is to extract value for his clients using his strong and vast corporate finance knowledge, extensive experiences and astute negotiation skills

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James H.M. Sprayregen, Kirkland & Ellis LLP
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James H.M. Sprayregen is a Restructuring partner in the Chicago and New York offices of Kirkland & Ellis LLP and serves on Kirkland's worldwide management committee. Mr. Sprayregen is recognized as one of the outstanding restructuring lawyers in the United States and around the world. Mr. Sprayregen has extensive experience representing major U.S. and international companies in restructurings out of court and in court around the world. He also has extensive experience advising boards of directors, and generally representing debtors and creditors in workout, insolvency, restructuring, and bankruptcy matters worldwide. He has handled matters for clients in industries as varied as manufacturing, technology, transportation, energy, media, and real estate. Chambers & Partners has described Mr. Sprayregen as a "great clients' lawyer, admired for his 'unflustered ways.'" Chambers said that clients it spoke to noted that he is "probably the best restructuring lawyer in the world." In March 2010, Mr. Sprayregen was selected by *The National Law Journal* as one of "The Decade's Most Influential Lawyers." In 2013, Mr. Sprayregen was named "Global Insolvency & Restructuring Lawyer of the Year" by Who's Who Legal Awards, receiving more votes from clients and peers than any other individual worldwide. In October 2013, Mr. Sprayregen was inducted into the TMA Turnaround, Restructuring, and Distressed Investing Industry Hall of Fame.

Mr. Sprayregen joined Kirkland in 1990 and built its international Restructuring Group. He joined Goldman Sachs in 2006 where he was co-head of Goldman Sachs' Restructuring Group and advised clients in restructuring and distressed situations. He rejoined Kirkland three years later. In the 2009 edition of *Chambers USA* Mr. Sprayregen was listed as a first tier lawyer practicing in the bankruptcy/restructuring category, and was described as having an "outstanding reputation for complex Chapter 11 cases." The 2011 edition of *Chambers USA, America's Leading Lawyers for Business* recognized Mr. Sprayregen as a key individual, noting that sources refer to him as "a restructuring genius and one of the best strategists in the country." In the 2012 edition of *Chambers USA*, Mr. Sprayregen was praised for his "incredible work ethic and skill" and for his ability to "bring a mastery of the law to practical application." In 2013, Chambers described Mr. Sprayregen as "one of the leading practitioners in the industry." Sources recommend Mr. Sprayregen for his "wisdom" and "strategic guidance on the big issues."

Mr. Sprayregen has led bankruptcy cases for numerous companies including United Airlines, Conseco, Chiquita Brands, General Growth Properties, Innkeepers USA Trust, Japan Airlines Corporation as U.S. and international counsel, The Great Atlantic & Pacific Tea Company, Edison Mission Energy, MSR Resort Golf Course LLC, Hawker Beechcraft Inc., Sbarro Inc., Visteon Corporation, Lear Corporation, The Reader's Digest Association, Corus Bankshares, Inc., Majestic Star Casino LLC, and ION Media Networks, Inc.

Mr. Sprayregen is a frequent lecturer and speaker, and has published numerous articles on insolvency, fiduciary duty, and distressed M&A issues. He has served as an Adjunct Professor at the University of Chicago Booth School of Business, New York University School of Law, and University of Pennsylvania Law School. In May 2013, Mr. Sprayregen was appointed to serve a two year term as the President of INSOL International, the leading insolvency association in the world.

Alan Tang
SHINEWING Specialist Advisory Services Limited
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As a Chartered Accountant, Alan has 30 years of hands on experience in restructuring, insolvency, investigations and related work based in the UK, Hong Kong and the PRC. During his term as Chairman of the Insolvency Practitioners Committee of the Hong Kong Institute of Certified Public Accountants, Alan also served as a director of INSOL International.

Alan speaks regularly at national, regional and international conferences organized by INSOL International, Turnaround Management Association, Forum of Asia Insolvency Reform, East Asian Association of Insolvency & Restructuring, the PRC Supreme People's Court, the All China Lawyers Association, The Beijing Bankruptcy Law Society, the PRC National Judges' College, Provincial High Courts and Municipal Lawyers Associations.

At the invitation by Sweet and Maxwell, Asia, Alan wrote and published a book on "Insolvency in China and Hong Kong – A Practitioner's Perspective" (circa 1,200 pages). He has contributed to various technical papers and case studies for INSOL International; he also writes extensively for other professional journals.

Nicolaes Tollenaar, Fellow, INSOL International
RESOR N.V.
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Nicolaes has specialised in corporate restructuring and insolvency law, and he advises and litigates on a variety of matters in this area. He has a special focus on cross-border matters. Nicolaes represents banks, multinational corporations, foreign office holders, investors and other stakeholders in formal and informal restructurings.

Recent matters include being appointed as one of the joint administrators of the Dutch finance vehicle of Q-Cells group; with EUR 750 million in bonds listed in Frankfurt and Luxemburg; advising a listed company on a EUR 300 million bond restructuring with activities and listings in several continents; advising the sponsor on a cross-border, sponsor-led restructuring of a EUR 2 billion credit facility of a Spanish real estate company; and representing the former shareholders of Yukos in relation to the global dispute over its remaining assets.

Colette Wilkins, Walkers
colette.wilkins@walkersglobal.com

Colette Wilkins has been a partner at Walkers since 2009, specialising in commercial litigation, contentious restructuring and insolvency. Colette practiced successfully as a barrister from chancery/commercial chambers in London for fifteen years before being admitted as an attorney in the Cayman Islands in 2005.

Colette has extensive experience in high value and cross-border commercial litigation, with a particular emphasis on disputes arising in connection with fraud, asset recovery, corporate governance, distressed investment vehicles and liquidations. She appears regularly in the Grand Court and the Cayman Islands Court of Appeal.

Colette is a member of FraudNet. Since 2009 she has been commended in the leading legal directories including Who's Who Legal, Chambers Global and Legal 500 . This year she was listed among the ten most highly regarded individuals in The International Who's Who of Asset Recovery Lawyers with the comment that she 'stands out as one of the most highly regarded individuals in the research. Recommended for her "pragmatic and solutions-oriented" approach, she earns "high praise" from her peers and clients'.

Jake Williams, Standard Chartered Bank
jake.williams@sc.com

Mr. Williams is Deputy Group Chief Risk Officer at SCB. Mr. Williams has over 39 years of financial services experience and has worked at SCB for the past fourteen years. He holds directorships of the Group's subsidiaries in China, Korea, Taiwan and Malaysia. Mr. Williams was previously Group Head of Group of Country and Credit Risk at SCB, a role in which he was responsible for approvals and the oversight of SCB's largest and most complex transactions and counterparty exposures as well as significant consumer bank portfolios.

Mr. Williams also monitored and facilitated the optimization of SCB's risk exposure to 140 countries. In his current role, he is still involved in all major credit approvals, heads up risk due diligence and integration for acquisitions and supervises SCB's problem credit portfolio and SCB's most significant risk problems. Before joining SCB, Mr. Williams held a variety of senior management positions at Citicorp/Citibank and Westpac Banking Corporation.

Mr. Williams received a Masters degree in Business Administration from Harvard Graduate School of Business, a masters degree in Aerospace Engineering from the Massachusetts Institute of Technology, and a bachelor degree in Aerospace Engineering from Princeton University.

Tim Williams, National Australia Bank
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Tim is General Manager Group Strategic Business Services for National Australia Bank's insolvency, work out & recovery team. Tim is responsible for a wide range of National's corporate & institutional problem and distressed loans across various asset classes, corporate groups and industry classifications.

Tim has over 30 years' experience in corporate finance being actively employed in Insolvency, Corporate Restructuring, Capital Markets, Securitisation, Structured Finance, Project Finance, Property Finance and Corporate Lending. He has worked with the National Bank in Sydney, New York, London and now resides in Melbourne.

Tim has a Bachelor of Laws and a Masters of Business Administration from the University of Technology, Sydney as well as a Masters of Laws from the University of Sydney. Tim is a Solicitor of the Supreme Court of New South Wales, a member of the Law Society of NSW, a member of the Law Institute Victoria, a Senior Associate of FINSIA, a member of the Insolvency Practitioners Association and a director on the National Board of the Turnaround Management Association of Australia.

Ashley Young, Kirkland & Ellis LLP
ashley.young@kirkland.com

Ashley Young focuses his practice on debt finance transactions. He has over a decade of experience advising clients on complex international cross-border banking transactions, particularly in the areas of leveraged finance, corporate acquisition finance and syndicated lending and the restructuring of those transactions. His experience includes advising both borrowers, including private equity funds and their portfolio companies, and creditors at every level of the capital structure.

Ashley is named as a top lawyer for leveraged acquisition finance by Chambers Asia Pacific and is recommended by Legal 500 Asia Pacific where he is described as “thoughtful and excellent”.

Dr. Yin Zhengyou, W&H Law Firm
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Dr. Yin Zhengyou is a Senior Partner of W&H Law Firm and is widely considered a leading practitioner with respect to restructuring and insolvency matters in mainland China. He has handled almost 100 restructuring and insolvency cases, and has played a substantial role in the drafting of relevant judicial interpretations of the Enterprise Bankruptcy Law.

Dr. Yin is the founder and Executive Chairman of the China Bankruptcy Law Forum as well as founding the Beijing Bankruptcy Law Society, serving as its Vice President & Secretary General. He is also the Chairman of the Restructuring and Insolvency Committee of the All-China Lawyers Association, Vice-Chair of the Inter-Pacific Bar Association’s Insolvency Committee, and Secretary-General of the East Asian Association of Insolvency and Restructuring (EAAIR)-China Chapter.

He is also the author of five professional works in the field, and has acted as chief editor of seven volumes of papers from the China Bankruptcy Law Forum.

INSOL Hong Kong

Technical Sessions

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PPB Advisory

Keynote address

The global financial crisis, the Asian century and the transformation of finance

Grand Ballroom

Michael Smith
Chief Executive Officer
Australia and New Zealand Banking Group Limited (ANZ)

Ali Moore
International TV Broadcast Journalist

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Michael Smith
Chief Executive Officer
Australia and New Zealand Banking Group Limited (ANZ)

Michael Smith has been Chief Executive Officer of Australia and New Zealand Banking Group Limited (ANZ) since October 2007.

Until June 2007, Mr Smith was President and Chief Executive Officer, The Hongkong and Shanghai Banking Corporation Limited; Chairman, Hang Seng Bank Limited; Global Head of Commercial Banking for the HSBC Group and Chairman, HSBC Bank Malaysia Berhad. Previously, Mr Smith was Chief Executive Officer of HSBC Argentina Holdings SA and was subsequently appointed Chairman of HSBC in Argentina in 2000.

Mr Smith joined the HSBC Group in 1978 and during his 29-year career he held a wide variety of posts in Hong Kong and the Asia-Pacific region, the United Kingdom, Australia, the Middle East and South America, including appointments in Commercial, Institutional and Investment Banking, Planning and Strategy, Operations and General Management.

Mr Smith graduated with honours in Economic Sciences in 1978 from City University of London. In 2013, he was awarded an Honorary Doctor of Laws from Monash University, Melbourne.

He is a member of the Australian Bankers' Association, the Business Council of Australia and the Asia Business Council.

Mr Smith is a Director of the Institute of International Finance and the International Monetary Conference; a Member of both the Chongqing Mayor's International Economic Advisory Council and the Shanghai Mayor's International Financial Advisory Council; and a Fellow of The Hong Kong Management Association. He is also a Director of the Financial Markets Foundation for Children, Financial Literacy Australia Limited and the Financial Literacy Advisory Board.

Mr Smith was made an Officer of the Order of the British Empire in 2000 and a Chevalier de l'Ordre du MeriteAgricole in 2007.

He is married with three children. His interests include wine, tennis and classic cars.

Ali Moore
International TV Broadcast Journalist

Ali Moore has more than 25 years experience as a journalist and broadcaster, working for the Australian Broadcasting Corporation, Australia's Nine Network, and BBC World TV News in Singapore. During the early 1990s she was based in Beijing as the ABC's China Correspondent. More recently she has hosted Australia's premier late night TV current affairs programme, as well as the country's key business news programmes.

In 2012 Ali moved back to Asia to live in Singapore as a freelance journalist, including producing and reporting for the BBC. Ali has interviewed key decision makers in business, economics and politics, both at home and abroad.

A1

Making something out of nothing: deficient trust funds

Magnolia/Camomile Room

Chair: Steven Palmer, Norton Rose Fulbright
Corinne Ball, Jones Day
Andrew Koo, EY
Ian Mann, Harney Westwood & Riegels

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A1 - Making something out of nothing: deficient trust funds

In recent times there have been cases in many jurisdictions including offshore involving deficient trust funds. It is a persistent and real problem (Lehman, MF Global, Sonray, Madoff) and could also occur in relation to estate agents and law firms and any other businesses holding other people's money. The issues and principles when dealing with deficient trust funds are generally similar in application in most common law jurisdictions, but the law is still evolving. Additionally, the forensic process involved in determining the precise position can be difficult and expensive.

This panel of lawyers and accountants with experience in these issues and from a variety of jurisdictions will interactively discuss topics including:

- How to identify the existence and nature of a trust.
- Determining if or why there is a deficiency and calculating or identifying it.
- Is there a single fund, or multiple mixed funds or a commingled fund or funds?
- How far should you / must you go with the forensic exercise?
- Determining parties rights – tracing, agency, others?
- How to distribute the funds and bind the recipients?
- Not getting sued, and getting paid.

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A2

A tale of two ancient economies (China and India) - similarities and differences in bankruptcy and restructuring

Rose/Peony Room

Chair: Alan Tang, SHINEWING Specialist Advisory Services Limited

Sajeve Deora, Integrated Capital Services Limited

Kirtee Kapoor, Davis Polk & Wardwell LLP

Prof. Li Shuguang, Bankruptcy Law and Restructuring Research Centre, China University of Politics and Law

Dr. Yin Zhengyou, W&H Law Firm

A2 - A tale of two ancient economies (China and India) - similarities and differences in bankruptcy and restructuring

Introduction

With the growing importance of China and India in international commercial activities, there appears to be a dilemma for many international businessmen, lenders and insolvency practitioners as relatively little is known about the restructuring and insolvency regimes in these two countries. Over the years, international academics and practitioners have tried to understand what really is happening in these systems; and yet a common conclusion with certainty is the uncertainty of what one might encounter if one faces real life restructuring and insolvency cases locally.

Outline

A video clip introducing these two ancient countries will set the background to the commonalities of the traditional stigma and pejorative associations of bankruptcy in these cultures. Experts from China and India will address the audience in an interactive manner, and begin by explaining the importance of the family and caste systems in their traditional debtor-creditor relationship; and whether this stigma is still hindering the development of modern day restructuring and insolvency regimes in these two countries.

Discussions will "bounce" from one culture to the other, also comparing similarities and contrasting differences. These discussions will then flow to what stimulus made the break-through for modern-day bankruptcy law and practice to set foot in these ancient cultures, highlighting the key driving force of international trade and market-led commercial activities in the economic and market reform programmes of these two countries.

Speakers will then take stock of the current legal framework for corporate (as well as personal, where applicable) restructuring and insolvency in these two regimes, noting and commenting on statistics of major reported cases in recent years. Key relevant features of the Company Law (2013) in India and the Enterprise Bankruptcy Law (2007), as well as the Supreme People's Court's Judicial Interpretations, in the PRC will be highlighted. New rules on the credit investigations industry in the PRC will be introduced. Focus will then turn to the achievements and difficulties in the "new" law and practices so far, especially the interplay between the new law and practices and the cultural stigma, drawing specific issues of interest or contention out of real-life cases and with emphasis on the impact that it has had on the international business community, as well as lessons learned and issues to be noted by international lenders.

The session will close with the speakers commenting on prospects of insolvency law and practice, as well as the development of the insolvency profession, in these two countries. Views on these prospects from experts not on the panel will also be shared via videoed interviews.

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B1

Hedge funds and distressed debt investing: the past, present and future

Rose/Peony Room

Chair: Jesse Hibbard, Fulcrum Capital
Peter Declercq, Fellow, INSOL International, Schulte Roth & Zabel
Ted Osborn, PwC
Christian Saunders, Allen & Overy LLP
Tim Williams, National Australia Bank

B1 - Hedge funds and distressed debt investing: the past, present and future

In the past, hedge funds often generated attractive returns through passive investments in distressed debt. However, the increase in the number of hedge funds investing in distressed debt, coupled with an environment of below-average default rates, has resulted in a supply-demand dynamic that has compressed the available returns. This phenomenon is causing many funds to get more active in restructurings and explore new geographies as a means to generate higher returns, which presents opportunities for practitioners to provide restructuring and other services to those funds.

Panel members from around the globe including Australia, China, United Arab Emirates, the United Kingdom and the United States will discuss what they are seeing from hedge funds in their respective markets.

Key topics that the panel will cover are:

- What have hedge funds historically invested in and how has that changed over time?
- What types of investments are hedge funds making in distressed debt in the current market environment, both in terms of geography and investment strategy?
- Are hedge funds becoming more willing to get active in effectuating the outcome in restructuring proceedings?
- How has the cast of hedge funds trafficking in distressed debt changed over the last few years?
- What opportunities do the entry of hedge funds into new geographies and their pursuit of new types of investments offer practitioners?

The panel will also discuss other topical items / current trends in the market.

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B2

It's not all about USA: issues in emerging and developing countries

Magnolia/Camomile Room

Chair: Prof. Fidelis Oditah QC, South Square/Oditah
Prof. Juanitta Calitz, University of Johannesburg
Maythawee Sarathai, Mayer Brown JSM
Jorge Sepúlveda, Bufete Garcia Jimeno S.C.

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B2 - It's not all about USA: issues in emerging and developing countries

In preparation for this session INSOL International sent all the registered delegates as of 13 January 2014, ten questions that were identified by the speakers as the most important and interesting topics for discussion during the session.

The questions were:

A. Creditor rights

1. Ranking of claims – expenses, secured, preferential and unsecured
2. Obstacles to enforcement of creditor rights

B. Rescue procedures

3. Formal procedures such as Chap 11, Administration, CVAs, schemes of arrangement, modified provisional liquidation, etc
4. Informal procedures such as receivership, out of court administration, common law compositions, standstill agreements, the London Approach, etc
5. Financing of insolvent debtors – sources, ranking and challenges

C. Cross-border insolvency

6. Recognition of foreign insolvency proceedings at common law and other statutory provisions
7. Assistance to foreign insolvency office holders
8. Ancillary proceedings in local courts in aid of foreign insolvency
9. UNCITRAL Model Law – have they been adopted? Should they be adopted?

D. Additional suggestions

10. Responsibility of the board of directors in pre and post insolvency proceeding. Where does this take us?

The 5 most popular questions will be revealed during the session. Speakers from emerging and developing, as well as more developed countries, will compare and contrast the issues raised and it is hoped this session will raise awareness and trigger further interest on a range of issues that will be of interest to practitioners.

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C1

Restructuring in the Asia Pacific – can the role of a Chief Restructuring Officer really work?

Rose/Peony Room

Chair: Paul Billingham, Grant Thornton
Andrew Riebe, Nomura International (HK) Ltd.
William Snyder, Deloitte
Jake Williams, Standard Chartered Bank
Ashley Young, Kirkland & Ellis LLP

C1 - Restructuring in the Asia Pacific – can the role of a Chief Restructuring Officer really work?

Case Study

Global Leisure Holdings Ltd (GLH) was founded in Hong Kong in 1992 and now owns 28 luxury hotel properties situated throughout Europe, the US and Asia – including 10 in China and eight others throughout the South East Asia region.

The global economic downturn has harmed the operational performance of the business and impacted the value of the hotel portfolio, which is highly geared using a complex array of debt instruments. Covenants have recently been breached; parcels of debt are now being traded; and GLH is seeking forbearance from its lenders.

The banking group has advised it has lost confidence in the management and wants GLH to appoint a CRO as a pre-condition of any further support.

Against this backdrop, the expert panel will discuss the legal, practical, risk and commercial difficulties and opportunities of appointing a CRO in such a situation; and the interactive session will require delegates to consider a short history of GLH beforehand as well as allowing them to direct the panel to specific areas of interest.

Can a CRO save GLH? Is such a role feasible in Asia? What will you conclude?

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C2

A bridge over troubled waters: the current climate in maritime and shipping insolvencies

Magnolia/Camomile Room

Chair: Lynn P. Harrison 3rd, Fellow, INSOL International
Curtis Mallet-Prevost Colt & Mosle LLP

Lisa Donahue, AlixPartners LLP

Stuart Frith, Stephenson Harwood LLP

Dr. Oliver Rossbach, Taylor Wessing LLP

C2 - A bridge over troubled waters: the current climate in maritime and shipping insolvencies

i. ***Perspectives on the current state of the maritime and shipping industry***

- The Principal: Owner/Borrower
- The Lender: Bank/Hedge Fund/Bondholder
- The Fiduciary: Liquidator/Trustee/Administrator
- The Opportunist: Vultures/Distressed Investors
- The Forum: Arbitral and Court Proceedings

ii. ***The protocols addressing the solutions***

- Administrations and “pre-packs”
- Chapter 11
- “Restructuring Platforms”
- Asset Sales

iii. ***The major problems and issues confronting practitioners in the maritime and shipping industry***

- Liquidity
- Lien and other encumbrances
- Extent of automatic stay
- Arresting ships and other assets
- Treatment of charter agreements
- *Ipso Facto*, termination and related contractual provisions

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C3

A Model Law on cross-border insolvency in Asia – is there any hope?

Grand Ballroom

Chair: Naomi Moore, Bingham McCutchen LLP
Patrick Ang, Rajah & Tann LLP
Scott Barker, Buddle Findlay
Neil Cooper, Zolfo Cooper LLP
David Kidd, Linklaters

C3 - A Model Law on cross-border insolvency in Asia – is there any hope?

With increasing trading activity both within and from Asia, and the popularity of offshore holding structures among Asian businesses, it is perhaps only a matter of time before we see an increase in cross-border insolvencies involving Asian countries.

The UNCITRAL Model Law on Cross-Border Insolvency was introduced in 1997. Since then it has been adopted in 20 countries in various parts of the world. The adoption rates in the Asian region, however, remain very low with only Korea, Japan, Australia and New Zealand adopting the Model Law so far. Many Asian countries continue to adopt a "wait and see" approach in respect of the Model Law. In the meantime, their courts are left to deal with cross-border insolvency issues through a combination of local statutes (where applicable) and case law.

This session will begin with a 10 minute introduction that will include a brief recap on the objectives of the UNCITRAL Model Law and the status of its adoption around the globe. It will also feature a brief audio presentation in which judges and other bankruptcy experts from Model Law countries will share their views on what difference, if any, adoption of the Model Law has made in their country.

The panel will then break into two teams to debate the following proposition:

> *"That adoption of the UNCITRAL Model Law on Cross-Border Insolvency by Asian countries would significantly benefit such countries"*

The debaters will put forward their arguments for or against this proposition and in doing so will explore various issues including:

- the pros and cons of the Model Law
- the adequacy of the current approaches of Asian courts from non Model Law countries for dealing with cross-border insolvency issues
- whether cross-border insolvency issues in Asia are so unique that an Asia-specific cross-border insolvency treaty is justified.

The audience will have the opportunity to ask questions from the debaters before voting to determine the winning team.

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If it's Tuesday, this must be Portugal: the European sovereign debt tour

Grand Ballroom

Peter A. Briggs, Alvarez & Marsal
Nils Melngailis, Alvarez & Marsal

If it's Tuesday, this must be Portugal: the European sovereign debt tour

The speakers will highlight the following topics and would encourage delegates to share their views and experiences to make this an interactive and informative session.

- **European Banking Landscape**
  - Major developments and trends since the Lehman crisis
  - Characteristics of European banking landscape

- **Global Economy**
  - Recent developments in Europe and the US
  - Global trends and potential challenges

- **Key Bank Restructuring Cases in Europe**
  - Background to the banking crisis in Europe
  - Key events and developments during the recapitalisation and restructuring

- **Outlook for Future Restructuring in Europe**
  - The Single Supervisory Mechanism (SSM)
  - Upcoming AQR, stress test and implications for bank systems

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Hot topics: you pick the topic

Grand Ballroom

Chair: Brian Empey, Goodmans LLP
Aaron Bielenberg, McKinsey & Company Inc., International
Edward Middleton, Fellow, INSOL International, KPMG
Gwyn Morgan, Westpac Banking Corporation
Nicolaes Tollenaar, Fellow, INSOL International, RESOR N.V.

Hot topics: you pick the topic

A collection of surprises awaits you!

The speakers have identified 8 hot topics and the delegates attending the session will be asked to vote for their preferred choices at the beginning of the session.

The most popular 4 topics will be discussed.

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Fifty shades of greed: cross-border asset recovery in the wake of the global financial crisis

Grand Ballroom

Co-Chair: Martin Kenney, Martin Kenney & Co., Solicitors
Co-Chair: Colette Wilkins, Walkers
Dr. Alexander Stein, Dolus Counter-Fraud Advisors
Rod Sutton, FTI Consulting

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Fifty shades of greed: cross-border asset recovery in the wake of the global financial crisis

Whether or not one accepts the aphorism that the outgoing tide was responsible for exposing naked swimmers, there is little doubt that global financial crises expose a significant number of financial scoundrels. Forensic accountants, liquidators and asset recovery lawyers remain busy more than five years after the tide last went out, testament to the complexity of asset recovery following fraud and serious breach of fiduciary duty.

This session will consider important issues in high value cross-border asset recovery work from multi-disciplinary perspectives collaborating in concert: lawyers, a liquidator and a psychoanalyst who specialises in decoding the psychology of fraud and psychodynamics in organisations.

The session is intended to be interactive, with questions and feedback from conference delegates.

The panel will consider:

- Initial fact gathering, 3-D profiles, link maps and organisational architecture
- Team building across jurisdictions
- Using psychodynamic analysis - decoding the inscrutable, irrational human elements of fraud - to enhance investigations and case prosecution
- Challenges and solutions to funding investigation and litigation
- Tools available to litigators and liquidators to (a) obtain information under the protection of utmost secrecy, and (b) preserve assets
- The importance of operational security and preservation of privilege
- Soft data analysis
- Considerations arising when deciding when and where to bring claims, and against whom
- Enforcement issues
- The toolkit of the defence

Notes

Notes

My courtroom rules: views from the bench

Grand Ballroom

Chair: The Honourable Mr. Justice Jonathan Harris
High Court of Hong Kong

The Honourable Mr. Justice Vinodh Coomaraswamy
Supreme Court of Singapore

The Honourable Mr. Justice Fabian Gleeson
Supreme Court of New South Wales

The Honourable Mr. Justice Arjan Kumar Sikri
Supreme Court of India

My courtroom rules: views from the bench

A panel of expert judges from four Asian jurisdictions will discuss and debate a collection of key topics that insolvency practitioners will find useful when working with Asian countries.

The topics are:

1. ***Judicial oversight of the remuneration of insolvency practitioners***

a. To what extent can (or should) courts exercise control over insolvency practitioners' fees?

(i) How do the courts hold the balance between the remunerating insolvency practitioners fairly and the interests of creditors in preventing depletion of the pool of assets available for division?

(ii) Should the courts allow insolvency practitioners' fees as an indemnity?

(iii) Should courts apply the same test as they do in exercising control over solicitors' fees (a reasonable amount for work reasonably done)? If so, on whom does the burden of proof lie? And on what evidential basis can the courts assess reasonableness?

(iv) To what extent can an insolvency practitioner in a consensual restructuring (i.e. one taking place outside court control) charge a success fee over and above time cost for work done in the restructuring?

2. ***The current ancillary liquidation doctrine***

a. Which version of the ancillary liquidation doctrine applies after *Re HIH*: Lord Hoffman's expansive view or Lord Scott's narrow view?

b. (i) Is "accretion of judicial decision" sufficient warrant to ignore a provision in an Act of Parliament in the 21st century?

(ii) If so, where does one draw the line? Which provisions can be ignored and which cannot?

c. Ring-fencing for locally-incurred debts in an ancillary liquidation

(i) Is it as parochial and retrograde as the universalists suggest?

(ii) Is there a distinction between ring-fencing those debts which would be preferential in a local winding up and ring-fencing all locally incurred debt?

(iii) Can ring fencing of non-preferential debts ever be justified in principle?

3. ***Recognition and enforcement of foreign judgments***

(i) Are the judgments of a foreign insolvency court somehow special and entitled to greater weight when it comes to local enforcement?

(ii) Or are they subject to the same principles which govern the recognition of any other civil judgment of a foreign court?

4. ***The "rescue culture"***

To what extent has statute, by creating new insolvency regimes as an alternative to liquidation swung the balance too far in the interests of debtors, and their owners and managers?

(i) Do these alternatives do nothing more than give insolvency practitioners an opportunity to earn fees at the expense of creditors?

(ii) How many times have these alternative regimes actually succeeded in restoring a company to financial health?

(iii) If the record is poor, is it because these alternative regimes are inherently flawed?

(iv) Or is it because owners/managers turn to these alternatives too late?

5. ***Court to court communication***

To what extent is it helpful, proper and done in practice for judges from one jurisdiction to communicate with and co-ordinate approaches with judges of another interested jurisdiction when hearing and deciding cross-border insolvency cases?

Notes

INSOL Hong Kong

Technical Sessions

Additional Reading Materials

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A1

Making something out of nothing: deficient trust funds

Magnolia/Camomile Room

Chair: Steven Palmer, Norton Rose Fulbright
Corinne Ball, Jones Day
Andrew Koo, EY
Ian Mann, Harney Westwood & Riegels

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BVI cases:

Ctico Global Custody NV v Y2K Finance Inc BVIHCV 2009/0020A

Relevance for INSOL:

A company operated under a hedge fund structure and has lost its substratum, i.e. it can no longer meet its objects as a mutual fund, winding up is necessary as a result, case considers the relevance and weight of the creditors (in this case, the remaining investors), views regarding winding up and redemption of shares.

Facts:

a. Y2K, a BVI incorporated company, operated under a hedge fund structure

b. This was an application for an appointment of a liquidator over Y2K

c. Y2K is a company that has lost its "substratum": it is no longer has any reasonable expectation of meeting its objects as a mutual fund – redemption payments to c.23 investors have ceased

d. Application to be wind up dismissed on grounds of lack of sufficient case for winding up but Bannister J held at [22] where a company has lost its substratum it should be wound up but that at [30] and [37] majority opposition from creditors against a winding up will be taken into account by the courts

Quilvest Finance Ltd and Others v Fairfield Sentry Ltd HCVAP 2011/041

Relevance for INSOL:

The contracts that Sentry made with its shareholder regarding the redemption of shares was not undermined by the mistake made by Sentry in calculating its NAV based on the fraudulent PONZI scheme run by BLMIS (paragraph [81]; the second preliminary issue in the appeal). Sentry had claimed that their fund was in fact deficient because its investments in BLMIS were lost immediately & their shareholders had therefore been unjustly enriched at Sentry's expense. The contract for shares was with Sentry and not BLMIS, the value of Sentry's investment in BLMIS was therefore not relevant.

Facts:

a. Fairfield Sentry, a feeder fund for Bernard L. Madoff Investment Securities LLC (BLMIS), had invested a substantial funds with BLMIS on behalf of its shareholders

b. BLMIS collapsed when its proprietor, Bernard L. Madoff, admitted that it had been run as a Ponzi scheme. Both companies subsequently went into liquidation

c. A number of shareholders in Sentry redeemed their shares in the company and Sentry stipulated that the price of the shares at redemption would be calculated by reference to the company's NAV. Sentry argued that in redeeming the shares, the NAV had been calculated under a mistake since BLMIS was in fact operating a Ponzi scheme and Sentry's investments in BLMIS were lost from the date of their investment in the company.

d. The Court found that the alleged mistaken calculation of the NAV does not undermine the legal obligation which required that Sentry pay the Redemption Price to the former shareholders upon their request. Sentry's contractual obligations gave rise to a debt obligation whatever the value of the shares and the surrender of the rights to the shares by the former shareholders was good consideration which would defeat Sentry's restitutionary claim.

e. The Court found that the fact that BLMIS was operating as a Ponzi scheme did not render the contract between Sentry and the former shareholders impossible to perform. The subject matter of the subscription contract was the shares; as such the subject matter existed. The contract for the shares was with Sentry and not with BLMIS, and therefore it mattered not what the value of Sentry's investment in BLMIS was as this did not form part of the contract. It was clearly possible for Sentry to redeem or purchase the shares at a price which was fixed by its own Directors. Essentially, there remained a contract between Sentry and the former shareholders which was never invalidated. On the true construction of the contract it was still possible to be performed.

Bermuda Court of Appeal:

Kingate Global Fund Ltd v Knightsbridge (USD) Fund Ltd [2010] WTLR 1197, CA Bermuda

Relevance for INSOL:

Payments were made to the fund for a specific purpose (to increase the amount available for investment by the New York "Investment Advisor" (para [21]). This case found that it was not conceptually impossible that money paid to a company in respect of a projected issue of shares should be received by the company as its own funds (para [48]), however in this case based on the provisions of the Subcription Instruments, there was no justification that subscription monies were intended to become the company's money before the issuance of the shares (para [36]). The invested monies were therefore held for the purpose of acquiring shares alone and were segregated from the company's own monies.

Facts:

a. The Court of Appeal for Bermuda has recently considered the issue of whether share subscription monies are held on trust by a mutual fund company, in the event that the fund is unable to issue shares to the subscribing investor, whether as a result of a suspension of dealing or winding up.

b. The Court of Appeal concluded that, on the particular facts of the case, share subscription monies were held on trust for subscribing investors until shares have actually been issued.

c. This was another feeder fund for BLMIS, the arrest of Madoff on 11 December 2008 made it impossible for the Fund to issue the shares for which the Respondents had subscribed, and led later to the insolvency and liquidation of the Fund.

d. The subscribing investors and the liquidators of the Fund were at odds as to whether the share subscription monies should be held on trust for the relevant investors, or whether they should form part of the assets of the Fund available for distribution to all unsecured creditors.

e. The Court of Appeal concluded, on their interpretation, that there was no justification for inferring that the subscription monies were intended to become the Fund's own money before that status was achieved by the actual issue of shares. The monies were paid into the subscription account for the purpose of acquiring shares and for that purpose alone.

Cayman cases - these cases cite some of the cases and principles as referenced in the INSOL note:

Ahmad Hamad Algosaibi v Saad Investments Company Limited [2010 (1) CLR 553]

Relevance for INSOL:

Re Eastern and *Berkeley Applegate* were cited in relation to the liquidator's costs (para 11): *"it is clear that where a liquidator has assets in which a creditor claims an equitable interest, as Edward Nugee, Q.C., sitting as a Deputy Judge of the High Court in Berkeley Applegate observed ([1989] Ch. at 50)—". . . the court has a discretion to require as a condition of giving effect to that equitable interest that an allowance be made for costs incurred and for skill and labour expended in connection with the administration of the property.""*

Liquidators costs to be paid from the assets of the relevant company in liquidation: the liquidators were innocently mixed up in fraudulent activities, but there was a *"good arguable case of fraud"* against the defendant companies in liquidation so they should bear their respective costs (para 121)

Facts:

a. Grand Court, Financial Services Division, Smellie CJ

b. Cites: *Re Eastern Capital Futures Ltd* [1988] BCLC 371 and *Berkeley Applegate (Investment Consultants) Ltd., In re,* [1989] Ch. 32

c. In this case, the plaintiff brought a claim against the second defendant and 42 companies controlled by him in relation to an alleged fraud. A world-wide freezing order was granted and upheld by the Grand Court. The liquidators of the 17 Cayman companies already in liquidation by the time of these proceedings did not manage to locate or secure all the assets over which the plaintiff asserted proprietary claims. The second defendant denied the allegations of fraud and refused to submit to the Cayman courts & sought a declaration that Saudi Arabia was the proper forum.

d. It was held that:

   i) the plaintiff would be granted leave to proceed with its claim against the 17 defendant companies in liquidation, despite the pending outcome of the second defendant's challenge to jurisdiction (paras. 74–78).

   ii) when determining whether it was appropriate to lift the statutory stay of proceedings (s97 Companies Law (2009 Revision)), the question for the court would be what was right and fair to all parties in the circumstances of the case. Since this case involved competing proprietary claims, the question was whether it would be more appropriate to determine the proposed claims in separate proceedings or in the winding-up process. It was more appropriate that this case be determined in separate proceedings, since the plaintiff needed to obtain a judgment on which it could base its proprietary claims in the liquidations of the defendant companies. (paras. 70–73; paras. 79–90; para. 124).

   iii) The liquidators would not be awarded their costs of disclosure from the plaintiff on the basis of their being innocently mixed up in others' tortious acts. The relevant parties were the defendant companies in liquidation, and could not at this time be said to have been "innocently mixed up," there having been a good arguable case of fraud shown against them. The liquidators' costs of disclosure would therefore

be paid from the assets of the relevant company in liquidation—though such costs might be eventually recoverable from the plaintiff, should it fail in its claim (paras. 120–122; para. 129).

5. ***Hahn v Bank International Limited*** [1986-87 CILR 407]

Relevance for INSOL:

Space Investments was cited in relation to:

i) An example of where a power was conferred on a bank in respect of its appointment as a trustee *"to open and maintain one of more savings accounts…and withdraw a portion or all of the funds deposited"* (page 408, line 20-25) and comment was made that *"a trustee has no power to use trust money for his own benefit unless the trust instrument expressly authorises him to do so"* (page 408 line 40)

ii) This case dealt with the *"machinery clause"* in the trust instrument – as was the subject of *Space Investments* (page 410 line 35)

Facts:

a. Grand Court, Hull J

b. Cites: *Space Investments Ltd. v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd.*, [1986] 1 W.L.R. 1072

c. In this case, the plaintiff sought approval of the court for the transfer of a trust fund of which he was the beneficiary from the original trustee (the defendant bank) to the new trustee. The deed of settlement authorised the defendant to transact on behalf of the trust any business which it was authorised to undertake for ordinary customers on the same terms, to use current or deposit accounts and it did not require it to account for any profit made. The bank placed the trust fund in one of its own interest-bearing deposit accounts. It then became insolvent and its licence was suspended.

   The plaintiff secured the appointment of a new trustee and sought in the present proceedings to have the trust fund paid over to the new trustee. The plaintiff submitted that the terms of the settlement did not confer an explicit power on the defendant to place the trust moneys on deposit with itself as banker and since it had therefore acted in breach of trust the plaintiff as beneficiary had a charge over the assets of the bank on its insolvency which ranked ahead of the claims of other unsecured creditors.

d. It was held refusing to grant the plaintiff's claim: Whether the bank had acted in breach of the trust by depositing the trust moneys in one of its own accounts had to be determined by the true construction of the deed of settlement. That instrument allowed the trustee to deal with the trust moneys as it would with the business of its other customers and since the trustee was a bank this would include depositing the trust money with itself as banker. The bank had therefore not acted in breach of the trust so as to give the beneficiary a charge over its assets ranking ahead of other unsecured creditors and the trust fund could in consequence not be handed over to the new trustee in preference to the claims of those creditors (page 408, lines 11–17; page 411, lines 17–36).

6. ***In the Matter of the Z Trust*** **[1997 CILR 248]**
Relevance for INSOL:

Space Investments was cited in relation to:

i) The construction of the trust instrument – *"as a matter of the express provisions in those trust agreements, the trustee banks were authorized to act in a conflict of interest between their own interests as bankers and duties as trustees"* (page 288 line 40ff);

ii) In *Space Investments*, the banks, both insolvent, had been expressly authorized—whilst going concerns and in their capacity as trustees—to invest trust moneys with themselves and so to treat and regard the trust moneys as they would any other deposits;

iii) In liquidation, the beneficiaries therefore had no right to trace and no right to an equitable charge – their moneys were no longer impressed with a trust and were instead entirely co-mingled with the other deposits, and the beneficiaries therefore ranked with all the other secured depositors (page 288 line 45ff);

In this case the valid amendments to the trust instruments was based on a necessary implication that the grantor intended the trust management committee members to be able to act to benefit beneficiary committee members themselves (page 289 line 5ff 294 line 30ff).

Facts:

a. Grand Court, Smellie CJ

b. Cites: *Space Investments Ltd. v. Canadian Imperial Bank of Commerce Trust Co. (Bahamas) Ltd.*, [1986] 1 W.L.R. 1072

c. In this case, the parties applied for declarations relating to the construction and administration of a trust. Subsequent amendments to the trust instrument were alleged to be invalid and the trust management committee were accused of acting fraudulently.

d. Held: the amendments to the trust and distributions of capital made, were valid.

Hahn v Bank International Limited [1986-87 CILR 407]

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d. Held: the amendments to the trust and distributions of capital made, were valid.

A2

A tale of two ancient economies (China and India) - similarities and differences in bankruptcy and restructuring

Rose/Peony Room

Chair: Alan Tang, SHINEWING Specialist Advisory Services Limited

Sajeve Deora, Integrated Capital Services Limited

Kirtee Kapoor, Davis Polk & Wardwell LLP

Prof. Li Shuguang, Bankruptcy Law and Restructuring Research Centre, China University of Politics and Law

Dr. Yin Zhengyou, W&H Law Firm

Hong Kong Corporate Rescue regime: a marathon yet to finish

By Terry Kan, *Partner*

Introduction

Credit crunches and sudden economic downturns can quickly undermine businesses in difficult times, but some businesses may be able to survive short-term financial difficulties if an effective corporate rescue process is available. This article will take you through the corporate rescue practices established over the years in Hong Kong and explain why the marathon to establish a statutory corporate rescue procedure has yet to cross the finishing line.

Before the onset of the Asian Financial Crisis in 1998, the average number of winding-up orders made by the court in Hong Kong for the decade before 1998 was about 400. In 2003/2004, company collapses stood at the peak of over 1,200 after the outbreak of the SARs epidemic. In 2008/2009, company failures fell to about 550 cases after the collapse of Lehman Brothers. Winding-up orders made in 2012 dropped to around 300 cases.

One key factor which contributed to the rising number of corporate collapses after the financial crisis was the lack of a corporate rescue regime in Hong Kong. The Companies Ordinance (Cap 32) (**CO**) and its subsidiary legislation provides comprehensive rules to deal with solvent and insolvent liquidations for both registered and unregistered companies. However, there is a lack of modern legal framework designed to save troubled companies from the fate of liquidation and, at the same time, balance the interests of creditors.

Corporate rescue - the Hong Kong approach

Traditionally, any default of payments on loans or failure to serve interest on debts by companies has triggered lenders, in particular bank creditors, to protect their interests by imposing an immediate suspension or termination of all financial support. Since the debtor companies are already struggling on extremely tight cash flow positions, few businesses survive this termination of credit.

The high number of company failures resulting from these arrangements triggered concern among major bank creditors to find alternative solutions to prevent debt-ridden companies

from sinking in this way – thereby preserving business value for a better return to creditors. Quite often, informal meetings among key creditors were called at short notice aiming to highlight key problems and bring in experienced restructuring and insolvency specialists for an urgent corporate health check and to recommend solutions to the debtor company.

In the absence of fraud or criminal allegations, this positive move in many instances safeguarded viable business as well as jobs for employees through a successful corporate rescue. This practice was widely adopted in many corporate work-outs and eventually resulted in the publication of a corporate rescue guideline, namely *Hong Kong Approach to Corporate Difficulties*, jointly issued by the Hong Kong Monetary Authority and the Hong Kong Association of Bankers in late 1999 which standardised the best practices at that time.

Essentially, the *Hong Kong Approach to Corporate Difficulties* promoted a supportive initiative led by bank creditors to maintain liquidity support to the borrower until well-informed decisions could be made to determine its prospects collectively by the bank creditors involved. Key to the success of this approach was the allowance of some breathing space on a consensus basis at the early stage, which prevented a financial crisis or a complete meltdown of the debtor company.

However, the *Hong Kong Approach to Corporate Difficulties* was only a voluntary and non-binding process. Other creditors, having diverse rights and interests, sometimes felt that their concerns were not considered at the outset and they were not even notified of the initial meetings. At best, these creditors pushed for separate meetings with the company in distress, but at worst, they petitioned for a court winding-up procedure to protect their interests.

Employees, typically with a mixture of preferential and unsecured claims, often find it unattractive to prolong their suffering by allowing time to proceed with corporate restructuring. Employees can apply for *ex-gratia* payments from the Protection of Wages on Insolvency Fund, which quickly alleviates their immediate financial needs. These payments are triggered upon the filing of a winding-up petition, rather than the discretionary process assessed on merit for companies undergoing restructuring where no liquidation proceedings have commenced.

Appointment of provisional liquidators and schemes of arrangement

This 'tug of war' between creditors trying to protect their interests is certainly unhelpful where companies are fighting to stay afloat. Over the last decade or more, the appointment of provisional liquidators through a court application (Section 193 of the old CO) by debtors or creditors was well regarded as a practical solution, pursuant to which a moratorium to stay legal proceedings was achieved automatically by operation of law unless with leave of the court (Section 186). This mechanism was complementary with the procedures set out in the *Hong Kong Approach to Corporate Difficulties* in most if not all restructuring attempts.

A typical Hong Kong corporate restructuring process therefore begins with the searching for a white knight investor and ends up with a rescue proposal through a scheme of arrangement (Section 166). Approval of a scheme of arrangement requires a majority in the number of creditors voting in favour of the proposal and they must represent at least three quarters of the value in question. A scheme of arrangement sanctioned by the court will bind other creditors holding opposite views to the scheme.

Restructuring through a scheme of arrangement has become a practical tool for the corporate rescue of large-scale or listed companies but it is rarely used for an SME as it can be complex and costly. Contractual

debt rescheduling or composition have also been used to rescue troubled businesses but the absence of a moratorium on debt demands remains a major obstacle.

Establishing a statutory corporate rescue procedure

'Provisional supervision' was first recommended as a corporate rescue procedure in the 1996 Law Reform Commission Corporate Rescue and Insolvent Trading report. Provisional supervision provides for a moratorium on debt demands for companies in corporate rescue. In 2000 and 2001, bills were proposed to the Legislative Council but the proposed law on provisional supervision was not enacted mainly due to the diversity of views regarding the treatment of employee entitlements.

The bills proposed either a full payment of all employee claims before the commencement of a provisional supervision, or a trust account to be set up in advance with money sufficient to fully pay all employee debts. It is not difficult to understand why this proposal did not appeal to investors. For companies which are either labour-intensive or employ high-ranking professionals selling financial products or services, employment debts could be significant. Investors are generally reluctant to provide funding solely for payment to employees and would rather ease the cash flow needs of the troubled organisation to maintain operations during the restructuring.

A further public consultation on a statutory corporate rescue procedure was launched in late 2009 and concluded in July 2010. The focus was on rescuing viable businesses in short-term financial difficulties and the proposed moratorium on debt demands was increased to 45 days from 30 days with a possible further extension of up to 12 months with court approval.

To further enhance employee payments, a new staged payment proposal with a minimum protection equivalent to the Protection of Wages on Insolvency Fund limits for *ex-gratia* payments was suggested. Outstanding wages would be paid within 30 days of the commencement of provisional supervision. A second-stage payment of wages in lieu of notice and severance would be made within 45 days of the approval of the restructuring arrangement, or within 45 days of the extension of the moratorium. These staged payments reduce the outflow of cash by investor before creditors agree on a rescue proposal and, at the same time, preserve the same employee entitlements in the Protection of Wages on Insolvency Fund so that employees are no worse off than in a liquidation.

New legislation on insolvent trading

Quite often corporate rescue attempts commence only after companies find themselves in serious financial difficulties. In order to encourage management directors to address problems at an earlier stage, legislation on 'insolvent

trading' was proposed alongside the government's corporate rescue proposals. Under this proposed legislation, directors could be personally liable for company losses where their company continues to trade when the directors know, or ought to know, that the company is insolvent.

Opponents of this proposed legislation have argued that this threat of personal liability will discourage directors from taking a proactive stand in restructuring attempts. In practice, directors in modern commercial companies should be both knowledgeable enough to read financial statements and aware of their obligation to pay close attention to the company's financial position in tough times.

Moreover, thanks to technological advances, directors have better access to timely information for making informed decisions. The circumstances which may persuade directors to seek help during corporate financial problems go beyond the numbers. Directors need to consider the company's future prospects, its profitability, its competitiveness, the industry climate, stakeholder expectations, corporate social responsibility, as well as their own remuneration packages and potential loss of personal reputation. All these factors could be as important as any concerns about personal liability.

Conclusion

The government's latest proposals to reform Hong Kong's corporate insolvency and winding-up regime (see the consultation document 'Improvement of Corporate Insolvency Law Legislative Proposals' on the Financial Services and Treasury Bureau website: www.fstb.gov.hk) do not include proposals for a statutory corporate rescue procedure and insolvent trading provisions. The government hopes to issue a consultation on new detailed proposals in this area soon.

The marathon to establish a statutory corporate rescue procedure in Hong Kong has already taken over 16 years. This does not compare well with the situation in mainland China – the PRC Enterprise Bankruptcy Law became effective in June 2007, in which corporate reorganisation procedures have been enacted. Time is always of the essence in corporate rescue attempts for listed companies and SMEs alike so perhaps this element should also be recognised in our law drafting process. We need to strike a balance between the interests of all creditors and stakeholders involved, but we also need to consider the reputation of our well-regarded market infrastructure in Hong Kong.

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recovery & reorganisation

BANKRUPTCY / INSOLVENCY REGIMES CHINA, HONG KONG AND INDIA

Note: This chart provides an overview of the basic issues relating to the bankruptcy or insolvency regimes applicable to corporations in China, Hong Kong and India. This is a summary that we believe may be of interest to you for general information. Davis Polk & Wardwell is not practicing law in any of the jurisdictions listed in this chart. The information in this summary is derived from publicly available information, the accuracy and completeness of which have not been verified by us independently. It is not a full analysis of the matters presented and should not be relied upon as legal advice.

Issues	**China**[a]	**Hong Kong SAR**[b]	**India**[c]
1. **Liquidation Waterfall**	• Secured creditors have priority in repayment out of the proceeds of the collateral; • Other claims will be paid out in the following order: o costs and expenses of the bankruptcy proceedings (*pochan feiyong*); o payments for common interest (*gongyi zhaiwu*); o employee claims (unpaid wages, medical subsidies, etc.), *provided that* if such debts occurred prior to August 27, 2006 and the proceeds of the bankruptcy estate are not sufficient to cover such amounts, then they will have priority over secured creditors; o social security expenses and taxes; and o payments due to ordinary unsecured creditors.	• Creditors secured by a fixed charge have priority in repayment out of the proceeds of the collateral; • Other claims will be paid out in the following order: o costs, charges and expenses properly incurred in the winding up; o payments due to preferential creditors including employees and the Hong Kong government or certain statutory bodies; [1] o payments due to creditors secured by a floating charge; and o payments due to ordinary unsecured creditors.	• Debts due as workmen's dues or to secured creditors have priority to all other debts;[2] • Other claims will be paid out in the following order: o revenues, taxes, ceases and rates due to the government and payable within the next 12 months; o wages or salary, or remunerations due to employees; o payments/ contributions due under certain employment-related statutes; o payments for provident fund, pension fund, gratuity fund or any other fund for the welfare of the employees, maintained by the company; o expenses related to investigation into the affairs of the company pursuant to the relevant provisions of the Companies Act; and o payments due to ordinary unsecured creditors.

[1] However, if the company in liquidation is a bank or insurance company, certain small deposits (up to HK $100,000) and various insurance-related claims may also rank as preferential debts.

[2] Secured creditors may enforce their security interest outside the winding up proceeding. If a secured creditor has established a receivership over his security then unless leave of the court is taken, the official liquidator cannot take over such security. Also, the debts due to workers and secured creditors shall abate in equal proportions if the assets are insufficient to meet them.

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Issues	China[a]	Hong Kong SAR[b]	India[c]
2. Filing for Involuntary Bankruptcy / Liquidation by Unsecured Creditors	• A creditor may petition for involuntary bankruptcy of the debtor company if the company is unable to pay its debts when due.	• A creditor may petition for winding up of the company on the ground that the company is insolvent (it cannot pay its debts when due).	• An unsecured creditor may petition for winding up of the company on the ground that it is unable to pay its debts.
3. Filing for Involuntary Bankruptcy / Liquidation by Secured Creditors	• The law does not make distinction between secured creditors and unsecured creditors and it seems that either may petition for the bankruptcy of the company.	• A secured creditor may realize its security by foreclosure, appointing a receiver, etc. • It is not clear if secured creditors necessarily have to surrender their security interests prior to filing for bankruptcy.	• A secured creditor is not entitled to petition for a winding up of the debtor company unless he waives his security for the benefit of all creditors, or deducts the amount of such security from his total dues claiming from the balance as an unsecured creditor.
4. Stay of Current Proceedings and Moratoria	• From the time the court accepts the bankruptcy petition, any civil action or arbitration and enforcement proceedings involving the debtor company's property (including secured creditor's claims) shall be suspended until the administrator takes over the debtor's assets; • Secured creditors' rights to enforce their security interest is suspended during reorganization.	• If a winding-up petition is presented against the debtor company, the court has discretion to stay any legal proceedings already commended upon the application of the company, a creditor or a member; • If a winding-up order has been made, then proceedings cannot be commenced or continued without leave of the court; • Enforcement procedures which have not been completed before the presentation of the winding-up petition are void.	• During the pendency of the insolvency proceedings, no creditor shall have any remedy or commence any suit or other legal proceedings against the property of the company in respect of the debt except with the leave of the court and on such terms as the court may impose.
5. "Preference", "Fraudulent Conveyance" and Other Transactions That May be Annulled	• The following transactions are voidable if they occur within one year prior to the acceptance of the bankruptcy petition: o transfer of property without consideration or below market value; o grant of security to previously unsecured creditors; o discharge of immature obligations; and o waiver of debtor's own claims. • Transactions that occur within one year prior to the acceptance of the bankruptcy petition to conceal or illicitly distribute assets to avoid debts are void. • The administrator may	• The following transactions are voidable: o transactions within six months before the insolvency proceeding (or two years if the transaction is with an associate[3] of the company) if it is made by a desire to place the other party in a better position in the liquidation than it would otherwise have been in; o any disposition of property made with intent to defraud creditors; o extortionate credit transactions entered into within three years of the commencement of liquidation; and o certain onerous property.	• The following transactions are void: o **Fraudulent preference**: a transfer or conveyance in favor of some particular creditor with intention to give a preferential treatment to that creditor or to defraud other creditors, if made by the company within six months before the commencement of winding up; o any transfer of share made after the commencement of winding up; o attachments, distress or execution without the leave of the court against estate of the company after the commencement of the winding up; and

[3] An entity over which the company has control or directors and members of their families.

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Issues	China[a]	Hong Kong SAR[b]	India[c]
	o void the repayment of an insolvent debtor to any creditors within six months of the acceptance of the bankruptcy petition, with the court's approval, unless such prepayment benefited the debtor; and o rescind contracts executed by the debtor but not fully performed by both parties after the bankruptcy proceeding.	• The following transactions is void: o any disposition of the assets, transfer of shares or alteration of the status of members of the company after the winding up has commenced, unless the court or the liquidator otherwise orders or approves; and o a floating charge created within 12 months prior to the commencement of the winding up, except with respect to the cash advance and its interest.	o sale of any property or effects of the company without the leave of the court after such commencement. • The official liquidator may disclaim onerous covenants or unprofitable contracts within 12 months from the commencement of the winding up.
6. Set-Off of Mutual Debts	• Creditors may request to set off mutual debts that have occurred prior to the acceptance of the bankruptcy petition through the administrator, *provided* that none of the following set-offs may be made: o the creditor obtained a third party's claim against the debtor after the petition for bankruptcy; o the creditor undertook the debts while knowing that the debtor is insolvent or that the bankruptcy petition has been brought to the court (except for debts undertaken by creditor as prescribed by law or for debts which were incurred more than a year prior to the petition).	• Set-off of mutual debt is mandatory. • Parties cannot avoid this set-off by way of any attempt at contracting out. • A creditor is not entitled to the set-off benefit if he had, at the time of giving credit to the company, noticed that a winding-up petition had been presented.	• Set-off of mutual debts is permissible, *provided* that o the amounts of the debts must be ascertained, be legally recoverable, and o the debts are between the parties occupying the same character. • A debt due to joint creditors cannot be set off against a separate debt due to one of the joint creditors.
7. Priority of Post-Filing Lenders Over Existing Secured Creditors	• Administrator may borrow and give security over the debtor's assets, subject to supervision by the creditors' committee or the court; • No express rules regarding special priority for such loans.	• No express rules provide for special priority of loans obtained after commencement of a winding-up.	• The official liquidator or the receiver may incur new borrowings for the beneficial winding-up of the company. • No express rules provide for special priority of such loans.
8. Jurisdiction and Appeal	• The "bankruptcy court" is not a separate court but a professional group specialized in trying bankruptcy cases in almost every court.	• Corporate insolvency matters are dealt with by the Court of First Instance of the High Court of Hong Kong; • Appeals from the Court of First Instance lie	• The District Courts have jurisdiction to hear insolvency petitions; • The High Courts with original jurisdiction and High Courts in certain presidency towns like

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Issues	China[a]	Hong Kong SAR[b]	India[c]
	• The District Court has the jurisdiction over bankruptcy of the enterprises registered in the district (*qu*) or county (*xian*) level and the Intermediate Court (which is superior to the District Court) has the jurisdiction over bankruptcy of enterprises registered at the city (*shi*) level. • Judgments by a court of first instance are appealable to an appellate court within 15 days (or 30 days for the appellant with no domicile in China).	to the Court of Appeal.	Bombay, Calcutta and Chennai have got insolvency jurisdiction as well. • An officer liquidator determines the validity of the proofs for creditor's claims. If a creditor is dissatisfied with such determination, the creditor may, not later than 21 days from the date of service, appeal to the court. The decision of the company court within the High Court can be challenged before an appellate court in the High Court.
9. Duties of Directors / Officers to File the Company Into Bankruptcy / Insolvency	• Generally directors or management is not obliged to cease trading or to petition for bankruptcy; • During a liquidation, if the liquidation committee (which generally include directors) discovers that the company is insolvent, the liquidation committee is required to file for bankruptcy of the company and transfer the liquidation to the court. • Directors who are members of the liquidation committee may be liable for losses intentionally or negligently caused by them to the company.	• No express rules require directors or management to commence the insolvency proceedings.	• No express rules require directors or management to commence the insolvency proceedings.
10. **Management of the Company After the Bankruptcy / Insolvency Proceeding Commences**.	• An administrator appointed by the court will take over the assets and operations of the company and decide whether to continue or suspend the business. • In an reorganization, the administrator will continue to manage the company's assets and operations unless the court approves the company to manage its own assets under the administrator's supervision.	• When a winding-up order has been made, the directors' powers of management are assumed by the provisional liquidator or the liquidator, as the case may be. • However, where corporate restructuring occurs during a winding up, the liquidator may confer "limited management" powers on the former management and appoint them as special managers.	• After the insolvency proceeding commences, rights of the company's directors in dealings with its assets are suspended other than under the supervision of the court. • The official liquidator or the receiver will take into custody or control all property or claims to which the company is or appears to be entitled and will have the powers to carry on business for the winding-up of the company.
11. **Reorganization as an Option Under the**	• A debtor may apply voluntarily, or in case of a bankruptcy petition by a creditor, the	• With the agreement of 75% in value and 50% in number of creditors, an insolvent	• The debtor company (not creditors) may submit to the court a proposal for a scheme of

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Issues	China[a]	Hong Kong SAR[b]	India[c]
Bankruptcy / Insolvency Law.	debtor or its 10% shareholders may apply to carry out reorganization.	company can reorganize through schemes of arrangement.	reorganization or composition.
12. Enforcement of Foreign Bankruptcy / Insolvency-Related Judgments	• Foreign court decisions or verdicts that involve assets of a debtor company in China are enforceable if o the enforcement is based on an existing agreement or international treaty to which China is a party, or on the basis of the principle of reciprocity; and o such enforcement will not violate Chinese law, nor harm public interest or the interests of Chinese creditors.	• Foreign judgments obtained in jurisdictions having reciprocal enforcement treaties with Hong Kong can be registered and enforced in Hong Kong as if they were an order of the Hong Kong courts. • Where there is no reciprocal treaty, a creditor holding a foreign judgment should bring an enforcement action in Hong Kong under common law principles.	• Only judgments from a reciprocating country are recognized. • In the absence of such reciprocity, a creditor holding a foreign judgment should bring an enforcement action in India. • Also, in view of limited reciprocating territories, there are severe disabilities in instituting foreign insolvency actions in relation to Indian companies.

[a] **Sources**: PRC Enterprise Bankruptcy Law (focusing on the bankruptcy of all enterprises with legal personality such as state-owned enterprises, private enterprises and foreign invested enterprises), the interpretations of the Supreme Court regarding the Enterprise Bankruptcy Law, and the Civil Procedure Law.

[b] **Sources**: The Companies Ordinance (Cap. 32) of Hong Kong, The Bankruptcy Ordinance (Cap. 6) of Hong Kong.

[c] **Sources**: The Provincial Insolvency Act, 1920 of India and the Presidency Towns Insolvency Act, 1909 of India (laying down the general legal and administrative structures for insolvency law) and the Companies Act, 1956 of India (providing for the procedures for corporate insolvency).

ASSERTING OFFSHORE INTERESTS IN MAINLAND CHINA: AN ACTION CHECKLIST

Foreign investors and lenders with stakes in Chinese companies will be keeping a close eye on the ongoing bankruptcy proceedings of solar panel giant Suntech Power Holdings Co., Ltd. ("Suntech"). Historically supported by generous government subsidies, China's growth in the solar power sector has outpaced demand. Over the past four years, however, the severe downturn in global solar panel sales has been felt throughout China's solar industry, with some Chinese solar companies kept afloat only by virtue of local government intervention.

Suntech's core subsidiary in China, Wuxi Suntech, now faces bankruptcy after eight Chinese banks filed an involuntary petition which was approved by a local PRC court in March this year. Currently, Suntech owes around US$541 million to offshore holders of convertible bonds together with some RMB7 billion (US$1.14 billion) to onshore creditors.

In this article, we explain the key drivers influencing this case, the relevant PRC bankruptcy law provisions, the onshore and offshore structural challenges and the role of the PRC government. We also provide an action checklist that may be useful for foreign investors and lenders with distressed interests in the PRC.

I. PRC ENTERPRISE BANKRUPTCY LAW

Submitting an Application for Approval

Effective since 1 June 2007, certain provisions of the PRC Enterprise Bankruptcy Law ("PRC Bankruptcy Law") are similar to the US Bankruptcy Code. Bankruptcy proceedings begin after an application has been approved by the PRC court. The court will then appoint an administrator to take over the debtor's business, which may include law firms, accounting firms and/or asset management companies. Creditors' interests are then safeguarded through a committee of creditors, which holds meetings and supervises the administrator.

In a reorganisation application, the debtor must submit a detailed reorganisation plan to the court and the creditors' committee for approval within six months of its application for reorganisation. This plan, unlike US plans, is not made publicly available to creditors. The plan is then voted upon by the creditors' committee; approval requires at least a majority vote of the creditors in each class, with those creditors representing at least two-thirds of the value of the liabilities therein. If the reorganisation plan fails to receive the requisite approval at this stage, the debtor will face liquidation.

Asserting Your Interests

As in the US Bankruptcy Code, a moratorium applies during the reorganisation process.

Under Chinese law, creditors are reimbursed only after the payment of (1) administrative bankruptcy fees; (2) employees' salaries and social insurance premiums; and (3) government taxes. This is similar to the US Bankruptcy Code except that PRC law requires employees' salaries and social insurance premiums to be paid before creditors and taxes. After these are paid, secured creditors who have registered their claims in accordance with Chinese law are paid next. Failure to register secured debts on time will impact the priority ranking, notwithstanding the secured status.

Enforcing Offshore Judgments

Article 5 of the PRC Bankruptcy Law dictates how Chinese courts deal with both inbound and outbound bankruptcy proceedings. Foreign judgments may only be recognised in PRC courts on the basis of reciprocity, international treaties and bilateral agreements to which China is a party. However, this is further subject to the caveat that such judgments do not go against, among others, PRC 'sovereignty, safety or social interests of the state'. How successfully this "sovereignty" or "public interest" provision can be invoked therefore remains to be seen, although a court in a case such as *Suntech* may look at the wider community impact of a bankruptcy and consider the number of jobs the employer provides, rather than focusing solely on economic interests.

In practice, the enforcement of the PRC Bankruptcy Law is often complicated by a range of factors. Local governments also play an important role in determining the outcome.

II. STRUCTURAL ISSUES

As a consequence of the lending restrictions on foreign investors, investments are generally structured by lending to an offshore holding company from which the target's Chinese subsidiaries then borrow. The subordinated nature of lending in this way presents the main challenge to Suntech's offshore bondholders as they are not a party to the onshore reorganisation proceedings of Wuxi Suntech.

III. ROLE OF THE GOVERNMENT

Bankruptcy proceedings of Chinese government-backed entities is inherently a politicised process. The success of a reorganisation will usually (if not always) hinge on local government support. The Chinese government will pay attention to: (a) maintaining community stability and minimising any impact of a large bankruptcy/reorganisation case; and (b) protecting the interests of any state-owned assets.

Although the approval of Wuxi Suntech's bankruptcy raised hopes that this would herald an era of reduced government interference, it has become evident that this is not likely to be an independent process. The appointment of Zhou Weiping, the previous executive at SOE Guolian Development Co., Ltd., to the board of directors as well as the appointment of several local government representatives onto Wuxi Suntech's administrative committee, makes it clear that the Government intends to control exactly how the bankruptcy unfolds.

"The enforcement of the PRC Bankruptcy Law is often complicated by a range of factors and local governments play an important role in determining the outcome."

IV. POTENTIAL STRATEGIES

Any investor and/or lender looking to invest in China should first assess whether it is possible to invest directly in the onshore entity or, at the very least, secure onshore assets, pledges or other mechanisms through which it can gain a direct course of action against a potential PRC debtor. In instances where this is not feasible and there are indications that bankruptcy proceedings are imminent, we set out below some recommended strategies for investors/bondholders:

Take control early. This means getting on the ground in China and starting conversations with management, shareholders and local government as soon as possible:

- Be proactive and try to negotiate a pre-packaged restructuring plan. If consensus is achieved between the requisite majority of creditors, a pre-packaged plan may be approved by the court.
- Seek engagement with the local government, which may well want to keep the company afloat and are prepared to support a restructuring when there is a viable plan or supportable interests are at stake.

Bring litigation onshore and find pressure points. If the company and other key stakeholders will not engage, identify the majority shareholders and other onshore creditors and apply as much pressure as you can:

- Conduct research on these entities and individuals to determine whether you can apply pressure onshore through countersuits of subsidiaries, contractual relationships or other possible legal strategies.
- Determine whether you are able to bring any form of litigation onshore that is related to the case or any of the entities or individuals with onshore creditor claims and attempt to freeze any of their shares, assets or interests as an indirect means of ensuring your interests are recognised in the reorganisation process.
- Litigation is not the endgame but often a necessary means to drive a recovery.

Settle. Offshore creditors often prefer to settle the case outside of a PRC court rather than await the outcome of onshore bankruptcy/reorganisation proceedings. You should look to develop a strategy, employing the methods discussed in this article, as a means to achieving a settlement.

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December 17, 2013

RBI releases Discussion Paper on Framework for Revitalising Distressed Assets in the Economy

The Reserve Bank of India today released on its website a Discussion Paper on 'Early Recognition of Financial Distress, Prompt Steps for Resolution and Fair Recovery for Lenders: Framework for Revitalising Distressed Assets in the Economy'. Comments on the Discussion Paper may be sent to the Principal Chief General Manager, Reserve Bank of India, Department of Banking Operations and Development, Central Office, 12th Floor, Central Office Building, Shahid Bhagat Singh Marg, Mumbai-400 001 or emailed by January 1, 2014.

The Discussion Paper outlines a corrective action plan that will incentivize early identification of problem cases, timely restructuring of accounts which are considered to be viable, and taking prompt steps by banks for recovery or sale of unviable accounts. The main proposals in the Discussion Paper are summarised below:

Summary of Proposals

(i) Early formation of a lenders' committee with timelines to agree to a plan for resolution.

(ii) Incentives for lenders to agree collectively and quickly to a plan – better regulatory treatment of stressed assets if a resolution plan is underway, accelerated provisioning if no agreement can be reached.

(iii) Improvement in current restructuring process: Independent evaluation of large value restructurings mandated, with a focus on viable plans and a fair sharing of losses (and future possible upside) between promoters and creditors.

(iv) More expensive future borrowing for borrowers who do not co-operate with lenders in resolution.

(v) More liberal regulatory treatment of asset sales

a. Lender can spread loss on sale over two years provided loss is fully disclosed.

b. Takeout financing/refinancing possible over a longer period and will not be construed as restructuring.

c. Leveraged buyouts will be allowed for specialised entities for acquisition of 'stressed companies'.

d. Steps to enable better functioning of Asset Reconstruction Companies mooted.

e. Sector-specific Companies/Private equity firms encouraged to play active role in stressed assets market.

Background

With the slowdown of the Indian economy, a number of companies/projects are under stress. As a result, the Indian banking system has seen increase in NPAs and restructured accounts during the recent years. Not only do financially distressed assets produce less than economically possible, they also deteriorate quickly in value. Therefore, there is a need to ensure that the banking system recognises financial distress early, takes prompt steps to resolve it, and ensures fair recovery for lenders and investors. 'Improving the system's ability to deal with corporate distress and financial institution distress by strengthening real and financial restructuring as well as debt recovery' has been indicated by the Governor, RBI as one of the five pillars on which Reserve Bank's developmental measures will be built for improving the financial system over the next few quarters. This Discussion Paper is a step in that direction.

Alpana Killawala
Principal Chief General Manager

Press Release : 2013-2014/1220

Reserve Bank of India

Discussion Paper

Early Recognition of Financial Distress, Prompt Steps for Resolution and Fair Recovery for Lenders: Framework for Revitalising Distressed Assets in the Economy

Introduction

1.1 With the slowdown of the Indian economy, a number of companies/projects are under stress. As a result, the Indian banking system has seen increase in NPAs and restructured accounts during the recent years. Not only do financially distressed assets produce less than economically possible, they also deteriorate quickly in value. Therefore, there is a need to ensure that the banking system recognises financial distress early, takes prompt steps to resolve it, and ensures fair recovery for lenders and investors. This Paper outlines a corrective action plan that will incentivize early identification of problem cases, timely restructuring of accounts which are considered to be viable, and taking prompt steps by banks for recovery or sale of unviable accounts.

1.2 The main proposals are:

(i) Early formation of a lenders' committee with timelines to agree to a plan for resolution.

(ii) Incentives for lenders to agree collectively and quickly to a plan – better regulatory treatment of stressed assets if a resolution plan is underway, accelerated provisioning if no agreement can be reached.

(iii) Improvement in current restructuring process: Independent evaluation of large value restructurings mandated, with a focus on viable plans and a fair sharing of losses (and future possible upside) between promoters and creditors.

(iv) More expensive future borrowing for borrowers who do not co-operate with lenders in resolution.

(v) More liberal regulatory treatment of asset sales.

a. Lenders can spread loss on sale over two years provided loss is fully disclosed.

b. Takeout financing/refinancing possible over a longer period and will not be construed as restructuring.

c. Leveraged buyouts will be allowed for specialised entities for acquisition of 'stressed companies'.

d. Steps to enable better functioning of Asset Reconstruction Companies mooted.

e. Sector-specific Companies/Private equity firms encouraged to play active role in stressed assets market.

1.3 Going forward, while some regulatory and governmental measures may be required to address the factors that are leading to deteriorating asset quality, there is an equal need for proper credit discipline among lenders. That is, however, not the focus of this Paper.

2. Corrective Action Plan to Arrest Increasing NPAs

2.1 Early Recognition of Stress and Setting up of Central Repository of Information on Large Credits (CRILC)

2.1.1 Before a loan account turns into an NPA, banks should identify incipient stress in the account by creating a new sub-asset category viz. 'Special Mention Accounts' (SMA) in line with instructions issued vide RBI Circular DBS.CO.OSMOS/B.C./4/33.04.006/2002-2003 dated September 12, 2002. Further, within SMA category there should be three sub-categories as given in the table below:

SMA Sub-category	**Basis for classification**
SMA-NF	Non-financial (NF) signals of incipient stress (Please see Annex)
SMA-1	Principal or interest payment overdue between 31-60 days
SMA-2	Principal or interest payment overdue between 61-90 days

2.1.2 The Reserve Bank of India will set up a Central Repository of Information on Large Credits (CRILC) to collect, store, and disseminate credit data to lenders. The credit information would also include all types of exposures as defined under RBI Circular on Exposure Norms and will therefore, inter alia, include data on lenders' investments in bonds/debentures issued by the borrower/obligor.

2.1.3 Banks will have to furnish credit information to CRILC on all their borrowers having aggregate fund-based and non-fund based exposure of Rs.50 million and above. While all scheduled commercial banks will mandatorily contribute their credit information on their borrowers/customers as above, systemically important non-banking financial companies (NBFC-SI) will also be asked to furnish such information. In addition, banks will have to furnish details of all current accounts of their customers with outstanding balance (debit or credit) of Rs.10 million and above.

2.1.4 Banks will be required to report, among others, the SMA status of the borrower to the CRILC. Individual banks will have to closely monitor the accounts reported as SMA-1 or SMA-NF as these are the early warning signs of weaknesses in the account. They should take up the issue with the borrower with a view to rectifying the deficiencies at the earliest. However, to start with, reporting of an account as SMA-2 by one or more lending banks/NBFC-SIs will trigger the mandatory formation of a Joint Lenders' Forum and formulation of Corrective Action Plan (CAP) as envisioned in the subsequent paragraphs. Banks must put in place a proper Management Information and Reporting System so that any account having principal or interest overdue for more than 60 days gets reported as SMA-2 on the 61st day itself.

2.1.5 It is the intention of the RBI that banks recognise warning signs of weakness in a borrowal account early and in due course would require banks to mandatorily form Joint Lenders' Forum (JLF) and formulate CAP if an account is reported as SMA-NF for three quarters during a year to date or SMA-1 for any two quarters during a year to date, in addition to reporting as SMA-2 during any time. Banks should, therefore, prepare themselves for this development.

2.2 Formation of Joint Lenders' Forum

2.2.1 As soon as an account is reported to CRILC as SMA-2, all lenders, including NBFC-SIs, should form a lenders' committee to be called Joint Lenders' Forum (JLF) under a convener and formulate a joint corrective action plan (CAP) for early resolution of the stress in the account. While the existing Consortium Arrangement for consortium accounts will serve as JLF and the Consortium Leader as convener, for accounts under Multiple Banking Arrangements (MBA), the lender with the highest exposure (fund-based plus non-fund based) will convene JLF at the earliest and facilitate exchange of credit information on the account.

2.2.2 Alternatively, the borrower may request its lender/s, with substantiated grounds, for formation of a JLF if it senses imminent stress. When such a request is received by a bank, the account may be reported as SMA-NF under CRILC. The lenders may then form the JLF immediately.

2.2.3 With a view to limiting the number of JLFs to be formed, it is proposed that JLF formation would be made mandatory for distressed corporate borrowers, engaged in any type of activity, with aggregate fund based and non-fund based exposure of Rs.1000 million and above. Lenders, however, have the option of formation of JLFs even when the aggregate fund-based and non-fund based exposures in an account are less than Rs.1000 million.

2.2.4 All the lenders' should formulate and sign an Agreement (which may be called JLF agreement) incorporating the broad rules for the functioning of the JLF. The JLF should explore the possibility of the borrower setting right the irregularities/weaknesses in the account. The JLF will have the capability/option to invite representatives of the Central/State Government/Project authorities/Local authorities, if they have a role in the implementation of the project financed.

2.2.5 JLF formation and subsequent corrective actions will be mandatory in accounts having aggregate fund-based and non-fund based exposures of Rs.1000 million and above. Even in other cases lenders have to monitor the asset quality and take corrective actions for effective resolution as deemed appropriate, under our extant guidelines.

2.3 Corrective Action Plan (CAP) by JLF

2.3.1 JLF may explore various options to resolve the stress in the account. The intention of this Framework is not to encourage a particular resolution option, e.g. restructuring or recovery, but to arrive at an early and feasible resolution to preserve the economic value of the underlying assets as well as the lenders' loans. The options under Corrective Action Plan (CAP) by the JLF would generally include:

(a) Rectification - Obtaining a specific commitment from the borrower to regularise the account so that the account comes out of SMA status or does not slip into the NPA category, within a specific time period acceptable to the JLF without involving any loss or sacrifice on the part of the existing lenders. If the existing promoters are not in a position to bring in additional money or take any measures to regularise the account, the possibility of getting some other investors to the company may be explored by the JLF in consultation with the borrower. These measures are intended to turn-around the company without any change in terms and conditions of the loan.

(b) Restructuring - Consider the possibility of restructuring the account if it is prima facie viable and the borrower is not a wilful defaulter, i.e., there is no diversion of funds, fraud or malfeasance, etc. At this stage, commitment from promoters for extending their personal guarantees along with their net worth statement supported by copies of legal titles to assets may be obtained along with a declaration that they would not undertake any transaction that would alienate assets without the permission of the JLF. Any deviation from the commitment by the borrowers affecting the security/recoverability of the loans may be treated as a valid factor for initiating recovery process. For this action to be sustainable, the lenders in the JLF may sign an Inter Creditor Agreement (ICA) and also require the borrower to sign the Debtor Creditor Agreement (DCA) which would provide the legal basis for any restructuring process. The formats used by the CDR mechanism for ICA and DCA could be considered, if necessary with appropriate changes. Further, a 'stand still' clause as in the case of CDR mechanism could be stipulated in the agreement to enable a smooth process of restructuring. The ICA may also stipulate that both secured and unsecured creditors need to agree to the final resolution.

(c) Recovery - Once the first two options at (a) and (b) above are seen as not feasible, due recovery process may be resorted to. The JLF may decide the best recovery process to be

followed among the various legal and other recovery options available with a view to optimising the efforts and results.

2.3.2 The decisions agreed upon by a minimum of 75% of creditors by value and 60% of creditors by number in the JLF would be considered as the basis for proceeding with the restructuring or recovery action of the account, and will be binding on the lenders under the terms of the ICA.

2.3.3 The JLF is required to arrive at an agreement on the option to be adopted for CAP within 30 days from (i) the date of an account being reported as SMA-2 by one or more lending banks/NBFC-SIs, or (ii) receipt of request from the borrower to form a JLF, with substantiated grounds, if it senses imminent stress. The JLF should sign off the detailed final CAP within the next 30 days from the date of arriving at such an agreement.

2.3.4 If the JLF decides on options (a) or (b), but the account fails to perform as per the agreed terms under option (a) or (b), JLF should initiate recovery under option (c) and accelerated provisioning [as indicated in para 6.3.1] will be applicable in these accounts depending on the asset classification.

3. Restructuring Process

3.1 RBI's extant prudential guidelines on restructuring of advances lay down detailed methodology and norms for restructuring of advances under sole banking as well as multiple/ consortium arrangements. Corporate Debt Restructuring (CDR) mechanism is an institutional but voluntary framework for restructuring of multiple/ consortium advances of banks where even creditors who are not part of CDR system can join by signing transaction to transaction based agreements.

3.2 If the JLF decides on restructuring the account as a CAP, it will refer the account to CDR Cell for restructuring after preliminary viability study.

3.3 In cases of accounts referred to CDR Cell by JLF, lenders who are not members of CDR mechanism will be required to sign transaction to transaction agreement under CDR mechanism for restructuring of a particular account.

3.4 Under extant instructions, CDR Cell is required to make the initial scrutiny of the restructuring proposals. As the preliminary viability of account has already been decided by

JLF, CDR Cell need not duplicate this process and should directly prepare the Techno-Economic Viability (TEV) study and restructuring plan in consultation with JLF within 30 days from the date of reference to it by JLF.

3.5 For accounts with aggregate exposure of less than Rs.5000 million, the above-mentioned restructuring package should be submitted to CDR Empowered Group (EG) for approval. Under extant instructions, CDR EG can approve or suggest modifications but ensure that a final decision is taken within a total period of 90 days, which can be extended up to a maximum of 180 days from the date of reference to CDR Cell. However, the cases referred to CDR Cell by JLF will have to be finally decided by the CDR EG within the next 30 days. If approved by CDR EG, the restructuring package should be approved by all lenders and conveyed to the borrower within the next 15 days for implementation.

3.6 For accounts with aggregate exposure of Rs.5000 million and above, the TEV study and restructuring package prepared by CDR Cell will have to be subjected to an evaluation by an Independent Evaluation Committee (IEC)[1] of experts fulfilling certain eligibility conditions. The IEC will look into the viability aspects after ensuring that the terms of restructuring are fair to the lenders. The IEC will be required to give their recommendation in these aspects to the CDR Cell under advice to JLF within a period of 30 days. Thereafter, considering the views of IEC if the JLF decides to go ahead with the restructuring, the same should be communicated to CDR Cell. Thereafter, CDR EG should decide on the approval/modification/rejection within the next 30 days. If approved by CDR EG, the restructuring package should be approved by all lenders and conveyed to the borrower within the next 15 days for implementation.

3.7 Restructuring cases will be taken up by JLF only in respect of assets reported as Standard, SMA or Sub-Standard by one or more lenders of the JLF.

3.8 Wilful defaulters will normally not be eligible for restructuring. However, the JLF may review the reasons for classification of the borrower as a wilful defaulter and satisfy itself that the borrower is in a position to rectify the wilful default. The decision to restructure such cases should however also have the approval of the board/s of individual bank/s within the JLF who have classified the borrower as wilful defaulter.

[1] The constitution of the IEC and the funding needs for payment of fees for independent experts would be decided by Indian Banks' Association (IBA) in consultation with RBI.

3.9 The viability of the account should be determined by the JLF based on acceptable viability benchmarks determined by them. Illustratively, the parameters may include the Debt Equity Ratio, Debt Service Coverage Ratio, Liquidity/Current Ratio and the amount of provision required in lieu of the diminution in the fair value of the restructured advance, etc. Further, the JLF may consider the benchmarks for the viability parameters adopted by the CDR mechanism and adopt the same with suitable adjustments taking into account the fact that different sectors of the economy have different performance indicators.

4. Other Issues/Conditions Relating to Restructuring

4.1 The general principle of restructuring should be that the equity holders bear the first loss rather than the debt holders. With this principle in view and also to ensure more 'skin in the game' of promoters, JLF/CDR may consider the following options when a loan is restructured:

- Possibility of transferring equity of the company by promoters to the lenders to compensate for their sacrifices;
- Promoters infusing more equity into their companies;
- Transfer of the promoters' holdings to a security trustee or an escrow arrangement till turnaround of company. This will enable a change in management control, should lenders favour it.

4.2 In case a corporate has undertaken diversification or expansion of the activities which has resulted in the stress on the core-business of the group, a clause for sale of non-core assets or other assets may be stipulated as a condition for restructuring the account if under the TEV study, the account is likely to become viable on hiving-off of non-core activities and assets.

4.3 For restructuring of dues in respect of listed companies, lenders may be ab-initio compensated for their loss/sacrifice (diminution in fair value of account in net present value terms) by way of issuance of equities of the company upfront, subject to the extant regulations and statutory requirements. In such cases, the restructuring agreement shall not incorporate any right of recompense clause. For unlisted companies, the JLF will have option of either getting equities issued or incorporate suitable 'right to recompense' clause.

4.4 In order to safeguard promoters' control over companies, the equity so issued may bestow 'call' option/'right of first refusal' to the promoters group before the banks sell the same. However, such call option/right of first refusal can only be exercised, after the entire loan and

the recompense has been repaid. Further, the price of shares under such call has to be equal to the fair value of the shares at the time of exercise.

4.5 If acquisition of such equity shares results in breaching the extant regulatory Capital Market Exposure (CME) limit, RBI will give exemption to the lenders from the CME limit on a case-by-case basis.

4.6 In order to distinguish the differential security interest available to secured lenders, partially secured lenders and unsecured lenders, the JLF/CDR could consider various options like:

- Prior agreement in the ICA among the above classes of lenders regarding repayments, say, as per an agreed waterfall mechanism;
- A structured agreement stipulating priority of secured creditors;
- Appropriation of repayment proceeds among secured, partially secured and unsecured lenders in certain proportion, say, 50%, 30% and 20%.

The above is only an illustrative list and the JLF may decide on a mutually agreed option. It also needs to be emphasised that while one bank may have a better security interest when it comes to one borrower, the case may be vice versa in the case of another borrower. So, it would be beneficial if lenders appreciate the concerns of fellow lenders and arrive at a mutually agreed option with a view to preserving the economic value of assets. Once an option is agreed upon, the bank having the largest exposure may take the lead in ensuring distribution according to agreed terms once the restructuring package is implemented.

4.7 As regards prudential norms and operational details, RBI's guidelines on CDR Mechanism, including OTS, will be applicable to the extent that they are not inconsistent with this proposed Framework. RBI will also further examine measures to strengthen the capacity under CDR Mechanism.

5. Refinancing of Project Loans

In terms of extant instructions (circular DBOD.No.BP.BC.144/21.04.048-2000 dated February 29, 2000 on 'Income Recognition, Asset Classification, Provisioning and other related matters and Capital Adequacy Standards - Takeout Finance'), banks can refinance

their existing infrastructure project loans by entering into take-out financing agreements with any financial institution on a pre-determined basis. Henceforth, RBI may allow infrastructure and other project loans to be refinanced by other institutions which substantially (60% or more of the outstanding loan by value) take over the loan from the existing set of financing banks of the borrowers and the refinancing institution(s) can fix a repayment period by taking into account the life cycle of the project and cash flows from the project. In such cases, even if the revised repayment period is longer than the residual repayment period in the earlier bank's books the account will not be considered as restructured, as long as a proper due diligence has been done by the refinancing bank/institution.

6. Prudential Norms on Asset Classification and Provisioning

6.1 While a restructuring proposal is under consideration by the JLF/CDR, the usual asset classification norm would continue to apply. The process of re- classification of an asset should not stop merely because restructuring proposal is under consideration by the JLF/CDR.

6.2 However, as an incentive for quick implementation of a restructuring package, the special asset classification benefit on restructuring of accounts as per extant instructions would be available for accounts undertaken for restructuring under the JLF framework, subject to adherence to the overall timeframe for approval of restructuring package detailed in paragraphs 3.4 to 3.6 above and implementation of the approved package within 120 days from the date of approval. The asset classification status as on the date of formation of JLF would be the relevant date to decide the asset classification status of the account after implementation of the final restructuring package. As advised to banks vide RBI circular dated May 30, 2013, the special asset classification benefit as above will however be withdrawn for all restructurings with effect from April 1, 2015 with the exception of provisions related to changes in Date of Commencement of Commercial Operations (DCCO) in respect of infrastructure and non-infrastructure project loans.

6.3 Penal Measures for non-adherence

6.3.1 In cases where banks/NBFCs-SIs fail to report SMA status of the accounts to CRILC or resort to methods with the intent to conceal the actual status of the accounts e.g., sanctioning additional facilities without genuine reasons, and the accounts subsequently turn into NPAs, RBI may prescribe accelerated provisioning as appended below for these accounts and/or other supervisory actions. The current provisioning requirement and the proposed accelerated provisioning in respect of such non performing accounts are as under:

Asset Classification	**Period as NPA**	**Current provisioning (percentage)**	**Proposed accelerated provisioning (percentage)**
Sub- standard (secured)	Up to 6 months	15	No change
	6 months to 1 year	15	30
Sub-standard (unsecured ab-initio)	Up to 6 months	25 (other than infrastructure loans)	25
		20 (infrastructure loans)	
	6 months to 1 year	25 (other than infrastructure loans)	50
		20 (infrastructure loans)	
Doubtful I	2nd year	25 (secured portion)	50 (secured portion)
		100 (unsecured portion)	100 (unsecured portion)
Doubtful II	3rd & 4thyear	40 (secured portion)	100 for both secured and unsecured portions
		100 (unsecured portion)	
Doubtful III	5th year onwards	100	100

6.3.2 Any of the lenders who has agreed to the restructuring decision under the CAP by JLF and is a signatory to the ICA and DCA, but changes their stance later on, or delays/refuses to implement the package, may also be subjected to accelerated provisioning requirement as indicated at para 6.3.1 above, on their exposure to this borrower i.e., if it is classified as an NPA. If the account is standard in those lenders' books, the provisioning requirement will be

5%. Further, any such backtracking by a lender might attract negative supervisory view during Supervisory Review and Evaluation Process.

6.3.3 Presently, asset classification is based on record of recovery at individual banks and provisioning is based on asset classification status at the level of each bank. However, if lenders fail to convene the JLF or fail to agree upon a common CAP within the stipulated time frame, the account will be subjected to accelerated provisioning as indicated at para 6.3.1 above.

6.3.4 If the escrow maintaining bank under JLF/CDR Mechanism does not appropriate proceeds of repayment by the borrower among the lenders as per agreed terms resulting into downgradation of asset classification of the account in books of other lenders, the account with the escrow maintaining bank would attract the asset classification which is lowest among the lending member banks.

7. Wilful Defaulters, Accountability of Promoters / Directors / Auditors

7.1 With a view to ensuring better corporate governance structure in companies and ensuring accountability of independent/professional directors, promoters, auditors, etc. henceforth, the following prudential measures will be applicable:

(a) The provisioning in respect of existing loans/exposures of banks to companies having director/s (other than nominee directors of government/financial institutions brought on board at the time of distress), whose name/s appear more than once in the list of wilful defaulters, will be 5% in cases of standard accounts; if such account is classified as NPA, it will attract accelerated provisioning as indicated at para 6.3.1 above. (In terms of paragraph 2.5 (a) of Master Circular on Wilful Defaulters dated July 1, 2013, no additional facilities should be granted by any bank/FI to the listed wilful defaulters.) This is a prudential measure since the expected losses on exposures to such borrowers are likely to be higher.

(b) With a view to discouraging borrowers/defaulters from being unreasonable and non-cooperative with lenders in their bonafide resolution/recovery efforts, banks may classify such borrowers as non-cooperative borrowers[2], after giving them due notice if satisfactory

[2] *A non-cooperative borrower is broadly one who does not provide necessary information required by a lender to assess its financial health even after 2 reminders; or denies access to securities etc. as per terms of sanction*

clarifications are not furnished. Banks will be required to make higher/accelerated provisioning in respect of new loans/exposures to such borrowers as also new loans/exposures to any other company promoted by such promoters/ directors or to a company on whose board any of the promoter / directors of this non-cooperative borrower is a director. The provisioning applicable in such cases will be at the rate of 5% if it is a standard account and accelerated provisioning as per para 6.3.1 if it is an NPA. This is a prudential measure since the expected losses on exposures to such non-cooperative borrowers are likely to be higher.

(c) RBI will create a database of directors on the boards of companies classified as non-cooperative borrowers for dissemination to lenders.

(d) At present, the list of Suit filed accounts of Wilful Defaulters (Rs.2.5 million and above) is submitted by banks to the Credit Information Companies (CICs) of which they are member(s), who display the same on their respective websites as and when received. The list of non-suit filed accounts of Wilful Defaulters (Rs.2.5 million and above) is confidential and is disseminated by RBI among banks and FIs only for their own use. The current system of banks/FIs reporting names of suit filed accounts of Wilful Defaulters and its availability to the market by CICs/RBI will be enhanced to make it as current as possible, as against the current 3-4 months' time lag from the date of reporting by a bank.

7.2 Banks will have to strictly comply with the existing instructions about formal lodging of complaints with ICAI against company auditors in case of observance of falsification of accounts/wrong certification of stock statement/end-use certificate etc. Pending disciplinary action by ICAI, the complaints will also be received in the RBI for records. The names of the CA firms against whom many complaints have been received from different banks may be flagged for information of all banks. Banks should consider this aspect before assigning any work to them. The names may also be shared with other regulators/MCA/CAG for information.

7.3 Further, banks may seek explanation from advocates who wrongly certify as to clear legal titles in respect of assets or valuers who overstate the security value, by negligence or

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or does not comply with other terms of loan agreements within stipulated period; or is hostile / indifferent / in denial mode to negotiate with the bank on repayment issues; or plays for time by giving false impression that some solution is on horizon; or resorts to vexatious tactics such as litigation to thwart timely resolution of the interest of the lender/s. The borrowers will be given 30 days' notice to clarify their stand before their names are reported as non-cooperative borrowers.

connivance, and if no reply/satisfactory clarification is received from them within one month, they may report their names to IBA for record and necessary action. IBA may circulate the names of such advocates/valuers among its members for consideration before availing of their services in future.

8. Credit Risk Management

8.1 Lenders should carry out their independent and objective credit appraisal in all cases and must not depend on credit appraisal reports prepared by outside consultants, especially the in-house consultants of the borrower company.

8.2 Banks/lenders should carry out sensitivity tests/scenario analysis, especially for infrastructure projects, which should inter alia include project delays and cost overruns. This will aid in taking a view on viability of the project at the time of deciding CAP.

8.3 Lenders should ascertain the source and quality of equity capital brought in by the promoters /shareholders. Multiple leveraging, especially, in infrastructure projects, is a matter of concern as it effectively camouflages the financial ratios such as Debt/Equity ratio, leading to adverse selection of the borrowers. Therefore, lenders should ensure at the time of credit appraisal that debt of the parent company is not infused as equity capital of the subsidiary/SPV.

8.4 While carrying out the credit appraisal, banks should verify as to whether the names of any of the directors of the companies appear in the list of defaulters/ wilful defaulters by way of reference to DIN / PAN etc. Further, in case of any doubt arising on account of identical names, banks should use independent sources for confirmation of the identity of directors rather than seeking declaration from the borrowing company.

8.5 With a view to ensuring proper end-use of funds and preventing diversion/siphoning of funds by the borrowers, lenders could consider engaging auditors for specific certification purpose without relying on certification given by borrower’s auditors. However, this cannot substitute bank’s basic minimum own diligence in the matter.

9. Reinforcement of Regulatory Instructions

9.1 RBI reiterates instructions regarding restrictions placed on banks on extending credit facilities including non-fund based limits, opening of current accounts, etc. to constituents who are not their regular borrowers. Banks must take necessary corrective action in case the above instructions have not been strictly followed. Further, RBI will ensure strict adherence by banks to these instructions. As any breaches of RBI regulations in this regard are likely to vitiate credit discipline, RBI would consider penalising the banks in case of breaches.

9.2 Banks are custodians of public deposits and are therefore expected to make all efforts to protect the value of their assets. Banks are required to extinguish all available means of recovery before writing off any account fully or partly. It is observed that many banks are resorting to technical write off of accounts, which reduces incentives to recover. Banks resorting to partial and technical write-offs should not show the remaining part of the loan as standard asset. With a view to bring in more transparency, henceforth banks would be required to disclose full details of write offs including separate details about technical write offs.

10. Sale of NPAs and ARCs

10.1 ARCs should be construed as a supportive system for stressed asset rather than the last resort to dispose of NPAs by banks. Sale of assets to ARCs at a stage when the assets have good chance of revival and fair amount of realizable value, for rehabilitation and reconstruction is encouraged.

10.2 According to current instructions on sale of financial asset by a bank to ARCs, if the sale is for a value higher than the Net Book Value (NBV), the excess provision is not allowed to be reversed but banks will have to utilise the same to meet the shortfall / loss on account of sale of other financial assets to Securitisation Company (SC) / Reconstruction Company (RC). However, banks are required to provide for any shortfall if the sale value is lower than the NBV. With a view to bringing in uniformity as also incentivising banks to recover appropriate value in respect of their NPAs promptly, the Reserve Bank will allow banks to reverse the excess provision on sale of NPA if the sale is for a value higher than the NBV to its P&L account in the year the amounts are received. Further, as an incentive for early sale of NPAs, the Reserve Bank will allow banks to spread over any shortfall, i.e., if the sale value

is lower than the NBV, over a period of two years. This facility of spreading over the shortfall would however be available for NPAs sold up to March 31, 2015 and will be subject to necessary disclosures.

10.3 In terms of extant instructions, floating provisions can be used by banks only for contingencies under extraordinary circumstances for making specific provisions in impaired accounts after obtaining board's approval and with prior permission of RBI. The Reserve Bank will allow banks to use floating provisions towards accelerated provisioning /additional provisions incurred at the time of sale of NPAs as per their approved internal policy without obtaining prior permission of RBI.

10.4 The promoters of the company/defaulting borrowers shall be barred from directly/ indirectly buying back the asset from the ARCs. Legal issues involved, if any, would be examined by RBI.

10.5 Current restrictions of Government of India (GOI)/Central Vigilance Commission (CVC) on bilateral sale of assets (by way of private treaty) would be taken up with the Government by suggesting controls as follows:

- Price being not less than the Reserve Price fixed for the asset and after price discovery through one auction.
- Public advertisements of sale in at least 2 leading newspapers inviting offers from anyone who is willing to offer a higher amount.
- If the bilateral sale covers the entire dues to the bank and is with the consent of the borrower, the auction process may be dispensed with.

10.6 Sale of assets between ARCs is not permitted under the SARFAESI Act provisions. In order to encourage liquidity and price discovery of stressed assets, sale of assets between ARCs may be permitted. The issue will be taken up with the Government.

10.7 The ability of the ARCs to raise limited debt funds to rehabilitate units will be considered. This will be accompanied by increasing their minimum level of capitalisation in view of recent liberalisation of FDI ceilings and enhancement of working funds. The ARCs will be encouraged to reach certain minimum level of AUM targets.

10.8 Banks using ARCs as a price discovery vehicle should be more transparent, including by disclosing the Reserve Price and specifying clauses for non-acceptance of bids, etc. If a bid

received is above the Reserve Price and also fulfils the other conditions specified, acceptance of that bid would be mandatory.

10.9 Methodologies for Independent Valuation of NAVs of Security Receipts (SRs) will be examined / considered. Further work on this will be done by looking at the valuation methodologies used in this regard and discussion with SEBI, Institution of Valuers, etc.

10.10 Large designated NBFCs could be allowed to assign stressed assets to ARCs. If any of these designated NBFCs are not notified under the SARFAESI Act, the issue of their notification will be taken up with the Government. However, a bank /NBFC cannot sell assets to its own promoted ARC or an ARC where it owns at least 10% equity.

10.11 PE firms and large NBFCs with proven expertise in resolution/recovery may be allowed to participate in auctions through explicit regulatory affirmation. Such entities will have to be provided authority under SARFAESI Act on selective basis to deal with specific assets.

10.12 Appropriate incentive structures (e.g. please see para 10.13 and 11.3) may be built so as to provide greater role to PE firms and other institutions in restructuring of troubled company accounts. These institutions can be expected not only to bring additional funds for restructuring but also bring in expertise for management of the business unit in question.

10.13 In terms of extant instructions, banks are generally not allowed to finance acquisition of promoters' stake in Indian companies. The underlying reasoning being promoters should acquire equity stake from their own sources and not through borrowings. The Reserve Bank would allow banks to extend finance to 'specialized' entities put together for acquisition of troubled companies. The lenders should however ensure that these entities are adequately capitalised.

10.14 Alternatively (or additionally), a specialized institution may be created with equity/ quasi-equity participation of the above entities or international institutions with the Government of India holding a part of the stake. This institution may participate in restructuring of borrowal accounts along with banks and other lenders. Government may take a view on this matter.

10.15 In terms of extant instructions, an NPA in the books of a bank is eligible for sale to other banks only if it has remained as NPA for at least two years in the books of the selling

bank. The Reserve Bank will withdraw this minimum holding period for any initial loan sale. However, the bank purchasing the NPA will, have to hold the asset in its books for at least one year before selling the asset.

11. DRTs and Other Recovery Infrastructure

11.1 The issues of large scale vacancies in DRTs and creating of special cadre of officers will be taken up with the Government. The post of Presiding Officers (POs) can be sought to be filled through experienced ex-bankers fulfilling certain eligibility norms.

11.2 Additional DRT benches at centres with large backlogs may be created. A separate bench for speedy disposal of SARFAESI related cases may be established in DRTs. Further, adequate staffing of Recovery Officers may have to be ensured by the Government.

11.3 It is learnt that certain issues relating to acquisition/restructuring of stressed companies where CLB involvement may help have been taken up by IBA. In cases of companies involved in / potentially involved in frauds etc., special privileges by CLB may be considered to protect the new management. The issue will be taken with the Government.

11.4 Recommendation will be made to the Government for establishing Special Courts/ Tribunals to deal with cases involving Section 138 of Negotiable Instruments Act, 1881. Recommendation may also be made to the Government to expedite setting up of special benches in every High Court for corporate cases.

11.5 Currently security registration, especially registered mortgages, is done at district level and Central Registry of Securitisation Asset Reconstruction and Security Interest of India (CERSAI) is generally used to register equitable mortgages. The Government mandate to register all types of mortgages with CERSAI will have to be strictly enforced among banks and NBFCs.

11.6 To address resource issues of CERSAI, RBI will take up the issue of funding with GOI for enhancing its human resource and technology upgradation.

11.7 The issue of tax claims and other authorities, workers claims etc. getting raised at the last moment and seeking ‘priority’ over secured creditors or getting ‘stay’ order distort the

recovery measures initiated by the lenders. The matter will be taken up with Government for fixing ‘limits’ to such claims.

11.8 In case of default in infrastructure project loans, where termination notice is issued to the project authority calling for payment of Debt Due, the termination payment is received after a lengthy procedure.The Government may be requested to review the procedure.

12. Board oversight

12.1 The Board of Directors should take all necessary steps to arrest the deteriorating asset quality in banks and should focus on improving the credit risk management system. Early recognition of problems in asset quality and resolution envisaged in this paper requires the lenders to be proactive and make use of CRILC as soon as it becomes functional.

12.2 Boards should put in place a policy for timely providing of credit information to and access of credit information from CRILC, prompt formation of JLFs, monitoring the progress of JLFs and periodical review of the above policy.

12.3 The boards of banks should put in place a system for proper and timely classification of borrowers as wilful or/and non-cooperative. Further, boards should review the accounts classified as such.

Annex

Non-financial Signals of Stress

Illustrative list of any one of the following signals that may lead to categorise an account as SMA-NF:

1. Delay of 90 days or more in (a) submission of stock statement / other stipulated operating control statements or (b) credit monitoring or financial statements or (c) non-renewal of facilities based on audited financials.

2. Actual sales / operating profits falling short of projections accepted for loan sanction by 40% or more; or a single event of non-cooperation / prevention from conduct of stock audits by banks; or reduction of Drawing Power (DP) by 20% or more after a stock audit; or evidence of diversion of funds for unapproved purpose; or drop in internal risk rating by 2 or more notches in a single review.

3. Return of 3 or more cheques (or electronic debit instructions) issued by borrowers in 30 days, on grounds of non-availability of balance / DP in the account or return of 3 or more bills / cheques discounted or sent under collection by the borrower.

4. Devolvement of Deferred Payment Guarantee (DPG) instalments or LCs or invocation of BGs and its non-payment within 15 days.

5. Third request for extension of time either for creation or perfection of securities as against time specified in original sanction terms or compliance with any other terms and conditions of sanction.

6. Increase in frequency of overdrafts in current accounts.

7. The borrower reporting stress in the business and financials.

B1

Hedge funds and distressed debt investing: the past, present and future

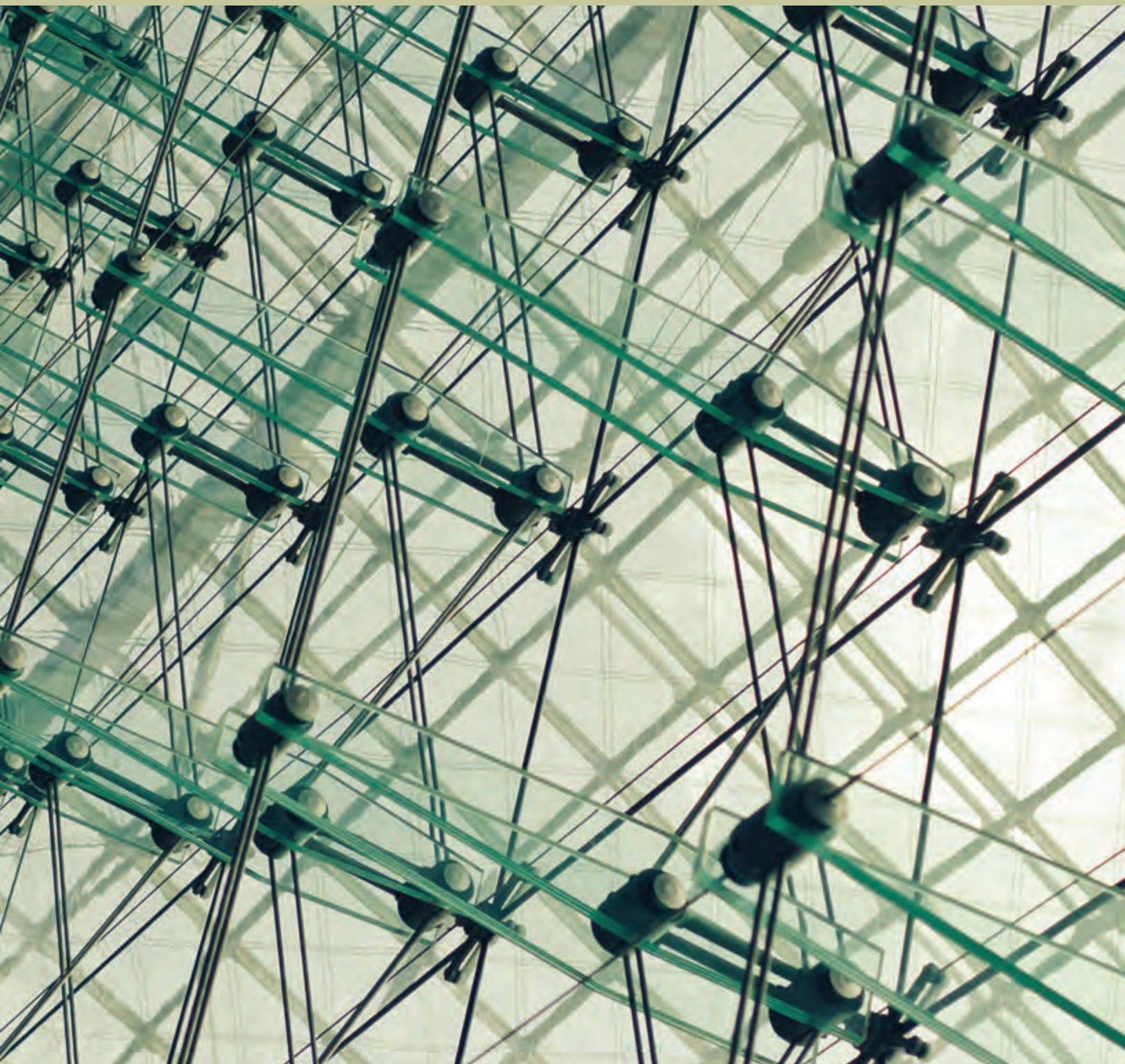
Rose/Peony Room

Chair: Jesse Hibbard, Fulcrum Capital
Peter Declercq, Fellow, INSOL International, Schulte Roth & Zabel
Ted Osborn, PwC
Christian Saunders, Allen & Overy LLP
Tim Williams, National Australia Bank

Schulte Roth & Zabel

Distressed Investing M&A

A Schulte Roth & Zabel LLP report in association with Mergermarket and Debtwire



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Foreword

This year's issue of Distressed Investing M&A sponsored by Schulte Roth & Zabel, in association with Mergermarket and Debtwire, examines the market for mergers and acquisitions for troubled assets in the US and abroad.

The current edition contains interviews with investment bankers, private equity practitioners and hedge fund managers. As distressed debt investors increasingly turn their eyes toward Europe, this report aims to gather insights on motivations and views on investing in the US and abroad.

Distressed M&A investors, who have previously mainly focused on distressed opportunities in the US, are now increasingly taking advantage of the historically low valuations of target firms in Europe. Also driving this trend is the fact that distressed prices in the US are going in the opposite direction — something that respondents in the report overwhelmingly agree upon. The improving economy and the more positive financing environment in the US are also pushing the amount of distressed assets down.

A majority of respondents claim that Europe will form part of their future distressed M&A investment strategies. An overwhelming number of them still cite troubles in the eurozone as a key consideration in their decision-making process. It appears that investors are very carefully treading European distressed waters.

By contrast, given that the US is viewed to be on the path to recovery, its economic health does not pose as much of a concern.

Evidently investors remain risk averse, and this shows in the factors they are looking out for and the strategies they employ. The lack of predictability in the companies they are investing in is considered a major deterrent by many. Additionally, the majority of the respondents are going for short-term investments for the quick turnaround, believing that they do not have the luxury of time when dealing with more troubled firms. They are also looking very closely at the operational risks that can easily hinder companies' growth prospects.

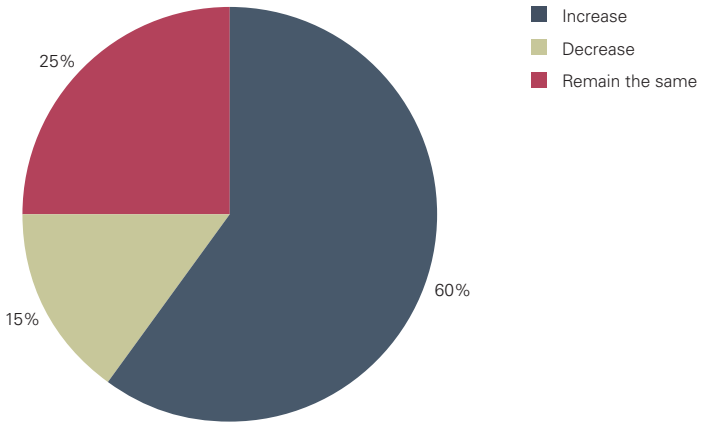
The survey also examines specific issues affecting investments such as the US government's role in reorganization sales and certain European regulatory issues. The myriad of topics covered by this edition is a reflection of the complex nature of distressed investing in a financial environment that generally remains challenged.

Methodology

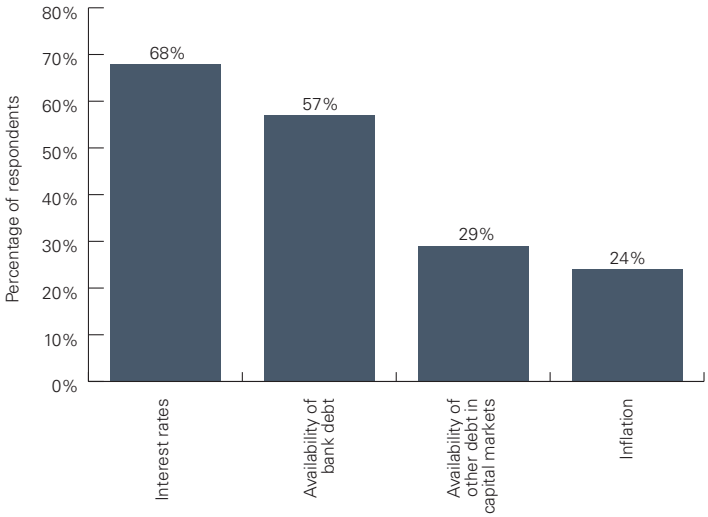
In the third quarter of 2013, Schulte Roth & Zabel commissioned Mergermarket to interview investment bankers, private equity practitioners and hedge fund managers based in the US and Europe regarding their experience with distressed M&A activity and their expectations for the upcoming 12–24 months. All respondents are anonymous and results are presented in aggregate.

Study Findings

What do you expect will happen to the pricing of distressed assets and companies in the US over the next 12 months?



What factors do you expect will have the greatest impact on the pricing of distressed assets and companies in the US over the next 12 months?



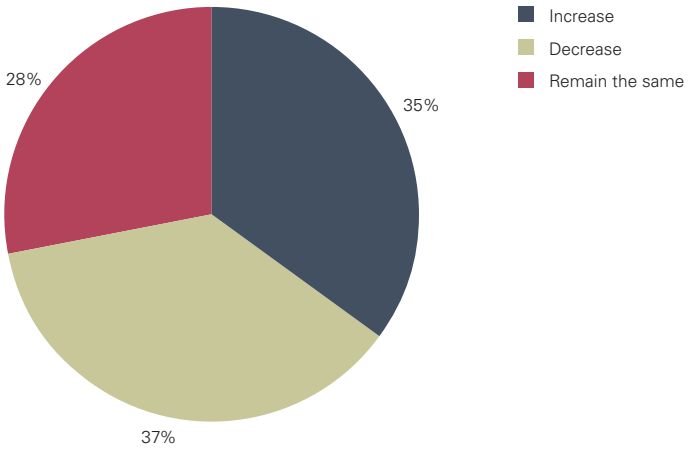
The majority of respondents expect distressed asset pricing to increase over the next 12 months. This year's results show a stronger consensus than last year's survey when the pool was split between respondents who were expecting an increase and those who anticipated no change in prices. An (albeit slowly) improving economy and financing environment are prominently cited. A US-based managing director explains: "Overall, the US is improving and debt levels are also coming down. So the level of distressed assets will also come down soon and that will trigger a price increase for the available distressed assets."

Interest rates will have the greatest influence on US distressed asset valuations, according to 68% of respondents. This is a marked change from last year when the availability of debt and the political climate were the top factors. Interest rates are remaining low atop the Federal Reserve's decision to delay the tapering of its bond purchase program. Respondents say this has eased the situation for companies in distress and has forced potential buyers to raise offers.

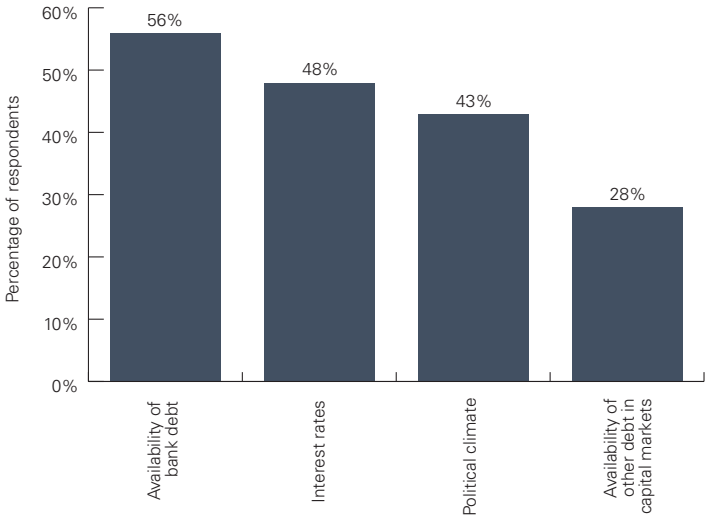
"A steadily improving economy, coupled with a favorable financial environment, has resulted in a more limited range of distressed investment opportunities. Given the amount of money dedicated to this asset class, we expect prices to rise as a function of supply and demand."

Adam C. Harris, Partner, Schulte Roth & Zabel

What do you expect will happen to the pricing of distressed assets and companies outside of the US over the next 12 months?



What factors do you expect will have the greatest impact on the pricing of distressed assets and companies outside of the US over the next 12 months?



The market for distressed assets outside of the US is relatively unchanged. Respondents expectations are similarly split, as they were in last year's survey, showing signs of stagnation in struggling economies. In the camp of respondents expecting prices to decrease, many express concerns surrounding the emerging markets and eurozone. One US-based private equity vice president explains: "The number of distressed assets is growing in Europe and Asia as the debt crises and emerging market slowdown have not improved."

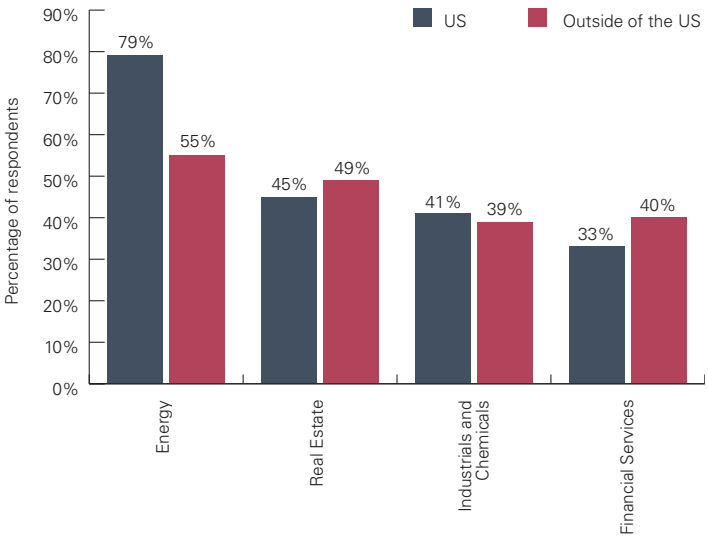
Conversely, over a quarter of respondents expect pricing to remain unchanged primarily due to overall uncertainty. A UK-based investment banker says prices will increase because distressed companies are in a better position now than they were 12 months ago and notes a rising trend in valuations.

The political climate remains a top concern for 43% of respondents (56% last year), but debt availability and rising interest rates have emerged as the leading factors affecting distressed pricing outside of the US. While the factors are similar to those impacting US-based distressed investments, the results are not. UK banks are in a much weaker position compared to those in the US, respondents say. This factor limits the bargaining ability of distressed asset owners.

As one US-based private equity practitioner explains: "It will be difficult for the banks to sustain lending and provide debt unless the market improves. Soon interest rates will increase too, and this will greatly affect the pricing of distressed assets as companies will feel greater pressure to sell at lower prices."

Study findings

In which sector(s) do you expect to see the best opportunities for distressed M&A in the US?



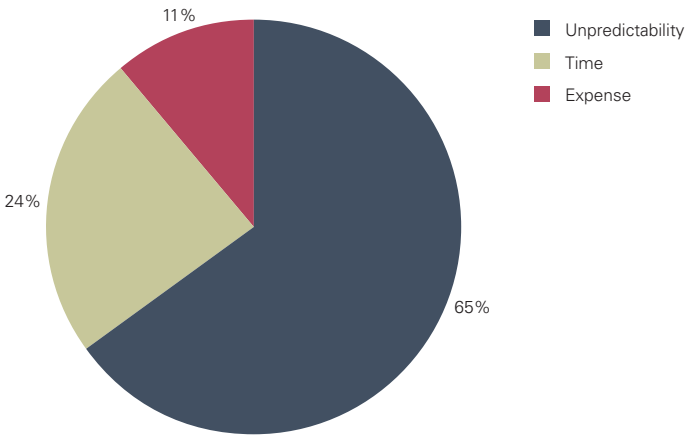
Energy is the clear favorite to top distressed M&A in the US, according to a majority of respondents. The response is stronger in this edition of the survey, with 79% expecting the best opportunities in the US Energy sector (compared to 42% last year). Real Estate, Industrials and Chemicals, and Financial Services round out the most valuable industries to distressed investors.

The high volume of M&A activity in the Energy sector is a primary driver for many investors. Expectations for Energy asset returns are high and there is typically an abundance of cash-rich corporates seeking expansion that are ready to invest. "The exit process is much easier in Energy and Industrials," a US-based private equity principal comments.

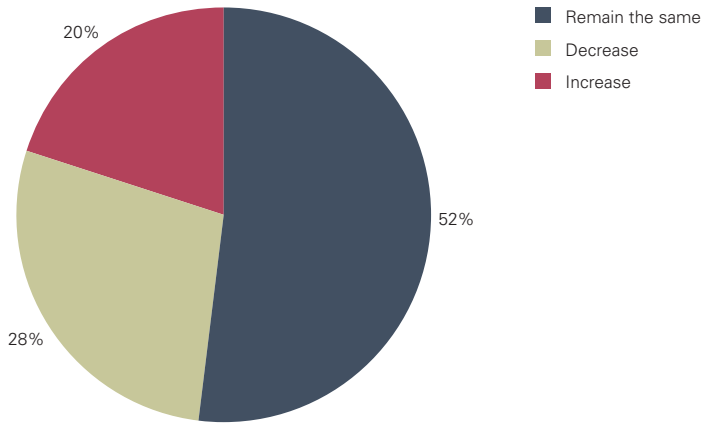
"The volume of distressed transactions in commercial real estate (CRE) will be enhanced over the next few years by the gap that will exist between the prolific amount of CRE mortgage loans that mature and the refinancing proceeds that borrowers will be able to obtain when these loans become due. Appraised values are still well below 2007/2008 levels and CRE mortgage loans are not at the loan-to-value ratio levels they were at five to six years ago."

Jeffrey A. Lenobel, Partner, Schulte Roth & Zabel

What is the biggest deterrent to pursuing distressed assets?



In light of recent cases (*e.g.*, Hawker Beechcraft), what do you expect to happen to US government's (CFUIS) role in future 363 and reorganization sales?



The biggest deterrent to pursuing distressed assets is the lack of predictability in terms of investment scenarios, with 65% of respondents citing this factor. They do not consider the time and expenses needed in evaluating these investments as much of a hindrance to pursuing opportunities in the distressed sector.

The inability to compute asset values based on a definite event are currently impacting valuations. "Unpredictable scenarios should favor distressed investments, but they have now created a valuation gap that distressed investors are not comfortable with," a Europe-based investment banker says.

"In addition to the impact on asset values, given the unpredictability of insolvency processes, competitive dynamics and post acquisition execution uncertainty, it is not surprising that distressed buyers focus on unpredictability — of course, as suggested, these uncertainties can create opportunities for the savvy buyer."

David E. Rosewater, Partner, Schulte Roth & Zabel

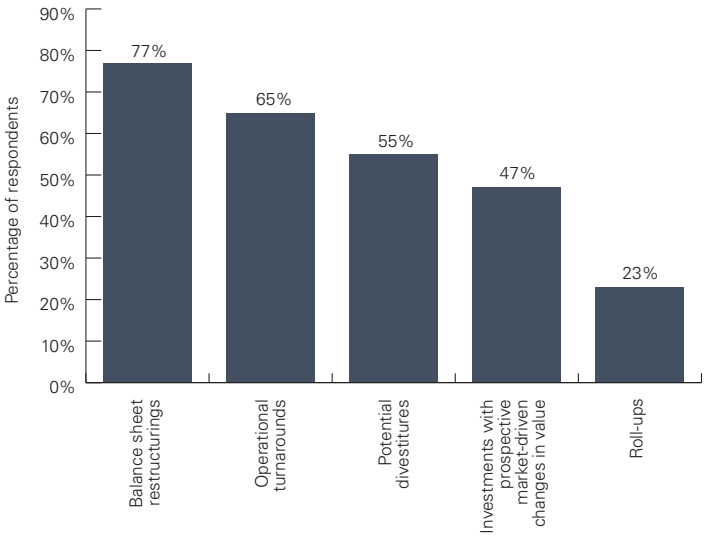
A majority (52%) of respondents think that deals similar to Aerospace firm Hawker Beechcraft's failed purchase by Chinese aircraft maker Superior Aviation Beijing Co. will not set a precedent in terms of the US Committee on Foreign Investment in the United States' (CFIUS) role in reorganization sales.

The planned purchase fell through in October 2012, which resulted in Hawker emerging from bankruptcy by itself with significantly scaled-back operations. The deal's collapse was reportedly due to complications with separating out Hawker's commercial aircraft business from its defense and military unit, which would have been subject to CFIUS approval.

However, some respondents think that the government's increased intervention will just further complicate things. "As the government intervention increases, the bankruptcy processes will not be the same and will be more complicated," a Europe-based investment banker says.

Study findings

Which type of distressed opportunities are you targeting?



Repeating last year's results, balance sheet restructurings remain the top targets for those purchasing distressed companies, according to a majority 77% of respondents (stronger than last year's 65%).

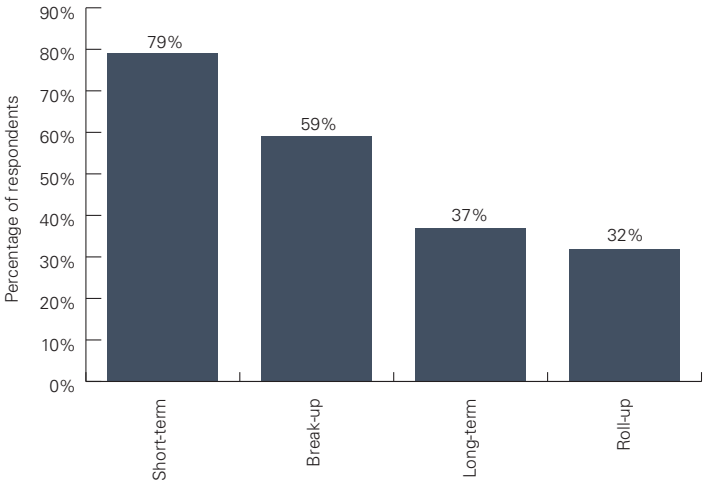
Balance sheet restructuring situations are popular for investors that have long- and short-term strategies. These opportunities will continue to increase as distressed companies seek to divest non-core assets to boost both strategic and financial flexibility. A private equity practitioner based in France explains: "These assets require less attention and little modification, while providing us with good returns."

"Investing in balance sheet restructuring gives more hope for a turnaround and realizing better value when exiting," says a European investment banker.

"The key to a successful balance sheet restructuring is an understanding of the needs and motivations of the various stakeholders in the capital structure, and at the company, in order to quickly identify and implement plans to insure both short-term stability to create the restructuring opportunity and long-term value creation, in each case in a manner that will be bought into by these critical stakeholders instead of leading to a destructive fight over available resources."

David E. Rosewater, Partner, Schulte Roth & Zabel

What type of strategy do you employ for your targeted distressed assets and companies?



In last year's survey results, 52% of respondents chose both short- and long-term strategies. This year tells a different story, as only 37% of respondents opt for long-term strategies. Increasing from the last survey, 79% of respondents are adopting short-term strategies while break-up distressed debt strategies have entered the mix, with a comparatively high percentage of respondents choosing this option.

Investors are clearly risk averse; the results show that many respondents do not want to commit to investments for the long haul. "Distressed and financially troubled companies have a host of significant risks and potential problems that are not typically found in the acquisition of a healthy, solvent company. Thus, in distressed investments, we do not have the leisure to make long-term investments," says a hedge fund investor based in the US.

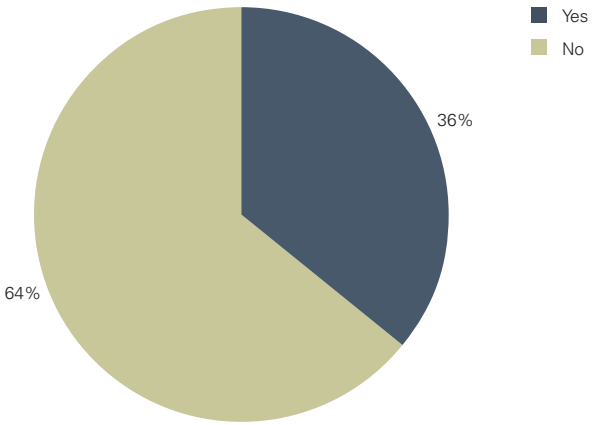
Investing for the short-term also offers a quick turnaround. As an Italy-based partner says: "We are splitting our investments accordingly in order to minimize risk and curtail losses to stay active in the market." A US-based private equity executive adds: "Our goal is to invest for a short-term, as it gives immediate results and fulfills our pre-decided targets."

"The increased focus on short-term strategies seems to signal a preference to invest in the more liquid names. However, in Europe in particular, liquid names are crowded and better opportunities may be found off the beaten track."

Peter J.M. Declercq, Partner, Schulte Roth & Zabel

Study findings

Have you participated in any distressed-for-control transactions as part of a broader investor group (know as a "club deal")?

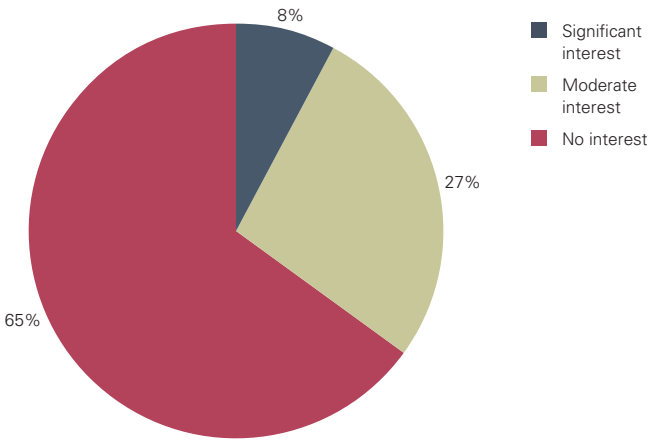


A majority 64% of respondents have not participated in club deals, which are distressed-for-control deals formed among a bigger group of investors. Of the 36% who have, there was a split of respondents between those that formed the group before and those that did so after the investment. Respondents who took part in these deals cite factors such as governance, understanding the capital structure, structuring the transaction as well as the internal requirements of various investors as the biggest hindrances to these transactions.

"Certain types of acquisitions, such as acquisitions of portfolios of distressed loans, are natural fits for club deals as the investors get the benefit of being able to take down larger portfolios and to agree upon a work out strategy during the course of portfolio due diligence. In our experience in these settings, while governance and structuring issues require attention, they are generally readily resolvable. Debt-for-equity swaps resulting in control of operating businesses may pose more difficult issues, as investors may have significantly different costs bases and return expectations, leading to complex negotiations over governance and exit rights."

Stuart D. Freedman, Partner, Schulte Roth & Zabel

What level of interest do you have in distressed municipal debt in the US?



Investing in US distressed municipal debt is not very popular among the respondent pool as 65% of them say that they have no interest in these opportunities. Despite the majority's refusal to engage in this type of investment, 27% express a moderate interest and 8% say they have a significant interest in these distressed assets.

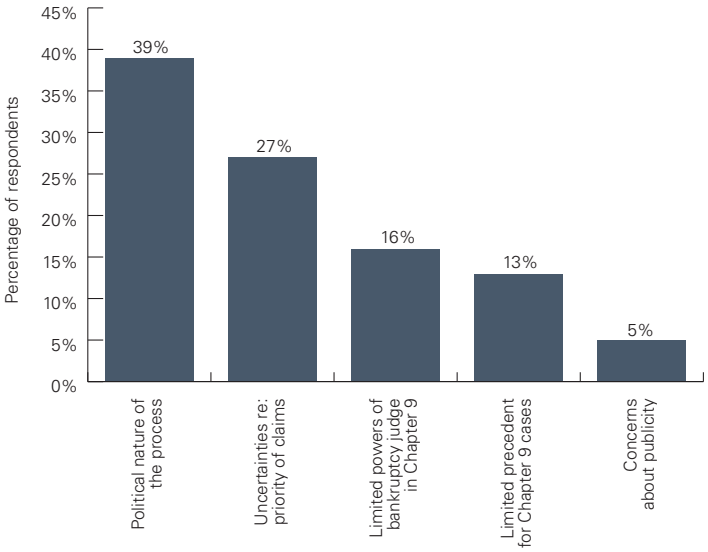
A US-based hedge fund investor cites how hard it is to get out of these investments as the reason why he is not enthusiastic about buying this type of debt. He continues: "Investing in municipal debt is complicated and finding an exit is very difficult."

"It is understandable that many investors are very cautious about investing in distressed municipal securities given the political nature of the process and the limited authority of bankruptcy judges in Chapter 9 cases. Nevertheless, while Detroit is an extreme case, the factors that led to its bankruptcy — underfunded pension plans, surging health care costs for an aging or retired work force, the funding of cash flow shortfalls through debt — are prevalent in state and local governments and more municipal restructurings are inevitable. As these cases proliferate, we anticipate that distressed investors will get increasingly accustomed to the process and will begin to more actively participate."

Stuart D. Freedman, Partner, Schulte Roth & Zabel

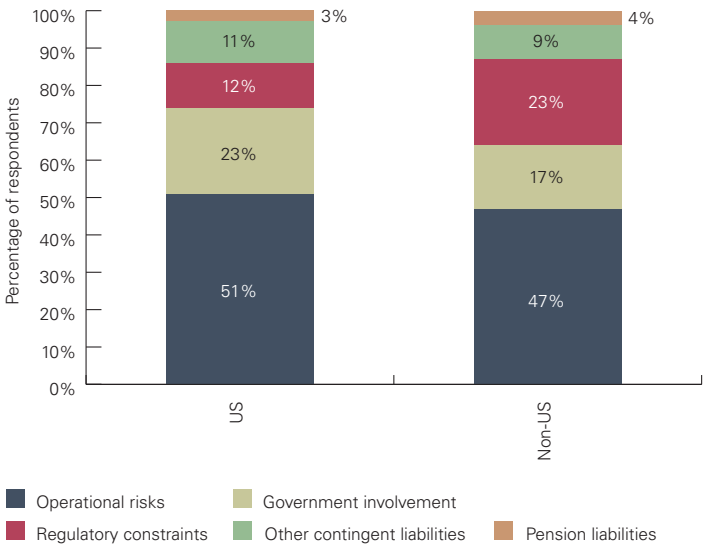
Study findings

Which factor is most significant in evaluating a distressed municipal opportunity?



In looking at distressed municipal investments, the political nature of the process — as opposed to one being mainly based on economic considerations — is the biggest factor for the plurality (39%) of respondents. Bankruptcy also emerges as a major influence in investors' comfort levels when it comes to municipal distressed debt investments. Not only did the second highest percentage of respondents (27%) cite the priority of claims as their biggest concern, but 16% say that the limited powers of the bankruptcy judge and 13% note the limited precedent for Chapter 9 cases as forming a major part of their decision making. Only 5% of respondents name apprehensions about publicity as their main driver when they make this type of investment.

Which factor will have the biggest impact on your decisions to invest in distressed assets and companies?

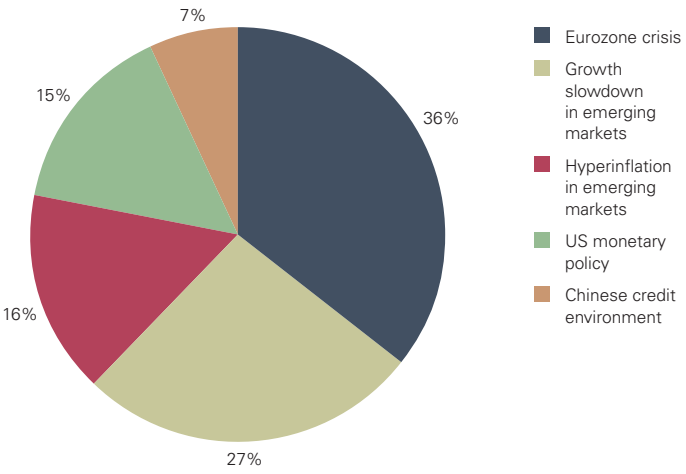


Respondents chose operational risks as the biggest factor affecting their distressed investment choices in both the US and globally, similar to last year's results. Regulatory constraints are more of an issue for non-US targets, with 23% of respondents choosing this as a factor in their investment decisions.

Last year, a majority (63%) of respondents chose operational risks as the factor with the largest influence on their decisions to invest.

Investors are mainly looking for targets with growth potential that operational risk can curtail. A US-based investment banker says: "Operational risk such as rising labor costs and low synergies will further lead companies to a downturn."

Which current economic issue will have the biggest impact on your distressed M&A decision-making over the next 12 months?



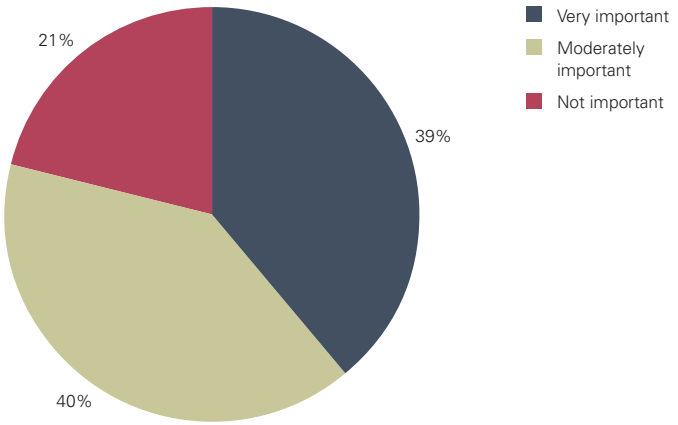
Troubles in Europe are clearly still in the minds of many distressed investors. Similar to last year's results, 36% of respondents (compared to 34% last year) cite the eurozone crisis as the leading economic issue that impacts their decisions when it comes to investing in distressed companies. However, a larger portion (39%) of respondents last year were concerned about US economic recovery. With the US economy viewed to be on the mend this year, only 15% of respondents are concerned about the US monetary policy in the current survey.

"The most significant macroeconomic issues affecting funds' approach to distressed investing into Europe appear to be concern about when European interest rates will increase, and by how much and how quickly. Many European companies are still highly leveraged and so a hike in interest rates, which seems inevitable, would significantly affect their ability to service existing debt and ongoing ability to source working capital — let alone growth capital. Also of indirect concern seems to be the reduction in growth in, and therefore in demand from, Asia (especially China)."

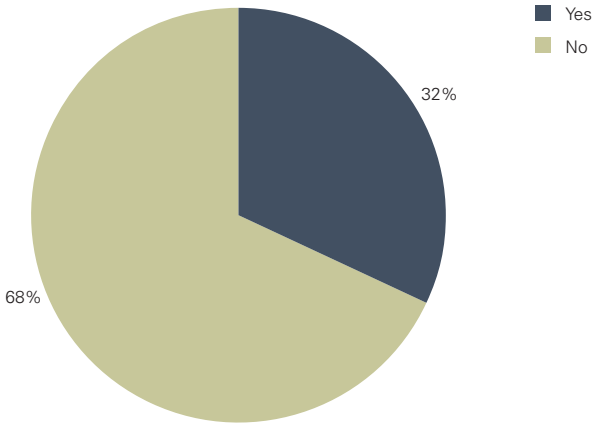
Sonya Van de Graaff, Partner, Schulte Roth & Zabel

Study findings

How important will Europe be to your distressed M&A investing strategy?



Has the EU's AIFMD "asset stripping rules" affected your distressed investment strategy in the EU?



Seeking opportunities in Europe plays a significant factor in investors' distressed M&A strategies. An almost equally split portion of the respondents consider the region to be either very or moderately important in formulating their investment goals. "European assets are very attractive and their valuations are low for us to make new investments and diversify our investments," a US-based investment banker says.

On the other hand, some say opportunities might be diminishing in the region. "The European market is at a standstill and the market does not offer a lot of distressed opportunities as European banks are not selling a lot of distressed assets. We would rather focus on other regions and make good use of those opportunities," a Europe-based investment banker says.

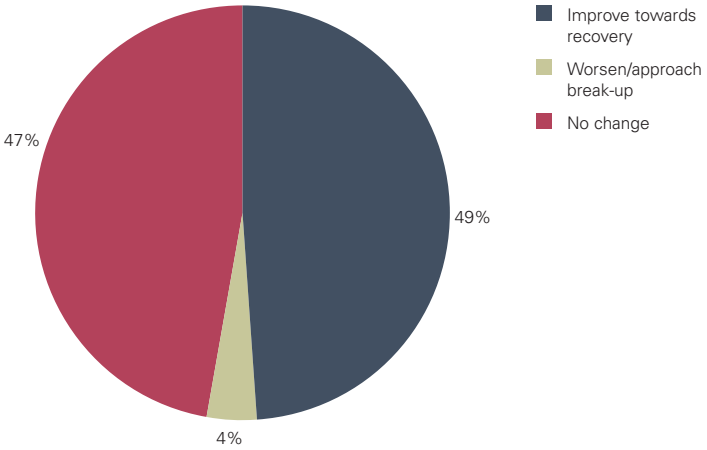
> "Despite the apparent reluctance of European banks to sell distressed assets into the secondary market, opportunities still exist and can provide significant returns for investors who are willing to dedicate the resources to identify the opportunities and who have the patience to realize on them."
>
> **Adam C. Harris, Partner, Schulte Roth & Zabel**

The European Union's Alternative Investment Fund Managers Directive's (AIFMD) "asset stripping rules" limits how much capital a general partner can get in the initial two years of ownership of an investment. Only 32% of distressed investors say that these rules will impact their investment strategy in the region.

A director in an investment bank in the US is in a wait-and-see mode. "We might scale back our investments if it proves to be worse. So far, we have not taken it seriously."

The rules might create a problem for private equity firms in terms of data reporting. "The reporting obligations have created a significant challenge to our investment strategies and processes," a Europe-based private equity practitioner says.

What are your expectations on the state of the EU over the next 12 months?



With Europe playing a key role in many distressed debt investors' strategies, their expectations regarding the region will impact their future choices. The survey shows that respondents are almost split between those who are optimistic that conditions in Europe are going to improve and those who think they will simply remain the same.

"There is no doubt that the situation in Europe is improving. The debt crisis is slowly subsiding and there is no threat of a European Union break-up now," a US-based investment banker says.

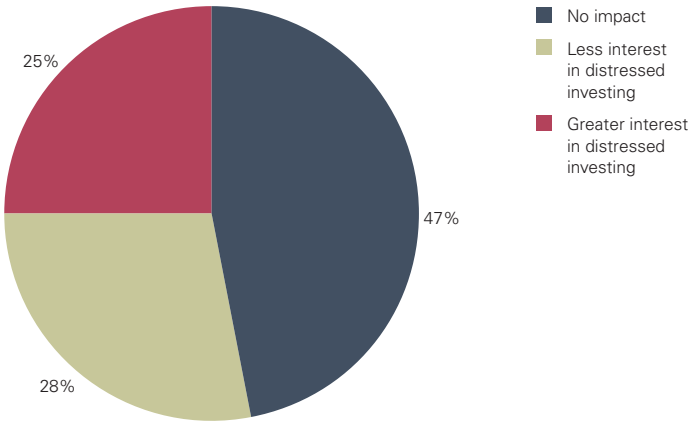
On the opposite side of the spectrum is the view that the debt crisis will deteriorate further. "It is very likely that the situation in the European Union will get worse. As the debt crisis worsens and new countries demand for bailout, soon the default threat will bring the European economy into recession again," an investment banker in France says.

"The survey couldn't show more clearly how much views on Europe differ. So there is uncertainty about Europe, uncertainty comes together with risk, shouldn't that create opportunities?"

Peter J.M. Declercq, Partner, Schulte Roth & Zabel

Study findings

What impact has the ECB's response to the Cypriot financial crisis in requiring converting consumer debt to capital affected the European distressed investing mentality?



The European Central Bank's (ECB) response to the Cypriot financial crisis does not create a strong impetus to invest in distressed assets in the region. Forty-seven percent of respondents say the ECB's decision to require the conversion of consumer debt into capital has no impact on their investment strategy.

A US investment banker views the effects of the ECB's move as localized. "The European Central Bank's response to the Cypriot financial crisis is only for Cyprus. It considers Cyprus' financial and debt position and will not have the same impact for all the countries."

"The ECB's response to the Cypriot crisis surprisingly seems to have had little impact on investors' appetite for exposure to European financial institution debt, at least in the non-fringe countries. This is perhaps because investors perceive Cyprus to be a contained and extreme situation which is unlikely to be repeated in the main European jurisdictions. Apart from those few worst affected, all seems to have been forgiven."

Sonya Van de Graaff, Partner, Schulte Roth & Zabel

Schulte Roth&Zabel

DISTRESSED INVESTING

COMES IN ALL SHAPES AND SIZES

Representative distressed investing transactions include:

ICBC Broadcast Holdings, Inc. — Acquisition	PRECISION PARTNERS — Foreclosure on Equity Interests	Speymill plc — Acquisition and Debt Restructuring	dri Corporation — Acquisition
phoenix technologies — Debt Restructuring	WaMu — Exit Financing	The Great ATLANTIC & PACIFIC Tea Company — Acquisition	REAL MEX RESTAURANTS — Acquisition
CHEF SOLUTIONS — Debt Financing	LOCAL insight MEDIA — Exit Financing	deb — Acquisition	INNKEEPERS USA — Acquisition
DIGITAL DOMAIN — Reorganization and Auction	Fiddler's Creek A RETURN TO NAPLES — Reorganization	STORMCAT ENERGY CORPORATION — Exit Financing	ORLEANS Building Trust Since 1918 — Reorganization
Angiotech — Debt Financing	Brunschwig & Fils — Acquisition	RIVIERA CASINO & HOTEL — Reorganization and Acquisition	Caritas — Acquisition

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Schulte Roth&Zabel

Distressed Debt Investing – An Overview

"Buy to the sound of cannons and sell to the sound of trumpets"
- Nathan Mayer Rothschild (1777-1836), 1810

"Buy when there's blood in the streets, even if the blood is your own."
- Nathan Mayer Rothschild, 1st Baron Rothschild (1840-1915), 1873

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I. Overview

Distressed debt investing has been recognized as a distinct investment style for over the last two decades. Over that period, returns have outperformed most traditional asset classes with lower volatility, with the HFR distressed index providing 12.7% annualized returns vs. 8.0% for the S&P 500. In this report we begin by outlining the return characteristics and styles of distressed investing. One of the questions that investors ask about distressed investing is whether they should view distressed investing as merely a cyclical / opportunistic allocation or if one can make a profitable long term allocation to the asset class. There is no question that distressed investing follows the economic and credit cycles, with periods of extraordinary opportunities and returns. However, we make the case that, to be successful, one needs to have an ongoing allocation in order to be involved in the early stages of the opportunities that arise. Because most classic distressed investing is inherently a secondary market strategy, there is a "J-curve" effect whereas the critical mass of debt instruments is transferred from par buyers to distressed investors well-before the bottom of the market. Moreover, there are always idiosyncratic opportunities that arise at any stage of the credit cycle. Finally, after reviewing the investment analytics applicable to distressed investing in developed and emerging markets, we provide an overview of the market elements we see that should give rise to an extremely large opportunity set for profitable distressed investing over the next five years.

II. What is "Distressed Debt"?

The two lead quotes are often cited and ascribed to the Rothschilds, although there is no proof of them ever uttering such words. Nonetheless, the Rothschild dynasty was noted for its contrarian investing style and they are the most famous institutionalized distressed investors in early financial market history.

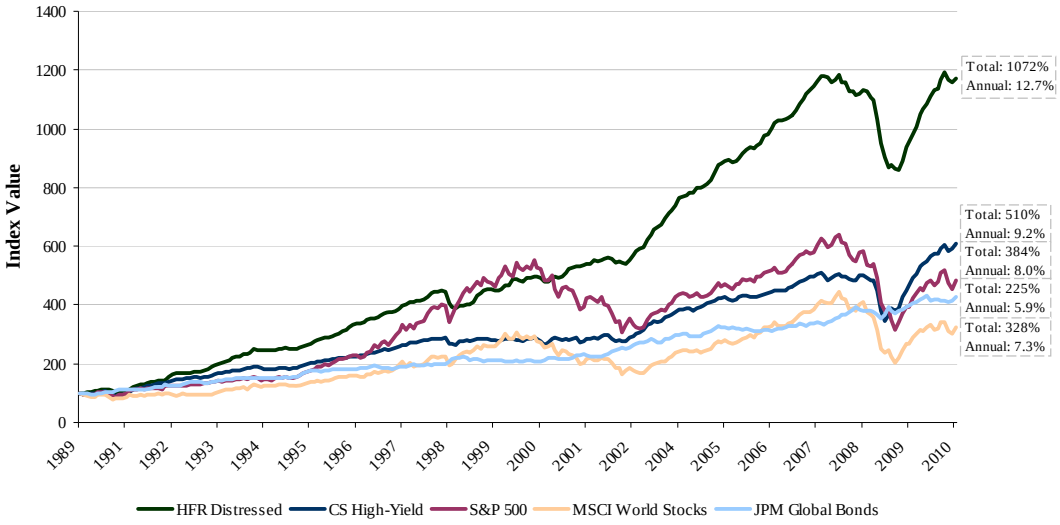
Distressed investing, at its most basic level, is a form of deep value investing typically with an event-driven element as well. Distressed investing can take many forms, although these days it is usually used in connection with distressed debt. One of the more widely accepted definitions of "distressed debt" is generally attributed to Martin Fridson, one of the deans of high-yield bond analysis. Mr. Fridson classified distressed debt as debt trading with a yield to maturity of greater than 1000 basis points more than the comparable underlying treasury security. Another commonly used criterion is debt that trades below 80 cents on the dollar. However, the distressed debt universe includes many other types of securities with different market prices, including defaulted fixed income instruments, stressed performing bonds, below-par bank loans, "busted" convertibles, credit default swaps, NPL portfolios, and post-restructuring equity, to name a few.

Distressed investing, sometimes pejoratively referred to as "vulture investing," began to be recognized as a distinct investment style in the late 1980s/early 1990s with the problems with the US thrift industry and the collapse of the burgeoning high yield debt market and Drexel Burnham Lambert in 1990, followed by the success of investors in the mid-1990s involved with the Resolution Trust Corporation and other forms of distressed investing.

III. Long-Term Return Profiles from Distressed Debt Investing

Distressed investors can find value across the full credit cycle and their performance is mostly driven by both the overall credit market and idiosyncratic credit events. Performance tends to be better during and after economic turnarounds when spreads tighten. This is when the profits from the successful restructuring can be reaped. Distressed hedge funds can make money in all stages of the market cycle, by shorting overvalued securities in frothy markets and by moving to extremely high levels of cash in order to maintain the "dry powder" necessary to take advantage of when the market turns and opportunities arise.

Exhibit 1: Performance Comparisons – Distressed Index vs. Traditional Indices (12/31/89 – 7/31/10)



Source: Gramercy, Bloomberg

Exhibits 1 and 2 show the relative returns of distressed investing – as measured by HFR's Distressed Debt Hedge Fund index – against the Credit Suisse high yield bond index, the S&P 500, the MSCI global equity index, and JP Morgan's global bond index for the 20+ years from December 31, 1989 through July 31, 2010. Distressed outperformed all of these indices by two to four times, with an annualized return of 12.7% vs. 8.0% for the S&P 500, with significantly lower volatility. Correlation of distressed debt with equity was fairly muted at 0.5, and non-correlated with the global bond index (see Exhibit 3).

Exhibit 2: Performance Metrics – Distressed Index vs. Traditional Indices (12/31/89 – 7/31/10)

HFRI Distressed Vs. Traditional Indices, 1/1/90 - 7/31/10					
	HFR Distressed	CS High-Yield	S&P 500	MSCI World Stocks	JPM Global Bonds
Total Return	1072.03%	510.26%	383.75%	225.03%	328.33%
Annualized Return	12.70%	9.18%	7.96%	5.89%	7.32%
Annualized Volatility	6.65%	8.63%	15.14%	15.81%	6.02%
Sharpe Ratio	1.32	0.61	0.26	0.12	0.56
Best Month	7.06%	10.08%	11.44%	11.90%	6.56%
Worst Month	(8.50%)	(15.84%)	(16.79%)	(19.79%)	(3.83%)

Source: Gramercy, Bloomberg

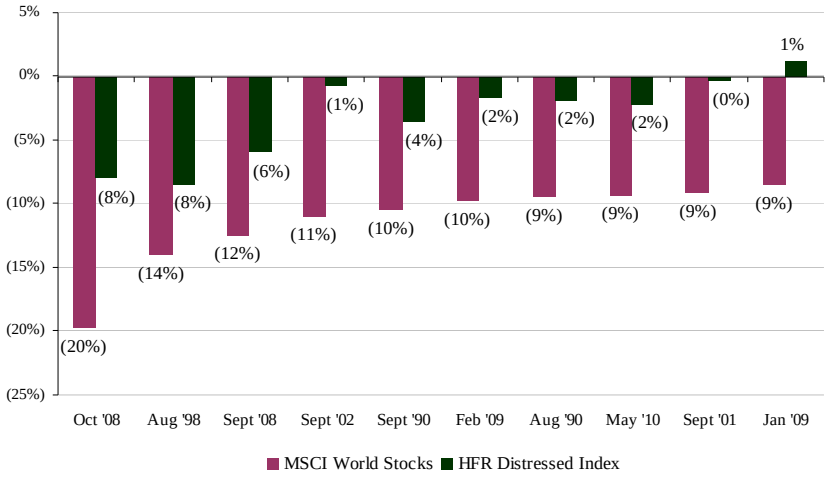
Exhibit 3: Correlation Statistics – Distressed Index vs. Traditional Indices (12/31/89 – 7/31/10)

Correlation of Distressed Index Vs. Traditional Indices, 1/1/90 to 7/31/10					
	HFR Distressed	CS High-Yield	S&P 500	MSCI World Stocks	JPM Global Bonds
HFR Distressed	*1.000*	***0.733***	***0.500***	***0.519***	***(0.037)***
CS High-Yield		*1.000*	***0.571***	***0.598***	***0.129***
S&P 500			*1.000*	***0.895***	***0.135***
MSCI World Stocks				*1.000*	***0.249***
JPM Global Bonds					*1.000*

Source: Gramercy, Bloomberg

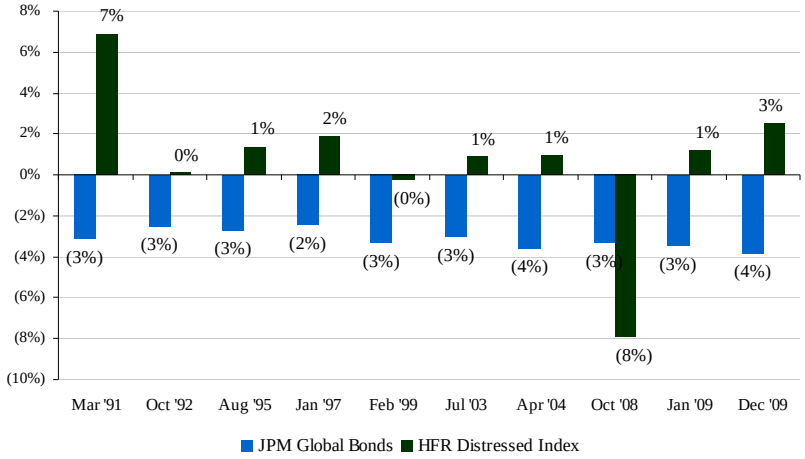
In addition to having low correlation with traditional investments, distressed debt also outperformed in virtually all of the worst months for performance for both global equity and debt over that 20 year period, as shown in Exhibits 4 and 5.

Exhibit 4: Distressed Debt Performance During Ten Worst Months for World Stocks



Source: Gramercy, Bloomberg

Exhibit 5: Distressed Debt Performance During Ten Worst Months for World Bonds



Source: Gramercy, Bloomberg

IV. Distressed Debt Strategies

One of the most common strategies for distressed debt investing is buying securities at a distressed price to what the investor believes is the net present value of the recovery. Typically, investors focus on high yield bonds and leveraged loans (bank debt of non-investment grade companies), but investors also will consider structured credit products (such as mortgage backed securities and CDOs), trade claims, leases, receivables, vendor financing, and other debt-like instruments. Within this typical strategy, there are generally two types of institutional investing sub-strategies: passive and active.

A **passive** strategy is more trading oriented and investment managers do not receive non-public information. As such, they are not engaged in the restructuring negotiations and are not locked from selling their securities. The strategy tends to focus on larger companies with liquid securities with a shorter time frame to exit. Passive managers view the asset class from a cyclical standpoint and typically invest opportunistically. Passive managers can also make money by shorting securities they believe will decline in price.

The **active** approach is divided between non-control and control. **Active non-control** investors are often members of a creditor committee but typically do not lead the restructuring. They will likely receive non-public information

and, as such, be restricted from selling their securities until after the restructuring process is complete. **Active control** managers will look to influence the process through a blocking position (size depends on the jurisdiction of the bankruptcy). They also look to play an active role by taking a seat on the board of a company and work closely with management. Both non-control and control active investors view the asset class in all credit environments.

In addition to more traditional forms of distressed corporate debt investing, there exist numerous strategies that distressed investors can utilize. We outline a few of these briefly.

Debtor-in-Possession Financing (DIP Financing), for example, is a unique form of working capital provided to companies in Chapter 11. This form of working capital is secured and usually more senior than all other securities issued by the company. It is often thought of as a life line provided to the company in dire need of capital. DIP financing typically has a maturity of between 12-24 months and allows the company to operate while restructuring its obligations. Such financing can ensure a better overall recovery for other creditors throughout the capital structure, as the obligor can use the rescue financing to hopefully avoid a liquidation and remain an on going concern. DIP financing is often provided by investors who have exposure in other parts of the capital structure and view the more senior lending as a way to increase the recovery value of their existing exposure. Additionally, DIP lending has become quite common among hedge funds and private equity funds and not just banks.

A similar type of strategy is **rescue financing** which is used to alleviate working capital issues for a company that might otherwise have to file for Chapter 11. Rescue financing can come in the form of secured lending and consist of equity and or warrants. Significant value can be garnered by providing desperately needed capital to a company that can in turn overcome liquidity constraints and turn around its business.

Another strategy employed by investors is a **short executed though credit default swaps** (CDS). Credit default swaps are derivatives whose value increases/decreases inversely with the underlying security. For example, if an investor has a bearish view of a company and believes it may default, purchasing a CDS contract will reflect that change in value.

Capital structure arbitrage is a strategy also commonly used by distressed investors. This strategy involves identifying mis-priced securities in different areas of the capital structure and taking advantage of the arbitrage opportunity. For instance, after considerable analysis of recovery valuation, discount rates (yields), asset coverage and a thorough understanding of all claimants within each class an investor may buy senior secured debt and short a security that ranks lower in the capital structure. Such a trade would profit if there is not enough to go around, that is to say either through liquidation or a restructuring the recovery on the senior instrument is significantly higher than the junior. Specifically, the difference in the recovery value of the two instruments is greater than the prevailing market price difference at the time the trade in implemented. Another capital arbitrage trade could include buying unsecured bonds and shorting the equity if the investor believes, for example, the common shareholders will get wiped out and there is something left over for bondholders.

There has been an active market for investments in **NPL portfolios** of defaulted bank loans – typically mortgage, commercial, and consumer loans – since the early 1990s with the RTC in the US. Such portfolios usually are offered only after significant pressure by regulators for banks to clean up their balance sheets (or after a bank is actually intervened) and there have been active markets in the last 20 years in the US, China, Thailand, Germany, and Mexico. One of the impediments to NPL investing is that it requires active servicing in order to realize value, an administrative and people-intensive burden many investors are unwilling to take on. In the most recent debt crisis, **securitizations and CDOs** offered analogous opportunities to specialists willing and capable of doing the appropriate analysis and work through the underlying instruments.

Post-reorganization equities can often present compelling risk-reward opportunities for a value investor. However, even though stocks of the companies that recently emerged from Chapter 11 can provide outsized gains to investors, there are issues such as concentrated holdings, illiquidity, lack of coverage, and the bankruptcy stigma that can make this a difficult investment strategy. For example, in their 2004 study “A Chapter after Chapter 11”, Lee and Cunney of JP Morgan looked at 117 companies that came out of Chapter 11 between 1988 and 2003. They found that relative performance (to the S&P 500) of these companies’ stocks averaged 85% in the first year after emergence. However, the same study showed that volatility of these stocks had been very high, with only 50% of the equities outperforming during the period.

V. Strategic Considerations

The credit cycle is a large driver for opportunities in distressed investing. Distressed opportunities are also caused by factors specific to certain countries or industries, or even individual companies. There is a fairly predictable pattern of distress and recovery on both a macro level with the economic cycle (see Exhibit 6) and on a micro level on a debtor specific basis.

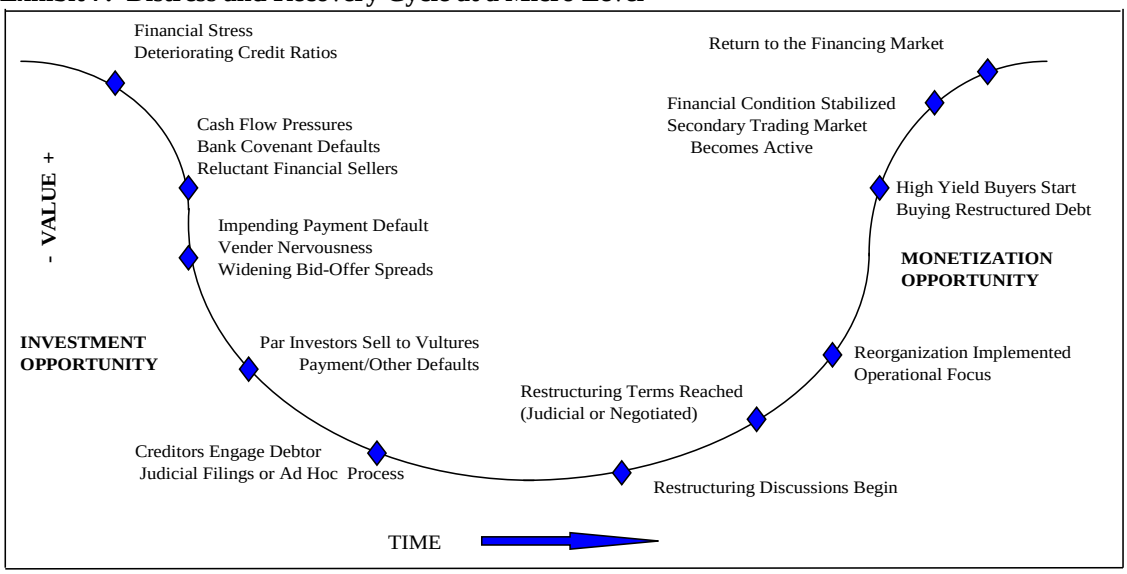
Exhibit 6: Macroeconomic Equity and Credit Cycles

Source: Citi Investment Research, Bloomberg, Gramercy

Phase	Equities	Credit	Description and Market Dynamic
1	↓	↑	Improving economy. Credit spreads tighten (i.e. credit markets rise) while equity markets still fall: Most interesting phase to be long distressed or credit risk in general as spreads quickly tighten. Balance sheets are being repaired and troubled companies restructured. In this situation credit outperforms equities.
2	↑	↑	Booming economy. Credit spreads continue to tighten while equity markets are rising: Everybody is happy and volatility across all asset classes is low or declining.
3	↑	↓	Softening economy. Credit spreads are rising (i.e. credit markets fall) while equity markets still rise: Late stage of the equity bull market as credit enters the emerging bear market. In this phase, corporate debt starts growing faster than profits and volatility is increasing.
4	↓	↓	Recession. Both equity and credit are in a bear market: This phase is bad for all risky asset classes. During this phase, investors can slowly build up exposure in the credit markets before phase 1 begins again. Entering the markets in this phase can yield the best future returns but requires patience as initial returns are often negative (J-curve effect).

Just as there is a macro cycle that needs to be considered in the evaluation of the magnitude of distressed opportunities, there is also a micro cycle that needs to be considered (see Exhibit 7). It is important to note that, from a distressed debt investors' standpoint, it is virtually impossible to buy at the bottom. Not only is it hard to know when the bottom is, but more importantly, the most significant trades in the secondary market typically occur prior to the commencement of the restructuring process and often even prior to the actual default. In order for a distressed investor to be able to purchase a significant position in the secondary market, they must be prepared to invest as the paper is offered, despite the "J-curve" effect where prices are likely to fall further until the restructuring process is commenced, which once completed will permit monetization at what will ultimately be a much higher level. It also suggests that a distressed investor needs to maintain significant "dry powder" in order to have sufficient capital for investment available when the opportunity arises.

Exhibit 7: Distress and Recovery Cycle at a Micro Level



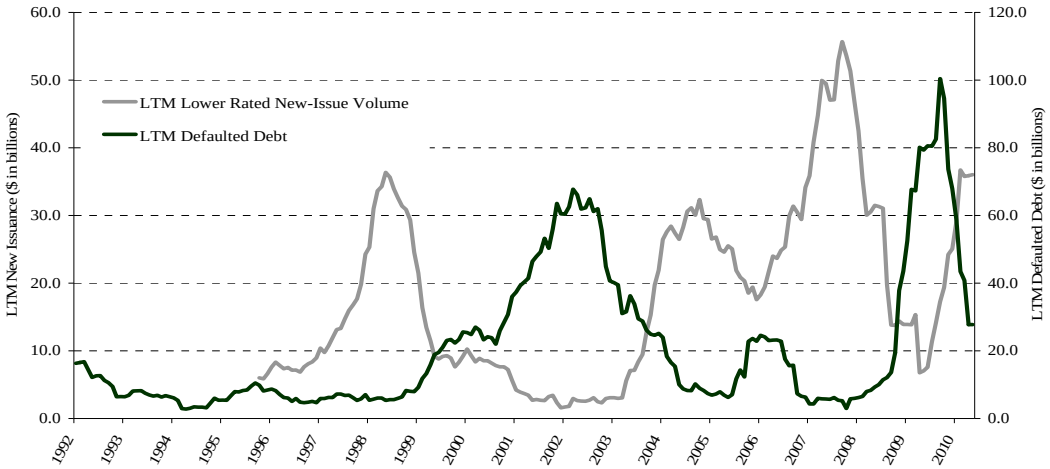
Source: Gramercy

A. The Credit Cycle: Easy credit policies as a driver of systemic distress

The credit cycle typically starts when low interest rates and lenient credit standards create incentives for companies to raise funds to start new business projects. The easy credit environment is often accompanied by the expansion of the money supply by financial institutions and central banks. This sudden increase in monetary liquidity leads to a temporary expansion in corporate earnings, asset prices, and consumer price indexes. However, when the money supply decelerates or central banks raise interest rates, usually to ease inflationary pressures, the economy is pushed into recession or deflation. Industries that benefited from the easy monetary environment and companies with stressed balance sheets suffer the most and have to restructure and liquidate. Central banks intervene by lowering interest rates and increasing the money supply, thereby restarting the credit cycle.

Exhibit 8 shows that easy credit has been a predecessor of default and distress over the last two decades. The spikes in default debt in 2002 and 2008 were both preceded by sharp increases in new low-rated bond issue volumes that reached peaked at $31.0 billion in 1998 and $53.6 billion in 2007. Both these periods were characterized by a sharp expansion of the monetary base and/or reduction in interest rates. As explained above, the current period of low interest rates and abundant liquidity supplied by the central banks is planting the seeds for the next period of distress. While it is useful to take an opportunistic approach and monitor the credit cycle to overweight investment allocations into distress, the time lags between the stages as well as the policy-makers decisions are very difficult to predict, although the default peak has typically been 2-5 years after the high-yield issuance peak.

Exhibit 8: New Issue Volume vs. Defaulted Debt



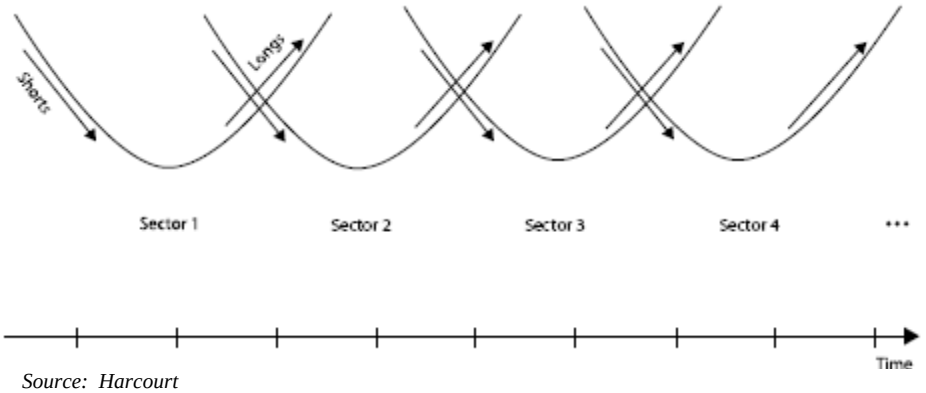
Source: JP Morgan, Default Monitor, High Yield, and Leveraged Loan Research, August 2, 2010

A result the cyclicality of credit supply is concentrated debt maturity schedules. At the top of the previous lax credit cycle in 2007, there were many high yield bonds and leveraged loans issues, which are commonly structured with a five, seven, or ten year maturity. Accordingly, the next wall of debt maturities is coming in 2012-2015. This technical factor creates an enormous amount of debt that needs to be refinanced and will likely put pressure on the financial system. This next wave of distress will be further compounded if monetary conditions are tight and the supply of credit is restricted.

B. Idiosyncratic factors as cause of company, industry or regional distress

A second source of distressed investment opportunities is those that arise from idiosyncratic factors that impact specific companies, industries and countries. These factors include unsuccessful business plans, technological obsolescence, changes in competitive landscape, political crisis, and natural disasters, among others. These idiosyncratic opportunities can arise in a period of systemic distress or even in boom times. Exhibit 9 presents a stylized representation of the impact of these idiosyncratic opportunities for a distressed portfolio. Specialization in an industry or region is crucial for investors in order to have a competitive advantage. For example, distressed investing in emerging markets requires a very different skill set compared to those in the U.S. as most restructurings are executed out-of-court given the deficiencies of local bankruptcy laws.

Exhibit 9 Stylized Impact on a Portfolio Level of Idiosyncratic Defaults Over Time



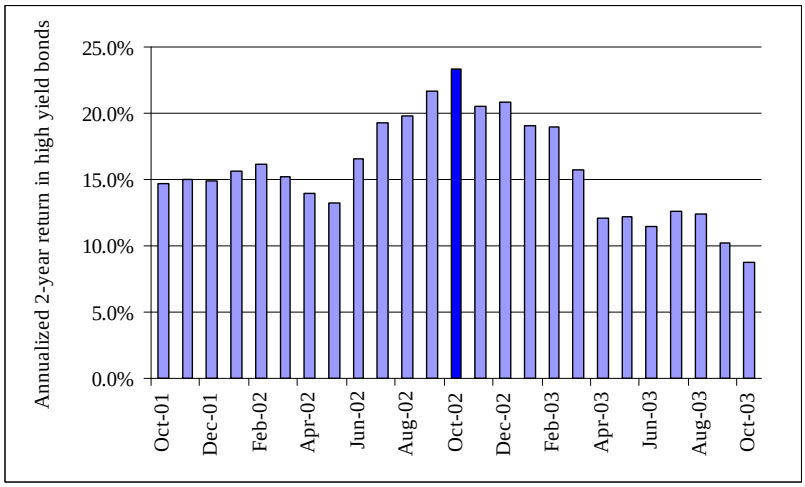
Source: Harcourt

C: Should investors make a long term allocation to distressed or merely a cyclical / opportunistic allocation?

One of the questions that investors ask about distressed investing is whether they should view distressed investing as merely a cyclical / opportunistic allocation or if one can make a profitable long term allocation to the asset class. There is no doubt that distressed investing follows the economic and credit cycles, with periods of extraordinary opportunities and returns. However, there are technical factors inherent in most distressed investing which suggest that, to be successful, one needs to have an ongoing allocation in order to be involved in the early stages of the opportunities that arise. Because most classic distressed investing is inherently a secondary market strategy, there is a "J-curve" effect whereas the the critical mass of debt instruments is transferred from par buyers to distressed investors well-before the bottom of the market.

It is important for investors to have cash ready to deploy as distressed opportunities arise and "forced selling" (the sale by par investors who are not allowed to hold defaulted or non-investment grade securities) puts pressure on asset values. Investors that allocate cash to distress opportunities late can easily miss the most attractive opportunities. Exhibit 10 shows the difference between early and late investing after the 2001/2002 recession (it is still too early to calculate the impact in the most recent downturn). Although there is no pure data on defaulted debt, we use high yields bonds with a two year holding period as a proxy. The analysis demonstrates that the optimal date to invest would have been October 2002 by generating a two-year annualized return of 23.4%. As it is difficult to capture the bottom of a credit cycle, it is better to invest early rather than late. In the aforementioned period, the average two year annualized return for investing 1-12 months earlier than the optimal month was 16.3%, whereas the average for investing 1-12 months later was 14.6%.

Exhibit 10: Historical Analysis: The Need to Invest Early in a Distressed Cycle



Investment date	Annualized 2-year return	Difference from optimal month
Oct-01	14.7%	-8.7%
Jan-02	15.6%	-7.7%
Apr-02	14.0%	-9.3%
Jul-02	19.3%	-4.1%
Oct-02	23.4%	0.0%
Jan-03	19.1%	-4.3%
Apr-03	12.1%	-11.2%
Jul-03	12.6%	-10.7%
Oct-03	8.7%	-14.7%

Source: JPMorgan Global High Yield Index

The second reason for maintaining an ongoing allocation is that there is virtually always some form of investment of distressed debt opportunities. These can be opportunities to short the debt of companies which appear to be heading for difficulties or investing in the idiosyncratic situations that arise. A prudent distressed manager will likely maintain a significant cash balance through boom periods when there is no systemic distress. The HFR distressed hedge fund index performance figures from Exhibits 1 and 2 above reflect long-term investing over several boom and bust periods. Gramercy has also done an 11 year historical analysis of the market for the spectrum of emerging markets debt (sovereign dollar and local currency, corporate, and distressed) captured in a long-only allocation product and found four episodes of outperformance of the distressed component. The product permits a reallocation on a basis that few investors in outside managers would be able to accomplish and highlights the need to be involved when the opportunity arises (see Appendix 1 for a further discussion).

VI. Keys to Investment Analysis and Performance

The key to distressed debt investing is to identify restructuring situations that are mispriced relative to the value of the underlying business franchise. However, just because an asset is cheap, it does not mean it is undervalued or that its intrinsic value will likely be achieved. The key to successful distressed investing is buying at the right price. As such, investors need to consider several key issues that are indispensable to distressed investing, including both valuation analysis and process risk. We bifurcate our discussion between the developed countries and the emerging markets, as the market and legal context is very different in each.

A. Analysis of a Distressed Investment in the Developed Markets

Distressed investing in the developed markets often is involved in some form of judicial insolvency procedure. Although most people think about Chapter 11 bankruptcy as the template for a restructuring procedure, each country has its own rules, many of which diverge quite significantly from Chapter 11. This is based not only on the very distinct cultural differences among various countries, but also the differences between common law and civil law procedures. The US bankruptcy code developed in the 1800s (with the first permanent code established in 1898) was based on English bankruptcy laws that were first created in 1543. Until recently, many countries' bankruptcy codes reflected a criminal presumption (think "debtors prisons") and a moral stigma around not paying one's debts, and were also more oriented to liquidation instead of reorganization. Germany only introduced a reorganization procedure in 1999, although France has had a system aimed at job protection for several decades. This means that both creditors and debtors remain reluctant in many jurisdictions outside the US and UK to rely on a legal proceeding to resolve an insolvency as court proceedings remain untested or poorly understood.

Chapter 11, which was revised significantly in 1978 to generally the process we know today, is aimed at preserving the estate for the benefit of all stakeholders. Reflecting US capitalism, the rules embrace "creative destruction" while offering creditors protection through the "absolute priority" rule, which requires senior creditors to be fully compensated before junior creditors receive anything, and which almost always wipes out the interests of equity holders as debt is crammed down. There has been a trend in the last 20 years toward a revision of bankruptcy codes globally more along lines of Chapter 11, although cultural differences in places like Japan have meant that the revised proceedings are not always used or accepted. Although any further discussion of bankruptcy codes is beyond the scope of this brief report, we offer a short discussion on Chapter 11 in Appendix 2. In the US, a Chapter

15 proceeding was introduced to ensure coordination with recognized foreign proceedings but it is largely a mechanism to defer to the foreign court.

From a US distressed investors' perspective, analyzing a defaulted corporate credit in Chapter 11 starts with a fundamental analysis of the enterprise value on a going concern basis. The analysis involves a combination of both fixed income and equity research skills, to understand both the sustainable debt level as well as the future prospects of the enterprise, respectively. The capital structure is a blank slate as the company can be expected to emerge as an "investment grade" company with markedly lower debt service requirements. From there, the investor needs to analyze the legal standing of the debt instruments to understand where they stand in the priority of the capital structure. Simplistically, it would not be atypical for senior secured bank loans to emerge unimpaired (albeit perhaps extended), senior unsecured bonds exchanged for all or most of the common equity, and junior creditors and shareholders wiped out. As there is significant information in the public domain and the court proceedings are reasonably transparent, most investors have similar information and the legal process is fairly predictable. As outlined in Section IV, here are a variety of strategies that can be deployed such as providing DIP financing or buying debt in the secondary market (and at different priorities within the capital structure), each of which has its own level of risk and return. The primary risks include miscalculating the enterprise value (due to further operational difficulties or fraud), having the process take longer than expected, or reducing return opportunities by paying too much because of competitive pressures in the secondary market.

B. Analysis of a Distressed Investment in Emerging Markets

Broadly, investing in distressed situations in the emerging markets requires a very different approach than that in the developed markets. If an investor needs to be cognizant that the process will not be governed by Chapter 11 rules when involved in situations in continental Europe or Japan, then it is even more imperative when operating in Latin America, Asia, or Eastern Europe. First, most companies (including the largest) in emerging markets are still controlled and managed by families for whom the equity is "patrimony," such that they are unlikely to cede equity control in a reorganization, in effect putting themselves at the top of the capital priority structure. Second, although many countries have updated their insolvency codes in the last decade, the rules remain untested, courts are at best unsophisticated, and there is often a level of local corruption that puts an international investor playing by the rules at a disadvantage. Third, there are political issues that can limit the recoveries of international creditors for national interest, populist, or political interest reasons. Finally, by their nature, these are usually cross-border cases (international investors in bonds or loans governed by New York or UK law issued by an emerging markets country or company), which introduces a whole new level of complexities and jurisdictional issues.

Most emerging markets restructurings take place outside of a judicial proceeding. Accordingly, while fundamental financial and economic analysis is again the starting point for assessing value, it merely tells the investor what they deserve to get, not what they can expect to get. Creditors will only get what they negotiate. Accordingly, the "process risk" analysis is exceedingly important as it is these elements that will determine recoveries.

The first consideration is trying to gain an understanding of what the debtor's controlling shareholders (or finance minister and other politicians in case of a sovereign default) want out of the process and how they are likely to handle the negotiation. The importance of this is heightened since the key discussions will occur face to face without a judge or trustee refereeing the process. The second element is to develop a sense of the other creditors in the process, since most of the emerging markets restructurings involving international investors are fairly large and have a diverse creditor base. It is important to be able to bring together behind one strategy commercial bankers, hedge fund managers, institutional investors, and private bank clients in order to effectively negotiate. Finally, it is essential to identify the negotiating leverage that creditors have upfront, so that the debtor negotiates in good faith. This leverage can include on shore and international litigation, offshore assets, business interruption risk, or political pressure. Over the years, a standard operating procedure has been developed where informal creditor committees have been accepted by EM debtors as necessary and beneficial to achieving a balanced restructuring resolution. In asking for concessions from creditors, debtors agree to reimburse the expenses of attorneys and financial advisors to facilitate a restructuring, and in many cases the there can be a resolution in a year or less if there is a good faith effort to achieve it (although 18-24 months is more typical).

Because there are relatively few distressed investors in emerging markets, there is less competition for secondary market paper and thus prices of debt instruments tend to be significantly lower than what you would expect in the developed markets. This permits greater flexibility in reaching an out of court settlement with the debtor and also permits a higher expected return profile. Although the lower certainty of the process can be a risk, especially to investors unfamiliar with the different cultural and jurisdictional issues, it typically manifests itself in things taking

longer to resolve as opposed to a company being liquidated or the investment being a total write-off. This risk goes up significantly if the underlying debt instruments are with much smaller companies, in local currency governed solely under local law, and so it is important to carefully consider the process risk elements before engaging in this.

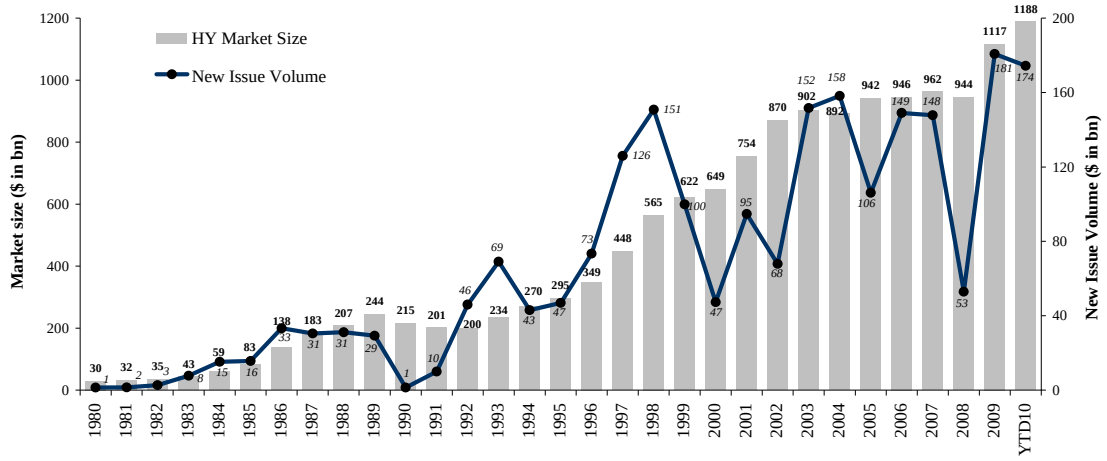
VII. Opportunities and Outlook for Distressed Debt Investing

Despite the fact that the high-yield market and CCC-rated debt generated returns of over 50% and 90% in 2009, respectively, we believe distressed debt will continue to be interesting in the near future given the slowdown of the global economy and the significant amount of looming maturities. We believe we are still in the early-middle stages for distressed investment opportunities that should last for at least another 4-5 years.

A. Developed Markets – US and Europe

There is still uncertainty related to the effectiveness of the stimulus in the developed markets and whether it has created lasting demand for goods and services. Moreover, while the capital markets were all but closed in the second half of 2008, there has been record high yield issuance in the US since April 2009 (see Exhibits 11 and 12), setting the stage for a wave of defaults in several years (due to the time lags illustrated in Exhibit 8).

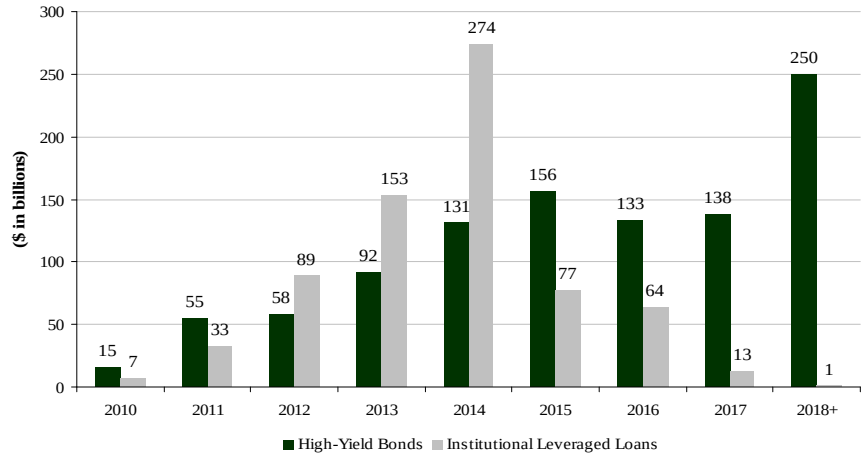
Exhibit 11: High-Yield Market Size and New Issue Volume



Source: JP Morgan, Default Monitor, High Yield, and Leveraged Loan Research, August 2, 2010

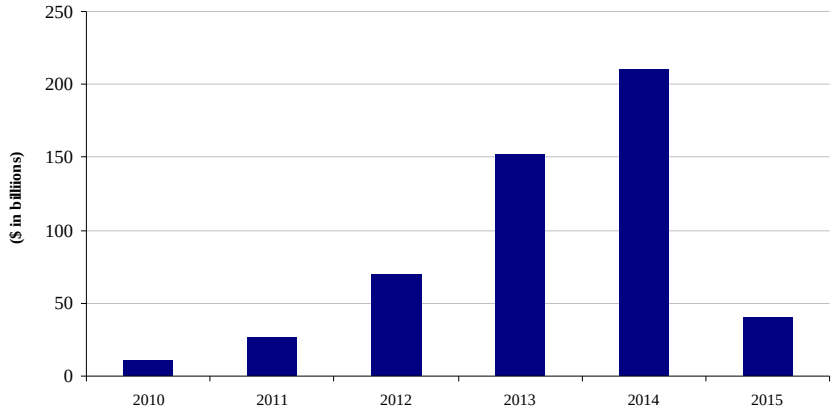
The maturity profile of leveraged loans originated in the private equity/LBO frenzy of 2005-08 suggests a distressed tsunami will not only come from the bond markets (see Exhibit 13). As a wall of maturities looms in 2013 and 2014, the "amend and extend" transactions that have allowed banks and their debtors to "kick the can down the road" will no longer be feasible and many of these deals, written at initial leverage terms of 6-9x leverage, will require a permanent fix.

Exhibit 12: Maturity Schedule of High Yield Bonds and Leveraged Loans



Source: JP Morgan, Default Monitor, High Yield, and Leveraged Loan Research, August 2, 2010

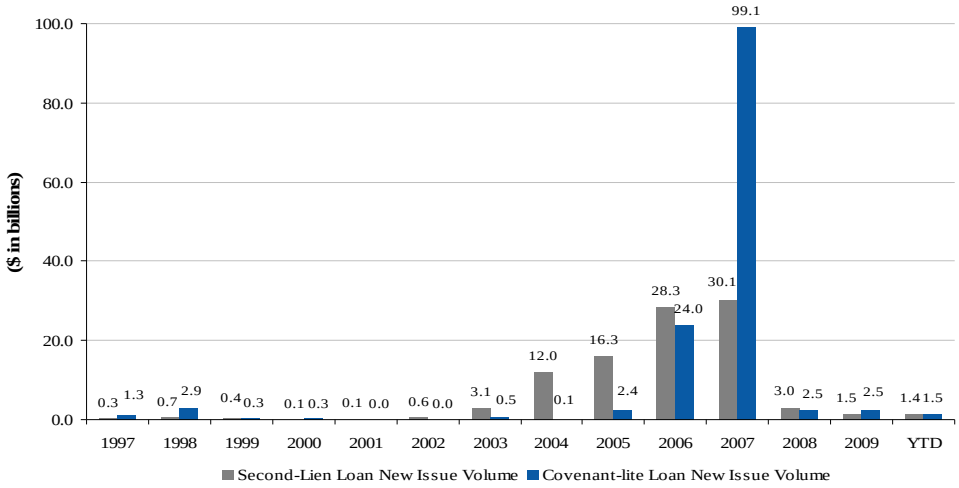
Exhibit 13: U.S. Leveraged Loan Maturity Profile from Deals Done in 2006-08



Source: Markit, JPMorgan

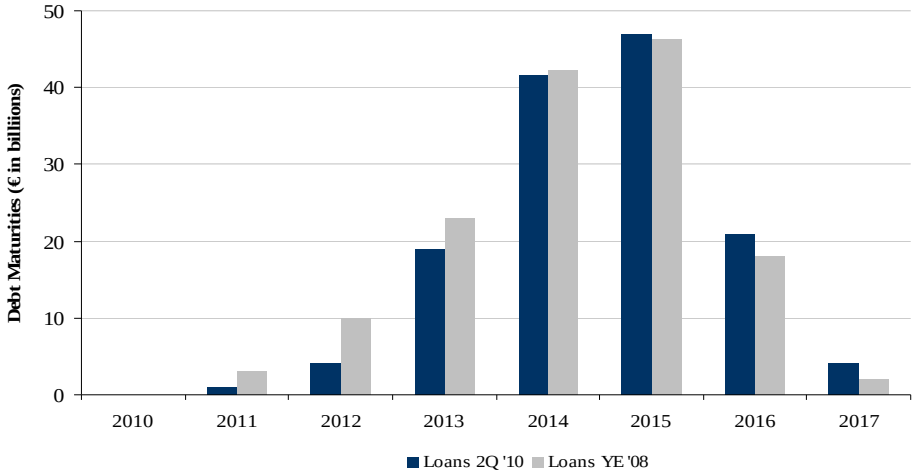
Second lien and "covenant-lite" structures (see Exhibit 14) will likely complicate recovery actions by lenders over this upcoming period, but all signs point to a massive next wave of corporate defaults in a couple years, far surpassing the volume seen in the brief shake-out of 2008/early 2009. We also note that this will not only be a US phenomenon but that there was also a commensurate amount of risky lending in Europe (see Exhibit 15).

Exhibit 14: Lending Standards Relaxed in Times of Easy Money



Source: JP Morgan, Default Monitor, High Yield, and Leveraged Loan Research, August 2, 2010

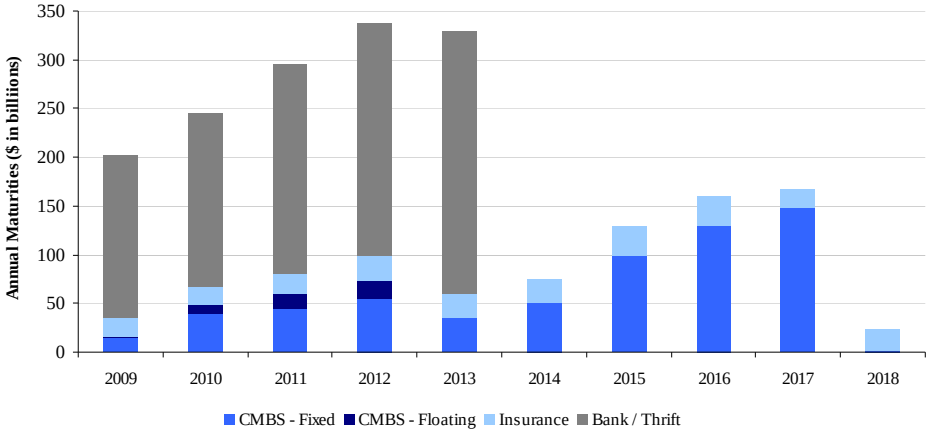
Exhibit 15: European Loan Maturity Profile



Source: Bank of America

Furthermore, the same credit bubble has inflated the commercial real estate sector, and a large percentage of these are likely to run into default. Indeed, during 2009, only 40% of post-2002 originated maturing CMBS loans paid off on their scheduled maturity dates. Deutsche Bank estimates that close to $1 trillion of commercial mortgages will mature over the next few years (see Exhibit 16).

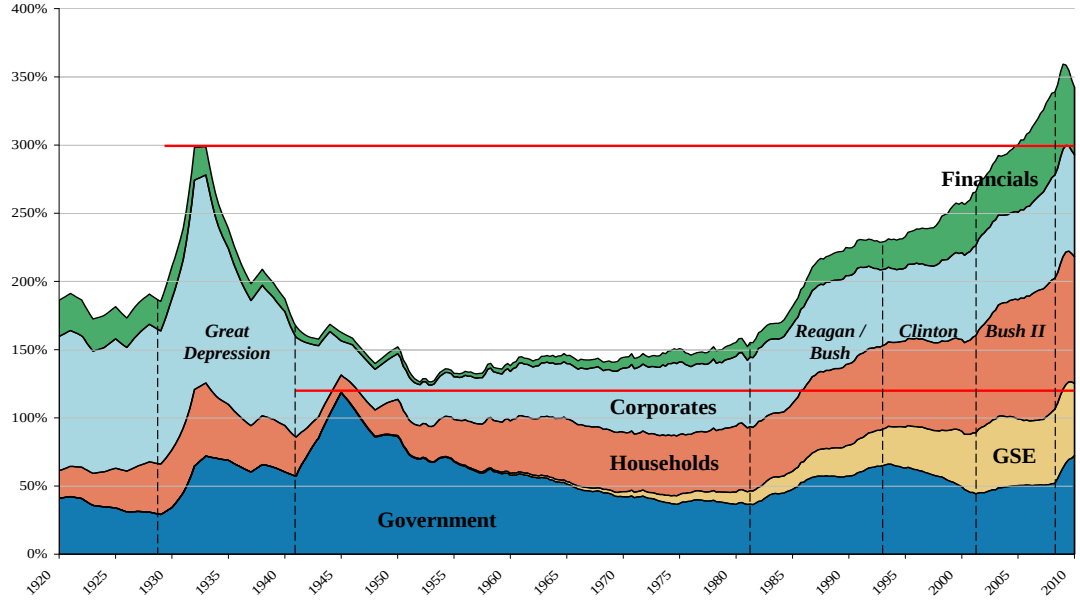
Exhibit 16: Commercial Mortgage Securities Maturities



Source: Deutsche Bank

Pundits have named the economic and financial market downturn over the last two years as "The Great Deleveraging." The term "deleveraging" refers to the unwinding of liabilities and/or debt, and since the onset of the securitized mortgage in August 2007 it has become common wisdom that the US and global economies were paying down debt in aggregate, which would eventually normalize conditions so that economic growth and financial market performance could resume. In the US, it has often been stated that the deleveraging is taking place in all private sectors, offset by "temporary" stimulus by the government to cushion the impact: the consumer is paying down mortgage, credit card and other forms of debt, corporate America is now flush with cash, and banks and financials have recapitalized themselves and are rolling off securitization exposures and not replacing them. Unfortunately, long-term statistics regarding US total credit market debt to GDP tell a different story (see Exhibit 17).

Exhibit 17: US Total Credit Market Debt to GDP Ratio 1920-2010



Source: Morgan Stanley, Federal Reserve, BEA, 'The Statistical History of the United States, From Colonial Times to the Present', by Ben Wattenberg, 1976

During the Great Depression and New Deal programs of the 1930s, total credit market debt as a percentage of GDP peaked at 300% of GDP. At the peak in the first quarter of 2009, it stood at $52.9 trillion, or 360% of GDP. At $52.1 trillion at the end of the first quarter 2010, it has only been reduced by 1.5%. The US government's outstanding debt (direct and GSE) to GDP remains higher today than it was at the end of World War II, and this does not include

contingent liabilities such as social security and medicare which may represent as much as another $45-50 trillion. And other developed countries may be similarly overlevered, with Ireland having $1.8 trillion of debt against GDP of $200 billion (900% ratio), the UK having $10.5 trillion of debt against GDP of $2.3 trillion (456%) and conservative Switzerland with a debt of $1.3 trillion versus GDP of $300 billion (433%).

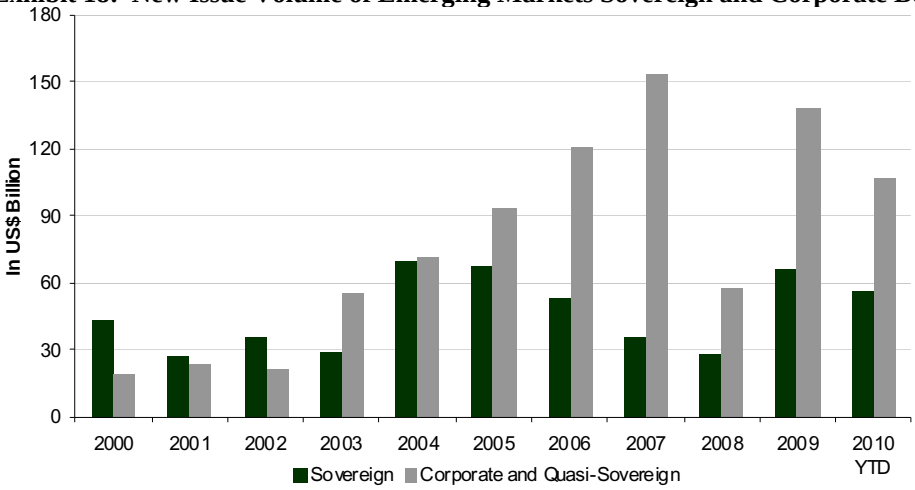
We draw three conclusions about the impact of this leverage on prospects for distressed investing in the developed markets. First, there has been very little deleveraging to date in the overall US economy. Instead, funded by temporary government stimulus programs, the private sector has deferred the day of pain, and fundamental restructurings based on delevered asset values have yet to take place. Second, the sharp rebound in financial markets in 2009 was due to the application of government stimulus capital to the purchase of financial markets instruments and not due to a fundamental investment in the real economy or a revaluation of investors' true appetite for risk assets. Third, while it is highly likely that there will be a deluge of distressed debt in the next five years, the true economic backdrop is likely to be anemic, especially as stimulus programs are slowly removed and true deleveraging begins to occur. This is likely to cap the upside of performance since there will be pressure on asset values, unless investment entry prices are reduced accordingly.

B. Emerging Markets – Latin America, CEEMEA, and Asia

There are many characteristics that make investing in EM distressed debt particularly attractive. Political dynamics, economic changes, structural factors, and an evolving investor base all result in high information asymmetries, leading to strong pricing inefficiency. In addition, there are few dedicated players in the space, allowing a manager with extensive expertise to capitalize on the wealth of opportunities and achieve outsized return level due to the lack of competition from other investors.

Similar to the situation in the developed markets, there was massive issuance of bonds and loans in emerging markets in the 2005-07 period, and volumes in 2009-10 nearly reached the 2007 peak (see Exhibit 18). There is an extremely high maturity schedule through 2013 (see Exhibit 19), with $1.02 trillion in emerging markets corporate and sovereign maturities over the next three years, or 40% of outstanding emerging markets external debt.

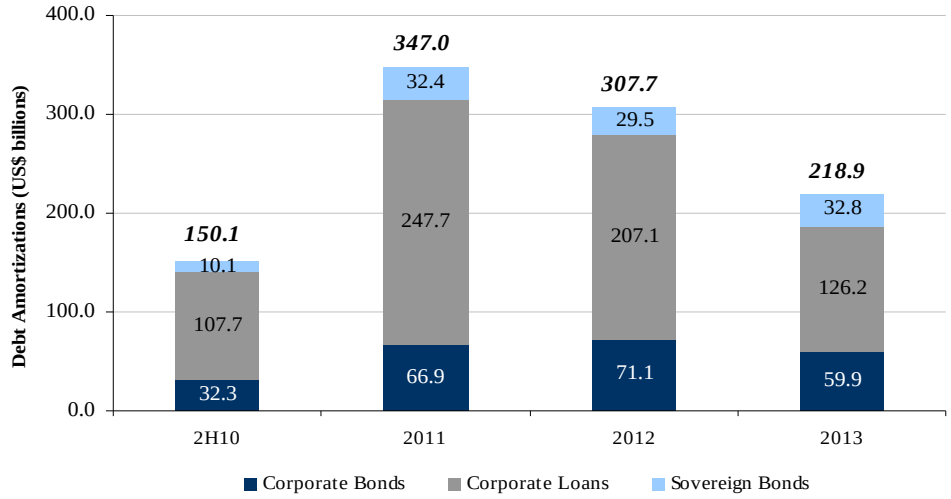
Exhibit 18: New Issue Volume of Emerging Markets Sovereign and Corporate Bonds



Source: ING

Although the breadth of the current and upcoming market opportunities is characterized by the same kind of maturity bulge as seen in the developed markets, there are some significant differences in the nature of the underlying assets. First, and most importantly, the catalyst for default is less likely to be due to the poor credit metrics of the individual debtor and more of what we perceive to be a lack of risk appetite for emerging markets credit by international investors which will preclude refinancing. This is crucial as local capital markets in emerging markets are at best undeveloped and, outside of China, few developing countries have banking systems that provide any significant capital to local private companies. Both the capital markets and leverage loan markets are going to be focused on the problems in the developed markets of the US and Europe and we expect there will be little interest in searching for yield and providing refinancing for the maturing debt in the emerging markets.

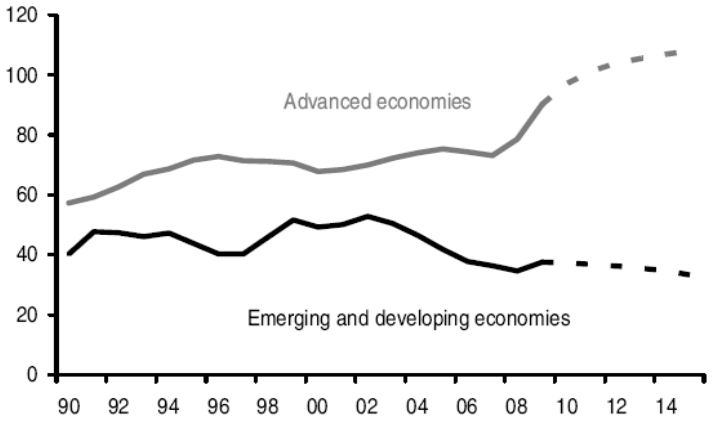
Exhibit 19: Maturity Schedule of Emerging Markets Bonds and Loans



Source: ING, Global External Funding Outlook, November 2009

Second, most of the borrowers/issuers in emerging markets typically have far better individual credit metrics than developed country debtors. While private equity and LBO financings were being done in the US and Europe at 6-9x leverage in 2005-08, emerging markets deals were still being done at more standard 3-4x leverage levels. Finally, the economies of the emerging markets are in far better financial condition than most of those in the developed world which should provide support for the underlying rebound of the debtors once they get the liquidity relief (see Exhibit 20).

Exhibit 20: Debt-to-GDP Ratios of Developed *vs.* Emerging Markets Countries



Source: IMF (dashed lines are IMF forecasts)

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The research analyst(s) on the cover of this report certifies that: (1) all of the views expressed in this report accurately reflect his or her personal views about any and all of the subject securities or issuers; and (2) no part of any of the research analyst's compensation was, is, or will be directly or indirectly related to the specific recommendations or views expressed by the research analyst(s) in this report.

Appendix 1: Emerging Markets Debt Allocation Model

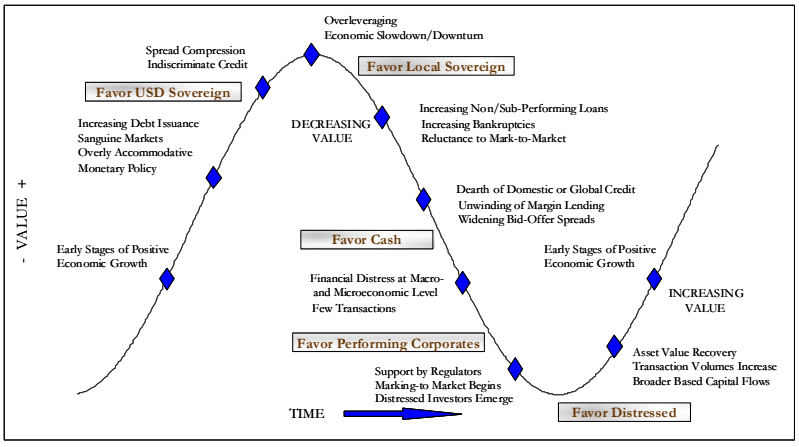
Emerging markets investing has developed into a full spectrum of investment opportunities which spans USD sovereign to local currency markets all the way to performing corporates and distressed situations. Gramercy has analyzed the investment cycle and the excess return potential by allocating based on a growth model signal among these four sectors for the emerging markets debt universe. We charted out the outperformance cycles (see Exhibit A1) for EM debt investing and find that cycles tend to last 1-2 years and move with the global investment trends.

Exhibit A1: Quartile rankings of the EMD subsectors over 6 month periods

	Asset Class, Semi-Annual Return (%)			
	1st Quartile	2nd Quartile	3rd Quartile	4th Quartile
12/1/98	GBI-EM, 16%	CEMBI IG, 2%	CEMBI HY,(9%)	EMBIG,(11%)
6/30/99	CEMBI HY, 12%	EMBIG, 10%	GBI-EM, 7%	CEMBI IG, 6%
12/31/99	EMBIG, 13%	CEMBI HY, 9%	GBI-EM, 5%	CEMBI IG, 4%
6/30/00	EMBIG, 7%	CEMBI HY, 6%	CEMBI IG, 6%	GBI-EM, 0%
12/31/00	CEMBI IG, 8%	EMBIG, 7%	GBI-EM, 2%	CEMBI HY,(1%)
6/30/01	CEMBI IG, 8%	EMBIG, 6%	CEMBI HY, 1%	GBI-EM,(0%)
12/31/01	CEMBI IG, 3%	GBI-EM, 3%	EMBIG,(4%)	CEMBI HY,(4%)
6/30/02	GBI-EM, 11%	CEMBI IG, 3%	EMBIG, 1%	CEMBI HY,(13%)
12/31/02	GBI-EM, 16%	CEMBI HY, 15%	EMBIG, 12%	CEMBI IG, 9%
6/30/03	CEMBI HY, 22%	EMBIG, 17%	GBI-EM, 12%	CEMBI IG, 9%
12/31/03	CEMBI HY, 9%	EMBIG, 7%	GBI-EM, 6%	CEMBI IG, 2%
6/30/04	CEMBI HY, 3%	GBI-EM, 1%	CEMBI IG, 0%	EMBIG,(2%)
12/31/04	GBI-EM, 22%	EMBIG, 14%	CEMBI HY, 14%	CEMBI IG, 9%
6/30/05	EMBIG, 5%	CEMBI HY, 5%	CEMBI IG, 4%	GBI-EM,(1%)
12/31/05	EMBIG, 5%	GBI-EM, 5%	CEMBI HY, 5%	CEMBI IG, 1%
6/30/06	CEMBI HY, 1%	EMBIG,(1%)	GBI-EM,(1%)	CEMBI IG,(1%)
12/31/06	GBI-EM, 14%	EMBIG, 11%	CEMBI HY, 9%	CEMBI IG, 7%
6/30/07	GBI-EM, 9%	CEMBI HY, 4%	CEMBI IG, 2%	EMBIG, 1%
12/31/07	GBI-EM, 9%	EMBIG, 5%	CEMBI IG, 2%	CEMBI HY,(0%)
6/30/08	GBI-EM, 5%	CEMBI HY, 2%	CEMBI IG,(0%)	EMBIG,(0%)
12/31/08	EMBIG,(11%)	GBI-EM,(13%)	CEMBI IG,(13%)	CEMBI HY,(29%)
6/30/09	CEMBI HY, 35%	CEMBI IG, 18%	EMBIG, 15%	GBI-EM, 8%
12/31/09	CEMBI HY, 23%	EMBIG, 12%	GBI-EM, 12%	CEMBI IG, 10%
6/30/10	CEMBI HY, 8%	CEMBI IG, 6%	EMBIG, 5%	GBI-EM, 2%
	USD	LOCAL	CORPORATE	DISTRESSED
	EMBIG	GBI EM	CEMBI IG	CEMBI HY

Identifying the cycle is the critical step in asset allocating to the subsectors within EMD (Exhibit A2). The Gramercy Global Cycle Indicator (GCI) is a proprietary signal that helps to identify the peaks and troughs in the economic cycle and how best to capture the opportunity set. Distressed investments can occur over any part of the cycle, however, they tend to become most attractive during the bottom part of the global investment cycle and therefore an allocation should be maximized during that period.

Exhibit A2: Identifying the Economic Cycle Signals

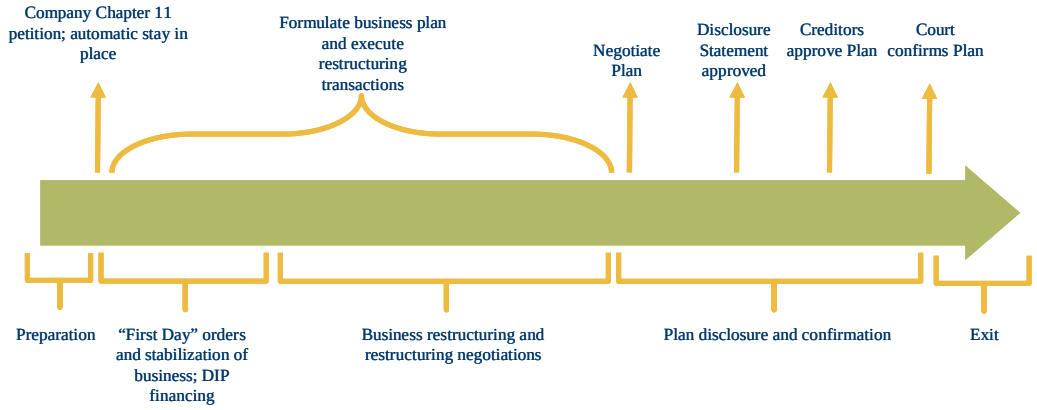


One of the biggest challenges to investing in distressed debt is to have the capital available to address the opportunity as it arises. Within our asset allocation model, the decision to overweight or underweight distressed opportunities is guided by the GCI model. However, the asset allocation product is more limited in that is a long only, more liquid opportunity set for an asset allocation model. The true opportunity for higher returns that come from traditional distressed investing lies in a dedicated allocation to a manager who can both hedge the fund during the early periods of weakening bond prices but can then also identify the best entry point to maximize the return set.

Appendix 2: A Brief Overview of U.S. Corporate Bankruptcy Procedures

In the U.S., the traditional distressed opportunity typically arises when a company, unable to service its debt, files for Chapter 7 (liquidation) or Chapter 11 (reorganization) bankruptcy. Chapter 7 involves shutting a company's doors and parceling out its assets (or the liquidation value of such assets) to its creditors. Chapter 11, which recognizes the corporation as a going concern, gives the company legal protection from creditor actions to continue operating while working out a repayment plan, known as a plan of reorganization ("POR"), with a committee of its major creditors. The POR describes how creditors and shareholders are to be treated under the new business plan, and claimants in each class of creditors (per capital structure priority) are entitled to review and vote on the plan. Chapter 11 enables a debtor to continue to operate its business while it reduces debt, eliminates unprofitable operations and renegotiates contracts and/or leases. In effect, the Chapter 11 process seeks to preserve the value of the estate for the benefit of the stakeholders, although in giving a priority to ongoing operations and the most senior creditors, shareholders and junior creditors in the capital structure may be impaired or wiped out.

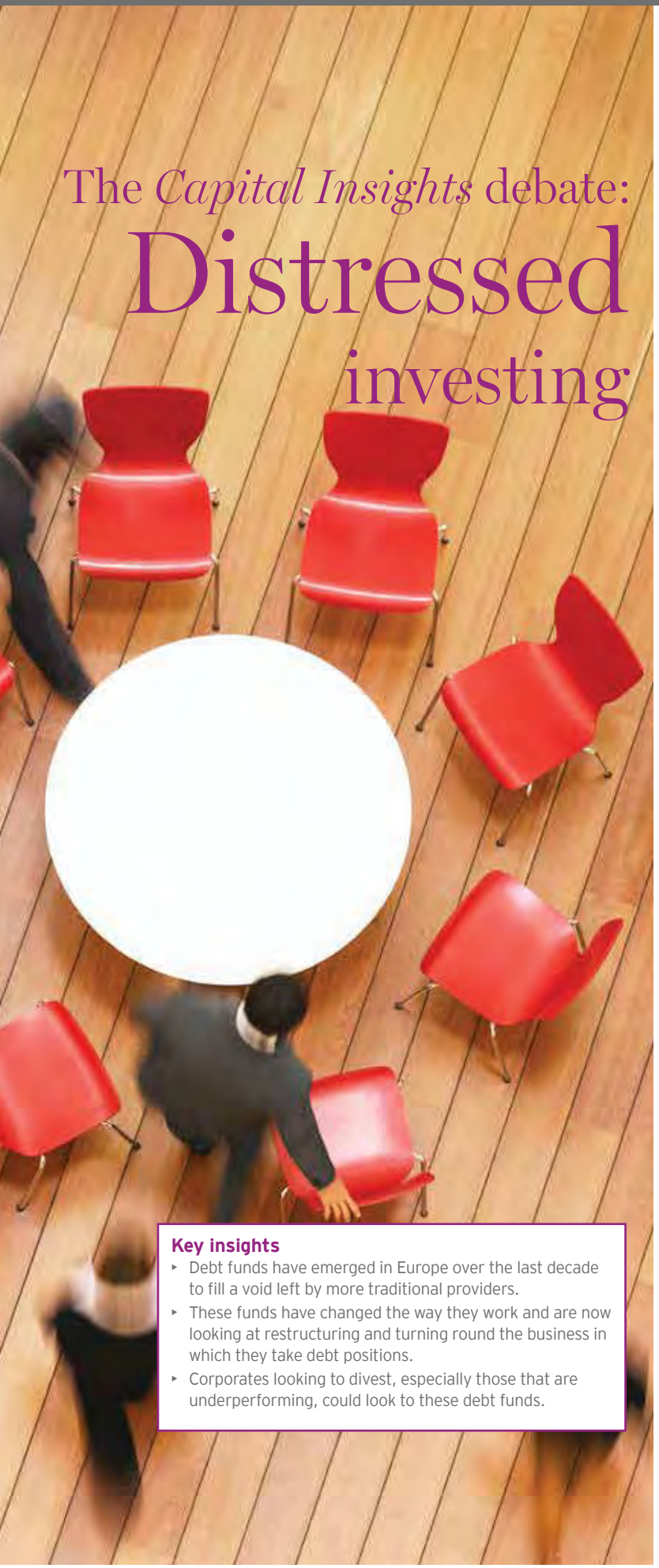
Illustrative Chapter 11 Timeline



Types of Chapter 11 Cases

	Traditional Chapter 11	Pre-Arranged	Pre-Packaged ("Pre-Pack")
Description	◆ Company files with no prior agreement on Plan of Reorganization (POR) with creditors ◆ Develops POR in Chapter 11	◆ Wide range of alternatives – Most extensive: Company files with a fully-developed POR and includes disclosure statement in First Day motions – Least extensive: term sheet with major creditors (nonbinding)	◆ POR developed entirely out of court ◆ POR and disclosure statement (and voting materials) distributed to all creditors who must approve plan ◆ Creditors cast ballots out of court and Company files for Chapter 11 with DS, POR and requisite votes ◆ First-day motion for Confirmation hearing
Pros		◆ Greater certainty of outcome ◆ Better First Day disclosure to constituencies and market ◆ Varies on form	◆ Takes least time (e.g., 45-90 days) ◆ Generally used as a backup to an out-of-court debt for equity exchange offer
Cons	◆ Takes the most time (e.g., 6-18 months) ◆ Most expensive	◆ In weaker forms, just optics ◆ In stronger forms, similar to pre-pack	◆ Can't utilize some advantages of Chapter 11 (e.g., lease rejection, 1113/1114)

A critical component of a debtor's reorganization is its valuation. In a company's disclosure statement, there are two types of valuations prepared. In a going concern valuation, an estimate of a reorganized debtor's value is derived from three basic methodologies: (1) discounted cash flow analysis, (2) trading comparables analysis, and (3) precedent transactions. Another type of valuation is the liquidation analysis which estimates the saleable value of each of the firm's assets, oftentimes taking into account severe haircuts, matched up against the firm's liabilities. Theoretically, no creditor should receive less in reorganization than it would have in liquidation. The going concern valuation is highly scrutinized given its implications for "pie splitting," as senior creditors likely want a low valuation while junior creditors want a high valuation.



The *Capital Insights* debate: Distressed investing

Traditional sources of finance are drying up and corporates are turning to a new breed of alternative funds for support. Ernst & Young's Keith McGregor discusses this change of direction with some of the leading figures in the industry

Key insights

- Debt funds have emerged in Europe over the last decade to fill a void left by more traditional providers.
- These funds have changed the way they work and are now looking at restructuring and turning round the business in which they take debt positions.
- Corporates looking to divest, especially those that are underperforming, could look to these debt funds.

At the turn of the millennium, distressed debt investors were already established players in the US. However, more recently, Europe has become a target market.

Banks have had to constrain lending. As a result, businesses already facing falling profits in weak Eurozone economies may also be looking into a funding hole. Growing numbers of alternative investment and distressed debt funds are moving in fast to fill that gap. Ten years ago, few funds chased European distressed debt – yet now, Bloomberg estimates that as much as US$74b is available for this market. The once unconventional band of distressed debt investors are stepping firmly into the mainstream.

KM: Today's distressed debt funds feel very different to those operating during the last downturn in the early 2000s. What has changed?

JD: Last time around, hedge funds and distressed debt funds made very good returns from effectively trading in and out of debt. They traded in below par, the environment improved, the debt returned to par and they made their money.

If you look at the wider economic picture now, we will have very sluggish economic conditions for a number of years, whereas last time we were in and out of recession relatively quickly. The challenges are very different.

What that means for the debt fund community is that its business model has to be different from the one that it used last time. Now they have to find ways to restructure and turn around the businesses in which they take debt positions. That is a different mindset.

JC: I agree. Last time, there was a lot of opportunity to buy in cheap and make a return a few months later with little true value creation. Now, there is a need to add value. This means that not only is the skill set different, but a much broader array of skills is required – sourcing and origination, structuring (and restructuring) and, perhaps most importantly, operational restructuring skills. It's no

On the web
For more information about debt and corporate divestment, read Ernst & Young's *Global corporate divestment study* at **www.capitalinsights.info/divest**

longer the case that a smart guy with a mobile phone and a checkbook can execute this from a small office in central London. Success now requires a broadly based team with extensive experience.

MW: Yes, investing in debt is by no means straightforward. For all the reasons outlined by John, you can't just buy cheap and sell a little later for a profit. As you think about the loan-to-own opportunity set (situations where investors seek to take ownership of struggling businesses by buying into their debt), it starts to look very different.

If you want to become involved in a debt-for-equity swap, for example, you know that it is going to involve disenfranchising multiple stakeholders. That is something we at GSO prefer to avoid, if possible. So one approach is to look at what we can do with the resources we have. We have scale and we have drawdown capital so we can provide a longer-term capital structure. That allows us to provide a credit-led solution to companies with a stressed balance sheet – a solution that does not disenfranchise stakeholders.

KM: I feel that funds really relish working alongside management and other advisors with a common purpose. A whole range of skills can be introduced from across a wide range of resources. In particular, a focus on the operational restructuring of the business, with the involvement of a chief restructuring officer, can really support management and be instrumental in change. We have found that an initial focus on getting short-term cash sorted and establishing stability can expand into a longer-term, more strategic role over the period of restructuring, looking at structural issues, supply chain and more.

JC: It is fair to say that the market is much more mature today. Distressed investors often all get seen as the same – but there are different types of investors within the community. Some will provide new capital into the right capital structure. Others are interested in buying non-core assets, often severely underperforming ones, because they are interested in the scope for turning these around. There are pools of capital available for all kinds of situations. A broader array of skill sets and objectives are being brought to bear on the more mature opportunity set presented by today's market and that can only be a good thing.

Our investment in Klöckner Pentaplast, a resins and packaging business with revenues above €1b (US$1.3b), is a good example. This was a high-quality business that was heavily constrained by its legacy capital structure. We were able to work with the business to restructure the balance sheet and address some operational deficiencies head-on, in a way that has enabled it to react well to current market developments. As a result, earnings have grown dramatically since the restructuring closed.

JD: For sure, the more diverse experience you have around a company, the better your chances of finding a solution. Management should not take it all on their own shoulders.

KM: So what do you think has made Europe so attractive to the funds?

JC: Traditional providers are more reluctant to service some parts of the corporate economy. Small and mid-sized businesses are clearly struggling to access lending in a way that they used to. The debt funds have emerged to fill the void.

From our perspective, there seems to be a new fund marketing its new direct lending capability almost every month or two in Europe right now. A lot of these guys have suddenly arrived looking to build a book of business over the course of the next 18 to 24 months.

I think we will see more and more capital provided by alternative lenders. What is going to be interesting is the cost of that capital – I think it is already becoming very competitive.

At the table

Keith McGregor (KM)
Head, EMEIA Capital Transformation and Restructuring practice at Ernst & Young

Jason Clarke (JC)
Managing Director, Strategic Value Partners

John Davison (JD)
Head of the Strategic Investment Group, RBS

Michael Whitman (MW)
Senior Managing Director, GSO Capital Partners

MW: Historically, commercial banks have been the primary provider of debt capital in Europe. The collateralized loan obligation (CLO) community, which invests in syndicated loans from larger corporate and leveraged buyout borrowers, also have grown to be a meaningful provider. Between them, those two have historically provided 75% to 80% of the senior debt to companies.

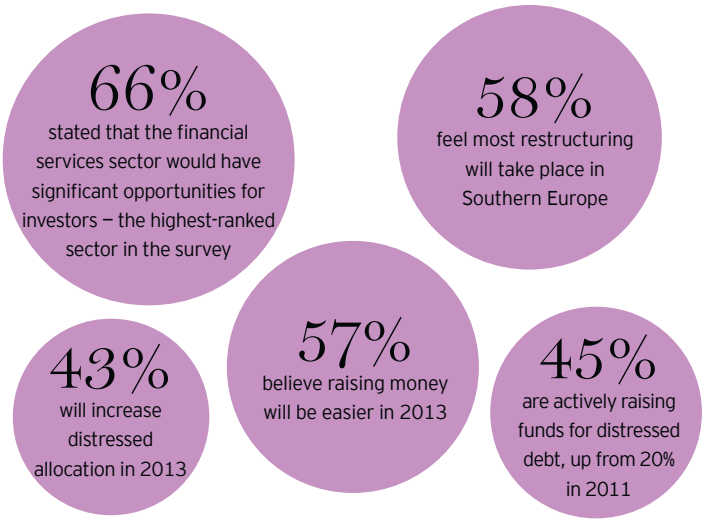
But going forward, if you think about the funding pressures that European banks are under, the banking system is going to provide less capital to corporates. These banks are faced with, among other issues, capital pressures from Basel III and a reduction in wholesale funding.

CEOs, CFOs and boards of directors have to look at ways to diversify their sources of funding – debt funds offer that.

KM: Alongside the changing approach of the funds, it's pretty clear that the traditional strategy of banks toward restructuring has also evolved. The stakeholder spectrum is so much broader and more complex and it's no longer possible for banks to control direction in the way they perhaps once did. Nor, with economic pressure and varying provisioning policies around Europe, is it as easy for banks to agree courses of action among themselves.

The shape of things to come

A 2012 survey of 100 European hedge fund managers, long-term investors and proprietary desk traders by research firm Debtwire suggests an optimistic outlook for the industry



US$74b

The amount funds have available to invest in distressed debt

JD: Banks as a group have a very wide range of approaches to restructuring, and there are often some very different objectives and priorities. Some banks want to exit and move on, while some are prepared to be patient and want to try to work through the business's problems to return it to strength and, as a result, deliver a longer-term financial return.

We also have to understand that it has taken time for banks to work through what has been a very large leverage loan portfolio. The market only had a limited amount of capacity to deal with all these restructurings and, to a certain extent, it should not be surprising that some things took two or three rounds of restructuring to sort out.

We have seen businesses with top lines that are dropping dramatically even within a year. That is a shock to the system for any management team, and it is not something many have contemplated with any degree of rigor. So it is reasonable to give them time to think how to react to a situation and then come back and have a sensible discussion.

It is also worth remembering that we have situations where there are a large number of stakeholders. We have banks holding debt at par, debt funds that have bought in below par and there are international banks with differing policies on restructuring.

As a result, it takes time to reach a solution that enough of the stakeholders are willing to support. There are situations where you would hope to come to a quicker solution, but the practicalities of the stakeholder group mean that that is often quite difficult.

MW: The banks have taken their time for sure. There was an expectation that the banks would be aggressive sellers early on, but that has generally not materialized. Banks are reluctant to take the capital hit and just sell.

KM: So what does having so many stakeholders mean for corporates? How should they approach banks and funds, and best influence stakeholders, to work together to preserve value?

JD: Talk to stakeholders and talk to them early; give them accurate information; don't give them false hope. Try to be realistic, because trust is important in these situations. Try to understand the process a stakeholder needs to go through, whether it is a bank or distressed debt fund, so nothing comes as a surprise.

The other thing I would say is that corporates should think about cash. Most of the businesses we deal with have a cash issue not an "earnings" or EBITDA issue.

Management should share the problem, and getting good support can only help – the restructuring of a business can be a horribly lonely place to be as a CEO.

MW: I would say, come in and start a conversation. Headline leverage in these situations is higher than anyone would like and that can lead to a lack of comfort around the credit story. A sector can be out of favor, or existing lenders may assign negligible value to a large base of installed assets that have a lot of intrinsic value.

A credit committee inside a financial institution typically adheres to very traditional credit metrics; a debt fund can deviate from that, given the nature of its capital, and we can devise something more bespoke.

The capital structure need not suffocate a business. Too often, we find management teams spending too much time managing their lenders and not enough time managing their business. The end objective for us is to allow CEOs to go back to managing their businesses.

KM: And that objective is particularly relevant given that the market is more complex than I've ever seen it. Longer term, a permanent reclassification of the debt capital markets is taking shape, which will have a profound impact on the restructuring landscape. It's clear that these funds have established their space across Europe and they can certainly be a force for good in the world of corporate turnaround. CI

For further insight, please email **keith@capitalinsights.info**

B2

It's not all about USA: issues in emerging and developing countries

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The Mexican Financial Reform on Bankruptcy Matters

On November 26, 2013, the Mexican Congress approved significant amendments to thirty four laws regulating financial matters and issued the new *Ley para Regular las Agrupaciones Financieras* (Law Regulating Financial Groups) in a single decree of amendments that includes the so called financial reform (the "**Financial Reform**"). The Financial Reform was signed into law by President Enrique Peña Nieto on January 9, 2014 and is expected to be published in the *Diario Oficial de la Federación* (Official Gazette of the Federation) on January 13, 2014 at the latest. The Financial Reform will become effective the day following its publication on such Official Gazette.

The Financial Reform intends to comply with certain commitments agreed to in the *Pacto por México*, entered into by the President of the United Mexican States ("Mexico") and the presidents of the main political parties. The stated purpose is to transform the banking sector and credit into leverage for the development of Mexican families and companies, as well as to extend the benefits of an economy formed by competitive markets, with special emphasis, among others, in the financial services sector. In such regards, the amendments proposed in the Financial Reform mainly seek to (i) favor the increase of credit by development and commercial banks, (ii) encourage competition among the participants of the financial sector, and (iii) strengthen the Mexican financial system.

In connection with bankruptcy matters, the Financial Reform provides for amendments to the *Ley de Concursos Mercantiles* (Bankruptcy Law; the "**Bankruptcy Law**"), which main purpose is to expedite the *concurso mercantil* proceeding and to deal with certain issues that in practice have resulted in the vulnerability of the rights of the creditors and the debtor.

The most relevant proposals that intend to expedite the *concurso mercantil* proceeding are, among other, (i) prohibiting the judge to extend the periods set forth in the Bankruptcy Law, (ii) the consolidation of *concurso mercantil* proceedings of companies that are part of the same corporate group, which concept now includes companies that have the ability to make decisions with respect to another company, regardless of the share holdings, (iii) the ability of a debtor to request the *concurso mercantil* prior to being generally in default with respect to its payment obligations, when such situation is expected to occur inevitably within the following 90 days, (iv) the possibility to request the *concurso mercantil* directly in the stage of bankruptcy, (v) permitting common representatives to file credit recognition claims on behalf of a group of creditors and the addition of certain rules for the subscription of the debt restructuring agreement in the case of collective credits, (vi) allowing for the use of standardized forms to request or demand the *concurso mercantil*, (vii) the ability to file petitions and other communications electronically, and (viii) the transparency in the process is emphasized.

The Financial Reform sets forth certain measures that intend to strengthen the protections of the creditors' and/or debtor's interests, in order to avoid abuses that diminish the bankrupt estate. For such purposes, the Financial Reform allows debtors to obtain dip financing for maintaining the ongoing business of the company and the necessary liquidity during the

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concurso, which will be considered privileged for purposes of the preference of the payment thereof.

Regarding abuses with respect to inter-creditor schemes of companies that are generally in default with respect to their payment obligations, the Financial Reform expressly recognizes subordinated creditors, including inter-company creditors in accordance with certain rules, and establishes that such inter-company creditors will not be allowed to vote for the approval of the debt restructuring agreement when such inter-company creditors represent 25% or more of the total amount of recognized credits, unless such creditors consent to the agreement adopted by the rest of the recognized creditors. Likewise, the retroactivity period applicable for the review of fraudulent conveyances is broadened only with respect to transactions entered into with inter-company creditors.

The Financial Reform also clarifies that the netting or the application of assets provided as collateral of derivative contracts, repo and securities lending transactions is allowed when such agreements provide that the ownership of such collateral has been transferred to the creditor.

The Financial Reform provides for additional guidelines to the rules contained in the Bankruptcy Law for the sale of the debtor's asset in order to protect to bankrupt estate. For example, the Bankruptcy Law (i) clarifies that the sale of securities will be made in accordance with such law and that the provisions of the *Ley del Mercado de Valores* (Securities Market Law; the "Securities Law") regarding the offering of securities will not be applicable; (ii) establishes that a secured creditor that is claiming the separation of its collateral from the bankrupt estate must grant security in case that its claim does not proceed; (iii) establishes that the procedures for the sale of assets may be entrusted to specialized third parties if the recovery value of the assets would be greater or it would be more profitable considering the costs and benefits; and (iv) defines the rules applicable for the valuation of assets that are necessary for the operation of the company in the ordinary course of business and that are granted as collateral, in the event the *síndico* (receiver or bankruptcy trustee) prevents the separate foreclosure of such collateral if it considers it would be beneficial for the bankrupt estate.

With respect to the *concurso mercantil* proceeding with pre-pack plan, the Bankruptcy Law permits the appointment of a *conciliador* (conciliator) that is not registered with the *Instituto Federal de Especialistas de Concursos Mercantiles* (Federal Institute of Bankruptcy Specialists), by the agreement of the debtor and creditors representing at least the majority of the total amount of debt. Likewise, the percentage required for filing a petition for *concurso mercantil* with pre-pack plan will increase to creditors representing at least a majority of the total amount of debt.

In order to avoid abuses against the bankrupt debtor, the amendments to the Bankruptcy Law provide for the creation of a system to award responsibility to the debtor's management and relevant employees for damages caused to the debtor if (i) acting with a conflict of interest; (ii) favoring one or more shareholders and causing damages to other shareholders; (iii) obtaining economic benefits for itself or for others; (iv) knowingly making, providing, disseminating, publishing or ordering false information; (v) ordering or causing the accounting registries, related documentation or conditions in a contract to be altered, modified or destroyed; (vi) failing to register transactions or causing false information to be registered, or causing nonexistent transactions or expenses to be registered or real transactions or expenses are exaggerated or

otherwise carrying out any act or transaction that is illegal or prohibited by law causing a damage to the bankrupt debtor and obtaining an economic benefit, directly or indirectly; and (vii) in general carrying out any willful or illegal act or acting with bad faith pursuant to the Bankruptcy Law or other laws. Although the Bankruptcy Law replicates the business judgment rule contained in the Securities Law applicable to the members of the board of *sociedades anónimas bursátiles* (publicly traded companies) and allows such members of the board and relevant employees of the bankrupt debtor to obtain insurance, guaranty or bonds to cover the amount of the indemnification for losses and damages caused, except for willful misconduct, acts of bad faith or illegal, it is important to mention that the Bankruptcy Law expressly prohibits any agreement, or provisions in the by-laws with respect to any type of considerations, benefits or exemptions that limit, release, substitute or redeem the liabilities of such members of the board and relevant employees of the bankrupt debtor.

Finally, due to the complexity of the banking business, the Financial Reform creates a specific legal framework for the court liquidation of banking institutions in the *Ley de Instituciones de Crédito* (Credit Institutions Law; the "**Credit Institutions Law**"); therefore, banking institutions shall be excluded from the Bankruptcy Law. The most relevant provisions in such respect are summarized below.

Under the reform to the Credit Institutions Law, the extinction of capital of a banking institution, meaning that its assets are not enough to cover its debts, is a cause to revoke the banking institution´s authorization to organize and operate as such. In addition, it will lead to the commencement of the liquidation procedure of the banking institution. The *Comisión Nacional Bancaria y de Valores* (National Banking and Securities Commission; the "CNBV") is the agency authorized to verify the extinction of the capital of a banking institution and revoke the corresponding authorization. The CNBV must inform the *Instituto para la Protección del Ahorro Bancario* (Institute for the Protection of Bank Savings; the "IPAB") about the extinction of the capital of a banking institution, and the IPAB may request a federal judge to declare the court liquidation of the institution. The IPAB will also act as receiver under the liquidation procedure and will carry out the creditor´s identification process.

Unlike the Bankruptcy Law, the banking liquidation procedure does not foresee a conciliation period prior to liquidation. Once the federal judge issues a sentence declaring the court liquidation, the IPAB may collect the debts of the banking institution, transfer its assets, pay or transfer its debts, liquidate the shareholders and carry out any other acts necessary to conclude the liquidation.

The IPAB will carry out the creditors' identification process. The IPAB must also comply with the following preference for the payment of the banking institution´s debts: first, secured creditors; second, labor obligations; third, debts with a special privilege provided by statute; fourth, credits from deposits and loans received or accepted by the banking institution and thereafter, payments shall be made in the preference provided in article 241 of the Credit Institutions Law, noting that the last debts to be paid are subordinated preferred and non-preferred obligations.

As of the date when the liquidation procedure of the banking institution begins, all term obligations shall become due and payable; unsecured peso denominated obligations and loans in

UDIS will cease to cause interests, unsecured obligations denominated in foreign currency will convert to pesos and will cease to cause interests; secured obligations will remain in their original currency and will only cause ordinary interest up to the amount of their guarantee; it will be deemed that the condition of obligations subject to a condition precedent never took place, it will be deemed that the condition of obligations subject to a condition subsequent took place and the parties shall return the assets exchanged while the obligation was in effect, in addition, the mechanisms to acquire funds shall be cancelled.

The reform provides that derivative, repo and securities lending transactions entered into by the banking institution will remain in effect for a period of 2 business days as of the date when the revocation of the authorization to organize and operate as a banking institution is published. After such 2 business day period, these transactions shall become due and payable as agreed by the parties or as provide by the Credit Institutions Law, and shall be netted and paid. If the banking institution in liquidation is both debtor and creditor in respect to the same counterparty, all the transactions entered into with such counterparty will be netted.

January 2014

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Key Insolvency Laws in Lithuania - An Overview

By
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The purpose of the Republic of Lithuania Law on Enterprise Restructuring (hereinafter referred to as 'Law on Restructuring') shall be to provide conditions for legal persons in financial difficulties which have not discontinued their economic and commercial activities to maintain and develop these activities, to settle their debts and to avert bankruptcy. '*Enterprise in financial difficulties*' means an enterprise unable to discharge its obligations and reduce losses which, without assistance rendered by creditors, would force it to terminate its activities and go bankrupt. '*Restructuring of an enterprise'* (in lith. 'restruktūrizavimas') by Law on Restructuring means the totality of procedures established by Law on Restructuring which aim to maintain and develop the activities of an enterprise, settle its debts and avert bankruptcy through securing assistance of the creditors of the enterprise and application of economic, technical, organisational and other measures. Creditors of an enterprise (hereinafter referred to as 'creditors') shall mean natural and legal persons entitled to request from the enterprise the discharge of its obligations and liabilities, as well as natural and legal persons for whom the time limits for the discharge of liabilities have not yet expired: 1) in the event of non-payment of compulsory payments – state institutions which have an obligation to collect them; 2) in the event of non-payment of salary and compensation for damage arising from employment relations – employees of the enterprise (successors thereof); 3) in the event of transfer of the obligation to compensate for damage due to accidents at work or contraction of an occupational disease to the State in the cases specified in the Provisional Law of the Republic of Lithuania on Damage Compensation in Accident at Work or Occupational Disease Cases – an institution authorized by the Government of the Republic of Lithuania; 4) in the event of non-repayment of loans granted from the funds borrowed on behalf of the State and loans granted with the State guarantee – the Ministry of Finance of the Republic of Lithuania or an institution administering the loan; 5) natural and legal persons upon the sale of agricultural products; 6) in the event of non-repayment of assistance granted from the EU funds – state institutions administering the EU funds; 7) other creditors.

Restructuring may be initiated where: 1) an enterprise is in financial difficulties or there is a real possibility that it will be in financial difficulties within the next three months; 2) an enterprise has not discontinued its activities; 3) an enterprise is not in bankruptcy or has not gone bankrupt; 4) an enterprise was established at least three years before the date of filing of a petition to initiate enterprise restructuring proceedings; 5) at least five years have passed from the coming into effect of the court decision to close the enterprise restructuring proceedings, or the court ruling to terminate the proceedings on the grounds specified in Law on Restructuring.

Law on Restructuring also gives guidelines of an enterprise restructuring plan, indicates a petition to the court on initiation of enterprise restructuring proceedings, initiation of enterprise restructuring proceedings in court, liabilities of an enterprise under restructuring and discharge of liabilities in respect of an enterprise under restructuring, management of an enterprise under restructuring and the assets thereof. In Law on restructuring one may find the information about simplified procedure for initiation of enterprise restructuring proceedings, what must be specifies in a restructuring plan also its consideration and approval, the duration of restructuring.

Law on Restructuring introduces the restructuring administrator (in lith. 'restruktūrizavimo administratorius'). On 31 December 2012 76 natural and 39 legal persons had the right to provide services of enterprise restructuring administration During the period from 1 January 2012 to 31 December 9 natural and 3 legal persons qualified to provide services of enterprise restructuring administration.

Law on Restructuring ends by giving information about the termination of the enterprise restructuring proceedings, closure of the enterprise restructuring.

According to data, since the validation of Law on Restructuring (from 1 July 2001, as last amended on 22 December 2011) to 31 December 2012 restructuring proceedings have been initiated in 274 enterprises, out of that number restructuring proceedings were completed in 7 enterprises, but during the first half of 2011 court adopted a ruling to initiate bankruptcy proceedings to one of them. During this period restructuring processes were pending in 128 enterprises, in 139 enterprises restructuring processes were terminated

(whereof in 102 bankruptcy proceedings were instituted). It is interesting informatikon that from 1 July 2001 to 31 December 2012 most of restructuring processes were instituted to enterprises of construction (108 ent. or 39,4 percent), manufacturing (55 ent. or 20,1 percent), wholesale and retail trade (32 ent. or 11,7 percent), agriculture, forestry and fishing (26 percent. or 9,5 percent), transportation and storage (15 ent. or 5,5 percent).

The Republic of Lithuania Enterprise Bankruptcy Law:

During the period from 1 January 1993 to 31 December 2012, bankruptcy was instituted in 12983 enterprises and 15 banks, whereof bankruptcy processes were completed in 9043 enterprises (69,7 percent) and 14 banks (93,3 percent). At the end of 2012, bankruptcy process was still in progress in 3940 enterprises, 2915 of them are under liquidation and in 1025 enterprises a decision concerning the execution of bankruptcy procedures has not been adopted yet.

The highest number of bankruptcies in 2012 was on September – 201 enterprises. Every year the number of enterprises in bankruptcy decreases on July and August. In accordance with 1993-2012 data, bankruptcy process was instituted mostly in private companies (78,1 percent) and in individual companies (13,8 percent).

Enterprise bankruptcy process shall regulate the Republic of Lithuania Enterprise Bankruptcy Law (hereinafter referred to as 'Enterprise Bankruptcy Law'). In accordance with 'Enterprise Bankruptcy Law, 'bankruptcy' (in lith. 'bankrotas') means the state of an insolvent enterprise where bankruptcy proceedings have been initiated against the enterprise in court or the creditors are performing extrajudicial bankruptcy procedures in the enterprise. 'Insolvency of an enterprise' (in lith. 'įmonės nemokumas') is defined as the state of an enterprise when it fails to discharge its obligations (pay debts, carry out works paid for in advance, etc.) and the overdue liabilities of the enterprise (debts, unperformed works, etc.) are in excess of half of the value of the assets entered in the enterprise's balance.

A bankruptcy process of an enterprise in Lithuania can be either: judicial or extradujicial. Judicial, when creditor (creditors), owner (owners), the head of the company have the right to file with a court for the initiation of bankruptcy proceedings. The liquidator of the enterprise under liquidation must file with a court a petition to initiate bankruptcy proceedings, if in the process of enterprise liquidation becomes clear that the enterprise will not be able to meet its obligations. A court, having initiated bankruptcy proceedings against an enterprise, appoints a bankruptcy administrator. Extrajudicial - the issues within the competence of the court shall be considered and decided by the creditors' meeting. Creditors can be offered to implement extrajudicial bankruptcy procedures by the head or an owner (owners) of the enterprise. However, an extrajudicial bankruptcy process cannot take place if action has been brought in court in which claims have been entered against the enterprise, or execution is levied on the enterprise under writs of execution issued by the courts or other institutions.

Creditors shall mean natural and legal persons entitled to request from the enterprise the discharge of its obligations and liabilities, including: 1) in the event of non-payment of taxes, state social insurance and compulsory health insurance contributions – state institutions which have an obligation to collect them; 2) in the event of non-payment of remuneration and compensation for damage arising from employment relations – employees of the enterprise (successors thereof); 3) in the event of transfer to the State of the obligation to compensate for damage due to accidents at work or contraction of an occupational disease in the cases specified in the Provisional Law on Damage Compensation in Accident at Work or Occupational Disease Cases – an institution authorised by the Government; 4) in the event of non-repayment of loans granted from the funds borrowed on behalf of the State and loans granted with the State guarantee – the Ministry of Finance; 5) natural and legal persons upon the sale of agricultural products; 6) in the event of non-repayment of assistance granted from the EU funds – state institutions administering the EU funds; 7) other creditors.

To file a petition with the court for the initiation of enterprise bankruptcy proceedings it is allowed if at least one of the following conditions is present: 1) the enterprise fails to pay the remuneration and other employment-related amounts in due time; 2) the enterprise fails, in due time, to pay for the goods received and works (services) carried out, defaults on the repayment of credits and fails to discharge other property obligations assumed under transactions; 3) the enterprise fails to pay, in due time, taxes and other compulsory contributions prescribed by law and/or the awarded amounts; 4) the enterprise has publicly announced or notified the creditor (creditors) in any other manner of its inability or lack of intent to discharge its obligations (publication of such information on the website (www.bankrotodep.lt) of the Department of

Enterprise Bankruptcy Management under the Ministry of Economy is also considered as public announcement); 5) the enterprise has no assets or income from which debts could be recovered and therefore the bailiff has returned the writs of execution to the creditor. The liquidator of the enterprise under liquidation must file with a court a petition to initiate bankruptcy proceedings, if in the process of enterprise liquidation becomes clear that the enterprise will not be able to meet its obligations.

In the situation indicated in the first three points above, the creditor must notify the debtor of its intention to file a petition for bankruptcy in writing. Such a notification must identify undischarged liabilities of debtor and contain a warning that in case of failure to discharge the above liabilities within the specified time limit (which must be at least 30 days), the creditor will file a petition for bankruptcy. A petition filed with the court may be waived before the court passes a ruling to institute bankruptcy proceedings. Petitions shall be filed in writing with the county court of the locality in which the registered office of the enterprise is situated in the manner set forth by the Code of Civil Procedure.

In Bankruptcy law one may find information about the preparation for hearing of bankruptcy proceedings in court, initiating bankruptcy proceedings in court.

A court, having initiated bankruptcy proceedings against an enterprise, appoints a bankruptcy administrator (in lith. ‘bankroto administratorius‘) and assistant administrator (in lith. ‘administratoriaus padėjėjas‘).

On 31 December 2012 491 natural and 171 legal persons had the right to provide services of enterprise bankruptcy administration, 10 persons had the right to work as assistant of bankruptcy administrator.

During the period from 1 January 2012 to 31 December 2012 39 natural and 20 legal persons qualified to provide services of enterprise bankruptcy administration, the right to work as assistant of bankruptcy administrator was given to 10 persons. In 2012 the certificate of bankruptcy administrator was revoked to 3 natural persons and they were removed from the List of persons, providing services of bankruptcy administration. In 2012 1 legal bankruptcy administrator was removed from the list of persons, providing services of bankruptcy administration.

Data about bankruptcy proceedings against enterprise, persons who have the right to provide enterprise bankruptcy administration services, assets of enterprises that are in bankruptcy or are bankrupt being sold by auction, and other information is published in the website of the Department of Enterprise Bankruptcy Management under the Ministry of Economy. The court may adopt a ruling to apply the simplified bankruptcy procedures - judicial enterprise bankruptcy procedures carried out where the enterprise has no assets or where its assets are insufficient to cover the legal and administrative expenses. These procedures may not last longer than one year from the day of entry into force of the ruling to apply the simplified bankruptcy procedures. During such procedures bankruptcy procedure of liquidation must be applied.

Bankruptcy proceedings are formally concluded by a court decision or, in extrajudicial bankruptcy proceedings, by a decision of the meeting of the creditors. After such decision is issued and respective documents are submitted to the Register of Legal Entities, the enterprise is removed from the said Register.

Interesting that in 2012 bankruptcy processes were instituted mostly to enterprises of wholesale and retail trade (380 enterprises or 27,1 percent), construction (264 ent. or 18,9 percent), manufacturing (171 ent. or 12,2 percent), administrative and support service activity (138 ent. or 9,9 percent), transportation and storage (115 ent. or 8,2 percent), accommodation and food service activity (92 ent. or 6,6 percent).

During the period of 1993-2012 82 percent of enterprises in bankruptcy and bankrupt enterprises were very small enterprises without employees or up to 9 employees at the beginning of 7 bankruptcy process. Enterprises, which had from 10 to 50 employees, made up 12,7 percent while enterprises, which had more than 50 employees – 3,1 percent.

The Republic of Lithuania Law on Natural Person Bankruptcy:

The Republic of Lithuania Law on Natural Person Bankruptcy (hereinafter referred to as ‘Law on Natural Person Bankruptcy‘) came into force on 1 May 2013.

The Law on Natural Person Bankruptcy enables individuals, whose main proprietary interests are in the Republic of Lithuania, to initiate personal bankruptcy proceedings. A person shall be deemed insolvent when the amount of personal debts for which the payment is due exceeds 25 minimum monthly wages as approved by the Government of the Republic of Lithuania (currently 25,000 LTL, 7,241 EUR). The personal bankruptcy proceedings can be initiated by the relevant individual exclusively and such proceeding shall be judicial. The Law on Natural Person Bankruptcy also provides that an individual will be entitled to commence bankruptcy proceedings for the second time only in 10 years after the previous bankruptcy proceedings were fully finished. The recovery of a person's solvency shall proceed in accordance to the Plan of the Solvency Recovery (hereinafter "Plan") and the schedule for fulfilling of the creditors' claims and reimbursement of other expenses. While executing the Plan, a person will be granted a monthly fixed amount depending on the number of encumbrances.

The term of the Plan execution shall not last for more than five years. The bankruptcy proceedings of natural persons are executed in the court. The court must appoint a bankruptcy administrator.

Individual bankruptcy proceedings may be brought in a simplified procedure, the Plan under the provisions of Law on Natural Person Bankruptcy shall be established by petition to initiate an individual bankruptcy case to the court.

By the Law on Natural Person Bankruptcy the first creditors' meeting approving the Plan, determine the amount to be paid to the administrator for individual bankruptcy procedures bankruptcy process, including the period of the order of the court to bring an individual bankruptcy case comes into force. The amount of time from the court order to initiate an individual bankruptcy case before the effective date of the order to confirm the plan effective date cannot be greater than 3,000 LTL (869 EUR).

Insolvency & Restructuring - Nigeria

Progress of insolvency law reform

Contributed by **Punuka Attorneys & Solicitors**

November 15 2013

Author

Anthony I Idigbe

Introduction

World Bank reports on the observance of standards and codes principles and guidelines for effective insolvency and creditor rights systems, published in October 2007, identified the following weaknesses in Nigerian insolvency law:

- a lack of efficient means by which debtors can rearrange their affairs and preserve a potentially viable entity;(1)
- from creditors' point of view, no credible legal threat to recalcitrant debtors;
- no provisions for insolvency practitioners to be qualified, regulated, licensed or bonded; and
- a substantially under-resourced court system, which is susceptible to corruption and substantial delay.

In 2011 the Business Recovery and Insolvency Practitioners Association of Nigeria (BRIPAN)(2) decided to pursue a legislative reform agenda to improve Nigerian insolvency law. BRIPAN is a private sector-driven association of insolvency practitioners comprised of lawyers, accountants and bankers. Its objective is to develop a body of knowledge in business recovery and insolvency in Nigeria, and ensure that its members retain such knowledge and conduct their insolvency and business recovery work professionally. BRIPAN was firmly of the view that Nigerian insolvency law was due for review to bring it into line with international best practice.

This update gives an overview of the progress made in the last two years and the various strategies adopted in the efforts towards modernising Nigerian insolvency law through private sector initiative. It also assesses whether private sector effort alone could result in the successful pursuit of a legislative agenda.

International exposure and participation

Pursuant to its objective of legislative reform, BRIPAN established a Legislative Agenda Committee. It also pursued international exposure for its members through increased participation in INSOL and United Nations Commission on International Trade Law (UNCITRAL) meetings, conferences and fellowships, and active engagement of its leaders with international experts. It also inaugurated its own international conference. BRIPAN achieved observer status at UNICITRAL Group V on Insolvency in 2012. The result of these efforts was improved access to materials and knowledge on international best practice related to insolvency. Through training workshops and seminars, BRIPAN ensured that this knowledge percolated downwards to its members. Eventually, its Legislative Agenda Committee issued an insolvency bill that was drafted solely by BRIPAN members. The draft was informed by international best practice.

Bringing in the public sector

BRIPAN involvement with INSOL's annual African roundtable from 2011 greatly influenced the course of reform in Nigeria. A reoccurring theme at all INSOL African

roundtables thus far has been the need for national associations such as BRIPAN to engage with the public sector in the pursuit of their reform agenda. Thus, BRIPAN implemented a strategy of engagement with the public sector, encouraging various ministries and institutions to become involved locally and internationally with insolvency. BRIPAN focused specifically on involving the Ministry of Industry, Trade and Investment and the attorney general in attending UNCITRAL meetings. BRIPAN was granted an audience with the ministry and attorney general and obtained authorisation for its staff to attend international insolvency events. The same strategy was pursued with the Securities and Exchange Commission, the Nigerian Import and Export Bank and the Corporate Affairs Commission. Before long, BRIPAN had acquired partners at different levels of the public sector. During the Nigeria-Canada Business Forum in April 2013, the minister of industry, trade and investment urged BRIPAN to issue a working document for insolvency reform. This coincided with finalisation of the BRIPAN legislative committee's work. The committee was therefore able to publish the first draft of its insolvency bill on May 14 2013 at a joint roundtable on insolvency organised by BRIPAN and the Nigerian Institute of Advanced Legal Studies.

Engaging government and public institutions locally

The success of the Nigerian Institute of Advanced Legal Studies/BRIPAN roundtable directly translated into more active interaction between BRIPAN and government policy makers, and particularly the Ministry of Industry, Trade and Investment. In that regard, BRIPAN leaders paid courtesy visits to the attorney general, the minister of justice and the minister of industry, trade and investment, which afforded it the opportunity to make private presentations and engage with these decision and policy makers regarding the bill.

The bill was presented to the Attorney General's Office, the Ministry of Justice and the Office of the Minister for Industry, Trade and Investment on July 2 2013. It was formally received by the minister of industry, trade and investment on July 15 2013 at a delegation led by BRIPAN President Dele Odunowo and former President Anthony Idigbe. The result has been strong support and a commitment to partner with BRIPAN in promoting a friendlier business rescue and insolvency environment in Nigeria. The understanding from this interaction was that the Ministry of Industry, Trade and Investment would lead the process as the supervising ministry, while the Attorney General's Office would provide legal drafting support.

Successful sale of reform process

The Ministry of Industry, Trade and Investment adopted the bill as an executive initiative and held a two-day stakeholders' retreat on September 10 and 11 2013. The retreat was funded by the UK Department for International Development (DFID) under its initiative for engaging with legal reform to promote commerce and competitiveness. Justice for All (a DFID consultant) organised the retreat on the ministry's behalf, in conjunction with BRIPAN General Secretary CVC Ihekweazu.

The aim of the workshop and objective of government was to bring together all stakeholders involved with business recovery and insolvency to discuss the draft bill to ensure that it meets their expectations. Representatives from the Ministry of Industry, Trade and Investment, the Ministry of Justice and the Ministry of Finance, the financial services sector and market regulators (eg, the Central Bank of Nigeria, the Nigerian Deposit Insurance Corporation of Nigeria, the Asset Management Corporation of Nigeria, the Securities and Exchange Commission, the National Insurance Commission, the Nigerian Institute of Advanced Legal Studies and the Corporate Affairs Commission) attended the retreat. In addition, private professional associations, the judiciary and members of the National Assembly were invited. The retreat was interactive, with oral submissions and memoranda made available to the retreat for further improvement on the bill.

Sub-groups conducted close review of several parts of the bill in sessions that lasted for two days. The provisions on personal insolvency, corporate insolvency, business rescue, liquidation, regulation of the profession, cross-border insolvency, the scope of application of general insolvency law and potential derogation for certain industries were also thoroughly examined. Working with Justice for All and BRIPAN, the Ministry of Industry, Trade and Investment collated all submissions and reports of rapporteurs for each of the breakout groups.

Follow-through

A committee has been set up by the Ministry of Industry, Trade and Investment to work with its legislative drafting department and the Ministry of Justice to improve the bill and hopefully pass it as an executive bill for consideration by the National Assembly within the year. BRIPAN's general secretary – a key member of the technical committee – has been assigned to continue driving the reform process. The committee recently released the amended draft bill for comment by stakeholders. It is hoped that the final draft, which takes into consideration the input of stakeholders, will soon be submitted to the Federal Executive Council for approval before it is forwarded to the National Assembly.

Reflections

One of the many issues that emerged from the stakeholders' retreat was the extent of the role to be given to private professional bodies in the regulation of insolvency in Nigeria – particularly the extent of regulatory support functions to be given to BRIPAN regarding existing institutions (eg, the Federal High Court, the Corporate Affairs Commission, the Official Receiver and the Ministry of Industry, Trade and Investment). Further, while the draft bill seeks to minimise receiverships and other private traditional modes of enforcement available to creditors that presently constitute the bulk of Nigerian insolvency practice, there seems to be a misunderstanding of the concept of 'administration' by many participants. Moreover, even though Nigerian jurisprudence seems to protect against dispossession of debtors, stakeholders and particularly lenders were divided on whether to adopt a modified US debtor-in-possession approach, as opposed to the UK administration (insolvency practitioner in possession) approach, in view of the perceived high incidence of corruption in the system. Creditors' experience seems to be that Nigerian debtors have a highly recalcitrant attitude towards repayment of debt. This suggests that a debtor-friendly insolvency framework would exacerbate the situation, rather than improve it. Perhaps it is for this reason that the BRIPAN committee, after a thorough comparative study, adopted the UK creditor-friendly administration system in the insolvency bill.

Comment

The experience in Nigeria so far suggests that effective legislative reform is a collaborative learning process. The traditional perception that law reform can be also initiated and sustained only by public sector institutions (eg, the Nigerian Law Reform Commission) no longer holds water. As seen by BRIPAN's effort, the private sector can also initiate law reform. However, credence must be given to the advice of INSOL that successful reform requires public sector cooperation and participation. Thus, the challenge in Nigeria for any reform-minded institution or group is to focus its efforts on cultivating public-private partnerships. BRIPAN's success so far in setting and pursuing a legislative agenda has been spurred by its appreciation of its limitations and effective engagement of the public sector for follow through.

For further information on this topic please contact Anthony Idigbe at Punuka Attorneys & Solicitors by telephone (+234 1 270 4789), fax (+234 1 270 4790) or email (a.idigbe@punuka.com). The Punuka Attorneys & Solicitors website can be accessed at www.punuka.com.

Endnotes

(1) Limited progress has been made since that report with the passage and implementation of the Asset Management Company of Nigeria Act, which set up the Asset Management Corporation of Nigeria to absorb the toxic assets of licensed banks. Progress is limited because this was a sector-specific reform.

(2) BRIPAN is the Nigerian affiliate of INSOL.

C1

Restructuring in the Asia Pacific – can the role of a Chief Restructuring Officer really work?

Rose/Peony Room

Chair: Paul Billingham, Grant Thornton
Andrew Riebe, Nomura International (HK) Ltd.
William Snyder, Deloitte
Jake Williams, Standard Chartered Bank
Ashley Young, Kirkland & Ellis LLP

Testimony before the American Bankruptcy Institute Commission to Study the Reform of Chapter 11

William K. Snyder
Deloitte Financial Advisory Services LLP

Field Hearing
November 1, 2013

My name is William Snyder, and I am a Principal with Deloitte Financial Advisory Services LLP and the national service line co-leader for its Corporate Restructuring Group, Deloitte CRG. Deloitte CRG is an internationally recognized leader in corporate restructuring and globally has over 1,400 restructuring professionals. I have been in management positions for over 30 years, have over 20 years of restructuring experience, and have held court appointed positions in over 30 companies, including Pilgrim's Pride Corporation and the Texas Rangers baseball team. In over half of these cases I served as an interim C-suite level officer which was the standard before the term Chief Restructuring Officer (CRO) was used widely. Additionally, I have also twice served as an Examiner, including Mirant Energy, and have served as a Chapter 11 Trustee once. I am a Certified Turnaround Professional and have spoken on many panels in industry conferences. This statement reflects my own views and in no way reflects the views of Deloitte Financial Advisory Services LLP.

The Need for a Chief Restructuring Officer

Chapter 11 of the Bankruptcy Code creates the distinctive concept of the "debtor in possession," which is defined in § 1101[1] to mean the debtor in a chapter 11 case, except where a trustee has been appointed in the case. The debtor, as debtor in possession, is vested with the

[1] Section (§) references herein are to the United States Bankruptcy Code.

rights, powers, and duties of a trustee, and the ability to operate the debtor's business during the course of the case. In a corporate chapter 11 reorganization or liquidation process, therefore, existing management presumptively remains in control of the debtor's business.

The debtor in possession model serves the process well. The board of directors of a company and existing management are in most cases best-suited to engineer operational restructuring plans. They typically possess far more "institutional knowledge" of a company's history and operations, and are much more invested in its success, than any hired outside advisor. Indeed, it is nearly impossible for an outsider to step into a company and fully appreciate every nuance of that company within the time constraints necessary to turn the company around in a crisis. Existing, competent management is therefore a critical piece of any turnaround. Boards of Directors who understand their duties and exercise them prudently can—aided by competent management—guide a firm through turbulent times with the proper professional assistance. In their absence, a "lights out" scenario in most instances yields a very low outcome for creditors.

Financial crisis, however, adds a new aspect to the company's business operation—one that frequently exceeds the experience of existing management. When a company finds itself in the position of having to undergo a substantial restructuring—whether financial or operational—it must often turn to outside experts to provide unvarnished, unbiased advice and guide it through the crisis. How this plays out in practice depends both on the competency of existing management and the severity of the crisis. In my own experience, I have generally seen this scenario unfold in one of three ways.

The first involves companies whose management is both sufficiently competent and trustworthy to operate the business and, in addition, to navigate the restructuring process. Such cases are uncommon, as it is the rare company whose management possesses the knowledge and

experience necessary to address restructuring challenges as well as operational ones. This scenario is dominated by the proverbial great company with a bad balance sheet (or a significant one-time liability) and the only restructuring involves fixing the right hand side of the balance sheet. These cases frequently use a pre-arranged or pre-pack bankruptcy to deal with their debt leverage issues. In such cases, a chief restructuring officer may not be not necessary to aid the board and management in exercising their duties and responsibilities as leaders of a debtor in possession.

The second, and equally uncommon, scenario involves those cases where existing management and directors have been exceptionally poor stewards of the company's assets. In cases involving fraud, dishonesty, incompetence, or gross mismanagement of the debtor's affairs by current management, § 1104 of the Bankruptcy Code directs the court to appoint a trustee to assume the duties, powers, and responsibilities of a debtor in possession—including to take over management and operation of the debtor's business. Commensurate with the penalty it threatens, however, the burden of proof for appointment under § 1104 is properly high. These cases, too, are relatively few and far between. As with the first category, where a trustee has been appointed to assume responsibility for managing the debtor's business and concurrent restructuring effort, a chief restructuring officer is generally not necessary to assist in the process.[2] Indeed, in some cases the appointment of a CRO may help to insulate a debtor in possession against the appointment of a trustee.[3]

[2] As an aside, the existence of a CRO in the case can sometimes help to insulate a debtor in possession against a motion for the appointment of a trustee, as the presence of the CRO often serves as a counterweight to allegations of mismanagement or incompetence by current management

[3] *See, e.g., In re The 1031 Tax Group, LLC*, 374 B.R. 78, 91 (Bankr. S.D.N.Y. 2007) (existence of a CRO "independent, unconflicted, and in no way beholden to prior management" was sufficient to refute a *prima facie* showing of "cause" based on prior management's misconduct).

The third, and most common, scenario involves a management team that understands the business but lacks specific restructuring or crisis management experience. These management teams need guidance on how to apply restructuring principals to their business to maximize results. Without a restructuring advisor, management is left to on-the-job training to fulfill the duties of a debtor in possession and to effectuate a successful restructuring. Yet simply retaining such expertise in an advisory role is not always enough. As I explain below, the crisis manager frequently needs the access and authority of an officer-level role to fully implement a restructuring.

The Role of a CRO in the Bankruptcy Process

Unlike a typical legal or financial advisor, the CRO—as a duly-appointed officer of the company—reports directly to the Board of Directors. In many cases there will be a reporting structure where the company CEO and the CRO both report to the Board of Directors. The Board of Directors is entrusted with the governance of the company and management can be conflicted from actions that may eliminate or reduce their jobs. The CRO has no vested interest in the outcome of the company, and can therefore typically maintain a greater degree of objectivity than is generally expected of a corporate officer or other insider as to the best course of action to maximize value, including liquidating the company if needed. The need for such expertise to be contained in an officer-level professional is a testament to the importance of the CRO's function at that particular moment in the lifecycle of the company. Just as professionals in other areas of expertise are appointed to officer positions to oversee finance (CFO), operations (COO), information technology (CIO), and other fundamental aspects of a business enterprise, so too is it sensible (indeed, necessary, at times) for a company to appoint an officer experienced in

the restructuring process to guide the company through reorganization. A crisis is no time for a management team to learn restructuring in bankruptcy through on-the-job training.

While some might argue that the CRO's function could be carried out just as easily as an outside advisor (like other financial advisors or outside legal counsel), that misses the significance of the "officer" part of the CRO's role. Unlike other professionals, who may be hired by the company to lend their expertise and advice to senior management's efforts to execute the company's business plan, the CRO is frequently called upon to lead that business plan as it transitions from normal operations to crisis management and restructuring efforts. As it is difficult for an outside advisor to lead such an effort, the "officer" aspect of a CRO's title is particularly important to the ultimate success of the turnaround.

As a member of senior management, the CRO works side by side with existing management and enjoys a comparable level of transparency to others in senior positions in the company. As an officer, a CRO typically reports directly to the Board of Directors, which is critical to a CRO's ability to recommend management changes when necessary. This critical nuance is not lost on management teams, who appreciate that the CRO can make direct recommendations to the Board of Directors concerning the effectiveness of existing management.

Issues Concerning the Retention and Compensation of CROs

Various commentators in recent years have highlighted the fact that neither § 327 nor § 363 provides a proper statutory basis upon which to approve a CRO's employment, as has been noted by various **[courts and]** commentators over the years.[4] The problem lies in the fact that a

[4] *See, e.g.*, Cooley, Michael P., "Two Round Holes and One Square Peg: The Employment of Turnaround Consultants under §§ 327 and 363," 24 *ABI Journal* 42 (September 2005); Gwynne, Kurt F., "Employment of Turnaround Management Companies, Disinterestedness Issues under the Bankruptcy Code, and Issues under Delaware General Corporation Law," 10 *ABI Law Review* 673 (Winter 2002).

CRO is both an officer (traditionally hired either in the ordinary course of business or with court approval under § 363) and a "professional person" whose employment is subject to § 327. As a result, the retention of CROs in chapter 11 cases has become fraught with confusion.

Section 327 governs the employment of professionals—or "professional persons"—in Code parlance. Section 327(a) offers some examples of professional persons, including attorneys, appraisers, accountants, and auctioneers, and the case law has extended the scope of "professional persons" to other categories of professionals based on either a qualitative analysis or a quantitative one. Courts adopting the former approach generally limit the concept of a professional person to those who play a central role in administering the debtor's case.[5] Those employing a more quantitative approach define a "professional person" as one who is "given discretion or autonomy in some part of the administration of the debtor's estate.[6] Under either definition, a CRO—typically a financial advisor or crisis manager hired specifically to take charge of the implementation of the company's restructuring efforts—is almost certainly a professional person for purposes of § 327.

That might end the discussion for most, except that to be employed under § 327, a professional must also be a "disinterested person," as that term is defined in § 101(14). As it is currently drafted, however, "disinterestedness" requires that the person "is not and was not, within 2 years before the date of the filing of the petition, a director, officer, or employee of the debtor."[7] If the CRO has not yet been appointed at the time the Debtor seeks to employ them, § 101(14) may still be satisfied; however, that is rarely the case. Far more common in my experience is the situation in which the debtor—facing the exigencies of whatever crisis or crises

[5] *In re Seatrain Lines Inc.*, 13 B.R. 980, 981 (Bankr. S.D.N.Y. 1981); *In re Bicoastal Corp.*, 149 B.R. 216, 218 (Bankr. M.D. Fla. 1993).
[6] *In re Fretheim*, 102 B.R. 298, 299 (Bankr. D. Conn. 1989); *In re Semenza*, 121 56, 57 (Bankr. D. Mont. 1990).
[7] 11 U.S.C. § 101(14)(B).

precipitated the filing—has already engaged the turnaround professional and appointed them chief restructuring officer. Indeed, this initial CRO hiring often occurs prepetition as one of the company's first steps to manage the financial crisis. In such cases, the CRO—as an officer of the company—is no longer disinterested for purposes of § 101(14), and therefore ineligible for employment under § 327.

Thus precluded from employing CROs in many cases under § 327, corporate debtors have turned to § 363, which governs the use, sale, or lease of property of the estate and been construed by many courts to extend to the use of estate funds to hire and pay senior management—for example, a new chief executive officer or chief financial officer.[8] This effectively side-steps the "disinterestedness" problem, albeit at the expense of the compensation process, as the fee disclosure and approval requirements of §§ 330 and 331 and Bankruptcy Rules 2014 and 2016 technically apply only to professionals employed under §§ 327 and 1103. The compensation of an officer employed under § 363(b)—like any other transaction subject to court approval under § 363—is generally subject only to the relatively low hurdle provided by the business judgment rule.

In recent years, the so-called "Jay Alix Protocol" has emerged in the Delaware and Southern District of New York bankruptcy jurisdictions—and others—as the *de facto* procedure for the employment of CROs and the review and approval of their compensation. Now widely accepted and used by professionals, US Trustees, and courts alike, the Jay Alix Protocol originated in September 2001 as a negotiated settlement between the United States Trustee for Region 3 (Delaware) and Jay Alix & Associates to resolve disputes over the qualification and compensation of Jay Alix & Associates in the *Safety-Kleen* and *Harnischfeger* cases. Among

[8] *See, e.g.*, *In re Adelphia Communications Corp.*, 2003 WL 22316543, *29 (Bankr. S.D.N.Y. 2003) (applying §363(b) to evaluate the proposed employment of a new CEO and CFO).

other terms and provisions, the protocol permits JA&A and its affiliates to seek employment in a case either as a financial advisor pursuant to §327 or as a crisis manager pursuant to §363, but not both. It further prohibits the firm from switching to a different role (*e.g.*, from crisis manager to financial advisor) in the same case. The protocol, however, ultimately fails to resolve the underlying conflict between §§ 327 and 363 in the context of CRO employment and compensation.

Suggested Reform

The Commission's purpose is to "study and propose reforms to Chapter 11 and related statutory provisions that will better balance the goals of effectuating the effective reorganization of business debtors—with the attendant preservation and expansion of jobs—and the maximization and realization of asset values for all creditors and stakeholders." In my opinion, this presents an ideal opportunity to consider and propose revisions to the Bankruptcy Code designed to more fully acknowledge the role of the CRO as a key player in chapter 11 reorganizations and establish a proper framework for the employment and compensation of CROs in such cases.

Such a recognition could be accomplished through a variety of means in the Code, perhaps most easily by simply amending § 101(14)(B) to specifically exclude service as a chief restructuring officer from the list of activities that render a person "not disinterested." Such an amendment would affirm the company's need to obtain experienced, officer-level assistance to guide it through the restructuring process, while simultaneously clarifying for all parties the retention and compensation procedures associated with this role.

Of course, we could simply maintain the status quo, where CROs are hired in the interstices between the Code sections. While this has worked in recent years, this uneasy

amalgamation of §§ 327 and 363 creates confusion over the applicability of the "disinterestedness" standard in this context and inserts a degree of unpredictability to the compensation process. The fact that this approach relies heavily on the Jay Alix Protocol, which was originally nothing more than a negotiated settlement between the US Trustee's office and one such restructuring advisor, further underscores the tenuous nature of the arrangement. Moreover, it leaves intact the possibility that courts may choose to enforce the statutes literally, potentially disqualifying CROs who were retained prepetition and thus fail to meet the disinterestedness test of § 101(14). As noted, all too often, a company in distress needs the assistance of an officer-level manager to provide restructuring expertise and experience *before* it seeks relief in chapter 11. Indeed, in the first instance I am often hired specifically in an attempt to *avoid* a chapter 11 filing. A statute that can be construed to penalize a company from employing such expertise *before* seeking relief in chapter 11 deprives companies of the ability to seek the help of a qualified restructuring advisor to assume the responsibilities of CRO when they need it most.

I thank the Commission for inviting me to speak here today. At this time I would be glad to entertain any questions you may have for me.

What Has Changed Since the Asian Crisis?

Jake Williams
Deputy Group Chief Risk Officer

Standard Chartered

Certainties

- ***Flow of economic power from West to East***
  - ***Stronger corporations/governments in Asia***
  - ***Political power shift?***
  - ***Thought leadership / philosophy shift?***

Certainties (continued)

- ***Rising regulatory intrusion with political, as well prudential, themes***
- ***Issue of "willingness to pay" trumping "ability to pay"***
- ***Broader base of financing alternatives / instruments in Asia***
- ***Witches brew of demographics and weak GDP growth (primarily in the West)***
- ***Post Lehman, erosion of faith in capitalism***

Certainties (continued)

- *Weak governments with very short term focus*
- *World getting smaller – impact of extraneous events, social media, etc*
- *Issues in specific countries – China & India*
- *The "long arm" of US law*

Debatable

- *China "crash"?*
- *Eastern values trump Western values – principles versus relationships?*
- *De-coupling of Asia from West?*
- *US economy / industry re-creating itself?*

Debatable (continued)

- ***Bad behaviours of Asian Crisis gone?***
- ***Generational change in Asian corporations?***
- ***Improved legal systems / processes?***
- ***World becoming more rational?***

Debatable (continued)

- ***New people (advisors / bankers) / ideas / technology in restructuring –***
  - ***IQ/Sophistication ↑***
  - ***Experience / practicality ↓***
  - ***Digitalization overriding judgment***

Do you need a computer or a compass?

Standard Chartered

?

Reveal

- ***Need for balanced business judgment.***

Objection Deadline: July 26, 2012 at 4:00 p.m. (prevailing Eastern Time)
Hearing Date (if necessary): August 2, 2012 at 2:00 p.m. (prevailing Eastern Time)

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
Patriot Coal Corporation., *et al.*,	Case No. 12-12900 (SCC)
Debtors.[1]	(Jointly Administered)

DEBTORS' APPLICATION FOR ENTRY OF AN ORDER (i) AUTHORIZING THE RETENTION AND EMPLOYMENT OF AP SERVICES, LLC AND (ii) DESIGNATING KENNETH A. HILTZ AS CHIEF RESTRUCTURING OFFICER AS OF JULY 17, 2012

Patriot Coal Corporation and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "**Debtors**"), file this application (the "**Application**") for entry of an order, substantially in the form attached hereto as Exhibit A, (i) authorizing the employment and retention of AP Services, LLC ("**APS**") to provide interim management and restructuring services *nunc pro tunc* to the Petition Date (as defined herein) and (ii) designating Kenneth A. Hiltz as Chief Restructuring Officer as of July 17, 2012. In support of this Application, the Debtors submit the Declaration of Kenneth A. Hiltz, a Managing Director of AlixPartners, LLP ("**AlixPartners**") and authorized representative of APS (the "**Hiltz Declaration**"), attached hereto as Exhibit B.

Relief Requested

1. By this Application, the Debtors request entry of an order, substantially in the form attached hereto as Exhibit A (the "**Order**"), (i) authorizing the employment and retention of APS to provide interim management and restructuring services *nunc pro tunc* to the Petition

[1] The Debtors are the entities listed on Schedule 1 attached hereto. The employer tax identification numbers and addresses for each of the Debtors are set forth in the Debtors' chapter 11 petitions.

Date and (ii) designating Kenneth A. Hiltz as Chief Restructuring Officer ("**CRO**") as of July 17, 2012, in accordance with the terms and conditions set forth in that certain engagement letter dated as of July 8, 2012 by and between the Debtors and APS, as amended as of July 17, 2012 (the "**Engagement Letter**"), a copy of which is attached hereto as Exhibit C and incorporated by reference herein.

Jurisdiction

2. This Bankruptcy Court for the Southern District of New York (the "**Court**") has jurisdiction to consider this matter pursuant to 28 U.S.C. § 1334. This matter is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2).

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1408.

Background

4. On July 9, 2012 (the "**Petition Date**"), each of the Debtors filed with this Court a voluntary petition for relief (the "**Chapter 11 Cases**") under chapter 11 of title 11 of the United States Code (the "**Bankruptcy Code**"). Each Debtor is continuing to operate its businesses and manage its properties as a debtor in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code. On July 10, 2012, this Court entered an order for joint administration of these Chapter 11 Cases pursuant to Rule 1015(b) of the Bankruptcy Rules.

5. Additional information about the Debtors' businesses and the events leading up to the Petition Date can be found in the Declaration of Mark N. Schroeder, Patriot Coal Corporation's Senior Vice President and Chief Financial Officer, filed on July 9, 2012 [ECF No. 4] which is incorporated herein by reference.

APS' Qualifications

6. As set forth in the Hiltz Declaration, the Debtors understand that APS has a wealth of experience in providing interim management and restructuring services, and enjoys an

excellent reputation for services it has rendered in large and complex chapter 11 cases on behalf of debtors and creditors throughout the United States.

7. APS' professionals have assisted and advised, and provided strategic advice to, debtors, creditors, bondholders, investors, and other entities in numerous chapter 11 cases of similar size and complexity to the Debtors' Chapter 11 Cases. Since its inception in 1981, APS, AlixPartners, its subsidiary affiliates, and its predecessor entities have provided restructuring or crisis management services in numerous large cases, including most recently: *In re Eastman Kodak Company*, Case No. 12-10202 (ALG) (Bankr. S.D.N.Y. 2012); *In re TBS Shipping Services, Inc.*, Case No. 12-22224 (RDD) (Bankr. S.D.N.Y. 2012); *In re United Retail Group, Inc*., Case No. 12-10405 (SMB) (Bankr. S.D.N.Y. 2012); *In re Borders, Inc.*, Case No. 11-10615 (Bankr. S.D.N.Y. 2011) (MG); *In re Neff Corp*., Case No. 10-12610 (Bankr. S.D.N.Y. 2011) (SCC); *In re Lyondell Chemical Co.*, Case No. 09-10023 (REG) (Bankr. S.D.N.Y. 2009); *In re Motors Liquidation Co.*, Case No. 09-50026 (REG) (Bankr. S.D.N.Y 2009); *In re Hayes Lemmerz*, Case No. 09-11655 (MFW) (Bankr. D. Del. 2009); *In re Bearing Point*, Case No. 09-10693 (REG) (Bankr. S.D.N.Y. 2009); *In re Charter Communications*, Case No. 09-11435 (JMP) (Bankr. S.D.N.Y. 2009); *In re General Growth Properties*, Case No. 09-11977 (ALG) (Bankr. S.D.N.Y. 2009); *In re ACG Holdings, Inc.*, Case No. 08-11467 (CSS) (Bankr. D. Del. 2008); *In re Bally Total Fitness of Greater New York*, Case No. 08-14818 (BRF) (Bankr. S.D.N.Y. 2008) and Case No. 07-12395 (BRL) (Bankr. S.D.N.Y. 2007); *In re Reader's Digest*, Case No. 09-23529 (Bankr. S.D.N.Y. 2009); *In re SemGroup, L.P.*, Case No. 08-11525 (BLS) (Bankr. D. Del 2008); *In re Tropicana Casinos & Resorts*, Case No. 08-10856 (DJC) (Bankr. D. Del. 2008); *In re VeraSun Energy Corporation*, Case No. 08-12606 (BLS) (Bankr. D. Del. 2008).

8. Kenneth A. Hiltz, who will act as CRO for the Debtors, specializes in the leadership of corporate turnarounds, restructurings and reorganizations. He has significant expertise in interim crisis management, including balance sheet restructuring, consolidation and wind down initiatives and sale and divestiture activities and cash management. Mr. Hiltz's expertise spans numerous industries including heavy manufacturing, automotive, contracting, automotive supply and numerous service businesses. Mr. Hiltz has served as Chief Financial Officer ("**CFO**") at BearingPoint, a global services firm; CFO and CRO of Hayes Lemmerz, an automotive parts supplier; CFO of Dana Corporation, a global automotive supplier; and CFO of Harnischfager Industries (now Joy Global), a leading supplier of equipment and services to the mining industry. Mr. Hiltz leadership positions included the rationalization of manufacturing facilities, cost reductions, pricing improvements, global sale and divestiture activities and leading performance improvement initiatives in the financial department.

9. The Debtors have selected APS to provide interim management and restructuring services because of APS' experience and reputation for providing such services in large, complex chapter 11 cases such as those listed above. Furthermore, as a result of the prepetition work performed on behalf of the Debtors, APS acquired significant knowledge of the Debtors and their businesses and is now intimately familiar with the Debtors' financial affairs, debt structure, operations, and related matters. Likewise, in providing prepetition services to the Debtors, APS' professionals have worked closely with the Debtors' management and their other advisors. Accordingly, APS has experience and expertise, and specifically relevant knowledge regarding the Debtors, that will assist it in providing effective and efficient services in these Chapter 11 Cases.

Services to be Provided

10. As provided in the Engagement Letter, APS has agreed that Mr. Hiltz will serve as the Debtors' CRO. Working collaboratively with the Debtors' senior management team and board of directors, as well as the Debtors' other professionals, Mr. Hiltz will assist the Debtors in evaluating and implementing strategic and tactical options through the restructuring process.

11. In addition, APS has agreed to provide certain temporary staff to assist Mr. Hiltz and the Debtors in their restructuring efforts (collectively, the "**Temporary Staff**"). The initial list of Temporary Staff, their rates and other information is set forth in the Engagement Letter and summarized in the section below regarding professional compensation.

12. Subject to further order of the Court and consistent with the Engagement Letter, the Debtors anticipate that Mr. Hiltz and the Temporary Staff will render the following interim management and restructuring services during these Chapter 11 Cases, including, without limitation, the following: [2]

Restructuring Activities

- Provide overall leadership of the restructuring process, including working with a wide range of stakeholder groups, together with the Debtors' senior management.
- Assist the Debtors in the design and implementation of a restructuring strategy, together with the Debtors' other professionals, which is designed to maximize enterprise value, and take into account the unique interests of all constituencies.
- Provide assistance to management in connection with the Debtors' development of their revised business plan, and such other related forecasts as may be required by the bank lenders in connection with negotiations or by the Debtors for other corporate purposes.
- Assist the Debtors in managing the "working group" of professionals who are assisting the Debtors in the reorganization process or who are working for the Debtors' various stakeholders to improve coordination of their effort and individual work product to be consistent with the Debtors' overall restructuring goals.
- Assist in obtaining and presenting information required by parties in interest in the

[2] To the extent that the Application and the terms of the Engagement Letter are inconsistent, the terms of the Application shall control.

Debtors' bankruptcy process including official committees appointed by the Court and the Court itself.

- Assist the Debtors in developing and implementing employee, customer and vendor communications programs.
- Assist in the development and implementation of a vendor management process to maximize on-going support from the vendor community, enhance or at least maintain liquidity and negotiate new contracts and relationships as appropriate.
- Assist the Debtors in other business and financial aspects of a Chapter 11 proceeding, including development of and support for the approval and confirmation process for a disclosure statement and plan of reorganization.

On-Going Chapter 11 Administration Tasks

- Assist the Debtors in the review and direction of the statement of affairs, schedules and other regular reports required by the Court as well as providing assistance in such areas as testimony before the Court on matters that are within APS' areas of expertise.
- Assist the Debtors in developing and implementing accounting procedures and controls to "operationalize" the requirements of the bankruptcy proceeding, including both the filing and subsequent activities through completion of the Chapter 11 Cases. Subsequent activities include vendor management, employee benefits claims, claims reconciliation, filing of Monthly Operating Reports with the Court and other matters.
- Assist the Debtors with electronic data collection.

Treasury & Cash Management

- Assist the Debtors in areas of the treasury and risk management function that are expected to be impacted by the bankruptcy process including cash management and banking accounts, worker's compensation and other self insured programs, letter of credit and or bonding obligations, lease obligations and capital programs and the DIP financing process.
- Work with the Debtors and their team to further identify and implement both short-term and long-term liquidity generating initiatives.
- Assist in developing and implementing cash management strategies, tactics and processes.
- Assist the Debtors and their management in managing their short-term cash flow forecasting tool(s) and related methodologies and to assist with planning for alternatives as requested by the Debtors.
- Assist the Debtors with such other matters as may be requested that fall within APS' expertise and that are mutually agreeable.

13. The Debtors and APS agree that all of the services that APS will provide to the Debtors will be: (a) appropriately directed by the Debtors so as to avoid unnecessary duplicative efforts among the other professionals retained in these Chapter 11 Cases; and (b) performed in accordance with applicable standards of the profession.

14. Under the Engagement Letter, if APS finds it desirable to augment its professional staff with independent contractors in these Chapter 11 Cases and the Debtors agree to the use of such independent contractors, then APS shall (i) to the extent that APS uses the services of independent contractors (the "**Contractors**") in these cases, pass-through the cost of such Contractors to the Debtors at the same rate that APS pays the Contractors; (ii) seek reimbursement for actual costs only; and (iii) require any such Contractor to file a declaration indicating that such Contractor has reviewed the list of interested parties in these cases, and disclosing such Contractor's relationships, if any, with such interested parties and indicating that such Contractor is disinterested and will remain disinterested during the time that such Contractor is involved in providing Services on behalf of the Debtors. The fees charged will be consistent with the rates set forth in the Engagement Letter.

15. In connection with each of its engagements, APS may use employees from each of its U.S. and non-U.S. subsidiary affiliates, depending on the needs of the engagement. To the extent APS uses employees from non-U.S. subsidiary affiliates of APS during this engagement, APS will charge discounted U.S. hourly rates for each such employee. To the extent APS uses employees of its U.S. subsidiary affiliates during this engagement, APS will charge discounted U.S. hourly rates for each such employee. In no event will the rates charged by APS' subsidiary affiliates exceed the rates set forth in the Engagement Letter.

Professional Compensation

16. APS' decision to accept this engagement to advise and assist the Debtors is conditioned upon its ability to be retained in accordance with its customary terms and conditions of employment and compensated for its services and reimbursed for the out-of-pocket expenses it incurs in accordance with its customary billing practices.

17. Pursuant to the Engagement Letter, the Debtors and APS have agreed to a fee structure based on APS' standard hourly rates subject to a 10% discount. In addition, Managing Director discounted hourly fees will be capped at a maximum of $850. The current standard hourly rates for 2012, subject to periodic adjustments, charged by APS in respect of the professionals anticipated to be assigned to this case are as follows:

Managing Directors	$815 – 970
Directors	$620 – 760
Vice Presidents	$455 – 555
Associates	$305 – 405
Analysts	$270 – 300
Paraprofessionals	$205 – 225

18. In addition the standard hourly rates of Mr. Hiltz and the Temporary Staff, subject to the 10% discount, and subject to periodic adjustments, as set forth in the Engagement Letter are as follows:

Temporary Staff
Individuals with Officer Positions

Name	Description	Standard Hourly Rate[3]	Commitment Full or Part Time
Kenneth A. Hiltz	Chief Restructuring Officer	$880	Full Time

[3] Hourly rate structure is further defined on Exhibit A and Schedule 1 of the Engagement Letter.

Additional Temporary Staff

Name	Description	Standard Hourly Rate[4]	Commitment Full or Part Time
Dipes Patel	Associate	$345	Full Time
Christopher Blacker	Director	$620	Full Time
Scott Mell	Director	$665	Full Time
Robb McWilliams	Director	$665	Full Time

19. In the normal course of business, APS may periodically adjust its billing rates. Changes in applicable hourly rates will be noted on the invoices for the first time period in which the revised rates became effective. In addition to compensation for professional services rendered by APS personnel, APS will seek reimbursement for reasonable and necessary expenses incurred in connection with these Chapter 11 Cases, including transportation costs, lodging, food, telephone, copying, and messenger services.

20. APS will submit monthly invoices to the Debtors, and the Debtors request authority to pay, in the ordinary course of business, all reasonable amounts invoiced by APS for fees and expenses.

21. Because APS is not being employed as a professional under section 327 of the Bankruptcy Code, it will not submit quarterly fee applications pursuant to Bankruptcy Code sections 330 and 331. APS will, however, file with the Court, and provide notice to the U.S. Trustee and the proposed counsel to the Creditors' Committee, reports of compensation earned and expenses incurred on at least a quarterly basis. Such reports shall summarize the services provided, identify the compensation earned by each executive officer and staff employee

[4] Hourly rate structure is further defined on Exhibit A and Schedule 1 of the Engagement Letter.

provided, and itemize the expenses incurred. Such compensation and expenses will be subject to Court review in the event an objection is filed.

22. APS typically works for compensation that includes hourly-based fees and performance-based contingent incentive compensation earned upon achieving meaningful results. The Debtors understand and acknowledge that the Success Fee, as more specifically defined in the Engagement Letter, is an integral part of APS' compensation for the engagement. In the instant cases, the Debtors and APS have agreed that the Debtors will pay APS a Success Fee in the amount of $2,000,000 upon the effectiveness of a chapter 11 plan of reorganization; provided, however, in the event that APS terminates its engagement other than for cause or is terminated for cause, APS shall not be entitled to any Success Fee.

23. APS and its personnel shall be required to: (i) maintain contemporaneous time records in tenth of an hour increments and (ii) conform to any schedule of hourly rates contained in the Engagement Letters.

24. The fee rates are consistent with and typical of compensation arrangements entered into by APS and other comparable firms in connection with the rendering of similar services under similar circumstances. The Debtors believe that the rates are in fact reasonable, market-based, and designed to fairly compensate APS for its work and to cover fixed and routine overhead expenses.

25. A Retainer of $150,000 (the "**Retainer**") was paid on June 18, 2012 pursuant to the June 16, 2012 engagement letter between AlixPartners and the Debtors. Pursuant to the Engagement Letter, that Retainer was transferred to APS for this engagement, and will be credited against any fees and expenses payable by the Debtors under this Engagement Letter.

Any remainder shall be returned to the Debtors as soon as practicable after the expiration or termination of the Engagement Letter.

26. Due to the ordinary course and unavoidable reconciliation of fees and submission of expenses immediately prior to, and subsequent to, the Petition Date, APS has incurred but not billed fees and reimbursable expenses which relate to the prepetition period. APS hereby seeks this Court's approval to apply the Retainer to these amounts and any further prepetition fees and expenses APS becomes aware of during its ordinary course billing review and reconciliation. Upon the proposed application of the Retainer, the Debtors would not owe APS any sums for prepetition services.

Indemnification

27. The Debtors shall only indemnify those APS employees serving as officers of the Debtors on the same terms as provided to the Debtors' other officers and directors under the Debtors' by-laws and applicable state law, along with insurance coverage under the Debtors' D&O policies. The indemnification provisions set forth in the first paragraph of section 7 of the Engagement Letter shall not apply to APS.

APS' Connection With Parties in Interest

28. The Debtors do not believe that APS is a "professional" whose retention is subject to approval under section 327 of the Bankruptcy Code. Nevertheless, APS has reviewed its electronic database and has provided information with respect to its connections with the Debtors and certain of their creditors or related parties, as more specifically set forth in the Hiltz Declaration.

29. APS will periodically review its files during the pendency of these chapter 11 cases to ensure that no conflicts or other disqualifying circumstances exist or arise. To the extent that APS discovers any new relevant facts or relationships bearing on the matters described

herein during the period of APS' retention, APS will use reasonable efforts to file promptly a supplemental declaration.

Basis for Relief

30. The retention of interim corporate officers and other temporary employees is proper under section 363 of the Bankruptcy Code. Section 363(b) of the Bankruptcy Code provides in relevant part, that the trustee or debtor in possession, "after notice and a hearing may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Section 363 of the Bankruptcy Code provides that transactions not in the ordinary course of business must be approved by court order. Under applicable case law, in this and other jurisdictions, if a debtor's proposed use of its assets pursuant to section 363(b) of the Bankruptcy Code represents a reasonable business judgment on the part of the debtor, such use should be approved. *See, e.g., Myers v. Martin (In re Martin)*, 91 F.3d 389, 395 (3d Cir. 1996) (citing *Fulton State Bank v. Schipper (In re Schipper)*, 933 F.2d 513, 515 (7th Cir. 1991)); *Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983); *In re Delaware & Hudson Ry. Co.*, 124 B.R. 169, 175-76 (D. Del. 1991) (courts have applied the "sound business purpose" test to evaluate motions brought pursuant to section 363(b)); *Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) ("Where the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct.").

31. The retention of APS and its professionals is a sound exercise of the Debtors' business judgment. Mr. Hiltz has extensive experience as a senior officer and as an advisor for many troubled companies. In addition, APS has acquired significant knowledge of the Debtors

and their business operations as a result of the extensive prepetition work performed on the Debtors' behalf. In providing prepetition services to the Debtors, APS has worked closely with the Debtors' management and their other advisors. The Debtors believe that the CRO, in conjunction with the other APS professionals, will provide services that benefit the Debtors' estates and creditors. Therefore, the Debtors believe that the retention of APS and its professionals is appropriate and in the best interests of the Debtors and their estates and creditors.

Notice

32. Consistent with the Order Establishing Certain Notice, Case Management and Administrative Procedures entered on July 16, 2012 [ECF No. 84] (the "**Case Management Order**"), the Debtors will serve notice of this Motion on (a) the Core Parties and (b) the Non-ECF Service Parties (as those terms are defined in the Case Management Order). All parties who have requested electronic notice of filings in these cases through the Court's ECF system will automatically receive notice of this motion through the ECF system no later than the day after its filing with the Court. A copy of this motion and any order approving it will also be made available on the Debtors' Case Information Website (located at www.PatriotCaseInfo.com). In light of the relief requested, the Debtors submit that no further notice is necessary. Pursuant to paragraph 21 of the Case Management Order, if no objections are timely filed and served in accordance therewith, an order granting the relief requested herein may be entered without a hearing.

No Prior Request

33. No prior application for the relief requested herein has been made to this or any other court.

[Remainder of page intentionally left blank]

WHEREFORE, for the reasons set forth herein, in the First Day Declaration, and in the Hiltz Declaration, the Debtors respectfully request entry of an Order granting the relief requested herein and such other and further relief as may be appropriate under the circumstances.

New York, New York
July 19, 2012
PATRIOT COAL CORPORATION

By: /s/ Mark Schroeder
Mark Schroeder
Senior Vice President and
Chief Financial Officer
Patriot Coal Corporation

SCHEDULE 1
(Debtor Entities)

1. Affinity Mining Company
2. Apogee Coal Company, LLC
3. Appalachia Mine Services, LLC
4. Beaver Dam Coal Company, LLC
5. Big Eagle, LLC
6. Big Eagle Rail, LLC
7. Black Stallion Coal Company, LLC
8. Black Walnut Coal Company
9. Bluegrass Mine Services, LLC
10. Brook Trout Coal, LLC
11. Catenary Coal Company, LLC
12. Central States Coal Reserves of Kentucky, LLC
13. Charles Coal Company, LLC
14. Cleaton Coal Company
15. Coal Clean LLC
16. Coal Properties, LLC
17. Coal Reserve Holding Limited Liability Company No. 2
18. Colony Bay Coal Company
19. Cook Mountain Coal Company, LLC
20. Corydon Resources LLC
21. Coventry Mining Services, LLC
22. Coyote Coal Company LLC
23. Cub Branch Coal Company LLC
24. Dakota LLC
25. Day LLC
26. Dixon Mining Company, LLC
27. Dodge Hill Holding JV, LLC
28. Dodge Hill Mining Company, LLC
29. Dodge Hill of Kentucky, LLC
30. EACC Camps, Inc.
31. Eastern Associated Coal, LLC
32. Eastern Coal Company, LLC
33. Eastern Royalty, LLC
34. Emerald Processing, L.L.C.
35. Gateway Eagle Coal Company, LLC
36. Grand Eagle Mining, LLC
37. Heritage Coal Company LLC
38. Highland Mining Company, LLC
39. Hillside Mining Company
40. Hobet Mining, LLC
41. Indian Hill Company LLC
42. Infinity Coal Sales, LLC
43. Interior Holdings, LLC
44. IO Coal LLC
45. Jarrell's Branch Coal Company
46. Jupiter Holdings LLC
51. KE Ventures, LLC
52. Little Creek LLC
53. Logan Fork Coal Company
54. Magnum Coal Company LLC
55. Magnum Coal Sales LLC
56. Martinka Coal Company, LLC
57. Midland Trail Energy LLC
58. Midwest Coal Resources II, LLC
59. Mountain View Coal Company, LLC
60. New Trout Coal Holdings II, LLC
61. Newtown Energy, Inc.
62. North Page Coal Corp.
63. Ohio County Coal Company, LLC
64. Panther LLC
65. Patriot Beaver Dam Holdings, LLC
66. Patriot Coal Company, L.P.
67. Patriot Coal Corporation
68. Patriot Coal Sales LLC
69. Patriot Coal Services LLC
70. Patriot Leasing Company LLC
71. Patriot Midwest Holdings, LLC
72. Patriot Reserve Holdings, LLC
73. Patriot Trading LLC
74. PCX Enterprises, Inc.
75. Pine Ridge Coal Company, LLC
76. Pond Creek Land Resources, LLC
77. Pond Fork Processing LLC
78. Remington Holdings LLC
79. Remington II LLC
80. Remington LLC
81. Rivers Edge Mining, Inc.
82. Robin Land Company, LLC
83. Sentry Mining, LLC
84. Snowberry Land Company
85. Speed Mining LLC
86. Sterling Smokeless Coal Company, LLC
87. TC Sales Company, LLC
88. The Presidents Energy Company LLC
89. Thunderhill Coal LLC
90. Trout Coal Holdings, LLC
91. Union County Coal Co., LLC
92. Viper LLC
93. Weatherby Processing LLC
94. Wildcat Energy LLC
95. Wildcat, LLC
96. Will Scarlet Properties LLC

47. Kanawha Eagle Coal, LLC
48. Kanawha River Ventures I, LLC
49. Kanawha River Ventures II, LLC
50. Kanawha River Ventures III, LLC
97. Winchester LLC
98. Winifrede Dock Limited Liability Company
99. Yankeetown Dock, LLC

Exhibit A

Proposed Order

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
PATRIOT COAL CORPORATION, *et al.*,	Case No. 12-12900 (SCC)
Debtors. [1]	(Jointly Administered)

ORDER (i) AUTHORIZING THE DEBTORS' EMPLOYMENT AND RETENTION OF AP SERVICES, LLC AND (ii) DESIGNATING KENNETH A. HILTZ AS CHIEF RESTRUCTURING OFFICER AS OF JULY 17, 2012

Upon the application (the "**Application**")[2] of the Debtors for entry of an order (this "**Order**") (i) authorizing the employment and retention of AP Services, LLC ("**APS**") to provide interim management and restructuring services *nunc pro tunc* to the Petition Date and (ii) designating Kenneth A. Hiltz as Chief Restructuring Officer as of July 17, 2012, all as further described in the Application; and the Court having jurisdiction to consider the Application and the relief requested therein pursuant to 28 U.S.C. § 1334; and consideration of the Application being a core proceeding pursuant to 28 U.S.C. § 157(b)(2); and notice of the Application being adequate and appropriate under the particular circumstances; [and a hearing having been held to consider the relief requested in the Application (the "**Hearing**")]; and upon consideration of the First Day Declaration, the Hiltz Declaration, [the record of the Hearing], and all proceedings had before the Court; and the Court having found and determined that the relief sought in the Application is in the best interests of the Debtors' estates, their creditors and other parties in

1 The Debtors are the entities listed on Schedule 1 attached to the Application. The employer tax identification numbers and addresses for each of the Debtors are set forth in the Debtors' chapter 11 petitions.

2 All capitalized terms used but otherwise not defined herein shall have the meanings set forth in the Application.

interest and that the legal and factual bases set forth in the Application establish just cause for the relief granted herein; and any objections to the requested relief having been withdrawn or overruled on the merits; and after due deliberation and sufficient cause appearing therefor, it is hereby ORDERED:

1. The Application is granted to the extent set forth herein.

2. The Debtors are authorized to (i) employ and retain APS to provide interim management and restructuring services *nunc pro tunc* to the Petition Date and (ii) designate Kenneth A. Hiltz as Chief Restructuring Officer as of July 17, 2012 pursuant to section 363(b) of the Bankruptcy Code and in accordance with the terms and conditions set forth in the Engagement Letter, as modified herein,.

3. APS is authorized to provide the following services to the Debtors:

Restructuring Activities

- Provide overall leadership of the restructuring process, including working with a wide range of stakeholder groups, together with the Debtors' senior management.
- Assist the Debtors in the design and implementation of a restructuring strategy, together with the Debtors' other professionals, which is designed to maximize enterprise value, and take into account the unique interests of all constituencies.
- Provide assistance to management in connection with the Debtors' development of their revised business plan, and such other related forecasts as may be required by the bank lenders in connection with negotiations or by the Debtors for other corporate purposes.
- Assist the Debtors in managing the "working group" of professionals who are assisting the Debtors in the reorganization process or who are working for the Debtors' various stakeholders to improve coordination of their effort and individual work product to be consistent with the Debtors' overall restructuring goals.
- Assist in obtaining and presenting information required by parties in interest in the Debtors' bankruptcy process including official committees appointed by the Court and the Court itself.
- Assist the Debtors in developing and implementing employee, customer and vendor communications programs.
- Assist in the development and implementation of a vendor management process to maximize on-going support from the vendor community, enhance or at least maintain

liquidity and negotiate new contracts and relationships as appropriate.

- Assist the Debtors in other business and financial aspects of a Chapter 11 proceeding, including development of and support for the approval and confirmation process for a disclosure statement and plan of reorganization.

On-Going Chapter 11 Administration Tasks

- Assist the Debtors in the review and direction of the statement of affairs, schedules and other regular reports required by the Court as well as providing assistance in such areas as testimony before the Court on matters that are within APS' areas of expertise.
- Assist the Debtors in developing and implementing accounting procedures and controls to "operationalize" the requirements of the bankruptcy proceeding, including both the filing and subsequent activities through completion of the Chapter 11 Cases. Subsequent activities include vendor management, employee benefits claims, claims reconciliation, filing of Monthly Operating Reports with the Court and other matters.
- Assist the Debtors with electronic data collection.

Treasury & Cash Management

- Assist the Debtors in areas of the treasury and risk management function that are expected to be impacted by the bankruptcy process including cash management and banking accounts, worker's compensation and other self insured programs, letter of credit and or bonding obligations, lease obligations and capital programs and the DIP financing process.
- Work with the Debtors and their team to further identify and implement both short-term and long-term liquidity generating initiatives.
- Assist in developing and implementing cash management strategies, tactics and processes.
- Assist the Debtors and their management in managing their short-term cash flow forecasting tool(s) and related methodologies and to assist with planning for alternatives as requested by the Debtors.
- Assist the Debtors with such other matters as may be requested that fall within APS' expertise and that are mutually agreeable.

4. APS shall be compensated for its services and reimbursed for any related expenses in accordance with the rates (as adjusted from time to time) and disbursement policies as set forth in the Application, the Hiltz Declaration, the Engagement Letter, and any other applicable orders of this Court.

5. APS and its personnel shall be required to: (i) maintain contemporaneous time records in tenth of an hour increments and (ii) conform to any schedule of hourly rates contained in the Engagement Letters.

6. APS is not required to submit fee applications pursuant to sections 330 and 331 of the Bankruptcy Code, but will instead submit monthly invoices to the Debtors, and the Debtors are hereby authorized to pay, in the ordinary course of business, all reasonable amounts invoiced by APS for fees and expenses.

7. APS shall submit to the Court, with copies to the U.S. Trustee and the proposed counsel to the Creditors' Committee (the "**Notice Parties**"), contemporaneously with such filing, quarterly reports of compensation earned, and parties-in-interest in these Chapter 11 Cases shall have the right to object to fees paid and expenses reimbursed to APS within 20 days after APS files such reports.

8. Each month, APS shall file with the Court (and serve copies to the Notice Parties) a report on staffing on the engagement for the previous month. Such report shall include the names and functions of the individuals assigned. All staffing shall be subject to review by the Court in the event an objection is filed.

9. APS shall apply any amounts of its prepetition retainer remaining, after applying such retainer to prepetition amounts (as described in the Application), as a credit toward postpetition fees and expenses, after such postpetition fees and expenses are approved pursuant to the first order of the Court awarding fees and expenses to APS.

10. Notwithstanding anything in the Application, the Hiltz Declaration or the Engagement Letter, the Debtors shall only indemnify those APS employees serving as officers of the Debtors on the same terms as provided to the Debtors' other officers and directors under the

Debtors' by-laws and applicable state law, along with insurance coverage under the Debtors' D&O policies. The indemnification provisions set forth in the first paragraph of section 7 of the Engagement Letter shall not apply to APS.

11. Notwithstanding anything in the Application or the Engagement Letter to the contrary, APS shall (i) to the extent APS uses the services of independent contractors (the **"Contractors"**) in these cases, APS shall pass-through the cost of such Contractors to the Debtors at the same rate that APS pays the Contractors; (ii) seek reimbursement for actual costs only; and (iii) ensure that the Contractors are subject to the same conflict checks as required for APS and (iv) shall file with the Court such disclosures required by Bankruptcy Rule 2014.

12. APS shall file on the Court's docket and provide ten business days notice to the Debtors, the U.S. Trustee, and any official committee of unsecured creditors then appointed in these Chapter 11 Cases of any increase of the hourly rates as set forth on Schedule 1 of the Engagement Letter.

13. APS shall use its reasonable efforts to avoid any unnecessary duplication of services provided by any of the Debtors' other retained professionals in these Chapter 11 Cases.

14. To the extent that there may be any inconsistency between the terms of the Application, the Hiltz Declaration or the Engagement Letter and this Order, the terms of this Order shall govern.

15. The Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order in accordance with the Application.

16. Notice of the Application as provided therein shall be deemed good and sufficient notice of such application, and the requirements of the Local Bankruptcy Rules are satisfied by the contents of the Application.

17. The terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

18. This Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

Date: New York, New York
_____ __, 2012

Shelley C. Chapman
United States Bankruptcy Judge

Exhibit B

Hiltz Declaration

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
PATRIOT COAL CORPORATION, *et al.*,	Case No. 12-12900 (SCC)
Debtors. [1]	(Jointly Administered)

DECLARATION OF KENNETH A. HILTZ IN SUPPORT OF THE DEBTORS' APPLICATION FOR ENTRY OF AN ORDER (i) AUTHORIZING THE DEBTORS' EMPLOYMENT AND RETENTION OF AP SERVICES, LLC AND (ii) DESIGNATING KENNETH A. HILTZ AS CHIEF RESTRUCTURING OFFICER AS OF JULY 17, 2012

I, Kenneth A. Hiltz, under penalty of perjury, declare as follows:

1. I am a Managing Director of AlixPartners, LLP ("**AlixPartners**") and I am an authorized representative of AP Services, LLC ("**APS**"), which has a place of business at 2000 Town Center, Suite 2400, Southfield, Michigan 48075. APS specializes in, among other things, supplying senior executives on an interim basis to financially troubled companies. AlixPartners and its subsidiary affiliates including, without limitation, APS, are internationally recognized restructuring and turnaround advisory, interim management and consulting firms.

2. I submit this declaration on behalf of APS (the "**Declaration**") in support of the application (the "**Application**") of the above-captioned debtors (collectively, the "**Debtors**") in the above-captioned Chapter 11 Cases for an order, pursuant to section 363(b) of the Bankruptcy Code for entry of an order (i) authorizing the employment and retention of APS as their restructuring advisor *nunc pro tunc* to the Petition Date and (ii) designating Kenneth A. Hiltz as

[1] The Debtors are the entities listed on Schedule 1 attached to the Application. The employer tax identification numbers and addresses for each of the Debtors are set forth in the Debtors' chapter 11 petitions.

Chief Restructuring Officer ("**CRO**") as of July 17, 2012.[2] Except as otherwise noted, I have personal knowledge of the matters set forth herein, and if called as a witness, would testify competently thereto.

APS' Qualifications

3. APS has a wealth of experience in providing interim management services, and enjoys an excellent reputation for services it has rendered in large and complex chapter 11 cases on behalf of debtors and creditors throughout the United States. APS has previously worked on many chapter 11 restructurings, advising both debtors and creditors in various cases and has vast experience working with companies in distressed situations, as more specifically set forth in the Application.[3]

4. Since June 2012, APS provided services to the Debtors in connection with their restructuring efforts. APS has become familiar with the Debtors' operations and is well qualified to represent the Debtors as crisis managers in connection with such matters in an effective and efficient manner.

APS' Connections to Parties in Interest

5. In connection with the proposed retention of APS by the Debtors, APS undertook a lengthy conflicts analysis process to determine whether it had any relationships adverse to the Debtors' estates.

6. Specifically, to check and clear potential conflicts of interest in these Chapter 11 Cases, APS reviewed its client relationships to determine whether it had any relationships with

[2] Capitalized terms not otherwise defined in this Declaration shall have the meanings ascribed to them in the Application.

[3] For a list of several recent cases in which AlixPartners has been involved, see Paragraph 7 of the Application.

the entities named on Schedule 1 attached hereto, which were provided to APS by the Debtors (collectively, the "**Potential Parties in Interest**"). In addition, APS sent a firm-wide e-mail to all of its professionals requesting information on potential relationships.

7. Based on that search, APS represents that, to the best of its knowledge, APS knows of no fact or situation that would represent a conflict of interest for APS with regard to the Debtors. While the disclosures refer to APS, the conflict search was performed and results were disclosed as to APS, AlixPartners, its parent company, AlixPartners Holdings, LLP ("**AP Holdings**") and each of its U.S. and non-U.S. subsidiary affiliates. Unless otherwise noted, references to APS in the disclosures below collectively refer to APS, AlixPartners, AP Holdings and each of their subsidiary affiliates. APS wishes to disclose the following:

- Funds managed by subsidiaries of CVC Capital Partners SICAV-FIS S.A. (**"CVC"**), a private equity and investment advisory firm, own a controlling stake in AP Holdings, the parent of AlixPartners, an affiliate of APS. CVC Credit Partners, L.P. ("**CVC Credit Partners**") is a global debt management business and a majority owned subsidiary of CVC.

- CVC's private equity funds ("**CVC Funds**") and debt funds ("**CVC Credit Partners' Funds**") are managed independently from each other, with no overlap in membership of the relevant investment committees or boards of entities with responsibility for investment decisions. CVC has in place an internal information barrier between the CVC Funds and the CVC Credit Partners' Funds. All CVC Credit Partners investment professionals are dedicated to CVC Credit Partners and are not involved in the private equity business. CVC Credit Partners also has separate IT systems and workspaces.

  No material nonpublic information about the Debtors has been furnished by APS to CVC or any CVC managed funds or their portfolio companies, including without limitation, CVC Credit Partners (collectively, the "**CVC Entities**") or to any managing director of CVC or CVC Credit Partners and APS will continue to abide by its confidentiality obligations to the Debtors. APS operates independently of the CVC Entities, and does not share employees or officers with the CVC Entities, except that a managing partner of CVC is on the Boards of Directors of AlixPartners and AP Holdings and on the advisory board to CVC Credit Partners. Certain other CVC executives, who are not connected with CVC Credit Partners, are also on the Boards of Directors of AP Holdings and AlixPartners. APS and the CVC Entities have separate offices in separate

buildings and use separate Internet email addresses. APS's financial performance is not directly impacted by the success or failure of the CVC Entities. Certain of the CVC Credit Partners' Funds act as lenders to AP Holdings or AlixPartners.

- As a component of its conflict checking system, APS has searched the names of CVC, CVC Credit Partners, the CVC Credit Partners' Funds, the CVC Funds, each managing partner of CVC and each portfolio company of the CVC Funds (the "**CVC Conflict Parties**") against the list of Potential Parties in Interest, and APS has determined to the best of its knowledge that there are no resulting disclosures other than as noted herein. The term "portfolio company" means any business in which a CVC fund has a direct controlling or minority interest. The term "portfolio company" does not include indirect investments such as businesses owned or investments made by a CVC Funds portfolio company or investments made by the CVC Credit Partners' Funds. CVC Credit Partners Funds, as well as other CVC Entities, may in the ordinary course from time to time hold, control and/or manage loans to, or investments in the Debtors and parties in interest in these cases. Further, the CVC Entities may have had, currently have or may in the future have business relationships or connections with the Debtors or other Potential Parties in Interest in matters related to or unrelated to the Debtors or their affiliates or these Chapter 11 Cases. Furthermore, APS has provided the list of Debtors to CVC and has performed appropriate checks to determine if any material connections between the CVC Entities and the Debtors exist. APS will supplement this disclosure if it obtains information regarding any such connection. Other than as specifically noted herein, APS has not undertaken to determine the existence, nature and/or full scope of any business relationships or connections that the CVC Entities may have with the Potential Parties in Interest, the Debtors and their affiliates or these Chapter 11 Cases.

- Based on, among other things, the business separation between the CVC Funds and the CVC Credit Partners' Funds, the business separation between the CVC Entities and APS, and the confidentiality obligations referred to above, APS believes that it does not hold or represent an interest adverse to the estate with respect to the engagement. Further, AP may have had, currently has or may in the future have business relationships with, among other entities, portfolio companies or managed funds of CVC in matters unrelated to the Debtors or their affiliates in these Chapter 11 Cases.

- There is one confidential client of APS that is a professional in interest to the Debtors. The confidential client is a current APS client in matters unrelated to the Debtors.

- Certain of the parties in interest may have extended credit or provided services, or may in the future extend credit or provide services to APS.

- APS has relationships with certain departments and agencies of the United States government, including, without limitation, the Internal Revenue Service ("**IRS**"), a significant taxing authority to the Debtors, and the Deparatment of Labor, a letter of credit and surety bond provider and beneficiary. The IRS and the Department of Labor are creditors, adverse parties and vendors to current and former APS clients in matters unrelated to the Debtors. The IRS is the previous employer of current APS employees. In addition, the United States Securities and Exchange Commission, the United States Attorneys' Office and the Federal Deposit Insurance Corporation are current or former clients of APS in matters unrelated to the Debtors.

- ACE and ACE American Insurance Company, insurance providers and letter of credit parties to the Debtors, are vendors to APS.

- AIG, an insurance provider to the Debtors, is affiliated with entities that are limited partners, litigation counterparties, insurance providers, adverse parties, lenders and bondholders to current and former APS clients in matters unrelated to the Debtors. AIG is a current and former APS client in matters unrelated to the Debtors. AIG has provided various types of insurance to APS in matters unrelated to the Debtors.

- Alcoa Fuels, Inc., a lessor to the Debtors, is affiliated with entities that are creditors and vendors to current and former APS clients in matters unrelated to the Debtors. An affiliate is the previous employer of a current APS employee.

- Allied World National Assurance Company and Allied World Assurance Company ("**Allied**"), insurance providers to the Debtors, are adverse parties and executory contract counterparties to former APS clients in matters unrelated to the Debtors. Allied is a vendor to APS.

- American Casualty Company of Reading, Pennsylvania (**"CNA"**), a letter of credit party to the Debtors, is affiliated with entities that are bondholders, creditors and adverse parties to current and former APS clients in matters unrelated to the Debtors. An affiliate of CNA is a former APS client in matters unrelated to the Debtors. CNA is the previous employer of a current APS employee.

- American Stock Transfer & Trust Company, LLC, a professional in interest in this bankruptcy matter, is a co-defendant and professional in interest to current and former APS clients in matters unrelated to the Debtors.

- AON Risk, an insurance provider to the Debtors, is affiliated with an entity that is a vendor to APS. AON is a current and former APS client in matters unrelated to the Debtors.

- Arnold & Porter LLP, a professional in interest in this bankruptcy matter, is a current and former APS client in matters unrelated to the Debtors.

- AT&T, AT&T Mobility and AT&T Teleconference Services (collectively, "**AT&T**"), utility providers to the Debtors, are affiliated with entities that are creditors, executory contract counterparties, vendors, lenders and shareholders to current and former APS clients in matters unrelated to the Debtors. An affiliate of AT&T is a former APS client in matters unrelated to the Debtors. AT&T is a vendor to APS.

- Axis Insurance (Bermuda) Ltd, Axis Insurance Company and Axis Surplus Insurance Company (collectively, "**Axis**"), insurance providers to the Debtors, are affiliated with entities that are executory contract counterparties, lessors, insurers and director affiliated companies to current and former APS clients in matters unrelated to the Debtors. Axis Insurance Company is a former APS client in matters unrelated to the Debtors.

- Banc of America Securities LLC, BancorpSouth Equipment Finance, Bank of America, Bank of America Corporation, Bank of America Leasing and Bank of America, N.A., professionals in interest, lessors, lenders and letters of credit parties to the Debtors, are current and former APS clients, as well as executory contract counterparties, creditors and lenders to current and former APS clients in matters unrelated to the Debtors. Bank of America is a former employer of a current APS professional. Bank of America provides banking services to APS.

- Bank of Oklahoma, NA, a lender to the Debtors, is a former APS client in matters unrelated to the Debtors. Bank of Oklahoma, NA is a vendor and creditor to current and former APS clients in matters unrelated to the Debtors.

- Bank of the West, a lessor to the Debtors, is a current APS client in matters unrelated to the Debtors.

- Barclays Bank PLC and Barclays Capital, Inc. ("**Barclays**"), lenders to the Debtors and professionals in interest in this bankruptcy matter, are affiliated with entities that are creditors, significant shareholders, adverse parties, lenders and bondholders to current and former APS clients in matters unrelated to the Debtors. Barclays is a vendor to APS and is a co-client to a current APS client in matters unrelated to the Debtors. Barclays is the previous employer of a current APS employee.

- Blackrock, Inc., a shareholder to the Debtors, is a lender, creditor, bondholder and executory contract counterparty to current and former APS clients in matters unrelated to the Debtors. Blackrock Financial Management is a significant shareholder to a former APS client in matters unrelated to the Debtors. Blackrock Realty Advisors, a subsidiary of Blackrock, Inc., is a lessor to a current APS client in matters unrelated to the Debtors.

- Blackstone Group LP, a professional in interest in this bankruptcy matter, is a former APS client in matters unrelated to the Debtors. Affiliates of Blackstone are professionals in interest, significant shareholders, bondholders, creditors, parent companies and lenders to current and former APS clients and is a landlord to APS, all in matters unrelated to the Debtors.

- Blue Cross Blue Shield, a vendor to the Debtors, is a vendor to APS. Blue Cross Blue Shield, is a vendor and insurance provider to current and former APS clients in matters unrelated to the Debtors. Blue Cross Blue Shield is a creditor to a current APS client in matters unrelated to the Debtors.

- Bowles Rice McDavid Graff & Love LLP, a professional in interest in this bankruptcy matter, is opposing counsel, client counsel and professional in interest to current and former APS clients in matters unrelated to the Debtors.

- Bryan Cave, LLP, a professional in interest in this bankruptcy matter, is opposing counsel and professional in interest to current and former APS clients in matters unrelated to the Debtors. Bryan Cave, LLP is a current and former APS client in matters unrelated to the Debtors.

- CAT Financial Services, Caterpillar Financial Services Corp., Caterpillar Financial Services Corporation and Caterpillar Global Mining America (collectively, "**Caterpillar**"), letters of credit parties, lenders, creditors, lessors and vendors to the Debtors, are vendors, customers, adverse parties, lenders, creditors and director affiliated companies to current and former APS clients in matters unrelated to the Debtors. Caterpillar is a former APS client in matters unrelated to the Debtors.

- Chartis, an insurance provider to the Debtors, is an insurance provider to current APS clients in matters unrelated to the Debtors. Chartis is an insurance provider to APS.

- Chubb-Federal Insurance, Chubb Surety and Chubb Group of Insurance Companies (collectively, "**Chubb**"), insurance providers and letter of credit parties to the Debtors, are vendors to APS and adverse parties, lenders, insurance providers and executory contract counterparties to current and former APS clients in matters unrelated to the Debtors. Chubb is a former APS client in matters unrelated to the Debtors.

- Citibank National Association, CitiCapital Commercial Leasing Corporation, Citigroup CIB, Citigroup Global Markets Inc. and Citigroup Global Markets, Inc. (collectively, "**Citi**"), lenders, professionals in interest and lessors to the Debtors, and affiliated entities, are creditors, lenders, bondholders, shareholders, adverse parties, professionals in interest and lessors to current and former APS clients in matters unrelated to the Debtors. An affiliate, Citigroup, is a related party to a

current APS client in matters unrelated to the Debtors. Citi is a current and former APS client in matters unrelated to the Debtors.

- Cleary Gottlieb Steen & Hamilton LLP, a professional in interest in this bankruptcy matter, is a current and former APS client in matters unrelated to the Debtors. Cleary Gottlieb Steen & Hamilton LLP is opposing counsel and a professional in interest to current and former APS clients in matters unrelated to the Debtors.

- Comerica Bank ("**Comerica**"), a lender to the Debtors, is a former lender to APS and also a former APS client in matters unrelated to the Debtors. Comerica is a lender, creditor, co-defendant and bondholder to current and former APS clients in matters unrelated to the Debtors. Comerica is the previous employer of a current APS employee. Comerica provides banking services to APS.

- Computershare, a professional in interest in this bankruptcy matter, is a professional in interest to a former APS client in matters unrelated to the Debtors.

- Continental Casualty Company, a letter of credit party to the Debtors, is affiliated with an entity that is a former APS client in matters unrelated to the Debtors.

- CSX Transportation, a vendor and creditor to the Debtors, is affiliated with an entity that is a creditor and lessor to former APS clients in matters unrelated to the Debtors. An affiliate, CSX Corporation, is the previous employer of a current APS employee.

- Davis Polk & Wardwell, a professional in interest in this bankruptcy matter, is a creditor, professional in interest and client counsel to current and former APS clients in matters unrelated to the Debtors.

- Dinsmore & Shohl LLP, a professional in interest in this bankruptcy matter, is a former APS client in matters unrelated to the Debtors.

- Dish Network, a utility provider to the Debtors, is a creditor and vendor to former APS clients in matters unrelated to the Debtors. Dish Network is a client related party to a former APS client in matters unrelated to the Debtors.

- DTE Energy, ("**DTE**"), a utility provider to the Debtors, is the previous employer of a current APS employee. DTE is an executory contract counterparty to current and former APS clients in matters unrelated to the Debtors. DTE is a vendor to APS.

- Duff & Phelps Corporation ("**Duff**"), a professional in interest in this bankruptcy matter, is a professional in interest to current and former APS clients in matters unrelated to the Debtors. Duff is the previous employer of a current APS employee. Duff is a vendor to APS.

- Duke Energy Carolinas LLC, Duke Energy Commercial Asset Management and Duke Energy Kentucky, Inc., vendors to the Debtors, are affiliated with entities that are creditors, director affiliated companies, strategic alliance parties and executory contract counterparties to current and former APS clients in matters unrelated to the Debtors.

- Eastman Kodak Company ("**Kodak**"), a customer and vendor to the Debtors, is a current and former APS client in matters unrelated to the Debtors. APS is currently providing interim management services to Kodak in its chapter 11 proceedings. APS and APS do not believe the interests of Kodak and the Debtors are adverse. However, in an abundance of caution, APS and APS will establish an appropriate informational barrier if necessary to protect confidential information of the Debtors from being shared with members of the Kodak engagement team and vice versa. Kodak and affiliated entities are lenders, co-defendants, vendors, litigation parties, significant shareholders and executory contract counterparties to current and former APS clients in matters unrelated to the Debtors.

- Ernst & Young ("**E&Y**"), a professional in interest in this bankruptcy matter, is an adverse party, client counsel, vendor and creditor to current and former APS clients in matters unrelated to the Debtors. E&Y is a vendor to APS and previously employed several current APS employees. E&Y is a current and former APS client in matters unrelated to the Debtors.

- Fifth Third Bank, Fifth Third Leasing Company and Fifth Third Securities, Inc. ("**Fifth Third**"), letter of credit parties, surety bond providers, lessors, creditor and professionals in interest to the Debtors, are bondholders, creditors, lenders, lessors and adverse parties to current and former APS clients in matters unrelated to the Debtors. In addition, Fifth Third is a member in a bank group for which APS performed services in matters unrelated to the Debtors. Fifth Third is a client-related party and a current and former APS client in matters unrelated to the Debtors.

- Flagstar Bank, FSB Gelco Corporation DBA GE Fleet Services ("**Flagstar**"), a lessor to the Debtors, is a former APS client in matters unrelated to the Debtors. Flagstar is an adverse party to a current APS client in matters unrelated to the Debtors.

- Freedom Group, an affiliation of a director of the Debtors, is a current APS client in matters unrelated to the Debtors.

- General Electric Capital Corporation and GE Capital TMS ("**GE**"), lessors and creditors to the Debtors, are affiliated with entities that are creditors, customers, lenders, vendors, litigation parties, adverse parties, lessors and bondholders to current and former APS clients in matters unrelated to the Debtors. GE is a

former APS client in matters unrelated to the Debtors. GE is the previous employer of current APS employees.

- Georgeson Inc., a professional in interest in this bankruptcy matter, is a professional in interest to a former APS client in matters unrelated to the Debtors.

- Greenberg Traurig, a professional in interest in this bankruptcy matter, is a professional in interest, opposing counsel and vendor to current and former APS clients in matters unrelated to the Debtors. Greenberg Traurig is a current and former APS client in matters unrelated to the Debtors.

- Hartford, an insurance provider to the Debtors, is a creditor, bondholder, lender, vendor, executory contract counterparty and adverse party to current and former APS clients in matters unrelated to the Debtors. Hartford is a former APS client in matters unrelated to the Debtors.

- Huntington National Bank, a lessor to the Debtors, is a creditor, lessor and lender to former APS clients in matters unrelated to the Debtors. Huntington National Bank is a current and former APS client in matters unrelated to the Debtors.

- Husch Blackwell, a professional in interest in this bankruptcy matter, is a professional in interest and adverse party to current and former APS clients in matters unrelated to the Debtors.

- IBM, a professional in interest in this bankruptcy matter and a vendor and creditor to the Debtors, is a lender, joint venture party, vendor, adverse party, client related party and creditor to current and former APS clients in matters unrelated to the Debtors. IBM is a current and former APS client in matters unrelated to the Debtors. IBM is the previous employer of current APS employees.

- Ironshore, an insurance provider to the Debtors, is a co-defendant and co-client to a current APS client in matters unrelated to the Debtors.

- Joy Mining Machinery, a vendor, creditor and customer to the Debtors, is affiliated with a former APS client in matters unrelated to the Debtors.

- Komatsu Financial Limited Partnership ("**Komatsu**"), a lessor and creditor to the Debtors, is a former APS client in matters unrelated to the Debtors. Komatsu is a customer to current and former APS clients in matters unrelated to the Debtors.

- KPMG LLP, a professional in interest in this bankruptcy matter, is a current and former APS client in matters unrelated to the Debtors. KPMG is a professional in interest, adverse party and creditor to current and former APS clients in matters unrelated to the Debtors. KPMG is an APS vendor. Additionally, KPMG previously employed several current APS employees.

- Latham & Watkins LLP, a professional in interest in this bankruptcy matter, is legal counsel, opposing counsel and professional in interest to current and former APS clients in matters unrelated to the Debtors. Latham & Watkins is a current and former APS client in matters unrelated to the Debtors.

- Liberty International Underwriters and Liberty Mutual Insurance Europe Limited ("**Liberty**"), insurance providers, letter of credit parties and surety bond providers to the Debtors, are affiliated with entities that are creditors, adverse parties, executory contract counterparties, insurers and lenders to current and former APS clients in matters unrelated to the Debtors. An affiliate of Liberty is a former APS client in matters unrelated to the Debtors.

- M & I Marshall (Southwest Bank of St. Louis), a lessor to the Debtors, is affiliated with an entity that is a co-defendant to a current APS client in matters unrelated to the Debtors. An affiliate is a significant shareholder to a current APS client in matters unrelated to the Debtors.

- Macquarie Corporate and Asset Funding, Inc., a lessor to the Debtors, is affiliated with entities that are current and former APS clients in matters unrelated to the Debtors.

- Marsh USA, an insurance provider to the Debtors, is a creditor and vendor to current and former APS clients in matters unrelated to the Debtors. Affiliates, Marsh & McLennan, Marsh Risk Insurance and Marsh Ltd., are all vendors to APS.

- Mercer, a professional in interest in this bankruptcy matter, is a professional in interest to former APS clients in matters unrelated to the Debtors. Mercer is the previous employer of current APS employees. An affiliate, Mercer HR Consulting, is a vendor to APS.

- Merrill Lynch and Merrill Lynch Capital ("**Merrill Lynch**"), professionals in interest and lessors to the Debtors, are affiliated with entities that are current and former APS clients, as well as lenders, bondholders, shareholders, limited partners, adverse parties and professionals in interest to current and former APS clients in matters unrelated to the Debtors. Merrill Lynch is a former APS client in matters unrelated to the Debtors. Merrill Lynch is the previous employer of current APS employees.

- Mirant Energy Trading, LLC, a customer and vendor to the Debtors, is a former APS client in matters unrelated to the Debtors.

- Mitel Leasing, Inc., a significant equipment lessor to the Debtors, is an affiliate of Mitel Networks Corporation. Mitel Networks Corporation is a current AlixPartners client in matters unrelated to the Debtors.

- Morris, Nichols, Arsht & Tunnell, LLP, a professional in interest in this bankruptcy matter, is a current APS client in matters unrelated to the Debtors. Morris, Nichols, Arsht & Tunnell, LLP is a vendor to APS.

- National Fire Insurance, National Fire Insurance Company of Hartford and National Union Fire Ins., letter of credit and surety bond parties to the Debtors, are affiliated with entities that are limited partners, litigation counterparties, adverse parties, lenders and bondholders to current and former APS clients in matters unrelated to the Debtors.

- Natixis Securities Americas LLC and Natixis, New York Branch, professionals in interest in this bankruptcy matter and lenders to the Debtors, are affiliated with an entity that is a co-client to a current APS engagement in matters unrelated to the Debtors.

- Neal, Gerber & Eisenberg LLP, a professional in interest in this bankruptcy matter, was client counsel and a professional in interest to former APS clients in matters unrelated to the Debtors.

- Ogletree, Deakins, Nash, Smoak & Stewart, a professional in interest in this bankruptcy matter, is a former APS client in matters unrelated to the Debtors.

- Old Republic Insurance, a letter of credit and surety bond party to the Debtors, is a former APS client in matters unrelated to the Debtors. Old Republic Insurance is an insurance provider, material contract party and lender to current and former APS clients in matters unrelated to the Debtors.

- Oliver Wyman, a professional in interest in this bankruptcy matter, is a professional in interest to a former APS client in matters unrelated to the Debtors. Oliver Wyman is the previous employer of current APS employees.

- Patriot Coal Sales, a debtor subsidiary, is a former APS client in litigation support matters unrelated to this bankruptcy matter.

- PNC, PNC Bank and PNC Capital Markets, LLC, professionals in interest in this bankruptcy matter and lenders, letters of credit and surety bond parties to the Debtors (collectively, "**PNC**"), are bondholders, lenders, significant shareholders and creditors to current and former APS clients in matters unrelated to the Debtors. PNC is a former APS client and is a co-defendant to a current APS client in matters unrelated to the Debtors. PNC is the previous employer of a current APS employee.

- Protiviti, a professional in interest in this bankruptcy matter, is the previous employer of a current APS employee.

- RBS Asset Finance ("**RBS**"), a lessor and creditor to the Debtors, is a lender, executory contract counterparty and creditor to current and former APS clients in matters unrelated to the Debtors. A former Managing Director of APS is currently the UK Head of the Global Restructuring Group of The Royal Bank of Scotland, but had no involvement with this matter while employed at APS. RBS is a current APS client in matters unrelated to the Debtors.

- Remington Arms Company, Inc., an affiliation of a director of the Debtors, is an affiliate of a current APS client in matters unrelated to the Debtors.

- R.R. Donnelley, a professional in interest in this bankruptcy matter, is a former APS client in matters unrelated to the Debtors. R.R. Donnelley is a professional in interest to current and former APS clients in matters unrelated to the Debtors.

- RSUI, an insurance provider to the Debtors, is a co-defendant to a current APS client in matters unrelated to the Debtors.

- Sandvik Mining and Construction, a customer and vendor to the Debtors, is affiliated with an entity that is a former APS client in matters unrelated to the Debtors.

- SG Americas Securities, a lessor to the Debtors, is affiliated with Societe Generale, a former APS client in matters unrelated to the Debtors.

- Siemens Financial Services, Inc. ("**Siemens**"), a lessor to the Debtors, and affiliated entities are creditors, lenders, adverse parties and lessors to former APS clients in matters unrelated to the Debtors. Affiliated entities of Siemens are current and former clients of APS in matters unrelated to the Debtors.

- SNR Denton, a professional in interest in this bankruptcy matter, is a current APS client in matters unrelated to the Debtors. SNR Denton is an adverse party to a current APS clients in matters unrelated to the Debtors. SNR Denton is the previous employer of a current APS employee.

- Societe Generale, a lender to the Debtors, is a former APS client in matters unrelated to the Debtors and their affiliates. Societe Generale is a bondholder, lessor and lender to current and former APS clients in matters unrelated to the Debtors.

- St. Paul Fire & Marine and St. Paul / Seaboard ("**St. Paul**"), letters of credit and surety providers to the Debtors, are affiliated with entities that are creditors, bondholders, executory contract counterparties and adverse parties to current and former APS clients in matters unrelated to the Debtors. St. Paul and St. Paul Travelers are vendors to APS.

- Steptoe & Johnson, PLLC, a professional in interest in this bankruptcy matter, is a current and former APS client in matters unrelated to the Debtors.

- Thompson Coburn, a professional in interest in this bankruptcy matter, is a professional in interest to a current APS client in matters unrelated to the Debtors. Thompson Coburn is a current APS client in matters unrelated to the Debtors.

- ThyssenKrupp CSA Siderurgica ("**ThyssenKrupp**") a customer and vendor to the Debtors, is affiliated with an entity that is a former APS client in matters unrelated to the Debtors. ThyssenKrupp affiliated entities are executory contract counterparties, creditors and vendors to current and former APS clients in matters unrelated to the Debtors.

- Time Warner, a utility provider to the Debtors, and affiliated entities, are litigation parties, vendors, adverse parties, creditors and director affiliated companies to current and former APS clients in matters unrelated to the Debtors. An affiliate, America On-Line, is a current and former APS client in matters unrelated to the Debtors.

- Travelers Casualty and Travelers Casualty and Surety Company of America ("**Travelers**"), letter of credit and surety bond providers to the Debtors, are affiliated with entities that are creditors, insurance providers, bondholders, executory contract counterparties and adverse parties to current and former APS clients in matters unrelated to the Debtors. Travelers is a vendor to APS.

- U.S. Army Corps of Engineers, a regulatory agency in this bankruptcy matter, is a former APS client in matters unrelated to the Debtors. U.S. Army Corps of Engineers is an adverse party to a current APS client in matters unrelated to the Debtors.

- U.S. Bank National Association ("**US Bank**"), a creditor to the Debtors, is a lender, creditor, indenture trustee and bondholder to current and former APS clients in matters unrelated to the Debtors. US Bank is a client related party to a current APS client in matters unrelated to the Debtors.

- UBS and UBS Investment Bank ("**UBS**"), professionals in interest in this bankruptcy matter and lenders to the Debtors, are creditors, customers, director affiliated companies, lenders, lessors and bondholders to current and former APS clients in matters unrelated to the Debtors. UBS is a current and former APS client in matters unrelated to the Debtors. UBS is the previous employer of a current APS employee.

- The Vanguard Group, a significant shareholder to the Debtors, and affiliated entities are lenders, vendors, co-defendants, adverse parties, bondholders and significant shareholders to current and former APS clients in matters unrelated to

the Debtors. The Vanguard Group is the previous employer of a current APS employee.

- Verizon and Verizon North ("**Verizon**"), utility providers to the Debtors, are former APS clients in matters unrelated to the Debtors. Other Verizon affiliated entities are creditors, executory contract counterparties and vendors to current and former APS clients in matters unrelated to the Debtors. Verizon is a vendor to APS.

- Waste Management of WV, Inc. ("**Waste Management**"), a utility provider to the Debtors, is affiliated with entities that are creditors, adverse parties and vendors to current and former APS clients in matters unrelated to the Debtors. Waste Management is a former APS client in matters unrelated to the Debtors.

- Weil, Gotshal & Manges LLP, a professional in interest in this bankruptcy matter, is a current and former APS client in matters unrelated to the Debtors. APS is a client of Weil, Gotshal & Manges, LLP in matters unrelated to the Debtors. Weil, Gotshal & Manges LLP is a professional in interest to current and former AP clients in matters unrelated to the Debtors.

- Wilmington Trust Co. ("**Wilmington Trust**"), a professional in interest in this bankruptcy matter, is a bondholder, creditor, lessor and indenture trustees to current and former APS clients in matters unrelated to the Debtors. Wilmington Trust is a former APS client and a client related party to current APS clients, all in matters unrelated to the Debtors.

- X.L., X.L. Specialty and X.L. UK, insurance providers to the Debtors, are affiliated to entities that are current and former APS clients in matters unrelated to the Debtors. Affiliated entities are executory contract counterparties to current and former APS clients in matters unrelated to the Debtors.

- Zurich, an insurance provider to the Debtors, is a creditor, vendor, executory contract counterparty and adverse party to current and former APS clients in matters unrelated to the Debtors. Zurich is a former APS client and a vendor to APS in matters unrelated to the Debtors.

8. None of the clients of APS listed above represent more than one percent of revenue of APS for the calendar year 2012 through May, 2012, except Kodak.

9. APS, AlixPartners and its subsidiary affiliates are advisors and crisis managers providing services and advice in many areas, including restructuring and distressed debt. As part of its diverse practice, APS appears in numerous cases, proceedings, and transactions involving

many different attorneys, accountants, investment bankers, and financial consultants, some of whom may represent claimants and parties in interest in these Chapter 11 Cases. Further, APS has in the past, and may in the future, be represented by several attorneys and law firms, some of whom may be involved in these Chapter 11 Cases. In addition, APS has been in the past, and likely will be in the future, engaged in matters unrelated to the Debtors or these Chapter 11 Cases in which it works with or against other professionals involved in these cases. To the best of my knowledge, information, and belief, insofar as I have been able to ascertain after reasonable inquiry, none of these business relations constitute interests adverse to the Debtors.

10. To the best of my knowledge, information, and belief, insofar as I have been able to ascertain after reasonable inquiry, except as otherwise disclosed herein, neither I nor any of AlixPartners' nor APS' professional employees: (a) have any connection with the Debtors, their creditors or any other Potential Parties in Interest in these Chapter 11 Cases; or (b) are related or connected to any United States Bankruptcy Judge for the Southern District of New York, any of the District Judges for the Southern District of New York who handle bankruptcy cases, the U.S. Trustee or any employee in the Office of the U.S. Trustee, except as otherwise set forth herein. In addition:

A. Neither AlixPartners nor APS is employed by, and have not been employed by any entity other than the Debtors in matters related to these Chapter 11 Cases.

B. From time to time, AlixPartners and APS have provided services, and likely will continue to provide services, to certain parties in interest of the Debtors and various other parties adverse to the Debtors in matters unrelated to these Chapter 11 Cases. As described above, however, APS has undertaken a detailed search to determine, and to disclose, whether it is providing or has provided services to any significant customers, equity security holders, insiders, or other parties in interest in such unrelated matters.

11. To the best of my knowledge, neither AlixPartners nor APS nor any of its professionals is a direct holder of any of the Debtors' securities. It is possible that certain of

AlixPartners' employees, managing directors, board members, equity holders, or an affiliate of any of the foregoing, may own interests in mutual funds or other investment vehicles that own the Debtors' debt or equity securities or other financial instruments including bank loans and other obligations. Typically, the holders of such interests have no control over investment decisions related to such investment funds or financial instruments. APS' policy prohibits its employees from trading in the Debtors' securities.

12. To the best of my knowledge, information, and belief, insofar as I have been able to ascertain after reasonable inquiry, neither AlixPartners nor APS has been retained to assist any entity or person other than the Debtors on matters relating to, or in direct connection with, these Chapter 11 Cases. If the Debtors are authorized by the Court to employ and retain APS, neither AlixPartners nor APS will accept any engagement or perform any service for any other entity in these Chapter 11 Cases. AlixPartners and APS will, however, continue to provide professional services to entities that may be creditors or equity security holders of the Debtors or parties in interest in these Chapter 11 Cases, provided that such services do not relate to, or have any direct connection with, these Chapter 11 Cases.

13. APS reserves the right to supplement this Declaration in the event that APS discovers any facts bearing on matters described in this Declaration regarding APS' employment by the Debtors.

14. Despite the efforts described above to identify and disclose the connections that APS and its affiliates have with parties in interest in these Chapter 11 Cases, because the Debtors are a large enterprise with thousands of creditors and other relationships, APS is unable to state with certainty that every client relationship or other connection has been disclosed. In this

regard, if APS discovers additional information that requires disclosure, APS will file promptly a supplemental declaration with the Court.

Services to be Provided

15. The parties have entered into an agreement that would govern the relationship between APS and the Debtors, a copy of which is attached as Exhibit C to the Application (the "**Engagement Letter**"). Pursuant to the Engagement Letter, APS will provide, without limitation, the following interim management during these Chapter 11 Cases: [4]

Restructuring Activities

- Provide overall leadership of the restructuring process, including working with a wide range of stakeholder groups, together with the Debtors' senior management.
- Assist the Debtors in the design and implementation of a restructuring strategy, together with the Debtors' other professionals, which is designed to maximize enterprise value, and take into account the unique interests of all constituencies.
- Provide assistance to management in connection with the Debtors' development of its revised business plan, and such other related forecasts as may be required by the bank lenders in connection with negotiations or by the Debtors for other corporate purposes.
- Assist the Debtors in managing the "working group" of professionals who are assisting the Debtors in the reorganization process or who are working for the Debtors' various stakeholders to improve coordination of their effort and individual work product to be consistent with the Debtors' overall restructuring goals.
- Assist in obtaining and presenting information required by parties in interest in the Debtors' bankruptcy process including official committees appointed by the Court and the Court itself.
- Assist the Debtors in developing and implementing employee, customer and vendor communications programs.
- Assist in the development and implementation of a vendor management process to maximize on-going support from the vendor community, enhance or at least maintain liquidity and negotiate new contracts and relationships as appropriate.
- Assist the Debtors in other business and financial aspects of a Chapter 11 proceeding, including development of and support for the approval and confirmation process for a disclosure statement and plan of reorganization.

[4] To the extent that the Declaration and the terms of the Engagement Letter are inconsistent, the terms of the Declaration shall control.

On-Going Chapter 11 Administration Tasks

- Assist the Debtors in the review and preparation of the statement of affairs, schedules and other regular reports required by the Court as well as providing assistance in such areas as testimony before the Court on matters that are within APS' areas of expertise.
- Assist the Debtors in developing and implementing accounting procedures and controls to "operationalize" the requirements of the bankruptcy proceeding, including both the filing and subsequent activities through completion of the Chapter 11 case. Subsequent activities include vendor management, employee benefits claims, claims reconciliation, filing of Monthly Operating Reports with the Court and other matters.
- Assist the Debtors with electronic data collection.

Treasury & Cash Management

- Assist the Debtors in areas of the treasury and risk management function that are expected to be impacted by the bankruptcy process including cash management and banking accounts, worker's compensation and other self insured programs, letter of credit and or bonding obligations, lease obligations and capital programs and the DIP financing process.
- Work with the Debtors and their team to further identify and implement both short-term and long-term liquidity generating initiatives.
- Assist in developing and implementing cash management strategies, tactics and processes.
- Assist the Debtors and their management in managing their short-term cash flow forecasting tool(s) and related methodologies and to assist with planning for alternatives as requested by the Debtors.
- Assist the Debtors with such other matters as may be requested that fall within APS' expertise and that are mutually agreeable.

16. APS shall use its reasonable efforts to avoid any unnecessary duplication of services provided by any of the Debtors' other retained professionals in these Chapter 11 Cases.

17. APS has agreed to represent the Debtors for compensation at the amounts agreed upon between the parties pursuant to the Engagement Letter. As more fully described in the Engagement Letter, in consideration of the restructuring services provided by APS, the Debtors have agreed to pay APS (defined terms as defined in the Engagement Letter):

(a) A Retainer of $150,000 (the "**Retainer**") was paid pursuant to the June 16, 2012 engagement letter between AlixPartners and the Debtors. Pursuant to the Engagement Letter, that Retainer was transferred to APS for this engagement, and will be credited against any fees and expenses payable by the Debtors under this Engagement Letter. Any remainder shall be returned to the Debtors as soon as practicable after the expiration or termination of the Engagement Letter.

(b) A Success Fee (as defined in the Engagement Letter) in the amount of $2,000,000 upon the effectiveness of a chapter 11 plan of reorganization; provided, however, in the event that APS terminates its engagement other than for cause or is terminated for cause, APS shall not be entitled to any Success Fee.

(c) In the event of the expiration of or a Termination without Cause of the Engagement Letter, the Debtors shall pay APS all compensation as described in and pursuant to Schedule 1 of the Engagement Letter, that has accrued prior to such expiration or termination but is unpaid, and expense reimbursements otherwise payable under the Engagement Letter.

(d) The Debtors agree to indemnify APS as provided in the Engagement Letter.

18. As of the Petition Date, AlixPartners has been compensated by the Debtors for approximately $532,589.42 in fees and expenses, as well as an initial advance retainer of $150,000. Pursuant to the Engagement Letter, invoiced amounts have been recouped against the Retainer, and payments on the invoices have been used to replenish the Retainer. After giving effect to the application of its final prepetition charges, APS now holds a retainer in the approximate amount of $150,000. Based on its experience, APS believes that the fees set forth

herein are fair and reasonable in light of the nature and scope of the services to be provided by APS.

19. In the 90 days prior to the Petition Date, in addition to the Retainer of $150,000.00 received on June 18, 2012, AlixPartners received the following payments totaling $532,589.42:

Invoice Number	Invoice Date	Billed Amount	Received Date	Payment Amount
2040411	June 26, 2012	$369,767.75	June 26, 2012	$369,767.75
2040776	July 6, 2012	$162,821.67	July 6, 2012	$162,821.67

20. Due to the ordinary course and unavoidable reconciliation of fees and submissions of expenses immediately prior to, and subsequent to, the Petition Date, APS may have incurred but not billed fees and reimbursable expenses, which relate to the prepetition period. APS hereby seeks the Court's approval to apply the Retainer to these amounts and any further prepetition fees and expenses APS becomes aware of during its ordinary course billing review and reconciliation. Upon the proposed applications of the Retainer, the Debtors would not owe APS any sums for prepetition services.

21. In accordance with section 504 of the Bankruptcy Code and Bankruptcy Rule 2016, neither I nor APS has entered into any agreements, express or implied, with any other party in interest, including the Debtors, any creditor, or any attorney for such party in interest in these Chapter 11 Cases (a) for the purpose of sharing or fixing fees or other compensation to be paid to any such party in interest or its attorneys for services rendered in connection therewith, (b) for payment of such compensation from the assets of the estates in excess of the compensation allowed by the Court pursuant to the applicable provisions of the Bankruptcy Code, or (c) for payment of compensation in connection with these Chapter 11 Cases other than in accordance with the applicable provisions of the Bankruptcy Code. If any such agreement is

entered into, APS undertakes to amend and supplement this declaration to disclose the terms of any such agreement.

22. No promises have been received by APS, or by any employee thereof, as to compensation in connection with these Chapter 11 Cases other than in accordance with the provisions of the Bankruptcy Code.

Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct.

Dated: July 19, 2012

AP Services, LLC

/s/ Kenneth A. Hiltz
Kenneth A. Hiltz
Authorized Representative

Exhibit C

Engagement Letter

APServices LLC
When it really matters

Chicago Dallas Detroit Los Angeles New York San Francisco Washington, DC

July 9, 2012

Irl F. Engelhardt
Chairman and Chief Executive Officer
Patriot Coal Corporation
12312 Oliver Boulevard
St. Louis, Missouri 63141

Re: Agreement for the Provision of Interim Management Services

Dear Mr. Engelhardt:

This letter, together with the attached Schedule(s), Exhibit and General Terms and Conditions, sets forth the agreement ("Agreement") between AP Services, LLC, a Michigan limited liability company ("APS"), and Patriot Coal Corporation and certain of its affiliates and subsidiaries ("Patriot" or the "Company") for the engagement of APS to provide certain temporary employees to the Company to assist it in its restructuring as described below.

All defined terms shall have the meanings ascribed to them in this letter and in the attached Schedule(s), Exhibit and General Terms and Conditions.

Generally, the engagement of APS, including any APS employees who serve in Officer positions, shall be under the supervision of the Company's Board Chairman or Chief Executive Officer.

OBJECTIVE AND TASKS

Subject to APS' internal approval from its Risk Management Committee, confirmation that the Company has a Directors and Officers Liability insurance policy in accordance with section 7 of the General Terms and Conditions below regarding Directors and Officers Liability Insurance coverage, and a copy of the signed Board of Directors' resolution (or similar document) as official confirmation of the appointment, APS will provide Mr. Ted Stenger to serve as the Company's Chief Restructuring Officer ("CRO"), reporting to the Company's Board Chairman. As such, Mr. Stenger would not be entitled to receive from the Company any vacation pay, sick leave, retirement, pension or social security benefits, workers' compensation, disability, unemployment insurance benefits or any other employee benefits. Mr. Stenger or APS will be responsible for all employment, withholding, income and/or any other taxes incurred in connection with the operation and conduct of the engagement. Nothing in this agreement shall be construed to create a joint

venture, partnership, franchise, employment or agency relationship between Mr. Stenger and/or APS and the Company or any part thereof. Working collaboratively with the senior management team, the Board of Directors and other Company professionals, Mr. Stenger will assist the Company in evaluating and implementing strategic and tactical options through the restructuring process. In addition to the ordinary course duties of a CRO, the Temporary Staff (as defined below) roles will include working with the Company and its team to do the following:

Restructuring Activities

- Provide overall leadership of the restructuring process, including working with a wide range of stakeholder groups, together with the Company's senior management.
- Assist the Company in the design and implementation of a restructuring strategy, together with the Company's other professionals, which is designed to maximize enterprise value and take into account the unique interests of all constituencies.
- Provide assistance to management in connection with the Company's development of its revised business plan, and such other related forecasts as may be required by the bank lenders in connection with negotiations or by the Company for other corporate purposes.
- Assist in managing the "working group" professionals who are assisting the Company in the reorganization process or who are working for the Company's various stakeholders to improve coordination of their effort and individual work product to be consistent with the Company's overall restructuring goals.
- Assist in obtaining and presenting information required by parties in interest in the Company's bankruptcy process including official committees appointed by the Court and the Court itself.
- Assist the Company in developing and implementing employee, customer and vendor communications programs.
- Assist in the development and implementation of a vendor management process to maximize on-going support from the vendor community, enhance or at least maintain liquidity and negotiate new contracts and relationships as appropriate.
- Assist the Company in other business and financial aspects of a Chapter 11 proceeding, including, but not limited to, development of and support for the approval and confirmation process for a disclosure statement and plan of reorganization.

Preparation for Chapter 11 Filing and On-Going Administration Tasks

- Assist in preparing for and filing bankruptcy petitions and related documents and filings in the event the Company and/or its subsidiaries choose to seek protection under the U.S. Bankruptcy Code, to the extent requested by the Company.

- Assist with the preparation of the statement of affairs, schedules and other regular reports required by the United States Bankruptcy Court (the "Court") as well as providing assistance in such areas as testimony before the Court on matters that are within APS' areas of expertise.
- Assist the Company in developing and implementing accounting procedures and controls to "operationalize" the requirements of the bankruptcy proceeding, including both the filing and subsequent activities through completion of the Chapter 11 case. Subsequent activities include vendor management, employee benefits claims, claims reconciliation, filing of Monthly Operating Reports with the Court and other matters.
- Assist the Company with electronic data collection.

Treasury & Cash Management

- Assist the Treasurer in areas of the treasury and risk management function that are expected to be impacted by the bankruptcy process including cash management and banking accounts, worker's compensation and other self insured programs, letter of credit and or bonding obligations, lease obligations and capital programs and the DIP financing process.
- Work with the Company and its team to further identify and implement both short-term and long-term liquidity generating initiatives.
- Assist in developing and implementing cash management strategies, tactics and processes.
- Assist the Company and its management in managing their short-term cash flow forecasting tool(s) and related methodologies and to assist with planning for alternatives as requested by the Company.
- Assist with such other matters as may be requested that fall within APS' expertise and that are mutually agreeable.

STAFFING

APS will provide the Company with the individuals set forth on Exhibit A ("Temporary Staff"), subject to the terms and conditions of this Agreement, with the titles, pay rates and other descriptions set forth therein.

The Temporary Staff may be assisted by or replaced by other professionals at various levels, as required, who shall also become Temporary Staff. APS will keep the Company informed as to APS' staffing and will not add additional Temporary Staff to the assignment without first consulting with the Company to obtain Company concurrence that such additional resources are required and do not duplicate the activities of other employees or professionals.

APServices LLC
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TIMING, FEES AND RETAINER

Upon receipt of a copy of this Agreement executed by the Company, and confirmation that the Company is in compliance with the requirements set forth in the first paragraph of the Objectives and Tasks section above, APS will commence providing services under this letter and the services provided by AlixPartners, LLP ("AlixPartners") under the engagement letter dated June 16, 2012 between Patriot and AlixPartners shall be deemed completed.

The Company shall compensate APS for its services, and reimburse APS for expenses, as set forth on Schedule 1.

* * *

In the event the Company seeks protection under the U.S. Bankruptcy Code, the Company will promptly apply to the Bankruptcy Court to obtain approval of APS' retention and Retainer nunc pro tunc to the date of filing. APS acknowledges that its retention and the terms thereof are subject to Court approval.

If these terms meet with your approval, please sign and return the enclosed copy of the Agreement.

We look forward to working with you.

Sincerely yours,

AP SERVICES, LLC

Ted Stenger
Authorized Representative

Acknowledged and Agreed to:

PATRIOT COAL CORPORATION

By: _____

Its: Senior Vice President - Law & Administration

Dated: July 9, 2012

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AP Services, LLC

Exhibit A

Temporary Staff
Individuals with Officer Positions

Name	Description	Hourly Rate[1]	Commitment Full[2] or Part[3] Time
Ted Stenger	Chief Restructuring Officer	$850	Full Time

Additional Temporary Staff

Name	Description	Standard Hourly Rate[1]	Commitment Full[2] or Part[3] Time
Dipes Patel	Associate	$345	Full Time
Christopher Blacker	Director	$620	Full Time
Scott Mell	Director	$665	Full Time
Robb McWilliams	Director	$665	Full Time

The parties agree that Exhibit A can be amended by APS from time to time to add or delete staff, and the Monthly Staffing Reports shall be treated by the parties as such amendments.

[1] Standard hourly rates listed are prior to application of the 10% discount set forth on Schedule 1. The hourly rate structure is further defined on Schedule 1.
[2] Full time is defined as substantially full time.
[3] Part time is defined as approximately 2-3 days per week, with some weeks more or less depending on the needs and issues facing the Company at that time.

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SCHEDULE 1

FEES AND EXPENSES

1. **Fees:** APS' fees will be based on the hours spent by APS personnel and billed at a 10% discount to the following standard hourly rates:

Managing Directors	$ 815 - 970
Directors	$ 620 - 760
Vice Presidents	$ 455 - 555
Associates	$ 305 - 405
Analysts	$ 270 - 300
Paraprofessionals	$ 205 - 225

APS reviews and revises its billing rates on January 1 of each year. Any increase in billing rates will require the approval of the Company and be subject to review of the Bankruptcy Court.

For this engagement, Managing Directors' (including Ted Stenger's) discounted hourly rate will be capped at a maximum of $850.

2. **Success Fee:** In addition to hourly fees, APS will be compensated for its efforts by the payment of a Success Fee. The Company understands and acknowledges that the Success Fee is an integral part of APS' compensation for the engagement. The Company will pay APS a Success Fee in the amount of $2,000,000 upon the effectiveness of a chapter 11 Plan of Reorganization; provided, however, in the event that APS terminates its engagement other than for cause or is terminated for cause, APS shall not be entitled to any Success Fee.

3. **Expenses:** In addition to the fees set forth in this Schedule, the Company shall pay directly, or reimburse APS upon receipt of periodic billings, for all actual, reasonable and documented out-of-pocket expenses incurred in connection with this assignment, such as travel, lodging and meals.

4. **Break Fee:** APS does not seek a Break Fee in connection with this engagement.

5. **Retainer:** This will confirm that AlixPartners is holding a retainer in the amount of $150,000 in accordance with the Engagement Letter dated June 16, 2012 between Patriot and AlixPartners. That Retainer will be transferred to APS for this engagement and no further retainer is required.

APServices, LLC
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SCHEDULE 2

DISCLOSURES

APS has completed a thorough check of the parties in interest with regard to the Company, based on the list of the parties in interest that APS received from the Company. For the purpose of these Disclosures, and unless otherwise expressly provided herein, the term "AlixPartners" shall mean AlixPartners, LLP, its parent company, AlixPartners Holdings, LLP ("AP Holdings"), together with each of their subsidiaries including, without limitation, APS.

- Funds managed by subsidiaries of CVC Capital Partners SICAV-FIS S.A. ("CVC"), a private equity and investment advisory firm, own a controlling stake in AP Holdings, the parent of AlixPartners, LLP, an affiliate of APS. CVC Credit Partners, L.P. ("CVC Credit Partners") is a global debt management business and a majority owned subsidiary of CVC.

  CVC's private equity funds ("CVC Funds") and debt funds ("CVC Credit Partners' Funds") are managed independently from each other, with no overlap in membership of the relevant investment committees or boards of entities with responsibility for investment decisions. CVC has in place an internal information barrier between the CVC Funds and the CVC Credit Partners' Funds. All CVC Credit Partners investment professionals are dedicated to CVC Credit Partners and are not involved in the private equity business. CVC Credit Partners also has separate IT systems and workspaces.

  No material nonpublic information about the Debtors has been furnished by AlixPartners to CVC or to any CVC managed funds or their portfolio companies, including without limitation, to CVC Credit Partners (collectively, the "CVC Entities") or to any managing director or executive of CVC or CVC Credit Partners and AlixPartners will continue to abide by its confidentiality obligations to the Debtors. AlixPartners operates independently of the CVC Entities, and does not share employees or officers with the CVC Entities, except that a managing partner of CVC is on the Boards of Directors of AlixPartners and on the advisory board to CVC Credit Partners. Three other CVC executives, who are not connected with CVC Credit Partners, are also on the Boards of Directors of AlixPartners. AlixPartners and the CVC Entities have separate offices in separate buildings and use separate Internet email addresses. AlixPartners's financial performance is not directly impacted by the success or failure of the CVC Entities. Certain of the CVC Credit Partners' Funds act as lenders to AlixPartners.

  As a component of its conflict checking system, AlixPartners has searched the names of CVC, CVC Credit Partners, the CVC Credit Partners' Funds, the CVC Funds, each managing partner of CVC and each portfolio company of the CVC Funds (the "CVC Conflict Parties") against the list of Potential Parties in Interest.

and AlixPartners has determined to the best of its knowledge that there are no resulting disclosures other than as noted herein. The term "portfolio company" means any business in which a CVC fund has a direct controlling or minority interest. The term "portfolio company" does not include indirect investments such as businesses owned or investments made by a CVC Funds portfolio company or investments made by the CVC Credit Partners' Funds. CVC Credit Partners Funds, as well as other CVC Entities, may in the ordinary course from time to time hold, control and/or manage loans to, or investments in the Debtors and parties in interest in these cases. Further, the CVC Entities may have had, currently have or may in the future have business relationships or connections with the Debtors or other Potential Parties in Interest in matters related to or unrelated to the Debtors or their affiliates or these chapter 11 cases. Furthermore, AlixPartners has provided the list of Debtors to CVC and has performed appropriate checks to determine if any material connections between the CVC Entities and the Debtors exist. AlixPartners will supplement this disclosure if it obtains information regarding any such connection. Other than as specifically noted herein, AlixPartners has not undertaken to determine the existence, nature and/or full scope of any business relationships or connections that the CVC Entities may have with the Potential Parties in Interest, the Debtors and their affiliates or these chapter 11 cases.

Based on, among other things, the business separation between the CVC Funds and the CVC Credit Partners' Funds, the business separation between the CVC Entities and AlixPartners, and the confidentiality obligations referred to above, AlixPartners believes that it does not hold or represent an interest adverse to the estate with respect to the engagement. Further, AP may have had, currently has or may in the future have business relationships with, among other entities, portfolio companies or managed funds of CVC in matters unrelated to the Debtors or their affiliates in these chapter 11 cases.

- There is one confidential client of AlixPartners that is a professional in interest to the Debtors. The confidential client is a current AlixPartners client in matters unrelated to the Debtors.

- Certain of the parties in interest may have extended credit or provided services, or may in the future extend credit or provide services to AlixPartners.

- AlixPartners has relationships with certain departments and agencies of the United States government, including, without limitation, the Internal Revenue Service ("IRS"), a significant taxing authority to the Debtors, and the Department of Labor, a letter of credit and surety bond provider and beneficiary. The IRS and the Department of Labor are creditors, adverse parties and vendors to current and former AlixPartners clients in matters unrelated to the Debtors. The IRS is the previous employer of current AlixPartners employees. In addition, the United States Securities and Exchange Commission, the United States Attorneys' Office and the Federal Deposit Insurance Corporation are current or former clients of AlixPartners in matters unrelated to the Debtors.

- ACE and ACE American Insurance Company, insurance providers and letter of credit parties to the Debtors, are vendors to AlixPartners.

- AIG, an insurance provider to the Debtors, is affiliated with entities that are limited partners, litigation counterparties, insurance providers, adverse parties, lenders and bondholders to current and former AlixPartners clients in matters unrelated to the Debtors. AIG is a current and former AlixPartners client in matters unrelated to the Debtors. AIG has provided various types of insurance to AlixPartners in matters unrelated to the Debtors.

- Alcoa Fuels, Inc., a lessor to the Debtors, is affiliated with entities that are creditors and vendors to current and former AlixPartners clients in matters unrelated to the Debtors. An affiliate is the previous employer of a current AlixPartners employee.

- Allied World National Assurance Company and Allied World Assurance Company ("Allied"), insurance providers to the Debtors, are adverse parties and executory contract counterparties to former AlixPartners clients in matters unrelated to the Debtors. Allied is a vendor to AlixPartners.

- American Casualty Company of Reading, Pennsylvania ("CNA"), a letter of credit party to the Debtors, is affiliated with entities that are bondholders, creditors and adverse parties to current and former AlixPartners clients in matters unrelated to the Debtors. An affiliate of CNA is a former AlixPartners client in matters unrelated to the Debtors. CNA is the previous employer of a current AlixPartners employee.

- American Stock Transfer & Trust Company, LLC, a professional in interest in this bankruptcy matter, is a co-defendant and professional in interest to current and former AlixPartners clients in matters unrelated to the Debtors.

- AON Risk, an insurance provider to the Debtors, is affiliated with an entity that is a vendor to AlixPartners. AON is a current and former AlixPartners client in matters unrelated to the Debtors.

- Arnold & Porter LLP, a professional in interest in this bankruptcy matter, is a current and former AlixPartners client in matters unrelated to the Debtors.

- AT&T, AT&T Mobility and AT&T Teleconference Services (collectively, "AT&T"), utility providers to the Debtors, are affiliated with entities that are creditors, executory contract counterparties, vendors, lenders and shareholders to current and former AlixPartners clients in matters unrelated to the Debtors. An affiliate of AT&T is a former AlixPartners client in matters unrelated to the Debtors. AT&T is a vendor to AlixPartners.

- Axis Insurance (Bermuda) Ltd, Axis Insurance Company and Axis Surplus Insurance Company (collectively, "Axis"), insurance providers to the Debtors, are

affiliated with entities that are executory contract counterparties, lessors, insurers and director affiliated companies to current and former AlixPartners clients in matters unrelated to the Debtors. Axis Insurance Company is a former AlixPartners client in matters unrelated to the Debtors.

- Banc of America Securities LLC, BancorpSouth Equipment Finance, Bank of America, Bank of America Corporation, Bank of America Leasing and Bank of America, N.A., professionals in interest, lessors, lenders and letters of credit parties to the Debtors, are current and former AlixPartners clients, as well as executory contract counterparties, creditors and lenders to current and former AlixPartners clients in matters unrelated to the Debtors. Bank of America is a former employer of a current AlixPartners professional. Bank of America provides banking services to AlixPartners.

- Bank of Oklahoma, NA, a lender to the Debtors, is a former AlixPartners client in matters unrelated to the Debtors. Bank of Oklahoma, NA is a vendor and creditor to current and former AlixPartners clients in matters unrelated to the Debtors.

- Bank of the West, a lessor to the Debtors, is a current AlixPartners client in matters unrelated to the Debtors.

- Barclays Bank PLC and Barclays Capital, Inc. ("Barclays"), lenders to the Debtors and professionals in interest in this bankruptcy matter, are affiliated with entities that are creditors, significant shareholders, adverse parties, lenders and bondholders to current and former AlixPartners clients in matters unrelated to the Debtors. Barclays is a vendor to AlixPartners and is a co-client to a current AlixPartners client in matters unrelated to the Debtors. Barclays is the previous employer of a current AlixPartners employee.

- Blackrock, Inc., a shareholder to the Debtors, is a lender, creditor, bondholder and executory contract counterparty to current and former AlixPartners clients in matters unrelated to the Debtors. Blackrock Financial Management is a significant shareholder to a former AlixPartners client in matters unrelated to the Debtors. Blackrock Realty Advisors, a subsidiary of Blackrock, Inc., is a lessor to a current AlixPartners client in matters unrelated to the Debtors.

- Blackstone Group LP, a professional in interest in this bankruptcy matter, is a former AlixPartners client in matters unrelated to the Debtors. Affiliates of Blackstone are professionals in interest, significant shareholders, bondholders, creditors, parent companies and lenders to current and former AlixPartners clients and is a landlord to AlixPartners, all in matters unrelated to the Debtors.

- Blue Cross Blue Shield, a vendor to the Debtors, is a vendor to AlixPartners. Blue Cross Blue Shield, is a vendor and insurance provider to current and former AlixPartners clients in matters unrelated to the Debtors. Blue Cross Blue Shield is a creditor to a current AlixPartners client in matters unrelated to the Debtors.

- Bowles Rice McDavid Graff & Love LLP, a professional in interest in this bankruptcy matter, is opposing counsel, client counsel and professional in interest to current and former AlixPartners clients in matters unrelated to the Debtors.

- Bryan Cave, LLP, a professional in interest in this bankruptcy matter, is opposing counsel and professional in interest to current and former AlixPartners clients in matters unrelated to the Debtors. Bryan Cave, LLP is a current and former AlixPartners client in matters unrelated to the Debtors.

- CAT Financial Services, Caterpillar Financial Services Corp., Caterpillar Financial Services Corporation and Caterpillar Global Mining America (collectively, "Caterpillar"), letters of credit parties, lenders, creditors, lessors and vendors to the Debtors, are vendors, customers, adverse parties, lenders, creditors and director affiliated companies to current and former AlixPartners clients in matters unrelated to the Debtors. Caterpillar is a former AlixPartners client in matters unrelated to the Debtors.

- Chartis, an insurance provider to the Debtors, is an insurance provider to current AlixPartners clients in matters unrelated to the Debtors. Chartis is an insurance provider to AlixPartners.

- Chubb-Federal Insurance, Chubb Surety and Chubb Group of Insurance Companies (collectively, "Chubb"), insurance providers and letter of credit parties to the Debtors, are vendors to AlixPartners and adverse parties, lenders, insurance providers and executory contract counterparties to current and former AlixPartners clients in matters unrelated to the Debtors. Chubb is a former AlixPartners client in matters unrelated to the Debtors.

- Citibank National Association, CitiCapital Commercial Leasing Corporation, Citigroup CIB, Citigroup Global Markets Inc. and Citigroup Global Markets, Inc. (collectively, "Citi"), lenders, professionals in interest and lessors to the Debtors, and affiliated entities, are creditors, lenders, bondholders, shareholders, adverse parties, professionals in interest and lessors to current and former AlixPartners clients in matters unrelated to the Debtors. An affiliate, Citigroup, is a related party to a current AlixPartners client in matters unrelated to the Debtors. Citi is a current and former AlixPartners client in matters unrelated to the Debtors.

- Cleary Gottlieb Steen & Hamilton LLP, a professional in interest in this bankruptcy matter, is a current and former AlixPartners client in matters unrelated to the Debtors. Cleary Gottlieb Steen & Hamilton LLP is opposing counsel and a professional in interest to current and former AlixPartners clients in matters unrelated to the Debtors.

- Comerica Bank ("Comerica"), a lender to the Debtors, is a former lender to AlixPartners and also a former AlixPartners client in matters unrelated to the Debtors. Comerica is a lender, creditor, co-defendant and bondholder to current and former AlixPartners clients in matters unrelated to the Debtors. Comerica is

the previous employer of a current AlixPartners employee. Comerica provides banking services to AlixPartners.

- Computershare, a professional in interest in this bankruptcy matter, is a professional in interest to a former AlixPartners client in matters unrelated to the Debtors.

- Continental Casualty Company, a letter of credit party to the Debtors, is affiliated with an entity that is a former AlixPartners client in matters unrelated to the Debtors.

- CSX Transportation, a vendor and creditor to the Debtors, is affiliated with an entity that is a creditor and lessor to former AlixPartners clients in matters unrelated to the Debtors. An affiliate, CSX Corporation, is the previous employer of a current AlixPartners employee.

- Davis Polk & Wardwell, a professional in interest in this bankruptcy matter, is a creditor, professional in interest and client counsel to current and former AlixPartners clients in matters unrelated to the Debtors.

- Dinsmore & Shohl LLP, a professional in interest in this bankruptcy matter, is a former AlixPartners client in matters unrelated to the Debtors.

- Dish Network, a utility provider to the Debtors, is a creditor and vendor to former AlixPartners clients in matters unrelated to the Debtors. Dish Network is a client related party to a former AlixPartners client in matters unrelated to the Debtors.

- DTE Energy, ("DTE"), a utility provider to the Debtors, is the previous employer of a current AlixPartners employee. DTE is an executory contract counterparty to current and former AlixPartners clients in matters unrelated to the Debtors. DTE is a vendor to AlixPartners.

- Duff & Phelps Corporation ("Duff"), a professional in interest in this bankruptcy matter, is a professional in interest to current and former AlixPartners clients in matters unrelated to the Debtors. Duff is the previous employer of a current AlixPartners employee. Duff is a vendor to AlixPartners.

- Duke Energy Carolinas LLC, Duke Energy Commercial Asset Management and Duke Energy Kentucky, Inc., vendors to the Debtors, are affiliated with entities that are creditors, director affiliated companies, strategic alliance parties and executory contract counterparties to current and former AlixPartners clients in matters unrelated to the Debtors.

- Eastman Kodak Company ("Kodak"), a customer and vendor to the Debtors, is a current and former AlixPartners client in matters unrelated to the Debtors. APS is currently providing interim management services to Kodak in its chapter 11 proceedings. AlixPartners and APS do not believe the interests of Kodak and the

Debtors are adverse. However, in an abundance of caution, AlixPartners and APS will establish an appropriate informational barrier if necessary to protect confidential information of the the Debtors from being shared with members of the Kodak engagement team and vice versa. Kodak and affiliated entities are lenders, co-defendants, vendors, litigation parties, significant shareholders and executory contract counterparties to current and former AlixPartners clients in matters unrelated to the Debtors.

- Ernst & Young ("E&Y"), a professional in interest in this bankruptcy matter, is an adverse party, client counsel, vendor and creditor to current and former AlixPartners clients in matters unrelated to the Debtors. E&Y is a vendor to AlixPartners and previously employed several current AlixPartners employees. E&Y is a current and former AlixPartners client in matters unrelated to the Debtors.

- Fifth Third Bank, Fifth Third Leasing Company and Fifth Third Securities, Inc. ("Fifth Third"), letter of credit parties, surety bond providers, lessors, creditor and professionals in interest to the Debtors, are bondholders, creditors, lenders, lessors and adverse parties to current and former AlixPartners clients in matters unrelated to the Debtors. In addition, Fifth Third is a member in a bank group for which AlixPartners performed services in matters unrelated to the Debtors. Fifth Third is a client-related party and a current and former AlixPartners client in matters unrelated to the Debtors.

- Flagstar Bank, FSB Gelco Corporation DBA GE Fleet Services ("Flagstar"), a lessor to the Debtors, is a former AlixPartners client in matters unrelated to the Debtors. Flagstar is an adverse party to a current AlixPartners client in matters unrelated to the Debtors.

- Freedom Group, an affiliation of a director of the Debtors, is a current AlixPartners client in matters unrelated to the Debtors.

- General Electric Capital Corporation and GE Capital TMS ("GE"), lessors and creditors to the Debtors, are affiliated with entities that are creditors, customers, lenders, vendors, litigation parties, adverse parties, lessors and bondholders to current and former AlixPartners clients in matters unrelated to the Debtors. GE is a former AlixPartners client in matters unrelated to the Debtors. GE is the previous employer of current AlixPartners employees.

- Georgeson Inc., a professional in interest in this bankruptcy matter, is a professional in interest to a former AlixPartners client in matters unrelated to the Debtors.

- Greenberg Traurig, a professional in interest in this bankruptcy matter, is a professional in interest, opposing counsel and vendor to current and former AlixPartners clients in matters unrelated to the Debtors. Greenberg Traurig is a current and former AlixPartners client in matters unrelated to the Debtors.

- Hartford, an insurance provider to the Debtors, is a creditor, bondholder, lender, vendor, executory contract counterparty and adverse party to current and former AlixPartners clients in matters unrelated to the Debtors. Hartford is a former AlixPartners client in matters unrelated to the Debtors.

- Huntington National Bank, a lessor to the Debtors, is a creditor, lessor and lender to former AlixPartners clients in matters unrelated to the Debtors. Huntington National Bank is a current and former AlixPartners client in matters unrelated to the Debtors.

- Husch Blackwell, a professional in interest in this bankruptcy matter, is a professional in interest and adverse party to current and former AlixPartners clients in matters unrelated to the Debtors.

- IBM, a professional in interest in this bankruptcy matter and a vendor and creditor to the Debtors, is a lender, joint venture party, vendor, adverse party, client related party and creditor to current and former AlixPartners clients in matters unrelated to the Debtors. IBM is a current and former AlixPartners client in matters unrelated to the Debtors. IBM is the previous employer of current AlixPartners employees.

- Ironshore, an insurance provider to the Debtors, is a co-defendant and co-client to a current AlixPartners client in matters unrelated to the Debtors.

- Joy Mining Machinery, a vendor, creditor and customer to the Debtors, is affiliated with a former AlixPartners client in matters unrelated to the Debtors.

- Komatsu Financial Limited Partnership ("Komatsu"), a lessor and creditor to the Debtors, is a former AlixPartners client in matters unrelated to the Debtors. Komatsu is a customer to current and former AlixPartners clients in matters unrelated to the Debtors.

- KPMG LLP, a professional in interest in this bankruptcy matter, is a current and former AlixPartners client in matters unrelated to the Debtors. KPMG is a professional in interest, adverse party and creditor to current and former AlixPartners clients in matters unrelated to the Debtors. KPMG is an AlixPartners vendor. Additionally, KPMG previously employed several current AlixPartners employees.

- Latham & Watkins LLP, a professional in interest in this bankruptcy matter, is legal counsel, opposing counsel and professional in interest to current and former AlixPartners clients in matters unrelated to the Debtors. Latham & Watkins is a current and former AlixPartners client in matters unrelated to the Debtors.

- Liberty International Underwriters and Liberty Mutual Insurance Europe Limited ("Liberty"), insurance providers, letter of credit parties and surety bond providers to the Debtors, are affiliated with entities that are creditors, adverse parties,

executory contract counterparties, insurers and lenders to current and former AlixPartners clients in matters unrelated to the Debtors. An affiliate of Liberty is a former AlixPartners client in matters unrelated to the Debtors.

- M & I Marshall (Southwest Bank of St. Louis), a lessor to the Debtors, is affiliated with an entity that is a co-defendant to a current AlixPartners client in matters unrelated to the Debtors. An affiliate is a significant shareholder to a current AlixPartners client in matters unrelated to the Debtors.

- Macquarie Corporate and Asset Funding, Inc., a lessor to the Debtors, is affiliated with entities that are current and former AlixPartners clients in matters unrelated to the Debtors.

- Marsh USA, an insurance provider to the Debtors, is a creditor and vendor to current and former AlixPartners clients in matters unrelated to the Debtors. Affiliates, Marsh & McLennan, Marsh Risk Insurance and Marsh Ltd., are all vendors to AlixPartners.

- Mercer, a professional in interest in this bankruptcy matter, is a professional in interest to former AlixPartners clients in matters unrelated to the Debtors. Mercer is the previous employer of current AlixPartners employees. An affiliate, Mercer HR Consulting, is a vendor to AlixPartners.

- Merrill Lynch and Merrill Lynch Capital ("Merrill Lynch"), professionals in interest and lessors to the Debtors, are affiliated with entities that are current and former AlixPartners clients, as well as lenders, bondholders, shareholders, limited partners, adverse parties and professionals in interest to current and former AlixPartners clients in matters unrelated to the Debtors. Merrill Lynch is a former AlixPartners client in matters unrelated to the Debtors. Merrill Lynch is the previous employer of current AlixPartners employees.

- Mirant Energy Trading, LLC, a customer and vendor to the Debtors, is a former AlixPartners client in matters unrelated to the Debtors.

- Morris, Nichols, Arsht & Tunnell, LLP, a professional in interest in this bankruptcy matter, is a current AlixPartners client in matters unrelated to the Debtors. Morris, Nichols, Arsht & Tunnell, LLP is a vendor to AlixPartners.

- National Fire Insurance, National Fire Insurance Company of Hartford and National Union Fire Ins., letter of credit and surety bond parties to the Debtors, are affiliated with entities that are limited partners, litigation counterparties, adverse parties, lenders and bondholders to current and former AlixPartners clients in matters unrelated to the Debtors.

- Natixis Securities Americas LLC and Natixis, New York Branch, professionals in interest in this bankruptcy matter and lenders to the Debtors, are affiliated with an

entity that is a co-client to a current AlixPartners engagement in matters unrelated to the Debtors.

- Neal, Gerber & Eisenberg LLP, a professional in interest in this bankruptcy matter, was client counsel and a professional in interest to former AlixPartners clients in matters unrelated to the Debtors.

- Ogletree, Deakins, Nash, Smoak & Stewart, a professional in interest in this bankruptcy matter, is a former AlixPartners client in matters unrelated to the Debtors.

- Old Republic Insurance, a letter of credit and surety bond party to the Debtors, is a former AlixPartners client in matters unrelated to the Debtors. Old Republic Insurance is an insurance provider, material contract party and lender to current and former AlixPartners clients in matters unrelated to the Debtors.

- Oliver Wyman, a professional in interest in this bankruptcy matter, is a professional in interest to a former AlixPartners client in matters unrelated to the Debtors. Oliver Wyman is the previous employer of current AlixPartners employees.

- Patriot Coal Sales, a debtor subsidiary, is a former AlixPartners client in litigation support matters unrelated to this bankruptcy matter.

- PNC, PNC Bank and PNC Capital Markets, LLC, professionals in interest in this bankruptcy matter and lenders, letters of credit and surety bond parties to the Debtors (collectively, "PNC"), are bondholders, lenders, significant shareholders and creditors to current and former AlixPartners clients in matters unrelated to the Debtors. PNC is a former AlixPartners client and is a co-defendant to a current AlixPartners client in matters unrelated to the Debtors. PNC is the previous employer of a current AlixPartners employee.

- Protiviti, a professional in interest in this bankruptcy matter, is the previous employer of a current AlixPartners employee.

- RBS Asset Finance ("RBS"), a lessor and creditor to the Debtors, is a lender, executory contract counterparty and creditor to current and former AlixPartners clients in matters unrelated to the Debtors. A former Managing Director of AlixPartners is currently the UK Head of the Global Restructuring Group of The Royal Bank of Scotland, but had no involvement with this matter while employed at AlixPartners. RBS is a current AlixPartners client in matters unrelated to the Debtors.

- Remington Arms Company, Inc., an affiliation of a director of the Debtors, is an affiliate of a current AlixPartners client in matters unrelated to the Debtors.

- R.R. Donnelley, a professional in interest in this bankruptcy matter, is a former AlixPartners client in matters unrelated to the Debtors. R.R. Donnelley is a professional in interest to current and former AlixPartners clients in matters unrelated to the Debtors.

- RSUI, an insurance provider to the Debtors, is a co-defendant to a current AlixPartners client in matters unrelated to the Debtors.

- Sandvik Mining and Construction, a customer and vendor to the Debtors, is affiliated with an entity that is a former AlixPartners client in matters unrelated to the Debtors.

- SG Americas Securities, a lessor to the Debtors, is affiliated with Societe Generale, a former AlixPartners client in matters unrelated to the Debtors.

- Siemens Financial Services, Inc. ("Siemens"), a lessor to the Debtors, and affiliated entities are creditors, lenders, adverse parties and lessors to former AlixPartners clients in matters unrelated to the Debtors. Affiliated entities of Siemens are current and former clients of AlixPartners in matters unrelated to the Debtor

- SNR Denton, a professional in interest in this bankruptcy matter, is a current AlixPartners client in matters unrelated to the Debtors. SNR Denton is an adverse party to a current AlixPartners clients in matters unrelated to the Debtors. SNR Denton is the previous employer of a current AlixPartners employee.

- Societe Generale, a lender to the Debtors, is a former AlixPartners client in matters unrelated to the Debtors and their affiliates. Societe Generale is a bondholder, lessor and lender to current and former AlixPartners clients in matters unrelated to the Debtors.

- St. Paul Fire & Marine and St. Paul / Seaboard ("St. Paul"), letters of credit and surety providers to the Debtors, are affiliated with entities that are creditors, bondholders, executory contract counterparties and adverse parties to current and former AlixPartners clients in matters unrelated to the Debtors. St. Paul and St. Paul Travelers are vendors to AlixPartners.

- Steptoe & Johnson, PLLC, a professional in interest in this bankruptcy matter, is a current and former AlixPartners client in matters unrelated to the Debtors.

- Thompson Coburn, a professional in interest in this bankruptcy matter, is a professional in interest to a current AlixPartners client in matters unrelated to the Debtors. Thompson Coburn is a current AlixPartners client in matters unrelated to the Debtors.

- ThyssenKrupp CSA Siderurgica ("ThyssenKrupp") a customer and vendor to the Debtors, is affiliated with an entity that is a former AlixPartners client in matters

unrelated to the Debtors. ThyssenKrupp affiliated entities are executory contract counterparties, creditors and vendors to current and former AlixPartners clients in matters unrelated to the Debtors.

- Time Warner, a utility provider to the Debtors, and affiliated entities, are litigation parties, vendors, adverse parties, creditors and director affiliated companies to current and former AlixPartners clients in matters unrelated to the Debtors. An affiliate, America On-Line, is a current and former AlixPartners client in matters unrelated to the Debtors.

- Travelers Casualty and Travelers Casualty and Surety Company of America ("Travelers"), letter of credit and surety bond providers to the Debtors, are affiliated with entities that are creditors, insurance providers, bondholders, executory contract counterparties and adverse parties to current and former AlixPartners clients in matters unrelated to the Debtors. Travelers is a vendor to AlixPartners.

- U.S. Army Corps of Engineers, a regulatory agency in this bankruptcy matter, is a former AlixPartners client in matters unrelated to the Debtors. U.S. Army Corps of Engineers is an adverse party to a current AlixPartners client in matters unrelated to the Debtors.

- U.S. Bank National Association ("US Bank"), a creditor to the Debtors, is a lender, creditor, indenture trustee and bondholder to current and former AlixPartners clients in matters unrelated to the Debtors. US Bank is a client related party to a current AlixPartners client in matters unrelated to the Debtors.

- UBS and UBS Investment Bank ("UBS"), professionals in interest in this bankruptcy matter and lenders to the Debtors, are creditors, customers, director affiliated companies, lenders, lessors and bondholders to current and former AlixPartners clients in matters unrelated to the Debtors. UBS is a current and former AlixPartners client in matters unrelated to the Debtors. UBS is the previous employer of a current AlixPartners employee.

- The Vanguard Group, a significant shareholder to the Debtors, and affiliated entities are lenders, vendors, co-defendants, adverse parties, bondholders and significant shareholders to current and former AlixPartners clients in matters unrelated to the Debtors. The Vanguard Group is the previous employer of a current AlixPartners employee.

- Verizon and Verizon North ("Verizon"), utility providers to the Debtors, are former AlixPartners clients in matters unrelated to the Debtors. Other Verizon affiliated entities are creditors, executory contract counterparties and vendors to current and former AlixPartners clients in matters unrelated to the Debtors. Verizon is a vendor to AlixPartners.

APServices LLC
When it really matters

- Waste Management of WV, Inc. ("Waste Management"), a utility provider to the Debtors, is affiliated with entities that are creditors, adverse parties and vendors to current and former AlixPartners clients in matters unrelated to the Debtors. Waste Management is a former AlixPartners client in matters unrelated to the Debtors.

- Weil, Gotshal & Manges LLP, a professional in interest in this bankruptcy matter, is a current and former AlixPartners client in matters unrelated to the Debtors. AlixPartners is a client of Weil, Gotshal & Manges, LLP in matters unrelated to the Debtors. Weil, Gotshal & Manges LLP is a professional in interest to current and former AP clients in matters unrelated to the Debtors.

- Wilmington Trust Co. ("Wilmington Trust"), a professional in interest in this bankruptcy matter, is a bondholder, creditor, lessor and indenture trustees to current and former AlixPartners clients in matters unrelated to the Debtors. Wilmington Trust is a former AlixPartners client and a client related party to current AlixPartners clients, all in matters unrelated to the Debtors.

- X.L., X.L. Specialty and X.L. UK, insurance providers to the Debtors, are affiliated to entities that are current and former AlixPartners clients in matters unrelated to the Debtors. Affiliated entities are executory contract counterparties to current and former AlixPartners clients in matters unrelated to the Debtors.

- Zurich, an insurance provider to the Debtors, is a creditor, vendor, executory contract counterparty and adverse party to current and former AlixPartners clients in matters unrelated to the Debtors. Zurich is a former AlixPartners client and a vendor to AlixPartners in matters unrelated to the Debtors.

This Schedule 2 may be updated by APS from time to time to disclose additional connections or relationships between APS and the interested parties.

AP SERVICES, LLC
GENERAL TERMS AND CONDITIONS

These General Terms and Conditions ("Terms") are incorporated into the Agreement to which these Terms are attached. In case of conflict between the wording in the letter and/or schedule(s) and these Terms, the wording of the letter and/or schedule(s) shall prevail.

Section 1. Company Responsibilities.

The Company will undertake responsibilities as set forth below:

1. Provide reliable and accurate detailed information, materials, documentation and

2. Make decisions and take future actions, as the Company determines in its sole discretion, on any recommendations made by APS in connection with this Agreement.

APS' delivery of the services and the fees charged are dependent on (i) the Company's timely and effective completion of its responsibilities; and (ii) timely decisions and approvals made by the Company's management..

In connection with any Chapter 11 filing, the Company shall apply promptly to the Bankruptcy Court for approval of the Company's retention of APS under the terms of the Agreement. The form of retention application and proposed order shall be reasonably acceptable to APS. APS shall have no obligation to provide any further services if the Company becomes a debtor under the Bankruptcy Code unless APS' retention under the terms of the Agreement is approved by a final order of the Bankruptcy Court reasonably acceptable to APS. The Company shall assist, or cause its counsel to assist, with filing, serving and noticing of papers related to APS' fee and expense matters.

Section 2. Billing, Retainer and Payments.

Billing. APS will submit monthly invoices for services rendered and expenses incurred. Unless explicitly stated in the invoice, all amounts invoiced are not contingent upon or in any way tied to the delivery of any reports or other work product in the future and are not contingent upon the outcome of any case or matter. APS' fees are exclusive of taxes or similar charges, which shall be the responsibility of the Company (other than taxes imposed on APS' income generally).

Retainer. AlixPartners is holding a retainer in the amount of $150,000 in accordance with the Engagement Letter dated June 16, 2012 between Patriot and AlixPartners ("Retainer"). The Retainer will be transferred to APS for this engagement and no further retainer is required. Invoices shall be offset against the Retainer. Payments of invoices will be used to replenish the Retainer to the agreed-upon amount. Any unearned portion of the Retainer will be applied against our final invoice or returned to the Company at the end of the engagement.

If the Company becomes a debtor under the Bankruptcy Code, due to the ordinary course and unavoidable reconciliation of fees and submission of expenses immediately prior to, and subsequent to, the date of filing, APS may have incurred but not billed fees and reimbursable expenses which relate to the prepetition period. APS will seek Court approval to apply the Retainer to these amounts.

Payments. All payments to be made to APS shall be payable upon receipt of invoice via wire transfer to APS' bank account, as follows:

Receiving Bank:	Deutsche Bank ABA #021-001-033
Receiving Account:	AP Services, LLC A/C #003-58897
Currency:	USD

Section 3. Relationship of the Parties.

The parties intend that an independent contractor relationship will be created by the Agreement. As an independent contractor, APS will have complete and exclusive charge of the management and operation of its business, including hiring and paying the wages and other compensation of all its employees and agents, and paying all bills, expenses and other charges incurred or payable with respect to the operation of its business. Of course, employees of APS will not be entitled to receive from the Company any vacation pay, sick leave, retirement, pension or social security benefits, workers' compensation, disability, unemployment insurance benefits or any other employee benefits. APS will be responsible for all employment, withholding, income and other taxes incurred in connection with the operation and conduct of its business. Nothing in this Agreement is intended to create, nor shall be deemed or construed to create a fiduciary or agency relationship between APS and the Company or its Board of Directors.

In the event the Company seeks protection under the U.S. Bankruptcy Code, if APS finds it desirable to augment its professional staff with independent contractors (each, an "I/C") in this case and the Company agrees to the use of such I/Cs, (i) APS will file, and require each I/C to file, a 2014 affidavit indicating that the I/C has reviewed the list of the interested parties in this case, disclosing the I/C's relationships, if any, with the interested parties and indicating that the I/C is disinterested; (ii) the I/C must remain disinterested during the time that the I/C is involved in providing services to the Company on behalf of APS; and (iii) the I/C must represent that he/she will not work for the Company or other interested parties in this case during the time APS is involved in providing services to the Company.

APS' standard practice is to charge for an I/C's services at the rate equal to the compensation provided by APS to such I/C, provided that in no event shall such rates exceed the rates listed on Schedule 1 to the Agreement.

Section 4. Confidentiality.

APS shall keep confidential all non-public confidential or proprietary information obtained from the Company during the performance of its services hereunder (the "Information"), and neither APS nor its personnel will disclose any Information to any other person or entity. "Information" includes non-public confidential and proprietary data, plans, reports, schedules, drawings, accounts, records, calculations, specifications, flow sheets, computer programs, source or object codes, results, models or any work product relating to the business of the Company, its subsidiaries, distributors, affiliates, vendors, customers, employees, contractors and consultants.

The foregoing is not intended to prohibit, nor shall it be construed as prohibiting, APS from making such disclosures of Information that APS reasonably believes is required by law or any regulatory requirement or authority, or to clear client conflicts. In addition, with the Company's prior approval (so long as the Company is not a debtor in Chapter 11), APS will have the right to disclose to others in the normal course of business that it provided services to the Company or its affiliates and a general description of such services, but shall not provide any other information about its involvement with the Company. The obligations of APS under this Section 4 shall survive the end of any engagement between the parties for a period of two (2) years.

The Company acknowledges that all information (written or oral), including advice and Work Product (as defined in Section 5), and the terms of this Agreement, generated by APS in connection with this engagement is intended solely for the benefit and use of the Company (limited to its management and its Board of Directors) in connection with the transactions to which it relates. The Company agrees that no such information shall be used for any other purpose or reproduced, disseminated, quoted or referred to with attribution to APS at any time in any manner or for any purpose without APS' prior approval, except as required by law.

Section 5. Intellectual Property.

Upon the Company's payment of all fees and expenses owed under this Agreement, all analyses, final reports, presentation materials, and other work product (other than any Engagement Tools, as defined below) that APS creates or develops specifically for the Company and delivers to the Company as part of this engagement (collectively known as "Work Product") shall be owned by the Company and shall constitute Information as defined above. APS may retain copies of the Work Product and any Information necessary to support the Work Product subject to its confidentiality obligations in this Agreement.

All methodologies, processes, techniques, ideas, concepts, know-how, procedures, software, tools, utilities and other intellectual property that APS has created, acquired or developed or will create, acquire or develop (collectively, "Engagement Tools"), are, and shall be, the sole and exclusive property of APS. The Company shall not acquire any interest in the Engagement Tools other than a limited non-transferable license to use the Engagement Tools to the extent they are contained in the Work Product. The Company acknowledges and agrees that any Engagement Tools provided to the Company are provided "as is" and without any warranty or condition of any kind, express, implied or otherwise, including, implied warranties of merchantability or fitness for a particular purpose.

Section 6. Framework of the Engagement.

The Company acknowledges that it is retaining APS solely to assist and advise the Company as described in the Agreement. This engagement shall not constitute an audit, review or compilation, or any other type of financial statement reporting engagement.

Section 7. Indemnification and Other Matters.

The Company shall indemnify, hold harmless, and defend APS and its affiliates and its and their partners, directors, officers, employees and agents (collectively, the "APS Parties") from and against all claims, liabilities, losses, expenses and damages (collectively, "Claims") arising out of or in connection with the engagement of APS that is the subject of the Agreement, except for such Claims finally determined to be arising out of the gross negligence, bad faith, willful misconduct or fraud of APS. Promptly after APS receives notice of the commencement of any action or other proceeding in respect of which indemnification or reimbursement may be sought hereunder, APS will notify the Company thereof; but the omission to so notify the Company shall not relieve the Company from any obligation hereunder unless, and only to the extent that, the Company shall have been materially prejudiced by such failure. If any such action or other proceeding shall be brought against any APS Party, the Company shall, upon written notice given reasonably promptly following APS' notice to the Company of such action or proceeding, be entitled to assume the defense thereof at the Company's expense with counsel chosen by the Company and reasonably satisfactory to APS; provided, however, that any APS Party may, at its own expense, retain separate counsel to participate in such defense. Notwithstanding the foregoing, such APS Party shall have the right to employ separate counsel at the Company's expense and to control its own defense of such action or proceeding if the named parties to any such claim or action include such APS Party and the Company and in the reasonable opinion of counsel to such APS Party there are or may be substantial legal defenses available to such APS Party or to other APS Parties that are different from or additional to those available to the Company; provided, however, that in no event shall the Company be required to pay fees and expenses under this indemnity for more than one counsel (in addition to one local counsel) for all APS Parties in connection with an action or related action.

The Company and APS agree that they will not, without the prior written consent of each other, settle or compromise or consent to the entry of any judgment in any pending or threatened claim, action, or proceeding relating to the matters contemplated by APS' engagement unless such settlement, compromise, or consent includes a release of

the parties reasonably satisfactory to APS and the Company.

If an APS Party is required by applicable law, legal process or government action to produce information or testimony as a witness with respect to this Agreement, the Company shall reimburse APS for any actual, reasonable and documented expenses (including reasonable external and internal legal costs and APS' expenses) incurred to respond to the request, except in cases where an APS Party is a party to the proceeding or the subject of the investigation.

In addition to the above indemnification and advancement, APS employees serving as directors or officers of the Company or affiliates will receive the benefit of the most favorable indemnification and advancement provisions provided by the Company to its directors, officers and any equivalently placed employees, whether under the Company's charter or by-laws, by contract or otherwise.

The Company shall specifically include and cover employees and agents serving as directors or officers of the Company or affiliates from time to time with direct coverage under the Company's policy for liability insurance covering its directors, officers and any equivalently placed employees ("D&O insurance"). Prior to APS accepting any officer position, the Company shall, at the request of APS, provide APS a copy of its current D&O policy, a certificate(s) of insurance evidencing the policy is in full force and effect, and a copy of the signed board resolutions and any other documents as APS may reasonably request evidencing the appointment and coverage of the indemnitees. The Company will maintain such D&O insurance coverage for the period through which claims can be made against such persons. The Company disclaims a right to distribution from the D&O insurance coverage with respect to such persons. Notwithstanding anything to the contrary, the Company's indemnification and advancement obligations in this Section 7 shall be primary to (and without allocation against) any similar indemnification and advancement obligations of APS, its affiliates and insurers to the indemnitees (which shall be secondary). In the event that the Company is unable to include APS employees and agents under the Company's policy or does not have first dollar coverage acceptable to APS in effect for at least $10 million (e.g. there are outstanding or threatened claims against officers and directors alleging prior acts that may give rise to a claim), APS may, at its option, attempt to purchase a separate D&O insurance policy that will cover APS employees and agents only. In such event, the cost of this policy shall be borne by APS. If APS is unable or unwilling to purchase such D&O insurance, then APS reserves the right to terminate the Agreement.

APS is not responsible for any third-party products or services separately procured by the Company. The Company's sole and exclusive rights and remedies with respect to any such third party products or services are against the third-party vendor and not against APS, whether or not APS is instrumental in procuring such third-party product or service.

Section 8. Governing Law and Arbitration.

The Agreement is governed by and shall be construed in accordance with the laws of the State of New York with respect to contracts made and to be performed entirely therein and without regard to choice of law or principles thereof.

Any controversy or claim arising out of or relating to the Agreement, or the breach thereof, shall be settled by arbitration. Each party shall appoint one non-neutral arbitrator. The two party arbitrators shall select a third arbitrator. If within 30 days after their appointment the two party arbitrators do not select a third arbitrator, the third arbitrator shall be selected by the American Arbitration Association (AAA). The arbitration shall be conducted in Southfield, Michigan under the AAA's Commercial Arbitration Rules, and the arbitrators shall issue a reasoned award. The arbitrators may award costs and attorneys' fees to the prevailing party. Judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof.

Notwithstanding the foregoing, APS may in its sole discretion proceed directly to a court of competent jurisdiction to enforce the terms of this Agreement for any claim (and any subsequent counter claim) against the Company relating to either (i) the non-payment of fees or expenses due under this Agreement, or (ii) the non-performance of obligations under Section 7.

In the event the Company files under Chapter 11, the Company and APS agree that the Bankruptcy Court shall have exclusive jurisdiction over any and all matters arising under or in connection with this Agreement.

In any court proceeding arising out of this Agreement, the parties hereby waive any right to trial by jury.

Section 9. Termination and Survival.

The Agreement may be terminated at any time by written notice by one party to the other; provided, however, that notwithstanding such termination APS will be entitled to any fees and expenses due under the provisions of the Agreement (for fixed fee engagements, fees will be pro rata based on the amount of time completed), in accordance with Schedule 1. Such payment obligation shall inure to the benefit of any successor or assignee of APS.

Sections 2, 4, 5, 7, 8, 9, 10, 11 and 12 of these Terms, the provisions of Schedule 1 and the obligation to pay accrued fees and expenses shall survive the expiration or termination of the Agreement.

Section 10. Non-Solicitation of Employees

The Company acknowledges and agrees that APS has made a significant monetary investment recruiting, hiring and training its personnel. During the term of this Agreement and for a period of two years after the final invoice is rendered by APS with respect to this engagement (the "Restrictive Period"), the Company and its affiliates agree not to directly or indirectly hire, contract with, or solicit the employment of any of APS' Managing Directors,

Directors, or other employees/ contractors assigned to this engagement.

The Company also acknowledges and agrees that money damages alone may not be an adequate remedy for a breach of this provision, and the Company agrees that APS shall have the right to seek a restraining order and/or an injunction for any breach of this non-solicitation provision. If any provision of this section is found to be invalid or unenforceable, then it shall be deemed modified or restricted to the extent and in the manner necessary to render the same valid and enforceable.

Section 11. Limit of Liability.

The APS Parties shall not be liable to the Company, or any party asserting claims on behalf of the Company, except for direct damages found in a final determination to be the direct result of the bad faith, self-dealing, intentional misconduct or gross negligence of APS. The APS Parties shall not be liable for incidental or consequential damages under any circumstances, even if it has been advised of the possibility of such damages. The APS Parties aggregate liability, whether in tort, contract, or otherwise, is limited to the amount of fees paid to APS for services on this engagement (the "Liability Cap"). The Liability Cap is the total limit of the APS Parties' aggregate liability for any and all claims or demands by anyone pursuant to this Agreement, including liability to the Company, to any other parties hereto, and to any others making claims relating to the work performed by APS pursuant to this Agreement. Any such claimants shall allocate any amounts payable by the APS Parties among themselves as appropriate, but if they cannot agree on the allocation it will not affect the enforceability of the Liability Cap. Under no circumstances shall the aggregate of all such allocations or other claims against the APS Parties pursuant to this Agreement exceed the Liability Cap.

APS acknowledges that, during the pendency of any Bankruptcy Court approved retention, the Liability Cap may be subject to modification as may be stated within the Bankruptcy Court's retention order.

Section 12. General.

Severability. If any portion of the Agreement shall be determined to be invalid or unenforceable, the remainder shall be valid and enforceable to the maximum extent possible.

Entire Agreement. This Agreement, including the letter, the Terms and the schedule(s), contains the entire understanding of the parties relating to the services to be rendered by APS and supersedes any other communications, agreements, understandings, representations, or estimates among the parties (relating to the subject matter hereof) with respect to such services. The Agreement, including the letter, the Terms and the schedule(s), may not be amended or modified in any respect except in a writing signed by the parties. is not responsible for performing any services not specifically described herein or in a subsequent writing signed by the parties.

Joint and Several. If there is more than one party to this Agreement, the Company shall cause each other entity which is included in the definition of Company to be jointly and severally liable for the Company's liabilities and obligations set forth in this Agreement.

Third-Party Beneficiaries. The indemnitees shall be third-party beneficiaries with respect to Section 7 hereof.

Data Protection. APS acknowledges and the Company agrees that in performing the services APS may from time to time be required to process certain personal data on behalf of the Company. In such cases APS may act as the Company's data processor and APS shall endeavor to (a) act only on reasonable instructions from the Company within the scope of the services of this Agreement; (b) have in place appropriate technical and organizational security measures against unauthorized or unlawful processing of personal data and against accidental loss or destruction of, or damage to, personal data; and (c) comply (to the extent applicable to it and/or the process) with relevant laws or regulations.

Notices. All notices required or permitted to be delivered under the Agreement shall be sent, if to APS, to:

AP Services, LLC
2000 Town Center, Suite 2400
Southfield, MI 48075
Attention: General Counsel

and if to the Company, to the address set forth in the Agreement, to the attention of the Company's General Counsel, or to such other name or address as may be given in writing to the other party. All notices under the Agreement shall be sufficient only if delivered by overnight mail. Any notice shall be deemed to be given only upon actual receipt.

APServices LLC
When it really matters.

Chicago Dallas Detroit Los Angeles New York San Francisco Washington, DC

July 17, 2012

Irl F. Engelhardt
Chairman and Chief Executive Officer
Patriot Coal Corporation
12312 Oliver Boulevard
St. Louis, Missouri 63141

Re: Agreement for the Provision of Interim Management Services – First Amendment

Dear Mr. Engelhardt:

This letter represents the first amendment (the "First Amendment") to the agreement between AP Services, LLC, a Michigan limited liability company ("APS") and Patriot Coal Corporation (the "Company") dated July 9, 2012 (the "Engagement Letter"). Unless otherwise modified herein, the terms and conditions of the Engagement Letter remain in full force and effect.

STAFFING

APS will replace Ted Stenger as Chief Restructuring Officer of Patriot Coal Corporation with Kenneth A. Hiltz, effective July 17, 2012. Attached is an updated Exhibit A to reflect this change.

If these terms meet with your approval, please sign and return the enclosed copy of the Agreement.

We look forward to working with you.

Sincerely yours,

AP SERVICES, LLC

Kenneth A. Hiltz
Authorized Representative

Acknowledged and Agreed to:

PATRIOT COAL CORPORATION

By: _____

Its: Senior Vice President – Law & Administration

Dated: 7/19/12

AP Services, LLC

Exhibit A – Revised July 17, 2012

Temporary Staff
Individuals with Officer Positions

Name	Description	Hourly Rate[1]	Commitment Full[2] or Part[3] Time
Kenneth A. Hiltz	Chief Restructuring Officer	$880	Full Time

Additional Temporary Staff

Name	Description	Hourly Rate[1]	Commitment Full[2] or Part[3] Time
Dipes Patel	Associate	$345	Full Time
Christopher Blacker	Director	$620	Full Time
Scott Mell	Director	$665	Full Time
Robb McWilliams	Director	$665	Full Time

The parties agree that Exhibit A can be amended by APS from time to time to add or delete staff, and the Monthly Staffing Reports shall be treated by the parties as such amendments.

[1] Standard hourly rates listed are prior to application of the 10% discount set forth on Schedule 1. The hourly rate structure is further defined on Schedule 1.
[2] Full time is defined as substantially full time.
[3] Part time is defined as approximately 2-3 days per week, with some weeks more or less depending on the needs and issues facing the Company at that time.

SCHEDULE 1

PATRIOT COAL CORPORATION

PARTIES IN INTEREST

Officers and Directors (2009 to Present)

Adorjan, J. Joe
Bean, Joseph W.
Bennett, Robert W.
Brandt, Philip A.
Brown, B. R.
Day, Michael D.
Ebetino, Charles A.
Engelhardt, Irl F.
Hartsog, Kent E.
Hatfield, Bennett K.
Hudson, Terry G.
Johnson, Michael P.
Jones, Jacquelyn A.
Jones, John R.
Longoria, Janeice M.
Lucha, Dale F.
Lushefski, John E.
Magro, James N.
Mead, Robert L.
Millburg, Lawrence J.
Scharf, Michael M.
Schnapp, Paul A.
Schroeder, Mark N.
Viets, Robert O.

Affiliations of Directors (Board Memberships, Charitable Organizations, etc.)

Adven Capital
Bates Sales Company
Beaucoup Farms LLC
Buffalo Wild Wings, Inc.
CenterPoint Energy, Inc.
Delta Trust & Bank
Engelhardt Family Foundation
Foundation for Pinckneyville, Illinois
Freedom Group, Inc.
Friends of KWMU

Galveston Bay Foundation
Greater Houston Partnership
Gulf Coast Health Services Steering Committee
Healthcare Service Corporation
Heritage Society
The Hungary-Missouri Educational Partnership
Illinois Rural Heritage Museum
J&A Group
MD Anderson Services Corporation
Ogden, Gibson, Broocks, Longoria & Hall L.L.P.
Oklahoma Conference for Community & Justice
Phillips Theological Seminary
Port of Houston Authority
QuikTrip Corporation
Ranken Technical College
Remington Arms Company, Inc.
Renewable Energy Group, Inc.
The Rumson Country Day School
RLI Corp.
Saint Louis University
Texas Medical Center
Tiger Woods Foundation
UTIMCO
White Walnut Farms LLC

Debtor Subsidiaries

Affinity Mining Company
Apogee Coal Company, LLC
Appalachia Mine Services, LLC
Beaver Dam Coal Company, LLC
Big Eagle LLC
Big Eagle Rail, LLC
Black Stallion Coal Company, LLC
Black Walnut Coal Company
Bluegrass Mine Services, LLC
Brook Trout Coal, LLC
Catenary Coal Company, LLC
Central States Coal Reserves of Kentucky, LLC
Charles Coal Company, LLC
Cleaton Coal Company
Coal Clean LLC
Coal Properties, LLC
Coal Reserve Holding Limited Liability Company No. 2
Colony Bay Coal Company
Cook Mountain Coal Company, LLC
Corydon Resources LLC

Coventry Mining Services, LLC
Coyote Coal Company LLC
Cub Branch Coal Company LLC
Dakota LLC
Day LLC
Dixon Mining Company, LLC
Dodge Hill Holding JV, LLC
Dodge Hill Mining Company, LLC
Dodge Hill of Kentucky, LLC
EACC Camps, Inc.
Eastern Associated Coal, LLC
Eastern Coal Company, LLC
Eastern Royalty, LLC
Emerald Processing, L.L.C.
Gateway Eagle Coal Company, LLC
Grand Eagle Mining, LLC
Heritage Coal Company LLC
Highland Mining Company, LLC
Hillside Mining Company
Hobet Mining, LLC
Indian Hill Company LLC
Infinity Coal Sales, LLC
Interior Holdings, LLC
IO Coal LLC
Jarrell's Branch Coal Company
Jupiter Holdings LLC
Kanawha Eagle Coal, LLC
Kanawha River Ventures I, LLC
Kanawha River Ventures II, LLC
Kanawha River Ventures III, LLC
KE Ventures, LLC
Little Creek LLC
Logan Fork Coal Company
Magnum Coal Company LLC
Magnum Coal Sales LLC
Martinka Coal Company, LLC
Midland Trail Energy LLC
Midwest Coal Resources II, LLC
Mountain View Coal Company, LLC
Newtown Energy, Inc.
New Trout Coal Holdings II, LLC
North Page Coal Corp.
Ohio County Coal Company, LLC
Panther LLC
Patriot Beaver Dam Holdings, LLC
Patriot Coal Company, L.P.

Patriot Coal Receivables (SPV), Ltd.
Patriot Coal Sales LLC –
Patriot Coal Services LLC
Patriot Leasing Company LLC
Patriot Midwest Holdings, LLC
Patriot Reserve Holdings, LLC
Patriot Trading LLC
PCX Enterprises, Inc.
Pine Ridge Coal Company, LLC
Pond Creek Land Resources, LLC
Pond Fork Processing LLC
Remington Holdings LLC
Remington II LLC
Remington LLC
Rhino Eastern LLC
Rivers Edge Mining, Inc.
Robin Land Company, LLC
Sentry Mining, LLC
Snowberry Land Company
Speed Mining LLC
Squaw Creek Coal Company
Sterling Smokeless Coal Company, LLC
TC Sales Company, LLC
Tecumseh Coal Corporation
The Presidents Energy Company LLC
Thunderhill Coal LLC
Trout Coal Holdings, LLC
Union County Coal Co., LLC
Viper LLC
Weatherby Processing LLC
White Stallion Coal, LLC
Wildcat, LLC
Wildcat Energy LLC
Will Scarlet Properties LLC
Winchester LLC
Winifrede Dock Limited Liability Company
WWMV, LLC
Yankeetown Dock, LLC

Five Percent and Greater Shareholders and Beneficial Owners (as of March 15, 2012)

BlackRock, Inc.
State Street Corporation
The Vanguard Group, Inc.

Significant Business Partners

American Patriot Mining, LLC
RWMV, LLC
Rhino Energy WV LLC

Attorneys, Professionals and Financial Advisors (Including Accountants and Investment Banks)

Allen Guthrie & Thomas
Arnold & Porter, LLP
American Stock Transfer & Trust Company, LLC
AST Fund Solutions, LLC
Banc of America Securities LLC
Bank of America Corporation
Barclays Capital Inc.
Boehl, Stopher & Graves
Bowen Engineering Corp.
Bowles Rice McDavid Graff & Love LLP
Broadridge Financial Solutions, Inc.
Buchanan, Ingersoll & Rooney
Bryan Cave, LLP
CH2M Hill Engineers
Citibank, National Association
Citigroup CIB
Citigroup Global Markets, Inc.
Computershare
Davis Polk & Wardwell LLP
Depository Trust and Clearing Corporation
Dinsmore & Shohl LLP
Duff & Phelps Corporation
Ernst & Young LLP
Equity Methods
FBR Capital Markets & Co.
Ferreri & Fogle
Fifth Third Securities, Inc.
Flaherty, Sensabaugh & Bonasso
GCG Inc.
Georgeson Inc.
Gordon Law Offices, PSC
Greenberg & Traurig
Greensfelder, Hemker & Gale, P.C.
Husch Blackwell
IBM
Jackson Kelly PLLC
Kohn, Shands, Elbert, Gianoulakis & Giljum, LLP

KPMG LLP
Lewis Glasser Casey & Rollins, PLLC
Mercer
Merrill Lynch
Milliman
Morris, Nichols, Arsht & Tunnell LLP
Natixis Securities Americas LLC
Neal, Gerber & Eisenberg LLP
Ogletree Deakins
Oliver Wyman
PNC Capital Markets, LLC
Protiviti
Robinson & McElwee, PLLC
RR Donnelly
Sandberg Phoenix & Von Gontard P.C.
Santander Investment Securities, Inc.
SG Americas Securities, LLC
Shuman, McCuskey & Slicer, PLLC
Smith Moore Leatherwood LLP
SNR Denton
Sorling, Northrup, Hanna, Cullen & Cochran, Ltd.
Steptoe & Johnson, PLLC
Summit Strategies Group
The Blackstone Group LP
Thompson Coburn
Towers Watson
UBS Investment Bank
Veritas Consulting/Richard Verheij
WebFilings
White & Risse
Wilmington Trust Company
Zenon Environmental Corp d/b/a GE Water
Ziemer, Stayman, Weitzel & Shoulders, LLP

Significant Financial Institutions (Including Administrative Agents, Lenders and Equipment Financing)

Bank of America, N.A.
Bank of Oklahoma, N.A.
Barclays Bank PLC
Caterpillar Financial Services Corp.
Citigroup Global Markets Inc.
Comerica
Fifth Third Bank
M&I Bank (Southwest Bank of St Louis)
Natixis, New York Branch

PNC Bank
Raymond James Bank
RZB Bank
Societe Generale (SocGen)
Sovereign Bank
The Private Bank
UBS
United Overseas Bank

Significant Equipment Lessors

AmerCable Incorporated
BancorpSouth Equipment Finance
Bank of America Leasing
Bank of the West
Black Equipment Co, Inc.
BMO Harris Equipment Finance
California First National Bank
Capitalsource Bank
Caterpillar Financial Services Corporation
Cecil I. Walker Machinery Co.
CitiCapital Commercial Leasing Corporation
DBT America Inc.
The Fifth Third Leasing Company
First National Capital Corp.
Fifth Third Bank
First Utah Bank
Flagstar Bank, FSBGelco Corporation DBA GE Fleet Services
General Electric Capital Corporation
Gibbs Technology Leasing
Hawthorn Bank
The Huntington National Bank
ICON Investments
ICON Magnum, LLC
Joy Technologies Inc.
Key Equipment Finance Inc.
Komatsu Financial Limited Partnership
Macquarie Corporate and Asset Funding, Inc.
Mazuma Capital Corp
Merrill Lynch Capital
Mitel Leasing, Inc.
Motion Industries, Inc.
Nations Fund I, Inc.
PEC Equipment Company, LLC (Peabody)
People’s Capital and Leasing Corp.
Prime Alliance Bank

RBS Asset Finance, Inc.
Relco Finance, Inc.
Renaissance Capital Alliance
Republic Bank, Inc.
Rish Equipment Company
Ritchie Bros. Auctioneers (America) Inc.
Rudd Equipment Company
SG Equipment Finance USA Corp
Siemens Financial Services, Inc.
Somerset Capital Group, LTD
United Leasing, Inc.
Wire Rope Industries Ltd.

Significant Landlords and Lessors

ACIN
Alcoa Fuels, Inc.
Alderson Heirs
Allegheny Land
Ark Land KH
Berwind Land Company
BGK –Integrated TIC Management, LLC
Black King
Blue Eagle
Boone East
Boone East Development
CC Dickinson Testamentary Trust
Central WV Energy
Chesapeake Mining
Cole & Crane
Courtney Co.
David Olliver, Agent
Donald Greenwell
Duke Realty
Elk Run
Federal Coal
Gerald Greenwell
Greenbrier Land Co.
Hoover
Hoover LaFollette
Horse Creek Coal Land Co.
Horse Creek Land and Mining
Imperial Coal Company
Jackson Vinson
James M. Greenwell
Johnny Royster

Kay-Ford-JamesLawson Heirs
Lewis Heirs
Little Coal Land Co.
LRPB
LRPB KE
Mariam Peak
Midwest Coal Reserves of Ky., LLC
Miller-Gilman
Mohler Lumber
Mounts & Dannheiser, LLC
Pardee
Payne Gallatin
Penn Virginia f/k/a Penn Virginia Operating Co., LLC
Pocahontas Land
Potter Family, LLC
Potter Grandchildren, LLC
Quincy Center
Rowland Land
Shepard Boone
William H. Shields
Shonk
So. Appalachian
Southern Dickinson
Southern Land Co.
SRIR (Pocahontas Land)
Tennessee Valley Authority
Tommy Long
Ward Heirs
Westvarendrag
WPP LLC

Unions

United Mine Workers of America
Bituminous Coal Operators' Association

Letter of Credit and Surety Bond Providers and Beneficiaries

Department of Labor
Peabody Energy Corp.

Surety Issuers
ACE American Insurance Company
American Casualty Company of Reading, Pennsylvania
Aspen American Insurance Company
Aspen Specialty Insurance Company
Argonaut Insurance Company

Chubb Group of Insurance Companies
Chubb Surety
CNA Surety
Continental Casualty Company
Bond Safeguard
Federal Insurance Company
Firemen's Insurance Company of Newark, New Jersey
HCC Surety Group
Indemnity Insurance Company of North America
Indemnity National Insurance Company
Insurance Company of North America
Lexon
Liberty
National Fire Insurance Company of Hartford –
Pacific Employers Insurance Company
Rockwood
St. Paul/Seaboard
St. Paul Fire & Marine
Surety Bonding Company of America
The Continental Insurance Company
Travelers Casualty and Surety Company of America
US Specialty
Universal Surety Company of America
Westchester Fire Insurance Company
Western Surety Company

Surety Obligees
Henderson County, Kentucky
Illinois Department of Mines and Minerals
Indiana State Agency
Kentucky Dept. for Natural Resources: Division of Mine Reclamation & Enforcement
Kentucky State Agency
Missouri State Agency
Ohio Department of Natural Resources; Reclamation Division
West Virginia Department of Natural Resources
West Virginia, Department of Transportation
West Virginia Division of Environmental Protection
West Virginia State Agency
WV Hwy

Letters of Credit Providers
Bank of America
Fifth Third Bank
PNC

Letters of Credit Beneficiaries
Arch Coal, Inc.

Argonaut Insurance Co
Bond Safeguard/LEXON
CAT Financial Svcs –
Clerk of Ct, US Dist Ct for WV
Commonwealth of KY
Commonwealth of PA
Federal Ins Co/CHUBB
First Surety Corp
ILL Workers Comp
Indemnity Natl Ins Co
Ins Commissioner of WV
Kenergy Corp
National Fire Insurance
National Union Fire Ins
Norfolk Southern
Old Republic Insurance
Travelers Casualty
UMWA 1992 Benefit Plan
US Surety Co
Western Surety C.N.A.

Significant Taxing Authorities

Internal Revenue Service –
Boone County, WV
Clay County, WV
Commonwealth of Kentucky
Henderson County, KY
Lincoln County, WV
Logan County, WV
Kanawha County, WV
Monongalia County, WV
State of Illinois
State of Indiana
State of Missouri
State of Pennsylvania
State of West Virginia
Union County, KY

Regulatory Agencies (e.g., Department of Interior, Mine Safety Administration, OSHA, and State and Local Regulators)

Environmental Protection Agency
Illinois Department of Natural Resources
Illinois Environmental Protection Agency
Illinois Pollution Control Board
Kentucky Department for Environmental Protection

Kentucky Department for Natural Resources
Kentucky Office of Mine Safety and Licensing
Mine Safety and Health Administration
Occupational Safety and Health Administration
Office of Surface Mining Reclamation and Enforcement
Ohio Department of Natural Resources
Pennsylvania Department of Environmental Protection
U.S. Army Corps of Engineers –
U.S. Bureau of Alcohol, Tobacco, and Firearms
U.S. Bureau of Land Management
U.S. Department of Interior
U.S. Department of Labor
West Virginia Department of Environmental Protection
West Virginia Office of Miners' Health Safety & Training

Parties to Significant Litigation

Bridgehouse Capital Limited
Bridgehouse Commodities Trading Limited
Environmental Protection Agency
Keystone Industries, LLC
Sierra Club
Sentrum Holdings Limited
State of Illinois; Illinois Attorney General's Office
State of West Virginia
Ohio Valley Environmental Coalition, Inc.
U.S. Attorney's Office
West Virginia Department of Environmental Protection
West Virginia Highlands Conservancy, Inc.

Significant Suppliers, Shippers, Warehousemen, Customers and Vendors
Alpha Coal Sales Co. LLC

American Electric Power Co., Inc
Anders Williams Resources, Inc.
Appalachian Power Co.
Bayer CropScience LP
Big Rivers Electric Corp.
Blue Cross Blue Shield –
Bridgehouse Commodities Trading Limited
Brody Mining, LLC
Carbofer Representacoes Ltda.
Cardinal Operating Company
Caremark
Caterpillar Global Mining America
Cecil I. Walker Machinery Co.
Clay's Trucking

Coal Network Inc.
Constellation Energy Commodities
CSX Transportation, Inc.
Dan River Resources LLC
Dekoven Dock, Incorporated
Drummond Coal Sales, Inc.
DTE Energy Company
Duke Energy Carolinas LLC
Duke Energy Commercial Asset Management
Duke Energy Kentucky, Inc.
E. On Ag
Eagle Valley, Inc.
East Kentucky Power Cooperative
Eastman Kodak Co.
EDF Trading North America, LLC/EDF Trading Limited
Emerald International
GenOn Energy Management, LLC
Gerdau Acominas S.A.
Gulf Power Company
Home Oil & Gas
Hunter Trucking
IBM
ILVA Spa
Jennmar Corporation
JMAC Leasing Inc.
Joy Mining Machinery
Kanawha River Terminals, LLC
Kentucky Utilities Co.
Keystone Industries
Komsa Sarl
Long Branch Energy
Louisville Gas and Electric Comp
Magnum Coal Co.
Mercuria Energy Trading, Inc.
Middletown Coke Company, LLC
Mirant Energy Trading, LLC
Monk Mining

Mountain State Carbon, LLC
Neville Island Fuels Company, LLC
Nelson Brothers LLC
Norfolk Southern Railway Company
Owensboro Municipal Utilities
Peabody COALTRADE, LLC
Peabody Energy Corp.
Peabody Terminals, LLC

Penn Virginia Resource Partners, L.P.
Petroleum Products Inc.
Phillips Machine Service Inc.
PPL EnergyPlus, LLC
PPL Generation, LLC
PowerSouth Energy Cooperative
Production Adjustment
Progress Energy Carolinas, Inc.
Raleigh Mine & Industrial Supply
Reiss Viking Division
Relco Finance, Inc.
Rish Equipment
River Trading Company
RWE Trading Americas Inc.
Sandvik Mining and Construction
Selah Corp.
Shenango Inc.
Shinewarm Resources (HK) Group Limited
Southern Company
SunCoke Energy
Tata Steel UK Limited
ThyssenKrupp CSA Siderurgica
Trafigura AG
United Central Industrial Supply
USIMINAS
U.S. Steel Corp.
The Vanguard Group
Vanomet International AG
Veyance Industrial Services
Vitol, Inc.
Webster Trucking
White River Coal Sales, Inc.
Xcoal Energy & Resources
Zug Island Fuels, LLC

Insurers

Brokers
Aon Risk
Marsh USA
Willis of Tennessee

Underwriters
ACE
AIG
Allied World Assurance Company
Allied World National Assurance Company

Arch Specialty
Argo QS
ARISE Inc.
Aspen Bermuda Ltd
Aspen Specialty Insurance Company
Aspen Insurance UK Limited
Axis Insurance (Bermuda) Ltd
Axis Insurance Company
Axis Surplus Insurance Company
Berkley
Chartis
Chubb
CNA
Endurance American Insurance Company
Hartford
Hiscox
Ironshore
Iron-Starr
HCC
Liberty International Underwriters
Liberty Mutual Insurance Europe Limited
MJB Consulting
RSUI
XL
XL UK
XL Specialty
Zurich

United States Trustee's Office

Office of the United States Trustee for the Districts of New York, Connecticut & Vermont
Abriano, Victor
Brooks, Catletha
Catapano, Maria
Choy, Danny A.
Crowder, Stephanie B.
Davis, Tracy Hope
Driscoll, Michael
Dub, Elizabeth C.
Felton, Marilyn
Fields, Myrna R.
Gasparini, Elisabetta
Golden, Susan
Khodorovsky, Nazar
Martin, Marylou
Martinez, Anna M.

Masumoto, Brian S.
Mendoza, Ercilia A.
Moroney, Mary V.
Morrissey, Richard C.
Nadkarni, Joseph
Nakano, Serene
Nguyen, Savitri
Porter, Carol A.
Riffkin, Linda A.
Schwartz, Andrea B.
Schwartzberg, Paul K.
Segreto, John
Sharp, Sylvester
Velez-Rivera, Andy
Weston, Jennifer L.
Zipes, Greg M.

Top Secured Creditors

BancorpSouth Equipment Finance
Bank of America
Bank of America Leasing
Bank of the West
BMO Harris Equipment Finance Company
Caterpillar Financial Services Corp.
Fifth Third Bank
Fifth Third Leasing Company
General Electric Capital Corp.
Key Equipment Finance Inc.
Komatsu Financial Limited Partnership.
People's Capital & Leasing Corp.
SG Equipment Finance
Siemens Financial Services
Somerset Capital Group, Ltd.
United Leasing, Inc.

Top 50 Unsecured Creditors

AFCO
Allegheny Power
Alley Trucking LLC
Alpha Natural Resources, Inc.
Amercable Incorporated
American Electric Power
American Freedom Innovations LLC
Bank of the West

Bentley Badgett II and Linda Badgett
CapitalSource Bank
Caterpillar Global Mining
Cecil I. Walker Machinery Co.
Chisler Brothers Contracting LLC
Chisler Inc.
Coalfield Services Inc.
Cogar Manufacturing Inc.
CSX Transportation Inc.
Dayton Power & Light
Environmine Inc
Fifth Third Leasing Company
Flomin Coal Inc.
GE Capital TMS
I.B.M. Corp.
Industrial Supply Solutions Inc.
J. H. Fletcher & Co.
Jabo Supply Corp
Jennmar Corporation
JMAC Leasing Inc
Joy Mining Machinery
Komatsu Financial Limited Partnership
Logan Corp.
Longwall Associates, Inc.
Mine Equipment & Mill Supply Co.
Monk Mining Supply, Inc.
Nelson Brothers LLC
Penn Virginia Operating Co LLC
Phillips 66 Receivable
Powell Construction Co., Inc.
Raleigh Mine & Industrial
RBS Asset Finance, Inc.
Richard Whiting
Rish Equipment Co.
SGS North America Inc.
Shonk Land Company LLC
Somerset Capital Group, Ltd.
Suncrest Resources LC
United Central Industrial Supply
United Leasing, Inc.
U.S. Bank National Association
Wilmington Trust Company

Utilities

Allegheny Power
American Electric Power

Aquis Communications
AT&T
AT&T Mobility
AT&T Teleconference Services
Buffalo Creek PSD
City of Morganfield
City of Uniontown
Citynet, LLC
Clay-Battelle Public Service District
Dish Network
Dominion Hope
Eldon Gas Company
Fiberlink Communications Corp.
Frontier
Henderson County Water District
Huntington Technology Group Inc.
Kanawha Public Service District
Kenergy Corp.
Kentucky Utilities Co
Lumos Networks Inc
Monongahela Power Company
Mountaineer Gas
Ohio Valley Answering Service
Q Wireless LLC
Rea Energy Cooperative Inc
Republic Services
SouthEastern Illinois Electric
Suddenlink
Tangoe Inc
Telemax Services
Time Warner Cable
Union County Water District
US Cellular
Valley Falls Public Service Dist
Verizon
Verizon North
Waste Management of WV, Inc.
West Penn Power Company
West Side Telecommunications
West Virginia American Water Co
Windstream

Professionals Representing Any of the Foregoing in Relation to Patriot

Cleary, Gottleib, Steen & Hamilton LLP
Latham & Watkins LLP
Ogletree, Deakins, Nash, Smoak & Stewart, P.C.
Weil, Gotshal & Manges

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
Fayetteville Division

In re: ALLENS, INC. and ALL VEG, LLC,[1] Debtors.	Chapter 11 Case Nos. 5:13-bk-73597 (BTB) and 5:13-bk-73598 (BTB) Jointly Administered Under Case No. 5:13-bk-73597 (BTB)

APPLICATION OF THE DEBTORS FOR ENTRY OF AN ORDER UNDER 11 U.S.C. §§ 105(a) AND 363(b) (A) AUTHORIZING RETENTION AND EMPLOYMENT OF ALVAREZ & MARSAL NORTH AMERICA, LLC TO PROVIDE THE DEBTORS A CHIEF RESTRUCTURING OFFICER, CERTAIN ASSISTANT CHIEF RESTRUCTURING OFFICERS, AND CERTAIN ADDITIONAL PERSONNEL AND (B) DESIGNATING JONATHAN HICKMAN AS CHIEF RESTRUCTURING OFFICER FOR THE DEBTORS *NUNC PRO TUNC* TO THE PETITION DATE

The above-captioned debtors and debtors-in-possession (collectively, the "**Debtors**"), hereby submit this application (the "**Application**") for entry of an order, pursuant to sections 105(a) and 363 of title 11 of the United States Code §§ 101, *et seq.* (the "**Bankruptcy Code**"): (a) authorizing the retention and employment of Alvarez & Marsal North America, LLC ("**A&M**") to provide a Chief Restructuring Officer ("**CRO**"), certain Assistant Chief Restructuring Officers and Additional Personnel, (b) appointing Jonathan Hickman as CRO to the Debtors, and (c) providing any additional relief required in order to effectuate the foregoing *nunc pro tunc* as of the Petition Date. The facts and circumstances supporting this Application are set forth in the declaration of Jonathan Hickman (the "**Hickman Declaration**"), which is attached hereto as **Exhibit A**

[1] The Debtors, along with the last four digits of each Debtor's tax identification number, are: All Veg, LLC (9250) and Allens, Inc. (5020). The Debtors' business address is 305 E. Main Street, Siloam Springs, Arkansas 72761..

and incorporated herein by reference. In further support of this Application, the Debtors respectfully state as follows:

Status of the Case

1. On October 28, 2013 (the "**Petition Date**"), each of the Debtors filed a voluntary petition for relief under chapter 11 of the Bankruptcy Code commencing the above-captioned cases (the "**Chapter 11 Cases**").

2. The Debtors have continued in possession of their properties and are operating and managing their business as debtors-in-possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

3. No request has been made for the appointment of a trustee or examiner. A creditors' committee has not yet been appointed in these cases.

Jurisdiction, Venue, and Statutory Predicates

4. The Court has jurisdiction over this Application pursuant to 28 U.S.C. §§ 157 and 1334. Venue is proper in this district pursuant to 28 U.S.C. § 1408. This matter is core within the meaning of 28 U.S.C. § 157(b)(2)(A).

5. The statutory predicates for the relief sought herein are sections 105(a) and 363 of the Bankruptcy Code.

Background

6. Allens, Inc. ("**Allens**"), a wholly owned subsidiary of All Veg, LLC, ("**All Veg**" and together with Allens, the "**Debtors**"), is a leading independent producer of canned vegetables serving the United States retail and foodservice channels. The Debtors are headquartered in Siloam Springs, Arkansas. All Veg is a holding company without employees or assets other than the stock of Allens. A detailed factual

background of the Debtors' business and operations, as well as the events precipitating the commencement of these cases, is more fully set forth in the *Declaration of Jonathan C. Hickman in Support of the Debtors' Chapter 11 Petitions and Requests for First Day Relief* (the "**First Day Declaration**"), filed on the Petition Date and incorporated herein by reference.

Alvarez & Marsal North America, LLC

7. In January 2013, the Debtors retained A&M's affiliate, Alvarez & Marsal Private Equity Performance Improvement, LLC ("**A&M-PEPI**"), pursuant to that certain engagement letter agreement, dated January 10, 2013, by and between A&M-PEPI and the Company (the "**Initial Letter**"), to provide certain services to the Debtors with respect to supporting the Debtors with developing a comprehensive assessment of their business and financial performance and recommend certain actionable performance improvement initiatives. The Initial Letter was amended as of January 24, 2013, to expand the scope of the engagement to provide additional personnel and financial modeling. As of February 11, 2013, the engagement was further modified pursuant to that certain letter (the "**Prior Letter**"), between A&M and the Company, and Addendum No. 1 to the Prior letter, dated February 15, 2013 between the Company and A&M-PEPI (the "**Prior Letter Addendum**" and together with the Prior Letter and the Initial Letter, the "**Prior Agreements**"), pursuant to which A&M agreed to provide expanded financial advisory services to the Debtor.

8. In July, 2013, in the context of overall restructuring negotiations, the Debtors' board of directors determined to hire a Chief Restructuring Officer and to appoint two independent directors, Timothy Boates and Richard Newsted (the

"**Independent Directors**"). The Board further formed a special committee, comprised solely of the Independent Directors (the "**Special Committee**") to oversee the Debtors' restructuring process.

9. The Debtors entered into an engagement letter with A&M, dated as of July 19, 2013 (the "**Engagement Letter**"), a copy of which is attached to the Hickman Declaration as **Schedule 1**, which Engagement Letter terminated and supersedes all of the Prior Agreements. Pursuant to the Engagement Letter, A&M agreed to make available to the Company:

a. Jonathan Hickman to serve as Chief Restructuring Officer (the "**CRO**"); and

b. Cary Daniel, Nick Campbell and Markus Lahrkamp to serve as Assistant Chief Restructuring Officers (each an "**Assistant CRO**")

c. Upon the mutual agreement of A&M and the Company, additional employees of A&M and/or its affiliates and wholly-owned subsidiaries ("**Additional Personnel**") as required to assist the CRO in the execution of the duties set forth more fully in the Engagement Letter. Such Additional Personnel may be designated by the Company as executive officers.

2. Pursuant to the Engagement Letter the CRO reports to the Special Committee and the Assistant CROs and Additional Personnel report to the CRO.

Relief Requested

10. By this Application, pursuant to sections 105(a) and 363(b) of the Bankruptcy Code, the Debtors request entry of an order authorizing, but not directing the Debtors to (i) retain Alvarez & Marsal North America, LLC to provide the Debtors with a Chief Restructuring Officer, certain Assistant Chief Restructuring Officers and certain Additional Personnel (as described below) and (ii) designate Jonathan Hickman as the Debtors' CRO, *nunc pro tunc* to the Petition Date.

11. Jonathan Hickman will serve as the CRO to assist the Debtors with their reorganization efforts and their Chapter 11 Cases, as further described below. A&M will provide Additional Personnel, (collectively with the CRO, the "**Engagement Personnel**") as necessary to assist the CRO in the execution of the duties set forth more fully herein.

12. In consideration of the size and complexity of their business, as well as the exigencies of the circumstances, the Debtors have determined that the services of experienced restructuring managers will substantially enhance their attempts to maximize the value of their estates. The Engagement Personnel are well qualified to act on the Debtors' behalf given their extensive knowledge and expertise with respect to chapter 11 proceedings.

13. The Engagement Personnel specialize in interim management, turnaround consulting, operational due diligence, creditor advisory services, and financial and operational restructuring. A&M's debtor advisory services have included a wide range of activities targeted at stabilizing and improving a company's financial position, including developing or validating forecasts and business plans and related assessments of a business's strategic position; monitoring and managing cash, cash flow, and supplier relationships; assessing and recommending cost reduction strategies; and designing and negotiating financial restructuring packages. In addition, Mr. Hickman has advised debtors, creditors, trustees, and equity constituencies in many complex financial restructurings.

14. In addition, A&M and the CRO are intimately familiar with the Debtors' businesses, financial affairs, and capital structure. Since A&M-PEPI's initial

engagement by the Company on January 10, 2013, certain Engagement Personnel have worked closely with the Debtors' management and other professionals. Consequently, the Debtors believe that A&M has developed significant relevant experience and expertise regarding the Debtors, their operations and the unique circumstances of these cases. For these reasons, A&M is both well qualified and uniquely suited to deal effectively and efficiently with matters that may arise in the context of these cases. Accordingly, the Debtors submit that the retention of A&M and the designation of Jonathan Hickman as CRO on the terms and conditions set forth herein is necessary and appropriate, is in the best interests of the Debtors' estates, creditors, and all other parties in interest, and should be granted in all respects.

Scope of Employment

15. The terms and conditions of A&M's retention are governed by the Engagement Letter, which reflects the substantial efforts that will be required of A&M in this engagement. [2] Pursuant to the terms of the Engagement Letter, A&M will provide the following services to the Debtors in a variety of matters, including, as reasonably requested:

a) Identify and implement both short-term and long-term process improvement and control initiatives within the organization including the existing Rapid Results recommendations previously identified under the Prior Letter Addendum. The engagement personnel responsible for this implementation will report to certain Assistant CRO's and the CRO;

b) Identify and execute upon additional cost reduction actions including but not limited to labor cost control initiatives, SG&A reductions, etc.;

[2] The summaries of the Engagement Letter contained herein are solely for the convenience of the Court and parties in interest. To the extent that such summaries and the terms of the Engagement Letter are inconsistent, the terms of the Engagement Letter shall control. Capitalized terms not otherwise defined in such summaries shall have the meanings ascribed to them in the Engagement Letter.

c) Develop, implement and oversee cash management strategies, tactics and processes;

d) Manage the communication and/or negotiation with outside constituents including lenders, customers and suppliers;

e) Manage the commencement of the sale of fixed assets including vehicles, trailers, real estate, etc.;

f) Make recommendations regarding and implement the sale or purchase of significant assets or business segments;

g) Prepare and analyze operating and financial budgets;

h) Oversee, manage and control cash disbursements;

i) Assist management with the development of updated business plans ("Latest Thinking Forecasts"), and such other related forecasts to be utilized during negotiations with outside constituencies or by the Company for other corporate purposes;

j) Manage the Company's restructuring process including, without limitation, assisting in (a) developing possible restructuring plans or strategic alternatives for maximizing enterprise value and (b) negotiating with lenders, vendors, suppliers (including Ball Corporation), and other stakeholders in connection with any restructuring, including with respect to interim, permanent, bridge or other refinancing, and any restructuring or reorganization;

k) Manage the implementation of any strategic alternative including, without limitation, preparation of budgets or projections, preparations of schedules and statements and preparation of other information necessary or appropriate in connection with any such alternative;

l) Supervise the Company's other restructuring professionals including counsel; and

m) Provide such other similar services as may be requested by the Special Committee.

16. Subject to this Court's approval of this Application, A&M has indicated that it is willing to provide a CRO, Assistant Chief Restructuring Officers and Additional Personnel to the Debtors, and Mr. Hickman has indicated that he is willing to serve as CRO to the Debtors in these Chapter 11 Cases to perform the services described above.

Professional Compensation

17. A&M's decision to make the Engagement Personnel available to the Debtors is conditioned upon its ability to be retained in accordance with its customary terms and conditions and to be compensated for the Engagement Personnel's services and reimbursed for the expenses it incurs in accordance with its customary billing practices.

18. All fees and expenses in connection with the Engagement Personnel's services shall be billed and payable on a monthly basis or, at A&M's discretion, more frequently. In addition, A&M will be reimbursed for its reasonable out-of-pocket expenses incurred in connection with this assignment, such as travel, lodging, duplicating, messenger and telephone charges. While neither A&M nor Mr. Hickman are being employed as professionals under section 327 of the Bankruptcy Code such that they would be subject to the compensation requirements of sections 330 and 331 of the Bankruptcy Code, A&M will file quarterly reports of services rendered and expenses incurred as described above and the Debtors will be authorized to pay, in the ordinary course of their business, the amount invoiced by A&M for fees and expenses on a monthly basis. Parties-in-interest shall have the right to object to fees paid when quarterly reports of compensation earned are filed with the Court, provided that any such objection shall be filed within twenty (20) days of filing of the quarterly report.

19. A&M will be compensated on an hourly basis in accordance with the schedule set forth below. The current hourly rates, which are adjusted annually are as follows:

Managing Directors	$675 - $875

Directors	$475 - $675
Analysts/Associates	$275-$475

20. Should A&M agree to provide Additional Personnel, the additional personnel will be compensated in accordance with the schedule set forth above.

21. In addition to the payment of fees, A&M shall be reimbursed for all reasonable out-of-pocket expenses incurred in carrying out the terms of the Engagement Letter, including travel, courier and attorneys' fees (to the extent necessary).

Termination of Engagement

22. A&M's engagement may be terminated for the reason's set forth in the Engagement Letter.

Indemnification and Contribution Provisions

23. The Debtors have agreed to indemnify, to make certain contributions to, and to reimburse A&M in connection with the Engagement Letter pursuant to terms substantially similar to the following:

> The Debtors agree to hold harmless A&M from all claims and/or losses to which A&M may become subject in connection with A&M's role in this matter, and to indemnify A&M against any claims, losses and expenses as incurred (including the reasonable expense of investigation and preparation and reasonable legal fees and disbursements) arising out of or in connection with any action or claim, unless it is finally judicially determined that such losses, claims, damages or liabilities resulted from the gross negligence or willful misconduct of A&M. Such commitments shall extend upon the terms set forth in this section to any controlling person, director, officer, member, employee, subcontractor, agent or affiliate of A&M (collectively, "**A&M Indemnitees**").

The Debtors agree that the indemnification and reimbursement commitments set forth in this paragraph shall apply if either the Debtors or A&M is a formal party to any such lawsuits, investigations, claims or other proceedings and that such commitments shall extend upon the terms set forth in this section to any A&M Indemnitees. The Debtors further agree that, without prior notice to A&M, they will not enter into any settlement of a lawsuit, claim or other proceeding arising out of the Engagement or the Engagement Letter (whether or not A&M or any other A&M Indemnitees are an actual or potential party to such lawsuit, claim or proceeding) unless such settlement includes an explicit and unconditional release from the party bringing such lawsuit, claim or other proceeding of all A&M Indemnitees for any acts or statements related to the Engagement or the underlying lawsuit.

The Debtors further agree that the A&M Indemnitees are entitled to retain, at their own cost and expense, separate counsel of their choice in connection with any of the matters in respect of which indemnification, reimbursement or contribution may be sought under the Engagement Letter. In no event shall A&M be liable for punitive, exemplary, or consequential indirect damages or expenses (including without limitation, lost profits, opportunity costs, etc.), which may be alleged in connection with the Agreement or the services provided thereunder. In no event shall A&M or its personnel or agents be liable for consequential, special, indirect, incidental, punitive or exemplary loss, damage or expense relating to A&M's engagement.

The Debtors caused their insurance broker to add Jonathan Hickman and Engagement Personnel serving as officers to their officers & directors insurance policy (the "**D&O**" policy) effective immediately and to send copies of all documentation and other communications regarding the Debtors' D&O policy, including without limitation any renewal or cancellation thereof, to the attention of Jonathan Hickman at Alvarez & Marsal North America, LLC. Upon cancellation or nonrenewal of the D&O policy, the Debtors shall exercise their right to extend the claim period for a one-year "discovery

> period" and shall exercise such rights and pay such premiums as may be required thereunder.
>
> The terms of this provision shall survive the expiration or termination of the Engagement Letter.

24. The indemnification, contribution, and reimbursement provisions reflected in the Engagement Letter are customary and reasonable terms of consideration for CROs providing the services described in the Engagement Letter. The terms of the Engagement Letter were fully negotiated between the Debtors and A&M at arm's-length and the Debtors respectfully submit that the indemnification language in the Engagement Letter is reasonable and in the best interests of the Debtors, their estates, and creditors.

No Duplication of Services

25. The Debtors intend for A&M's services to complement, and not duplicate, the services to be rendered by any other professional retained in these Chapter 11 Cases. A&M understands that the Debtors have retained and may retain additional professionals during the term of the engagement and will work cooperatively, as requested by the Debtors, with such professionals to integrate any respective work conducted by the professionals on behalf of the Debtors.

A&M's Relationships to the Debtors

26. To the best of the Debtors' knowledge, information, and belief, A&M has no connection with, and holds no interest adverse to, the Debtors, their creditors, or any other party in interest, or their respective attorneys or accountants, or the Office of the United States Trustee or any person employed in the Office of the United States Trustee, in the matters for which A&M is proposed to be retained except as disclosed in the Hickman Declaration.

27. Although the Debtors submit that the retention of A&M is not governed by section 327 of the Bankruptcy Code, the Debtors attach the Hickman Declaration, which discloses, among other things, any relationship that A&M, Hickman or any individual member of the Additional Personnel has with the Debtors, their significant creditors, or other significant parties in interest known to A&M. Based upon the Hickman Declaration, the Debtors submit that A&M is a "disinterested person" as that term is defined by section 101(14) of the Bankruptcy Code.

28. In addition, as set forth in the Hickman Declaration, if any new material facts or relationships are discovered or arise, A&M will provide the Court with a supplemental declaration.

29. The Debtors submit that the retention of A&M on the terms and conditions set forth herein is in the best interests of the Debtors, their creditors, and all parties-in-interest.

Fees and Reporting

30. If the Court approves the relief requested herein, A&M will be retained to provide the Debtors with the Engagement Personnel and Hickman will be designated as the Debtors' CRO pursuant to section 363 of the Bankruptcy Code. Because A&M is not being employed as a professional under section 327 of the Code, A&M will not be required to submit fee applications pursuant to sections 330 and 331 of the Bankruptcy Code. Instead, A&M will file with the Court, and provide notice to the U.S. Trustee and all official committees (together with the U.S. Trustee, the "**Notice Parties**"), reports of compensation earned and expenses incurred on at least a quarterly basis. Such compensation and expenses shall be subject to Court review in the event that an objection

is filed. In addition A&M will file with the Court and provide the Notice Parties a report on staffing (the "**Staffing Report**") by the 20th of each month for the previous month, which report would include the names and tasks filled by all Engagement Personnel involved in this matter. The Staffing Report (and A&M's staffing for this matter) would be subject to review by the Court in the event so requested by any of the Notice Parties.

31. A&M received $350,000 in total retainers in connection with preparing for and conducting the filing of these Chapter 11 cases, as described in the Engagement Letter. In the 90 days prior to the Petition Date, A&M received payments totaling $2,540,350.16 in the aggregate for services performed for the Debtors. A&M has applied the outstanding retainers to amounts due for services rendered and expenses incurred prior to the Petition Date. Per A&M's agreement with the DIP Lender, A&M refunded the balance of their retainers ($123,911.89) to the Debtors.

32. A precise disclosure of any amounts held as of the Petition Date will be provided in A&M's first report filed regarding compensation earned and expenses incurred.

33. Given the numerous issues which the Engagement Personnel may be required to address in the performance of their services, A&M's commitment to the variable level of time and effort necessary to address all such issues as they arise, and the market prices for such services for engagements of this nature in an out-of-court context, as well as in chapter 11, the Debtors submit that the fee arrangements set forth in the Engagement Letter are reasonable.

Dispute Resolution Procedures

34. The Debtors and A&M have agreed, subject to the Court's approval of this Application, that notwithstanding the Engagement Letter: (a) any controversy or claim with respect to, in connection with, arising out of, or in any way related to this Application or the services provided by the Engagement Personnel to the Debtors as outlined in this Application, including any matter involving a successor in interest or agent of any of the Debtors or of A&M, shall be brought in this Court or the United States District Court for the Western District of Arkansas (the "**District Court**") (if the reference is withdrawn); (b) A&M, the Debtors, and any and all successors and assigns thereof, consent to the jurisdiction and venue of such court as the sole and exclusive forum (unless such courts do not have or retain jurisdiction over such claims or controversies) for the resolution of such claims, causes of actions, or lawsuits; (c) A&M and the Debtors, and any and all successors and assigns thereof, waive trial by jury, such waiver being informed and freely made; (d) if this Court, or the District Court (if the reference is withdrawn), does not have or retain jurisdiction over the foregoing claims and controversies, A&M and the Debtors, and any and all successors and assigns thereof, will submit first to non-binding mediation; and, if mediation is not successful, then to binding arbitration, in accordance with the dispute resolution procedures (as set forth in **Exhibit B** attached hereto); and (e) judgment on any arbitration award may be entered in any court having proper jurisdiction. By this Application, the Debtors seek approval of this agreement by the Court. Further, A&M and the Debtors have agreed not to raise or assert any defense based upon jurisdiction, venue, abstention or otherwise to the jurisdiction and venue of this Court or the District Court (if the reference is withdrawn) to

hear or determine any controversy or claims with respect to, in connection with, arising out of, or in any way related to this Application or the services provided hereunder.

Basis for Relief Requested

35. The Debtors seek approval of the employment of A&M pursuant to section 363 of the Bankruptcy Code, *nunc pro tunc* to the Petition Date. Section 363(b)(1) of the Bankruptcy Code provides in relevant part that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate." 11 U.S.C. § 363(b)(1). Further, pursuant to section 105(a) of the Bankruptcy Code, the "court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

36. Under applicable case law, in this and other circuits, if a debtor's proposed use of its assets pursuant to section 363(b) of the Bankruptcy Code represents a reasonable business judgment on the part of the debtor, such use should be approved. *See, e.g., Comm. of Equity Sec. Holders v. Lionel Corp. (In re Lionel Corp.)*, 722 F.2d 1063, 1070 (2d Cir. 1983) ("The rule we adopt requires that a judge determining a §363(b) application expressly find from the evidence presented before him at the hearing a good business reason to grant such an application."); *Comm. of Asbestos-Related Litigants v. Johns-Manville Corp. (In re Johns-Manville Corp.)*, 60 B.R. 612, 616 (Bankr. S.D.N.Y. 1986) ("Where the debtor articulates a reasonable basis for its business decisions (as distinct from a decision made arbitrarily or capriciously), courts will generally not entertain objections to the debtor's conduct").

37. The retention of A&M and its professionals is a sound exercise of the Debtors' business judgment. Jonathan Hickman has extensive experience as a senior

officer and as an advisor for many troubled companies. The Debtors believe that the Engagement Personnel will provide services that benefit the Debtors' estates and creditors. In light of the foregoing, the Debtors believe that the retention of A&M is appropriate and in the best interests of the Debtors and their estates and creditors.

38. The retention of interim corporate officers and other temporary employees, therefore, is proper under section 363 of the Bankruptcy Code. Bankruptcy courts frequently authorize the retention of officers utilizing this provision of the Bankruptcy Code. *See, e.g., In re Texas Rangers Baseball Partners*, Ch. 11 Case No. 10-43625 (DML) (Bankr. N.D. Tex. June 28, 2010) [Docket No. 28]; *In re Blue Stone Real Estate, Const. & Development Corp.*, 392 B.R. 897 (Bankr. M.D. Fla. 2008); *In re Lehman Bros. Holdings, Inc.*, Ch. 11 Case No. 08-13555 (JMP) (Bankr. S.D.N.Y. Dec. 17, 2008) [Docket No. 2278]; *In re PRC, LLC*, Ch. 11 Case No. 08-10238 (MG) (Bankr. S.D.N.Y. Feb. 27, 2008) [Docket No. 182]; *In re Bally Total Fitness of Greater N.Y., Inc.*, Ch. 11 Case No. 07-12395 (BRL) (Bankr. S.D.N.Y. Aug. 21, 2007) [Docket No. 283]; *In re Exide Technologies, Inc., et al.*, (Case No. 02-11125) (JCA) (Bankr. D. Del. May 10, 2002).

39. Based upon the foregoing, the Debtors submit that the retention of A&M, and the designation of Jonathan Hickman as CRO on the terms set forth herein and in the Engagement Letter, would inure to the benefit of the Debtors' estates and their creditors. Moreover, Mr. Hickman is clearly qualified for the position for which he is being employed. The Debtors have determined that the compensation terms of the Engagement Letter are within the range for senior executive officers employed with companies of comparable size, value and reputation. Accordingly, the Debtors' decision to enter into

the Engagement Letter, as modified to limited extent by the provisions of the proposed order, reflects an exercise of the Debtors' sound business judgment.

Request for Approval of Retention of Alvarez & Marsal North America, LLC, *Nunc Pro Tunc* as of the Petition Date

40. The Debtors request that A&M's retention be made effective, *nunc pro tunc* as of the Petition Date, in order to allow A&M to be compensated for the work it performs for the Debtors prior to the Court's consideration and approval of this Application. The Debtors submit that under the circumstances, and to avoid irreparable harm to the Debtors' estates that may occur if A&M is not immediately retained, retroactive approval to the Petition Date is warranted. *See, e.g., In re National Home Centers, Inc.*, Case No. 09-76195 (Bankr. W.D. Akr. Jan. 21, 2010) *Order Authorizing Amended Application of Debtor to Employ Attorneys* (authorizing employment of debtor's counsel *nunc pro tunc* to debtor's petition date); *F/S Airlease II, Inc. v. Simon (In re F/S Airlease II, Inc.)*, 844 F.2d 99, 103 (3d Cir. 1988), cert. denied, 488 U.S. 852 (1988); *Indian River Homes, Inc. v. Sussex Trust Co.*, 108 B.R. 46, 51 (D. Del. 1989) (approval of debtor's employment of attorney and real estate agent as of a prior date was not an abuse of discretion).

Notice

41. Notice of this Application has been given the "Special Service List" as defined in the *Order Granting Motion to Limit Notice, Approving Special Service List, and Establishing Notice Procedures* [Docket No. 67]. The Debtors submit that, in light of the nature of the relief requested, no other or further notice need be given.

No Prior Request

42. No prior request for the relief sought in this Application has been made to this Court or any other court.

Conclusion

WHEREFORE, the Debtors respectfully request that the Court enter the Order attached hereto as **Exhibit C** (a) authorizing the Debtors to retain and employ A&M to provide a CRO, certain Assistant Chief Restructuring Officers and Additional Personnel and (b) appointing Jonathan Hickman as CRO to the Debtors, *nunc pro tunc* as of the Petition Date, and (c) granting such other and further relief necessary to effectuate the foregoing.

Dated: November 4, 2013

Respectfully submitted,

MITCHELL, WILLIAMS, SELIG,
GATES & WOODYARD, P.L.L.C.
425 West Capitol Avenue, Suite 1800
Little Rock, Arkansas 72201-3525
Telephone: (501) 688-8800
Facsimile: (501) 688-8807

By: */s/ Stan D. Smith*
Stan D. Smith (Ark. Bar No. 90117)
Lance R. Miller (Ark. Bar No. 85109)
Chris A. McNulty (Ark. Bar No. 08198)

-and-

GREENBERG TRAURIG, LLP
Nancy A. Mitchell (*pro hac vice*)
Maria J. DiConza (*pro hac vice*)
Matthew L. Hinker (*pro hac vice*)
200 Park Avenue
New York, New York 10166
Telephone: (212) 801-9200
Facsimile: (212) 801-6400

Proposed Counsel for the Debtors
and Debtors in Possession

Exhibit A

Hickman Declaration

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
Fayetteville Division

In re: ALLENS, INC. and ALL VEG, LLC,[1] Debtors.	Chapter 11 Case Nos. 5:13-bk-73597 (BTB) and 5:13-bk-73598 (BTB) Jointly Administered Under Case No. 5:13-bk-73597 (BTB)

DECLARATION OF JONATHAN HICKMAN IN SUPPORT OF APPLICATION OF THE DEBTORS PURSUANT TO 11 U.S.C. §§ 105(a) AND 363(b) TO (I) RETAIN ALVAREZ & MARSAL NORTH AMERICA, LLC TO PROVIDE THE DEBTORS A CHIEF RESTRUCTURING OFFICER, CERTAIN ASSISTANT CHIEF RESTRUCTURING OFFICERS, AND CERTAIN ADDITIONAL PERSONNEL AND (II) DESIGNATE JONATHAN HICKMAN ASCHIEF RESTRUCTURING OFFICER FOR THE DEBTORS *NUNC PRO TUNC* TO THE PETITION DATE

Jonathan Hickman, being duly sworn, hereby states as follows:

1. I am a Managing Director with Alvarez & Marsal North America, LLC (together with employees of its professional service provider affiliates (all of which are wholly-owned by its parent company and employees), its wholly-owned subsidiaries and independent contractors, "**A&M**"), a restructuring advisory services firm with numerous offices throughout the country. I submit this declaration on behalf of A&M (the "**Declaration**") in support of the Application of the Debtors Pursuant to 11 U.S.C. §§ 105(a) and 363(b) to (I) Retain Alvarez & Marsal North America, LLC to Provide the Debtors a Chief Restructuring Officer, certain Assistant Chief Restructuring Officers and Certain Additional Personnel and (II) Designate Jonathan Hickman as Chief Restructuring Officer for the Debtors *Nunc Pro Tunc* to the Petition Date (the

[1] The Debtors, along with the last four digits of each Debtor's tax identification number, are: All Veg, LLC (9250) and Allens, Inc. (5020). The Debtors' business address is 305 E. Main Street, Siloam Springs, Arkansas 72761.

"**Application**")[2] on the terms and conditions set forth in the Application and the engagement letter, dated July 19, 2013, entered into between the Debtors and A&M and attached hereto as **Schedule 1** (the "**Engagement Letter**"), *nunc pro tunc* to the Petition Date. Except as otherwise noted, I have personal knowledge of the matters set forth herein.[3]

I.

DISINTERESTEDNESS AND ELIGIBILITY

2. A&M together with its affiliates (the "**Firm**") utilizes certain procedures (the "**Firm Procedures**") to determine its relationships, if any, to parties that may have a connection to any of the Debtors in the Chapter 11 Cases. In implementing the Firm Procedures, the following actions were taken to identify parties that may have connections to the Debtors and to determine the Firm's relationship with such parties:

(a) A&M requested and obtained from the Debtors extensive lists of interested parties and significant creditors (the "**Potential Parties in Interest**").[4] The list of Potential Parties in Interest which A&M reviewed is annexed hereto as **Schedule 2**. The Potential Parties in Interest reviewed include, among others, the Debtors, prepetition and proposed post-petition lenders, officers and directors, contract parties, suppliers, litigation claimants, and various professionals related to the Engagement.

(b) A&M then compared the names of each of the Potential Parties in Interest to the names in the master electronic database of the Firm's current and former clients (the "**Client Database**"). The Client Database generally includes the name of each client of A&M, the name of each party who is or was known to be adverse to such client of the Firm in connection with the matter in which the Firm is representing such client, the name of each party that has, or has had, a substantial role with regard to the subject matter

[2] Capitalized terms used but not otherwise defined herein shall have the meaning ascribed to such terms in the Application.

[3] Certain of the disclosures herein relate to matters within the personal knowledge of other professionals at A&M and are based on information provided by such professionals.

[4] As may be necessary, A&M will supplement this Declaration if it becomes aware of a relationship that may adversely affect A&M's retention in these cases or would otherwise require disclosure.

of the Firm's retention, and the names of Engagement Personnel who are or were primarily responsible for matters for such clients.

(c) An email was issued to all Firm professionals requesting disclosure of information regarding: (i) any known personal connections between the respondent and/or the Firm on the one hand, and either the Potential Parties in Interest or the Debtors, on the other hand;[5] (ii) any known connection or representation by the respondent and/or the Firm of any of the Potential Parties in Interest in matters relating to the Debtors; and (iii) any other conflict or reason why the Firm may be unable to represent the Debtors.

(d) Known connections between former or recent clients of the Firm and the Potential Parties in Interest were compiled for purposes of preparing this Declaration. These connections are listed in **Schedule 3** annexed hereto.

3. As a result of the Firm Procedures, I have thus far ascertained that, except as may be set forth herein, upon information and belief, if retained, A&M:

(a) is not a creditor of the Debtors (including by reason of unpaid fees for prepetition services)[6] or an equity security holder of the Debtors **(**except certain Firm employees may own de minimis amounts representing not more than 0.01% of the equity interests in the related entity);

(b) is not and has not been, within 2 years before the date of the filing of the petition, a director, officer (other than by virtue of A&M employees serving in the roles as Engagement Personnel (pre and post petition) as described in the Application), or an employee of the Debtors; and

---

[5] In reviewing its records and the relationships of its professionals, A&M did not seek information as to whether any Firm personnel or member of his/her immediate family: (a) indirectly owns, through a public mutual fund or through partnerships in which certain A&M personnel have invested but as to which such professionals have no control over or knowledge of investment decisions, securities of the Debtors or any other party in interest, or (b) has engaged in any ordinary course consumer transaction with any party in interest. If any such relationship does exist, I do not believe it would impact A&M's disinterestedness or otherwise give rise to a finding that A&M holds or represents an interest adverse to the Debtors' estates. It is also noted that in the course of our review it came to A&M's attention that A&M personnel hold de minimis investments, representing not more than 0.01% of the equity interests in the related entity, in various parties in interest, including but not limited to AT&T, Bank of America, BMC, BP Energy, General Electric Capital Corp., IBM, JPMorgan, Siemens Water Technologies, Southwestern Energy, Symantec System, Sysco Corporate, Travelers, Wal-Mart Stores, Inc., Waste Management, Wells Fargo.

[6] *See* paragraph 11 below.

(c) does not have any interest materially adverse to the interests of the Debtors' estates, or of any class of creditors or equity security holders, by reason of any direct or indirect relationship to, connection with, or interest in, the Debtors, or for any other reason.

4. As can be expected with respect to any international professional services firm such as the Firm, the Firm provides services to many clients with interests in the Debtors' Chapter 11 Cases. To the best of my knowledge, except as indicated below, the Firm's services for such clients do not relate to the Debtors' Chapter 11 Cases.

5. In addition to the relationships disclosed on **Schedule 3**, we note that JPMorgan Chase Bank, N.A. ("**JPMC**") together with certain of its affiliates (collectively, "**JPM**") and Wells Fargo Bank, National Association ("**WFBNA**") together with certain of its affiliates (collectively, "**Wells Fargo**") are Potential Interested Parties in the Debtors' chapter 11 cases. Under certain credit facilities (the "**Credit Facilities**") to A&M's parent company Alvarez & Marsal Holdings, LLC ("**A&M Holdings**"): WFBNA is the administrative agent, swingline lender and issuing lender, JPMC is the syndication agent and participating lender, and Wells Fargo Securities, LLC and J.P. Morgan Securities LLC are the joint lead arrangers and joint book runners. In addition to WFBNA's and JPMC's receipt of interest in their capacity as lenders under the Credit Facilities, Wells Fargo and JPM have received certain customary and negotiated fees and reimbursement of expenses in connection with their roles under the Credit Facilities**.**

6. Further, as part of its diverse practice, the Firm appears in numerous cases and proceedings, and participates in transactions that involve many different professionals, including attorneys, accountants, and financial consultants, who represent claimants and parties-in-interest in the Debtors' Chapter 11 Cases. Further, A&M has performed in the past, and may perform in the future, advisory consulting services for various attorneys and law firms, and has been represented by several attorneys and law firms, some of which may be involved in these

proceedings. Based on our current knowledge of the professionals involved, and to the best of my knowledge, none of these relationships create interests materially adverse to the Debtors in matters upon which the Firm is to be employed, and none are in connection with these cases.

7. If any new material relevant facts or relationships are discovered or arise, A&M will promptly file a supplemental declaration.

II.

COMPENSATION

8. Subject to Court approval of the Application and in accordance with the applicable provisions of the Bankruptcy Code and the Bankruptcy Rules, A&M will seek from the Debtors payment for compensation on an hourly basis for all Engagement Personnel, and reimbursement of actual and necessary expenses incurred by A&M. A&M's customary hourly rates as charged in bankruptcy and non-bankruptcy matters of this type by the professionals assigned to this engagement are outlined in the Application. These hourly rates are adjusted annually.

9. To the best of my knowledge, (i) no commitments have been made or received by A&M with respect to compensation or payment in connection with these cases other than in accordance with applicable provisions of the Bankruptcy Code and the Bankruptcy Rules, and (ii) A&M has no agreement with any other entity to share with such entity any compensation received by A&M in connection with these chapter 11 cases.

10. By reason of the foregoing, I believe A&M is eligible for retention by the Debtors pursuant to sections 105(a) and 363(b) of the Bankruptcy Code and the applicable Bankruptcy Rules and Local Rules.

Dated this 4th day of November 2013

By: */s/ Jonathan Hickman*
Jonathan Hickman
Managing Director

Schedule 1

Engagement Letter

Alvarez & Marsal North America, LLC
112 South Tryon Street, Suite 1200
Charlotte, NC 28284
Phone: +1 704 778 4700
Fax: +1 704 778 4699

July 19, 2013

Mr. Josh Allen
Chief Executive Officer
Allens, Inc.
305 East Main Street
Siloam Springs, AR 72761

Dear Mr. Allen:

This letter confirms and sets forth the terms and conditions of the engagement between Alvarez & Marsal North America, LLC ("A&M") and Allens, Inc., and its assigns and successors (the "Company"), including the scope of the services to be performed and the basis of compensation for those services. Upon execution of this letter by each of the parties below and receipt of the retainer described below, (a) this letter will constitute an agreement between the Company and A&M (the "Agreement") and (b) all prior engagement agreements between A&M and/or its affiliates and the Company, including (i) that certain engagement letter agreement, dated January 10, 2013, by and between Alvarez & Marsal Private Equity Performance Improvement, LLC ("A&M-PEPI") and the Company, as amended as of January 24, 2013 (as amended, the "Initial Letter"), (ii) that certain engagement letter agreement, dated February 11, 2013 (the "Prior Letter"), between A&M and the Company, and (iii) Addendum No. 1 to the Prior letter, dated February 15, 2013 between the Company and A&M-PEPI (the "Prior Letter Addendum" and together with the Prior Letter and the Initial Letter, the "Prior Agreements"), will be terminated; provided that such termination shall not affect the terms of the Prior Agreements which give the parties rights beyond termination, including but not limited to indemnification, limitations on liability, confidentiality and non-solicitation obligations.

1. Description of Services

(a) Officers. In connection with this engagement, A&M shall make available to the Company:

(i) Jonathan Hickman to serve as Chief Restructuring Officer (the "CRO"); and

(ii) Carey Daniel, Nick Campbell and Markus Lahrkamp to serve as Assistant Chief Restructuring Officers (each an "Assistant CRO")

(iii) Upon the mutual agreement of A&M and the Company, A&M will provide additional employees of A&M and/or its affiliates and wholly-owned subsidiaries ("Additional Personnel") as required (collectively, with the CRO and Assistant CROs, the "Engagement Personnel"), to assist the CRO in the execution of the duties set forth more fully herein.

Such Additional Personnel may be designated by the Company as executive officers.

(b) Duties. The CRO will provide the services listed below to the Company. The CRO shall initially report to the Company's Board of Directors (the "Board") and subsequently to the Special Committee (as defined below) once appointed. This Agreement assumes that the Board will add two independent directors who will comprise a special committee of the Board (the "Special Committee"), with an agreed delegation of authority that will include authority over the restructuring process and Rapid Results implementation and the authority to modify the scope of the CRO engagement (which cannot be modified without consent of the Special Committee.

(i) Identify and implement both short-term and long-term process improvement and control initiatives within the organization including the existing Rapid Results recommendations previously identified under the Prior Letter Addendum. The engagement personnel responsible for this implementation will report to certain Assistant CRO's and the CRO.

(ii) Identify and execute upon additional cost reduction actions including but not limited to labor cost control initiatives, SG&A reductions, etc.

(iii) Develop, implement and oversee cash management strategies, tactics and processes;

(iv) Manage the communication and/or negotiation with outside constituents including lenders, customers and suppliers;

(v) Manage the commencement of the sale of fixed assets including vehicles, trailers, real estate, etc.

(vi) Make recommendations regarding and implement the sale or purchase of significant assets or business segments;

(vii) Prepare and analyze operating and financial budgets;

(viii) Oversee, manage and control cash disbursements;

(ix) Assist management with the development of updated business plans ("Latest Thinking Forecasts"), and such other related forecasts to be utilized during negotiations with outside constituencies or by the Company for other corporate purposes;

(x) Manage the Company's restructuring process including, without limitation, assisting in (a) developing possible restructuring plans or strategic alternatives for maximizing enterprise value and (b) negotiating with lenders, vendors, suppliers (including Ball Corporation), and other stakeholders in connection with any restructuring, including with respect to interim, permanent, bridge or other refinancing, and any restructuring or reorganization;

(xi) Manage the implementation of any strategic alternative including, without limitation, preparation of budgets or projections, preparations of schedules and statements and preparation of other information necessary or appropriate in connection with any such alternative;

(xii) Supervise the Company's other restructuring professionals including counsel; and

(xiii) Provide such other similar services as may be requested by the Special Committee.

The CRO shall report to the Special Committee and, at the request of the Special Committee, make recommendations to and consult with the Special Committee. All other Engagement Personnel shall report to the CRO.

(c) The Engagement Personnel will continue to be employed, by A&M and, while rendering services to the Company, will continue to work with other personnel at A&M in connection with unrelated matters that will not unduly interfere with the services rendered by the Engagement Personnel pursuant to this Agreement. With respect to the Company, however, the Engagement Personnel shall operate under the direction of the Special Committee and A&M shall have no liability to the Company for any acts or omissions of the Engagement Personnel related to the performance or non-performance of services at the direction of the Special Committee and consistent with the requirements of the Engagement and this Agreement.

(d) In connection with the services to be provided hereunder, from time to time A&M may utilize the services of employees of its affiliates and subsidiaries as Engagement Personnel. Such affiliates and subsidiaries are controlled by A&M's parent company and wholly owned by A&M's parent company and certain of such affiliates' employees.

2. Information Provided by Company and Forward Looking Statements. The Company shall use all reasonable efforts to: (i) provide the Engagement Personnel with access to management and other representatives of the Company; and (ii) to furnish all data, material, and other information concerning the business, assets, liabilities, operations, cash flows, properties, financial condition and prospects of the Company that Engagement Personnel reasonably request in connection with the services to be provided to the Company. The Engagement Personnel shall rely, without further independent verification, on the accuracy and completeness of all publicly available information and information that is furnished by or on behalf of the Company and otherwise reviewed by Engagement Personnel in connection with the services performed for the Company. The Company acknowledges and agrees that the Engagement Personnel are not responsible for the accuracy or completeness of such information and shall not be responsible for any inaccuracies or omissions therein. A&M and Engagement Personnel are under no obligation to update data submitted to

them or to review any other areas unless specifically requested by the Special Committee to do so.

You understand that the services to be rendered by the Engagement Personnel may include the preparation of projections and other forward-looking statements, and numerous factors can affect the actual results of the Company's operations, which may materially and adversely differ from those projections. In addition, Engagement Personnel will be relying on information provided by the Company in the preparation of those projections and other forward-looking statements.

3. Limitation of Duties. Neither A&M, nor the Engagement Personnel make any representations or guarantees that, inter alia, (i) an appropriate restructuring proposal or strategic alternative can be formulated for the Company, (ii) any restructuring proposal or strategic alternative presented to the Company's management, the Special Committee or the Board will be more successful than all other possible restructuring proposals or strategic alternatives, (iii) restructuring is the best course of action for the Company, or (iv) if formulated, that any proposed restructuring plan or strategic alternative will be accepted by any of the Company's creditors, shareholders and other constituents. Further, neither A&M, nor the Engagement Personnel, assume any responsibility for the Company's decision to pursue, or not pursue any business strategy, or to effect, or not to effect any transaction. The Engagement Personnel shall be responsible for implementation only of the restructuring proposal or alternative approved by the Special Committee and only to the extent and in the manner authorized and directed by the Special Committee.

4. Compensation.

(a) A&M will receive fees for the services of the Engagement Personnel based on the following hourly rates:

Managing Directors	$675-875
Directors	$475-675
Analysts/Associates	$275-475

Such rates shall be subject to adjustment annually at such time as A&M adjusts its rates generally.

(b) In addition, A&M will be reimbursed for its reasonable out-of-pocket expenses incurred in connection with this assignment, such as travel, lodging, duplicating, messenger and telephone charges. All fees and expenses will be billed and payable on a monthly basis or, at A&M's discretion, more frequently.

(c) Pursuant to the Prior Agreement, A&M holds a retainer of $75,000. The Company agrees that A&M may continue to hold such prior retainer under this

Agreement and the Company shall promptly remit to A&M an additional retainer in the amount of $175,000, such that A&M will have a retainer at all times under this Agreement of $250,000, which retainer shall be credited against any amounts due at the termination of this engagement and returned upon the satisfaction of all obligations hereunder.

(d) The Company and A&M recognize that it is appropriate that A&M receive incentive compensation for its services hereunder, in addition to the compensation set forth above. To establish such incentive compensation, A&M and the Company will seek to reach agreement within 30 days from the date hereof on the amount of such incentive compensation and the terms on which it shall be payable (the "Incentive Fee").

5. Termination.

(a) This Agreement will apply from the commencement of the services referred to in Section 1 and may be terminated with immediate effect by either party without cause by written notice to the other party.

(b) A&M normally does not withdraw from an engagement unless the Company misrepresents or fails to disclose material facts, fails to pay fees or expenses, or makes it unethical or unreasonably difficult for A&M to continue performance of the engagement, or other just cause exists; provided however, A&M may terminate this Agreement in the event that the Special Committee is not appointed by July 26, 2013, or such later date as determined by A&M in its sole discretion.

(c) On termination of the Agreement, any fees and expenses due to A&M shall be remitted promptly (including fees and expenses that accrued prior to but are invoiced subsequent to such termination).

(d) If the Company terminates this Agreement without "Cause" or if A&M terminates this Agreement for "Good Reason", A&M shall also be entitled to receive any Incentive Fee upon the occurrence of the event specified in Section 4(d) if such event occurs within 12 months of the termination. "Cause" shall mean gross negligence, willful default or fraud by A&M; "Good Reason" shall mean the Company's misrepresentation of or failure to disclose material facts, failure to pay fees or expenses when due (or circumstances indicating to A&M that fees or expenses will not be paid when due), circumstances such that it is unethical or unreasonably difficult for A&M to continue performance of the engagement, or other just cause.

(e) The provisions of this Agreement that give the parties rights or obligations beyond its termination shall survive and continue to bind the parties.

6. No Audit. Company acknowledges and agrees that A&M and Engagement Personnel are not being requested to perform an audit, review or compilation, or any other type of financial statement reporting engagement that is subject to the rules of the AICPA, SEC or other state or national professional or regulatory body.

7. No Third Party Beneficiary. The Company acknowledges that all advice (written or oral) provided by A&M and the Engagement Personnel to the Company in connection with this engagement is intended solely for the benefit and use of the Company (limited to its Board , the Special Committee and management) in considering the matters to which this engagement relates. The Company agrees that no such advice shall be used for any other purpose or reproduced, disseminated, quoted or referred to at any time in any manner or for any purpose other than accomplishing the tasks referred to herein without A&M's prior approval (which shall not be unreasonably withheld), except as required by law.

8. Conflicts. A&M is not currently aware of any relationship that would create a conflict of interest with the Company or those parties-in-interest of which you have made us aware. Because A&M and its affiliates and subsidiaries comprise a consulting firm (the "Firm") that serves clients on an international basis in numerous cases, both in and out of court, it is possible that the Firm may have rendered or will render services to, or have business associations with, other entities or people which had or have or may have relationships with the Company, including creditors of the Company. The Firm will not be prevented or restricted by virtue of providing the services under this Agreement from providing services to other entities or individuals, including entities or individuals whose interests may be in competition or conflict with the Company's, provided the Firm makes appropriate arrangements to ensure that the confidentiality of information is maintained.

9 Confidentiality/Non-Solicitation.

A&M and Engagement Personnel shall keep as confidential all non-public information received from the Company in conjunction with this engagement, except: (i) as requested by the Company or its legal counsel; (ii) as required by legal proceedings; or (iii) as reasonably required in the performance of this engagement. All obligations as to non-disclosure shall cease as to any part of such information to the extent that such information is, or becomes, public other than as a result of a breach of this provision. The Company, on behalf of itself and its subsidiaries and affiliates and any person which may acquire all or substantially all of its assets agrees that, until two (2) years subsequent to the termination of this engagement, it will not solicit, recruit, hire or otherwise engage any employee of A&M or any of its affiliates who worked on this engagement while employed by A&M or its affiliates ("Solicited Person"). Should the Company or any of its subsidiaries or affiliates or any person who acquires all or substantially all of its assets extend an offer of employment to or otherwise engage any Solicited Person and should such offer be accepted, A&M shall be entitled to a fee from the party extending such offer equal to the Solicited Person's hourly client billing rate at the time of the offer multiplied by 4,000 hours for a Managing Director, 3,000

hours for a Senior Director and 2,000 hours for any other A&M employee. The Company acknowledges and agrees that this fee fairly represents the loss that A&M will suffer if the Company breaches this provision. The fee shall be payable at the time of the Solicited Person's acceptance of employment or engagement.

10. Indemnification/Limitations on Liability. The Company shall indemnify the Engagement Personnel acting as officers (the "Indemnified Professionals") to the same extent as the most favorable indemnification it extends to its officers or directors, whether under the Company's bylaws, its certificate of incorporation, by contract or otherwise, and no reduction or termination in any of the benefits provided under any such indemnities shall affect the benefits provided to the Indemnified Professionals. The Indemnified Professionals shall be covered as officers under the Company's existing director and officer liability insurance policy. As a condition of A&M accepting this engagement, a Certificate of Insurance evidencing such coverage shall be furnished to A&M prior to the effective date of this Agreement. The Company shall give thirty (30) days' prior written notice to A&M of cancellation, non-renewal, or material change in coverage, scope, or amount of such director and officer liability policy. The Company shall also maintain such insurance coverage for the Indemnified Professionals for a period of not less than six years following the date of the termination of the Indemnified Professionals' services hereunder. The provisions of this section are in the nature of contractual obligations and no change in applicable law or the Company's charter, bylaws or other organizational documents or policies shall affect the Indemnified Professionals' rights hereunder. The attached indemnity and limitation on liability provisions are incorporated herein and the termination of this agreement or the engagement shall not affect those provisions, which shall remain in full force and effect.

11. Miscellaneous. This Agreement (together with the attached indemnity provisions), including, without limitation, the construction and interpretation of thereof and all claims, controversies and disputes arising under or relating thereto, shall be governed and construed in accordance with the laws of the State of New York, without regard to principles of conflict of law that would defer to the laws of another jurisdiction. The Company and A&M agree to waive trial by jury in any action, proceeding or counterclaim brought by or on behalf of the parties hereto with respect to any matter relating to or arising out of the engagement or the performance or non-performance of A&M hereunder. The Company and A&M agree, to the extent permitted by applicable law, that any Federal Court sitting within the Southern District of New York shall have exclusive jurisdiction over any litigation arising out of this Agreement; to submit to the personal jurisdiction of the Courts of the United States District Court for the Southern District of New York; and to waive any and all personal rights under the law of any jurisdiction to object on any basis (including, without limitation, inconvenience of forum) to jurisdiction or venue within the State of New York for any litigation arising in connection with this Agreement.

This Agreement shall be binding upon A&M and the Company, their respective heirs, successors, and assignees, and any heir, successor, or assignee of a substantial portion of A&M's or the Company's respective businesses and/or assets, including any Chapter 11 Trustee. This Agreement incorporates the entire understanding of the parties with respect to the subject matter hereof and may not be amended or modified except in writing executed by the Company and A&M. Notwithstanding anything herein to the contrary, A&M may reference or list the Company's name and/or logo and/or a general description of the services in A&M's marketing materials, including, without limitation, on A&M's website.

If the foregoing is acceptable to you, kindly sign the enclosed copy to acknowledge your agreement with its terms.

Very truly yours,

Alvarez & Marsal North America, LLC

By: _____
Jonathan C. Hickman
Managing Director

Accepted and agreed:

Allens, Inc.

By: _____
Josh Allen, CEO

INDEMNIFICATION AND LIMITATION ON LIABILITY AGREEMENT

This indemnification and limitation on liability agreement is made part of an agreement, dated July 16, 2013 (which together with any renewals, modifications or extensions thereof, is herein referred to as the "Agreement") by and between Alvarez & Marsal North America, LLC ("A&M") and Allens, Inc. (the "Company"), for services to be rendered to the Company by A&M.

A. The Company agrees to indemnify and hold harmless each of A&M, its affiliates and their respective shareholders, members, managers, employees, agents, representatives and subcontractors (each, an "Indemnified Party" and collectively, the "Indemnified Parties") against any and all losses, claims, damages, liabilities, penalties, obligations and expenses, including the costs for counsel or others (including employees of A&M, based on their then current hourly billing rates) in investigating, preparing or defending any action or claim, whether or not in connection with litigation in which any Indemnified Party is a party, or enforcing the Agreement (including these indemnity provisions), as and when incurred, caused by, relating to, based upon or arising out of (directly or indirectly) the Indemnified Parties' acceptance of or the performance or nonperformance of their obligations under the Agreement; provided, however, such indemnity shall not apply to any such loss, claim, damage, liability or expense to the extent it is found in a final judgment by a court of competent jurisdiction (not subject to further appeal) to have resulted primarily and directly from such Indemnified Party's gross negligence or willful misconduct. The Company also agrees that (a) no Indemnified Party shall have any liability (whether direct or indirect, in contract or tort or otherwise) to the Company for or in connection with the engagement of A&M, except to the extent that any such liability for losses, claims, damages, liabilities or expenses are found in a final judgment by a court of competent jurisdiction (not subject to further appeal) to have resulted primarily and directly from such Indemnified Party's gross negligence or willful misconduct and (b) in no event will any Indemnified Party have any liability to the Company for special, consequential, incidental or exemplary damages or loss (nor any lost profits, savings or business opportunity). The Company further agrees that it will not, without the prior consent of an Indemnified Party, settle or compromise or consent to the entry of any judgment in any pending or threatened claim, action, suit or proceeding in respect of which such Indemnified Party seeks indemnification hereunder (whether or not such Indemnified Party is an actual party to such claim, action, suit or proceedings) unless such settlement, compromise or consent includes an unconditional release of such Indemnified Party from all liabilities arising out of such claim, action, suit or proceeding.

B. These indemnification provisions shall be in addition to any liability which the Company may otherwise have to the Indemnified Parties. In the event that, at any time whether before or

after termination of the engagement or the Agreement, as a result of or in connection with the Agreement or A&M's and its personnel's role under the Agreement, A&M or any Indemnified Party is required to produce any of its personnel (including former employees) for examination, deposition or other written, recorded or oral presentation, or A&M or any of its personnel (including former employees) or any other Indemnified Party is required to produce or otherwise review, compile, submit, duplicate, search for, organize or report on any material within such Indemnified Party's possession or control pursuant to a subpoena or other legal (including administrative) process, the Company will reimburse the Indemnified Party for its out of pocket expenses, including the reasonable fees and expenses of its counsel, and will compensate the Indemnified Party for the time expended by its personnel based on such personnel's then current hourly rate.

C. If any action, proceeding or investigation is commenced to which any Indemnified Party proposes to demand indemnification hereunder, such Indemnified Party will notify the Company with reasonable promptness; provided, however, that any failure by such Indemnified Party to notify the Company will not relieve the Company from its obligations hereunder, except to the extent that such failure shall have actually prejudiced the defense of such action. The Company shall promptly pay expenses reasonably incurred by any Indemnified Party in defending, participating in, or settling any action, proceeding or investigation in which such Indemnified Party is a party or is threatened to be made a party or otherwise is participating in by reason of the engagement under the Agreement, upon submission of invoices therefor, whether in advance of the final disposition of such action, proceeding, or investigation or otherwise. Each Indemnified Party hereby undertakes, and the Company hereby accepts its undertaking, to repay any and all such amounts so advanced if it shall ultimately be determined that such Indemnified Party is not entitled to be indemnified therefor. If any such action, proceeding or investigation in which an Indemnified Party is a party is also against the Company, the Company may, in lieu of advancing the expenses of separate counsel for such Indemnified Party, provide such Indemnified Party with legal representation by the same counsel who represents the Company, provided such counsel is reasonably satisfactory to such Indemnified Party, at no cost to such Indemnified Party; provided, however, that if such counsel or counsel to the Indemnified Party shall determine that due to the existence of actual or potential conflicts of interest between such Indemnified Party and the Company such counsel is unable to represent both the Indemnified Party and the Company, then the Indemnified Party shall be entitled to use separate counsel of its own choice, and the Company shall promptly advance its reasonable expenses of such separate counsel upon submission of invoices therefor. Nothing herein shall prevent an Indemnified Party from using separate counsel of its own choice at its own expense. The Company will be liable for any settlement of any claim against an Indemnified Party made with the Company's written consent, which consent shall not be unreasonably withheld.

D. In order to provide for just and equitable contribution if a claim for indemnification pursuant to these indemnification provisions is made but it is found in a final judgment by a court of competent jurisdiction (not subject to further appeal) that such indemnification may not be enforced in such case, even though the express provisions hereof provide for indemnification, then the relative fault of the Company, on the one hand, and the Indemnified Parties, on the other hand, in connection with the statements, acts or omissions which resulted in the losses, claims, damages, liabilities and costs giving rise to the indemnification claim and other relevant equitable considerations shall be considered; and further provided that in no event will the Indemnified Parties' aggregate contribution for all losses, claims, damages, liabilities and expenses with respect to which contribution is available hereunder exceed the amount of fees actually received by the Indemnified Parties pursuant to the Agreement. No person found liable for a fraudulent misrepresentation shall be entitled to contribution hereunder from any person who is not also found liable for such fraudulent misrepresentation.

E. In the event the Company and A&M seek judicial approval for the assumption of the Agreement or authorization to enter into a new engagement agreement pursuant to either of which A&M would continue to be engaged by the Company, the Company shall promptly pay expenses reasonably incurred by the Indemnified Parties, including attorneys' fees and expenses, in connection with any motion, action or claim made either in support of or in opposition to any such retention or authorization, whether in advance of or following any judicial disposition of such motion, action or claim, promptly upon submission of invoices therefor and regardless of whether such retention or authorization is approved by any court. The Company will also promptly pay the Indemnified Parties for any expenses reasonably incurred by them, including attorneys' fees and expenses, in seeking payment of all amounts owed it under the Agreement (or any new engagement agreement) whether through submission of a fee application or in any other manner, without offset, recoupment or counterclaim, whether as a secured claim, an administrative expense claim, an unsecured claim, a prepetition claim or a postpetition claim.

F. Neither termination of the Agreement nor termination of A&M's engagement nor the filing of a petition under Chapter 7 or 11 of the United States Bankruptcy Code (nor the conversion of an existing case to one under a different chapter) shall affect these indemnification provisions, which shall hereafter remain operative and in full force and effect.

G. The rights provided herein shall not be deemed exclusive of any other rights to which the Indemnified Parties may be entitled under the certificate of incorporation or bylaws of the Company, any other agreements, any vote of stockholders or disinterested directors of the Company, any applicable law or otherwise.

ALLENS, INC.

By: _____
Josh Allen
Chief Executive Officer

ALVAREZ & MARSAL NORTH AMERICA, LLC

By: _____
Jonathan Hickman
Managing Director

Schedule 2

Potential Parties in Interest

LIST OF POTENTIAL PARTIES IN INTEREST

DEBTORS
Allens, Inc.
All Veg LLC

DIRECTORS
Allen, Joshua C
Allen, Nicholas
Allen, Roderick L
Newsted, Richard
Boates, Timothy

OFFICERS
Allen, Joshua C
Allen, Nicholas
Allen, Roderick L
Phillips, James W
Sherrell, Lori L
Towery, Mark
Hickman, Jonathan
Fields, Mark S
Queen, Dwayne A

LEASES
Allen Leasing LLC
Americold Logistics LLC
Anchor Distributing Inc.
Atlapac Warehouse
AT&T Mobility National Accounts LLC
Burris Ranches, Inc.
CA Overstreet
Cecil Smith Field
Cisco Systems Capital Corp.
Cryo-Trans, Inc.
Danny Bolstad
Dan Galkiewicz
Eloise Gamble
Fifth Third Leasing Company
Foster S. Johnson Jr.
Four County Peanut Services, Inc.
General Electric Capital Corporation
Hewlett Parkard Financial Services Company
IBM Credit LLC
Konica Minolta
M & W Distribution Serv, Inc.
Mcdermid Warehousing Inc.
Microsoft Licensing, GP
Millard Refrigerated Services
Mitel Leasing, Inc.
Nitron
Northwest Arkansas Naturals
Penske Truck Leasing Co. LP
Peter Gunn
Pitney Bowes
Port Jersey Logistics
Professional Business Systems (PBS)
Rose Real Estate
Smith Communications LLc
Steve Gatlin
Tony Brown
Tyler Distribution Centers Inc.
United Companies, LLC
United Companies, LLC
US Bancorp.
W T Young Storage Company
Zero Mountain Inc.

PARTIES TO CONTRACT
5 Star Life Insurance Company
AC Taylor Farms
AHOLD U.S.A., Inc. c/o The Stop & shop Supermarket Company LLC
AJG Risk Management Services
ALDI Inc.
Allen Leasing LLC
Alvarez & Marsal
American Fidelity Assurance Company
American Heritage Life Insurance Company
Americold Logistics LLC
Amphire Solutions, Inc.
Anchor Distributing Inc.
Aramark
Archer Daniels Midland Co.
Arkansas Western Gas
Arthur Henderson
Associated Food Stores

Associated Wholesale Grocers
AT&T Mobility National Accounts LLC
Ball Metal Food Container
Balton Winningham
Bank Direct
Bank of America Merrill Lynch
Ben E Keith Company
Ben Fish & Son
Bes Bean Company, Inc.
BKD, LLC
Blackhive Corp., Inc.
BlueAdvantage Administrators of Arkansas
BMC
Boardman Foods, Inc.
Bonanza Bean LLC
Bonduelle, Inc.
Brian Badtke
Burris Ranches, Inc.
Bushman Associates Inc
Bushman Riverside Ranch Inc
C&S Wholesale Grocers, Inc.
CA Overstreet
Cajun Operating Company, d/b/a Church's Chicken
Captain D's
Cary Taylor Farms
CBOCS Distributions, Inc.
Cecil Smith Field
Central Produce Sales, Inc.
Ceridian COBRA Services
Chep USA
Chris Pollack
Cisco Systems Capital Corp.
Coach Limited
Cody Hays
Comdata
Computer Sciences Corporation / Risk Master
Conrad Valley Farms, LLC
Cox Com, LLC
Crown Cork & Seal USA, Inc.
Cryo-Trans, Inc.
CVS Pharmacy, Inc.
D & E Farms Inc.
Dan Galkiewicz
Dandy Veal, LLC
Danny Bolstad
Dave Chamberlain
David Eyster
David Hielke
Del Tropic Foods, SA DE CV
Delhize America
Delta Dental of Arkansas
Dennis Hielke
Denny's
Dewey Produce, Inc.
DineEquity, Inc.
Docagent / Formserver
Dollar General
Domino Foods, Inc.
DPI Specialty Foods, Inc.
Dudzingki Farms LLC
EasyLink Services
Eckroat Seed
EDI Global Solutions
Eloise Gamble
Enterprise Marketing
EntryPoint Communications LLC
Eric and Kristi Eyster Farms, Inc.
Explorer Enterprise Corp
F.A.B., Inc. dba Frosty Acres
FEU Pro - Applied Logic
Fifth Third Leasing Company
Fletcher Farms Inc.
Food Lion
Foodbuy
Forest River Bean
Fort Dearborn Company
Foster S. Johnson Jr.
Four County Peanut Services, Inc.
Fredrick Marohn
Fresh Frozen Foods
FSE Data Synchronization Network
Garden Fresh Restaurant Corp. (dba Souplantation/Sweet Tomatoes)
Gary Page
General Electric Capital Corporation
Genesis, Esha Research Inc.
GEORGIA POWER
Giant Eagle
Glory Foods, Inc.
Gordon Food Service, Inc.

Goya Foods, Inc.
Gracious Gifts
Green Bay Packaging
Green Valley Bean Company LLC
Guth Farm Inc.
H & W Farms
Hanover Foods, Corp
Harp Farms, Inc.
Hartung Brothers Inc.
Hawkeye
HC Schmieding Produce
Hearst Holdings, Inc. - King Features
HEB
Help / Systems (Sequel)
Hereford Grain Corp
Hewlett Parkard Financial Services Company
HireRight Solutions, Inc.
HiT Software
Honeywell Engines & Systems
HSA Bank
Iberia Foods Corporation
IBM Credit LLC
Ignite Solutions LL C
Imaginasium
Imperial Credit Corporation (IPFS)
Imperial Distributing, Inc.
Imperial Sugar
Infor Global Solutions
Ingomar Packing Company LLC
Ingredion
Inn Foods, Inc. (Valley Packing Services)
International Paper
Intralink Exchanges
iTera
iTrade Network, Inc., EFS Network Inc.
J & J Potatoes
J D Carmichael Farms
Jamestown Container
Jay Page
Jeff Hickson
Jesse D Synder
Jetro Cash & Carry / Restaurant Depot
Jettco - Ricky Jett
Jim Schultz
Joe Sanky Farms LLC
Jones-Neitzel Company
Just Quality International, Inc.
Kapstone Container Corp
Kelley Bean Co.
Kenneth J Rivers
Kerry Dean Farms
Kody Collins
Konica Minolta
Kronos, Inc.
Lazard Middle Market
Leach Farms, Inc.
LearnSmart
Legacy Foodservice Alliance, LLC
Liberty Food Marketers Company
LIMS, Northwest Analytics
Lincoln National Corporation
Los Gatos Tomato Productions
M & W Distribution Serv, Inc.
Marketing Management Inc.
MBM Corp
McDermid Warehousing Inc.
MedCareOne
Microsoft Licensing, GP
Milksource LLC
Missouri Sugars
Mitel Leasing, Inc.
MVI Technology, Inc. / CDC Software
NCH Marketing Services
Newly Weds Foods
Nielsen Company
Nitron
Northwest Arkansas Naturals
NSF
Nsight Domain Services
Ocean Direct and/or American Bounty Foods
Okray Family Farms Inc
P W Montgomery LLC
Paramount Farms Inc
Park 100
Penske Truck Leasing Co. LP
Peter Gunn
Piggly Wiggly Corp
Pinnacle Foods Group LLC
Pizzazzy Foods, Inc.
Pomp's Services, Inc.

Port Jersey Logistics
Powers Mechanical Inc.
PricewaterhouseCoopers
Professional Business Systems (PBS)
Publix Supermarkets, Inc.
Quality Seed
Quality Seed
Ram International 1, LLC
Razorback Farms Inc.
Razorjack Consulting
Reb'l Acres
Reese Brokerage Company
Regions Insurance
Reinhart Foodservice, LLC
Rib City Grill
Rick Hargrave
Rite Aid
Robin Roof
Rose Real Estate
RVI
Ryders Logistics
Safeway, Inc.
Save-A-Lot
Scan Texas
Schwan's Global Supply Chain, Inc.
Schwan's Global Supply Chain, Inc.
Schwind Trucking LLC
Script Care, LTD
Seafax Inc.
Sears Brands Management Corporation
Securitas
Select Foods Services LLC
Select Marketing, Inc.
Shamrock Foods
Shaver Foods LLC
Siloam Springs School District
Sisson Seed - Dan Sisson
Smith Communications LLc
SouthStar Energy Services
Southwestern Energy
Steve Gatlin
Steve Meyer
Stockade Companies
Supervalu Inc.
Symantec System Endpoint Protection
Sysco Corporate
Sysco Merchandising and Supply Chain Services, Inc.
Taatools
Tarke Bean, LLC
Texas Life
The Kroger Co.
The Western Sugar Cooperative
Thompsons, Ltd
Tidy View Dairy
TL Ashford
TMW Systems, Inc.
Tom Badtke
Tom Sina
Tomatek, Inc.
Tony Brown
Topco Associates, Inc.
Total Training Network
Triangle K
Triple Nickel
Triple S Farms
Tri-Point DR Monitoring
Tyler Distribution Centers Inc.
Unified Foodservice Purchasing Co-op, LLC
UniPro Foodservice, Inc.
United Companies, LLC
United Companies, LLC
US Bancorp.
US Foods FKA US Foodservicem, Inc.
USDA
W Howard Brown Farms LLC
Wakefern Food Corp.
Walgreens Co.
Walhalla Bean
Wal-Mart Stores, Inc.
Weekly Farms Inc
Western Family Foods, Inc.
Western Sizzlin
Wildgoose Ranch
Windstream
Windstream Communications
Wingstop
Winn-Dixie Stores, Inc.
Winn-Dixie Stores, Inc.
Wisconsin Gas LLC
Wood Fruitticher Grocer Co

Workwell Industrial Medicine
Worzella & Sons Inc.
Yum Restaurant Services Group, Inc.
Mike & Debra Beauchamp
Tony & Traci Beauchamp
Devin Vaughan
Luke Steelman
Deider Isaacson
Raider Farms, Inc.
Ben Osborn
Woo Partners
Lance McClaran
Clay Grant
Steven Foster
VS Farms, Inc.
K-M Farms
Jordan Pool
Marshall Pool
Pool Farms, Inc.
F & S Pool Farms, Inc.
The Pumpkin Patch LLC
Greg McClaran
Fujitsu Computer Products of America, Inc.
Brian Kerry Dean
Jason Murray
Missouri Sugars
Hugh Bert Quackenbush
Carlos Garcia
Ernest Bippert Jr.
Hamilton Farms
Miles Cumberland
Prukop Farms
Quackenbush Farms
Schneider Brothers
R & D Unterbrink Farms
Steven Unterbrink
Tate & Lyle
TGI Friday's Inc.
Murray Farms
Jeff Hickson
Joele Frank Wilkinson Brimmer Katcher
Power Mechanical Inc.
NWA Sales & Marketing Group
Potter & Sons LLC

UTILITIES

Alma Water
Arkansas Oklahoma Gas Corp
AT&T
AT&T
AT&T Long Distance
Bayland Telephone
BP Energy Company
Carroll Electric Co-Op Corp.
Centerpoint Energy
City of Fort Smith
City Of Montezuma
City of Siloam Springs
Cox Communications
Fifth Ward Water Systems Inc.
Four County Electric Corp.
Georgia Power
Kiamichi Electric Cooperative
Oklahoma Gas & Electric Co.
Piedmont Natural Gas
Progress Energy Carolinas Inc.
Sampson County Public Works
Scana Energy
Sourcegas Arkansas Inc.
Southstar Energy Services
Southwestern Electric Power Co
Southwestern Energy
Springdale Water Utilities
Van Buren Municipal Utilities
Village of Pulaski
WE Energy
Windstream
Winfield Solutions LLC
Wisconsin Gas LLC
Arkansas Western Gas
Windstream

BANKS

Wells Fargo
Bank of America
BMO
SunTrust
JP Morgan
Liberty Bank
Citizens Bank
RBC Centura Bank
Sankaty Advisors, LLC *

1903 Onshore Funding, LLC

SUPPLIERS

1sync
206 Holdings LLC
3m
4b Transportation
62 Auto Salvage
A & B Operating, LLC
A & D Foundry Group Inc.
A & K Development Co
A And C Taylor Farms LLC
A Touch Above The Rest
A-1 Fire Suppression Srvs Inc.
AAA Cooper Transportation
AAA Fire Safety
Abbott Company Inc.
ABC Research
ABSCO Metal Fabricators
Ac Controls Company Inc.
Ac Nielsen
ACCUTECH Films Inc.
Ace Fence Company
Ace Net Consulting
Ace Tool Inc.
Ackerman Marketing Inc.
Adan Lopez Jr
Adm Edible Bean Specialties, Inc.
Advantage Clinton
Advantage Waypoint LLC
Aep Industries Inc.
Aeroimage
Ag Aviation Inc.
Agratech
AIB International
Air Compressor Equipment Co
Aircraft Performance Group Inc.
Airgas Chicago
Airgas Dallas
Airgas National Welders
Airgas Specialty Products, Inc.
Airgas USA LLC
Airresource Group
Aj Seibert Company
Albany Communications Inc.
Alexander Farms
Alf Christianson Seed Co
Allegiant Staffing Inc.
Allen Leasing LLC
Allens Inc. Health Trust
Alliance Identification And Security Systems Inc.
Alliance Valley Bean
Allied Electronics, Inc.
Allied Frozen Storage Inc.
Allied Plumbing & Drain
Alma Tractor & Equipment
Alma Water
Alpha Chem Of Georgia Inc.
Alta Refrigeration Inc.
Alteca Ltd
Alternative Tradeshow Services
Alternator-Starter Exchange
Alvarez & Marsal Prvt Equity
Am Bickley Chemicals
Ameri Green Environ Recycling
America Belt And Hose LLC
American Express
American Holt Corp
American Internat'l Chemical
American Materials Company LLC
American Patriot Sales Inc.
American Piping & Boiler Works
American Piping Supply Inc.
American Proficiency Institute
Americas Best Vaule Inn & Suit
Americold
Ampac Flexibles
Amphire Solutions Inc.
Ana-Lab Corp
Analytical Food Laboratories
Analytical Services, Inc.
Anchor Distributing Inc.
Anderson Lumber
Anderson Produce Logistics LLC
Anderson's Gas And Propane
Andre's Banquet Center
Anglen Crane Inc.
Antech Sales Inc.
Aos LLC
Apl Logistics
Applied Ind Tech

Applied Logic Corp
Applied Mss
AR Society Of Certified Public
Aramark Uniform & Career Apparel, LLC
Archer Daniels Midland Co.
Arison Inc.
Arkansas & Missouri Railroad
Arkansas Automatic Sprinklers
Arkansas Chemical Specialties
Arkansas College Of Electricity
Arkansas Industrial Machinery
Arkansas Occupational Health
Arkansas Oklahoma Gas Corp
Arkansas Travelers Baseball
Arkansas Truck Center
Arlans Markets Inc.
Armellini Express Lines, Inc.
Arpac LLC
Arrow Bolt & Screw, Inc.
Arthur Henderson
Arthur J Gallagher Risk Manage
Aspen Transportation LLC
Associated Dental Consultants
Astro Hydraulics Inc.
AT&T
AT&T Long Distance
AT&T Mobility
Atlanta Belting Company
Atlantic Tape Co
Atlapac Warehouse
Atw Detailed Solutions Inc.
Automationdirect.Com Inc.
B & M Cleaners
B & M Oil Company Inc.
B And B Produce LLC
B C Ames Inc.
B Johnson Trucking LLC
B&D Industrial Inc.
B. J. Williamson, Inc.
Badger Plastic And Supply Inc.
Bailey & Company
Ball & Prier Tire Inc.
Ball Metal Food Container
Balton Winningham
Banc Of America Leasing
Bank Direct Capital Finance
Bank Of America
Banks Boiler Service
Barfield Industrial Service In
Baril Engine Rebuilding Inc.
Barnes Distribution
Barry Brown
Batson & Associates LLC
Battery Outfitters
Baycom
Bayland Industrial Supply Co
Bayland Telephone
Bear Label Machine Company
Bear Transportation Services
Bearing Headquarters, Inc.
Becker Boiler Co Inc.
Bell Office Supply
Belson Co
Belt Power Corporation
Bemis Performance Packaging
Ben Fish & Son
Benger Aero Spraying Inc.
Benton County Stone Co Inc.
Berkovitz Mechanical LLC
Berry Plastics Corporation
Bes Bean Company, Inc.
Betsy's Flower Shop
Bexar County Markets
Big Blue Store Of Clinton
Big Water Ventures
Birite
Bissell Partners 109 LLC
Blackhawk Industrial
Blackhive Corp., Inc.
Blue View Inc.
Blueprint Automation Inc.
Boardman Foods Inc.
Bobs Super Saver
Bolt & Screw Supply Inc.
Bonanza Bean LLC
Bonduelle Inc.
Bowman Hollis Manufacturing
Boyd Metals
Boyle Services Inc.
Bozzutos Inc.
Bp Energy Company
Brainerd Chemical Company Inc.

Brand Aromatics Inc.
Brenntag Southeast Inc.
Brenntag Southwest Inc.
Brent L Pollet
Brewer Company True Value
Briggs Equipment
Bright Harvest
Brookhaven IRS Center Coic
Bruske Products
Bryant Preserving Co
Buehler's
Buley-Patterson Sales
Burch Equip LLC
Burger's Ozark Cch Inc.
Burkett Welding Services Inc.
Burris Ranches Inc.
Bushman Associates
Bw Tire Repair Inc.
C & C Services LLC
C A Overstreet, Jr
C A Perry & Son Inc.
C&F Parts West
C. Marshall Ground Services
C. Mayo, Inc.
C.R. England Inc.
Cable Conveyor Systems Inc.
Cadence Technologies
Cambridge Engineered Solutions
Capitol Atlantic Transit Inc.
Carlton-Bates Company
Carroll Electric Co-Op Corp.
Carters General Maintenance
Cb Richard Ellis Inc.
Cc Dickson Co
Cdw Direct LLC
Cellcom Green Bay Msa
Centerpoint Energy
Central Hydraulics Inc.
Central Produce Sales Inc.
Centricity Technologies
Centro, Inc.
Centurytel
Cert Id LC
Ch Robinson Worldwide, Inc.
Chamber Of Commerce
Charles Aris Inc.
Charles F Lewis Jr
Charlotte Scale Co Inc.
Chart Pool Usa Inc.
Chemaqua
Chemical Systems Inc.
Chemproof Polymers Inc.
Chemsouth Southeast LLC
Chemstation International
Chemtreat Inc.
Chep USA
Chesapeake Spice Company
Chill It Ice Company
Chubb Group Of Insurance Co
Cintas Corporation
Cisco Systems Capital Corp
City Of Sallisaw Solid Waste
City Of Siloam Springs Light & Water
Cleco Power LLC
Clinton Schilling
Clinton Urgent Care
Clovis Inn
Cm Jackson Associates Inc.
Coastal Agrobusiness Inc.
Coastal Security Systems
Cody Dale Hays
Coenco Inc.
Cole-Parmer Instrument Company
Columbus Fire & Safety Eqpmt
Comdata Network Inc.
Comdata Transportation Services
Comfort Inn Of Clinton
Commercial Manufacture &Supply
Commercial Power Solutions LLC
Competitive Sewer & Water Inc.
Complete Distribution Services
Computer Sciences Corporation
Com-Scapes Inc.
Concentric Sourcing
Conger Industries Inc.
Conney Safety Products
Connie Acosta
Conrad Valley Farms LLC
Consolidated Electrical Dist.
Constitution State Service LLC
Construction Rentals &
Continental Distributing

Continental Logistics Inc.
Con-Way Freight Inc.
Con-Way Multimodal
Cooper Clinic Pa
Copesan Services
Corn Service Co Inc.
Corvel Corporation - Tx
Cosentino's Foods Stores
Cox Com, LLC
Cox Communications
Coyote Logistics Systems LLC
Crane Engineering Sales Inc.
Crop Production Services
Crow-Burlingame Co.
Crowley Liner Services
Crown Cork & Seal USA, Inc.
Crs Onesource
Cryo-Trans Inc.
Csp Business Media LLC
Csx Transportation Inc.
Ct A Wolters Kluwer Business
Ctl Scientific Supply Corp
Ctw Corporation
Culligan Water Conditioning
Cummins Mid-South Inc.
Cunningham Grain Inc.
Custom Equipment Co
Custom Equipment Installation
Cw Brabender
D & B
D & E Farms Inc.
D & T Farms Inc.
D E Shipp Belting Co
D Hintz Trucking LLC
D O C Transportation
Dalen K Newhart
Damage Recovery Systems Inc.
Damar Mfg
Dandy Veal, LLC
Darragh Company
Darrell Hoffman
Dassault Falcon Jet Corp
Data Forms Inc.
Data Testing
Dave Chamberlain
David Edwards
David Jones - J & B Farms
David R Barnett
David R Eyster
Davis Oil Company
Daymon Design
Daymon Worldwide
D-Best Computer Center
Dcs Radio Communication Inc.
Ddm Logistics Services Inc.
Deb Tone Inc.
Deboer Transportation Inc.
Decatur Salvage Inc.
Deffenbaugh Of Arkansas LLC
Del Monte Foods
Del Tropic Foods,Sa De Cv
Delcambre's Lawn & Tree Serv
Delta Electric Motors
Dennis Keigley
Dep Corporation
Dept Of Finance And Admin
Dewey Produce Inc.
Dewitt Farms
Diamond International Trucks
Digital Color Inc.
Direct Sales Co
DirecTV
Dival Safety Equipment Inc.
Diversey Inc.
Dmt Services Inc.
Domino Foods, Inc.
Dompe Warehouse Co
Don Peters Construction Inc.
Doug Miller Trucking Inc.
Douglas Lee
Drain Masters
Drivers Select Inc.
Drv Technologies Inc.
Duke Energy Progress
Dunn Rite Millwright Services
Dunnhumby
E-470 Public Highway Authority
Eagle Body Inc.
Earls Awning Inc.
Easylink Services Int. Corp
Ecklund-Harrison Technologies
Eckroat Seed

Ecolab Inc.
Edi Global Commerce Inc.
Edmondson Farms Packing Inc.
Edward Dale Bohne
Edwards Pest Control Inc.
Edwards/Wilmington Inc.
Efs Networks Inc.
Eftps - Electronic Federal Tax
Egi Mechanical Inc.
Electric Motor Ctr-Springdale
Electrotek, Inc.
Elevator Safety Inspection
Eloise P Gamble Trust
Emed Company Inc.
Ems Inc.
Enable Midstream Partners LP
Engineering Sales Association
Enshriners
Ent Head & Neck Surgery Clinic
Entech Systems Corporation
Entergy
Environmental Services Co Inc.
Eric And Kristi Eyster Farms
Erickson's Industrial Sweepers
Ernest & Glenda Bippert
Ersa Court Reporters
Esm Upstate
Eugene Alexander
Eureka Pizza
Evans Body Shop
Evergreen Sweeteners Inc.
Examinetics Inc.
Excel Distribution LLC
Excelsior Packaging Group
Express Test Corporation
E-Zpass
F&H Food Equipment Co.
Fabrex Unlimited Inc
Fabrication Specialties Of AR
Fabri-Form Company
Fagan/Crossroads True Value
Fanuc Robotics America Inc.
Farm Fresh First LLC
Farmers Coop - Van Buren
Fastenal Company
Fastenersplus Supply Co
Fastway Terminals Inc.
Fedex Freight
Fedex Freight East
Fedex Trade Network
Ferguson Enterprise Inc.-Dallas
Ferguson Enterprises #448
Ferrellgas - Green Bay
Ffe Transportation Services
Fifth Third Equipment Finance
Fifth Ward Water Systems Inc.
Filtration & Fluid Solutions
Finance System Of Green Bay
First Film Extruding
Firstfleet Inc.
Fisher Scientific
Fitzhugh Communications, Inc.
Fitzmark Inc.
Five Star
Flavor Unlimited
Fleck Bearing Company
Fleetpride
Fleming Electric Inc. NW
Fletcher Farms, Inc.
Flexsol Packaging Corporation
Florida Food Products
Flowers Baking Co
Food Consulting Group Inc.
Food Instrument Corporation
Food Marketing Services Inc.
Food Marketing Services LLC
Foodline Piping Products
Foodservice Specialists Inc.
Forest River Bean
Formers By Ernie, Inc.
Forseasons Sales Group Inc.
Fort Dearborn Company
Fortune Rope & Metal Co Inc.
Foster S Johnson Jr
Foth Infrastructure & Envirome
Four B Corporation
Four County Electric Corp.
Four County Peanut Services, Inc.
Fox Specialty Co LLC
Frank Dougherty
Franklin Electrofluid Co Inc.
Freedom Packaging

Fresh Choice
Fresh Encounters
Frost Oil Company
Frozen Food Development Inc.
Fse, Inc.
Fti Consulting Inc.
Full Moon Bbq
G & S Refuse Inc.
G & S Wholesale Shoe Company
G & W Transportation Inc.
G And C Foods
G And G Peppers LLC
G.J. Olney, Inc.
Galileo Global Branding Group
Gallagher Sales Corp
Gammage Print Shop
Garrett Tire Centers
Gartner Refrigeration And MFG
Gb Merchant Partners LLC
Gdh Consulting, Inc.
GE Capital
GE Fleet Services
Gehrke Co Inc.
Gemini Brokerage
General Steel
General Transportation Inc.
George Hay Company
George Taylor
Georgia Automation Inc.
Georgia Power
Gerland Corporation
Gipson Crane Service Inc.
Global Equipment Company
Globenatural Agro Co. S.A.C.
Golper Supply Co Inc.
Good Measure LLC
Goodchild Trading LLC
Graffiti Inc.
Grainger
Graphic Controls LLC
Graphic Excursions
Graybar Electric Company Inc.
Great Dane Trailers Inc.
Green Bay Packaging
Green Valley Bean Company LLC
Griffith Laboratories USA Inc.
Grimes Warehousing Services
Group 360 Worldwide
Group Purchasing Alliance LLC
Group Service Underwriters
Grower Invoicing
Gs1 Us
Gst Corporation
Gulf Coast Coop
Gw Palmer Logistics LLC
Gws Supply Inc.
H & W Farms LLC
H C Schmieding Produce Co Inc.
H E Engineered Equipment Inc.
H&S Forest Products Inc.
Ha Logistics Inc.
Haccp Consulting Group LLC
Hach Company
Hamilton Farms
Hampton Inn Siloam Springs
Hanover Foods, Corp.
Hantover Inc.
Harbor Freight Tools
Harcros Chemical
Hardin Jesson And Terry PLC
Harness Roofing SD
Harolds Construction
Harp Farms Inc.
Harris And Harris Pressure
Harris Moran Seed Co
Harris Silver MD
Hartness International Inc.
Hartt Transportation Systems
Hartung Brothers Inc.
Harvest Insurance Program
Hava Sign
Hayssen Sandiacre
Hb Fuller Company
H-C Ingredient Distributors
Hc Schmieding Produce Co. Inc.
Hd Supply Waterworks Ltd
Hearst Holdings, Inc./King Features Syndicate Division
Heartland Supply Co, Inc.
Heartland Voluntary Ad Group
Heat And Control, Inc.
Helmar Inc

Henderson & Associates Inc.
Henley Meat Co
Hereford Grain Corp.
Heritage Crystal Clean LLC
Heritage Food Service Equip
Herrons Soil Interpretations
Herspring-Gibbs LLC
Hertz Equipment Rental
Hewlett Packard Financial Serv
Heyl Logistics
Highland Containers Inc.
High-Mark Systems LLC
Hillside Plastics Corp
Hireright Solutions, Inc.
Hit Software Inc.
Hi-Tech Truck Refrigeration
Hogan Lovells Us LLP
Holman Dist Ctr Of Washington
Honeywell Engines & Systems
House Autry Mills Inc.
Hugg & Hall Equipment
Hugh Bert Quackenbush
Hutcherson Plumbing & Air Inc.
Hydrite Chemical Co
Hydroblend Inc.
Hydroclean Equipment Inc.
Hydro-Spec Inc.
Hydrotex
Icix North America LLC
Iconotech
Ideal Chemical & Supply
Ignite Solutions LLC
Imperial Credit Corporation
Imperial Distributing Inc.
Imperial Inc.
Imperial Sugar
Industrial Chemicals Inc.
Industrial Manufacturing
Industrial Oils Unlimited AR
Industrial Pipe & Supply Co
Industrial Power & Components
Industrial Power Inc.
Industrial Resource Solutions
Industrial Splicing & Sling
Info
Infor Global Solutions
Information Network Of AR
Infrared Research Inc.
Ingomar Packing Company LLC
Ingredion
Inland Label & Mktg Services
Inn Foods, Inc. - Valley Packing Services
Integrated Trans Group Inc.
Integrys Energy Services Inc.
Intermountain Food Brokerage
International Business Machine
International Dunnage LLC
International Fire Protctn Inc.
International Marketing De
International Paper
Interstate Electrical Supply
Interstate Food Processing Com
Interstate Transportation
Intralinks Inc.
Iserv Company
Iso Services Inc.
Itrade Network
Itw Angleboard
Itw Muller
Itw Shippers Products
J & A Body Service
J & J Trucking Brandon LLC
J & R Schugel Trucking Inc.
J & W Railroad Construction Co
J B Hunt Transport Inc.
J D Carmichael Farms
J Frank Associates LLC
J J Keller & Associates, Inc.
J Lee Co LLC
J Roland Wood Farms Inc.
J W Gist
J.V. Manufacturing Inc.
Jab Inc.
Jack Sanders
Jacob Todd Pennington
James D Anthony
James K Richard
James Michael Hope
Jamestown Container
Jamison Door Company
Jatasco, Inc.
Jd Carmichael Farms

Jeff C Hickson
Jeff Pope
Jerry Brothers South
Jerry Simmons
Jg Neil & Company Inc.
Jim Neeleys Interstate BBQ
Jim Sloan, Inc.
Jm Swank
Joe Caputo & Sons
Joe Sankey Farms LLC
John Bean Technologies Corp
John Boys Electrical Supply
John Brown University, WLHC
John Christner Trucking
John Hudson Farms Inc.
Johnny Painter
Johnson Equipment Company
Johnson Machine Works Inc.
Johnson O'hare Inc.
Johnson Truck & Trailer
Johnson&Jonet Mech Contractors
Jones Motor Logistics Inc.
Jordan Piping & Mechanical Inc.
Julie Yagalla
Just Quality International Inc.
Jw Allen & Company Inc.
Jwc Trucking
K & K Material Handling Inc.
Kalsec
Kaman Industrial Technologies
Kansas City Southern Railway
Karcher North America Inc.
Kc Trading Company LLC
Keils
Keith Brown Express Inc.
Kelley Bean Co.
Kelly Green Seeds Inc.
Ken Overbey
Kenansville Equipment Co Inc.
Kenneth Gerald Mayo
Kent Swinney
Kepware Inc.
Kerry Ingredients And Flavours
Key Technology Inc.
Keyence Corp. Of America
Keystone
Keystone Automation Inc.
Keystone Industries Inc.
Keystone Us Management Inc.
Khs Kisters Inc.
Kiamichi Electric Cooperative
Kimberly Seeds International
King Kullen Grocery Co Inc.
King's Fire & Safety
Kmf Inc.
Kmt Brrr Inc.
Kody Collins
Kollker Consulting LLC
Konica Minolta Premier Finance
Koss Industrial Inc.
Kronos Inc.
Kundinger Fluid Power Inc.
Lab Instrument Specialists Inc.
Lafayette Utilities System
Lakeview Farm
Lambs Progressive Food Service
Lanny's Brite-Way Window Serv.
Lantech Inc.
Larkin Mechanical Co
Larson Grain Company
Lazard Middle Market LLC
Leach Farms, Inc.
Lee Bean & Seed, Inc.
Lee Process Systems & Equip
Legacy Incorporated
Legumex Walker Canada, Inc.
Lehigh Safety Shoes
Leon C. Osborn Co, Inc.
Leonards Express Inc.
Levenhagen Oil Corporation
Liberty Mutual
Liebovich Brothers Inc.
Lift Truck Service Center, Inc.
Lightning Bolt Advertising
Lincoln Life & Annuity Of NY
Linda Murphy
Littlefield Oil Co
LJ Merck Trucking LLC
Lmg Radio LLC
Lodi Canning Co Inc.
Loma Systems
Lone Star Safety & Supply

Los Gatos Tomato Products
Louis Blanda Jr MD
Loveless Mfg.
Lowe's Companies Inc.
Lp Sales & Marketing LLC
Lumsden Flex Flow Inc.
Lyco Manufacturing, Inc.
M & M Fork Lift Motors
M & M Tooling & Engineering
M & W Distribution Serv, Inc.
M. G. Newell Company
Macon County Tire & Service
Magna Manufacturing Inc.
Mailco USA
Mainor Tile & Irrigation Co
Mar-Cel Co Inc.
Marchant Schmidt Inc.
Markem-Imaje Corporation
Market Basket Consolidated
Marten Transportation Ltd
Mary Davis Trucking LLC
Master Sales Inc.
Mastercraft Boiler & Mech Inc.
Matt Marshall & Co.
Matthew K & Richard D Yoder
Matthews International
Matthews Ridgeview Farms
May Trucking Company
Mccall Farms Inc.
Mcclancy Seasoning Company
Mccrometer Inc
Mcdermid Warehousing Inc.
Mckeefry & Sons Inc.
Mckeever's Enterprises
Mcmaster-Carr Supply
Mcmor LLC
Mcnaughton Mckay Electric Co
Meadors Lumber Co., Inc.
Mechanical Service Company Inc.
Medcor, Inc.
Melvin Mccoy Trucking
Menco-Royal Inc.
Mennekes
Merco Packaging
Mettler-Toledo Safeline Inc.
Meyer Machine Company
Mgm Sales & Service
Mhc Kenworth/Volvo - Sprindale
Mick Ross
Microbac Laboratories Inc.
Microsoft Licensing, GP
Mid Georgia Industrial Sales
Mid South Extrusion
Mid State Pallet Inc.
Mid-Continent Concrete
Middle Flint Behavioral Health
Midland Plastics Inc.
Mid-States Supply Company Inc.
Midwest Food Processing
Midwest Food Processors Assoc.
Midwestern Industries Inc.
Mikeal Alexander
Mike's Replacement
Miles Cumberland And
Milksource LLC.
Millard Refrigerated Services
Miller Auto Parts
Mir Inc.
Missouri Sugars LLC
Mitel Leasing
Mizkan Americas Inc.
Modern Control Access
Modern Medical Inc.
Momar
Monett Metals Inc.
Monica Fields
Montezuma Welding & Radiator
Monzor H Yazji MD
Moore Bros Septic Systems Inc.
Moore Medical LLC
Motion Industries
Mro Marketing
Msc Industrial Supply Co Inc.
Msg Waste & Salvage LLC
Mueller Yurgae
Multi-Craft Contractors Inc.
Mvi Technology, Inc. / CDC Software
Myers-Aubrey Company
Mymatrixx
Nalco Company
Nance Machine Inc.
Napa Auto Parts

National Barbeque News
National Comp Care Inc.
National Pump Company LLC
National Testing Laboratories
National Transit Staffing Inc.
National Union Fire Insurance
Nationjob Inc.
NC Spuds Inc.
Nch Marketing Services, Inc.
Ncl Graphic Specialties
Ncs Group
Neogen Corporation
New Concept Total Sales Inc.
Newark Inone
Newly Weds Foods
Nielsen Company
Nipper Trucking LLC
Noah W Yoder
Norflex
North American Salt Company
North Central Irrigation Inc.
Northwest Analytical Inc.
Northwest Arkansas Naturals
Northwest Tire Service
Norwood/Kingsley
Nsf International
Nsight Telservices
Numara Software Inc.
Numero Uno
Nwa Orthopedic Consulting
Nys Assessment Receivables
Oak Palm Enterprise Inc.
Oconto County Treasurer
Odenberg Engineering Inc.
Oglethorpe Hardware
Ok Transportation Inc.
Oklahoma Gas & Electric Co.
Okray Family Farms, Inc.
Olson Oil Co
Omega Engineering Inc.
One Network Enterprises
Onevision Corporation
Orange Commercial Credit
O'reilly Automotive Inc.
Orthodox Union
Osbourn's Automotive Store LLC
Ota Pikepass Center
Overhead Door Co.
Overhead Door Company Of Macon
Overhead Doors Unlimited Inc.
Oxbo International Corp
Ozark Fluid Power, Inc.
Ozark Food Processors Assoc.
Ozark Laser & Shoring
Ozarko Tire Centers Inc.
P & C Tire Co.
P L Marketing Inc.
P W Montgomery LLC
Pace Inc.
Pacific Atlantic Brokerage Inc.
Package Machinery
Pak-Master
Pak-Tec Inc.
Palisades International
Pallet Express Inc.
Pallet One
Palmetto Adhesives Company
Paltech Enterprises Of AR Inc.
Pam Transport
Paragon Films Inc.
Paramount Farms Inc.
Parks Lumber Co., Inc.
Parmer Cad
Parmer Water Co
Parts Associates, Inc.
Patricia Ann Foods LLC
Patton's Inc.
Paypal Inc.
Pc Connection
Penick Produce Co Inc.
Penske Truck Leasing Co LP
Penton Media Inc.
Perry Brothers Oil Company
Perry's Jewelry Inc.
Petersen Auto Electric
Philadelphia Indemnity Ins.
Philip Owens Trucking Inc.
Phoenix Life Insurance Co
Piedmont Natural Gas
Pinnacle Logistics LLC
Pinnacle Motor Club
Plastic Enterprises Co Inc.

PMS Tax Consultants
Pneumatic & Hydraulic Co Inc.
Pneumaticscaleangelus
Pneusource Inc
Pollesch Llc
Polly's Country Market
Pomp's Services Inc.
Potter Bulk Transport LLC
Powell Farm And Home
Powell Aircraft Title Service
Power Mechanical Inc.
Power Tool Service Company
Power/Mation Division
Power-Flo Technologies Inc.
Powerhouse Industrial Supply
Powers Mechanical Services Company
Pratt LLC
Premier
Prepass
Press Argus-Courier
Presstek Inc.
Prevea Health
Pricewaterhousecoopers LLP
Prime Automotive Warehouse Inc.
Prince Oil Company
Private Client Group
Private Label Mfrs Association
Process & Power Incorporated
Process Management Consulting
Process Systems & Equipment
Prochemicals LLC
Production Service Co Inc.
Professional Business Systems
Progressive Car Finance Co
Promopoint Marketing
Przybylski Custom Metal Fab
Psi/Carolinas Inc.
Pulaski Food & Gas
Purcro Fleet Services Inc.
Purdee's Diesel Service
Pure Line Seeds Inc.
Purvis Industries Ltd
Push Button Food Services LLC
Pw La Ad South
Pye-Barker Supply Co Inc.
Pyles Plumbing & Utility
Pyramid Trucking USA
Quaker Transportation Inc.
Quality Equipment & Parts Inc.
Quality Equipment LLC
Quality Inn Warsaw
Quanxi Technologies LLC
Quasar Marketing LLC
Quick Care Medical Clinic
R & R Creative Marketing
R A S Trucking Inc.
R Keys Locksmith & Safe
Radwell International Inc.
Ralph D Robinson
Ram Inc.
Ranchito Supermarket
Randall Ford
Rasmussen Dairy Transit Inc.
Rayburn Cooper & Durham Pa
Razorback Farms Inc.
Reabe Spraying Service Inc.
Real Vision Software Inc.
Red Line Distributors
Reddy Ice
Reeder Pallet Co Inc.
Refrigiwear
Reliable Fire Protection LLC
Renner Spray Service
Rentco Inc.
Rga
Ric Alvarez
Riceland Foods Inc. (Oil)
Richard E Newsted
Richard's Tire & Service
Riesbeck
Riesterer & Schnell Inc.
River Valley Plumbing
Rmd Advertising
Robert James Sales Inc.
Roberts Communication & Elec.
Robinson & Son Machine Inc.
Rocktenn CP LLC
Rockwell Collins
Rogers Garage, Radiator, Muffler
Rol-Tec Inc.
Rose Real Estate
Ross Farms

Ross Systems Inc.
Russell Spraying
Ryder Integrated Logistics Inc.
Ryder Transportation Services
S & D Electric Motors Inc.
S & J Farms
S & W Ready Mix Concrete
Safari Books Online LLC
Safelite Fulfillment Inc.
Safety Council Of The Ozarks
Safety Kleen Corp
Saia Motor Freight Lines, Inc.
Sales Concepts Inc.
Sampson Community College
Sampson County Public Works
Sampson Farmers Hardware
Sampson-Bladen Oil Co Inc.
Samuel Son & Co Inc.
Sanders Farms
Sandys Hauling & Backhoe Serv.
Sankaty Advisors LLC
Sartorius Corporation
Sc State Transport Police
Scana Energy
Schaeffer Mfg Co
Schneider Bros
Schraad & Associates LLC
Schuh Construction Inc.
Schwind Trucking LLC
Scott Equipment Company LLC
Scott James
Scott Larson
Sd Transportation
Seaboard Tampa Terminals
Seaboard Warehouse Terminals
Seafax, Inc.
Seatruck Inc.
Securitas Security Serv. USA
Seed Grow LLC
Selective Seasonings
Sell Ethics
Sencon Inc.
Seneca Foods
Shaw Engineering/Cmi
Sherwin-Williams Clinton
Sherwin-Williams Springdale
Shipley Motor Equipment Co
Shoes For Crews LLC
Shores Ag-Air, Inc.
Shoup Manufacturing Co
Shred-It Arkansas
Shutdown Solutions Inc.
Siemens Industry Inc.
Siemens Water Technologies LLC
Silliker Inc
Siloam Flowers & Gifts
Siloam Glass & Mirror
Siloam Springs Memorial Hosp.
Siloam Springs Metal Recycling
Siloam Springs Printing
Simmons Energy Solutions Inc.
Simplex Leasing Inc.
Sirmon Farms Inc.
Sisson Seed
Sl Motors
Smith Two-Way Radio
Smith-Gray Electric Company
Smyth Companies Inc.
Solarwinds Inc.
Solbern Inc.
Sonic Air Systems Inc.
Sonoco
Sonoco Products Company
Sound Check/Radio Shack Dealer
Sourcegas Arkansas Inc.
South States Metals Corp
Southeastern Freight Lines
Southern Auto Supply
Southern Graphic Systems Inc.
Southern Produce Dist Inc.
Southern Refrigerated Transpor
Southern Tire Mart LLC
Southstar Energy Services LLC
Southwest Food Service News
Southwestern Electric Power Co
Southwestern Energy Services
Southwestern Sales Co.
Sowega Chlorinator Co Inc.
Sparks Belting Company
Spider Webb Farm Implement Inc.
Spokane Seed Company
Spraying Systems Co

Springdale Auto Supply
Springdale Water Utilities
Sps Commerce
Spudnick Equipment Company LLC
Srs Commodities Ltd
Sshs Scholarship Committee
St Edward Mercy Medical Center
Staffmark
Star K Kosher Certification
Star Mechanical Supply Inc.
Steger Trucking Inc.
Stellar
Steven B Williams
Steven Unterbrink
Stewart Stainless Supply Inc.
Stone River Pharmacy Solutions
Stordeur Sanitation
Stricloc Co Inc.
Sullivan Farms
Super 8 Motel
Super Ron's
Superglass Windshield Repair
Superior Auto Mall LLC
Superior Court Of Macon County
Superior Foods International
Superior Packaging Company
Suzanne Y Meadows
Synergy Enterprises
Syngenta Seeds Inc.
System Scale Corporation
T And T Machine Co Inc.
T H Agri-Chemicals Inc.
Taff Pressure Washers
Target Sales Management Inc.
Tarke Bean LLC
Tarrant County Tax Assessor -
Tate & Lyle Ingredient America
Tcb Transportation Inc.
Tcsi Transland Inc.
Technology Consulting Inc.
Technology Recovery Group Ltd
Tektronix Inc.
Teleco Of Wilmington
Teledyne Isco Inc.
Temperature Indicators Limited
Tencarva Machinery Co
Terra Renewal
Terra Renewal Services Inc.
Texas Best Bean & Seed
The Buehrle Group
The Core Group - Saleswest Inc
The Core Group-Main Street Mkt
The Food Institute
The Pictsweet Company
The Sampson Independent
The Sell Group
The Short Stuff Company Inc.
The Steritech Group Inc.
The Western Sugar Cooperative
Thomas Eugene Kornegay Ii
Thompsons, Ltd.
Thurman L Blanton Jr
Thyssenkrupp Elevator Corp
Tidy View Dairy
Tmw Systems Inc.
Tnt Manufacturing LLC
T-N-T Radiator
Tomatek Inc.
Tommy Mccoy Trucking Inc.
Tonys Express Inc.
Tool Makers International
Top Onions USA Inc.
Topashaw Farms Partnership
Total Quality Logistics
Total Tool Supply Inc.
Total Training Network, Inc.
Toteco Packing Co.
Town & Country Soft Water
Trans Chemco Inc.
Transaction Tax Resources Inc.
Transport Refrigeration Of NWA
Travelers Indemnity
Tri Star Industrial Equipment
Triple C Express LLC
Triple J Inc.
Triple Nickel, Inc.
Triple S Farms
Triple T Parts & Equipment Co
Triple T Transport Inc.
Tri-Point Solutions Inc.
Tristar
Truck Equipment Inc.

Truckpro Inc.
Tsi Solutions
Tulco Oils Inc.
Turley & Associates Inc.
Twin Lakes Machine & Tool
Tydenbrooks
Tyler Distribution Centers Inc.
Tyrus Group LLC
Tyson Foods Inc.
Ul Vs Canton Inc.
Uline
Ultra Seating Co Inc.
Uni Temp Refrigeration Inc.
Unicoat Industrial Roofing
Unified Food Ingredients Inc.
Unified Foodservice Purchasing
Union Pacific Railroad Company
Unique Florist
United Cooperative
United Engines LLC
United Rentals North America
United States Cold Storage
United True Value Hardware
Univar Usa Inc
Universal Systems Se Inc.
University Of Arkansas
Upchurch Electrical Supply Co
Ups
Ups Freight
Urschel Laboratories Inc.
Us 1 Logistics LLC
Us Bank National Association
Us Cellular
Us National Inc.
Us Petrolon Ind Inc.
Us Transportation Services Inc.
Utc Overseas Inc.
Utilities Analyses, Inc.
Utility Tri-State Inc.
Vacuum Pump & Compressor Inc.
Valco Melton
Valley Scale Service Inc.
Van Buren Hma Inc.
Van Buren Municipal Utilities
Vcf Llc
Veolia Environmental Services
Verizon Wireless
Vern's Hardware Inc.
Viking Electric Supply Inc.
Visa Corporate Card Center
Vorpahl Fire And Safety
VWR International
W Howard Brown Farms LLC
W J Pence
W J Pence Company Inc.
W L S Sawmill Inc.
W T Young Storage Company
Walhalla Bean
Walker Seeds Ltd
Walthall Oil Company
Warren Meads & Sons Inc.
Waste Industries Inc.
Waste Management Acadiana
Waste Mgmt - Central Wisconsin
Waste Mgmt - Central Wisconsin
Watson & Associates
Wayne E Bailey Produce Company
We Energies
Weekly Farms Inc.
Weimer Bearing & Transmission
Wellman Oil Company
Welsco Inc.
Werner Electric Supply
Wesco CCA
Wexxar Packaging Inc.
Whallon Machinery, Inc.
Wholesale Electric Supply
Wiese Planning & Engineering
Wilco Transportation Service
Wilevco
Wiley Glen Quackenbush Etal Pt
Wilkens Anderson Company
William Bergmann
William Bobby Hathcock
William L Brown Farms LLC
Williams Tractor Inc.
Willie Griffin
Willie J Gartrell Jr
Willis Shaw Logistics LLC
Wilson Clearing And Mulching
Wilson Industrial Tire
Windstream

Winfield Solutions LLC
Winford D Overturf
Wintergarden Spinach
Winzer Corporation
Wisconsin Aerial Lift Service
Wisconsin Lift Truck - Gb
Wolfe Investments Inc.
Woodfield Inc.
Worksource Inc.
Workwell Industrial Medicine
Worzella & Sons Inc.
Xerox Corp
Xpedx
Yeagers True Value Hardware
Yes Equipment & Services Inc.
Yusen Logistics Americas Inc.
Zacmi Food & Beverage Plants
Zacmi Sales And Service
Zero Mountain Inc.
Zurich American Insurance

LITIGATION PLAINTIFFS

Billy Middleton
Calvin & Lisa Brown
Robert Woods
Demetra Barnes-Shaw, Horace Thurman & Savanah Shaw
Little Lady Foods
Little Lady Foods - Same Case 2nd set of attorneys
McCain Foods - Same Case as above
Jeffrey Ryne
Kyria Bennett
Judy Reid
Preston Martin
Ginger Jones

LAW FIRMS /ACCOUNTANTS/OTHER PROFESSIONALS

Quesada & Moore
Davis Wright Clark Butt Carithers
Hamberger & Weiss
Allen & Gooch
Brooks Stevens & Pope
Bennett Bricklin & Saltzburg LLP
Swanson Martin & Bell
Bass Berry & Sims
Liskow & Lewis
Godfrey Kahn SC
Nixon & Vanderhye PC
Pricewaterhouse Coopers LLP
Freeborn & Peters LLP
Robinson Bradshaw & Hinson
Kullman Law Firm
BKD
Professional Management Services
Lazard Middle Market LLC
Alverez & Marsal
Greenberg Traurig, LLP
Bobo Law Firm
Ashland Group LP
The Salt Group
Bonner Kiernan
AJG Risk Management Services
Regions Insurance
Mitchell Williams Selig Gates & Woodyard PLLC
Wright Lindsey and Jennings
Joele Frank Wilkinson Brimmer & Katcher
Corbitt Environmental
Qai Inc
Adduci, Mastriani & Schaumberg
Hood & Stacy, P.A.
Hosto & Buchan PLLC
Kazmier & Associates Inc.
Lucas Associates Inc.
Razorjack Consulting

INSURANCE/BANKING

Bank Direct
C.A. Shea
Chartis Specialty
Chubb
CNA
Crum & Forster
Great American
Harvest Insurance Company
IPFS Corporation
National Union Fire
Old Republic
Philadelphia Indemnity

Sankaty Advisors LLC
Travelers
USAIG
Westchester Fire Ins / ACE
Western Surety
Zurich American

ISSUERS OF LOCS
Bank of America

LOCAL STATE FED TAXING AUTHORITIES
Adair County Treasurer
Adeq Fiscal Division
Administrator, Unemploy Comp
Ar Dept. Of Finance And Admin
Ar Dept. Of Finance Fuel Tax
Arizona Department Of Revenue
Arkansas Corporation Inc. Tax
Arkansas Department Of Revenue
Arkansas Dept. Of Finance - Eft
Arkansas Dept. Of Workforce Eft
Arkansas State Highway And
Avoyelles Parish Sales Tax
Avoyelles Parish Tax Collector
Benton County Tax Collector
Bergen Town Clerks Office
Brown County Treasurer
Bureau Of Tax And Accounting
Byron-Bergen Central School
Cameron County Tax Office
City Of Birmingham
City Of Brundidge
City Of Drew
City Of Fort Worth
City Of Montezuma
City Of Philadelphia
City Of Portland
City Of Riverside
City Of Siloam Springs
City Of Springdale
City Of Van Buren
City Treasurer - Rochester
Commissioner Of Motor Vehicles
Commissioner Of Taxation & Fin
Comptroller Of Public Accounts
Connecticut Dept. Of Rev - Eft
Consolidated Electrical Dist
Corporation Rar Franchise Tax
Crawford County Tax Collector
Dekalb County Tax Commissioner
Delaware County Treasurer
Department Of Commerce
Department Of Revenue Service
Dept. Of Finance And Admin
Dept. Of Financial Institutions
Dept. Of License & Inspections
Dept. Of Workforce Development
Eftps - Electronic Federal Tax
Florida Dept. Of Revenue
Fond Du Lac County Treasurer
Fulton County Tax Commissioner
Georgia Department Of Revenue
Georgia Dept. Of Revenue - Eft
Harlingen Tax Office
Henry County Tax Commissioner
Illinois Dept. Of Revenue
Indiana Department Of Revenue
Indiana Dept. Of Revenue - Eft
Kentucky State Treasurer
La Dept. Of Revenue And Tax
Lafayette Consolidated Governm
Lafayette Parish Tax Collector
Louisiana Dept. Of Revenue
Louisiana Dept. Of Revenue-Eft
Louisiana State Treasurer
Macon County Tax Commissioner
Mississippi Dept. Of Rev - Eft
Mo. Dept. Of Revenue
Monroe Cnty Dept. Of Weights &
Monroe County Recv Of Taxes
MS Dept. Of Employment Secu-Eft
MS State Tax Commission
NC Dept. Of Revenue
NC Division Of Motor Vehicles
NC Employment Security Com-Eft
New Jersey Division - Taxation
New York Dept. Of Taxation
New York Dept. Of Taxation- Eft
North Carolina Dept. Of Revenue
North Carolina State Highway
NYS Department Of State

NYS Sales Tax Processing
NYS Unemployment Insurance
Oakfield Town Clerks Office
Oakfield/Alabama Central
Oconto County Treasurer
Ohio Business Gateway
Oklahoma Tax Commission
Oregon Dept. Of Revenue
PA Department Of Revenue
Registration Fee Trust
Sampson County Tax Collector
Sebastian County Tax Collector
Secretary Of State Of La.
Secretary Of State Of Missouri
Secretary Of State Of Ms.
Secretary Of The State
South Carolina Empl Security
State Of Arkansas Department
State Of Georgia
State Of Michigan
State Of South Carolina
State Of Tennessee
Sumter County Tax Commissioner
Sunflower County Tax Collector
Tarrant County Tax Assessor -
Tennessee Department Of Revenue
Texas Department Of Licensing
Texas State Comptroller
TN Dept. Labor & Workforce Dev
Town Of Chase Treasurer
Town Of Metomen
TX Workforce Commission - Eft
Txdmv
United States Treasury
Village Of Bergen
Village Of Brockport
Village Of Fairwater
Village Of Oakfield
Virginia Dept. Of Taxation
Washington Co. Tax Collector
Washington State Dept. Of Rev
WI Department Of Commerce
WI Dept. Of Revenue
Wisconsin Dept. Of Revenue
Wisconsin Dept. Of Revenue-Eft
Wisconsin Workforce Comm-Eft

OTHER LOCAL STATE FED AUTHORITIES

Arkansas Sales And Use Tax
AR Agriculture Department
AR Secretary Of State
Arkansas Department Of Health
Arkansas Dept. Of Labor
AR Dept. Of Workforce Serv
Arkansas State Plant Board
AR Dept. Environmental Quality
Benton County Planning
Boiler Inspection Division
Colorado Dept. Of Agriculture
Commissioner Of Labor-NYS
Department Of Health/Hospitals
Department Of State Health
Department Of Workforce Develo
Dept. Of Environmental Quality
Florida Dept Of State
Genesee County Health Dept.
Georgia Department Of Agri
Georgia Department Of Labor
Georgia Dept. Of Labor Eft
Indiana Secretary Of State
LA Dept. Of Health
Louisiana Dep Of Environmental
Louisiana Workforce Comm - Eft
Missouri Dept. Of Agriculture
MS State Dept. Of Health
NC Department Of Labor
NC Dept. Of Environment And
NOFA NY Certified Organic LLC
NYS Dept. Of Agriculture & Mark
NYS Dept. Of Environmental Cons
Sampson County Emergency Mngmt
State Police - Right-To-Know
Texas Commission On
Texas Department Of State
Wisconsin Depart Of Commerce
Wisconsin Dept. Of Agriculture
Wisconsin Emergency Management
Chair, Workers Comp Board
US Potato Board

WC CLAIMAINTS

Oscar Baires Carranza
Angela Jacobs
Jesus Valdor-Pantoja
Craig Murphy
Henry Worrell
Francisco Castanon
Sinh Tran
Sinh Tran
Lidia Salazar
Maria Gonzalez
Ricky Cox
Richard Bishop
Sidney Brown

Schedule 3

Potential connections or related parties

LIST OF POTENTIAL CONNECTION OR RELATED PARTIES

Current and Former Clients of A&M and/or its Affiliates [1]

Ace American Insurance Company
Ahold USA/Stop & Shop
AIG
AJG Risk Management Services
Aldi Inc.
American Electric Power
Americold Logistics
Aramark
Archer Daniels Midland
Ashland Inc.
AT&T
Bain Capital
Ball Corporation
Bank of America
Bank of Montreal
BMC
BP Energy
Captain D's LLC
CDC Software/MVI Technology
Centerpoint Energy
Chartis
ChubbCisco Systems
Citizens Bank
City of Philadelphia
City of Portland
City of Riverside, Missouri
CNA
Computer Sciences Corporation
Cox Communications
Core Group
CSX Corporation
CVS Pharmacy
Del Monte Foods
Denny's
Diversey, Inc.
Fifth Third Leasing Company
Fisher Scientific Healthcare
General Electric Capital Corp.
Georgia Secretary of State
Giant Eagle
HEB
Hewlett-Packard Financial
Honeywell Engines & Systems
IBM
Imperial Distributing Inc.
International Paper
Intralink Exchanges
Imperial Sugar
JPMorgan
Lazard Middle Market
Lincoln National
Microsoft Corporation
Nalco Company
National Comp Care Inc.
National Union Fire
Old Republic
PricewaterhouseCoopers
Progress Energy
RBC Centura Bank
Roberts Communication
Ryder Logistics
Safety Kleen Corp.
Safeway, Inc.
Sankaty Advisors
Shamrock Foods
Siemens Water Technologies
Southwestern Electric Power Co
Southwestern Energy
State of Georgia
State of Louisiana, Department of Revenue
SunTrust
Symantec System
Sysco Corporate
Tate & Lyle Ingredient America
TGI Friday's
Travelers

[1] A & M and/ or an affiliate is currently providing or has previously provided certain consulting or interim management services to these parties or their affiliates (or, with respect to those parties that are investment funds or trusts, to their portfolio or asset managers or their affiliates) in wholly unrelated matters.

TruckPro Inc.
Tyson Foods Inc.
U.S. Bancorp
U.S. Cellular
Univar USA Inc.
Visa
Wal-Mart Stores, Inc.
Wasserstein and Co.
Waste Management
Westchester Fire/ACE Insurance
Wells Fargo
Yum Restaurant Services Group, Inc.
Yusen Logistics Americas Inc.
Zurich American

Significant Equity Holders of Current and Former A&M Clients[2]

Aldi, Inc.
Aramark
AT&T
Bain Capital
Bank of America
Bank of Montreal
BP Energy
CDC Software
Chartis
Cisco Systems
CNA
Computer Sciences Corporation
Fifth Third
Fisher Scientific
General Electric Capital Corp
Hearst Holdings/King Features
Hewlett-Packard Financial
Honeywell Engines & Systems
JPMorgan
Lazard Middle Market
Microsoft Corporation
Penske Truck Leasing
PricewaterhouseCoopers
RBC Centura Bank
Safeway, Inc.
Sankaty Advisors, LLC
Siemens Water Technologies
Southwestern Energy
State of Michigan Retirement System
SunTrust
Sysco Food Services
Travelers
U.S. Bancorp
Waste Management
WE Energy
Wells Fargo
WW Grainger Inc.
Yum Restaurant Services Group, Inc.
Yusen Logisitics
Zurich American

Creditors in A&M Engagements[3]

Aramark
Archer Daniels Midland
AT&TBank of America
Bank of Montreal
CDW Direct LLC
C.H. Robinson Worldwide, Inc.
Citizens Bank
CSX Transportation Inc.
General Electric Capital Corp.
Georgia Power
Grainger
IBM
International Paper
JPMorgan

[2] These parties or their affiliates (or, with respect to those parties that are investment funds or trusts, their portfolio or asset managers or other funds or trusts managed by such managers) are significant equity holders of clients or former clients of A&M or its affiliates in wholly unrelated matters.

[3] A&M is currently advising or has previously advised these parties or their affiliates (or, with respect to those parties that are investment funds or trusts, their portfolio or asset managers or other funds managed by such managers) as creditors or various official creditors' committees in which these parties or their affiliates were members or which represented the interests of these parties or their affiliates.

Konica Minolta
McMaster Carr Supply
Nalco
National Union Fire
RBC Centura Bank
Siemens Water Technologies
State of Georgia Department of Revenue
State of Illinois, Department of Revenue
State of Michigan
State of North Carolina, Department of Revenue
State of Tennessee, Department of Revenue
St. Paul's
SunTrust
Sysco Food Services
U.S. Bancorp
U.S. Foods
Waste Management
Wells Fargo

Members of Noteholders Group [4]
AIG
Bank of America
Citizens Bank
CNA
Fifth Third
General Electric Capital Corp.
JPMorgan
U.S. Treasury
Wells Fargo

Professionals & Advisors [5]
Bass Berry & Sims
BKD, LLP
Greenberg Traurig LLP
Joele Frank Wilkinson Brimmer Katcher
Liskow & Lewis
Mitchell Williams Selig Gates & Woodyard
PricewaterhouseCoopers
Rayburn Cooper & Durham PA
Scott Larson

Significant Joint Venture Partners [6]
Bain Capital
IBM
Siemens Water Technologies

Board Members [7]
Richard Newstead
Roger S. Penske

A&M Vendors [8]
Aramark
AT&T
Bank of America
Bank of Montreal
BP Energy
CDW Direct LLC

[4] A&M is currently advising or has previously advised various official or unofficial noteholders' committees in which these parties or their affiliates (or, with respect to those parties that are investment funds or trusts, their portfolio or asset managers or other funds managed by such managers) were members or which represented the interests of these parties or their affiliates.

[5] These professionals have represented clients in matters where A&M was also an advisor (or provided interim management services) to the same client. In certain cases, these professionals may have engaged A&M on behalf of such client.

[6] These parties or their affiliates are significant joint venture partners of other clients or former clients of A&M or its affiliates in wholly unrelated matters.

[7] These parties or their affiliates are board members of other clients or former clients of A&M or their affiliates in wholly unrelated matters.

[8] These parties or their affiliates provide or have provided products, goods and/or services (including but not limited to legal representation) to A&M and/or its affiliates

Chubb
Cintas Corp.
Cisco Systems
General Electric Capital Corp.
Greenberg Traurig
Hewlett-Packard Financial
IBM
Imperial Inc.
Intralink Exchanges
JPMorgan
Konica Minolta
Liskow & Lewis
Marketing Management Inc.
MBM Corp.
Microsoft Corporation
National Union Fire
Pitney Bowes
PricewaterhouseCoopers
Shred-It
Staffmark
Sysco Food Services
Travelers
Univar
U.S. Bancorp
Visa
Wells Fargo
Windstream
Xerox Corp.
Zurich American

Exhibit B

Dispute Resolution Procedures

The following procedures shall be used to resolve any controversy or claim (a "**Dispute**") as provided in this agreement. If any of these provisions are determined to be invalid or unenforceable, the remaining provisions shall remain in effect and binding on the parties to the fullest extent permitted by law.

Mediation

A dispute shall be submitted to mediation by written notice to the other party or parties. In the mediation process, the parties will try to resolve their differences voluntarily with the aid of an impartial mediator, who will attempt to facilitate negotiations. The mediator will be selected by agreement of the parties. If the parties cannot agree on a mediator, a mediator will be designated by the American Arbitration Association ("**AAA**") or JAMS/Endispute at the request of a party. Any mediator so designated must be acceptable to all parties.

The mediation will be conducted as specified by the mediator and agreed upon by the parties. The parties agree to discuss their differences in good faith and to attempt, with the assistance of the mediator, to reach an amicable resolution of the dispute. The mediation will be treated as a settlement discussion and therefore will be confidential. The mediator may not testify for either party in any later proceeding relating to the dispute. No recording or transcript shall be made of the mediation proceedings.

Each party will bear its own costs in the mediation. The fees and expenses of the mediator will be shared equally by the parties.

Arbitration

If a dispute has not been resolved within 90 days after the written notice beginning the mediation process (or a longer period, if the parties agree to extend the mediation), the mediation shall terminate and the dispute will be settled by arbitration and judgment on the award rendered by the arbitration may be entered in any court having jurisdiction thereof. The arbitration will be conducted in accordance with the procedures in this document and the Arbitration Rules for Professional Accounting and Related Services Disputes of the AAA ("**AAA Rules**").

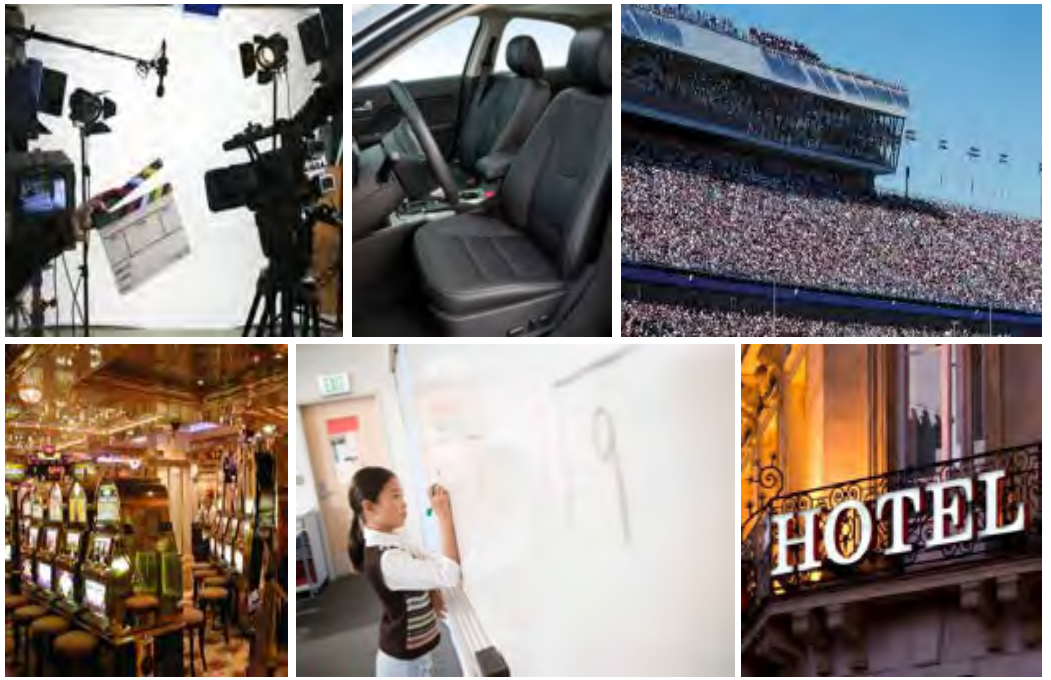
Deloitte.

Paul Billingham, Grant Thornton
Andrew Riebe, Nomura
William Snyder, Deloitte CRG
Jake Williams, Standard Chartered
Ashley Young, Kirkland & Ellis

CRO Session – Case Study

Global Leisure Holdings Ltd.

presented to INSOL 2014 Annual Asia Pacific Conference



Deloitte Transaction and Business Analytics LLP
March 2014

Situation Overview

- Global Leisure Holdings Ltd. (“GLH”) is a privately-held international hotel investment group that owns luxury hotels located throughout the world
- Founded by the Wén family in 1992 with the opening of its first hotel in Hong Kong, GLH initially expanded into mainland China before geographically diversifying its portfolio with acquisitions in South East Asia, the United States and Europe
  - GLH currently owns 31 hotels and outsources operations through a series of management contracts
- Despite its historical growth, GLH recently suffered from weak operating results and disappointing property appraisals, both of which triggered covenant defaults on American and European debt residing in a complex, highly levered capital structure
- From preliminary conversations with management, it is understood that:
  - Management is generally disappointed with the financial performance of its hotels, is critical of its hotel operators and is party to several unattractive hotel management agreements
  - Hedge funds have begun purchasing junior CMBS notes securing American assets as well as secured bank debt in Europe; LTV covenants have been breached and significant 2014 refinancing risk exists
  - Chinese and South East Asian creditors are increasingly concerned, although a clear understanding of these relationships and ongoing discussions is not yet forthcoming
- As a condition of forbearance, American and European funds have demanded that management appoint a Chief Restructuring Officer (“CRO”) to lead group-wide restructuring efforts to maximize value for all stakeholders

Stakeholder Motivations

- **Wén Family (Company Management)**
  - *Representative:* Ashley Young
  - *Key Motivations:* Maximize equity, board and management control of the family's hospitality and leisure empire across all regions. Furthermore, because numerous employed family members and friends have lost credibility after potentially misusing company positions and contracts, leading family members believe that hiring a CRO can help restore credibility, while preferring a CRO the family can control
- **General Unsecured Bonds Indenture Trustee and American and European hedge funds invested in general unsecured bonds (Bermuda), CMBS (U.S.) and mezzanine loan (Spain)**
  - *Representative:* Andrew Riebe
  - *Key Motivations:* Capturing value from other regions to enhance credit support for their respective debt securities while appointing a CRO to improve transparency and "clean up" family issues
- **Chinese and South East Asian Banks**
  - *Representative:* Jake Williams
  - *Key Motivations:* Maintain their currently strong credit support levels and prevent dividends and any other transfers of value from their security pools to those of other entities in the group. Despite strong ties with the family, the banks do not trust that the family's current interests are aligned with those of the banks
- **Chief Restructuring Officer**
  - *Representative:* William Snyder
  - *Key Motivations:* Employment by the family to broker a settlement between parties. The CRO is well aware that "shared" sacrifice will be important to make a deal work and that timing of negotiations is critical

Summary of Operations

PRELIMINARY INSIGHTS

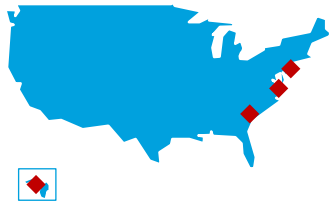
- GLH is an investment group that owns its upscale hotels outright while outsourcing their operation via management agreements with local hotel operators
- The hotel portfolio has comprised the same 31 hotels for some time and the assets are slowly becoming aged and less competitive
- Unbeknownst to hotel operators, GLH recently commissioned a third-party firm to conduct several consumer surveys. Common customer feedback included:
  - Outdated décor of common areas and rooms
  - Unsatisfactory meals and room service
  - High pricing for several 5-star hotels that are rather perceived as 4-star hotels
  - Frustration with the hotel website and booking online reservations
  - Business travelers expressed confusion with varying levels of service quality, promotion and brand across country borders
- Following from preliminary site visits, there may also be opportunities to optimize free space to further enhance revenue generation

HOTEL PERFORMANCE BY GEOGRAPHY

CHINA, SOUTHEAST ASIA & AUSTRALASIA

Hotels (#)	Occ.	Rate	RevPAR	EBITDA
Hong Kong (2)	81%	$350	$284	$34
Beijing (2)	74%	$200	$148	$12
Guangzhou (2)	69%	$140	$97	$4
Shanghai (2)	75%	$225	$169	$14
Chengdu (1)	82%	$160	$131	$3
Macau (1)	81%	$200	$162	$6
China (10)	**77%**	**$233**	**$178**	**$74**
Jakarta (2)	61%	$175	$107	$6
Seoul (2)	79%	$250	$198	$15
Bandung (1)	52%	$90	$47	$0
Busan (1)	49%	$180	$88	$1
Singapore (1)	81%	$276	$224	$14
Perth (1)	68%	$290	$197	$8
SE Asia/Aus.(8)	**69%**	**$233**	**$162**	**$44**

UNITED STATES

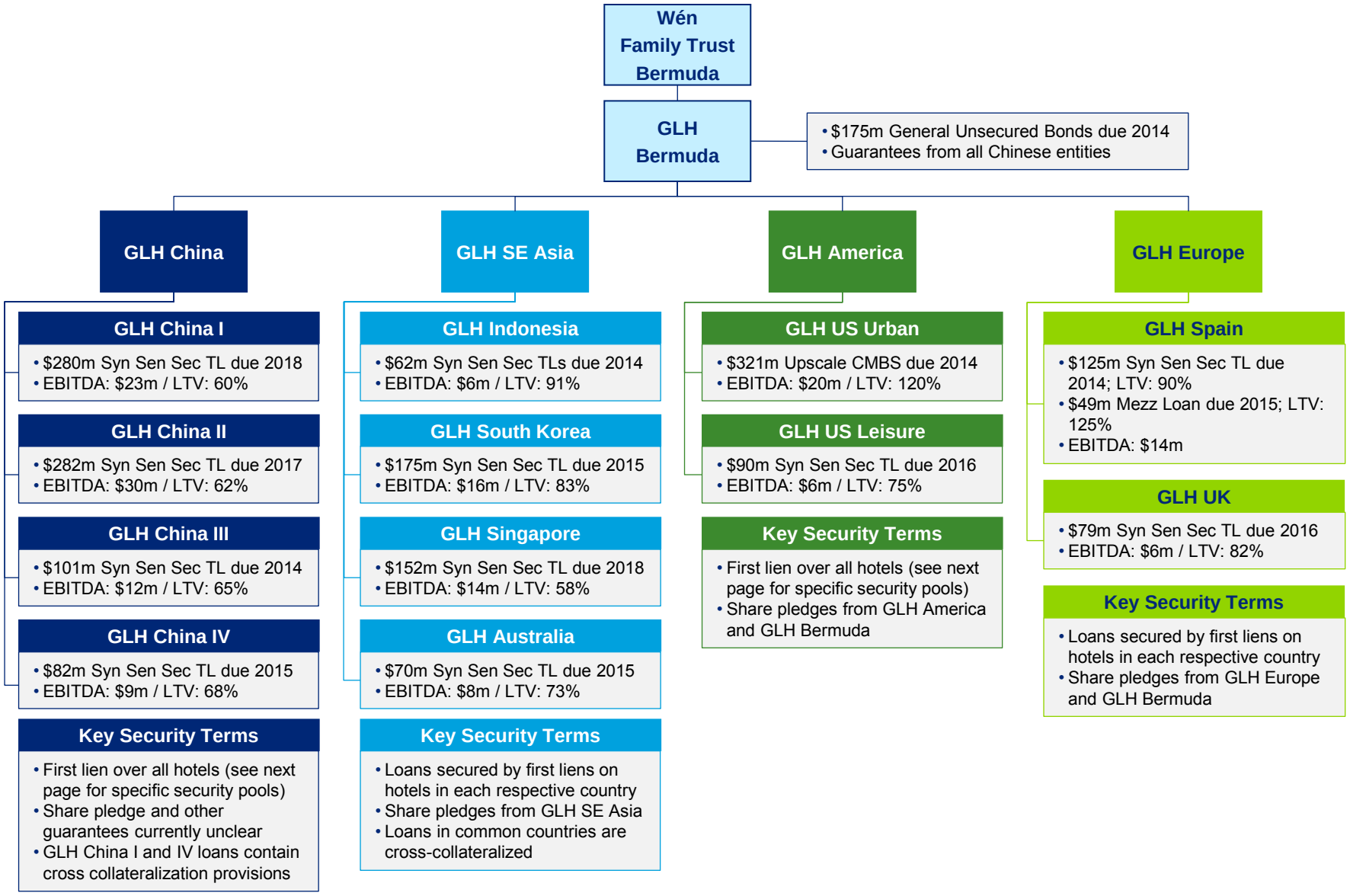


Hotels (#)	Occ.	Rate	RevPAR	EBITDA
Wash. DC (2)	62%	$220	$136	$4
Atlanta (2)	65%	$300	$195	$7
Honolulu (1)	74%	$240	$178	$6
New York (2)	80%	$350	$280	$9
U.S. (7)	**69%**	**$283**	**$196**	**$26**

EUROPE

Hotels (#)	Occ.	Rate	RevPAR	EBITDA
Madrid (3)	57%	$225	$128	$3
London (1)	80%	$330	$264	$6
Barcelona (2)	68%	$220	$150	$11
Europe (6)	**63%**	**$238**	**$150**	**$20**

Corporate Organization & Capital Structure



Highly leveraged capital structure with multiple covenant defaults increases short-term refinancing risk

Figures in USDm	Issuer	Book Bal.	Mkt Price	Interest	Maturity	LTV[1]	Secured Assets	Parent Gtees?	Holders
2007 Upscale Prop CMBS[2]	GLH US Urban	$321	Varies	Varies	Mar 2014	120%	Wash DC, Atlanta, NYC	Yes	Hedge funds
2011 Synd Sen Sec TL	GLH US Leisure	90	n.a.	5.0%	Jun 2016	75%	Honolulu	Yes	4 American banks
Total U.S. Debt		**411**				**106%**			
2007 Synd Sen Sec TL	GLH Spain	125	88	4.5%	Sep 2014	90%	Madrid & Barcelona	Yes	4 Spanish banks
2007 Mezz Loan	GLH Spain	49	68	7.5%	Sep 2015	125%	Madrid & Barcelona	Yes	Hedge funds
2011 Synd Sen Sec TL	GLH UK	79	n.a.	L+3.5%	Mar 2016	82%	London	Yes	3 British banks
Total Europe Debt		**254**				**107%**			
2012 Synd Sen Sec TL	GLH China I	280	n.a.	6.0%	Jul 2018	60%	HK (1), Beijing (1)	Unclear	2 Chinese banks
2012 Synd Sen Sec TL	GLH China II	282	n.a.	5.0%	Sep 2017	62%	HK (1), Beijing (1), Macau (1)	Unclear	4 Chinese banks
2009 Synd Sen Sec TL	GLH China III	101	n.a.	5.5%	Nov 2014	65%	Shang.(1),Guang.(1),Chengdu(1)	Unclear	3 Chinese banks
2010 Synd Sen Sec TL	GLH China IV	82	n.a.	5.3%	Jan 2015	68%	Shanghai (1), Guangzhou (1)	Unclear	2 Chinese banks
Total China Debt		**745**				**62%**			
Synd Sen Sec TL's[3]	GLH Indonesia	62	n.a.	6.2%	Jul 2014	91%	Jakarta (2), Bandung (1)	Yes	1 Chinese bank
Synd Sen Sec TL's[3]	GLH South Korea	175	n.a.	5.5%	Sep 2015	83%	Seoul (2), Busan (1)	Yes	3 Chinese banks
2013 Synd Sen Sec TL	GLH Singapore	152	n.a.	5.3%	Apr 2018	58%	Singapore	Yes	4 Sing. banks
2010 Synd Sen Sec TL	GLH Australia	70	n.a.	5.8%	Feb 2015	73%	Perth	Yes	2 Australian banks
Total SE Asia & Aus. Debt		**460**				**72%**			
General Unsec. Bonds	GLH Bermuda	**175**	78	8.5%	Jun 2014	**n.a.**	n.a.	Yes	Hedge funds

Capital leases	17
Total Gross Debt	**2,062**
Cash	(223)
Total Net Debt	**1,839**
Estimated Net Leverage	*11.2x*

Notes:

1) Loan-to-value covenants embedded throughout the capital structure

2) CMBS notes issued in three tranches with a total weighted average interest rate of 4.5%; hedge funds have primarily traded into the two most junior tranches offering higher yields, and potentially, a fulcrum security

3) Individual terms loans associated with each hotel asset treated as a security pool given cross-collateralization terms in credit docs that provide recourse to the other loans within country borders

Earnings and cash flow deterioration trend continues as substantial liquidity risk looms in 2014

Figures in USDm	2009A	2010A	2011A	2012A	2013F	2014F
Income Statement						
Rooms	$520	$530	$533	$528	$501	$476
Food & Beverage	184	164	146	134	111	98
Spa	15	15	15	7	7	6
Other	46	37	37	35	33	31
Total Revenue	**765**	**747**	**730**	**704**	**651**	**611**
Growth (%)	*(10%)*	*(2%)*	*(2%)*	*(4%)*	*(7%)*	*(6%)*
Rooms	(109)	(106)	(117)	(121)	(120)	(114)
Food & Beverage	(108)	(97)	(89)	(83)	(71)	(63)
Spa	(15)	(14)	(14)	(7)	(7)	(6)
Other	(32)	(27)	(27)	(26)	(24)	(23)
SG&A	(107)	(112)	(124)	(127)	(130)	(122)
Property Operations	(31)	(37)	(51)	(56)	(59)	(55)
Utilities, Property Tax, Insurance	(46)	(45)	(51)	(49)	(49)	(49)
Management Fee	(23)	(22)	(22)	(28)	(26)	(24)
EBITDA	**294**	**286**	**234**	**205**	**165**	**154**
Margin (%)	*38%*	*38%*	*32%*	*29%*	*25%*	*25%*
Statement of Cash Flow						
Movements in Working Capital	(4)	2	3	1	(1)	(1)
Cash Flow from Operating Activities	**290**	**288**	**237**	**206**	**164**	**153**
Capital Expenditure	(61)	(67)	(73)	(84)	(98)	(92)
Free Cash Flow	**229**	**221**	**164**	**122**	**66**	**62**
Growth (%)	*(11%)*	*(3%)*	*(26%)*	*(26%)*	*(46%)*	*(6%)*
Dividends	(15)	(22)	(10)	0	0	0
Cash Interest	(82)	(83)	(91)	(92)	(112)	(112)
Principal Payments, net	(26)	(14)	(34)	(20)	(8)	(834)
Net Cash Flow	**106**	**102**	**29**	**10**	**(54)**	**(884)**
Balance Sheet						
Cash	136	238	266	276	223	(661)
Tangible Assets	2,190	2,225	2,273	2,301	2,460	2,460
Borrowings	2,138	2,124	2,090	2,070	2,062	1,228

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C2

A bridge over troubled waters: the current climate in maritime and shipping insolvencies

Magnolia/Camomile Room

Chair: Lynn P. Harrison 3rd, Fellow, INSOL International
Curtis Mallet-Prevost Colt & Mosle LLP

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Shipping Chapter 11s: Safe Harbor or Rough Seas?

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Financial Restructuring Group, Bracewell & Giuliani LLP

BRACEWELL &GIULIANI

There has been a lot of press regarding non-US shipping companies utilizing US Chapter 11 proceedings in an attempt to reorganise their businesses.

The international maritime industry is still suffering from low freight rates, high bunker fuel oil prices, vessel oversupply and limited charter demand. Some industry experts predict vessel oversupply, in particular, will constrain freight rates for another 18 months.[3] Only time will tell. In such poor market conditions, international shipping companies cannot generate sufficient cash from operations to meet scheduled debt and operating payments, causing shippers to default under their secured credit facilities. Post-default, the companies' secured lenders may exercise self-help remedies, including arresting vessels and freezing access to cash.

When faced with aggressive lender tactics, a distressed shipping company's first, and perhaps best, line of defense is an out-of-court restructuring solution. One option is a standstill agreement with lenders. Another option is an amendment to the company's secured loan facility. When these or other out-of-court attempts fail, the company may choose to file Chapter 11 as a tactical measure in order to keep its business as a going concern.

Chapter 11 is open to international companies because the threshold for jurisdiction is very low. In order to be eligible for relief under Chapter 11, a debtor must have a domicile, a place of business, or property in the US.[4]

Accordingly, "a foreign debtor with property in the United States would be eligible for relief under the Code, and the court will have proper jurisdiction."[5]
Eligibility is determined as of the date a debtor files Chapter 11.[6] Each debtor must independently satisfy the eligibility test.[7]

Where a "place of business" is used to establish eligibility, courts have found that the debtor need only have "a" place of business in the US, not a primary one.[8]

Where "property" is used to establish eligibility, "courts have required only nominal amounts of property to be located in the United States, and have noted that there is 'virtually no formal barrier' to having federal courts adjudicate foreign debtors' bankruptcy proceedings."[9]
Any property will do. For example, a retainer paid to counsel before filing Chapter 11 is sufficient property to establish eligibility. The Marco Polo Seatrade Chapter 11 case is a good example of this.[10] TMT Procurement Corporation is also informative.[11]

Chapter 11 offers a distressed shipping company a breathing spell from the demands of creditors, an opportunity to remain in business with existing management, reassess its business plan and negotiate (or seek to impose) a restructuring of its capital structure binding on existing creditors and shareholders.

One benefit of Chapter 11 is the automatic stay. Under

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[2] Mark Dendinger is an associate at Bracewell & Giuliani LLP and a member of the Financial Restructuring Group. Mr. Dendinger advised Marco Polo Seatrade in its Chapter 11 case.
[3] *See* Moody's: Sustained oversupply keeps outlook for global shipping industry negative, available at: https://www.moodys.com/research/Moodys-Sustained-oversupply-keeps-outlook-for-global-shipping-industry-negative--PR_275523.
[4] *See* 11 U.S.C. § 109(a).
[5] 2 Collier on Bankruptcy 109.01[2] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. rev.).
[6] *In re Global Ocean Carriers, Ltd.*, 251 B.R. 31, 37 (Bankr. D. Del. 2000) (citing *In re Axona Int'l Credit and Commerce, Ltd.*, 88 B.R. 597, 614-615 (Bankr. S.D.N.Y. 1988)).
[7] *Global Ocean Carriers*, 251 B.R. at 37 ("The test must be applied to each debtor.") (citation omitted).
[8] *See, e.g., In re Paper I Partners, L.P.*, 283 B.R. 661, 672 (Bankr. S.D.N.Y. 2002) (in involuntary case, the court found that the alleged debtors had a place of business in the US despite their contention that only administrative matters were conducted from the US office); *In re Brierley*, 145 B.R. 151, 162 (Bankr. S.D.N.Y. 1992) (concluding that debtor had a place of business in the US based on debtor's engagement (as an independent contractor) of an accountant in New York, who kept files, books and records of the debtor, and on debtor's other activities in New York).
[9] In re Globo Comunicacoes E Partipacoes S.A., 317 B.R. 235, 249 (S.D.N.Y. 2004) (citation omitted).
[10] *In re Marco Polo Seatrade B.V.*, Case No. 11-13634, Hr'g Tr. at 490:3-491:15 (Bankr. S.D.N.Y. Oct. 21, 2011) (bench ruling set forth in transcript and not in a published decision given urgency of situation) ("I am concluding that the payment of a retainer here ... constitutes sufficient property to satisfy the 109 test."); *see also Global Ocean*, 251 B.R. at 39 ("The Debtors assert that they all have an interest in the escrow funds which were paid to counsel on all of their behalf. We agree…. It is not relevant who paid the retainer, so long as the retainer is meant to cover the fees of the attorneys for all the Debtors….").
[11] *In re TMT Procurement Corporation*, Case No. 13-33763, Hr'g Tr. at 234:14-240:13 (Bankr. S.D. Tex. June 24, 2013) (bench ruling set forth in transcript and not in a published decision given urgency of situation) (finding engagement letter on behalf of all debtors unambiguously provides each entity a legal property interest in the retainer sufficient to establish 109 eligibility).
[12] *See* 11 U.S.C. § 362(a).

§ 362(a) of the Bankruptcy Code, the Chapter 11 filing operates as a stay that protects the debtor and property of the estate from collection efforts and foreclosure actions, and prevents creditors from satisfying their claims to the detriment of other creditors.[12] Once a company is in Chapter 11, a holder of a security interest in the debtor's property cannot take action against the property without court permission.

The availability of the automatic stay led Netherlands-based Marco Polo Seatrade to file Chapter 11 in July 2011. In Marco Polo, one of the company's secured lenders had arrested one vessel, initiated arrest proceedings on two other vessels, and had swept the company's cash from a secured vessel retention account. The automatic stay stalled the lender's self-help remedies and caused the lender to return the arrested vessel to the bankruptcy estate.

Chapter 11 may appeal to a shipping company for other reasons. For example, a Chapter 11 debtor remains in possession, meaning existing management continues to run the business after the filing and maintains control of operations for the duration of the cases.[13] A court can appoint a trustee to replace existing management for "cause," including fraud, dishonesty and gross mismanagement,[14] however these appointments are uncommon. Further, a Chapter 11 debtor has access to the US capital markets, where debtor in possession, or "DIP," financing may be available to help fund the company's stay in in bankruptcy and, in some instances, upon exit.[15] In addition, a Chapter 11 debtor can sell an asset (e.g., a vessel), with Court permission, free and clear of existing liens on the asset with the security interest usually transferring to proceeds of the sale.[16] These are just some examples of Chapter 11 provisions to help facilitate reorganisation.

Chapter 11 is not a panacea. Publicity surrounding a Chapter 11 case could damage a shipping company's reputation with charterers, critical trade vendors and other constituents and hamper the company's ability to operate as a going concern. Post-filing, the company's secured lenders may oppose the company's use of cash securing the lenders' loans, making it difficult for the company to operate. The company may have trouble finding DIP financing because US lenders may not want to extend credit to a foreign company with foreign assets and limited US jurisdictional ties. And even if a company secures a DIP, a stint in Chapter 11 can be extraordinarily expensive. Among other expenses, a Chapter 11 debtor must fund substantial professional fees to its legal and financial advisors, advisors for an official committee of unsecured creditors and, in certain instances, the secured lenders' advisor team. These are just some of the waves a shipping company may encounter on a maiden voyage through Chapter 11.

Chapter 11 can be a safe harbor for international shipping companies due to its limited jurisdictional and eligibility requirements and debtor-friendly features. For a distressed shipping company with lender support and adequate financing, Chapter 11 may be the best opportunity to reorganise. However, a contested Chapter 11 case can be expensive, time consuming and unpredictable, so any shipper considering this restructuring alternative should batten down the hatches and prepare for rough seas.

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[13] *See* 11 U.S.C. §§ 1107-08.
[14] *See* 11 U.S.C. § 1104.
[15] *See* 11 U.S.C. § 364.
[16] *See* 11 U.S.C. § 363.

GLOBAL SHIPPING ABOUT TO HIT ANOTHER WAVE: THE ECB CAPITAL REGULATIONS

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January 14, 2014 — As global shipping enters its sixth year of crisis, the road to recovery is still hampered by a sustained lack of demand and surplus capacity. Anticipating a new wave of capital regulations, European banks – the primary financiers of global shipping – continue to trim their levels of exposure to the sector. As a result, private firms who believe that global shipping may be poised for recovery are in a favorable position to infuse capital into the industry and reap corresponding rewards.

CURRENT SHIPPING OVERSUPPLY TRIGGERED BY THE FINANCIAL CRISIS OF 2008

Prior to the recent financial crisis, the maritime industry experienced remarkable growth due in part to cheap and available credit as well as surging global trade. Global exports, which first exceeded $US 1 trillion in 1977, grew to more than $US 16 trillion in 2008.[1] With interest rates nearing all-time lows, banks and investors pumped hundreds of billions of dollars into the industry.[2] Worldwide container shipping volumes grew at an average annual growth rate of 12.6% between 2002 and 2007, while world GDP grew by 4.4% in the same period.[3]

The supply side correspondingly responded to increased demand. The Baltic Dry Index, a measure of what an end-user would pay to ship goods, increased from around 1,500 points in 2001 to over 11,500 points in May 2008.[4] This increase reflected a heightened demand for containerized shipping that far outpaced supply. The industry answered the call by ordering record levels of new tonnage. Shipyard order books were full and it was not uncommon for new vessel construction – which can take over a year to complete – to be backlogged for up to three years after placement of an order.

However, beginning in 2008 and continuing into 2009, both imports and exports declined at double-digit rates in key trading countries, including the U.S., Germany, Japan, and the U.K.[5] New tonnage continued to reach the market for several years and the resulting oversupply led to a significant decline in container freight rates, including a one third drop in rates between the end of 2008 and the end of 2009.[6] By December 2008, the Baltic Dry Index had fallen 94% to a low of 663 points. In 2010, at the height of the crisis, twelve percent of global container carrying capacity (more than 500 ships) lay idle and anchored across the globe, while double that quantity was still due to be delivered by shipbuilders.[7] Similar conditions existed in dry bulk and tanker shipping.

NEW EUROPEAN CAPITAL REGULATIONS PRESSURE BANKS TO SHED RISKY SHIPPING LOAN PORTFOLIOS

A new wave of European banking regulation has increased pressure on banks to shed risky shipping portfolios. Prior to 2008, many European banks acquired sizeable shipping exposure relative to their capital positions. For example, eight German banking groups considered in a recent Moody's report had a combined $EUR 105 billion of shipping loans in their portfolios, representing 137% of their combined Tier 1 capital.[8] It is believed that these exposures contain considerable levels of risk, as evidenced by record-high problem loans that reached 21% of all shipping loans at year's-end 2012, up from an elevated 14% at year's-end 2011.[9]

On September 12, 2012, the European Commission revealed a proposal that would assign the supervision of the largest and most important euro zone banks to the European Central Bank ("ECB"). The European Parliament and member states agreed on specifics of ECB oversight of euro zone banks on March 19, 2013. In preparation for its role as euro zone banking supervisor, the ECB has begun to review the capital reserves of

roughly 130 banks though a procedure termed the Comprehensive Assessment.

The Comprehensive Assessment, which began in November 2013 and is scheduled to run through October 2014, is broken down into three pillars: a supervisory risk assessment, an asset quality review, and a stress test. The supervisory risk assessment, currently underway, involves a review of liquidity, leverage and funding risks for supervised banks.

The most important pillar of the assessment is the Asset Quality Review ("AQR"). Planned for the first half of 2014, the AQR will examine the asset side of bank balance sheets. The review will be risk-based and rumors indicate that particular focus will be paid to potential problem areas like shipping and small business loan portfolios. As expected, the ECB plans to incorporate the heighted capital requirements contained in Basel III.

Analysts expect shipping loan portfolios to be assessed as fairly risky assets. The ECB will use Common Equity Tier 1 ("CET1"), a measure of core equity capital compared with total risk-weighted assets, to grade a bank's capital adequacy. A CET1 threshold of 8% has been set as a benchmark for banks evaluated under the assessment. Depending on ECB assumptions, banks with heavy shipping loan exposure may experience large capital shortfalls and may need to increase capital reserves in order to avoid undercapitalization. Details about the stress test have not yet been released, but the test will undoubtedly reveal whether adequate capital provisioning has been made for shipping loans and other risky assets.

Banks have already begun to sell shipping assets, in a likely effort to avoid a fire sale in October 2014 when the results of the Comprehensive Assessment are scheduled to be announced. As expected, the exercise will be followed by corrective measures, such as recapitalization through profit retention, equity issuance, and mandatory asset separation and sales. The ECB has invited banks and national regulatory authorities to begin implementing these remedies before the conclusion of the exercise.

Should it become necessary, the ECB is authorized to require banks to reduce institutional exposure to risk, to restrict or limit the activities of banks that pose risks to soundness, and to remove, at any time, members from the management body of credit institutions who do not fulfill ECB requirements. In its capacity as the new supervisory authority over euro zone banking, the ECB will be able to monitor and enforce the implementation of those measures.

WHAT DOES THE COMPREHENSIVE ASSESSMENT MEAN FOR SHIP FINANCING?

Although the shipping finance market was dominated by European banks, particularly German banks, five years ago, half of that lending capacity has since permanently left the market.[10] As mentioned above, European banks already have begun to shop shipping loan portfolios in anticipation of efforts required to comply with new capital rules.[11] Reports indicate that Lloyds Banking Group sold $US 500 million of shipping loans to U.S. hedge fund Davidson Kempner Capital Management in early December 2013.[12] Around the same time, Britain's Royal Bank of Scotland reportedly sold a $US 800 million shipping loan to U.S. private equity firms Oaktree Capital Management and Centerbridge Partners.[13] Dallas-based Delos Shipping LLC and Tennenbaum Capital Partners LLC of Santa Monica, California, took an 80% stake in König & Cie, a German KG house, for an undisclosed price in May, 2013.[14]

Wilbur Ross, the veteran distressed-asset investor, believes the major need for equity capital in marine transport has triggered an unusual level of interest in shipping from private equity firms.[15] Ross has recently made his own moves in the space. Navigator Holdings Ltd., an owner of smaller LPG carriers whose largest shareholder is a fund led by Ross, raised $US 228 million by selling shares in November, 2013.[16] Ross, the founder of WL Ross & Co., has also recently raised $US 100 million to buy ships hauling coal, iron ore and grains, a bet that accelerating growth in emerging markets will boost trade.[17]

In remains to be seen whether these investments are well timed. The ClarkSea Index, which covers the earnings of tankers, bulk-carriers, container-ships, and gas carriers) ended 2013 up 79% over the end of 2012. However, the Baltic Dry Index, which reached a peak of 2,337 in early December 2013 – its highest point since November 2010, has recently returned to around 1,500. Industry experts continue to acknowledge the problem of surplus capacity.[18] There is no quick fix for the shipping

industry. However, investors should remain alert as opportunities for sources of alternative capital may continue to arise.

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[1] Gustaaf De Monie et al., *Economic Cycles in Maritime Shipping and Ports: The Path To The Crisis of 2008*, International Workshop on Integrating Maritime Transport in Value Chains, June 2009.

[2] Thomas Schulz, *That Sinking Feeling: Global Crisis Hits Shipping Industry Hard*, Spiegel Online, December 5, 2008.

[3] Ruangwud Jarurungsipong, Nopalak Rakthum, *Container Shipping Industry: Facing Another Difficult Year*, TRIS Rating, June 15, 2012.

[4] De Monie et al., *supra* note 1.

[5] Jian Wang, *Durable Goods and the Collapse of Global Trade*, Economic Letter: Insights from the Federal Reserve Bank of Dallas, February 2010.

[6] Jan Hoffmann, *Shipping out of the Economic Crisis*, Brown Journal of World Affairs, Spring/Summer 2010.

[7] *Id*.

[8] Info-Prod Strategic Business Information, *Moody's Sees Significant Asset Quality Challenges for German Shipping Lenders in 2014*, Info-Prod Research (Middle East), December 10, 2013.

[9] *Id*.

[10] Lisa Allen, *Sick At Sea*, The Deal Pipeline, June 24, 2013.

[11] Jonathan Saul, *Funds Buy Shipping Loans From Capital-Conscious Banks*, Reuters Hedgeworld, December 18, 2013.

[12] *Id*.

[13] *Id*.

[14] Allen, *supra* note 10.

[15] Ira Breskin, *Wilbur Ross Still Trolling for Shipping Deals*, Mergers & Acquisitions, November 2013.

[16] Isaac Arnsdorf, *Oil-Tanker Recovery Trails Market With U.S. Export Ban: Freight*, Bloomberg, January 9, 2014.

[17] *Id*.

[18] Clarkson Research, *Bulk Market Bottom – So When Will The Fat Lady Sing?*, January 3, 2014.

C3

A Model Law on cross-border insolvency in Asia – is there any hope?

Grand Ballroom

Chair: Naomi Moore, Bingham McCutchen LLP
Patrick Ang, Rajah & Tann LLP
Scott Barker, Buddle Findlay
Neil Cooper, Zolfo Cooper LLP
David Kidd, Linklaters

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10.20am – 11.40am

Paper by John Martin
Partner, Henry Davis New York, Sydney

Cross-border insolvency- judicial assistance in the post-Hoffmann era.

Commentators:
Justice Reg Barrett, Judge of Appeal, Supreme Court of NSW, Sydney.
Lord Hope of Craigshead, KT, PC, FRSE, Deputy President of the Supreme Court of the United Kingdom.

CROSS-BORDER CONTROVERSY - A TALE OF TWO SHIPS PASSING IN THE NIGHT?

John Martin*

Introduction

The 21st century is the age of Facebook, the patenting of the human genome, and information on demand. Commerce similarly is in a state of dynamic change with globalisation a major theme. Companies trade relatively unhindered by national borders. Production occurs in low cost jurisdictions. Business functions such as IT and finance are "offshored". Parent company and treasury functions are conducted from tax havens and domiciles of convenience. Money can move countries at the click of a mouse. Capital flows seamlessly across borders in search of a home, as do goods and services in search of consumers.

But one thing that remains constant is that in a market economy, businesses still fail.

Insolvency laws are there to address such failure. But insolvency laws are the product of national legislatures. Where the company has conducted business internationally, there is asymmetry. Although a business operated internationally, perhaps globally, national borders will impede the effective operation of the laws that will govern its insolvency, and the effective reach of the court with supervisory jurisdiction.

In an attempt to address this asymmetry, the cross-border insolvency model law was formulated by UNCITRAL and, so far, has been adopted by 20 countries and territories, including Australia in 2008 and New Zealand in 2006. But the model law has its limitations. These are not confined to its lack of reach beyond the 20 adopting jurisdictions (out of 193 UN member states). In participating countries, its application is often excluded in respect of certain insurance companies and banks, its operation is substantially confined to procedural and relatively basic assistance[1], and as a recent decision[2] of the UK Supreme Court evidences, there may be a judicial reluctance to assume jurisdiction beyond what is unambiguously spelled out in the express text of the law.

Global trade is not new, though, and cross-border insolvencies have been addressed in judicial decision-making for at least 250 years. But two things are relatively new. First, globalisation, aided and abetted by the global financial crisis, has led to an increased regularity of cross-border failures that require judicial attention. Secondly, commerce has embraced financial and deal structuring complexity like never before.

In this context, no less than 4 cross-border insolvency cases have fallen for consideration at the highest level in the UK in the last 7 years. Two UK Supreme Court cases, *Rubin v Eurofinance* and *Grant v New Cap Re* were heard together, with judgment delivered last October.[3] Re *HIH*[4] was decided by the House of Lords in 2008 and *Cambridge Gas*[5] by the Privy Council in 2006. What arises from these decisions is a controversy, as two

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* John Martin is a partner at Henry Davis York, Sydney. John advised the respondent in the New Cap Re appeal to the UK Supreme Court (cited in footnote 2) and one of the joint appellants in the HIH appeal to the House of Lords (cited in footnote 4). He wishes to acknowledge the assistance in preparing this paper received from Emma Beechey and Tara Hamilton of HDY.

1 Such assistance will, though, be sufficient in many if not most cases.

2 *Rubin v Eurofinance SA; New Cap Reinsurance Corp (in liquidation) v Grant* [2013] 1 AC 236.

3 Ibid.

4 *HIH Casualty and General Insurance Ltd, In re; McGrath & Ors v Riddell & Anor* [2008]1 WLR 852.

5 *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings PLC* [2007] 1 AC 508.

distinguished Law Lords with impeccable credentials in the cross-border sphere take starkly divergent approaches to the principles underpinning the availability of substantive cross-border judicial assistance. The controversy arises between the approach of Lord Hoffmann, who carried the Privy Council in *Cambridge Gas*, and that of Lord Collins, the current editor of Dicey, Morris and Collins, whose judgment in *Rubin/New Cap Re* found favour with the majority in that case.

The UK Supreme Court's decision in Rubin v Eurofinance and *New Cap Re v Grant*

In these two jointly determined cases, the majority held that the bankruptcy character of the preference judgments issued by courts in the US and Australia did not take them outside of the normal rules for enforcement of in personam judgments, which these default judgments were held to be. The US judgment was not enforced in England[6] as the US Court lacked in personam jurisdiction over the defendant, whilst the Australian judgment was enforced, but only because the English defendant's conduct in lodging proofs of debt in the liquidation was held to be a submission to the jurisdiction of the court supervising that liquidation.

The decision itself, though interesting, is of far less relevance in the cross-border field than the passage in Lord Collins judgment in which his Lordship declared *Cambridge Gas* to have been wrongly decided, and the reasoning deployed in so deciding.

The Privy Council's decision in Cambridge Gas

The decision in *Cambridge Gas* presents a formidable illustration of judicial co-operation across borders. This was a bankruptcy with international dimensions, being the insolvency of a holding company of a shipping group, Navigator Holdings PLC (**Navigator**) incorporated in the Isle of Man. Given the absence of creditors and stakeholders (and their assets and personnel) in the Isle of Man, a bankruptcy filing there may have faced practical problems in securing compliance outside of the Isle of Man with orders of the Manx Court and with Manx insolvency legislation. So a bankruptcy filing in the US, an international centre of commerce (which may well have been the company's centre of main business, or "COMI") was undertaken, and the Chapter 11 process culminated in the adoption by creditors, and sanctioning by the US Bankruptcy Court, of a plan of reorganisation for Navigator. However, the plan of reorganisation required that the shares in Navigator be transferred to the committee of creditors so they could implement the plan. As Navigator was incorporated in the Isle of Man, its shares (described in the judgment as "*completely and utterly worthless*"[7]) were located there. The US Court, recognising that its jurisdiction to achieve this objective would not be recognised outside of the US, issued a letter of request to the Manx Court requesting that the Manx Court provide assistance by transferring the shares in order to enable creditors to give effect to the plan.

Thus, the involvement of one court was required in order to protect assets and proceed effectively to a plan of reorganisation, and the involvement of another jurisdiction's court was required to give efficacy to that plan. Neither court could with certainty achieve the process from start to finish by itself. Both courts, acting together, could achieve what creditors considered to be the most advantageous outcome.

Could the two courts successfully co-operate in this way to protect and reorganise this insolvent international shipping company so as to pay its creditors? Lord Hoffmann, speaking for the Privy Council in *Cambridge Gas*, held they could. In *Rubin*, Lord Collins (with Lord Walker and Lord Sumption concurring) effectively held they could not.

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6 Lord Clarke dissenting.

7 [2007] 1 AC 508 at 515; [9].

The controversy at a technical level

The controversy in *Cambridge Gas* arose because the owner (Cambridge Gas) of the shares in Navigator was a Cayman company that had not submitted to the jurisdiction of the US Court. The owner argued that the US Court lacked both in personam jurisdiction against Cambridge Gas, and in rem jurisdiction in respect of the shares (located in the Isle of Man).

Lord Hoffmann, delivering the advice of the Privy Council, accepted these submissions as correctly stating the law vis-à-vis enforcement of in personam and in rem judgments, but held that a bankruptcy proceeding such as the Navigator proceeding, was neither in rem nor in personam, it being "*a collective proceeding to enforce rights and not to establish them*"[8]. Lord Hoffmann proceeded to identify the existence of a common law power of assistance, and observed that the same outcome as the plan could have been achieved via a scheme of arrangement in the Isle of Man. It was held to be appropriate (and consistent with universalist principles) for the Manx Court to exercise its common law power of assistance by giving effect to the plan rather than requiring creditors to go to the trouble of commencing parallel Manx insolvency proceedings for no purpose other than to achieve the same outcome.

In *Rubin v Eurofinance*, Lord Collins' basis for overruling *Cambridge Gas* is succinctly set out in paragraphs 118 and 132:

> "118. ... The shares in Navigator owned by Cambridge Gas (a Cayman Islands company) were, on ordinary principles of the conflict of laws, situated in the Isle of Man, and the shareholder relationship between Navigator and Cambridge Gas was governed by Manx law. The Privy Council, as noted above, did not articulate any rule for the jurisdiction of the US Bankruptcy Court over Navigator (although it had plainly submitted to its jurisdiction) or over Cambridge Gas (which the Manx Courts had held and the Privy Council accepted, had not submitted) or over Cambridge Gas' Manx assets.
>
> ...
>
> 132. It follows that, in my judgment, Cambridge Gas was wrongly decided. The Privy Council accepted (in view of the conclusion that there had been no submission to the jurisdiction of the Court in New York) that Cambridge Gas was not subject to the personal jurisdiction of the US Bankruptcy Court. The property in question, namely the shares in Navigator, was situated in the Isle of Man, and therefore also not subject to the in rem jurisdiction of the US Bankruptcy Court. There was therefore no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man."

Significantly, Lord Hoffmann's judgment in *Cambridge Gas* evidences agreement with all three of the legal propositions set out in paragraph 132.[9] In particular, Lord Hoffmann accepts that there was no basis for the recognition and enforcement of the US Court's order in the Isle of Man in the sense that Isle of Man law was obliged to recognise the US Court's order as having vested the shares in the creditors committee.

Here the common ground concludes. Lord Hoffmann provides a different characterisation of the US Court's order. Secondly, and contrary to Lord Collins assertion that (in view of the stated premises) there was "*no basis*" for the requested relief, Lord Hoffmann identifies such a basis - the Court's "*common law power of assistance*".[10]

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8 [2007] 1 AC 508 at 516; [13], [14].
9 Ibid, at [6], [12], [13] and [23].
10 [2007] 1 AC 508 at 518; [23].

The significance of the controversy

The implications of Lord Collins' judgment are potentially very significant. Indeed, outside of matters of procedural assistance (to which, it may be inferred, Lord Collins' observations are not directed), a circumstance where a request for judicial assistance is made is because a party and/or property is not within the jurisdictional reach of the court administering the insolvency. It would be the very circumstance that necessitated the issue of a request for assistance that would, on this analysis, deny the entitlement to assistance.

The issue is significant in another respect. In addressing the specific controversy in issue in *Rubin v Eurofinance*, Lord Collins declined to "enforce" the US default preference judgment under article 25 of the model law (as enacted in the UK), which provides that "*the court may cooperate to the maximum extent possible with foreign courts or foreign representatives*". The reasoning deployed was that a number of specific examples of permissible cooperation were provided in article 27 and they did not include "enforcement" of judgments. Recognition and enforcement are fundamental matters in private international law. Lord Collins concluded that even applying a purposive interpretation to article 25, the model law had not been designed to enable the recognition and enforcement of such judgments.

The specific examples given in article 27 of judicial cooperation are quite narrow and largely procedural. Many requests for assistance will fall outside of these examples. Lord Collins' approach to the issue, if followed in future cases, will on the face of it give somewhat limited scope to the jurisdiction conferred by article 25. But his Lordship's approach to interpretation must be subject to one important qualification. If a common law power of assistance existed **prior to** the enactment of the model law, the enactment of article 25 would not serve to diminish that jurisdiction. The language of the provision is unambiguously to the contrary. If the jurisdiction already existed, it would remain in existence following the enactment of the model law. The interpretation of article 25 in this circumstance, with its statutory encouragement to "*cooperate to the maximum extent possible*", would no doubt be quite different.

Therefore, from the important perspective in Australia and other adopting countries of determining the scope of permissible judicial cooperation under article 25, it is imperative to determine whether there already existed a potent common law power of assistance.

Bankruptcy Orders - Deciding Rights or Collective Enforcement Remedy?

A "bankruptcy order" may consist of an order that a company be wound up, or that a scheme of arrangement be sanctioned, or as evidenced by *Cambridge Gas*, that a plan of reorganisation under Chapter 11 of the US Bankruptcy Code be confirmed. The proper characterisation of such an order is one important aspect of the divergent approaches evident between Lord Hoffmann and Lord Collins.

Lord Hoffmann held the order of the US Bankruptcy Court was neither in personam nor in rem – it was a bankruptcy order and the purpose of bankruptcy proceedings is to provide a mechanism of collective execution. The shares in Navigators (owned by Cambridge Gas) were to be transferred to the creditors committee "*to enable the creditors to control the* [subsidiary] *shipping companies and implement the plan*"[11].

Lord Collins, in contrast, after first observing that the US Court's order was not of an in personam character, then said this:

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[11] Ibid at 514;[5].

> "The order vested the shares in Navigator in the creditors' committee. It did not declare existing property rights. Indeed the whole purpose of what was the functional equivalent of a scheme of arrangement was to alter property rights. But it is not easy to see why it was not an in rem order in relation to property in the Isle of Man in the sense of deciding the status of a thing and purporting to bind the world."[12]

Several observations may be offered in respect of these competing characterisations.

First, there appears to be a difference of view as to whether the US Court's order is "*deciding the status of a thing*" in respect of the shares, and in this sense possibly an in rem order. Characterisation is important because an identification of the nature of a bankruptcy order will guide the selection of the appropriate theory to govern its recognition internationally.

In the author's view, Lord Hoffmann's analysis on this point is to be preferred. There was no issue in the US Court as to who owned the shares. There was, indeed, no adjudication of private rights (albeit there was an alteration of private rights). The shares were, without contest, owned by Cambridge Gas. But Navigator was hopelessly insolvent, under a formal insolvency process, and the US Bankruptcy Act (as well as Manx legislation) provides means to address, collectively, the claims of creditors in this context. The order, indeed, presupposed Cambridge Gas' uncontested ownership of the shares (this fact necessitating the vesting clause in the plan). As Lord Mance puts it in *Rubin*, indicating why he was not prepared to subscribe to Lord Collins' view as the incorrectness of *Cambridge Gas*[13], the vesting of the shares in the creditor's committee "*was no more than a mechanism for disposing of Navigators' assets, which did not affect or concern Cambridge Gas. The Board was therefore, in its view (rightly or wrongly), concerned with the distribution of the insolvent company's assets in a narrow and traditional sense* "[14].

Secondly, it may be questioned whether it is the US Court's order, rather than the US Bankruptcy Act itself, that had the operative effect on the share ownership. Clarifying this issue is important given that Lord Collins' approach is premised on it being the foreign court's order that is, or is not, to be recognised and enforced.

Lord Collins clearly sees the order of the US Bankruptcy Court as having the operative effect, framing the ultimate legal issue as being one of whether **the order** is entitled to recognition in the Isle of Man. In this characterisation, Lord Collins, though supported by Australian authority in this respect, would appear to have overruled another recent Privy Council decision, that of *Kempe v Ambassador Insurance Company (in liquidation)*[15], delivered on behalf of the Board, it should be noted, by Lord Hoffmann.

The WA Court of Appeal has held that the effects of a scheme of arrangement are "*created*" by the Court's order.[16] This case was followed at first instance in Western Australian by Anderson J in *Bond Corporation Holdings Limited v State of Western Australia (No 2)*[17], his Honour expressly holding that it is the Court's order that has the operative effect "*not the resolution of the creditors and not the statute*"[18]. Delivering the opinion of the Privy Council in *Kempe*, however, Lord Hoffmann expressly disagreed with the above Australian authorities:

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12 Rubin v Eurofinance at [103].
13 Instead remaining neutral on the correctness of *Cambridge Gas*.
14 *Rubin v Eurofinance* at [182].
15 [1998] 1 WLR 271.
16 *Caratti v Hillman* [1974] WAR 92 at 95.
17 (1992) WAR 61.
18 Ibid at 68.

> "It is true that the sanction of the Court is necessary for the Scheme to become binding and that it takes effect when the order expressing that sanction is delivered to the Registrar. But this is not enough to enable one to say that the Court (rather than the liquidators who proposed the Scheme or the creditors who agreed to it) has by its order made the scheme. It is rather like saying that because Royal assent is required for an Act of Parliament, a statute is an expression of the Royal will. Under section 99 it is for the liquidators to propose the scheme, for the creditors by the necessary majority to agree to it and for the Court to sanction it. It is the statute which gives binding force to the Scheme when there has been a combination of these three Acts, just as the rules of the constitution give validity to acts duly passed by the Queen in Parliament."[19] (citations omitted)

Moving from a scheme of arrangement (and US plan of reorganisation) to liquidation, the position appears clearer with regard to a winding up order made by a Court. It is legislation that attaches the consequences to a winding up order, including the many and varied effects on property rights such as the stay on proceedings, the protection of the company's property against attachment, the restrictions on dealings with shares in the company, and the mechanisms that may, if deployed, displace or deplete property rights of stakeholders. When the supervising court seeks the assistance of a foreign court to protect assets located there, it is not seeking to enforce the order that the company be wound up, but instead requesting that the foreign court assist by affording protection consistent with the legislated winding up regime. It is recognition and assistance of the bankruptcy proceeding/process – the statutory effects as well as any specific court order – that is being sought.

Cross-border judicial assistance – jurisprudential underpinnings

Lord Collins analysed the issue in *Cambridge Gas* through the prism of judgment enforcement principles, bringing into play the forensic tests for international jurisdiction that are essential foundations for the application of the doctrine of obligation.

In contrast, there is no attempt by Lord Hoffmann to base the *Cambridge Gas* decision on any rule or principle that a "bankruptcy proceeding" is entitled, internationally, to be recognised and enforced in the same sense (though governed by different rules) as in personam orders and in rem orders are recognised and enforced internationally. In contrast, Lord Hoffmann indicated there was only one source of jurisdiction for the Manx Court to make such an order – pursuant to its common law power of assistance.[20]

Fundamental to evaluating the correctness of the *Cambridge Gas* decision is recognition that the jurisprudence deployed respectively by Lord Collins and Lord Hoffmann is fundamentally different. Lord Collins' approach is firmly rooted in the doctrine of obligation, resting on the public interest in limiting re-litigation. It is a black letter rule with no ambiguity and limited scope for contest as to its application. As Lord Hoffmann describes the doctrine:

> "When a judgment in rem or in personam is recognised by a foreign court, it is accepted as establishing the right which it purports to have determined, without further enquiry into the grounds upon which it did so. The judgment itself is treated as the source of the right[21]."

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19 *Kempe v Ambassador Insurance Company* [1997] UKPC 55 at [12].

20 Indeed, as Lord Hoffmann observes at [13], the New York Court was similarly aware that the vesting "could not automatically have effect under the law of the Isle of Man" which is why the order the US Court made confirming the plan recorded an intention to request judicial assistance.

21 *Cambridge Gas* at 516; [13].

Lord Hoffmann took no issue with the doctrine; rather, his Lordship considered it had no relevant application to the question of how the Manx Court ought to respond to the letter of request. Lord Hoffmann's alternative process of reasoning can be summarised as follows:

First, Lord Hoffmann discerned from the authorities the private international law principle of modified universalism, evident from the case law as far back as 1764 (*Solomons v Ross*[22]), and which his Lordship subsequently described in *Re HIH*[23] as being "*the golden thread running through English cross-border insolvency law since the 18th century*".[24] This principle requires a Court to recognise locally the person who is empowered to act on behalf of the company under the foreign bankruptcy law.

Secondly, bankruptcy proceedings should ideally have universal application where there is a single bankruptcy in which all creditors are entitled and obliged to prove, so that no single creditor should be advantaged (or disadvantaged) simply because the creditor resides in a jurisdiction where more of the assets or fewer of the creditors are located.

Thirdly, citing a South African case, *Re African Farms*[25] Lord Hoffmann held that such recognition "*carries with it the active assistance of the Court*". Again citing the *African Farms* decision, Lord Hoffmann went on to hold that active assistance could include permitting the foreign office holder to deal with the local assets in the same way as if they were within the jurisdiction of the foreign court administering the insolvency.

Fourthly, in applying these principles to the facts at hand in *Cambridge Gas*, Lord Hoffmann observed that the same outcome as under the US Plan could have been achieved via a scheme of arrangement in the Isle of Man, and it was therefore appropriate for the Manx Court to provide assistance by giving effect to the plan rather than requiring creditors to go to the trouble of commencing parallel Manx insolvency proceedings simply to achieve the same outcome.

Finally, the Court's power was subject to several constraints[26], including that the assistance did not infringe any local laws, and that it was not manifestly contrary to public policy. The relief could also, where appropriate, be subject to any conditions as may be imposed for the protection of local creditors[27].

Universalism or Obligation?

Universalism and obligation are very different theories and are underpinned by quite different considerations. Indeed, they are chalk and cheese. Where private rights of litigants are in issue in adversarial proceedings, the doctrine of obligation has much to commend it, but its underlying rationale sits ill at ease within the framework of an international insolvency:

> "The rationale underlying the granting of comity to a final foreign judgment is that litigation should end after the parties have had an opportunity to present their cases fully and fairly to a court of competent jurisdiction. The extension of comity to a foreign bankruptcy proceeding, by staying or enjoining the commencement or continuation of an action against a debtor or its property, has a somewhat different rationale. The granting of comity to a foreign bankruptcy proceeding enables the

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22 (1764) 1H Bl 131n.
23 [2008] 1 WLR 852.
24 [2008] 1 WLR 852 at 861.
25 In *Re African Farms* [1906] TS 373 at 377.
26 Hence the inclusion of the word "modified" in the description "modified universalism".
27 [2007] 1 AC 508 at 518.

> assets of a debtor to be disbursed in an equitable, orderly, and systematic manner, rather than in a haphazard, erratic or piecemeal fashion."[28]

In the author's view, the distinctions drawn above by a US Appeals Court are compelling, but the problems with any suggested application to cross border insolvency of the doctrine of obligation (or of the tests for international jurisdiction that are considered essential to the doctrine's efficacy) do not end there.

To begin with, authority is against the doctrine being the underlying rationale, in the sense that cross border judicial assistance has been provided in substantive ways where the supervising court lacked relevant in personam or in rem jurisdiction. There are many cases where courts in foreign jurisdictions have recognised an insolvency proceeding and assisted the liquidator or trustee take control of the assets of a bankrupt within that jurisdiction Most of these cases can perhaps be justified on the basis of other private international law principles[29]. This is not always the case, however. Take, for example, the Transvaal decision of *Ex parte B.Z. Stegmann*[30] where the application by a foreign trustee related to real property in Transvaal assigned to him as a matter of Cape law. The foreign trustee had no legally recognised entitlement (as a matter of Transvaal law) to have the assignment to him of that real property recognised and enforced. Judicial assistance was nonetheless provided in accordance with comity principles. This same issue came up more recently in Ireland, with the same outcome, the Irish Court assisting at common law.[31]

A second illustration can be found in the cases where a court has stayed local court proceedings by a creditor against a company that is in liquidation overseas. It is clear law that the stay imposed by insolvency legislation does not have extra territorial operation even though the surrounding insolvency provisions do. That is, Parliament in one country does not legislate to bind the courts of another country.[32] Notwithstanding that there was no foreign statutory provision, nor foreign Court order, effecting a stay of local proceedings, courts have nonetheless ordered a stay locally. To take but one example, from Lord Hoffmann's early judicial career, *Banque Indosuez SA v Ferromet Resources Inc*[33], Hoffmann J held:

> "This Court is not of course bound by the stay under United States Law but will do its utmost to cooperate with the United States Bankruptcy Court and avoid any action which might disturb the orderly administration of Inc in Texas under Ch11. This court has jurisdiction to make interlocutory orders for the preservation of Inc's property in this country by way of assistance to the United States Bankruptcy Court ..."

A third example is provided by the ancillary liquidation doctrine.

Closer to home, in *ML Ubase Holdings Co Limited v Trigem Computer Inc*[34], Brereton J refused to exercise the NSW Supreme Court's discretion to make a garnishee order absolute because the creditor seeking the order had also proven in the Korean scheme for reorganisation of the corporation. Again, it is clear from his Honour's judgment that Korean

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28 *Cunard Steamship Company Limited v Salen Reefer Services* (1985) 773 F.2d 452 at 457-458.

29 For example, principles pertaining to assignments of moveable property in the case of individual bankrupts where their assets have been transferred to a trustee, or in the case of a corporate insolvency, the principle that the law of the place of incorporation determines who has capacity on behalf of the company to deal with its assets.

30 [1902] TS 40.

31 *In the matter of David K Drumm, a bankrupt*, unreported, 13 December 2010, High Court, Dunne J.

32 As a matter of authority, these propositions were confirmed as long ago as 1874 in *re Oriental Inland Steam Co* (1874) R9Ch App 557, and recently confirmed in the English Court of Appeal in *Blooms v Harms* [2010] Ch187.

33 [1993] BCLC 112.

34 (2007) 69 NSWLR 577.

law did not prevent or preclude garnishee proceedings in Australia, but "*it is far more just and convenient that the claims of all creditors be resolved according to the law of the place of incorporation, where there can if necessary be a general pro-rata-distribution ...*"[35].

A further objection to the applicability of the doctrine of obligation as the relevant rule governing the circumstances where substantive rights of stakeholders affected by an insolvency can be enforced internationally is that the doctrine pertains only to Court orders. Frequently, the assistance being sought internationally arises not out of any order of the Court, but exclusively in respect of the legislative regime. There are many formal insolvency processes, illustrated in Australia by voluntary windings up, voluntary administrations, and deeds of company arrangement, where there is no necessary court involvement in the insolvency. Any theory for international recognition and assistance that is based on judgment enforcement theory, or its applicable tests for international jurisdiction, will struggle at a conceptual level to explain cross-border judicial assistance granted in respect of such processes.

A competing theory, comity, is more often cited as the underlying rationale for a court of one country assisting a foreign insolvency court (or liquidator).

Comity

The US Supreme Court, in *Hilton v Guyot*,[36] described comity in the following terms:

> "'Comity', in the legal sense, is neither a matter of absolute obligation on the one hand, nor of mere courtesy and goodwill, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws."[37]

If not a matter of "*absolute obligation*" nor "*mere courtesy and goodwill*", what then is comity's underlying rationale? Examination of an early analysis of comity by Story[38] provides some insightful analysis. In Story's review of the then existing literature in the area, the recurring themes were "*mutual interest*" and "*utility*", grounded in the observation that even though the laws of one country do not have direct force in another country, "*nothing could be more inconvenient in the commerce and general intercourse of nations, than that what is valid by the laws of one place should become without effect by the diversity of laws of another.*"[39] Story concludes:

> "The true foundation, on which the administration of international law must rest, is, that the rules, which are to govern, are those, which arise from mutual interest and utility, from a sense of the inconvenience, which would result from a contrary doctrine, and from a sort of moral necessity to do justice, in order that justice may be done to us in return[40]."

Supporting this conclusion, Story cites the jurist Rodenburg. The quotation is in Latin but is worth translating and reproducing as, though written two centuries ago in a different context, its rationale would appear to have clear parallels to the circumstances of the winding up of a company operating internationally:

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35 Ibid at [76].
36 159 U.S 113 (1895)
37 (Ibid at 163-164.
38 Story, J, *Commentaries on the Conflict of Laws* (1st ed, 1834), pp 1-38.
39 Ibid at 30.
40 Ibid at 34.

> "What manner of thing is there in the explanation that means that personal statutes should apply outside the territory? This alone: that the very nature of the thing or necessity entails that the law of only one jurisdiction, that of the domicile, should be held to be universal, as when it is a question of a person's status or condition; since it is necessary for a law to take the status of a man from one fixed place, because it would be absurd, and there would naturally be a conflict between those things, if the status or condition of a man who was travelling or sailing changed with each place to which he was carried, such that at one and the same time he would be independent in one place but subject to another's authority in another place, such that a wife would at the same time be subject to her husband's authority and free of it, such that in one place a man would be held to be wasteful and in another place frugal."[41]

While, contrary to Story's conclusion, comity is no longer seen as the theoretical underpinning of private international law, it nonetheless continues to play a major role in that field. Lord Collins, writing extra-judicially, has written of "*the resurgence of the doctrine of comity, not as a basis for the system of private international law, but as a basis for the development of particular rules and attitudes in the resolution of international disputes*".[42]

There has recently in Australia been a resurgence in interest in comity, both in its relevance in the cross-border insolvency field and in other areas. There have been judicial protocols entered into between the New South Wales Supreme Court and the equivalent courts in New York and Singapore to facilitate resolution of foreign law issues. Secondly, in recent proceedings relating to the admissibility of a debt in the liquidation of an HIH subsidiary in New Zealand, there was effectively a division of responsibilities between the New Zealand Court and Justice Brereton in the NSW Supreme Court, with each Court addressing the respective issues of law governed by their laws. Thirdly, speaking at an INSOL conference in Singapore, Justice Barrett considered the future may witness a "*strengthening of the principles of comity*" which would, according to his Honour, "*go hand in hand with the implementation of the model law where it is in force, with each likely to underwrite and strengthen the other*".[43] Finally, the Honourable JJ Spigelman AC, former Chief Justice of New South Wales, has spoken of the increasing opportunities (at conferences, for example) for interactions amongst judges from different jurisdictions, and "*an enhanced sense of international collegiality*" that has developed. "*This has considerably expanded the mutual understanding among judges of other legal systems. It has transformed the concept of judicial comity.*"[44]

In the author's view, the attribution in almost all of the authorities to comity as the foundation both for a Court's obligation not to "*interfere*" with a foreign insolvency, and for its power to act in aid of it, is securely grounded, and is to be favoured over any application of the doctrine of obligation or the tests for international jurisdiction that underpin it.

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41 Ibid at 35.

42 Lawrence Collins, 'Comity in Modern Private International Law' in Fawcett JJ (ed), Reform and Development of Private International Law (OUP, Oxford, 2002), p 91.

43 *Judicial Reflections on Insurance Insolvency* presented by Hon. Justice Barrett to the INSOL International Insurance Insolvency Ancillary Meeting, Singapore,13 March 2011<http://nswca.jc.nsw.gov.au/courtofappeal/Speeches/barrett130311.pdf> viewed 8 August 2013, at p 10. .

44 *MOU between New York and New South Wales* presented by the Honourable JJ Spigelman AC, Chief Justice of New South Wales to the New York State Bar Association International Section Meeting, Sydney, 28 October 2010 <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/spigelman281010.pdf/$file/spigelman281010.pdf> viewed 8 August 2010, at p 9.

Looking into the future - the rise and rise of the scheme of arrangement

The insolvency community is not immune from the dynamic change happening in society and commerce, and the last 10 years has seen some significant changes in the administration of insolvent estates, particularly at the large end of town. One driver of this change has been the recent emergence of hedge funds as a significant player in this space, bringing ideas, patience and (importantly) capital to the resolution of complex problems. By investing their equity as capital in the insolvent company (or converting debt that they have acquired into equity), they have a particular focus on preserving value, and a longer term horizon within which to secure a return on their investment. As formal insolvency processes such as liquidation and receivership are frequently accompanied by a destruction in value[45], there has been a renewed interest in the use of schemes of arrangement in an attempt to restructure a distressed company's balance sheet so as to return it to a state of solvency. Recent high profile examples in this country include Alinta and Centro.

The law surrounding schemes of arrangement is complex enough where such schemes have purely domestic factors at play, but where there are international creditors sought to be bound by the scheme, or creditors with foreign law as the designated proper law, additional legal complexities arise. According to settled principles of private international law, some issues that may be central to a scheme, such as discharge of a debt, are to be addressed by reference to the proper law of the contract. If the scheme is to be entered into in a jurisdiction other than that selected by the proper law clause, the effect of the scheme on that debt will not (or may not) be recognised internationally. Other private international law principles have also been applied to preclude effective international recognition of the effects of a scheme, even to schemes pertaining to insolvent companies, and to a scheme entered into by a company in liquidation.[46] Australian Courts have been mindful of these issues when considering whether to sanction a scheme of arrangement[47].

These authorities suggest that schemes purporting to bind all creditors, including those located overseas or with a selected overseas proper law will, or the very least may, face difficulties in securing compliance with the scheme in respect of those creditors. It would be an understatement to say that this is problematic. Absent a solution, it may mean that a distressed company may have no alternative but to pursue an alternative formal insolvency route, such as liquidation or administration (with all the value destruction risks).

There are two potential solutions to this dilemma. One is to undertake parallel schemes of arrangement in all of the relevant jurisdictions (as occurred with HIH, where business had been conducted in both England and Australia). This is, of course, an expensive solution, and the costs, delay and uncertainty associated with it is one of the reasons cited by Lord Hoffmann for the second alternative, being a solution based on universalist principles. That alternative is for the scheme to proceed in the natural forum[48], and for the position to be addressed in other relevant jurisdictions by the supervising court issuing a letter of request to the courts of those other jurisdictions asking that those courts assist by giving effect to the scheme locally. This is, indeed, what happened in *Cambridge Gas*.[49]

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45 For example, as ipso facto clauses are triggered, and "fire sale" connotations attach to asset sales.

46 *New Zealand Loan & Mercantile Agency Company Ltd v Morrison* [1898] AC 349.

47 See *Re Bulong Nickel Pty Limited* [2002] WASC 226, *Re Glencore Nickel Pty Limited* 44 ACSR 210, and *Re HIH Casualty & General* 215 ALR 562.

48 Generally the place of incorporation, though possibly the centre of main interest if that is different.

49 For completeness, it is noted that the UNCITRAL model law would also provide jurisdiction to order the necessary relief, but this solution will be confined to the 20 jurisdictions that have enacted the model law within their jurisdiction.

The other aspect associated with the rise of schemes of arrangement is that they are increasingly deployed not as an alternative means for winding up the company's affairs, but instead to restructure the insolvent company's balance sheet so as to restore solvency to the company. Such a process is directed at the same outcome as a formal liquidation or (quasi-liquidation) scheme, namely the best return for creditors from a company unable to pay its debts. It is therefore to be hoped that cross-border assistance will similarly be provided in respect of schemes aimed at such an outcome, notwithstanding that the company itself will continue to trade into the future as a viable entity[50].

Conclusion

In Australia at least, the Cross Border Insolvency Act will provide the solution in many, if not most, cross-border liquidations. But this will not always be so, particularly where complexity takes the matter into novel territory. The jurisdiction conferred by article 25 of the model law may also very much be dependent on the view a court takes as to its pre-existing power to assist.

Lord Hoffmann, in identifying the "*golden thread*" of universalism that has guided the common law for more than 200 years, is simply the latest distinguished judge to provide cross border assistance that is, at the same time, practical and representative of a principled development of the law.

It is suggested that the jurisprudence underpinning comity provides a secure foundation for this approach. Illustrating one aspect of that jurisprudence, Innes J in *Ex parte B.Z. Stegman* remarked, in granting assistance to the Cape Courts, that in doing so his Honour was "*trusting to receive reciprocal recognition in the future from those Courts.*"[51] And as Millett LJ (as his Lordship then was) said[52]:

> "In other areas, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention ... it is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."

To do any less would be to place at risk the delivery of fairness and equality of treatment to creditors and other stakeholders in the administration of an insolvent company.

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50 Indeed, that is exactly what happened in *Re Glencore Nickel* (2003) 44 ACSR 210 at 225 where McLure J sanctioned a scheme upon receipt of evidence that a US Court would likely "under the comity principle" restrain US creditors from acting contrary to the terms of the scheme.

51 [1902] TS 40 at 54.

52 [1998] Q.B. 81.

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WHERE'S THE GOLD?

The Case of the Missing Bullion

By The Hon. Justice Paul Heath
Judge of the High Court of New Zealand

WHERE'S THE GOLD?

A case study

[1] The UNCITRAL Model Law on Cross-border Insolvency (the Model Law) was endorsed by the General Assembly of the United Nations in December 1997. Since that time, it has been adopted in 19 states and territories throughout the world. Given UNCITRAL's mandate, the Model Law was directed primarily to commercial debtors (whether corporate or individual) with assets and/or liabilities in more than one state. The object was to provide procedural mechanisms to facilitate more efficient disposition of cases in which an insolvent debtor had assets or debts in more than one state.[1]

[2] Every now and then an unusual application will arrive on a judge's desk that immediately stirs his or her interest. A without notice application, made in the context of a cross-border insolvency case, to obtain a search warrant to locate allegedly concealed gold bullion in a dwellinghouse is such an application. It landed on my desk on September 10, 2010.

[3] At the time the application was made, the debtor, a retired individual who had been adjudged bankrupt in England, owed about £250,000 to Society of Lloyd's. By February 22, 2011, after gold, silver and other assets had been seized and sold, the Official Assignee at Hamilton,[2] (who had been appointed as the New Zealand court's agent) had realised assets to the value of just over $NZ3,000,000; enough to

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1 UNCITRAL Model Law on Cross-border Insolvency: The Judicial Perspective (United Nations, New York 2012) at para 9. This text can be accessed on UNCITRAL's website at http://www.uncitral.org/uncitral/publications/publications.html

2 The Official Assignee is a statutory officer appointed under the State Sector Act 1988 who is responsible for the administration of bankrupt estates of individuals and can also be appointed as a liquidator of a company placed in liquidation by the High Court. Section 399(2) of the Insolvency Act 2006 makes it clear that all Assignees and Deputy Assignees are "officers of the court". In practice, Official Assignees are appointed for different regions in New Zealand. In this case, Mr Currie, the Official Assignee at Hamilton, was appointed as the court's agent to get in, store and subsequently realize property belonging to Mr Simpson.

pay creditors in the English bankruptcy 100 pence in the pound, to meet all costs of realisation and to return a surplus to the debtor.

[4] In this paper, I endeavour to explain the background to the English bankruptcy, the circumstances in which the English trustee in bankruptcy sought relief under the New Zealand legislation adopting the Model Law and the legal issues that arose. The legal aspects may be of interest to a wider audience.

[5] Three issues of wider significance arose:

[a] To what standard was it necessary to be satisfied of the prospects of success of the substantive recognition proceeding, in order to grant interim relief on a without notice basis?

[b] Was it appropriate to issue a search warrant, as interim relief, to locate assets allegedly concealed in a person's home?

[c] Is it desirable to have residual provisions entitling a court in one jurisdiction to assist an insolvency representative or court in another? Or, should the adopted Model Law provisions be regarded as a code?

[6] As to the first, I took the view that it was enough to determine whether, *prima facie*, the application fell within the Model Law.[3] On the face of it, an insolvency representative had been appointed by a foreign court to administer a collective bankruptcy proceeding that was subject to the oversight of an English court. I left open the possibility that an argument to the contrary might be advanced by the debtor on the substantive application.

[7] On the search warrant issue, in a New Zealand bankruptcy, it was open for the court to issue a warrant to search a bankrupt's property for allegedly concealed property. Therefore, I saw no reason why the interim relief provisions of art 19 of the Model Law[4] should not be invoked for the same purpose.[5]

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3 *Williams v Simpson* [2011] BPIR 398 (HCNZ) at para [41], set out at para [33] below.

4 In New Zealand, the Model Law is given statutory effect by the Insolvency (Cross-border) Act 2006. Article 19, together with art 21(c), (d) and (f), incorporated by reference, were

[8] The debtor was an individual who was not trading in the country in which he had been adjudged bankrupt and was no longer living there full-time. He was not "habitually resident" in England.[6] Nor did he have an "establishment" in that country.[7] In those circumstances, it was not possible to make a recognition order under the New Zealand version of the Model Law.

[9] Fortunately, however, when the Model Law was adopted in New Zealand, parliament retained a residual power that authorised the High Court of New Zealand to act in aid of and to be auxiliary to courts exercising bankruptcy jurisdiction in other countries.[8] Because the English trustee in bankruptcy had obtained a letter of request from the English court as a fall-back position, I was prepared to make an order recognising the English bankruptcy and granting relief under that provision.[9]

[10] So, how did these issues arise? Let the story begin.

A Lloyd's Name goes bankrupt

[11] Alan Simpson was a consultant psychiatrist who, in the 1990s, lived in London, England. He practised out of consulting rooms in Harley Street. He was also a Lloyd's Name. On March 11, 1998, Lloyd's obtained judgment against Mr Simpson for £163,078.92. The judgment related to monies that Lloyd's alleged the Names were required to make to meet underwriting obligations.

[12] Understandably, Mr Simpson was unhappy about this state of affairs. Together with other Names, he brought proceedings in the English courts alleging

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adopted into New Zealand law by art 19 of the First Schedule to the Insolvency (Cross-border) Act 2006.

5 *Williams v Simpson* [2011] BPIR 398 (HCNZ), at paras [48] and [49] (set out at para [35] below). See also *Insolvency Act 2006*, ss 150 and 151 (set out at para [30] below).

6 In the absence of proof to the contrary, a person's "habitual residence" is presumed to be his or her "center of main interests": art 16(3) of Schedule 1 to the *Insolvency (Cross-border) Act 2006*. That is the touchstone for determining whether a proceeding can be recognised as a foreign main proceeding: *Insolvency (Cross-border) Act* 2006, Sch 1, art 17(2)(a). See *Williams v Simpson* [2011] 2 NZLR 380 (HC) at paras [42]–45 and [49] and paras [45] and [46] below.

7 *Insolvency (Cross-border) Act* 2006, Sch 1, arts 2(f) and 17(2)(b). See also para [47] below.

8 *Insolvency (Cross-border) Act* 2006, s 8, set out at para [50] below.

9 See para [51] below.

that Lloyd's was guilty of misfeasance in public office. The claims were dismissed by the Commercial Court and an appeal against that judgment was unsuccessful.[10]

[13] Mirroring Mr Simpson's view about its conduct, Lloyd's appears to have been rather aggrieved at the nature of the allegations Mr Simpson had levelled against it. There followed a determined resolve to obtain the fruits of the judgment in its favour.

[14] In 2009, Lloyd's petitioned the High Court of England and Wales to have Mr Simpson adjudged bankrupt. That petition was brought over 11 years after the original judgment in favour of Lloyds was entered. By this time, the amount owing had escalated to £242,920.29, including accrued interest and costs. Mr Simpson was adjudged bankrupt on September 9, 2009. Following an initial period of administration by the official receiver, Mr Williams became trustee of Mr. Simpson's bankrupt estate, on January 12, 2010.

Administration of the English bankruptcy[11]

[15] After his adjudication, Mr Simpson provided a statutory declaration to the official receiver answering questions to assist in the administration of the bankrupt estate. That document is dated October 7, 2009. It included an acknowledgement by Mr Simpson that he had read s 5 of the *Perjury Act 1911 (UK)* and was aware that providing false information deliberately to the official receiver was a criminal offence.

[16] Mr Simpson provided information to the official receiver about his assets and liabilities. Subsequently, in correspondence with Mr Williams, Mr Simpson confirmed the accuracy of the information. Relevantly, he disclosed that:

> [a] Although in the United Kingdom when he signed the declaration, his "home address" was 35 Ann Street, Hamilton, New Zealand.

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10 Generally, see *Society of Lloyd's v Henderson and Ors* [2005] EWHC 850 (Comm) and *Stockwell v Society of Lloyd's* [2007] EWCA Civ 930.

11 This summary is taken from my judgment in *Williams v Simpson* [2011] BPIR 938 (HCNZ), on an application for interim relief under art 19 of Sch 1 to the *Insolvency (Cross-border) Act 2006.* Article 19 of Sch 1 is the equivalent of art 19 of the Model Law.

[b] He had no personal assets of any significance. While bank accounts were disclosed in three different jurisdictions (New Zealand, Scotland and the Isle of Man), minimal amounts were held to his credit in each.

[c] The property at Ann Street, Hamilton was leased to Mr Simpson by the BV Adams No 2 Trust. The rental was disclosed as $NZ808 per month; $9696 per annum.

[d] He had two sources of income. The first was from a pension plan in the United Kingdom, payments for which began in 1998. The monthly amount of the pension he received was £103.80; £1245.60 per annum. The second was a net New Zealand superannuation payment of $NZ1284 per month; NZ$15,408 per annum.[12]

[e] He did not own a car but had the use of one from the BV Adams No 2 Trust "to drive [his] daughter [aged 12 years] to school".

[f] He had seven creditors, the most significant of which was Lloyd's. Mr Simpson described that debt as having been incurred in "2009" and as an "alleged debt for insurance underwriting". A debt to the United Names Organisation[13] of £85,000 was also disclosed, covering the period between 1996 and 2009.

[g] The only debt outside the United Kingdom was in relation to a "potential income tax liability" in New Zealand, for the period between 1999 and 2009. The amount was stated to be "unknown".

[h] Monthly household expenses were said to be $NZ1548; $NZ18,576 per annum.

[i] He had lost about £1,980 gambling, in the two years prior to his bankruptcy.

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[12] The exchange rate quoted in respect of all amounts stated in New Zealand dollars was $NZ2.15 = £1.00.

[j] He had been unemployed for 12 years, his last employer being Hong Kong University in 1993. He declared that he had "retired" in 1998, consistent with the time at which pension payments began to be made to him in the United Kingdom.

[17] Mr Williams and Mr Simpson entered into correspondence. The letters sent by Mr Simpson, on first reading, suggest an air of co-operation. Closer consideration of the contents painted a different picture.

[18] The correspondence began on February 10, 2010, when Mr Williams sent forms of authority for Mr Simpson to sign to enable him to make inquiries about assets and liabilities. The letter was written to Mr Simpson at his New Zealand address in Hamilton. Responses were received from that address until July 1, 2010, when Mr Simpson wrote to Mr Williams advising a "change of address until further notice" to "The Old Surgery, 18 Heath Road, Petersfield", Hertfordshire. Thereafter, Mr Simpson corresponded from the United Kingdom.

[19] While signing particular forms to enable Mr Williams to make inquiries (for example, directed to Her Majesty's Inspector of Taxes), Mr Simpson declined from the outset to sign a form authorising Mr Williams to obtain information from "all third parties worldwide who hold details" of his affairs. In a letter to Mr Williams dated March 29, 2010, Mr Simpson said:

> While I am conscious of the need to co-operate with you and of the need for you to make necessary inquiries regarding my affairs in relation to matters relevant to the bankruptcy as a result of your appointment in England, I am uncertain whether co-operation requires me to sign such an open ended and wide authority. I say this not because I do not wish to assist you, but rather as a matter of principle and from the academic viewpoint that I am concerned to protect my own privacy rights and do not know whether you are entitled to obtain such a worldwide authority in respect of unnamed third parties ....

[20] By letter dated May 7, 2010, Mr Williams advised Mr Simpson that "upon the making of the Bankruptcy Order against [him] on the September 7, 2009, all

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[13] A group that defended claims by Lloyd's against Names and attempted to bring misfeasance in public office proceedings against Lloyd's.

assets worldwide [vested] inside the bankruptcy estate which [Mr Williams] now [controlled]". Mr Williams added that a request in respect of individual entities on each occasion information was required would only delay "administration and the conclusion of" the bankrupt estate.

[21] In response, Mr Simpson advised, by letter dated June 7. 2010, that he had made his own inquiries and had "received very clear advice that [he was] under no obligation to sign [the worldwide authority] and that [he] should only sign authorities which [were] directed to specific entities". Mr Simpson reiterated this was not reflective of an unco-operative stance but one by which valid privacy concerns could be addressed. That viewpoint was again reiterated in a letter of July, 15 2010, after Mr Simpson returned to the United Kingdom.

[22] After Mr Simpson returned to the United Kingdom, Mr Williams continued to correspond with him. In a letter dated July 28, 2010:

[a] Mr Williams asked Mr Simpson directly to confirm whether he had previously traded in any gold or silver purchases which had subsequently been disposed of by him.

[b] Mr Williams stated that he understood the "Petersfield" address was that of a "Citizens Advice Bureau" and asked Mr Simpson to confirm his true residence in the United Kingdom, "by return".

[23] On August 12, 2010, Mr Simpson responded to both queries, stating:

[a] He had not disposed of or traded in silver or gold, so he had no details to send to Mr Williams.

[b] He had sought help from the Citizen's Advice Bureau because he was of "no fixed abode" and needed help with a "home application" and "Pension credit". He said that the Petersfield address remained his "only reliable address".

[24] In his letter of August 27, 2010, Mr Williams raised two other points:

[a] Despite Mr Simpson's position that he had not been a beneficiary of the BV Adams No 2 Trust for many years, Mr Williams asked him to provide further details of a loan from the Bank of New Zealand that took an "over-riding charge" over a mortgage in favour of Sennex Ltd, in respect of the property at 35 Ann Street. Mr Simpson was asked to confirm whether Sennex Ltd had traded in any gold or silver, in the event that the company was known to Mr Simpson.

[b] Mr Simpson was asked whether gold or silver trading had occurred through the BV Adams Trust.

No reply was received to that letter.

Mr Simpson's assets in New Zealand

[25] Records held by the Registrar-General of Land in New Zealand revealed that the original proprietor of the property at 35 Ann Street was Carrick John Clough. A search of the title identified the following interests:

[a] A mortgage in favour of Sennex Ltd, produced on May 20, 1998.

[b] A transfer of the property to Mr Clough and Mr Simpson jointly, produced on September 25, 2003.

[c] A mortgage to the Bank of New Zealand, produced on September 25, 2003.

[d] A priority instrument giving priority to the Bank of New Zealand mortgage over the Sennex mortgage, produced on September 25, 2003.

[e] A transfer of the property to Carrick John Clough and Victoria May Mann (the latter being a solicitor in Hamilton), produced on October 30, 2007.

[26] The registered proprietors held title to the Ann Street property in their capacities as trustees of the B V Adams No 2 Trust. The mortgage in favour of Sennex Ltd was executed on March 5, 1998 by Mr Clough. It recorded that the BV Adams No 2 Trust had been created by a will on 20 November 1958 and that Mr Clough gave the mortgage "solely in his capacity as trustee with the intention of binding himself and his successor as trustee only to the extent that the assets of the trust are available or would (but for the default of the mortgagor) have been available, ... to meet his liability under" the mortgage.

[27] The mortgage in favour of the Bank of New Zealand had a priority amount of $340,000 but, as is customary, was open-ended in relation to amounts actually secured. That mortgage was signed by both Mr Simpson and Mr Clough, on September 18, 2003.

The Model Law application

[28] Having not received any meaningful response from Mr Simpson to his "world-wide authority" request, Mr Williams applied to the High Court of New Zealand to recognise the English bankruptcy. That is the court with jurisdiction under New Zealand legislation that has adopted the Model Law.[14] At the same time, an application for interim relief was filed. By chance, it came before me on a without notice basis on September 10, 2010 in Auckland, because I was rostered to sit on circuit in Hamilton over the following three weeks.

[29] I was aware that the nature of the application for interim relief was unique. In broad terms, it sought a search warrant entitling a representative of the English trustee to enter the Ann Street property and to search for any bullion that might be concealed there. I was acutely aware that no such application had been granted in any jurisdiction that has adopted the Model Law.

[30] However, there is power for the High Court of New Zealand to make such an order in a domestic bankruptcy. Sections 150 and 151 of the *Insolvency Act 2006* provides:

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[14] *Insolvency (Cross-border) Act 2006*, Sch 1, art 2(g).

150 Warrant to search for and seize bankrupt's property

(1) The Court may issue a search warrant to the Assignee or any other person if there is reason to believe that any relevant property is concealed in a locality.

(2) The warrant may authorise the Assignee or other person named in the warrant, together with any assistants that may be necessary, to—

(a) enter and search the locality; and

(b) seize and take possession of any relevant property; and

(c) if necessary, use force to enter the locality, whether by breaking open doors or otherwise; and

(d) break open any box or receptacle at the locality, by force if necessary.

(3) In this section and in section 151,—

locality means any building, aircraft, ship, carriage, vehicle, premises, or place

relevant property means—

(a) any property of the bankrupt; or

(b) any document relating to the bankrupt's property, conduct, or dealings.

151 Seizure of bankrupt's property

(1) If authorised by a warrant issued by the Court, the Assignee or any other person, together with any assistants that may be necessary,—

(a) may seize any part of the bankrupt's property in the custody or possession of the bankrupt or of any other person; and

(b) with a view to seizing the bankrupt's property, may—

(i) break open any building or room of the bankrupt where the bankrupt is believed to be; and

(ii) break open any building, room, or receptacle of the bankrupt where the bankrupt's property is believed to be; and

(iii) seize and take possession of the bankrupt's property found in the building, room, or receptacle.

(2) For the purposes of this section and section 150, if the execution of a warrant takes place without the bankrupt being present, the person executing the warrant must leave in a prominent place at the locality searched a notice that—

(a) states the date and time when the warrant was executed; and

(b) states the name of the person who executed it.

(3) For the purposes of this section and section 150, the person executing the warrant must leave with the bankrupt, or leave in a prominent place at the locality searched if the bankrupt is not present, a list of any property seized during the course of the search.

(4) Subsection (3) does not apply if it is impractical to leave a list of property seized or if the bankrupt consents to receiving a list sent in accordance with subsection (5).

(5) If subsection (4) applies, the person executing the search must leave with the notice referred to in subsection (2), or with the bankrupt if the bankrupt is present, a notice stating that—

(a) relevant property has been seized in the course of the search; and

(b) within 5 working days after the execution of the warrant, a list of the property seized will be delivered or sent to the bankrupt or left in a prominent position at the place searched.

(6) If subsection (4) applies, the person executing the warrant must ensure that within 5 working days after the execution of the warrant there is delivered or sent to the bankrupt, or left in a prominent position at the place searched, a notice listing the property seized and identifying the place where the property was seized.

[31] I was not prepared to make an order, but indicated that I would see counsel in chambers in Hamilton on the Monday (September 13) to discuss matters further, if they wished. At that time, the evidence was that Mr Williams had been led to believe that approximately $US3,000,000 in gold and silver bullion was stored in three safes at that property. Mr Williams deposed, based on information from the anonymous informants, that he had fears Mr Simpson may dispose of the bullion through a precious metal dealer in New Zealand, meaning that the proceeds of sale could be dissipated, to the detriment of Mr Simpson's creditors.[15]

[32] I met with counsel on September 13, 2010. Following that meeting, I gave counsel an opportunity to provide further evidence on which I would decide the application. I indicated that I would need better evidence of the basis on which Mr Williams believed a search warrant was required. Further evidence came to light. In summary, it established:

[a] Mr Simpson arrived back into New Zealand on September 12, 2010, on a Thai Airways flight.

[b] Mr Simpson had been sighted recently in New Zealand; in particular, on September 13 and 14, 2010 driving a Holden Commodore vehicle in the vicinity of the Ann Street property.

[c] Through Sennex Ltd, Mr Simpson had been a client of a firm dealing in currency, bullion and derivatives for some time.

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[15] While Mr Williams' affidavit was largely based on hearsay, evidence of that nature is admissible on interlocutory applications in New Zealand. The hearsay nature of the evidence

[d] Significant open contract dealings occurred in the period between September 2009 and March 2010, after the commencement of the English bankruptcy.

[e] An estimated value of bullion that could be linked to Mr Simpson (or persons associated with him) was over $NZ1,000,000.

[f] Although Sennex Ltd obtained a mortgage over the Ann Street property in 1998, no company of that name could be located on the New Zealand register. While a company of that name had been found on the English register, it was not incorporated until 2004.[16] The priority instrument showed that Mr Clough executed that document on behalf of Sennex Ltd.

[g] Since September 11, 2001, the export of precious metals had been made more difficult. Therefore, while the risk of moving any assets within New Zealand remained high (if the interim relief application were made on notice), the chance the property might be shifted out of the jurisdiction was less likely.

[33] In those circumstances, I had to consider whether interim relief should be granted in the form of a search warrant. The very nature of the application meant that it could not be dealt with on notice to Mr Simpson, so that Mr Simpson was not alerted to the English trustee's actions, nor had the recognition application been served on him. A hearing date had not been allocated for the application to be heard. I decided that the appropriate approach was to make provisional findings as to the applicability of the Model Law provisions to the English bankruptcy to determine whether there was a sufficient evidential threshold to proceed to consider whether interim relief of the type sought should be granted. I said:[17]

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goes to reliability and weight. See High Court Rules 1985, rr 7.30 and 9.76 and *Makin v Hayward* (1991) 5 PRNZ 139 (HC).

16 Subsequently, it was established that this company had been incorporated in the British Virgin Islands.

17 *Williams v Simpson* [2011] BPIR 938 (HCNZ).

[41] Solely for the purpose of the interim relief application, I am satisfied that Mr Williams has been appointed by a foreign Court to administer a collective bankruptcy proceeding in relation to the affairs of Mr Simpson which is subject to the oversight (in different respects) of either the High Court of England and Wales or the Secretary for State. I do not foreclose any argument of that type on the substantive application, on which Mr Simpson will be heard.

[34] In discussing art 19 of the Model Law, I made these observations:[18]

[a] The purpose of art 19 was to provide a mechanism to enable the court to protect assets or the interests of creditors when concern exists that the assets may perish, be susceptible to devaluation or otherwise be in jeopardy. The emphasis was on flexibility of approach. The framers of the Model Law could not have anticipated the vast array of circumstances in which interim relief might be required. The provision was expressed in non-exhaustive terms, using the word "including" before specifying particular types of relief that might be ordered. Comparator cases in the United States under Chapter 15 of the *US Bankruptcy Code* (s 1519) highlighted the need for flexibility.[19]

[b] The relief contemplated by art 19 was designed to assist the general body of creditors under a collective insolvency regime, as opposed to relief aimed at helping individual creditors to obtain execution of a judgment debt. The collective nature of the bankruptcy regime supported an order when there were risks that assets may be spirited away or have their value diminished significantly, to the detriment of those who would otherwise share in the distribution of their proceeds.[20]

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18 Ibid, at paras [44]–[46].

19 Chapter 15 is that part of the *Code* that adapts the Model Law for application in the United States. Section 1519 is in material terms the same as art 19 of Schedule 1. See *Re Ho Seok Lee* 348 BR 799 (Bankr WD Wash, 2006) at 802, applying *Re Rukavina* 227 BR 234 (Bankr SDNY 1998) at 239-240.

20 For a discussion of the approach to personal and collective claims, in the context of the Model Law provisions, see *Rubin v Eurofinance SA* [2009] EWHC 2129 (Ch) at para 47 and *Rubin v Eurofinance SA* [2010] EWCA Civ 895 at para 61(2).

[c] The UNCITRAL Guide to Enactment reinforced those propositions. While a recognition application was pending, collective relief was to be restricted to urgent and provisional measures for the collective good.[21] That was consistent with interim relief extending only to the point at which a recognition decision is made.[22]

[35] I then considered whether a search warrant[23] would be available as a form of interim relief. I said:[24]

> [47] Article 19 plainly contemplates entrusting assets in jeopardy into the care of an appointed representative to preserve value. It would be odd if the ability to grant such relief extended only to property known to exist and readily locatable. It seems to me that, in an appropriate case, the flexibility inherent in art 19 could justify the issue of a search warrant to ascertain whether there are assets that are being concealed that might be in jeopardy if some form of interim relief did not attach to them.
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> [48] Under New Zealand law, once an individual has been adjudged bankrupt, the Official Assignee has power to seek a search warrant from this Court to obtain property that is part of the estate vested in the Official Assignee. The applicant for the warrant must establish "reason to believe that any [property of the bankrupt] is concealed in a locality".[25] The term "locality" is defined as "any building, aircraft, ship, carriage, vehicle, premises, or place".[26]
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> [49] The "reason to believe" test is the same as that applied when search warrants are sought in respect of suspected criminal offending, under s 198 of the *Summary Proceedings Act 1957*. In *R v Williams*,[27] the Court of Appeal expressed the view that "reasonable grounds to believe" meant an "objective and credible basis for thinking that a search will turn up the item(s) named in the warrant ...". It is for the judicial officer determining the application to determine whether that standard has been reached.
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> [50] I am satisfied on the evidence before me that there is a credible basis for believing that bullion or precious metals of the type to which the application relates are concealed at the Ann Street property. The bankrupt's

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21 Guide to Enactment, para 137.

22 *Insolvency (Cross-border) Act 2006*, Schedule 1, art 19(3).

23 While a search warrant may not be available in all jurisdictions, it may be possible in some for the Court to make an order authorising a search under the principles set out in *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 (CA).

24 Ibid, at paras [47]–[53].

25 *Insolvency Act 2006*, s 150(1). The words in square brackets reflect the type of "relevant property" in issue in this case, to which s 150(1) refers: see s 150(3)(a).

26 Ibid, s 150(3).

27 *R v Williams* [2007] 3 NZLR 207 (CA) at para [213]. For a summary of what applications for warrants should contain see para [224].

> denial of dealing in such metals, the absence of any reply to the question of Sennex Ltd trading in those products and the uncertainty about the corporate status of Sennex Ltd lead me to conclude that the dealings to which [the Official Assignee's] affidavit refer may well have been undertaken by Mr Simpson, either alone or in conjunction with Mr Clough. At least, there is a reason to believe that is the case.
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> [51] To the extent reliance is placed on information received by Mr Williams which has not been disclosed for fear of putting informers at risk, the information provided has, to a significant extent, been confirmed through independent inquiries made by [the Official Assignee] in New Zealand. In *R v Williams*,[28] the Court of Appeal emphasised that information from an informer that was verified through other inquiries could be treated as more reliable by the judicial officer responsible for issuing the warrant.
>
> [52] Any search warrant should be limited to orders this Court could make if the issue had arisen in New Zealand, in the context of a New Zealand bankruptcy.[29] In that regard I have considered whether such relief should be limited to that available prior to an order of adjudication being made in this country, in respect of which the type of interim relief that could be ordered is more restrictive.[30] On reflection, I accept Mr Crossland's submission that I should approach the question on the basis of an extant bankruptcy, albeit one commenced in England. That approach is appropriate because the prerequisites to the status of bankruptcy have been found proved in England and have not been challenged in that jurisdiction by Mr Simpson.
>
> [53] Because I am satisfied that this is a case in which the "reason to believe" threshold of s 150 has been passed, I hold there is jurisdiction to issue a search warrant as part of the provisional relief available under art 19. However, such relief must be tailored to ensure minimum invasion of property owned by third parties and take account of the possibility of mistake, if any items seized are subsequently found to be owned by persons other than Mr Simpson.

[36] I appointed the Official Assignee at Hamilton, Mr Currie, as the court's agent for the purpose of executing the search warrant I decided to issue. In case they may be of interest, I set out the search order, together with others I made:[31]

> [a] A search warrant shall issue authorising the Official Assignee at Hamilton, together with such assistants as may be necessary, to enter and search the dwelling, garage and any other outbuildings situated at 35 Ann Street, Hamilton to search for and to seize any safes or other receptacles containing bullion or other precious metals. In doing so, they are authorised to use force to enter the premises, whether by breaking open doors or otherwise, and to break open any safe or

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28 Ibid, at para [218].
29 *Insolvency (Cross-border) Act 2006*, s 8(3).
30 *Insolvency Act 2006*, s 50.
31 *Williams v Simpson* [2011] BPIR 938 (HCNZ) at para [56].

receptacle in order to ascertain whether bullion or other precious metals are stored in them. The warrant is issued subject to the following additional conditions:

[i] The warrant shall be executed by the Official Assignee at Hamilton and at least one constable.

[ii] Any items seized shall be taken immediately, under Police guard, to the premises of Westpac Banking Corporation in Auckland where they shall be stored in a secure vault pending further order of the Court.

[iii] The execution of the search warrant shall be filmed in its entirety and a video cassette or DVD recording what has taken place shall be filed in Court and served on Mr Simpson, Mr Clough and Ms Mann as soon as practicable after the search has been undertaken.

[iv] If the execution of the warrant does not occur in the presence of Mr Simpson, the Official Assignee at Hamilton shall leave a written notice in a prominent place in the dwelling stating the date and time when the warrant was executed, the buildings which were searched and the names of those involved in the execution process. The notice shall also contain a list of property seized during the course of the search. Otherwise, the provisions of s 151 of the Insolvency Act 2006 apply.

[v] The Official Assignee at Hamilton shall file and serve a report of what occurred during the search within 48 hours of completion of the search process. Service shall be effected on the persons identified in para [56](d) below.

[b] Suspending Mr Simpson's right to transfer, encumber or otherwise dispose of any of his assets situated in New Zealand.

[c] Authorising the Official Assignee at Hamilton to summon Mr Simpson to be examined before an Associate Judge of this Court at 10am on Tuesday 21 September 2010. The summons may require Mr Simpson to produce and surrender to the Court any document in his possession or control relating to his property, conduct or dealings. The conduct of the examination shall be in accordance with s 166 of the *Insolvency Act 2006*. No expenses need be tendered to Mr Simpson to attend examination.

[d] The application for recognition and all documents filed in relation to the interim relief application, together with Minutes issued by me and this judgment shall be served on the following people:

[i] Mr Simpson

[ii] Mr Clough and Ms Mann, as registered proprietors of the property at 35 Ann Street

[iii] The Commissioner of Inland Revenue, a potential creditor disclosed by Mr Simpson.

[e] Any person claiming an interest in any property seized may apply to the Court for an order requiring the property to be returned to them. Such application shall be heard contemporaneously with the application for recognition.

[f] All orders are made on the basis that the undertaking as to damages filed by Lloyd's extends to any losses caused to any person in the event that property is owned by third parties and has been, therefore, wrongfully seized.

(footnotes omitted)

[37] I then sat back to see what happened!

The search warrant is executed

[38] The search warrant was executed on September 20, 2010. Bullion, currency and precious metals of the type for which the search was authorised were located, amounting in value to about $NZ1,000,000.

[39] The examination of Mr Simpson was conducted before Associate Judge Faire. During that examination, Mr Simpson contended that the bullion was owned by the B V Adams No 2 Family Trust, of which Mr Clough and Ms Mann were trustees. They were the registered proprietors of the Ann Street property.

[40] The recognition application had been set down for hearing on October 1, 2010. Nevertheless, on September 29, 2010, counsel for the trustee sought a further search warrant.[32] Once again, the subject of the search was to be bullion, currency, precious metals and allied documentation. The application was based on affidavits from Mr Currie, and a builder, Mr Holloway, who had contacted Mr Currie after newspaper reports of the initial search.

[32] *Williams v Simpson* HC Hamilton CIV 2010-419-1174, 29 September 2010.

[41] In my judgment on this application I summarised the position in this way:[33]

> [9] In short, Mr Currie's deposition established there was a shortfall between the bullion seized and documentation identified bullion obtained. The difference is said to be 41 bars. As a result of the audit carried out by the Official Assignee, inquiries were made to ascertain whether there were other places in which bullion could be stored.
>
> [10] Mr Holloway was contacted. He has sworn an affidavit deposing that in December 2009, his company was contracted by Mr Simpson to replace flooring at the Ann Street property. As a result of that engagement, two compartments were created within the house. Mr Holloway says that Mr Simpson told him that the first was a place for storage of water and a survival kit. The second was to store suitcases. Somewhat bizarrely, Mr Holloway says that Mr Simpson told him he was doing this "because he believed the world was going to end".
>
> [11] Mr Holloway's employees installed the first compartment under the dining room. Part of the floor could be lifted up if screws that were installed were removed. This part of the floor was not glued by the contractors. The second compartment is located off a downstairs storeroom, leading underneath the kitchen. That enables access under the rest of the house. There is an existing hatch for under floor access. In that area, a concrete pad was laid and a concrete block surround constructed.
>
> [12] Based on that evidence, I am asked to authorise a further search of the Ann Street property not only in the area of the two compartments but also in the balance of the dwelling, garage and outbuildings.
>
> [13] That request is made because of concerns on the part of the trustee in bankruptcy about Mr Simpson's credibility and a fear that he may have moved bullion stored in the compartments back inside the house and placed it within safes that have already been searched or, indeed, in other places around the dwelling. Mr Crossland, for the trustee in bankruptcy, has, for example, identified that some bars were found in the vanity unit in the bathroom and others under documents contained in the bottom drawer of a filing cabinet; two bars were located underneath that bottom drawer.
>
> [14] Mr Hammond, for the trustees of the B V Adams No 2 Trust, as registered proprietors of the dwelling, submitted that the scope of the search should be restricted to the two rooms identified in Mr Holloway's affidavit. He confirms, and I expressly record at his request, that his instructions from the two trustees, Mr Clough and Ms Mann, are to co-operate in allowing searches to be undertaken in terms authorised by the court. They have no desire, Mr Hammond informs me, to obstruct in any way the functions that the Official Assignee is undertaking at the direction of the Court. In making

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[33] *Williams v Simpson* HC Hamilton CIV 2010-419-1174, 29 September 2010, at paras [9]–[16]. The application was made on notice to the trustees of the B V Adams No 2 Trust who were subjected to an order that they not disclose the existence of the application to Mr Simpson.

that submission, Mr Hammond made it clear that he had no instructions to consent to any search order. However, an order was not actively opposed.

[15] Ms Bryant, for the same trustees, made submissions also about the scope of any search. Her submissions were directed to the extent to which the Official Assignee and members of a search party may be entitled to look at documents to ascertain whether they are relevant for seizure or privileged. That concern arose out of the possibility that some documents had been used inappropriately by the Official Assignee to undertake further inquiries and as a result of the location of a photograph taken of a cheque book that was found in the dwelling.

[16] The latter photograph was significant because it was a cheque book in the name of "J W Smith", an alias that the trustee in bankruptcy alleges was used by Mr Simpson. In his examination before Judge Faire, Mr Simpson described "Mr Smith" as a person whom he knew in Hong Kong.

[42] I decided, given "the result of the audit conduct by the Official Assignee and the bizarre circumstances in which the two compartments came to be constructed at the Ann Street property during the period of the English bankruptcy"[34] to issue a further warrant. Again, I sat back to see what would happen!

[43] News came through that the search had located more bullion, currency and precious metals. Again, the value was something in the vicinity of $NZ1,000,000.

[44] All of the assets seized were held pending resolution of the recognition application and disputes about ownership that I thought were likely to ensue.

The recognition application[35]

[45] The interesting aspect of the recognition hearing was Mr Simpson's position as an individual who no longer lived in the country in which he had been adjudged bankrupt and was not involved in trading activities. At the heart of the application was whether England was the "center of [his] main interests"[36] or an "establishment".[37] If the former, the English bankruptcy could be recognised as a foreign main proceeding;[38] if the latter, as a foreign non-main proceeding.[39]

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34 Ibid, at para [25].
35 *Williams v Simpson* [2011] 2 NZLR 380 (HC).
36 *Insolvency (Cross-border) Act 2006*, Sch 1, art 17(2)(a).
37 Ibid, art 2(f), definition of "establishment".
38 Ibid, art 17(2)(a).

[46] I held that Mr Simpson did not have his "center of main interests" in England. In determining this issue it was necessary to consider the meaning of the term "habitual residence" which provides a presumptive location for a person's center of main interests in the case of an individual. In my judgment, I said:[40]

> [42] The term "habitual residence" is well known in international law. For example, in New Zealand, it is used in the Care of Children Act 2004, in those parts of the statute which enacts the Hague Convention on the Civil Aspects of Child Abduction. In *Basingstoke v Groot* [[2007] NZFLR 363 (CA)] our Court of Appeal said that the inquiry into "habitual residence" was a "broad factual one, taking into account such factors as settled purpose, the actual and intended length of stay in a State, the purpose of the stay, the strength of ties to the State and to any other State (both in the past and currently), the degree of assimilation into the State (including living and schooling arrangements), and cultural, social and economic integration". I see no reason why "habitual residence", for the purposes of the Act, should be approached any differently.
>
> [43] Where is Mr Simpson's "habitual residence"? It is clear that Mr Simpson has lived in New Zealand for many years. In the bankruptcy petition presented in England, Lloyd's disclosed that he was residing in New Zealand. The petition was not presented on the basis that Mr Simpson was amenable to the jurisdiction of the English Courts by reason of residence, but because he "carried on ... business" "as a member of the Society of Lloyd's" and had done for the greater part of six months before the petition.
>
> [44] Importantly, Lloyd's bankruptcy petition did not assert that Mr Simpson's centre of main interests was in England. In para 1 of its petition, Lloyd's said:
>
> > 1. [Mr Simpson's] centre of main interests is not within a Member State and therefore the EC Regulation on Insolvency Proceedings does not apply.
>
> [45] If Lloyd's had believed that Mr Simpson had his centre of main interests in England, it would have been necessary to aver that fact to ensure the English Court had jurisdiction to open main proceedings in that country. Lloyd's own stance on this point tells against a finding that Mr Simpson has his centre of main interests in England.
>
> ...
>
> [49] I am not persuaded that those factors are enough to rebut the presumption based on "habitual residence". Mr Simpson has lived in New Zealand for many years; he goes to England each summer to enjoy the cricket and to see family; he has a school aged daughter in New Zealand and regards this country as his home. Mr Simpson's centre of main interests is in New

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39 Ibid, art 17(2)(b).

40 *Williams v Simpson* [2011] 2 NZLR 380 (HC), at paras [42]–[45] and [49].

Zealand. On that basis, it is not permissible for this Court to recognise the English bankruptcy as a "foreign main proceeding".

[47] Nor did I consider that the bankruptcy could be recognised as a foreign non-main proceeding because Mr Simpson did not, at the relevant time, have a place of operation in England from which he carried out a non-transitory economic activity with human means or goods or services.[41] After referring to authorities from other jurisdictions[42] I took the view that the definition of "establishment" was difficult to apply in the context of a retired professional who stated he had been unemployed for 12 or 13 years and was drawing a private pension in the United Kingdom as well as New Zealand superannuation.

[48] I considered also the use of the present tense in art 16(3) of the Model Law, which provides that a person's habitual residence *is* presumed to be his place of establishment. I said:[43]

> [64] Like s 1502(2) of the US Bankruptcy Code, art 16(3) of Schedule 1 uses the present tense. Both provisions have their origin in art 2(f) of the Model Law. In New Zealand, having also adopted the latter part of the Model Law's definition of "establishment" (with "human means and goods or services"), there is a more compelling case for taking the same approach to the interpretation of "establishment".
>
> [65] It is true that English law permits a creditor to present a petition against a debtor based on that person having "carried on business in England and Wales".[44] However, the use of the *present* tense in art 16(3) militates against a conclusion, based on a ground on which a bankruptcy petition might be presented in England, that is expressed in the *past* tense. In other words, while under English law Mr Simpson is subject to the bankruptcy laws of that country, on the basis that he is still in the process of winding up his business activities, that is not a reason for holding that he, *in fact*, has a place of operations in England or Wales from which he (presently) "carries out a non-transitory economic activity with human means and goods or services". On the facts, such a conclusion would be a mere fiction.

[49] It followed that the Model Law provisions did not permit recognition.

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41 *Insolvency (Cross-border) Act 2006*, Sch 1, art 2(f); definition of "establishment".

42 In particular, *Shierson v Vlieland-Boddy* [2005] EWCA Civ 974, *Re Ran* 607 F 3d 1017 (Fifth cir 2011) and two decisions in the *Bear Stearns* litigation, *Re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* (in provisional liquidation) 374 BR 122 (Bankr SDNY 2007) at 131 and 389 (BR 325 SDNY 2008).

43 *Williams v Simpson* [2011] 2 NZLR 380 (HC) at paras [64] and [65].

44 *Insolvency Act 1986 (UK)*, s 265(1)(c)(ii); see also *Theophile v Solicitor* General [1950] AC 186 (HL) and *Re a debtor (No 784/1991, ex parte the debtor v Inland Revenue Commissioners* [1992] 3 All ER 376 (Ch D).

An alternative method of recognition

[50] Fortunately, when the New Zealand parliament enacted the *Insolvency (Cross-border) Act 2006*, it expressly retained, as a residual power, the ability of the High Court to act in aid of overseas courts. Section 8 of the Act provides:

> **8 High Court to act in aid of overseas courts**
>
> (1) This section applies to a person referred to in article 1(1) of Schedule 1.
>
> (2) If a court of a country other than New Zealand has jurisdiction in an insolvency proceeding and makes an order requesting the aid of the High Court in relation to the insolvency proceeding of a person to whom this section applies, the High Court may, if it thinks fit, act in aid of and be auxiliary to that court in relation to that insolvency proceeding.
>
> (3) In acting in aid of and being auxiliary to a court in accordance with subsection (2), the High Court may exercise the powers that it could exercise in respect of the matter if it had arisen within its own jurisdiction.

[51] In case of difficulties with the Model Law application, the English trustee had obtained a letter of request from the English Court. I decided that s 8 enabled me[45] to recognise the English bankruptcy and to grant relief entitling the Official Assignee to realise assets and distribute proceeds to the English trustee, subject to resolving some residual issues in the New Zealand Courts. I said:[46]

> [86] In this particular case, in the absence of evidence to the contrary, Mr Williams has a strong case for asserting that the bullion and foreign currency found in Mr Simpson's home is his property and has been concealed from seizure for the benefit of creditors in the English bankruptcy. I take into account, in making that finding, the information provided to me by Mr O'Neill, for Mr Clough, at the recognition hearing, which suggests that the two trustees of the B V Adams No 2 Trust have different views about whether the assets seized are held on trust by them. As I said at the hearing, those circumstances disclose the need for the trustees to consider carefully

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45 Applying a "universalist" approach of the type asserted by the Privy Council in *Cambridge Gas Transport Corporation v Official Committee of Unsecured Creditors of Navigator Holdings Plc* [2006] 3 All ER 829 (PC) at 834–835. And established principles of comity.

46 *Williams v Simpson* [2011] 2 NZLR 380 (HC), at paras [86]–[87].

their position and whether it is preferable for an independent trustee to be appointed to deal with the ownership issues that have arisen.

[87] I am satisfied that relief should be granted, so that the Official Assignee (as this Court's agent) is authorised to take possession of the items seized and to undertake forensic analysis of the computer data and other documents presently in safe custody. There will also need to be provision for any disputes about ownership of the bullion and foreign currency to be resolved and for any issues concerning any legitimate tax debt owed by Mr Simpson in New Zealand to be determined. Those questions fall to be determined later, logically after ownership of the bullion and foreign currency has been ascertained. Orders that give effect to those requirements will preserve the interests of all parties while ownership issues are resolved.

Some thoughts

[52] *Williams v Simpson* is interesting because:

[a] It is a great yarn.

[b] It shows the flexibility of the interim relief provisions of the Model Law.

[c] It demonstrates a limitation of the Model Law when dealing with an individual who, while not trading has lived, incurred debt and accumulated assets in more than one country.

[d] It highlights the wisdom of retaining residual provisions, such as s 8 of the *Insolvency (Cross-border) Act 2006*.

1 of 1 DOCUMENT: Unreported Judgments Federal Court of Australia

31 Paragraphs

CRUMPLER ((AS LIQUIDATOR AND JOINT REPRESENTATIVE) OF GLOBAL TRADEWAVES LTD (A COMPANY REGISTERED IN THE BRITISH VIRGIN ISLANDS)) v GLOBAL TRADEWAVES ((in LIQ), RE GLOBAL TRADEWAVES LTD (in liq)) - BC201314415

Federal Court of Australia -- Queensland District Registry
Logan J

QUD 688 of 2013

28 October 2013

Crumpler (as liquidator and joint representative) of Global Tradewaves Ltd (a company registered in the British Virgin Islands) v Global Tradewaves (in liq), in the matter of Global Tradewaves Ltd (in liq) [**2013] FCA 1127**

BANKRUPTCY AND INSOLVENCY -- Cross-border insolvency -- UNCITRAL Model Law on Cross-Border Insolvency (Model Law) -- Cross-Border Insolvency Act 2008 (Cth) -- Application for recognition of proceedings in British Virgin Islands as a "foreign proceeding" under the Model Law given force of law in Australia by s 6 of the Cross-Border Insolvency Act 2008 (Cth) -- Application for summons of the examination of a former company director of now insolvent corporation pursuant to Article 21(1)(d) of the Model Law and s 581 and s 596B of the Corporations Act 2001 (Cth), each as applied by s 8 of the Cross-Border Insolvency Act 2008 (Cth).

(CTH) Corporations Act 2001

(CTH) Corporations Regulations 2001

(CTH) Cross-Border Insolvency Act 2008

(CTH) Evidence Act 1995

(CTH) Federal Court (Bankruptcy) Rules 2005

(CTH) Insolvency Act 2003 (BVI)

(CTH) Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law

Creque v Penn [2007] UKPC 44; *Re Mount Capital Fund Ltd (in liq)* [2012] IEHC 97, considered

Gainsford v Tannenbaum (2012) 293 ALR 699, cited

Cross-Border Insolvency II: a Guide to Recognition and Enforcement (2012, INSOL International: London)

Logan J.

[1] Messrs Russell Crumpler and Alex Lawson have been appointed by the Eastern Caribbean Supreme Court's High Court of Justice, the British Virgin Islands Commercial Division (the BVI Court) as the liquidators of Global Tradewaves Limited, a company registered in the British Virgin Islands. The British Virgin Islands is a British Overseas Territory of the United Kingdom.

[2] Messrs Crumpler and Lawson, in their capacities as liquidators and thus as "foreign representatives" for the Cross-Border Insolvency Act 2008 (Cth) (Cross-Border Insolvency Act) have applied for orders that the winding up proceeding in respect of Global Tradewaves in the BVI Court, namely BVI HC Com Claim No 2013/0090 (BVI proceeding) be recognised as a foreign proceeding for the purposes of the Cross-Border Insolvency Act. In addition, the BVI Court has issued a letter of request to this court requesting, materially, the examination of one Mahmood Riaz concerning the affairs of Global Tradewaves and the production by him of related books, records and other documents in his possession or control.

[3] Upon the footing that the Court recognises the BVI proceeding as a foreign proceeding and more particularly as "foreign main proceeding" for the purposes of the Cross-Border Insolvency Act, the liquidators have sought consequential interlocutory relief for the issuing of a summons for the examination of Mr Riaz concerning the affairs of Global Tradewaves and the production by him of related books, records and other documents.

[4] It is convenient, first, to consider the question of recognition. As to this, s 6 of the Cross-Border Insolvency Act provides that, subject to that Act, "the Model Law, with the modifications set out in this Part, has the force of law in Australia." The "Model Law" is defined by s 5 of the Cross-Border Insolvency Act to mean "the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law set out in the Annex to the United Nations General Assembly Resolution A/RES/52/158 (1997), the English text of which is set out in Sch 1 to this Act".

[5] In respect of corporations, this court is one of those which, by s 10 of the Cross-Border Insolvency Act, is taken to be a court specified in Art 4 of the Model Law as a court competent to perform the functions referred to in the Model Law relating to recognition of foreign proceedings and cooperation with foreign courts. Article 17 of the Model Law is directed to the recognition of a proceeding as a foreign proceeding and, as the case may be, in turn, either as a foreign main proceeding or a foreign non-main proceeding. It provides:

> Decision to recognize a foreign proceeding
>
> 1. Subject to article 6, a foreign proceeding shall be recognized if:
>   (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
>   (b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;
>   (c) The application meets the requirements of paragraph 2 of article 15;
>   (d) The application has been submitted to the court referred to in article 4.
>
> 2. The foreign proceeding shall be recognized:
>   (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
>   (b) As a foreign non main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.
>
> 3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.
> 4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

[6] "Foreign proceeding" is defined by Article 2 of the Model Law in this way:

> "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

[7] "Foreign main proceeding" and "foreign non-main proceeding" are respectively defined by Article 2 as follows:

> "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
>
> "Foreign non main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of the present article;

[8] The evidence establishes that the BVI Court is presently, via the winding up order it has made and the appointment of the liquidators as joint and several liquidators of Global Tradewaves, controlling and supervising the winding up of that company. That winding up proceeding is, in my view, a collective judicial proceeding in a foreign state for the purposes of the definition of "foreign proceeding" in Art 2 of the Model Law.

[9] The content of British Virgin Islands insolvency law so far as that winding up proceeding is concerned is to be found in the Insolvency Act 2003 (British Virgin Islands) (Insolvency Act 2003). An electronic copy of that Act is ex 1 in these proceedings, (the contents of that Act for the purposes of the exhibit being conveniently described by a paper reproduction of the table of contents of that Act). As so produced and tendered, I regard that electronic version as evidence of that statute admissible pursuant to s 174 of the Evidence Act 1995 (Cth). Further guidance as to British Virgin Island insolvency law and practice and to the interpretation of its Insolvency Act 2003 is to be found conveniently in a publication, Cross-Border Insolvency II: a Guide to Recognition and Enforcement, published by the International Association of Restructuring Insolvency and Bankruptcy Professionals, 2012. That appears to me to be a book which would be used by the courts in the British Virgin Islands as a convenient summary of insolvency law and practice in that locale. One sees by reference to the Insolvency Act 2003 and that book that there is in place in the British Virgin Islands a statutory regime for the winding up of corporations which has broad analogies with the Corporations Act 2001 (Cth) so far as provision for a court order for winding up, appointment of liquidators for that purpose and provision for the examination of those having knowledge of the affairs of the company being wound up.

[10] The evidence also establishes that the registered office of Global Tradewaves is in the British Virgin Islands. I am satisfied that it is in the British Virgin Islands that Global Tradewaves has its centre of main interests. That being so, the BVI proceeding is not just a foreign proceeding but also a foreign main proceeding. There is no evidence of any body of creditors in Australia, at least on present materials, in respect of Global Tradewaves. It is not necessary for the purposes of these proceedings, given the existence of a registered company office in the British Virgin Islands, the absence of any evidence of the carrying on of business in Australia or elsewhere than these or any other evidence to displace the presumption I the Model Law, to consider whether the identification of a company's centre of main interests for the purposes of the Model Law or the rebuttal of the presumption can only be established by evidence which is objectively ascertainable by third parties, cf. *Gainsford v Tannenbaum* (2012) 293 ALR 699, especially at para 46.

[11] In terms of formal requirements arising under the Cross-Border Insolvency Act, rules of court and an earlier order

made by me on 16 October 2013, the existence, formally, of the BVI proceedings is proved by a notarised and sealed copy of the winding up order made by the BVI Court in respect of Global Tradewaves. Publication of the proceeding in newspapers has occurred as required by the Court's order of 16 October 2013. There is evidence which establishes that for the purposes of s 13 of the Cross-Border Insolvency Act there are no proceedings under chapter five or section 601CL of the Corporations Act in respect of Global Tradewaves.

[12] Further, the evidence establishes that there are not, at present, other foreign proceedings concerning Mr Riaz. The liquidators have in their evidence candidly deposed that there may shortly be proceedings concerning Mr Riaz, also instituted in Dubai in the United Arab Emirates. Mr Riaz's connection with that country I will refer to shortly. So far as the British Virgin Islands itself is concerned, it will also be necessary later in these reasons for judgment to make some reference to its status, at least insofar as can be ascertained from materials presently before the Court and also facts of which I consider I can take judicial notice.

[13] Thus, the liquidators appointed by the BVI Court are, for the purposes of the Cross-Border Insolvency Act and the Model Law, foreign representatives. The liquidators have the benefit of the presumption found in Art 16 of the Model Law so far as recognition is concerned. In other words, because the registered office of Global Tradewaves is located in the British Virgin Islands, that place is, having regard to Article 16(3) of the Model Law, presumed to be the centre of that company's main interests. That the BVI Court is a foreign court is a given.

[14] Further, for the purposes of the Model Law the British Virgin Islands is, in my view, to be regarded as a state. Its status is that of a British Overseas Territory. Inferentially, on the face of the Insolvency Act, the British Virgin Islands has its own legislature. Further, on the basis of the orders and other materials in evidence from the Eastern Caribbean Supreme Court's High Court of Justice in the British Virgin Islands, the British Virgin Islands has its own judicial system. The ultimate appellate court for that judicial system is the Judicial Committee of the Privy Council: see, for example, by way of the exercise of that ultimate appellate jurisdiction, *Creque v Penn* [2007] UKPC 44. A helpful summary of the position so far as insolvency law and the court system of the British Virgin Islands is concerned is to be found in *Re Mount Capital Fund Limited (in liq)* [2012] IEHC 97 (Mount Capital Fund) at paras 3.1, 3.2 and 3.3 (Laffoy J).

[15] Having regard to the foregoing, I am satisfied that the BVI proceeding is both a foreign proceeding and a foreign main proceeding for the purposes of the Cross-Border Insolvency Act and the Model Law.

[16] That being so, a question then becomes whether a summons should issue for the purpose of Mr Riaz's examination?

[17] It is necessary first to consider whether the Court has power to issue such a summons or to direct the issuing of such a summons and if so what are the sources of that power. As to this, Article 21 (1) of the Model Law itself makes provision, relevantly, in these terms:

> Relief that may be granted upon recognition of a foreign proceeding
>
> 1. Upon recognition of a foreign proceeding, whether main or non main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:
>
> [...]
>
> (d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
>
> [...]
>
> (g) Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State.

As to Article 21(1)(g) of the Model Law, s 8 of the Cross-Border Insolvency Act provides:

> Identifying Australian laws relating to insolvency
>
> The Model Law has the force of law in Australia as if the Model Law referred to:
>
> (a) the Bankruptcy Act 1966 ; and
> (b) Chapter 5 (other than Parts 5.2 and 5.4A), and section 601CL, of the Corporations Act 2001;
>
> wherever the Model Law provides that the laws of the enacting State relating to insolvency are to be identified.

[18] It is to be remembered that the effect of s 6 is that, subject to the Cross-Border Insolvency Act the Model Law has the force of law in Australia. That being so, my view is that, by virtue of that Act and as made part of the law of Australia, Article 21 (1)(d) is itself a source of authority for the Court to order the examination of a witness concerning a company's "assets, affairs, rights, obligations or liabilities" and to produce to the Court on such examination "information" concerning those subjects. Read with s 8, Article 21(1)(g) provides for this incorporation, by reference of the nominated provisions of the Corporations Act and is a further source of power to summon a witness and order the production of documents concerning the affairs of a company in liquidation.

[19] Finally, and having regard to the letter of request, s 581 of the Corporations Act is, in the circumstances of this case, an additional source of relevant power. The British Virgin Islands is not in my view a prescribed country for the purposes of s 581(2) of the Corporations Act. The United Kingdom is, but the reference in the Corporations Regulations 2001 (Cth) (Corporations Regulations) to the United Kingdom does not, in my view, carry with it British Overseas Territories. Some indication of that is to be found in the separate prescription in the Corporations Regulations to the Bailiwick of Jersey, a territory of which Her Majesty the Queen exercises sovereignty in her capacity as Duke of Normandy. That suggests to me that the reference in Reg 5.6.74 is intended to be a reference solely to the United Kingdom rather than to other places for which the United Kingdom has responsibilities.

[20] In this particular case it is not necessary further to explore that subject. That is because there is in evidence the letter of request which I have mentioned. For the purposes of s 581(3) of the Corporations Act the British Virgin Islands is, in my view, to be regarded as a country other than Australia. It is a court which has, as I have mentioned, a recognisably similar insolvency jurisdiction to that exercised by this Court. It is, in my view, a court in respect of which this Court, as one having jurisdiction in matters arising under the Corporations Act, should act in aid of and be auxiliary to, so far as the administration of Global Tradewaves is concerned. I note that the Irish courts have a similar disposition to act in aid of the insolvency administration of the Courts of the British Virgin Islands, see Mount Capital Fund.

[21] The question then becomes whether or not the powers which I have described should be exercised? As to this, there is in evidence an extract search of the records of the Australian Securities and Investments Commission (ASIC) in respect of a company termed GTL Tradeup Proprietary Limited, ACN 145 955 906. That establishes that Mr Riaz is a current director of that company and that he has a residential address at Strathfield, in New South Wales, Australia.

[22] Further evidence of Mr Riaz's Australian residency is provided in a bundle of emails which form part of the liquidator's evidence. In an email of 26 June 2013, addressed to multiple addressees under the subject Global Tradewaves Limited, Mr Riaz advises, at para 4:

> This year, when I decided to moving [sic] to Sydney full time to look after my family business, I found a new partner who could inject the capital in GTL-BVI and turn around the company with his own vision. I agreed to give him full control of Global Tradewaves business to give him some extra comfort level and I resigned being director of Global Tradewaves, however, I have been under the contract with the new management that I will continue providing them my assistance wherever they require. [Sic].

That "new investor" would seem to be one "Ahmad Darwash": see an email from Mr Riaz to a Mr Mikkel Thorup of 7 March 2012.

[23] The email bundle contains an extensive exchange of correspondence relative to funds apparently placed with Global Tradewaves by Capricorn Currency Management (Cayman), a company carrying on business in the Cayman Islands, of which Mr Thurrup is the chief investment officer. It suffices for present purposes to record that I am well satisfied, having regard to that exchange of email correspondence, that Mr Riaz is a person likely to have an intimate knowledge of the affairs of Global Tradewaves. That is so even though, on the face of the email exchange, Mr Riaz asserts that he has resigned from the directorship of that company. It is not necessary for the purposes of today's proceedings to determine whether or not Mr Riaz is or is not what might be described as a "shadow director" of Global Tradewaves. It is not necessary so to decide because the power conferred by Article 21(1)(d) is not restricted to directors, either actual or shadow, but extends to "witnesses".

[24] Further, insofar as its provisions are available by the Cross-Border Insolvency Act, the Corporations Act by s 596B empowers the Court to summon a person for examination about a corporation's examinable affairs if satisfied that the person may be able to give information about examinable affairs of the corporation. I am, having regard to the email exchange and to the contents, of which I have referred generally already, well satisfied that Mr Riaz is such a person. As was put on behalf of the liquidators by Mr Goodwin of counsel in his helpful and careful submissions, there are reasons, why the court would not reach a concluded view as to Mr Riaz's status in terms of office holding in Global Tradewaves at this present juncture. The proceeding is one of an ex parte nature. Axiomatically, Mr Riaz has not been heard on the subject, neither has there been, as yet, any examination of him. These factors tell that as a matter of prudence, 596A should not be regarded as a source of power.

[25] Finally, if articles 21(1)(d) and 596B as applied by the Cross-Border Insolvency Act were not themselves sufficient, s 581 in the circumstances of the present case provides itself power to order the examination of Mr Riaz and to order him to produce documents concerning the affairs of Global Tradewaves.

[26] The earliest availability of a registrar of the court at least for the purposes of commencing an examination, is in Brisbane rather than Sydney. That being so, and my being firmly of the view that it is necessary to make early provision for the commencement of an examination, I propose to order that the examination be conducted, at least in the first instance, in Brisbane. I put matters that way because I did not in any way intend to foreclose the possibility of the conduct of an examination, if demonstrated to be more convenient, continuing before the court in Sydney. It is though, in light of that provision for an examination in the first instance in Brisbane, to make provision to ensure that Mr Riaz is not disadvantaged. That, in my view, will be sufficiently met by requiring the liquidators to provide him in advance with conduct money, including travel expenses not less than those which would be applicable in the event that the examination were one to which the Federal Court (Bankruptcy) Rules 2005 (Cth) applied.

[27] I note that the liquidators by their solicitors have given an undertaking to the court to provide Mr Riaz with such conduct money. That conduct money will include provisions of a return economy class airfare from Sydney to Brisbane.

[28] I propose to reserve the costs of the examination. Obviously enough, I am not exercising jurisdiction of the jurisdiction of the BVI Court. It is, in the first instance, in my view, for that court to determine the expenses properly incurred in the course of a BVI winding-up proceeding. I do no more than observe that the present application, both for recognition and consequentially for the examination of Mr Riaz, seems to me on the evidence to hand to be a logical, reasonable and necessary step in the winding up of Global Tradewaves.

[29] I shall also direct the registrar of this court to furnish to the registrar or other proper officer of the BVI Court by way of response to the letter of request, a copy of the orders that I propose to make today.

[30] Finally, I propose to reserve in those orders liberty to apply in the proceeding as one in respect of which there may well be need for further orders, either in respect of the transfer of an examination to Sydney or, for that matter, by way of ancillary relief arising from the issuing of a summons in respect of ensuring if Mr Riaz is in Australia, that he remain here. Further, the liquidators may have a need for information held in official records concerning Mr Riaz's movements. These are but contingencies on the face of the material filed. I do not in any way, by reference to them, intend to be prescriptive as to applications which may be made under liberty to apply. I refer to such matters solely because, on the evidence to hand it appears that, though Mr Riaz has a Sydney residence, he also undertakes business activities in Dubai. That doubtless informed the reference by the liquidators to the possibility of proceedings concerning Global Tradewaves and his association with that company being commenced in Dubai.

[31] There will be orders accordingly.

Order

1. Pursuant to Art 17 (1) of Sch 1 (the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law -- "Model Law") of the Cross-Border Insolvency Act 2008 (Cth) (Cross-Border Insolvency Act), the proceeding in the Eastern Caribbean Supreme Court in the High Court of Justice, Commercial Division, British Virgin Islands (BVI Court), BVI HC Com Claim No 2013/0090, (BVI Proceeding), by which the plaintiffs were appointed liquidators of the defendant on 23 September 2013, be recognised as a foreign proceeding for the purposes of the Cross-Border Insolvency Act.
2. Pursuant to Art 17(2) of Sch 1 of the Model Law, the BVI Proceeding be recognised as a foreign main proceeding for the purposes of the Cross-Border Insolvency Act.
3. Pursuant to para 1(g) of Art 21(1) of the Model Law, and subject to the exceptions for which s 8 of the Cross-Border Insolvency Act provides, all powers available to liquidators appointed under the provisions of the Corporations Act 2001 (Cth) (Corporations Act), be available to the plaintiffs as if they were liquidators appointed jointly and severally under that Act.

4.1 The plaintiffs:

   a. send a notice of the making of Orders 1-3 above in accordance with Form 21 to each person whose claim to be a creditor of the defendant is known to them; and
   b. publish a notice of the making of those Orders in accordance with Form 21 in The Australian newspaper.

4.2 Service of the order on the defendant be dispensed with.

5. Pursuant to Article 21 (1) (d) of the Model Law and pursuant to s 581 and s 596B of the Corporations Act, each as applied by s 8 of the Cross-Border Insolvency Act and Article 21(1)(g) of the Model Law, the Registrar summon Mr Riaz to attend in Brisbane, Queensland for examination on oath before a Registrar about the examinable affairs of the defendant at a time fixed by the Registrar and from day to day thereafter until the conclusion of the examination and that Mr Riaz bring with him to such examination for production thereat such books as are within his possession which relate to the defendant or any of the examinable affairs of the defendant as are specified in the summons.
6. The plaintiffs and their solicitors may at any time after Mr Riaz produces any of the books set out in order 5 above, take custody of the said books for the purpose of preparing for the examination.
7. The questions put to Mr Riaz and the answers given by him from any such examination be recorded in writing and that a copy of the same be furnished to the plaintiffs by the Registrar.
8. If the plaintiffs require Mr Riaz to authenticate the transcript of his examination in accordance with the provisions of the Corporations Act as applied by the Cross-Border Insolvency Act and the Federal Court

(Corporations) Rules 2000 (Cth) as likewise applied by that Act, he shall attend and authenticate the transcript.

9. A summons in the form annexed hereto and marked "A" be issued in relation to Mr Riaz.
10. Costs reserved.
11. The Registrar send a sealed copy of this order to the Registrar (or other proper officer) of the BVI Court.
12. Liberty to apply.

No appearance for the defendant.

Counsel for the plaintiffs: *Mr E Goodwin*

Solicitors for the plaintiffs: *Allens*

Examining a witness under the Model Law

Natalie Tatasciore, Senior Associate, Clayton Utz, Sydney

Crumpler (as liquidator and joint representative) of Global Tradewaves Ltd (a company registered in the British Virgin Islands) v Global Tradewaves (in liquidation), in the matter of Global Tradewaves Ltd (in liquidation) [2013] FCA 1127

http://www.austlii.edu.au/au/cases/cth/FCA/2013/1127.html

Background

Global Tradewaves Ltd was registered in the British Virgin Islands. Liquidators were appointed to the company by the Eastern Caribbean Supreme Court (the BVI Court).

Mr Riaz may have been a director of Global. By the time liquidators were appointed, he was resident in Australia.

The liquidators wanted to conduct a judicial examination of Mr Riaz in Australia. To obtain orders for that examination, they adopted a two-fold approach:

- they applied to the Federal Court of Australia for recognition of their appointment under the UNCITRAL Model Law on Cross-Border Insolvency;
- they obtained a letter of request from the BVI Court to the Federal Court.

In each case, the object was to obtain a Federal Court order for the examination of Mr Riaz.

It appears that Global may have had neither assets nor liabilities in Australia. That distinguished this matter from the majority of UNCITRAL recognition proceedings, which are directed at preserving the company's assets in the relevant company.

Recognition

The Federal Court had no hesitation in finding that the requirements for recognition of the BVI liquidation as the foreign main proceedings were satisfied. It is noticeable that, in arriving at this conclusion, the Court relied upon INSOL's Cross-Border Insolvency II: a Guide to Recognition and Enforcement (2012):

> *"Further guidance as to British Virgin Island insolvency law and practice and to the interpretation of its Insolvency Act 2003 is to be found conveniently in a publication, Cross-Border Insolvency II: a Guide to Recognition and Enforcement, published by the International Association of Restructuring Insolvency and Bankruptcy Professionals, 2012. That appears to me to be a book which would be used by the courts in the British Virgin Islands as a convenient summary of insolvency law and practice in that locale. One sees by reference to the Insolvency Act 2003 and that book that there is in place in the British Virgin Islands a statutory regime for the winding up of corporations which has broad analogies with the Corporations Act 2001 (Cth) so far as provision for a court order for winding up, appointment of liquidators for that purpose and provision for the examination of those having knowledge of the affairs of the company being wound up."*

Source of power to order an examination under the Model Law

Having recognised the BVI insolvency, the Federal Court's next task was to decide whether it was empowered to order the requested examination.

Interestingly, the Federal Court identified two separate sources of power in the Model Law.

The first was the Model Law itself, which is part of Australian domestic law in the form of the Cross-Border Insolvency Act 2008 (Cth). Article 21(1)(d) of the Model Law states that, upon recognition of a foreign proceeding, a court may grant "*any appropriate relief, including … [p]roviding for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs,"* etc.

In the Court's view, art 21(1)(d) was a standalone source of power for the making of orders for the examination of a witness about the company's assets, affairs, etc.

The second source of power was art 21(1)(g). In the Australian enactment of the Model Law, that article provides that an Australian court may grant "*any additional relief that may be available to [a liquidator] under the laws of this State*". Article 8 provides that this includes a reference to the provisions of the Australian Corporations Act that allow a Court to grant a liquidator's application for the examination of a person about the affairs of a company. The Federal Court held that this was a further source of power to order the examination sought by the foreign liquidators in this case.

The Court also held that the letter of request from the BVI Court was an additional source of power to order the examination. That was because s 581(3) of the Corporations Act allows an Australian Court which receives a letter of request about an corporate insolvency from a court of another country to exercise all the powers under the Corporations Act that it could exercise if the corporate insolvency had arisen in Australia. In the Court's view, the British Virgin Islands was to be regarded as a "country" for the purposes of that section (citing the Irish decision in Re Mount Capital Fund Ltd [2012] IEHC 97).

In obiter, the Court considered, but ultimately rejected, the possibility that there might even be a fourth source of power for the requested orders, in the form of s 581(2) of the Corporations Act:

> "(2) In all external administration matters, the Court:
>
> (a) must act in aid of, and be auxiliary to, the courts of:
>
> …
>
> (iii) prescribed countries;
>
> that have jurisdiction in external administration matters".

The countries prescribed for the purposes of this provision explicitly include "the United Kingdom" (reg 5.6.74), but not the British Virgin Islands. The Court noted that the British Virgin Islands is a British Overseas Territory, but concluded that the designation of "the United Kingdom" as a prescribed country for the purposes of s 581(2) did not extend to the British Overseas Territories:

> *"Some indication of that is to be found in the separate prescription in the Corporations Regulations to the Bailiwick of Jersey, a territory of which Her Majesty the Queen exercises sovereignty in her capacity as Duke of Normandy. That suggests to me that the reference in Regulation 5.6.74 is intended to be a reference solely to the United Kingdom rather than to other places for which the United Kingdom has responsibilities."*

(With respect, this part of the Court's reasoning is open to the objection that Jersey is not a British Overseas Territory, as was pointed out by the House of Commons Justice Committee - Eighth Report, *Crown Dependencies* (23 March 2010), Introduction, para 6.)

Should the examination order be made?

The final step for the Court was to consider whether the examination order should actually be made.

It looked at evidence of Mr Riaz's alleged involvement with Global. On the basis of that evidence it was satisfied that he was a person "likely to have an intimate knowledge" of the company's affairs. That knowledge was sufficient to justify an examination order under either or both of art 21 or s 596B of Corporations Act.

The Court was at pains to point out that it was unnecessary to reach any conclusion about whether Mr Riaz was a director of Global, since:

- art 21 empowered the Court to order an examination of a "witness", who did not necessarily have to be a director;
- similarly, s 596B empowered the Court to order an examination of a person "who may be able to give information about examinable affairs of" the company.

For more information, please contact:

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My courtroom rules: views from the bench

Grand Ballroom

Chair: The Honourable Mr. Justice Jonathan Harris
High Court of Hong Kong

The Honourable Mr. Justice Vinodh Coomaraswamy
Supreme Court of Singapore

The Honourable Mr. Justice Fabian Gleeson
Supreme Court of New South Wales

The Honourable Mr. Justice Arjan Kumar Sikri
Supreme Court of India

INSOL International

The Snipping of the Golden Thread and the Sacking of the Temple of Universalism

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The Snipping of the Golden Thread and the Sacking of the Temple of Universalism

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Acknowledgement

INSOL International is very pleased to present the 26th Technical Paper under its Technical Papers Series titled “The Snipping of the Golden Thread and the Sacking of the Temple of Universalism” written by John Verrill of Chadbourne & Parke LLP, London.

Until recently – the principle of unity and universality was very much part of English international insolvency law particularly when recognising and enforcing foreign insolvency judgments.

The UK Supreme Court has now decided that the principles that apply to the recognition and enforcement of foreign insolvency judgments are the same as those applicable to civil law judgments and that no distinction should be made thus declining to extend the concept of universalism to insolvency judgments.

This paper discusses the Supreme Court’s decision and its consequences in context. We hope that our members will find the authors analysis and arguments thought provoking and useful in practice.

INSOL International sincerely thanks John Verrill for writing this excellent paper.

July 2013

The Snipping of the Golden Thread and the Sacking of the Temple of Universalism[1]

John Verrill
Chadbourne & Parke LLP, London

> *"...the principle of (modified) universalism ... has been the golden thread running through English cross-border insolvency law since the eighteenth century"* Lord Hoffmann[2]

In the *Rubin* appeal,[3] which raised important questions about the approach of the English courts to cross-border insolvencies (a subject of growing practical importance at a time of rapid globalisation of both markets and companies) The Supreme Court of the United Kingdom has reached some surprising and disappointing conclusions. The purpose of this paper is to try to put the judgment and its consequence in context.

A. Background

David Rubin and his partner Henry Lan ("Rubin") are Receivers appointed by the English court who were subsequently the appointed foreign representatives of insolvency proceedings commenced in relation to The Consumers Trust ("TCT") (an English law bare trust) under Chapter 11 of the United States Bankruptcy Code in the Southern District of New York (Case No. 05-60155). TCT carried on a scheme known as the "*cashable voucher program*" which was shut down in the face of proceedings brought by the authorities of a number of States in the United States. Although TCT is governed by English law, all of its activities were carried on in the United States and to some extent in Canada.

In the course of the Chapter 11 insolvency proceedings, the Receivers brought adversary proceedings against Adrian Roman, his two sons and his corporate vehicle Eurofinance SA (the settlor of TCT) ("Roman et al"), *inter alia*, to recover monies transferred to them by TCT prior to it going into insolvency proceedings. Roman et al made a conscious decision not to participate in the New York proceedings. The United States Bankruptcy Court for the Southern District of New York ("the Bankruptcy Court") gave judgment against Roman et al on 22 July 2008 ("the Judgment"). The question which arose for determination on the appeal from the English court of Appeal[4] to the United Kingdom Supreme Court was whether the relevant parts of the Judgment could be recognised and enforced against Roman et al in England and Wales.

Roman et al sought to resist the recognition and enforcement of the Judgment in the UK on the grounds that, since they did not appear in the New York proceedings, then the US Bankruptcy Court did not have jurisdiction over them in accordance with English rules of private international law as set out in what was rule 36 of *Dicey, Morris & Collins*[5]. Roman et al said that, as a result, the Judgment, which they argued to be a judgment *in personam*, cannot be enforced against them in the UK. In effect, their position was that, notwithstanding they received substantial payments from an entity which carried on most of its activities in the United States and was in insolvency proceedings in the US, they were entitled to remain in the UK and to ignore the proceedings brought by the Receivers and that they could resist recognition and enforcement of the Judgment.

It was argued that this approach is not only unattractive but unrealistic in the modern world of globalised trade and business and cross-border insolvency proceedings. The English Court of Appeal found, Roman et al to be wrong. As the Judicial Committee of the Privy Council (a Judicial panel made up of UK Supreme Court Justices to deal with appeals from Commonwealth jurisdictions) explained in *Cambridge Gas Transportation Corporation v Official Committee of Unsecured Creditors of Navigator Holdings plc*[6] (*"Cambridge"*) (an Isle of Man case), orders

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1 The opinions and comments expressed in the paper upon the judgment are my own unless indicated. However the account of the arguments put by the Respondents to The Supreme Court draws heavily on the skeleton argument from both the Court of Appeal and the UKSC itself to which Tom Smith and Robin Dicker QC both of South Square contributed. Mistakes are those of the author.
2 In Re HIH Casualty and General Insurance Ltd: McGrath v Riddell (Conjoined Appeals) [2008] UKHL 21
3 Rubin & Anor v Eurofinance SA & Ors; New Cap Reinsurance Corporation (In Liquidation) & Anor v AE Grant & Ors (Conjoined Appeals)[2012] UKSC 46 (24 October 2012)
4 Rubin & Anor (Joint Receivers and Managers of the Consumers Trust) v Eurofinance SA & Ors [2010] EWCA Civ 895 (30 July 2010).
5 Dicey, Morris & Collins, Conflict of Laws (14th edition, 2006), as "Dicey's Rule 36.", Now Rule 43 (15th edition 2012).
6 [2007] 1 A.C. 508 P.C.

made in insolvency proceedings are classified as neither judgments *in personam* nor judgments *in rem* for the purposes of recognition and different principles govern the recognition and enforcement of such orders. The question arises what damage has the Supreme Court done to the enlightened approach of the Privy Council in *Cambridge*?

The relevant principles, as far as cross-border insolvency proceedings are concerned, arising from *Cambridge* appeared to be that:

(1) wherever possible, there should be a single insolvency proceeding in relation to an insolvent debtor which takes place in one jurisdiction and which has universal effect;

(2) to this end, the English court should recognise and wherever possible grant active assistance to such a foreign insolvency proceeding.

It was argued for Rubin that such assistance encompasses recognising and enforcing judgments and orders of the foreign court given in the course of the foreign insolvency proceeding. In Rubin, the US Bankruptcy Court requested the assistance and co-operation of the English courts through recognition of its judgments. The relevant parts of the Judgment in respect of which recognition and enforcement is sought were "*part and parcel*" of the Chapter 11 proceedings[7]. In accordance with the principles governing the grant of assistance to foreign insolvency proceedings, these parts of the Judgment ought to be recognised and enforced in the UK.

It was argued that the Court of Appeal was therefore correct to find that the court had jurisdiction at common law to recognise and enforce the relevant parts of the Judgment in the US Bankruptcy Court against Roman et al in their home jurisdiction, England. Having established the existence of this jurisdiction, there was no basis for contending that the court should not then exercise its obvious discretion to permit recognition and enforcement.

In addition to the jurisdiction at common law, it was argued that the court also has jurisdiction under the Cross-Border Insolvency Regulations 2006 ("the CBIR") to recognise and enforce the relevant parts of the Judgment. The CBIR have enacted into English law the UNCITRAL Model Law on Cross-Border Insolvency ("the Model Law") which is the UK equivalent of Chapter 15 of the US Bankruptcy Code. Although the Court of Appeal did not need to, and did not, decide this point, it appears to have preferred the view that there was also jurisdiction under the CBIR to recognise and enforce the Judgment[8].

The Rubin Respondents argued that there is jurisdiction under the CBIR to recognise and enforce the relevant parts of the Judgment, and this represents an alternative route to the recognition and enforcement of the Judgment at common law.

B. Detailed Facts

The background to the appeal concerned a scheme (or "scam" as it was described in the Court of Appeal[9]) established by Roman et al, and which operated in the United States (and Canada).

TCT

The scheme was operated through a trust, The Consumers Trust ("TCT"), established by the terms of a trust deed dated 25 March 2002 governed by English law. The settlor of the trust was the First Appellant, Euro-finance SA ("Eurofinance"). Eurofinance was a British Virgin Islands company which was wholly owned by Adrian Roman. The trustees of the trust were two solicitors and two accountants; all based in Harrow, England ("the Trustees"). As a result of separate actions the Trustees compromised their liability for breach of trust in consideration of the payment of several millions of dollars to the Receivers.

[7] Court of Appeal ("CA") Judgment para. 46
[8] CA judgment, para. 63
[9] Para 4 CA Judgment – in fact it had all the hallmarks of a Ponzi scheme.

The scheme

The purpose for which TCT was established was to carry on a sales promotion scheme in the United States and Canada, known as a cashable voucher program, created by Adrian Roman ("the Scheme").

Under the Scheme, arrangements were entered into with participating merchants in the United States and Canada. When the merchants sold products or services to customers, they offered their customers a cashable voucher promising a rebate of up to 100% of the purchase price for the product or service to be paid in three years. However, in order to obtain this payment, the consumers had to satisfy what the Deputy Judge at the first lower court hearing described as "*a complex and obscure process involving both memory and comprehension tests*"[10]. These tests were themselves assessed in a pedantic manner by those administering the scheme, the Trustees and Roman's two sons. In the New York proceedings it was described as a memory test designed to help you forget.

Under the arrangements, the participating merchants paid 15% of the face amount of vouchers issued by them to TCT to their sales prices and account for the uplift to TCT to fund the scheme[11]. Of these funds paid to TCT, only 40% was retained by the Trustees[12]. Of the remaining 60%, about half was paid to Eurofinance, and thus to Adrian Roman[13]. The balance was used for payments to various entities involved in the operation of the programme. From mid-2002 the Third and Fourth Appellants, Justin Roman and Nicholas Roman (Adrian Roman's adult children), also began to receive payments representing approximately 2% of the merchant payments[14].

Given that the Trustees only retained 6% of the face value of the issued vouchers, the success of the Scheme was necessarily predicated on the consumers either forgetting to redeem the vouchers or being unsuccessful in navigating the process required to be followed in order to obtain payment. The success of this strategy is evidenced by the fact that when the Scheme folded in 2005 the Trustees held nearly US$10 million in bank accounts in the United States and Canada.

Unsurprisingly, however, the Scheme attracted the attention of the authorities in the United States. The Scheme started to come to grief when it came to the attention of the Attorney-General for the State of Missouri who in January 2005 commenced proceedings against the Trustees, Eurofinance, Adrian Roman and others under Missouri consumer protection legislation[15]. In August 2005, the proceedings were settled on payment by the Trustees of US$1,650,000 together with US$200,000 in costs to the Missouri Attorney General[16]. This was in breach of the trusts establishing TCT, since the trust deed contained no indemnification of the TCT trustees.

The Attorney Generals of other States were also concerned by the Scheme and it became clear that further proceedings were likely.

Appointment of receivers and Chapter 11 proceedings

As a result, in November 2005 Adrian Roman caused Eurofinance to apply for the appointment of receivers to TCT to protect trust property which was at extreme risk of dissipation as claims came home to roost in the USA. On 14 November 2005 Rubin and Lan were appointed as Receivers by order of Mr Justice Lewison. On 5 December 2005, the Receivers then caused TCT to present a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code ("Chapter 11").

TCT was placed into Chapter 11 proceedings in New York as virtually all of its 60,000 creditors were located in the United States or Canada as were its assets[17]. The Scheme itself was

[10] [2009] EWHC 2129 (Ch), [2010] 1 All ER (Comm) 81, [2009]: Judgment para 7
[11] CA judgment, para 5
[12] CA judgment, para 5
[13] CA judgment, para 5
[14] CA judgment, para 5
[15] CA judgment, para 6
[16] CA judgment, para 6
[17] CA judgment para. 7

operated principally in the United States and also in Canada. In order better to ground jurisdiction in a US Bankruptcy Court which is used to hearing the cases of foreign applicants, the funds of TCT were moved from the Blue Ridge Bank of Missouri to JP Morgan in New York prior to filing.

On 24 October 2007 the US Bankruptcy Court approved a Plan of Liquidation for TCT, as did the English court as required by the order appointing the Receivers. On the same date Rubin and Lan as Receivers of TCT were appointed as foreign representatives in order to seek recognition of the Chapter 11 proceedings as foreign main proceedings under the CBIR in the UK. The order of the Bankruptcy Court specifically mandated the Receivers:

> *"to seek aid, assistance and cooperation from the High Court in connection with the Chapter 11 case, and, in particular, to seek the High Court's assistance and cooperation in the prosecution of litigation which may be commenced in this court, including relief regarding service of process, discovery, and the enforcement of judgments of this Court that may be obtained against persons and entities residing or owning property in Great Britain."* (emphasis added)

Adversary proceedings

On 3 December 2007 proceedings were commenced by the Receivers and the Official Committee of Unsecured Creditors of TCT before the Bankruptcy Court ("the Adversary Proceedings"). In the Adversary Proceedings claims were made, *inter alia*, for the recovery of monies paid to Eurofinance, Adrian, Justin and Nicholas Roman from the monies received by the Trustees from the merchants. Roman et al were served personally with the proceedings[18], but deliberately took the decision not to defend the proceedings.

As a result, the Adversary Proceedings were not defended at all. On 18 July 2008 the Bankruptcy Court granted the Receivers' motion for default and summary judgment and on 22 July 2008 default and summary judgment was entered by the Bankruptcy Court against Roman et al.

As to the Judgment, the relevant parts in respect of which the Receivers sought recognition and enforcement before the Court of Appeal were:

(1) Under paragraph 3, judgment was granted to recover the funds received by TCT from merchants which were paid out to the defendants[19].

    This order was made pursuant to causes of action in respect of unjust enrichment / restitution, fraudulent conveyance under State fraudulent conveyance laws, fraudulent transfer under Chapter 11 (11 USC section 548(a)) and avoidable transfer under Chapter 11 (11 USC section 550).

(2) Under paragraph 5, judgment was granted on the amounts transferred to the defendants within one year prior to the commencement of the TCT bankruptcy case including Roman et al[20].

This order was made pursuant to causes of action in respect of fraudulent transfer under Chapter 11 (11 USC section 548(b)) and avoidable transfer under Chapter 11 (11 USC section 550).

As explained further below, the relief granted in the Judgment under paragraphs 3 and 5 reflect claims arising under the US insolvency legislation (i.e. sections 548 and 550 of Chapter 11) is directly analogous to the relief which would have been available to an office-holder under English insolvency law[21] if TCT had been subject to an analogous insolvency proceeding in England.

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[18] CA judgment, para. 11.
[19] In the following amounts: Eurofinance/Adrian Roman US$8,377,504.76; Nicholas Roman US$432,338.86; Justin Roman US$238,514.31.
[20] In the following amounts: Eurofinance/Adrian Roman US$1,129,461.98; Nicholas Roman US$21,119.16. The sums ordered to be paid under paragraph 5 are also included within the sums ordered to be paid under paragraph 3.
[21] In particular, relief to set aside the transfers of funds made from TCT would have been available under section 238 (transactions at an undervalue) and/or section 423 (transactions defrauding creditors) of the Insolvency Act 1986

Application for recognition and enforcement

On 3 November 2008 the Receivers made an application to the High Court for recognition of the Chapter 11 proceedings in relation to TCT as foreign main proceedings under the CBIR and for relief permitting the enforcement of the Judgment. At first instance, the Deputy Judge (Nicholas Strauss QC) made an order recognising the Chapter 11 proceedings under the CBIR, but declined to make an order recognising and enforcing the Judgment. On appeal by the Receivers, the Court of Appeal (Ward, Wilson LLJ, Henderson J)[22] overturned the latter order and ordered that paragraphs 3 and 5 of the Judgment be recognised and enforced in England. The Court of Appeal dismissed the cross-appeal of Roman et al against the order recognising the Chapter 11 proceedings.

C. UK Bases for Recognising and Assisting Foreign Insolvency Proceedings

Under English law, there are four main juridical bases for assisting insolvency proceedings in other jurisdictions:

(1) Section 426 of the Insolvency Act 1986 provides a statutory power to assist corporate as well as personal insolvency proceedings in countries specified in the Act or designated for that purpose by the Secretary of State. All the countries to which it currently applies are common law countries or countries sharing a common legal tradition with England[23].

(2) The EC Regulation on Insolvency Proceedings ("the Insolvency Regulation")[24] applies to insolvency proceedings in respect of debtors with their centres of main interests (COMI) within the European Union (excluding Denmark)[25].

(3) The Cross-Border Insolvency Regulations (CBIR) came into force on 4 April 2006 implementing the Model Law. The Model Law provides for a wide range of assistance to foreign courts and office-holders. The Model Law has, so far, been implemented by 19 countries and territories around the world, including the United States and Great Britain[26].

(4) At common law the court has power to recognise and grant assistance to foreign insolvency proceedings.

As explained in the Explanatory Memorandum which accompanied the CBIR, Great Britain is accordingly "*in the unique position of having a suite of statutory procedures available in cross-border insolvency cases, as well as the flexibility of the common law*".

The different sources of the power to assist foreign insolvency proceedings complement and supplement each other, and are not mutually exclusive[27]. The Explanatory Memorandum explains that the underlying policy is to seek to engage in a genuine process of co-operation in international insolvency matters[28]. The stated policy aim is ultimately to reduce the costs in recovering assets from overseas, and thereby to increase funds available for distribution to creditors.

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[22] Supra

[23] The Cooperation of Insolvency Courts (Designation of Relevant Countries and Territories) Order 1986, S.I. 1986/2123 designated Anguilla, Australia, the Bahamas, Bermuda, Botswana, Canada, Cayman Islands, Falkland Islands, Gibraltar, Hong Kong, Republic of Ireland, Montserrat, New Zealand, St Helena, Turks and Caicos Islands, Tuvalu and the Virgin Islands. The Cooperation of Insolvency Courts (Designation of Relevant Countries) Order 1996, S.I. 1996/253 designated South Africa and Malaysia. The Cooperation of Insolvency Courts (Designation of Relevant Countries) Order 1998, S.I. 1998/2766 designated Brunei Darussalam.

[24] Council Regulation (EC) No. 1346/2000 of 29 May 2000 on insolvency proceedings.

[25] There are further European instruments which deal with the position of insurance companies and credit institutions: see Directive 2001/17/EC on the reorganisation and winding-up of insurance undertakings, Directive 2001/24/EC on the reorganisation and winding up of credit institutions, the Insurers (Reorganisation and Winding Up) Regulations 2004, SI 2004/353 and the Credit Institutions (Reorganisation and Winding Up) Regulations 2004, SI 2004/1045. In each case, the legislation provides for a single insolvency proceeding to take place in the insurer's or credit institution's home Member State. The EU Member States are Austria Belgium Bulgaria Cyprus* Czech Republic Denmark Estonia Finland France Germany Greece Hungary The Irish Republic Italy Latvia Lithuania Luxembourg Malta The Netherlands Poland Portugal Romania Slovakia Slovenia Spain (but not the Canary Islands) Sweden The UK (but not the Channel Islands) Although Gibraltar is part of the EU, it is outside the Community customs territory.

[26] The countries are: Australia (2008), British Virgin Islands (2005), Canada (2009), Colombia (2006), Eritrea (1998), Great Britain (2006), Greece (2010), Japan (2000), Mauritius (2009), Mexico (2000), Montenegro (2002), New Zealand (2006), Poland (2003), Republic of Korea (2006), Romania (2003), Serbia (2004), Slovenia (2007), South Africa (2000) and the United States of America (2005).

[27] For example, Article 7 of the Model Law provides that nothing in the Law limits the power of the court or a British insolvency officeholder to provide additional assistance to a foreign representative under other laws of Great Britain.

[28] Paragraph 7.2.

In the Rubin case, the Receivers' application, which concerned an insolvency proceeding in the State of New York, was founded on the common law and the CBIR.

In particular, the Receivers contended that the court had power under English law to assist the Chapter 11 proceedings in New York by recognising and enforcing paragraphs 3 and 5 of the Judgment at common law and / or pursuant to the provisions of the CBIR.

It was argued before the Supreme Court that both the common law and the CBIR represented free-standing independent routes to the recognition and enforcement of the relevant parts of the Judgment in *Rubin*.

The appeal in the *Rubin* case was joined with the appeal in *New Cap Re*. That appeal also raised issues relating to the Foreign Judgments (Reciprocal Enforcement) Act 1933 and section 426 of the Insolvency Act 1986. Neither of these statutes was applicable in the *Rubin* case since the judgments of the courts of the United States are not subject to the 1933 Act and the United States is not a designated country or territory for the purposes of section 426.

D. The Position at Common Law

The nature of insolvency

Part of the argument put to the Supreme Court was that when analysing the developing principles governing the recognition of, and the giving of assistance to, foreign insolvency proceedings, it was first necessary to appreciate the particular characteristics of insolvency that makes the giving of such recognition and assistance desirable if not essential.

Insolvency obviously arises where a debtor has insufficient assets or liquid funds to meet the claims of his creditors. The primary purpose (and global feature) of all insolvency law is to replace the free-for-all, which would arise on the pursuit by individual claims of their own claims, with a statutory regime. Under that regime, creditors' rights and remedies are suspended (in whole or in part) and a mechanism is provided for the orderly collection and realisation of assets and the distribution of the net proceeds of those assets amongst creditors in accordance with the statutory scheme of distribution[29].

To this end, it remains a fundamental principle that the debtor's assets are to be distributed amongst his creditors on a *pari passu* basis. The very first insolvency law statute in England, enacted in 1542, provided that the debtor's assets were to be sold in order to pay creditors "*a portion, rate and rate alike, according to the quantity of their debts*"[30]. This principle remains central to the modern version of the statutory scheme and to those in other jurisdictions.

There are a number of implications of the requirement for a *pari passu* distribution amongst creditors which are also relevant:

(1) First, in order to achieve a proper and fair distribution of assets amongst creditors, it will often be necessary to avoid prior transactions in order to recover assets for purposes of adding to the estate and then distributing the resulting fruit to creditors. It is for this reason that such avoidance mechanisms are invariably a feature of any scheme of insolvency.

(2) Secondly, where a debtor has assets and liabilities across different jurisdictions, a true *pari passu* distribution can only realistically be achieved if there is a single insolvency proceeding which takes place in one jurisdiction and which applies to all the debtor's assets and to all his creditors; wherever situated, international insolvency practitioners have dubbed this "universality".

(3) Thirdly, conversely, where there are multiple local insolvency proceedings in relation to a debtor in different jurisdictions, it is unlikely that an overall *pari passu* distribution will be achieved. This is because some creditors may do better than others depending on the relevant amounts of assets subject to, and claims submitted in, the various different insolvency proceedings.

[29] Sir Roy Goode, *Principles of Corporate Insolvency Law*, 4th ed., 1-08.
[30] Statute of Bankrupts, 34 & 35 Hen. VIII, c.4.

For this reason, as stated by the Privy Council in *Cambridge*[31]:

> "*The English common law has traditionally taken the view that fairness between creditors requires that, ideally, bankruptcy proceedings should have universal application. There should be a single bankruptcy in which all creditors are entitled and required to prove. No one should have an advantage because he happens to live in a jurisdiction where more of the assets or fewer of the creditors are situated* ..."

However, as the Privy Council explained, the ideal of universality of bankruptcy has historically not always been achieved in practice. The common law of cross-border insolvency has for some time been "*in a state of arrested development*"[32]. It is the decision in *Cambridge*, followed by that of the House of Lords in *McGrath v Riddell, Re HIH Casualty and General Insurance Ltd*[33] *("HIH")*, which has reinitiated this process of development.

The Development of Cross-border Insolvency Law

Although, prior to *Cambridge*, the law of cross-border insolvency was in a state of "*arrested development*", it can nevertheless be said that the principle of universality of insolvency has established origins in English law[34]. As the opening paragraphs of this paper state, it has been described as the golden thread running through English cross-border insolvency law since the 18th century[35].

In a number of cases, the courts have sought to apply this principle by exercising their powers so as to allow effect to be given universally to insolvency proceedings under the law of the insolvent's incorporation[36].

The most powerful illustrations of this, because they involve declining to give effect to rights recognised as a matter of English law, are the cases in which common law courts have refused to allow execution to issue on a debtor's local assets when the debtor was subject to insolvency proceedings in another jurisdiction in which the creditors could participate.

The earliest reported case of this type is *Solomons v Ross*, which was cited with approval by the Privy Council in *Cambridge* at paras. 16-17. There are other examples in other jurisdictions. In *Modern Terminals (Berth 5) Ltd v States Steamship Company*[37] the Hong Kong Court stayed execution of a judgment because the debtor (a Nevada company) had petitioned for protection under Chapter 11 of the US Bankruptcy Code. To allow execution, they held, would obstruct the legitimate claims of the law of the United States to achieve a universal resolution[38]. In *CCIC Finance Limited v Guangdong International Trust & Investment Corporation* HCA[39] the Hong Kong court followed the decision in *Modern Terminals*, observing:

> "*The concept of comity of nations is not of itself reason to turn away a litigant with a bona fide claim that should otherwise be granted on the merits. But where a foreign jurisdiction is actively and openly pursuing a liquidation in which it says it intends to treat all creditors, domestic and foreign, alike, and then patently does so, it is not, I believe, for the courts of Hong Kong to interfere with that process*."

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[31] Para 16 per Lord Hoffmann.
[32] *Cambridge* para 18
[33] [2008] 1 W.L.R. 852
[34] The origins of the principle go back at least to the 18th century case of *Solomons v Ross* (1764) 1 H Bl 131n (also reported at (1839) Wallis Irish Chancery Reports 59). In that case a firm based in Amsterdam was declared bankrupt, and assignees were appointed by the Dutch court. An English creditor brought garnishee proceedings in London to attach £1,200 owing to the Dutch firm, but the English court held that the bankruptcy had vested all the firm's moveable assets, including debts owed by English debtors, in the Dutch assignees. The English creditor had to surrender the fruits of the garnishee proceedings and prove in the Dutch bankruptcy. Accordingly, as long ago as 1764, the English court was prepared to recognise the extra-territorial effects of a foreign bankruptcy in England, so as to require creditors based in England to prove in the foreign bankruptcy. Since the evidence before the English court showed that English creditors would be treated equally in the Dutch bankruptcy, there was no reason why the English court should not recognise, and give effect to, the Dutch insolvency proceeding.
[35] *HIH* para 30.
[36] As well as the decision in *Cambridge*, the court has for example appointed the foreign office-holder as receiver of the foreign debtor's English assets: *Bergerem v Marsh* [1921] B&CR 195, *Re Kooperman* [1928] B&CR 189 and has ordered the examination or production of documents: *Re Impex Services Worldwide Ltd* [2004] BPIR 564 (an Isle of Man case).
[37] [1979] HKLR 515
[38] Similarly, in *Re Cavell Insurance Company Ltd* (21 Feb. 2005 (2005) CanLII 4094 and 23 May 2006 (2006) CanLII 16529) the Canadian courts recognised an order of the English Court convening a meeting of creditors to consider a proposed scheme of arrangement, and gave effect to it by staying proceedings in respect of the company's Canadian assets.
[39] No. 15651 of 1999, 31 July 2001

In this context, it is important to recognise there is nothing objectionable in principle with giving effect to a foreign insolvency proceeding in relation to an individual creditor or officer of the insolvent company. A creditor who contracts with a foreign company must take the law of the place of incorporation as the governing system of insolvency (*Firswood Ltd v Petra Bank*[40]). This is *a fortiori* in the case of directors and officers of a foreign company.

Similarly, English law has always ascribed a universal effect to its own insolvency proceedings. It assumes that they will take effect in relation to all of the insolvent's assets no matter where they are located in the world: *Mitchell v Carter*[41]. But, by the same token that it seeks universal effect for its own procedures, English law has also recognised the *universalist* aspirations of foreign courts conducting insolvency proceedings in respect of a debtor within their jurisdiction. Consequentially, at an early stage of the development of the law of corporate insolvency, the potential conflict between the locally effective winding-up of an overseas company in England, and a universal winding-up in the country of the debtor's incorporation was resolved by a judge-made principle which treated the English proceedings as ancillary to the principal winding-up: see *Re International Tin Council*[42].

Greater recognition of the value of judicial comity in relation to cross-border insolvency has also come with the increasing incidence of complex international insolvencies in recent years[43].

(1) In *Banque Indosuez SA v Ferromet Resources Inc*[44] Hoffmann J made clear that the English court would grant assistance to support insolvency proceedings taking place in relation to the debtor in the United States:

> "*This court … will do its utmost to co-operate with the United States Bankruptcy Court and avoid any action which might disturb the orderly administration of [the company] in Texas under Ch 11*."

(2) In *Credit Suisse Fides Trust v Cuoghi* [1998] Q.B. 818 C.A., 826 Millett LJ said:

> "*In other areas, such as cross-border insolvency, commercial necessity has encouraged national courts to provide assistance to each other without waiting for such co-operation to be sanctioned by international convention … It is becoming widely accepted that comity between the courts of different countries requires mutual respect for the territorial integrity of each other's jurisdiction, but that this should not inhibit a court in one jurisdiction from rendering whatever assistance it properly can to a court in another in respect of assets located or persons resident within the territory of the former."*

This context demonstrates that, even prior to the decision of the Privy Council in *Cambridge* and the speeches of Lords Hoffmann and Walker in *HIH,* the principles underlying the common law of cross-border insolvency law were being recognised and applied by the courts. It is, however, in these two recent cases that the principles have begun to be fully articulated and developed although they have not yet been fully worked out[45]. The question now is to what extent has the Supreme Court stifled the development of a principle of assistance in cross-border bankruptcy cases.

Cambridge Gas

In *Cambridge*, a group of insolvent Isle of Man companies (Navigator) were in insolvency proceedings under Chapter 11 in the United States. A request was made by the United States Bankruptcy Court to the Isle of Man court to give assistance to the Chapter 11 proceedings by

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[40] [1996] CLC 608, 618E-F Per Schiemann LJ: "*… the creditor has to contract with a company whose domicile is Jordan and therefore has to take Jordanian law as governing the priorities in the distribution of the company's assets; the system of priorities contains nothing surprising or at odds with English public policy*."

[41] [1997] 1 BCLC 673, 686-7 (Millett LJ)

[42] [1987] Ch. 419, 446-447 (Millett J)

[43] In addition, see *Re Bank of Credit and Commerce International SA (No 2)* [1992] BCLC 579 where Sir Nicolas Browne-Wilkinson V-C emphasised the importance of co-operating with the principal liquidation of the bank taking place in Luxembourg (where it was incorporated)

[44] [1993] BCLC 112, 117

[45] *Cambridge* para. 19. The process of development of the common law is part of its essential nature. "*The genius of the common law is its capacity to develop*" (*Kuddus v Chief Constable of Leicestershire Constabulary* [2002] 2 A.C. 122 at para. 33 per Lord Mackay). See also *R v Governor of Brockhill Prison, Ex parte Evans (No. 2)* [2001] 2 A.C. 19 at p.48 per Lord Hobhouse: "*The common law develops as circumstances change and the balance of legal, social and economic needs changes. New concepts come into play; new statutes influence the non-statutory law. The strength of the common law is its ability to develop and evolve*". (Emphasis added)

giving effect at common law to a reorganisation plan which had been promulgated in the Chapter 11 proceedings and confirmed by the bankruptcy court. Under the terms of the plan, the shares in the top Navigator company (Navigator Holdings plc) were to be transferred to a representative of the creditors – in essence, a "*debt for equity*" swap.

A shareholder objected to the recognition of the plan and confirmation order under which its shares would be transferred to the creditors. It argued that the order of the New York bankruptcy court confirming the plan was either a judgment *in rem* or a judgment *in personam*, and that in either case it was not capable of being recognised in the Isle of Man. The Privy Council rejected this argument: the bankruptcy proceedings did not fall into the category of either judgments *in rem* or judgments *in personam* (para.13).

The principle of universality required that, ideally, there should be a single insolvency with universal effect in which all creditors are required and entitled to prove (para.16). Lord Hoffmann continued (para.17):

> *"[17] This doctrine may owe something to the fact that 18th and 19th century Britain was an imperial power, trading and financing development all over the world. It was often the case that the principal creditors were in Britain but many of the debtor's assets were in foreign jurisdictions. Universality of bankruptcy protected the position of British creditors. Not all countries took the same view. Countries less engaged in international commerce and finance did not always see it as being in their interest to allow foreign creditors to share equally with domestic creditors. But universality of bankruptcy has long been an aspiration, if not always fully achieved, of United Kingdom law. And with increasing world trade and globalisation, many other countries have come round to the same view."*

These principles were sufficient to confer upon the court jurisdiction to assist the foreign insolvency proceeding by giving effect to the plan (para. 21). Accordingly, although the plan and the confirmation order in *Cambridge prima facie* had the indicia of being either a judgment *in rem* or a judgment *in personam*, the Privy Council nevertheless concluded that they were correctly characterised as an order made in bankruptcy proceedings and were to be recognised and given effect to accordingly.

HIH

HIH concerned four Australian insurance companies, which were being wound up in Australia and in respect of which provisional liquidators had been appointed in England. The question was whether the English court had power to direct remittance of assets collected in England to Australia, notwithstanding that there were differences between the English and Australian statutory regimes for distribution, which meant that some creditors would benefit from remittance whilst some creditors would be worse off. The House of Lords overturned the decisions of the judge at first instance and of the Court of Appeal and unanimously directed that remission should take place.

The decisions of two of their Lordships (Lords Scott and Neuberger[46]) were based exclusively on the statutory power to assist foreign insolvency proceedings contained in section 426 of the Insolvency Act 1986, but Lord Hoffmann (with whom Lord Walker agreed) also considered that such a power existed at common law.

Lord Hoffmann characterised the principle of universality as a principle of English private international law that, where possible, there should be a unitary insolvency proceeding in the courts of the insolvent's domicile which receives worldwide recognition and which should apply universally to all the bankrupt's assets (at para.6):

> *"Despite the absence of statutory provision, some degree of international co-operation in corporate insolvency had been achieved by judicial practice. This was based upon what English judges have for many years regarded as a general principle of private international law, namely that bankruptcy (whether personal or corporate) should be*

[46] Speaking extra-judicially, Lord Neuberger has since commented that, having revisited the matter, he considers that there is considerable attraction in the approach of Lords Hoffmann and Walker: '*Insolvency, internationalism and Supreme Court judgments*', speech by Lord Neuberger to the Insolvency Lawyers Association, 16 November 2009.

unitary and universal. There should be a unitary bankruptcy proceeding in the court of the bankrupt's domicile which receives world-wide recognition and it should apply universally to all the bankrupt's assets."

Applying that principle to the facts in *HIH* meant that remission of the English assets to the Australian principal liquidations should be directed. Lord Hoffmann stated (para.30):

"The primary rule of private international law which seems to me applicable to this case is the principle of (modified) universalism, which has been the golden thread running through English cross-border insolvency law since the 18th century. That principle requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution."

Principle of active assistance

As to the extent of the assistance which can be granted at common law, in *Cambridge* the Privy Council approved the statement in *Re African Farms* that recognition of a foreign insolvency proceeding *"carries with it the active assistance of the Court*".

The court can grant such assistance by doing whatever it could have done in the case of an equivalent domestic insolvency. As the Privy Council stated in *Cambridge* (para.22):

"At common law, their Lordships think it is doubtful whether assistance could take the form of applying provisions of the foreign insolvency law which form no part of the domestic system. But the domestic court must at least be able to provide assistance by doing whatever it could have done in the case of a domestic insolvency. The purpose of recognition is to enable the foreign office holder or the creditors to avoid having to start parallel insolvency proceedings and to give them the remedies to which they would have been entitled if the equivalent proceedings had taken place in the domestic forum."

This emphasises that the purpose of recognition is to avoid the need for multiple proceedings and to give the foreign office holder such remedies as he would have been entitled to if equivalent insolvency proceedings had been commenced in England and Wales, without actually requiring him to commence such proceedings.

The approach in *Cambridge*, whereby the court may grant assistance at common law in support of foreign insolvency proceedings, has been followed in subsequent cases without difficulty:

(1) In *Larsen v Navios International Inc*[47] the company, Atlas Bulk Shipping, had been made the subject of a bankruptcy order in Denmark. A debtor of the company subsequently acquired by way of assignment claims against the company which it sought to rely on by way of set-off to defeat the claims of the company. As a matter of Danish law, the post-insolvency assignment set-off was prohibited and, if Atlas had been in English insolvency proceedings, the set-off of claims acquired after commencement of the insolvency proceedings would likewise not be permitted[48]. The court held that relief could be granted under Article 21(1)(g) of the Model Law to prevent the debtor from relying on the set-off in Commercial Court proceedings on the basis that the foreign officeholder was entitled to the relief which would have been open to an English officeholder if proceedings had been opened in England on the date of opening of the foreign proceedings (paras.23, 24). The judge considered that this conclusion was also consistent with the common law position as stated in *Cambridge* and *Rubin* (see paras.29-32).

(2) In *Re Phoenix Kapitaldienst GmbH* [49] the court, applying *Cambridge* and *Rubin*, granted relief at common law to enable the administrator of a company which was in insolvency proceedings in Germany to bring an application for relief in England, pursuant to section 423

[47] [2011] EWHC 878 (Ch)
[48] See rules 2.85 and 4.90 Insolvency Rules 1986.
[49] [2012] EWHC 62 (Ch). This case was probably wrongly decided since the foreign representative was asking the English court to assist in doing something which was not available in his home court.

of the Insolvency Act 1986, to recover alleged fictitious profits paid out by the company to investors.

(3) In *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd*[50] it was common ground between the parties that the principle in *British Eagle*[51], i.e. that parties cannot consistently with public policy contract out of the mandatory provisions of the Insolvency Act 1986, could be applied in support of a foreign insolvency proceeding recognised by the English Court even absent any insolvency process taking place in England[52].

E. The Boundaries of an Insolvency Order

In light of *Cambridge*, *HIH* and the preceding authorities, the guiding principles to be applied in relation to foreign insolvency proceedings seemed to be, firstly, that the English court should seek so far as possible to give effect to the principle of there being a single insolvency proceeding in relation to an insolvent debtor which has universal effect and, secondly, that active assistance should be given to that insolvency proceeding.

Classification of foreign judgments

As in *Cambridge*, the application of these principles may require the court to recognise and enforce an order made in the course of the foreign insolvency proceedings. It is clear from *Cambridge* and the passages cited above, that there is jurisdiction at common law to recognise such orders: the debate now centres upon what that assistance involves. Moreover, the rules governing the recognition of such orders are separate and distinct from the rules governing the recognition and enforcement of judgments *in rem* and judgments *in personam*.

Cambridge had established that there is a third category of judgment, independent of judgments *in rem* and judgments *in personam*. In particular, where the order can be said to form part of the foreign insolvency proceeding, then for the purposes of English rules governing the recognition of foreign judgments it is to be characterised as neither a judgment *in rem* nor a judgment *in personam.* As far as the UK is concerned that principle has been cast into doubt by the judgment of the majority in *Rubin* even though it was *common ground* between the parties in *Rubin* that there is a three-fold classification of foreign judgments as judgments *in rem*, judgments *in personam* and orders which form part of insolvency proceedings ("Insolvency Orders").

As the Privy Council stated in *Cambridge* (paras.13-15):

> *"[13] If the New York order and plan had to be classified as falling within one category or the other, the appeal would have to be allowed. But their Lordships consider that bankruptcy proceedings do not fall into either category*."

The three-fold classification of foreign judgments as judgments *in rem*, judgments *in personam* and Insolvency Orders was also followed by the Privy Council in *Pattni v Ali*[53], (para. 23 per Lord Mance who gave the advice of the Board):

> *"In* Cambridge ... *the Board touched on the concepts of in personam and in rem proceedings, but held that the bankruptcy order with which it was concerned fell into neither category. Its purpose was simply to establish a mechanism of collective execution against the property of the debtor by creditors whose rights were admitted or established."*

Applying this three-fold classification, the question in the *Rubin* appeal was whether the relevant parts of the Judgment in respect of which recognition and enforcement were sought were an Insolvency order.

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[50] [2011] UKSC 38
[51] *British Eagle International Airlines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758.
[52] See the decision of the Chancellor in *Perpetual Trustee Co Ltd v BNY Corporate Trustee Services Ltd* [2009] EWHC 1912 (Ch) at para. 48.
[53] [2006] UKPC 51, [2007] 2 A.C. 85 P.C.

It is worth noting at this point that ten of the highest ranking judges in the UK were apparently content with the classification if not with the principle of assistance, the doctrine of universality, and the golden thread. As also described above in the context of *HIH, three* more judges added their weight to the numbers game in support of *Cambridge,* totalling thirteen supporters of the highest calibre.

Scope of insolvency proceedings

Insolvency proceedings involve the collective enforcement by creditors of their claims against the assets of the insolvent debtor[54]. As the Privy Council stated in *Wight v Eckhardt Marine GmbH* [55] (paras.26-27 per Lord Hoffmann):

> *"[26] … a winding up order is not the equivalent of a judgment against the company which converts the creditor's claim into something juridically different, like a judgment debt. Winding up is, as Brightman LJ said in* In re Lines Bros Ltd[56]*, 'a process of collective enforcement of debts'. The creditor who petitions for a winding up is 'not engaged in proceedings to establish the company's liability or the quantum of the liability (although liability and quantum may be put in issue) but to enforce the liability'.*
>
> *[27] The winding up leaves the debts of the creditors untouched. It only affects the way in which they can be enforced. When the order is made, ordinary proceedings against the company are stayed (although the stay can be enforced only against creditors subject to the personal jurisdiction of the court). The creditors are confined to a collective enforcement procedure that results in pari passu distribution of the company's assets. The winding up does not either create new substantive rights in the creditors or destroy the old ones. Their debts, if they are owing, remain debts throughout. They are discharged by the winding up only to the extent that they are paid out of dividends. But when the process of distribution is complete, there are no further assets against which they can be enforced."*

Accordingly, an insolvency proceeding is not a proceeding in the nature of an ordinary civil action brought by a creditor to establish the liability of the debtor or to establish the quantum of the creditor's claim. Rather, it is a means by which the creditor's claim, and the claims of other creditors, are collectively enforced against the debtor.

The process of collective enforcement takes place as against the debtor's assets. However, the relevant assets of the debtor for these purposes are not merely the assets which the debtor actually retains at the date of commencement of the insolvency. In order to achieve a proper and fair distribution of assets between creditors, it will often be necessary to adjust prior transactions and to recover previous dispositions of property (fraudulent conveyances and preferences) so as to constitute the estate which is then available for distribution.

For this reason, most if not all systems of insolvency law include mechanisms for adjusting prior transactions by the debtor and for recovering property disposed of by the debtor prior to his insolvency to swell the estate available for distribution. For example:

(1) The UNCITRAL Legislative Guide on Insolvency Law (2005) (paras.148-151):

> *"[150] Many insolvency laws include provisions that apply retroactively from a particular date (such as the date of application for, or commencement of, insolvency proceedings) for a specified period of time (often referred to as the 'suspect' period) and are designed to overturn those past transactions to which the insolvent debtor was a party or which involved the debtor's assets where they have certain effects …*

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[54] *Re Lines Bros Ltd* [1983] Ch. 1, 20E-F, per Brightman LJ ("*The liquidation of an insolvent company is a process of collective enforcement of debts for the benefit of the general body of creditors. Although it is not a process of execution, because it is not for the benefit of a particular creditor, it is nevertheless akin to execution because its purpose is to enforce, on a pari passu basis, the payment of the admitted or proved debts of the company. When, therefore, a company goes into liquidation a process is initiated which, for all creditors, is similar to the process which is initiated, for one creditor, by execution.*")

[55] [2004] 1 A.C. 147 P.C.

[56] [1983] Ch 1, 20.

> *[151] It is a generally accepted principle of insolvency law that collective action is more efficient in maximizing the assets available to creditors than a system that leaves creditors free to pursue their individual remedies and that it requires all like creditors to receive the same treatment. Provisions dealing with avoidance powers are designed to support these collective goals, ensuring that creditors receive a fair allocation of an insolvent debtor's assets consistent with established priorities and preserving the integrity of the insolvency estate."*
> (emphasis added)

(2) Professor Ian Fletcher, *The Law of Insolvency*, 4th ed. (2009), 26-02:

> *"The implications of the principle of collectivity can be very far reaching. Not only are the creditors' individual rights and remedies 'frozen' from the moment of formal commencement of the liquidation procedure, but also there is the possibility that transactions which took place a considerable time before that moment can be impeached on account of what has subsequently transpired. There is a consistent jurisprudential thread running through the law of corporate insolvency, maintaining that the interests of creditors are elevated to a position of paramount importance from the time when the company becomes insolvent, even though at that stage no formal proceedings have been initiated. It is therefore seen as an essential aspect of the process of liquidation that antecedent transactions whose consequences have been detrimental to the collective interest of the creditors must be amenable to adjustment or avoidance."*
> (emphasis added)

(3) Professor Sir Roy Goode, *Principles of Corporate Insolvency Law*, 4th ed. (2011):

> *"13-01However, the principle of equity among creditors that underlies the pari passu rule of insolvency law will in certain conditions require the adjustment of concluded transactions which but for the winding up of the company would have remained binding on the company, and the return to the company of payments made or property transferred under the transactions or the reversal of their effect.*
>
> *11-03 The conditions of avoidance vary according to the particular ground of avoidance involved but are for the most part dictated by a common policy, namely to protect the general body of creditors against a diminution of the assets available to them by a transaction which confers an unfair or improper advantage on the other party … The avoidance provisions may thus be seen as necessary both to preserve the company's net asset value and to ensure equality of distribution, at least among classes of creditors."*

As Lord Hoffmann stated in HIH (at para.19):

> *"… the process of collection of assets will include, for example, the use of powers to set aside voidable dispositions, which may differ very considerably from the English statutory scheme."*

See also the description given by Millett J in *Re International Tin Council.* [57]

It is important to have in mind that these avoidance provisions arise under insolvency law and may therefore allow the recovery of property even though such dispositions were effective and valid as a matter of the ordinary law of contract and property. In other words, they enable the insolvent estate to be reconstituted by recovering property even though the insolvent debtor may not be entitled to such property as a matter of general law. This is because as a matter of policy insolvency law enables such property to be recovered in pursuit of the overriding goal to treat the creditors of the insolvent debtor equally and fairly.

Accordingly, avoidance provisions by which prior transactions can be adjusted and assets recovered, thus supplementing the estate available for distribution to creditors, are an integral part of the process of collective enforcement represented by an insolvency proceeding.

[57] [1987] Ch. 419, 446.

Contrary to the assertion made by Roman et al, they are central to the purpose of insolvency proceedings. They are essential because they are a necessary means of constituting or reconstituting the estate of the debtor against which collective enforcement then takes place.

Furthermore, it was argued by Rubin that the distinction sought to be drawn by the appellants in the *New Cap* appeal between the collection and the distribution of assets is a false one. Insolvency proceedings are a process of collective enforcement, and that process necessarily involves applying the statutory insolvency scheme in order to constitute the debtor's estate.

The Rubin Case

In the *Rubin* case, paragraphs 3 and 5 of the Judgment were entered pursuant to Count VII (fraudulent transfer under section 548(a) of Chapter 11), Count VIII (fraudulent transfer under section 548(b) of Chapter 11) and Count X (liability of transferees of avoided transfers under section 550 of Chapter 11) of the Complaint[58]. Accordingly, in the case of both paragraph 3 and paragraph 5, the Receivers were entitled to judgment pursuant to sections 548 and 550 of Chapter 11[59].

As to this the US position is that:

(1) Section 548(a), in summary, provides that the trustee may avoid any transfer of an interest of the debtor in property that was made on or within two years of the date of the filing of the petition, where the transfer was made with either an actual intent to defraud or where the debtor received less than a reasonably equivalent value in exchange and the debtor was, *inter alia*, insolvent on the date of the transfer or become insolvent as a result of the transfer.

(2) Section 548(b) likewise provides that the trustee of a partnership debtor[60] may avoid any transfer of an interest of the debtor in property that was made on or within two years of the date of the filing of the petition, where the debtor was insolvent on the date of the transfer or become insolvent as a result of the transfer.

(3) Section 550 provides that, to the extent that a transfer is avoided under section 548, the trustee may recover, for the benefit of the estate, the property transferred or, if the court so orders, the value of such property. The insolvent estate of the debtor includes the property which is recovered under section 550 (section 541(3)).

Section 548 of Chapter 11 is the direct equivalent of section 238 of the Insolvency Act 1986 and section 550 of Chapter 11 is the direct equivalent of section 241.

Before the Court of Appeal, Roman et al conceded the general equivalence of section 548 of Chapter 11 with section 238 of the Insolvency Act 1986[61]. Both the Deputy Judge and the Court of Appeal correctly concluded that the Adversary Proceedings were (in the Deputy Judge's words) "*part and parcel*" of the Chapter 11 proceedings.

Assistance which a domestic office-holder could obtain

The jurisdiction at English common law to grant assistance in support of a foreign insolvency proceeding, according to the Privy Council in *Cambridge*, extends to the relief which could have been granted in the case of an equivalent domestic insolvency.

Accordingly, in *Cambridge* the plan and confirmation order were recognised and enforced, notwithstanding that this had the effect of divesting the existing shareholders of their rights, because equivalent relief could have been obtained by way of a scheme of arrangement under the Manx Companies Act (paras.24-25).

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[58] Paragraph 3 was also entered pursuant to Count IV (unjust enrichment and restitution) and Count VI (fraudulent conveyance under state fraudulent conveyance laws). State fraudulent conveyance laws were applicable pursuant to section 544(b) of Chapter 11: see para. 84 of the Complaint.

[59] For these purposes, it is irrelevant that paragraph 3 of the Judgment was also entered pursuant to Counts IV and VI. This is because the entirety of the relief granted in paragraph 3 could have been granted pursuant to Count VII alone: see paras. 85-86 of the US Complaint.

[60] For these purposes, the Receivers' allegation on advice, was that TCT was in substance a partnership and that Roman et al were general partners.

[61] CA judgment, paras 49, 60.

Applying this test to *Rubin*, in the case of an equivalent domestic insolvency in respect of TCT, the Receivers would have been entitled to equivalent relief to that granted pursuant to paragraphs 3 and 5 of the Judgment. Such relief could have been granted pursuant to sections 238 and / or 423 of the Insolvency Act 1986. Paragraphs 3 and 5 of the Judgment therefore represent remedies to which the Receivers would have been entitled if the equivalent insolvency proceedings had taken place in England.

Collective execution versus determination of or establishment or rights

Roman et al did *not* argue that *Cambridge* was wrongly decided or that it does not properly represent the common law of England and Wales. They sought to narrow the ambit of the decision. They sought to do this by focussing heavily on the description given by Lord Hoffmann in paras. 14-15 of the nature of insolvency proceedings:

> "*The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established."*

Roman et al argued that the Judgment in the *Rubin* case determined or established the existence of rights and therefore fell outside the scope of the Chapter 11 insolvency proceeding as described in *Cambridge*. The Receivers disagreed. The Roman approach was argued to be wrong. The *Rubin* reasoning was as follows:

First, it is necessary to identify the distinction which was being drawn by Lord Hoffmann. This distinction was between, on the one hand, proceedings brought by a creditor to establish the liability of the debtor or the quantum of the creditor's claim and, on the other hand, the collective enforcement by the creditor of his claim through the commencement of an insolvency proceeding.

That this is the distinction which Lord Hoffmann was making can be seen most clearly from his speech in *Wight v Eckhardt* at para. 26, referring to the same distinction which was drawn by Brightman LJ in *Re Lines Bros*. The point being made was that, unlike an ordinary civil proceeding brought by a creditor against a debtor in order to establish his claim, an insolvency proceeding is a process whose purpose is to enforce the *creditor's* existing claim rather than to establish or determine the *creditor's* rights on a bilateral debtor / creditor basis.

Secondly, it does not follow that, in the course of an insolvency proceeding, it may not be necessary to establish or determine other rights. The Privy Council expressly recognised that this might well be necessary ("*It may incidentally be necessary in the course of bankruptcy proceedings to establish rights which are challenged: proofs of debt may be rejected; or there may be a dispute over whether or not a particular item of property belonged to the debtor and is available for distribution.*").

With respect this does not change the fundamental nature of insolvency proceedings as a process of collective enforcement, nor does it mean that, even if avoidance provisions can be said to involve the establishment or determination of rights, they are not to be regarded as falling within the scope of the relevant insolvency proceedings.

As to this:

(1) The rights which fall to be determined in the context of an insolvency proceeding may be *either* insolvency claims (for example, avoidance claims arising under the statutory scheme), *or* ordinary civil claims (for example, claims by the insolvent company to be entitled to recover property to which it has title under the applicable law of property or to collect in a debt).

(2) So far as the former are concerned, as explained above, such claims are an integral part of the process of collective distribution effected through an insolvency proceeding and it is for this reason that such claims and any resulting judgments form part of the insolvency proceeding and may be recognised and enforced pursuant to the principles of universality and assistance described above.

Thirdly, Roman et al in the appeal contended that there was no principled basis to draw a distinction between a claim for the recovery of property to which the debtor is entitled as a matter of ordinary property law and a claim under statutory avoidance provisions. This is also the wrong approach in the view of the Receivers.

(1) The relevant principles were argued to be the principles of universality and assistance identified above, but ultimately the overriding principle is of fairness and equality of treatment of creditors. The Supreme Court notwithstanding, the only way in which such fairness and equality can be achieved is to have a single insolvency proceeding applying to all the debtor's assets in which all creditors participate. If this is to be achieved, then where such insolvency proceeding is taking place abroad it is necessary for the courts here to recognise it. It is not good enough for the Supreme Court to say that a UK resident can take the benefit of fraudulent conveyances and preferential payments and then to opt out of any attempt to recover the fruits of unconscionable behaviour by artificially not submitting to the jurisdiction of any anticipated bankruptcy to avoid being held to account.

(2) Nonetheless (the Supreme Court differs on this point too), there is a fundamental conceptual difference between insolvency claims and other civil claims. In the case of a civil *lis* between two parties (for example, arising under a contract) it will usually be possible for a claimant to seek out and sue the defendant in the country where the defendant is resident. In contrast, an insolvency claim will typically arise under the statutory scheme applicable to the relevant insolvency proceeding. Accordingly, in the case of a foreign insolvency, absent those cases where specific statutory provision has been made[62], it will usually *only* be the foreign court that can hear and determine the claim since it is the only court which has the power to apply the relevant statutory scheme collectively on behalf of the universal creditor community.

(3) In the case of insolvency, in practice it will often if not invariably be the case that the appropriate forum in which proceedings relating to the insolvency should be brought will be the courts of the jurisdiction in which the insolvency proceeding is taking place. If, for example, a company incorporated and with its centre of main interests in New York is in bankruptcy proceedings in New York, then the New York courts would ordinarily be the appropriate forum in which proceedings to set aside antecedent transactions under the applicable insolvency law would be brought[63]. It is not clear why in these circumstances the New York insolvency officeholder should be required to bring separate proceedings making the same claims in other jurisdictions[64], even if he is able to do so[65]. On the contrary, the Privy Council in *Cambridge* made clear that one of the purposes of recognising and assisting a foreign insolvency proceeding was to avoid the need for multiple parallel actions brought by an officeholder (para.22).

(4) The same distinction between ordinary civil claims (for example, for the recovery of property to which the debtor is entitled as a matter of ordinary property law) and insolvency claims (for example, a claim under statutory avoidance provisions where the power derives from the opening of insolvency proceedings) has been drawn in the European legislation which has been deliberately constructed to establish a coherent scheme for the recognition and enforcement of judgments. The architects of this legislation considered that this was a principled and practical way to proceed.

Fourthly, if it was the case that the Judgment in *Rubin* fell outside the scope of the US insolvency proceedings because it determines or establishes the existence of rights, then it is difficult to see why exactly the same would not have been true of the plan and confirmation order of the US court which was recognised and enforced in *Cambridge*, which

[62] i.e. under section 426 of the Insolvency Act 1986 and Article 23 of the Model Law.

[63] *In re Maxwell Communication Corporation* 170 B.R. 800 (US Bankruptcy Court for the Southern District of New York) the question was which system of law should govern the avoidability of pre-insolvency transactions, which the US bankruptcy and district courts resolved by deferring to English law and the English courts based on the finding that England was the centre of the case. This was despite the fact that US creditors would have done better if US rather than English law been applied to the preference issue. See also *Barclays Bank plc v Homan* [1993] BCLC 680 where the English court had earlier refused to grant an anti-suit injunction restraining the US proceedings. In the event, the US court itself declined jurisdiction in favour of England.

[64] In a complex insolvency, where there are multiple defendants to a claim who are resident in different jurisdictions, this would lead to the prospect of multiple different proceedings in different jurisdictions in respect of the same claims.

[65] Conversely, if a company incorporated and with its COMI in England goes into liquidation in England, then England would ordinarily be considered the appropriate forum in which proceedings should be brought, for example, to set aside any antecedent transactions. Even if the defendant was resident abroad, it would be expected that leave for service out of the jurisdiction would be given under the Insolvency Rules 1986 (Re Paramount Airways Ltd [1993] Ch. 223, C.A.; Re Howard Holdings Inc [1998] BCC 549).

at face value involved expropriation of shares. The plan and confirmation order in that case can equally be said to have determined rights, in the sense that the shares held by the existing shareholders were transferred to the creditors notwithstanding that there was in that case no submission to the jurisdiction as the advice recognised.

Relationship with Rule 36 [now 43] of Dicey[66]

It was argued by Rubin that since the relevant parts of the Judgment in *Rubin* are a US Insolvency Order rather than a judgment *in personam*, Roman et al's reliance on what is said to be the effect of rule 36 of *Dicey* was misplaced. Rule 36 of *Dicey* itself follows from[67]:

"*A fundamental requirement for the recognition or enforcement of a foreign judgment in England at common law is that the foreign court should have had jurisdiction according to the English rules of conflict of laws*."

Rule 36 then sets out the principles governing the circumstances in which the courts of a foreign country are considered to have jurisdiction to give a judgment *in personam* which will then be capable of enforcement or recognition in England. In essence, it is necessary for the defendant either to have been present in the foreign country at the time proceedings were instituted or to have submitted to the foreign jurisdiction in some way. Roman et al asserted that they had done neither.

Rule 36, it was argued, does not apply to judgments which fall within the third category identified in *Cambridge* i.e. judgments given in the course of foreign insolvency proceedings and which form part of those proceedings. But this was not accepted by the Supreme Court which rejected any argument that bankruptcy is different or that the principle of assistance in connection with foreign, core insolvency orders was desirable or indeed an ancient principle.

Paradoxically[68] by recognising a foreign insolvency proceeding, the court is accepting that the procedures and mechanisms of the foreign insolvency process will apply to establish the claims of creditors against the debtor, to establish the assets of the debtor and to provide for the collective enforcement of the claims of creditors against the available assets. As under the English statutory scheme, the applicable mechanisms under the foreign insolvency scheme for establishing the assets of the debtor will invariably include provision for enabling the recovery of assets which have been disgorged by the debtor prior to insolvency. As explained above, mechanisms providing for recovery of such assets are invariably a feature of any system of insolvency. But to characterise such core insolvency mechanism as *in personam* to engage the *Dicey Rule* is perverse. It deprives global creditors of a collective not a bilateral remedy and to state also that the policy is to protect British business interests is bizarre.

This is because since the recovery of assets pursuant to the foreign insolvency law for the purpose of facilitating a distribution of assets between creditors is part of the foreign insolvency process, then the foreign court's jurisdiction over such actions stems from its jurisdiction over the insolvency procedure itself. Thus it was argued for Rubin that the *Dicey Rule* is not the relevant basis for determining whether a judgment given in such an action should be recognised in England. The basis for recognition stems from the English Court's recognition of the foreign insolvency proceeding itself, not the bilateral dealing which arguably gave rise to the bankruptcy.

As a hypothesis, in advance of bankruptcy any person in a bilateral dealing with the debtor in Country A can only be visited with the consequences of his dealings can be sued in Country A if he submitted to the jurisdiction of country A. If he does so any judgment from the courts of Country A may be enforced against him at home. If he was not present and did not submit then he is safe, no matter how nefarious his dealings. The Receivers were not seeking to open the floodgates by arguing that any nefarious dealing which became remediable on the opening of insolvency proceedings deserved special assistance, rather they contended that it was only core bankruptcy remedies which were susceptible to assistance.

[66] Dicey Morris and Collins: Private International Law 15th edition October 2012
[67] *Dicey, Morris & Collins*, 14-049.
[68] Lord Collins' judgment is full of paradoxes, see below.

As a matter of principle and policy, the Receivers asserted that there was no proper basis for applying the *Dicey Rule* as the test for recognition of foreign judgments in the insolvency context and in particular:-

First, the effect of applying the *Dicey Rule* mechanically means that a foreign officeholder is deprived of any means of pursing a claim against the defendants in any jurisdiction where they have not submitted to that jurisdiction. This is the outcome which Roman et al in effect argued for in the *Rubin* case. It raises the serious question whether the Supreme Court has provided a wiring diagram for fraudsters.

Secondly, it is likely to be the case that the appropriate forum in which proceedings relating to the insolvency should be brought will be the courts of the jurisdiction in which the insolvency proceeding is taking place, regardless of the location of the actors who move money and manage their business at the click of a mouse in foreign parts.

Thirdly, in the modern, globalised world, the *Dicey Rule* does not represent a sound test for governing the recognition of Insolvency Orders. The origins of the rule appear to have lain in the perceived unfairness to an English defendant in being subject to the jurisdiction of a foreign court unless he was either physically present in the foreign jurisdiction or had submitted to the jurisdiction of the foreign court[69]. In the modern world, it is questionable whether this rationale for the rule remains sound. But that is precisely the rationale invoked by Lord Collins in *Rubin* when he said at paras 128 to 130:

> *"In my judgment, the dicta in Cambridge Gas and HIH do not justify the result which the Court of Appeal reached. This would not be an incremental development of existing principles, but a radical departure from substantially settled law. There is a reason for the limited scope of the Dicey Rule and that is that there is no expectation of reciprocity on the part of foreign countries. Typically today the introduction of new rules for enforcement of judgments depends on a degree of reciprocity. The EC Insolvency Regulation and the Model Law were the product of lengthy negotiation and consultation.*
>
> *A change in the settled law of the recognition and enforcement of judgments, and in particular the formulation of a rule for the identification of those courts which are to be regarded as courts of competent jurisdiction (such as the country where the insolvent entity has its centre of interests and the country with which the judgment debtor has a sufficient or substantial connection), has all the hallmarks of legislation, and is a matter for the legislature and not for judicial innovation. The law relating to the enforcement of foreign judgments and the law relating to international insolvency are not areas of law which have in recent times been left to be developed by judge-made law. As Lord Bridge of Harwich put it in relation to a proposed change in the common law rule relating to fraud as a defence to the enforcement of a foreign judgment, "if the law is now in need of reform, it is for the legislature, not the judiciary, to effect it": Owens Bank Ltd v Bracco [1992] 2 AC 443, 489.*
>
> *Furthermore, the introduction of judge-made law extending the recognition and enforcement of foreign judgments would be only to the detriment of United Kingdom businesses without any corresponding benefit. I accept the appellants' point that if recognition and enforcement were simply left to the discretion of the court, based on a factor like "sufficient connection," a person in England who might have connections with a foreign territory which were only arguably "sufficient" would have to actively defend foreign proceedings which could result in an in personam judgment against him, only because the proceedings are incidental to bankruptcy proceedings in the courts of that territory. Although I say nothing about the facts of the Madoff case, it might suggest that foreigners who have bona fide dealings with the United States might have to face the dilemma of the expense of defending enormous claims in the United States or not defending them and being at risk of having a default judgment enforced abroad."*

[69] See *Adams v Cape Industries* [1990] Ch. 433 C.A., 517-518, 519 per Slade LJ.

Even in the context of judgments *in personam*, the *Dicey Rule* has been rejected in Canada as being the appropriate test for the recognition of foreign judgments[70]. The United States itself adopts a broader and more flexible test for the recognition of foreign judgments based on the doctrine of comity (*Hilton v. Guyot*, 159 U.S. 113, 205-06 (1895)). In its recent decision in *Re Flightlease (Ireland) Limited* [2012] IESC 12 the Irish Supreme Court followed the *Dicey Rule* because it considered itself compelled to do so, rather than because it considered that the policy basis for rule 36 remained sound[71].

As far as the *Rubin* respondents were concerned, and based upon good if not highly persuasive authority, there appeared to be no good reason why as a matter of policy the criteria for the recognition of a judgment given in proceedings relating to such insolvency should depend on whether or not the defendant submitted to the jurisdiction of the foreign court. That proposition with respect to the Supreme Court is deeply rooted in the Victorian era and has no place in the electronic age; it has more to do with travel by steam than e-commerce.

The Position under the Insolvency Regulation and the Judgments Regulation

In an attempt to persuade the Supreme Court that the common law could adapt itself to modern mores by reference to statutory parallels, the *Rubin* Respondents sought to show that at English common law it is necessary to draw a boundary between ordinary civil proceedings and insolvency proceedings, and to determine which type of actions fall into each category.

This has been a necessary part of the assimilation into UK jurisprudence of the EC Insolvency Regulation for in the European context where there is a pan European Insolvency Regulation affecting all 27 EU States other than Denmark. The outcome of this exercise at the European level is instructive because it provides guidance as to what is both a principled and practical approach for distinguishing between insolvency proceedings and ordinary civil actions ("civil and commercial matters").

The rules governing the recognition of judgments in civil and commercial matters are contained in the Judgments Regulation[72]. However, the Judgments Regulation, like the preceding Brussels Convention, excludes from its scope bankruptcy and proceedings relating to the winding-up of insolvent companies or other legal persons (Article 1.2(b)). In *Gourdain v Nadler*[73] the European Court of Justice ("ECJ") held that if decisions relating to bankruptcy and winding-up are to be excluded from the scope of the Brussels Convention "*they must derive directly from the bankruptcy or winding-up and be closely connected with the proceedings*" (para. 4).

When the Insolvency Regulation came into force in May 2002, it likewise followed the *Gourdain v Nadler* test in determining which proceedings fall under the scope of the Insolvency Regulation, and not under the scope of the Judgments Regulation.

(1) Accordingly, Article 3(1) of the Insolvency Regulation confers international jurisdiction on the Member State within the territory of which insolvency proceedings are first opened to hear

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[70] *De Savoye v Morguard Investments Limited and Credit Foncier Trust Company* [1990] 3 S.C.R. 1077: LaForest J stated: "*The approach adopted by the English courts in the nineteenth century may well have seen suitable to Great Britain's situation at the time. One can understand the difficulty in which a defendant in England could find himself in defending an action initiated in a far corner of the world in the then state of travel and communication … The approach, of course, demands that one forget the difficulties of the plaintiff in bringing an action against the defendant who has moved to a distant land. However this may not have been perceived as too serious a difficulty by English courts at a time when it was predominantly English men who carried on enterprises in far away land. As well there was an exaggerated concern about the quality of justice that might be meted out to British residents abroad; see Lord Reid in The Atlantic Star [1973] 2 All E.R. 175 at p. 181. The world has changed since the above rules were developed in nineteenth century England. Modern means of travel and communications have made many of these nineteenth century concerns appear parochial. The business community operates in a world economy and we correctly speak of a world community even in the face of decentralised political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances our approach to the recognition and enforcement of foreign judgments would appear right for reappraisal. Certainly, other countries, notably the United States and members of the European Economic Community, have adopted more generous rules for the recognition and enforcement of foreign judgments to the general advantage of litigants.*" See also Saldanha & Ors v Frederick H. Beals & Another [2003] 3 S.C.R. 416)

[71] O'Donnell J stated at para. 10: "*In so much therefore as this appeal challenges the intrinsic merits and logic of the rules contained in Rule 36 of the latest edition of Dicey & Morris, then in my view, the argument has considerable force. The principal thing to be said in favour of Rule 36 is that very fact; that it is a rule and is understood as such, that it provides certainty and therefore predictability. These are important values, but if the law on the recognition of foreign judgments was being constructed from scratch, and by reference solely to rules which best accorded with function of private international law rules in the modern era, then I think it is unlikely that a rule as restrictive as that contained in Rule 36 would be adopted.*"

[72] Council Regulation (EC) No. 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters.

[73] [1979] ECR 733 Case 133/78.

and determine actions which derive directly from the insolvency proceedings and are closely connected with them: *Seagon v Deko Marty Belgium NV*[74], (para. 21).

(2) Under Article 25 of the Insolvency Regulation, judgments emanating from the Courts of the Member State in which the insolvency proceedings were opened and which derive directly from the proceedings and are closely linked with them are to be recognised in other Member States.

(3) It follows that in the case of an action to set aside a transaction at an undervalue arising in insolvency proceedings, the jurisdiction to hear and determine the action arises under the Insolvency Regulation, not under the Judgments Regulation[75]. Likewise, any resulting judgment will be recognised and enforced under Article 25 of the Insolvency Regulation, and not under the Judgments Regulation.
(emphasis added)

Accordingly, there is a dichotomy between judgments given in actions which directly derive from and are closely connected with an insolvency proceeding (such as avoidance actions or actions for fraudulent or wrongful trading) and which fall within the scope of the Insolvency Regulation, and judgments given in ordinary civil actions (which may include actions brought by an office-holder, but based on the company's ordinary rights rather on insolvency provisions) which fall within the scope of the Judgments Regulation.

English case law dealing with the Insolvency Regulation and the Judgments Regulation has adopted the same approach:

(1) In *UBS AG v Omni Holdings AG (in liquidation)*[76], Rimer J stated:

> *"It is apparent, therefore, that for the paragraph (2) exception [of bankruptcy from civil matters] to apply it is not enough that the claim can be said to relate to the winding-up of an insolvent company: it must derive directly from it. For example, a claim by a liquidator to recover the company's pre-liquidation debts would be a claim which would be made in the course of the winding-up and could therefore in one sense be said to relate to it; but I respectfully agree with Rattee J when he expressed the view in* In re Hayward (decd) *[1997] Ch 45, 54D that such a claim would not be within the paragraph (2) exception so as to take it outside the scope of the [Lugano] convention. It is a claim which would have existed as much before as during the winding-up and so would not be one deriving directly from it. By contrast, I think it probable that (by way of non-exhaustive examples) claims in a compulsory liquidation by a liquidator under section 238 (transactions at an undervalue) or section 239 (preferences) of the Insolvency Act 1986, being claims for which an insolvency regime for the company is a prerequisite, would be within the paragraph (2) exception. Such claims derive directly from the insolvency."*
> (emphasis added)

(2) In *Re Ultra Motorhomes International Ltd, Oakley v Ultra Vehicle Design Ltd (in liq)* [77]Lloyd LJ stated:

> *"42 . . . it has been held that a claim by a liquidator to recover pre-liquidation debts, although made in the course of the winding-up and so, in a sense, relating to it, does not derive directly from it and is therefore not excluded from the Brussels Convention (and therefore now not from the Regulation) by art 1.2(b): see* Re Hayward deceased *[1997] Ch 45, and* UBS AG v Omni Holding AG (in liq) *[2000] 1 WLR 916 [2000] BCC 593. By contrast, proceedings by a liquidator against a debtor or a third party to set aside a transaction as having been effected at an undervalue or on the basis of wrongful or fraudulent trading would be claims deriving directly from the winding-up and therefore excluded from the Brussels Convention and now from the Judgments Regulation."*
> (emphasis added)

[74] [2009] 1 W.L.R. 2168 Case C-339/07.
[75] *Seagon*, para. 28
[76] [2000] 1 WLR 916, 922
[77] [2005] EWHC 872 (Ch), [2006] BCC 57, [2006] BPIR 115

The effect of the common law principles applicable to cross-border insolvency, described above, give rise to the same dichotomy and approach. Thus Insolvency Orders given in actions which arise in the course of a foreign insolvency proceeding (such as in avoidance actions) and which form part of the proceeding are recognised by application of the principles which govern the recognition of the foreign insolvency itself. Judgments *in personam* which are not closely related to the foreign insolvency proceeding, and which do not form part of them are recognised in accordance with the *Dicey Rule* which govern ordinary civil litigation.

Flightlease

In *Re Flightlease (Ireland) Limited*[78] the Irish Supreme Court recently considered the application of *Cambridge* and the *Dicey Rule*. The facts of that case were that an Irish subsidiary of the Swissair group ("Flightlease") had gone into liquidation in Ireland. The parent company ("Swissair") was in liquidation in Switzerland. Proceedings were instituted by Swissair before the Swiss court seeking the repayment by Flightlease of certain monies paid by Swissair prior to it going into liquidation.

The Irish High Court directed the trial of a preliminary issue as to whether a judgment of the Swiss court would be recognised and enforced in Ireland. On appeal, the Irish Supreme Court held that the judgment would not be recognised and enforced. As to this:

(1) Finnegan J declined to adopt the approach in *Cambridge*. He considered that *Cambridge* had effected a change in the common law position and that a similar change in the common law of Ireland should await the establishment of a consensus amongst common law jurisdictions. He did not go quite as far as saying it could only be done through legislation, which ended up being the default position of Lord Collins in *Rubin.* Finnegan J also appears to have considered that the decision in *Cambridge* had resulted from legislative changes in the United Kingdom[79]. On this basis, Finnegan J considered that any order of the Swiss court would be a judgment *in personam*, and that the Irish courts should continue to apply the test in rule 36 of *Dicey* in preference to the real and substantial connection test which had been adopted by, for example the Canadian courts.

(2) O'Donnell J also considered that it was not possible to reject the *Dicey Rule* in favour of the real and substantial connection test. However he questioned whether the *Dicey Rule* remained relevant in the modern context (para.4):

> *"It can be said that the narrowness of Rule 36 in Dicey, Morris & Collins has little to recommend it at a policy level other than the fact that it is rule which is known and therefore predictable ... No matter how thoughtful and impressive some of those individual judgements (and the commentary upon them) may be, it is asking a lot that the outlook of the British empire at its height, with its justifiable pride in its own legal system, and perhaps less justifiable suspicion of others, should provide enduring rules which are well adapted to the circumstances of a world in which international travel is commonplace, and global trade an essential feature of modern economies."*

(3) O'Donnell J also pointed to the desirability, in cases of insolvency, for there to be a central location for the determination of disputes (para.8). Likewise, in his view there was no good reason why a litigant should be able to ignore proceedings brought in the courts of a friendly state whose legal system there was no reason to doubt (para.7). He concluded (para.9):

> *"Accordingly, for my part, I would not wish to entirely rule out the possibility of the development of an insolvency principle as a matter of common law as indeed was discussed by Lord Hoffman in United Kingdom House of Lords in Cambridge Transportation v Unsecured Creditors of Navigator Holdings Plc [2007] 1 AC 508, and Re HIH Casualty and General Insurance Limited [2008] 1 WLR 852 (House of Lords) and in the United Kingdom Court of Appeal in Rubin & Anor v Eurofinance SA [2010] EWCA 895. It would of course be desirable that this situation could be*

[78] [2012] IESC 12

[79] This was wrong since the decision in *Cambridge* concerns the common law, not any legislative instruments such as section 426, the CBIR or the Insolvency Regulation. The Judge may, however, have had in mind that these instruments, which are designed to further assistance and co-operation in international insolvency matters, formed the context in which the decision in *Cambridge* had been made.

> *achieved by international agreement and domestic legislation, but I would not rule out a possible development of the common law, if that appeared necessary. However, that question was not argued in any detail on this appeal. The Cambridge Gas case was referred to only in the context of whether or not any order obtained in the Swiss proceedings would be an in personam judgment. Accordingly I would reserve that question for another day, when it could be the subject of focussed argument in the context of all the conditions then prevailing."*

It is relevant that the Irish Supreme Court recognised that a development of the common law on the basis of the approach taken in *Cambridge* and *Rubin* might well be desirable, particularly given the importance of there being a single forum for the determination of insolvency disputes. Similarly, the Supreme Court recognised the limitations of the approach embodied in the *Dicey Rule*, not because considerations of policy and practicality led to the conclusion that it was the correct approach, but rather because legal certainty and precedent apparently required it. The judgment recognised that the line between insolvency orders and other orders is easy to draw by reference to the EC cases and others, but rather than embrace incremental development of the law to sensible effect, the opportunity was lost for pure policy reasons. It is clear from the passages above, that Lord Collins understood the damage being done[80].

F. Limits of the Jurisdiction

On the facts of *Rubin*, the questions turned on whether the court had jurisdiction in principle to recognise and enforce the relevant parts of the Judgment. If there is such jurisdiction, then there is no reason why the jurisdiction should not be exercised in favour of providing assistance. It is that simple proposition which was cast aside on pure policy grounds.

However, it is important to recognise that where the jurisdiction to assist a foreign insolvency in principle arises (e.g. by recognising a judgment given in that insolvency), then the court may not be bound to grant such assistance: the relief is acknowledged to be discretionary. On the facts of other cases, there may be factors present which are relevant to the question of when the jurisdiction arises and / or whether the discretion to grant assistance should be exercised.

Justice and Public Policy

The principle ought to be that recognition of foreign insolvency "*carries with it the active assistance of the court*": *Re African Farms*; *Cambridge* at para.20. However, this does not mean that the court is bound to provide the assistance sought in every case[81]. The principle of assistance requires that English courts should, so far as is consistent with justice and UK public policy, co-operate with the courts in the country of the principal liquidation to ensure that all the company's assets are distributed to its creditors under a single system of distribution (*HIH*, para. 30). Accordingly, the court would not be required to grant assistance to a foreign insolvency where this was repugnant to domestic standards of justice or to UK public policy. In that regard the judgment of Lord Collins can be seen as insensitive and mechanical in its rejection of the principle of assistance in favour of a rigid rule based upon policy alone.

The foreign insolvency proceeding

There were even before *Rubin* other boundaries to the extent to which the court is required to recognise foreign insolvency proceedings and insolvency orders made in those proceedings.

There are two aspects to this:

(1) First, the nature of the connection required between the debtor and the relevant foreign jurisdiction in which the insolvency proceeding is being conducted such that it is proper for the courts of this jurisdiction to recognise the foreign insolvency proceeding; and

[80] Paras 91 to 93

[81] Cf. the obligation to assist which arises under section 426(4) of the Insolvency Act 1986. In that context, the function of the court is to grant assistance to the foreign insolvency provided that such assistance can properly be granted: *Hughes v Hannover Ruckversicherungs AG* [1997] 1 BCLC 497, 517-518.

(2) Secondly, in cases such as *Rubin* where recognition and enforcement of an Insolvency Order is sought, the nature of the connection required between the foreign insolvency proceeding and that Insolvency Order.

So far as the first aspect is concerned, English law has traditionally recognised insolvency proceedings taking place in the insolvent's place of domicile (*HIH*, para.6). In the case of corporate insolvents, that will usually mean the place of incorporation (*HIH*, para.31). On the facts of different cases, there may however be a basis for applying a different test (*HIH*, para.31, per Lord Hoffmann):

> *"I have spoken in a rather old-fashioned way of the company's domicile because that is the term used in the old cases, but I do not claim it is necessarily the best one. Usually it means the place where the company is incorporated but that may be some offshore island with which the company's business has no real connection. The Council Regulation on insolvency proceedings ((EC) No 1346/2000 of 29 May 2000) uses the concept of the "centre of a debtor's main interests" as a test, with a presumption that it is the place where the registered office is situated: see article 3.1. That may be more appropriate."*

On the facts of *Rubin*, no issue arose since, although TCT is an English law trust, the links between TCT and the United States were compelling such that New York was and is the appropriate forum in which the insolvency proceedings in respect of TCT should be conducted.

As to the second aspect, it is also necessary for there to be an appropriate connection between the foreign insolvency proceeding and the Insolvency Order in respect of which recognition and enforcement is sought.

English courts seeking assistance abroad

In the converse position, where there is an English insolvency proceeding and permission is sought to bring proceedings against the defendants outside the jurisdiction, the courts have approached this issue in the following way:

(1) In *Re Paramount Airways Ltd*[82] the administrators of a company in administration in England sought permission to serve section 238 (transaction at an undervalue) proceedings out of the jurisdiction on a bank incorporated in Jersey. In relation to the exercise of the discretion to permit service out of the jurisdiction, the Court of Appeal identified as one of the relevant factors that (241G):

> *"Where a foreign element is involved one of the factors which the court will consider is the apparent strength or weakness of the plaintiff's claim that the defendant has a sufficient connection with England, in respect of the relief sought in the proceedings."*

(2) Similarly, in *Re Howard Holdings Inc*[83] the court identified the fact that the respondent is resident abroad as a relevant factor in deciding whether to give permission to serve out of the jurisdiction (554A-B):

> *"The second element, as it seems to me, is that the court must take account of the fact that the prospective respondent is abroad, and should not be required to answer claims in England unless there is good reason why England is the proper place for those claims to be litigated."*

Accordingly, where recognition and enforcement of a foreign Insolvency Order is sought, it will be necessary for there to be a sufficient connection between the foreign insolvency proceeding and the subject of the Insolvency Order[84]. This is an answer to Roman et al's second principal criticism of the approach of the Court of Appeal in the *Rubin* case. On the facts of the present case, such a sufficient connection is present. Lord Collins ignored this argument.

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[82] [1993] Ch. 223 C.A.
[83] [1998] BCC 549
[84] In many cases this is likely to be satisfied where the courts of the jurisdiction in which the insolvency proceeding was taking place were the only courts in which the action giving rise to the Insolvency Order could be brought.

It is interesting therefore to note that if the facts of the *Rubin* case were reversed such that TCT had carried on the scheme in England and had been placed into insolvency proceedings here and Roman et al were resident in New York, then it could be expected that the English court would have considered that England was the correct forum in which to bring section 238 proceedings to recover payments made to Roman et al and would have given permission to serve proceedings out of the jurisdiction accordingly.

It is implicit in this that the English court would have expected the New York court then to recognise and enforce any judgment of the English court even if Roman et al had remained in New York and had not contested the proceedings. This makes it all the more extraordinary that Lord Collins (para 128) where he seeks to limit what he calls "*dicta" in HIH* and *Cambridge* should state so baldly that:

> *"This would not be an incremental development of existing principles, but a radical departure from substantially settled law. There is a reason for the limited scope of the Dicey Rule and that is that there is no expectation of reciprocity on the part of foreign countries. Typically today the introduction of new rules for enforcement of judgments depends on a degree of reciprocity. The EC Insolvency Regulation and the Model Law were the product of lengthy negotiation and consultation."*

The evidence is that the New York courts would reciprocate as a matter of comity the treatment afforded what the US courts have called *"sister jurisdictions"*[85]. Thus the scope of any discretion is important. Abandoning *carte blanche* any concept of exercising a discretion to make things work is deeply protectionist and tends in the direction of the UK being seen as an ugly sister.

Discretion

The single argument advanced by Roman et al was to the effect that they proceeded on their basis of their understanding of the law and it would be unfair if, because of the way the law has developed, that understanding turns out to have been incorrect. The Judges in the Court of Appeal (rightly) had little sympathy with this argument[86]. Roman et al deliberately decided not to contest the merits and took their chances on resisting the enforcement of any resulting judgment in England. In any event, this argument is incompatible with the general principle that court rulings making findings to the law as it is and only in very exceptional circumstances will such rulings have a prospective effect only[87].

G. Cross-Border Insolvency Regulations 2006 – UNCITRAL Model Law

It was argued by the *Rubin* Respondents that in addition to the position at common law, the relevant parts of the Judgment could also be recognised and enforced under the provisions of the Model Law as implemented by the CBIR.

The Model Law

The CBIR implement the Model Law into English law[88]. The purpose of the Model Law, which was adopted by UNCITRAL in May 1997, is to provide effective mechanisms for dealing with cases of cross-border insolvency by providing a set of model statutory provisions which may be implemented into the domestic laws of countries and territories.

The preamble to the Model Law itself identifies the purpose of the Law as being to provide effective mechanisms for dealing with cases of cross-border insolvency as to promote the objectives of: (a) co-operation between the courts and other competent authorities of states involved in cases of cross-border insolvency; (b) greater legal certainty for trade and investment; (c) fair and efficient administration of cross-border insolvencies that protects the interests of all creditors and other interested persons, including the debtor; (d) protection and maximisation of the value of the debtor's assets; and (e) facilitation of the rescue of financially troubled businesses, thereby protecting investment and preserving employment.

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[85] *Re Metcalfe & Mansfield Alternative Investments* 421 B.R. 685 (Bankr. S.D.N.Y. 2010) and see belo

[86] CA judgment para. 64. See also *New Cap Re* [2011] EWHC 677 (Ch) para. 35 per Lewison J.

[87] *In re Spectrum Plus Ltd (in liquidation)* [2005] 2 A.C. 680 H.L.(E.).

[88] Regulation 2(1) of the CBIR provides that the Model Law shall have the force of law in Great Britain in the form set out in Schedule 1 to the CBIR which contains the Model Law with certain modifications to adapt it for application in Great Britain. The CBIR themselves were made pursuant to section 14 of the Insolvency Act 2000.

The Model Law is accompanied by a Guide to Enactment issued by UNCITRAL ("the Guide to Enactment"). This states (para.1):

> *"The UNCITRAL Model Law on Cross-Border Insolvency, adopted in 1997, is designed to assist States to equip their insolvency laws with a modern, harmonized and fair framework to address more effectively instances of cross-border insolvency. Those instances include cases where the insolvent debtor has assets in more than one State or where some of the creditors of the debtor are not from the State where the insolvency proceeding is taking place."*

The Guide to Enactment also emphasises that the Model Law enables enacting states to make available to foreign insolvency proceedings the type of relief which would be available in the case of a domestic insolvency (para.20(b)):

> *"The Model Law presents to enacting States the possibility of aligning the relief resulting from recognition of a foreign proceeding with the relief available in a comparable proceeding in the national law."*

Interpretation of the Model Law

Article 8 of the Model Law provides[89]:

> *"In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith."*

Accordingly, the way in which the Model Law has been applied in other States will be relevant to the proper interpretation and application of the Model Law in the United Kingdom.

The CBIR further provide that the following materials may be considered in ascertaining the meaning or effect of the Model Law: the Model Law itself, any documents of UNCITRAL and its working group relating to the preparation of the Model Law and the Guide to Enactment[90].

Recognition of the foreign proceedings

Under the scheme of the Model Law as implemented by the CBIR, a foreign representative may apply to the court for recognition of the foreign proceeding in which the foreign representative has been appointed (Article 15.1). The court is obliged to recognise a foreign proceeding provided that certain requirements are satisfied (Article 17.1). If the foreign proceeding is taking place in the State where the debtor has its centre of main interests (COMI), then it must be recognised as a foreign main proceeding (Article 17.2(a)). Such recognition has certain automatic effects including the imposition of a stay on the commencement or continuation of proceedings against the debtor (Article 20).
For these purposes:

(1) "*foreign proceeding*" means:

> *"a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganisation or liquidation".*

(2) "*foreign representative*" means:

> *"a person or body, including one appointed on an interim basis, authorised in a foreign proceeding to administer the reorganisation or the liquidation of the debtor's assets or affairs or to act as a representative of the foreign proceeding".*

[89] Similarly, the Guide to Enactment, at para. 21 states: "*The flexibility to adapt the Model Law to the legal system of the enacting State should be utilized with due consideration for the need for uniformity in its interpretation and for the benefits to the enacting State in adopting modern, generally acceptable international practices in insolvency matters.*"

[90] Regulation 2(2).

As part of their arguments in opposition to the recognition and enforcement of the Judgment, Roman et al sought to advance two arguments which they advanced in the courts below (but which were rejected both by the Deputy Judge and by the Court of Appeal) as to the recognition of the Chapter 11 proceeding in the present case. The first argument relates to the recognition of the Adversary Proceedings. The second argument relates to the recognition of the Receivers as "*foreign representatives*".

Recognition of the adversary proceedings

As to the first argument, Roman et al twice sought to run the argument they ran before both the Deputy Judge and the Court of Appeal that the Adversary Proceedings should not be recognised under the Model Law. Both the Deputy Judge and the Court of Appeal correctly rejected this argument. The argument proceeded on the basis of a misunderstanding as to the nature of the "*proceedings*" which are recognised under the Model Law.

As the definition of "*foreign proceeding*" set out above makes clear, under Articles 15 and 17 of the Model Law, the recognition is of the foreign insolvency process i.e. in the *Rubin* case, the Chapter 11 proceeding itself. The court is not required under the provisions of Article 15 and 17 to grant separate recognition to actions which are then brought within the context of that insolvency proceeding. However, to the extent that such actions do form part of the foreign insolvency proceeding, then the recognition of the foreign insolvency proceeding will necessarily encompass such actions.

In the *Rubin* case, the order made by the Deputy Judge recognised the Chapter 11 proceeding "*including the Adversary Proceedings*"[91]. This followed from the Deputy's Judge's conclusions that "*bringing adversary proceedings against debtors of the bankrupt is clearly part of collecting the bankrupt's assets with a view to distributing them to creditors*" and that "*the adversary proceedings are part and parcel of the Chapter 11 insolvency proceedings*"[92]. The Court of Appeal was of the same view (paras.61(2) and (3)).

Accordingly, the order made by the Deputy Judge recognising the Chapter 11 proceeding was correct.

As to the second argument, Roman et al argued that the Receivers should not be recognised as foreign representatives, at least in so far as such recognition extends to the Adversary Proceedings. This argument it is submitted was and is misconceived. The recognition of the Receivers as foreign representatives is on the basis that they have been authorised in the Chapter 11 proceeding to act as representatives of the Chapter 11 proceeding[93].

Relief that may be granted under the Model Law

The principal question which in fact arose in relation to the Model Law in *Rubin* is whether the court has power to grant relief recognising *and enforcing* the relevant parts of the Judgment.

Article 21 of the Model Law provides that:

> *"Upon recognition of a foreign proceeding, whether main or non-main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief …"* (emphasis added)

Article 21 then lists a number of forms of relief which may be granted by the court. However, this list is not exclusive and the Guide to Enactment, which is admissible as an aid to construction[94], states (paras.154, 156):

> *"[154]The types of relief listed in article 21, paragraph 1, are typical or most frequent in insolvency proceedings; however, the list is not exhaustive and the court is not*

[91] Order of 31 July 2009, para. 1.
[92] See paras. 46 and 47 of the Judgment.
[93] Order of the Bankruptcy Court of 24 October 2007.
[94] Regulation 2(2)(c).

restricted unnecessarily in its ability to grant any type of relief that is available under the law of the enacting State and needed in the circumstances of the case.

[156] It is in the nature of discretionary relief that the court may tailor it to the case at hand. This idea is reinforced by article 22, paragraph 2, according to which the court may subject the relief granted to conditions that it considers appropriate."

(emphasis added)

Accordingly, the power under Article 21 is to grant any type of relief that is available under the law of the relevant state[95]. Further, the fact that recognition and enforcement of foreign judgments is not specifically mentioned in Article 21 as one of the forms of relief available, does not mean that such relief cannot be granted, as the Guide to Enactment makes clear.

The international approach

Article 8 of the Model Law requires the court to have regard to its international origin and to the need to promote uniformity in its application. This means that it is necessary to take into account how the Model Law has been applied in other jurisdictions.

The courts of the United States, in particular, have taken a broad approach to the application of the Model Law[96]. The Model Law has been implemented into United States law through Chapter 15 of Title 11 of the United States Code ("Chapter 15"). The equivalent provision to Article 21 of the Model Law is section 1521 of Chapter 15.

In *Re Metcalfe & Mansfield Alternative Investments* the Bankruptcy Court ordered that orders made by a Canadian court in relation to a plan of compromise and arrangement under the Canadian Companies' Creditors Arrangement Act be enforced in the United States pursuant to sections 1521(a)(7) and 1507 of Chapter 15.

As to this:

(1) The Bankruptcy Court appears to have had little difficulty with the notion that recognition and enforcement of the Canadian orders fell within the scope of the "*additional assistance*" which could be granted by the United States courts under section 1521(a)(7).

(2) It noted that the grant of post-recognition relief was largely discretionary, but that the court would exercise its discretion consistent with principles of comity and co-operation with foreign courts[97].

(3) It also held that the relief granted in the foreign proceeding and the relief available in an equivalent United States proceeding need not be identical, and that the key determination was whether the procedures used in the foreign jurisdiction satisfied domestic fundamental standards of fairness.

On this basis, the Bankruptcy Court ordered the enforcement in the United States of the Canadian orders. The enforcement order was made in *Metcalfe*, notwithstanding that the Bankruptcy Court itself might not have had jurisdiction to approve a similar plan in an equivalent Chapter 11. To this extent, the decision in *Metcalfe* goes further than both *Cambridge* and *Rubin* in the Court of Appeal: indeed it builds upon the expectation of reciprocity which Lord Collins had held to be an insufficient basis for assistance (para.128-9).

It was argued in *Rubin* that as required by Article 8 of the Model Law, Article 21 of the Model Law should be applied in the same way as the Bankruptcy Court applied section 1521 in

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[95] See also para. 159 of the Guide to Enactment.

[96] In addition to the *Metcalfe* case referred to below, see also *Re Condor Insurance Limited* 601 F.3d 319 (5th Cir. Miss. 2010) where the United States court granted relief to enable the liquidator of a Nevis insurance company to bring proceedings in the United States in respect of claims governed by Nevis law. In *In re Atlas Shipping A/S* 404 B.R. 726, 738 (S.D.N.Y. 2009). the Bankruptcy Court granted relief vacating maritime attachments which had been entered by creditors in the New York against the property of two companies in insolvency proceedings in Denmark (including attachments both entered before and after the commencement of the Danish insolvency proceedings), and entrusted the attached funds for administration in the Danish insolvency proceedings.

[97] *In re Bear Stearns High-Grade Structured Credit Strategies Master Fund Ltd* 398 B.R. 325, 333 (S.D.N.Y. 2008); *In re Atlas Shipping A/S* 404 B.R. 726, 738 (S.D.N.Y. 2009).

Metcalfe. Accordingly, the relief available under Article 21 should include recognising and enforcing a judgment of the foreign court made in the foreign insolvency proceedings.

The approach under the Model Law, as enacted by the CBIR, is arguably consistent with that at common law. The Court is empowered to grant any appropriate relief which includes, at least, any type of relief that is available under the law of the enacting State.

In *Rubin*, the relief sought reflects relief which would have been available under the English statutory scheme if TCT had been in an insolvency procedure in England. It is therefore a type of relief that is available under English law. Furthermore, the relief sought is in the interests of creditors because it will facilitate the recovery of assets for distribution in accordance with the applicable statutory scheme (i.e. that of Chapter 11) to the creditors of TCT.

Co-operation

In addition to Article 21, Article 25 of the Model Law provides that:

> *"In matters referred to in paragraph 1 of Article 1, the court may co-operate to the maximum extent possible with foreign courts or foreign representatives either directly or through a British insolvency officeholder."*

Article 27 provides that the co-operation referred to in Article 25 may be implemented "*by any appropriate means*" (emphasis added).

The recognition and enforcement of the judgments of a foreign court is the paradigm means of co-operation with that court. Given the very broad terms in which Articles 25 and 27 are framed, the court must be taken to have jurisdiction to co-operate with foreign courts by recognising and enforcing the judgments of those courts. As the Court of Appeal pointed out, co-operation "*to the maximum extent possible*" should surely include enforcement[98].

What is the point of having the tree in your orchard without being able to enjoy the fruit?

H. What the Supreme Court Decided[99]

In both *Rubin* and *New Cap* the English Court was being asked to enforce judgments based on insolvency avoidance powers obtained in default of the appearance of the respective defendants, it having been accepted or found in respect of each of the cases that the judgment debtor was neither present in the foreign country nor submitted to its jurisdiction.

In *Rubin,* as articulated above, the English Court of Appeal (CA) had held that it had power under both English common law principles and under the Cross-border Insolvency Regulations 2006 ("CBIR") to enforce a judgment of the US Federal Bankruptcy Court for the Southern District of New York, in default of appearance, of approximately US $10m in respect of fraudulent conveyances and preference claims.

In *New Cap* the CA (as it was obliged to as a matter of pure precedent) had followed *Rubin* in its analysis of the common law and also found (this point was not relevant in *Rubin* since the subject statutes were not engaged) that the English Court had jurisdiction to enforce a judgment obtained by an Australian liquidator under section 426 IA 1986 and under the Foreign Judgments (Reciprocal Enforcement) Act 1933 ("1933 Act").

As part of its deliberations the Supreme Court also considered the written submissions of Mr Irving Picard, the trustee appointed under the US Securities Investor Protection Act 1970 of Bernard L Madoff Investment Securities LLC, as an interested party in connection with pending proceedings in Gibraltar to enforce US default judgments.

The hearing of the combined appeals involved the Supreme Court considering each of the available gateways through which a foreign insolvency judgment can potentially be recognised and enforced in England (with the exception of Insolvency Regulation), and the Judgments

[98] CA judgment para. 63.

[99] In order to bring a degree of objectivity to the conclusions of this paper reliance has been placed on the excellent Technical Bulletin produced on the subject by the UK Insolvency Lawyers' Association in structuring this section.

Regulation, neither of which were relevant because the insolvency proceedings and relevant debtors all had their centres of main interests outside the EU).

The gateways as already noted comprise the following:

1. S426 IA 86 (relevant to *New Cap*, but not *Rubin*).

2. The CBIR (relevant to *Rubin* – but not to *New Cap* as the matters in issue there took place before the implementation of the CBIR).

3. Recognition under the common law (considered in both appeals).

4. The 1933 Act. (Relevant in *New Cap,* given that Australia is a country within the scope of the 1933.

5. Act, but not relevant in *Rubin*).

The 1933 Act applies to and concerns the enforcement of any judgment for the payment of money in respect of civil and commercial matters by courts in an applicable jurisdiction.

The Supreme Court Decision - Recognition under the Common law

Lord Collins for the majority, approached the issue as one of pure policy and rejected the argument that in the interests of universality of bankruptcy procedures the court should:

> '*devise a rule for the recognition and enforcement of judgments in foreign insolvency proceedings which is more expansive, and more favourable to liquidators, trustees in bankruptcy, receivers and other office holders, than the traditional common law embodied in the Dicey Rule*'.

He held that no such rule presently existed and stated that if such a rule were to be developed, it would have to be a matter for Parliament, after appropriate consultation, and was not the appropriate subject of judge-made law. The rest of the law lords, with the exception of Lord Clarke, agreed.

Lord Collins went further and held that the decision in *Cambridge* was wrongly decided, even though he was not asked to do so, and did not need to do so. to find for the Appellants, Roman et al (Para123):

> **"***It follows that, in my judgment, Cambridge Gas was wrongly decided. The Privy Council accepted (in view of the conclusion that there had been no submission to the jurisdiction of the court in New York) that Cambridge Gas was not subject to the personal jurisdiction of the US Bankruptcy Court. The property in question, namely the shares in Navigator, was situate in the Isle of Man, and therefore also not subject to the in rem jurisdiction of the US Bankruptcy Court. There was therefore no basis for the recognition of the order of the US Bankruptcy Court in the Isle of Man*".

Lord Mance reserved his opinion on whether *Cambridge* was wrongly decided the point had simply not been argued before the Supreme Court and because *Cambridge* was distinguishable given that it concerned shareholdings in an insolvent company rather than *in personam* claims. None of the justices appears to have considered whether it was open to them to determine that *Cambridge* was wrongly decided, of which see the commentary below. Strictly all that was open to them was to overrule *Rubin* in the court of appeal.

Lords Walker and Sumption agreed with Lord Collins' judgment without qualification without either of them producing a reasoned opinion and Lord Clarke issued a short dissenting judgment. Lord Clarke agreed that *Cambridge* was distinguishable, but did not agree with the majority decision that it was wrongly decided. In a minority ruling he considered that the appeal on *Rubin* should be dismissed. He agreed on all other issues with the judgment of Lord Collins.

The Application of the Dicey Rule and Submission to the Jurisdiction

In the context of *New Cap*, and having found that the *Dicey Rule* did apply, Lord Collins went on to consider the question of whether the judgment debtors had submitted to the jurisdiction for the purposes of that rule thus opening them up to enforcement proceedings. He articulated (para 161) the principles by which this issue was to be determined.

> *"The characterisation of whether there has been a submission for the purposes of the enforcement of foreign judgments in England depends on English law. The court will not simply consider whether the steps taken abroad would have amounted to a submission in English proceedings. The international context requires a broader approach. Nor does it follow from the fact that the foreign court would have regarded steps taken in the foreign proceedings as a submission that the English court will so regard them. Conversely, it does not necessarily follow that because the foreign court would not regard the steps as a submission that they will not be so regarded by the English court as a submission for the purposes of the enforcement of a judgment of the foreign court. The question whether there has been a submission is to be inferred from all the facts".*

As explained above Roman et al had not taken any steps in the clawback proceedings themselves, but Lord Collins went on to consider whether the steps taken by the judgment debtors in the Australian liquidation in NewCap amounted to a submission to the jurisdiction for the purposes of the *Dicey Rule*. The AE Grant syndicates had submitted a proof of debt and proxy form at a meeting of creditors, voted on a scheme of arrangement and had claims to a sum of £650,000 admitted by the office holder (although they had not yet received a dividend pending resolution of the preference claim against them). These steps had all post-dated the entry of the default judgment.

Lord Collins, relying on *Robertson* concluded that, having chosen to submit to the Australian insolvency proceeding by proving in the insolvency, the judgment debtors should be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of that proceeding in its entirety. He commented: (at paras.166 and 167)

> *"The Syndicate objected to the jurisdiction of the Australian court. Barrett J in his judgment of 14 July 2009 accepted that it had made it clear that it was not submitting to its jurisdiction, and he also accepted that as a result the judgment of the Australian court would not be enforceable in England. His judgment is concerned exclusively with the preference claims, and he did not deal with the question of submission by reference to the Syndicate's participation in the liquidation by way of proof and receipt of dividends. He decided that the court had jurisdiction because the New South Wales rules justified service out of the jurisdiction on the basis that the cause of action arose in New South Wales.*
>
> *I would therefore accept the liquidators' submission that, having chosen to submit to New Cap's Australian insolvency proceeding, the Syndicate should be taken to have submitted to the jurisdiction of the Australian court responsible for the supervision of that proceeding. It should not be allowed to benefit from the insolvency proceeding without the burden of complying with the orders made in that proceeding"*[100].

[100] This reliance has been criticised elsewhere by Lexa Hilliard QC of 11 Stone Buildings who argues that Firstly in *Re Robertson* is not a decision of high authority. It was made by the Chief Justice in Bankruptcy on appeal from a county court. Whilst the level of decision-making is not, in itself, a reason for according it little weight, Lord Collins' uncritical application of it in New Cap Re was surprising.
Second, the reasoning of in *Re Robertson* is based on s.72 of the Bankruptcy Act 1869, a predecessor to s.363 of the Insolvency Act 1986. S.363 provides that every bankruptcy is under the general control of the court and that the court has full power to decide all questions arising in any bankruptcy. The insolvency in *New Cap Re* was a voluntary liquidation, not a bankruptcy. There is no s.363 equivalent for voluntary liquidations in the Insolvency Act 1986. On the contrary, unlike a bankruptcy or compulsory liquidation, a voluntary liquidation is not a court-driven process with each application made being part of, and within, that process. In a voluntary liquidation each court application forms a separate set of proceedings. The reasoning, in *Re Robertson* to the effect that the creditor had already become an "active party" to the bankruptcy proceedings by proving and accepting a dividend does easily apply to a voluntary liquidation which is not, in itself, a "court proceeding".
Third, in *Re Robertson* the creditor had already received and accepted a dividend in the bankruptcy by the time the proceedings against him were commenced. The Chief Justice's reasoning in the case is based in part on the proposition that the creditor having accepted a benefit from the bankruptcy proceedings will not thereafter be permitted to challenge the jurisdiction of court in charge of those proceedings. Although the defendant had proved in the liquidation of New Cap Re, the liquidator had held back a dividend that would have otherwise have been payable in partial discharge of the liquidators' costs. It cannot be said, in quite the same way as in *Re Robertson* that the defendant in New Cap Re had accepted a benefit in the liquidation and therefore must accept the burden of submission to the jurisdiction.

In *Robertson* the trustees in bankruptcy then sought to recover from the creditor a payment that had been made to him by the debtor after the petition had been presented, on the basis that it was a void disposition. The creditor argued that he was not subject to the jurisdiction of the English Court. Sir James Bacon CJ held that by proving in the bankruptcy and taking the benefit of a dividend the Scottish creditor had submitted to the jurisdiction of the English court. On the basis of this single ancient judgment Lord Collins held that the defendant in New Cap had submitted to the jurisdiction[101].

The CBIR

The Supreme Court unanimously concluded that as the CBIR includes no express provision dealing with enforcing a foreign judgment against a third party there was no power under the CBIR for the court to do so. Lord Collins commented (at para.143):

> *"It would be surprising if the Model Law was intended to deal with judgments in insolvency matters by implication. Articles 21, 25 and 27 are concerned with procedural matters. No doubt they should be given a purposive interpretation and should be widely construed in the light of the objects of the Model Law, but there is nothing to suggest that they apply to the recognition and enforcement of foreign judgments against third parties".*

Given what is said above about the CBIR having an international dimension it is perhaps regrettable that Lord Collins did not avail himself of the opportunity to review greater depth the opinions of the US Fifth Circuit Court of Appeal in *Re Condor Insurance*[102]. US courts have the power to assist foreign representatives in the enforcement of foreign bankruptcy judgments under Chapter 15 of the US Bankruptcy code. In *Condor* the silence in the US Code itself on the extent of the Model Law was taken as an affirmation of the width of the relief available, not as Lord Collins would have it a restriction[103]. In fact Lord Collins referred to *Condor* in the passage of his opinion dealing with the characterisation of Avoidance laws[104], but seems to have overlooked the inconvenient final conclusion as to the substantive relief inherent in Section 1521 of Ch 15 of the US Code, clearly he was aware of it.

Assistance under s426(4) and (5) IA 86

The decision of the Supreme Court that the judgment debtors in *New Cap* had submitted to the jurisdiction of the Australian Court made its decision on the scope of s426 not strictly part of the reasoning. Nevertheless Lord Collins went on to express a view about the applicability of the section as the matter had been fully argued. In practice his remarks on the scope of s426 (4) and (5), may carry very significant weight. Lord Collins concluded that there was no power for the court to make an order enforcing a foreign insolvency order under s426 (4) and (5). He reached this decision having observed that s426 (1) and (2) dealt with the enforcement of orders from one part of the United Kingdom to another, but that in contrast s426 (4) and (5) made no mention of enforcement. He concluded that if it were to be held that the court had a general power to enforce under s426 (4) this would render s426 (1) and (2) largely redundant.

Fourth, Lord Collins does not attempt to reconcile the principle in *Re Robertson* with the principle that a defendant who submits to the jurisdiction in an ordinary civil claim to contest a particular claim on the merits is not to be treated as submitting to the jurisdiction for the purposes of contesting all claims that the claimant might subsequently wish to bring, by amendment, in the same set of proceedings.

[101] In *Isis Investments Ltd v Oscatello Investments Ltd & Ors* [2013] EWHC 7 Ch. Asplin J. where proofs had been lodged in Isle of Man liquidation proceedings on a contingent basis, refused to characterise the proving process as an election to have all matters determined in the Manx court, and distinguished *Rubin* (para81).

[102] "The UNCITRAL Model Law represents a culmination of a long standing effort by the United States and other countries to develop a uniform system guiding needed cooperation. That the final negotiations included thirty-six UNCITRAL members-including the United States-representatives of forty observer states, and thirteen international organizations evidences its widespread support." 601 F.3d 319 (5th Cir. Miss. 2010)

[103] "The structure of Chapter 15 provides authority to the district court to assist foreign representatives once a foreign proceeding has been recognized by the district court. Neither text nor structure suggests additional exceptions to available relief. Though the language does not explicitly address the use of foreign avoidance law, it suggests a broad reading of the powers granted to the district court in order to advance the goals of comity to foreign jurisdictions. And this silence is loud given the history of the statute including the efforts of the United States to create processes for transnational businesses in extremis." (emphasis added)

[104] Para 97

I. Precedent?

The clash between the Privy Council and the Supreme Court

Following the unanimous advice of the Privy Council in *Cambridge* and the majority opinion of the Supreme Court in *Rubin* is there evidence of a schism at the apex of two important common law judicial hierarchies?

At the heart of the matter is whether the Supreme Court has the judicial capacity to assert that the Privy Council is wrong and what the effect of such an assertion may be. The role of the Privy Council is to hear appeals from Crown Dependencies (Jersey, Guernsey and the Isle of Man) and from the Commonwealth, including some republics[105]. It also hears appeals from overseas territories of the United Kingdom[106]. The Supreme Court judges are all members of the Privy Council in order, in theory, to produce a harmonised system of appeals for what was the British Empire. Appeals from Hong Kong, New Zealand, Australia and Canada are a thing of the past. In *Rubin*, Lord Collins when delivering the opinion of the majority simply concluded [132] that *Cambridge* was wrongly decided.

He did not in any sense address the Privy Council's role as a final appellate court for the jurisdictions noted above. Even though the influence of the Privy Council has dwindled, as a growing number of jurisdictions have introduced final courts of appeal of their own, it still remains an important final court of appeal for some economically important, mainly Caribbean, jurisdictions which have a direct nexus to the Privy Council not the Supreme Court.

As a matter of principle the doctrine of *stare decisis* (binding precedent) can only operate as between courts within the hierarchy of the same judicial system. A decision of a final court of appeal is binding on its intermediate or inferior courts within the same system, and is only persuasive in parallel jurisdictions[107].

The position therefore of Privy Council advices on appeals outside any hierarchy within which it is operating (the Supreme Court for example) is important. Take *Cambridge*, where the Privy Council is the final appellate court for the Isle of Man: its advice will bind the Manx Courts. The advice in respect of another jurisdiction (say *Cayman*) will be persuasive, but possibly more so with the Privy Council at the apex of its appeal system than an opinion of the Supreme Court. The reason that it is persuasive only in Cayman is that in *Cambridge* the Privy Council is not discharging its judicial responsibility as a Cayman Court. See *De Lasala v de Lasala*[108] where Lord Diplock said of the relative compositions of the House of Lords and the Privy Council:

> *"The Board is unlikely to diverge from a decision which its members have reached in their alternative capacity, unless the decision is in a field of law in which the circumstances of the Colony or its inhabitants make it inappropriate that the common law in that field should have developed on the same lines in Hong Kong as in England."*

As to the influence of the House of Lords (now the Supreme Court) in the Colony, as it then was, he said:

> *"Since the House of Lords is not a constituent part of the judicial system in Hong Kong it may be that in justice theory it would be more correct to say that the authority of its decisions on any question of law, even the interpretation of recent common legislation, can be persuasive only. …"*

[105] Antigua and Barbuda, Bahamas, British Indian Ocean Territory, Cook Islands and Niue (Associated States of New Zealand), Grenada, Jamaica, St Christopher and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Tuvalu. The Republics are the Republic of Trinidad and Tobago, the Commonwealth of Dominica, Kiribati, Mauritius.

[106] Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands, Gibraltar, Monserrat, Pitcairn Islands, St Helena and dependencies, Turks and Caicos Islands.

[107] From *Picard and Anor v Primeo Fund (In Official Liquidation) (unreported) (14 January 2013)* it appears that The Cayman court's view is that *Rubin* did not decide the question of whether a court would be able, in line with the principle of assistance, to offer at common law a "direct remedy" to the foreign office-holder to enable the pursuit of transaction avoidance claims or other causes of action not necessarily dependent on insolvency law. It appears that the Cayman court has the authority to entertain at common law an action based on the transactional avoidance provisions in Cayman: for such purposes, the court deemed the insolvent company to be the subject of liquidation before the Cayman court.

[108] [1980] AC 546 PC

Logically therefore the "overruling" of *Cambridge* inherent in [132] of Lord Collins opinion is effective only in the UK, and in strict theory only really overrules the Court of Appeal decision in *Rubin* itself. In respect of the wider Privy Council jurisdiction (other than the Isle of Man where *Cambridge* logically remains good law) the Supreme Court opinion is persuasive only.

It is submitted that the observation of Lord Diplock in *De Lasala* regarding the influence House of Lords decisions in Hong Kong that they:

> … *"will have the same practical effect as if they were strictly binding and the courts in Hong Kong would be well advised to treat them as being so."*

is susceptible to scrutiny in a case where both the House of Lords and the Privy Council have, as in *Cambridge* (numerically at least) concluded that *Cambridge* was not wrongly decided.

In *Cambridge* itself Lords Bingham, Hoffmann, Hutton, Rodger and Carswell, (5) sitting as the Privy Council, concluded that the fact that *Cambridge* did not technically submit to the jurisdiction of the New York court was not a bar to the effective enforcement of an order approving a plan of reorganisation which had the effect of expropriating the shares held by Cambridge in Navigator.

In *Pattni v Ali*, another Isle of Man case on appeal to the Privy Council, Lords Walker and Mance with the approval of Baroness Hale (and Lord Carswell again) added their tacit support to the correctness of the *Cambridge* decision. Lord Mance giving the advice adopted the analysis of Lord Hoffmann in *Cambridge* on the concepts of *in rem* and *in personam* proceedings at [23]. The Privy Council did not cast doubt on the *Cambridge* assertion that bankruptcy is different or that lack of submission to the jurisdiction was an issue sufficient bar to enforcement or assistance.

Moreover in HIH[109] Lords Walker, Hoffmann, Scott, Neuberger and Phillips did not question the correctness of *Cambridge*. At issue in HIH was the courts power to remit funds to Australia. Lords Hoffmann and Walker agreed that common law was capable to do that which was requested broadly on the basis of *Cambridge*. Lords Scott and Neuberger disagreed on the Rubin point, but Lord Neuberger has since recanted.

Why did Lord Walker change his mind? What certainty comes from the agreement of ten Judges in their final appellate role agreeing that *Cambridge* is a welcome development of the law only for Lord Walker to recant and Lord Sumption (who had argued the contrary in HIH as an advocate) to side with Lord Collins?

The doctrine of *stare decisis* is based upon precedent which is desirable since, as Lord Nicholls put it in *Re Spectrum Plus Limited*[110]*.*

> ***"People generally conduct their affairs on the basis of what they understand the law to be."***

One of the ways in which the Court of Appeal has historically navigated its way round unconventional decisions is the development of the *per incuriam* doctrine. In short, a decision of the Court of Appeal - or even the House of Lords / Supreme Court ceased to be followed where a tribunal had failed to take into account all the relevant and important statutes and authorities, but this only applies if the defect seriously affected the reasoning in the case and thus the outcome.

J. Comment

The Supreme Court's decision represents a depressing retreat and narrowing of the power of the English courts to assist foreign office holders since the golden age of Lord Hoffman, but perhaps only in so far as enforcement of judgments is concerned. It does not necessarily affect the recognition of the insolvency proceedings themselves or indeed the granting of assistance within those proceedings, but it does apparently severely limit the scope of such assistance having concluded that *Cambridge* is wrongly decided. The Supreme Court has concluded that

[109] [2008] UKHL 21
[110] [2005] UKHL 41

the *Dicey Rule* must be satisfied if a foreign judgment is to be enforced in the case of insolvency proceedings as it must in other contexts: submission to the jurisdiction is a necessary prerequisite. Having found that lodging a proof is a submission, absolutely no clarity is provided as to the nature of other acts amounting to submission. Tantalisingly Lord Collins held that Roman et al had not submitted (paras.168 and 169):

> "*... It would certainly have been arguable that Eurofinance SA had submitted to the jurisdiction of the United States District Court, for these reasons: first, it was Eurofinance SA which applied for the appointment by the High Court of Mr. Rubin and Mr Lan as receivers of TCT specifically for the purpose of causing TCT then to obtain protection under Chapter 11; second, it was Eurofinance SA which represented to the English court that officeholders appointed by the United States court would be able to pursue claims against third parties; third, the judgment of the US Bankruptcy Court states that the court had personal jurisdiction over Eurofinance SA not only because it did business in the United States but also (as I have mentioned above) because it had filed a notice of appearance in the Chapter 11 proceedings (Order 22 of July 2008, paras.42-43).*

But the Rubin appellants did not appear in the adversary proceedings, and it was not argued in these proceedings that Eurofinance SA (or Mr Adrian Roman, who caused Eurofinance SA to make the application) had submitted to the jurisdiction of the US Bankruptcy Court in any other way and it is not necessary therefore to explore the matter further."

Having held without any real argument that lodging a proof was submission for all purposes as regards the *NewCap* debtors, Lord Collins concludes that a much more active engagement of the assistance of the US courts by Roman et al is not submission because they did not appear in the adversary proceeding: this is at best a logical inconsistency.

It is a decision which has quite overtly been taken on policy grounds. There is a reluctant acceptance of the general principle that the English court has power at common law to recognise and grant assistance to foreign insolvency proceedings. Paragraphs 29-34 of the judgment consider the circumstances in which the English court has exercised this common law power (being circumstances ranging from the granting of stays of local proceedings to orders for the examination of debtors) but without embracing the principles fully.

There is now uncertainty as to the precise extent to which the English courts can give assistance, and enforcement of overseas bankruptcy judgments is a moving feast without there necessarily being a very appetizing menu. The lines between assistance and enforcement are now rather blurred and the opportunity to provide welcome clarity and to simplify has been missed, if not eschewed. It will be some time before The Supreme Court will have the opportunity to consider again common law assistance, Section 426, the CBIR, and the 1933 Act in one hearing and to rationalize properly their interaction.

It seems likely and regrettable that parallel proceedings may now more frequently have to be opened in cross-border insolvency cases, unless of course they fall under the Insolvency Regulation or under the European Winding Up Directives for banks and insurance companies.

As far as the 1933 Act is concerned Lord Collins deduced that its main object was to facilitate the enforcement of commercial judgments abroad by making reciprocity easier. He referred to the Report of the Foreign Judgments (Reciprocal Enforcement) Committee (1932) (Cmnd 4213), as an aid to construction. He also referred to an ECJ Judgment *F-Tex SIA v Lietuvos-Anglijos UAB-Jadecloud-Vilma*[111], where the court said that the Brussels I Regulation was "intended to apply to all civil and commercial matters apart from certain well-defined matters" and as a result actions directly deriving from insolvency proceedings and closely connected with them were excluded: para 29, but he observed that the exclusion of bankruptcy proceedings does not affect their character as civil or commercial matters. This is an odd result, since using 2012 ECJ logic to inform the reasoning underlying 1933 legislation for the Commonwealth stretches the concept of persuasive authority too far. Moreover referring as he did to *Condor* in the US but not then progressing to consider its authority on legislation with the same genesis and drafted in the

[111] (Case C-213/10) 19 April 2012

same terms (The UNCITRAL Model Law on Cross Border Insolvency) against this background looks a little odd, with respect.

In some respects the most interesting (and dangerous) aspect of the Supreme Court's decision in the context of *New Cap* is the concept of submission to the jurisdiction of a foreign bankruptcy court by filing a proof in the proceedings, and how far this may affect future practices. No general guidance is given about what may amount to submission, save that it is to be 'inferred from all the facts' and has to be considered objectively, or whether lodging a proof is submission for all purposes or has only limited effect.

The danger can be illustrated thus: a trader who has not submitted to the jurisdiction of the US courts has receivables totalling £3million owed which are 4 months overdue from a US debtor. The debtor files for Ch 11 and in the period pre filing, sixty days pre-petition the trader is paid £1million by the debtor. Such sums are automatically recoverable as preferences under section 547 of the US Code. The trader's non-submission to the US jurisdiction on the analysis of the *Dicey Rule* is a complete answer to any recovery claim. Unaware of the position the trader submits a proof for the outstanding balance of £2million thereby, on Lord Collins' analysis, submitting to the jurisdiction and opening himself up to a liability to repay the preferential sum. The paradox of the judgment is that the protection argued for in paras. 128 to 130 of Lord Collins' opinion are potentially fatally eroded by his reliance on *Re Robertson* to hold that submitting a proof is submission to the jurisdiction for all insolvency purposes.

In a restructuring context where compositions are relied upon to bind a minority of dissenting creditors, it will be interesting to see whether reliance on that composition in other jurisdictions may fall foul of being enforced, if the dissenting minority domiciled in the UK does not submit to the jurisdiction. But if they submit a proof?

It is tempting to observe that the opinion of the Court has mapped out for fraudsters an obvious means of not being held to account for their misdemeanours. It is anachronistic that in the electronic age where trading is possible in any number of jurisdictions at the click of a mouse wherever the controlling mind happens to reside for the time being that short of actual submission to the jurisdiction of the English courts he is untouchable.

Simmons & Simmons

Recognition of foreign Non-EU insolvency proceedings in the Netherlands

Dutch Supreme Court 13 September 2013 in re Yukos Finance II

By Gerhard Gispen[1]

Many foreign companies own assets that are located in the Netherlands. These assets may be physical assets but more often these assets are financial assets, such as shareholdings in Dutch companies or monetary claims against Dutch debtors. If a foreign company (the "Foreign Debtor") enters into insolvency proceedings, the question arises if and to what extent the insolvency officeholder (the "Foreign Administrator") has the authority to manage and dispose of the Foreign Debtor's assets that are located in The Netherlands.

The Dutch Bankruptcy Act law holds only a few rules in relation to the international aspects of insolvency proceedings. These rules only relate to the effect of Dutch bankruptcies in relation to a Dutch debtor's foreign assets, which rules are based on the principle of universality. This means that the Dutch bankruptcy encompasses all the debtor's assets, wherever they are located. If a creditor recovers its claims on the debtor's assets that are located outside the Netherlands (and outside the EU), the foreign creditor must on-pay the proceeds to the Dutch bankruptcy estate. If a foreign creditor would under the law of his country would be entitled to set-off, he must still pay his debt to the Dutch bankruptcy estate if Dutch bankruptcy law does not permit set-off.

The Netherlands are a European Union ("EU") Member State in which the EU Insolvency Regulation applies, and insolvency proceedings that are opened in an EU Member State in accordance with the EIR are recognised in the Netherlands by operation of the EIR. The Dutch Bankruptcy Act does not hold a provision in relation to the recognition of foreign insolvency proceedings that are opened outside the EU ("Foreign Proceedings"). The Dutch approach is that there is no automatic recognition of Foreign Proceedings, and that there is no procedure available to the Foreign Administrator to seek the recognition of Foreign Proceedings in the Netherlands. This approach to Foreign Proceedings Dutch law is based on the rule of territoriality.

The Dutch Supreme Court (Hoge Raad) has in a number of decisions explained of how this territoriality rule works, whereby in its most recent decision re Yukos Finance it came to an exhaustive summing up that is explained below.

The Yukos Finance II decision by the Supreme Court

The background of this matter is that the Foreign Administrator was the bankruptcy liquidator in the bankruptcy of the Russian based Yukos Oil Company, who had been appointed by the Moscow Arbitrazh court. According to applicable Russian bankruptcy law the Foreign Administrator was authorised to manage and dispose of all the assets owned by the Foreign Debtor wherever they are located. The assets of Yukos Oil Company included the shares in the capital of Yukos Finance BV, a Dutch company with its registered office in Amsterdam. The Foreign Administrator appointed new directors in Yukos Finance BV and eventually sold and transferred the shares in the capital of Yukos Finance BV to a third party buyer. Both the appointment of new management as well as the sale and transfer of the shares were challenged by the incumbent management of Yukos Finance. This challenge was based on two grounds, the first being that the territoriality rule prohibits that the Foreign Administrator manages and disposes of the Foreign Debtor's assets that are located in the Netherlands. The second argument was that the bankruptcy order by the Arbitrazh Court would violate Dutch public order.

In its decision of 13 September 2013 re Yukos Finance II, the Supreme Court held that, except where otherwise provided in an international regulation that is binding on the Netherlands, Foreign Proceedings pronounced in another country have territorial effect, which means the following:

Rule 1: the freeze or attachment of the bankrupt's assets by operation of Foreign Proceedings does not encompass the Foreign Debtor's assets located in the Netherlands; this means that Foreign Proceedings do not protect the Foreign Debtor's assets against attachments by creditors and do not preclude creditors from making attachments to recover their claims individually.

Rule 2: the legal effects that are linked to the Foreign Proceedings by operation of the insolvency law of the country where the Foreign Proceedings were opened cannot be invoked in the Netherlands inasmuch as this would result in unpaid creditors no longer having the possibility of having recourse against assets of the (former) Foreign Debtor located in the Netherlands, either during the Foreign Proceedings or after their completion. This does not only mean that a bankruptcy asset freeze or a bankruptcy attachment on the Foreign Debtor's assets by operation of the Foreign Proceedings cannot be invoked in the Netherlands, but also other effects such as for instance a debt restructuring or (partial) debt release that is crammed down on creditors through Foreign Proceedings.

Rule 3: this territoriality rule does not preclude the effects in the Netherlands of other consequences of the Foreign Proceedings[1]. In an earlier decision re Yukos Finance the Supreme Court held that Rule 3 means that the territoriality rule does not preclude a Foreign Administrator to exercise voting rights on shares in a Dutch company that is the subsidiary of the Foreign Debtor[2].

In the Yukos Finance II decision the Supreme Court confirmed that Rule 3 also means that a Foreign Administrator may (to the benefit of the bankruptcy estate) manage and dispose of the Foreign Debtor's assets located in the Netherlands if the Foreign Administrator is authorised to do so pursuant to the laws that apply to the Foreign Proceedings (the lex concursus). However, Rule 2 limits the authority of the Foreign Administrator that he must always respect prior attachments that creditors have made on the Foreign Debtor's assets in the Netherlands.

What does this mean in practice?

If the Foreign Debtor's powers to manage and dispose of its assets by operation of the Foreign Proceedings transfer to the Foreign Administrator, the latter is authorised to manage as well as sell or otherwise dispose of assets located in the Netherlands provided that this is allowed under the lex concursus. Therefore, the Foreign Administrator trustee may, for example, charge assets with security rights, may collect receivables against Dutch debtors, may exercise voting rights on shares in Dutch companies, and may sell such assets to third parties and collect the proceeds into the Foreign Proceedings for distribution to the joint creditors.

The Foreign Administrator cannot in the Netherlands invoke any authority or right pursuant to the lex concursus to demand from creditors that they refrain or desist from the making of or enforcement of any attachments on the Foreign Debtor's assets located in the Netherlands. A sale and transfer (or any other form of disposition[3]) of assets located in the Netherlands by the Foreign Administrator (or as the case may be the Foreign Debtor in possession) will as a consequence in the Netherlands have the same effect as a private transaction. This means that if an asset is encumbered with a prior attachment by a creditor, the rights of this creditor must be respected. This could entail in a sale and transfer of the asset made by the Foreign Administrator while the asset remains encumbered with such a prior attachment. Such a sale and transfer of an attached requires careful preparation and execution, because if not done properly it could be construed as a violation of the state authority vested in the bailiff who made the attachment, which violation may be a criminal offence.

Finally, if a decision by a foreign court to open Foreign Proceedings (a "Foreign Decision") violates Dutch public policy, the effects of the Foreign Proceedings may not be recognised in the Netherlands. This means that the effects cannot be invoked in the Netherlands by any party who wants to rely thereon. The Foreign Administrator is not required to seek an exequatur or other recognition order before exercising his powers in the Netherlands. He can exercise his powers unless and until an interested party challenges the lawfulness of the Foreign Decision. That interested party will carry the burden of proof and must convince the court that the Foreign Decision violates Dutch public policy.

[1] The rules Rules 1 - 3 were reiterated from three prior decisions by the Supreme Court (Supreme Court 2 June 1967, NJ 1968/16 in re Hiret/Chiotakis; Supreme Court 31 May 1996, NJ 1998/108 in re De Vleeschmeesters, and Supreme Court 24 October 1997, NJ 1999/316 in re Gustafsen/Mosk).
[2] Supreme Court 19 December 2008, NJ 2009, 456 in re Yukos Finance I.
[3] The same rule applies if the Foreign Administrator would create a security right or a lien in favour of a creditor, for instance a DIP Lender.

Examining a witness under the Model Law

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Crumpler (as liquidator and joint representative) of Global Tradewaves Ltd (a company registered in the British Virgin Islands) v Global Tradewaves (in liquidation), in the matter of Global Tradewaves Ltd (in liquidation) [2013] FCA 1127

http://www.austlii.edu.au/au/cases/cth/FCA/2013/1127.html

Background

Global Tradewaves Ltd was registered in the British Virgin Islands. Liquidators were appointed to the company by the Eastern Caribbean Supreme Court (the BVI Court).

Mr Riaz may have been a director of Global. By the time liquidators were appointed, he was resident in Australia.

The liquidators wanted to conduct a judicial examination of Mr Riaz in Australia. To obtain orders for that examination, they adopted a two-fold approach:

- they applied to the Federal Court of Australia for recognition of their appointment under the UNCITRAL Model Law on Cross-Border Insolvency;
- they obtained a letter of request from the BVI Court to the Federal Court.

In each case, the object was to obtain a Federal Court order for the examination of Mr Riaz.

It appears that Global may have had neither assets nor liabilities in Australia. That distinguished this matter from the majority of UNCITRAL recognition proceedings, which are directed at preserving the company's assets in the relevant company.

Recognition

The Federal Court had no hesitation in finding that the requirements for recognition of the BVI liquidation as the foreign main proceedings were satisfied. It is noticeable that, in arriving at this conclusion, the Court relied upon INSOL's Cross-Border Insolvency II: a Guide to Recognition and Enforcement (2012):

> *"Further guidance as to British Virgin Island insolvency law and practice and to the interpretation of its Insolvency Act 2003 is to be found conveniently in a publication, Cross-Border Insolvency II: a Guide to Recognition and Enforcement, published by the International Association of Restructuring Insolvency and Bankruptcy Professionals, 2012. That appears to me to be a book which would be used by the courts in the British Virgin Islands as a convenient summary of insolvency law and practice in that locale. One sees by reference to the Insolvency Act 2003 and that book that there is in place in the British Virgin Islands a statutory regime for the winding up of corporations which has broad analogies with the Corporations Act 2001 (Cth) so far as provision for a court order for winding up, appointment of liquidators for that purpose and provision for the examination of those having knowledge of the affairs of the company being wound up."*

Source of power to order an examination under the Model Law

Having recognised the BVI insolvency, the Federal Court's next task was to decide whether it was empowered to order the requested examination.

Interestingly, the Federal Court identified two separate sources of power in the Model Law.

The first was the Model Law itself, which is part of Australian domestic law in the form of the Cross-Border Insolvency Act 2008 (Cth). Article 21(1)(d) of the Model Law states that, upon recognition of a foreign proceeding, a court may grant "*any appropriate relief, including … [p]roviding for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs,"* etc.

In the Court's view, art 21(1)(d) was a standalone source of power for the making of orders for the examination of a witness about the company's assets, affairs, etc.

The second source of power was art 21(1)(g). In the Australian enactment of the Model Law, that article provides that an Australian court may grant "*any additional relief that may be available to [a liquidator] under the laws of this State*". Article 8 provides that this includes a reference to the provisions of the Australian Corporations Act that allow a Court to grant a liquidator's application for the examination of a person about the affairs of a company. The Federal Court held that this was a further source of power to order the examination sought by the foreign liquidators in this case.

The Court also held that the letter of request from the BVI Court was an additional source of power to order the examination. That was because s 581(3) of the Corporations Act allows an Australian Court which receives a letter of request about an corporate insolvency from a court of another country to exercise all the powers under the Corporations Act that it could exercise if the corporate insolvency had arisen in Australia. In the Court's view, the British Virgin Islands was to be regarded as a "country" for the purposes of that section (citing the Irish decision in Re Mount Capital Fund Ltd [2012] IEHC 97).

In obiter, the Court considered, but ultimately rejected, the possibility that there might even be a fourth source of power for the requested orders, in the form of s 581(2) of the Corporations Act:

> "(2) In all external administration matters, the Court:
>
> (a) must act in aid of, and be auxiliary to, the courts of:
>
> …
>
> (iii) prescribed countries;
>
> that have jurisdiction in external administration matters".

The countries prescribed for the purposes of this provision explicitly include "the United Kingdom" (reg 5.6.74), but not the British Virgin Islands. The Court noted that the British Virgin Islands is a British Overseas Territory, but concluded that the designation of "the United Kingdom" as a prescribed country for the purposes of s 581(2) did not extend to the British Overseas Territories:

> *"Some indication of that is to be found in the separate prescription in the Corporations Regulations to the Bailiwick of Jersey, a territory of which Her Majesty the Queen exercises sovereignty in her capacity as Duke of Normandy. That suggests to me that the reference in Regulation 5.6.74 is intended to be a reference solely to the United Kingdom rather than to other places for which the United Kingdom has responsibilities."*

(With respect, this part of the Court's reasoning is open to the objection that Jersey is not a British Overseas Territory, as was pointed out by the House of Commons Justice Committee - Eighth Report, *Crown Dependencies* (23 March 2010), Introduction, para 6.)

Should the examination order be made?

The final step for the Court was to consider whether the examination order should actually be made.

It looked at evidence of Mr Riaz's alleged involvement with Global. On the basis of that evidence it was satisfied that he was a person "likely to have an intimate knowledge" of the company's affairs. That knowledge was sufficient to justify an examination order under either or both of art 21 or s 596B of Corporations Act.

The Court was at pains to point out that it was unnecessary to reach any conclusion about whether Mr Riaz was a director of Global, since:

- art 21 empowered the Court to order an examination of a "witness", who did not necessarily have to be a director;
- similarly, s 596B empowered the Court to order an examination of a person "who may be able to give information about examinable affairs of" the company.

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1 of 1 DOCUMENT: Unreported Judgments Federal Court of Australia

31 Paragraphs

CRUMPLER ((AS LIQUIDATOR AND JOINT REPRESENTATIVE) OF GLOBAL TRADEWAVES LTD (A COMPANY REGISTERED IN THE BRITISH VIRGIN ISLANDS)) v GLOBAL TRADEWAVES ((in LIQ), RE GLOBAL TRADEWAVES LTD (in liq)) - BC201314415

Federal Court of Australia -- Queensland District Registry
Logan J

QUD 688 of 2013

28 October 2013

Crumpler (as liquidator and joint representative) of Global Tradewaves Ltd (a company registered in the British Virgin Islands) v Global Tradewaves (in liq), in the matter of Global Tradewaves Ltd (in liq) [**2013] FCA 1127**

BANKRUPTCY AND INSOLVENCY -- Cross-border insolvency -- UNCITRAL Model Law on Cross-Border Insolvency (Model Law) -- Cross-Border Insolvency Act 2008 (Cth) -- Application for recognition of proceedings in British Virgin Islands as a "foreign proceeding" under the Model Law given force of law in Australia by s 6 of the Cross-Border Insolvency Act 2008 (Cth) -- Application for summons of the examination of a former company director of now insolvent corporation pursuant to Article 21(1)(d) of the Model Law and s 581 and s 596B of the Corporations Act 2001 (Cth), each as applied by s 8 of the Cross-Border Insolvency Act 2008 (Cth).

(CTH) Corporations Act 2001

(CTH) Corporations Regulations 2001

(CTH) Cross-Border Insolvency Act 2008

(CTH) Evidence Act 1995

(CTH) Federal Court (Bankruptcy) Rules 2005

(CTH) Insolvency Act 2003 (BVI)

(CTH) Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law

Creque v Penn [2007] UKPC 44; *Re Mount Capital Fund Ltd (in liq)* [2012] IEHC 97, considered

Gainsford v Tannenbaum (2012) 293 ALR 699, cited

Cross-Border Insolvency II: a Guide to Recognition and Enforcement (2012, INSOL International: London)

Logan J.

[1] Messrs Russell Crumpler and Alex Lawson have been appointed by the Eastern Caribbean Supreme Court's High Court of Justice, the British Virgin Islands Commercial Division (the BVI Court) as the liquidators of Global Tradewaves Limited, a company registered in the British Virgin Islands. The British Virgin Islands is a British Overseas Territory of the United Kingdom.

[2] Messrs Crumpler and Lawson, in their capacities as liquidators and thus as "foreign representatives" for the Cross-Border Insolvency Act 2008 (Cth) (Cross-Border Insolvency Act) have applied for orders that the winding up proceeding in respect of Global Tradewaves in the BVI Court, namely BVI HC Com Claim No 2013/0090 (BVI proceeding) be recognised as a foreign proceeding for the purposes of the Cross-Border Insolvency Act. In addition, the BVI Court has issued a letter of request to this court requesting, materially, the examination of one Mahmood Riaz concerning the affairs of Global Tradewaves and the production by him of related books, records and other documents in his possession or control.

[3] Upon the footing that the Court recognises the BVI proceeding as a foreign proceeding and more particularly as "foreign main proceeding" for the purposes of the Cross-Border Insolvency Act, the liquidators have sought consequential interlocutory relief for the issuing of a summons for the examination of Mr Riaz concerning the affairs of Global Tradewaves and the production by him of related books, records and other documents.

[4] It is convenient, first, to consider the question of recognition. As to this, s 6 of the Cross-Border Insolvency Act provides that, subject to that Act, "the Model Law, with the modifications set out in this Part, has the force of law in Australia." The "Model Law" is defined by s 5 of the Cross-Border Insolvency Act to mean "the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law set out in the Annex to the United Nations General Assembly Resolution A/RES/52/158 (1997), the English text of which is set out in Sch 1 to this Act".

[5] In respect of corporations, this court is one of those which, by s 10 of the Cross-Border Insolvency Act, is taken to be a court specified in Art 4 of the Model Law as a court competent to perform the functions referred to in the Model Law relating to recognition of foreign proceedings and cooperation with foreign courts. Article 17 of the Model Law is directed to the recognition of a proceeding as a foreign proceeding and, as the case may be, in turn, either as a foreign main proceeding or a foreign non-main proceeding. It provides:

> Decision to recognize a foreign proceeding
>
> 1. Subject to article 6, a foreign proceeding shall be recognized if:
>   (a) The foreign proceeding is a proceeding within the meaning of subparagraph (a) of article 2;
>   (b) The foreign representative applying for recognition is a person or body within the meaning of subparagraph (d) of article 2;
>   (c) The application meets the requirements of paragraph 2 of article 15;
>   (d) The application has been submitted to the court referred to in article 4.
>
> 2. The foreign proceeding shall be recognized:
>   (a) As a foreign main proceeding if it is taking place in the State where the debtor has the centre of its main interests; or
>   (b) As a foreign non main proceeding if the debtor has an establishment within the meaning of subparagraph (f) of article 2 in the foreign State.
>
> 3. An application for recognition of a foreign proceeding shall be decided upon at the earliest possible time.
> 4. The provisions of articles 15, 16, 17 and 18 do not prevent modification or termination of recognition if it is shown that the grounds for granting it were fully or partially lacking or have ceased to exist.

[6] "Foreign proceeding" is defined by Article 2 of the Model Law in this way:

> "Foreign proceeding" means a collective judicial or administrative proceeding in a foreign State, including an interim proceeding, pursuant to a law relating to insolvency in which proceeding the assets and affairs of the debtor are subject to control or supervision by a foreign court, for the purpose of reorganization or liquidation;

[7] "Foreign main proceeding" and "foreign non-main proceeding" are respectively defined by Article 2 as follows:

> "Foreign main proceeding" means a foreign proceeding taking place in the State where the debtor has the centre of its main interests;
>
> "Foreign non main proceeding" means a foreign proceeding, other than a foreign main proceeding, taking place in a State where the debtor has an establishment within the meaning of subparagraph (f) of the present article;

[8] The evidence establishes that the BVI Court is presently, via the winding up order it has made and the appointment of the liquidators as joint and several liquidators of Global Tradewaves, controlling and supervising the winding up of that company. That winding up proceeding is, in my view, a collective judicial proceeding in a foreign state for the purposes of the definition of "foreign proceeding" in Art 2 of the Model Law.

[9] The content of British Virgin Islands insolvency law so far as that winding up proceeding is concerned is to be found in the Insolvency Act 2003 (British Virgin Islands) (Insolvency Act 2003). An electronic copy of that Act is ex 1 in these proceedings, (the contents of that Act for the purposes of the exhibit being conveniently described by a paper reproduction of the table of contents of that Act). As so produced and tendered, I regard that electronic version as evidence of that statute admissible pursuant to s 174 of the Evidence Act 1995 (Cth). Further guidance as to British Virgin Island insolvency law and practice and to the interpretation of its Insolvency Act 2003 is to be found conveniently in a publication, Cross-Border Insolvency II: a Guide to Recognition and Enforcement, published by the International Association of Restructuring Insolvency and Bankruptcy Professionals, 2012. That appears to me to be a book which would be used by the courts in the British Virgin Islands as a convenient summary of insolvency law and practice in that locale. One sees by reference to the Insolvency Act 2003 and that book that there is in place in the British Virgin Islands a statutory regime for the winding up of corporations which has broad analogies with the Corporations Act 2001 (Cth) so far as provision for a court order for winding up, appointment of liquidators for that purpose and provision for the examination of those having knowledge of the affairs of the company being wound up.

[10] The evidence also establishes that the registered office of Global Tradewaves is in the British Virgin Islands. I am satisfied that it is in the British Virgin Islands that Global Tradewaves has its centre of main interests. That being so, the BVI proceeding is not just a foreign proceeding but also a foreign main proceeding. There is no evidence of any body of creditors in Australia, at least on present materials, in respect of Global Tradewaves. It is not necessary for the purposes of these proceedings, given the existence of a registered company office in the British Virgin Islands, the absence of any evidence of the carrying on of business in Australia or elsewhere than these or any other evidence to displace the presumption I the Model Law, to consider whether the identification of a company's centre of main interests for the purposes of the Model Law or the rebuttal of the presumption can only be established by evidence which is objectively ascertainable by third parties, cf. *Gainsford v Tannenbaum* (2012) 293 ALR 699, especially at para 46.

[11] In terms of formal requirements arising under the Cross-Border Insolvency Act, rules of court and an earlier order

made by me on 16 October 2013, the existence, formally, of the BVI proceedings is proved by a notarised and sealed copy of the winding up order made by the BVI Court in respect of Global Tradewaves. Publication of the proceeding in newspapers has occurred as required by the Court's order of 16 October 2013. There is evidence which establishes that for the purposes of s 13 of the Cross-Border Insolvency Act there are no proceedings under chapter five or section 601CL of the Corporations Act in respect of Global Tradewaves.

[12] Further, the evidence establishes that there are not, at present, other foreign proceedings concerning Mr Riaz. The liquidators have in their evidence candidly deposed that there may shortly be proceedings concerning Mr Riaz, also instituted in Dubai in the United Arab Emirates. Mr Riaz's connection with that country I will refer to shortly. So far as the British Virgin Islands itself is concerned, it will also be necessary later in these reasons for judgment to make some reference to its status, at least insofar as can be ascertained from materials presently before the Court and also facts of which I consider I can take judicial notice.

[13] Thus, the liquidators appointed by the BVI Court are, for the purposes of the Cross-Border Insolvency Act and the Model Law, foreign representatives. The liquidators have the benefit of the presumption found in Art 16 of the Model Law so far as recognition is concerned. In other words, because the registered office of Global Tradewaves is located in the British Virgin Islands, that place is, having regard to Article 16(3) of the Model Law, presumed to be the centre of that company's main interests. That the BVI Court is a foreign court is a given.

[14] Further, for the purposes of the Model Law the British Virgin Islands is, in my view, to be regarded as a state. Its status is that of a British Overseas Territory. Inferentially, on the face of the Insolvency Act, the British Virgin Islands has its own legislature. Further, on the basis of the orders and other materials in evidence from the Eastern Caribbean Supreme Court's High Court of Justice in the British Virgin Islands, the British Virgin Islands has its own judicial system. The ultimate appellate court for that judicial system is the Judicial Committee of the Privy Council: see, for example, by way of the exercise of that ultimate appellate jurisdiction, *Creque v Penn* [2007] UKPC 44. A helpful summary of the position so far as insolvency law and the court system of the British Virgin Islands is concerned is to be found in *Re Mount Capital Fund Limited (in liq)* [2012] IEHC 97 (Mount Capital Fund) at paras 3.1, 3.2 and 3.3 (Laffoy J).

[15] Having regard to the foregoing, I am satisfied that the BVI proceeding is both a foreign proceeding and a foreign main proceeding for the purposes of the Cross-Border Insolvency Act and the Model Law.

[16] That being so, a question then becomes whether a summons should issue for the purpose of Mr Riaz's examination?

[17] It is necessary first to consider whether the Court has power to issue such a summons or to direct the issuing of such a summons and if so what are the sources of that power. As to this, Article 21 (1) of the Model Law itself makes provision, relevantly, in these terms:

> Relief that may be granted upon recognition of a foreign proceeding
>
> 1. Upon recognition of a foreign proceeding, whether main or non main, where necessary to protect the assets of the debtor or the interests of the creditors, the court may, at the request of the foreign representative, grant any appropriate relief, including:
>
> [...]
>
> (d) Providing for the examination of witnesses, the taking of evidence or the delivery of information concerning the debtor's assets, affairs, rights, obligations or liabilities;
>
> [...]
>
> (g) Granting any additional relief that may be available to [insert the title of a person or body administering a reorganization or liquidation under the law of the enacting State] under the laws of this State.

As to Article 21(1)(g) of the Model Law, s 8 of the Cross-Border Insolvency Act provides:

> Identifying Australian laws relating to insolvency
>
> The Model Law has the force of law in Australia as if the Model Law referred to:
>
> (a) the Bankruptcy Act 1966 ; and
> (b) Chapter 5 (other than Parts 5.2 and 5.4A), and section 601CL, of the Corporations Act 2001;
>
> wherever the Model Law provides that the laws of the enacting State relating to insolvency are to be identified.

[18] It is to be remembered that the effect of s 6 is that, subject to the Cross-Border Insolvency Act the Model Law has the force of law in Australia. That being so, my view is that, by virtue of that Act and as made part of the law of Australia, Article 21 (1)(d) is itself a source of authority for the Court to order the examination of a witness concerning a company's "assets, affairs, rights, obligations or liabilities" and to produce to the Court on such examination "information" concerning those subjects. Read with s 8, Article 21(1)(g) provides for this incorporation, by reference of the nominated provisions of the Corporations Act and is a further source of power to summon a witness and order the production of documents concerning the affairs of a company in liquidation.

[19] Finally, and having regard to the letter of request, s 581 of the Corporations Act is, in the circumstances of this case, an additional source of relevant power. The British Virgin Islands is not in my view a prescribed country for the purposes of s 581(2) of the Corporations Act. The United Kingdom is, but the reference in the Corporations Regulations 2001 (Cth) (Corporations Regulations) to the United Kingdom does not, in my view, carry with it British Overseas Territories. Some indication of that is to be found in the separate prescription in the Corporations Regulations to the Bailiwick of Jersey, a territory of which Her Majesty the Queen exercises sovereignty in her capacity as Duke of Normandy. That suggests to me that the reference in Reg 5.6.74 is intended to be a reference solely to the United Kingdom rather than to other places for which the United Kingdom has responsibilities.

[20] In this particular case it is not necessary further to explore that subject. That is because there is in evidence the letter of request which I have mentioned. For the purposes of s 581(3) of the Corporations Act the British Virgin Islands is, in my view, to be regarded as a country other than Australia. It is a court which has, as I have mentioned, a recognisably similar insolvency jurisdiction to that exercised by this Court. It is, in my view, a court in respect of which this Court, as one having jurisdiction in matters arising under the Corporations Act, should act in aid of and be auxiliary to, so far as the administration of Global Tradewaves is concerned. I note that the Irish courts have a similar disposition to act in aid of the insolvency administration of the Courts of the British Virgin Islands, see Mount Capital Fund.

[21] The question then becomes whether or not the powers which I have described should be exercised? As to this, there is in evidence an extract search of the records of the Australian Securities and Investments Commission (ASIC) in respect of a company termed GTL Tradeup Proprietary Limited, ACN 145 955 906. That establishes that Mr Riaz is a current director of that company and that he has a residential address at Strathfield, in New South Wales, Australia.

[22] Further evidence of Mr Riaz's Australian residency is provided in a bundle of emails which form part of the liquidator's evidence. In an email of 26 June 2013, addressed to multiple addressees under the subject Global Tradewaves Limited, Mr Riaz advises, at para 4:

> This year, when I decided to moving [sic] to Sydney full time to look after my family business, I found a new partner who could inject the capital in GTL-BVI and turn around the company with his own vision. I agreed to give him full control of Global Tradewaves business to give him some extra comfort level and I resigned being director of Global Tradewaves, however, I have been under the contract with the new management that I will continue providing them my assistance wherever they require. [Sic].

That "new investor" would seem to be one "Ahmad Darwash": see an email from Mr Riaz to a Mr Mikkel Thorup of 7 March 2012.

[23] The email bundle contains an extensive exchange of correspondence relative to funds apparently placed with Global Tradewaves by Capricorn Currency Management (Cayman), a company carrying on business in the Cayman Islands, of which Mr Thurrup is the chief investment officer. It suffices for present purposes to record that I am well satisfied, having regard to that exchange of email correspondence, that Mr Riaz is a person likely to have an intimate knowledge of the affairs of Global Tradewaves. That is so even though, on the face of the email exchange, Mr Riaz asserts that he has resigned from the directorship of that company. It is not necessary for the purposes of today's proceedings to determine whether or not Mr Riaz is or is not what might be described as a "shadow director" of Global Tradewaves. It is not necessary so to decide because the power conferred by Article 21(1)(d) is not restricted to directors, either actual or shadow, but extends to "witnesses".

[24] Further, insofar as its provisions are available by the Cross-Border Insolvency Act, the Corporations Act by s 596B empowers the Court to summon a person for examination about a corporation's examinable affairs if satisfied that the person may be able to give information about examinable affairs of the corporation. I am, having regard to the email exchange and to the contents, of which I have referred generally already, well satisfied that Mr Riaz is such a person. As was put on behalf of the liquidators by Mr Goodwin of counsel in his helpful and careful submissions, there are reasons, why the court would not reach a concluded view as to Mr Riaz's status in terms of office holding in Global Tradewaves at this present juncture. The proceeding is one of an ex parte nature. Axiomatically, Mr Riaz has not been heard on the subject, neither has there been, as yet, any examination of him. These factors tell that as a matter of prudence, 596A should not be regarded as a source of power.

[25] Finally, if articles 21(1)(d) and 596B as applied by the Cross-Border Insolvency Act were not themselves sufficient, s 581 in the circumstances of the present case provides itself power to order the examination of Mr Riaz and to order him to produce documents concerning the affairs of Global Tradewaves.

[26] The earliest availability of a registrar of the court at least for the purposes of commencing an examination, is in Brisbane rather than Sydney. That being so, and my being firmly of the view that it is necessary to make early provision for the commencement of an examination, I propose to order that the examination be conducted, at least in the first instance, in Brisbane. I put matters that way because I did not in any way intend to foreclose the possibility of the conduct of an examination, if demonstrated to be more convenient, continuing before the court in Sydney. It is though, in light of that provision for an examination in the first instance in Brisbane, to make provision to ensure that Mr Riaz is not disadvantaged. That, in my view, will be sufficiently met by requiring the liquidators to provide him in advance with conduct money, including travel expenses not less than those which would be applicable in the event that the examination were one to which the Federal Court (Bankruptcy) Rules 2005 (Cth) applied.

[27] I note that the liquidators by their solicitors have given an undertaking to the court to provide Mr Riaz with such conduct money. That conduct money will include provisions of a return economy class airfare from Sydney to Brisbane.

[28] I propose to reserve the costs of the examination. Obviously enough, I am not exercising jurisdiction of the jurisdiction of the BVI Court. It is, in the first instance, in my view, for that court to determine the expenses properly incurred in the course of a BVI winding-up proceeding. I do no more than observe that the present application, both for recognition and consequentially for the examination of Mr Riaz, seems to me on the evidence to hand to be a logical, reasonable and necessary step in the winding up of Global Tradewaves.

[29] I shall also direct the registrar of this court to furnish to the registrar or other proper officer of the BVI Court by way of response to the letter of request, a copy of the orders that I propose to make today.

[30] Finally, I propose to reserve in those orders liberty to apply in the proceeding as one in respect of which there may well be need for further orders, either in respect of the transfer of an examination to Sydney or, for that matter, by way of ancillary relief arising from the issuing of a summons in respect of ensuring if Mr Riaz is in Australia, that he remain here. Further, the liquidators may have a need for information held in official records concerning Mr Riaz's movements. These are but contingencies on the face of the material filed. I do not in any way, by reference to them, intend to be prescriptive as to applications which may be made under liberty to apply. I refer to such matters solely because, on the evidence to hand it appears that, though Mr Riaz has a Sydney residence, he also undertakes business activities in Dubai. That doubtless informed the reference by the liquidators to the possibility of proceedings concerning Global Tradewaves and his association with that company being commenced in Dubai.

[31] There will be orders accordingly.

Order

1. Pursuant to Art 17 (1) of Sch 1 (the Model Law on Cross-Border Insolvency of the United Nations Commission on International Trade Law -- "Model Law") of the Cross-Border Insolvency Act 2008 (Cth) (Cross-Border Insolvency Act), the proceeding in the Eastern Caribbean Supreme Court in the High Court of Justice, Commercial Division, British Virgin Islands (BVI Court), BVI HC Com Claim No 2013/0090, (BVI Proceeding), by which the plaintiffs were appointed liquidators of the defendant on 23 September 2013, be recognised as a foreign proceeding for the purposes of the Cross-Border Insolvency Act.
2. Pursuant to Art 17(2) of Sch 1 of the Model Law, the BVI Proceeding be recognised as a foreign main proceeding for the purposes of the Cross-Border Insolvency Act.
3. Pursuant to para 1(g) of Art 21(1) of the Model Law, and subject to the exceptions for which s 8 of the Cross-Border Insolvency Act provides, all powers available to liquidators appointed under the provisions of the Corporations Act 2001 (Cth) (Corporations Act), be available to the plaintiffs as if they were liquidators appointed jointly and severally under that Act.

4.1 The plaintiffs:

   a. send a notice of the making of Orders 1-3 above in accordance with Form 21 to each person whose claim to be a creditor of the defendant is known to them; and
   b. publish a notice of the making of those Orders in accordance with Form 21 in The Australian newspaper.

4.2 Service of the order on the defendant be dispensed with.

5. Pursuant to Article 21 (1) (d) of the Model Law and pursuant to s 581 and s 596B of the Corporations Act, each as applied by s 8 of the Cross-Border Insolvency Act and Article 21(1)(g) of the Model Law, the Registrar summon Mr Riaz to attend in Brisbane, Queensland for examination on oath before a Registrar about the examinable affairs of the defendant at a time fixed by the Registrar and from day to day thereafter until the conclusion of the examination and that Mr Riaz bring with him to such examination for production thereat such books as are within his possession which relate to the defendant or any of the examinable affairs of the defendant as are specified in the summons.
6. The plaintiffs and their solicitors may at any time after Mr Riaz produces any of the books set out in order 5 above, take custody of the said books for the purpose of preparing for the examination.
7. The questions put to Mr Riaz and the answers given by him from any such examination be recorded in writing and that a copy of the same be furnished to the plaintiffs by the Registrar.
8. If the plaintiffs require Mr Riaz to authenticate the transcript of his examination in accordance with the provisions of the Corporations Act as applied by the Cross-Border Insolvency Act and the Federal Court

(Corporations) Rules 2000 (Cth) as likewise applied by that Act, he shall attend and authenticate the transcript.

9. A summons in the form annexed hereto and marked "A" be issued in relation to Mr Riaz.
10. Costs reserved.
11. The Registrar send a sealed copy of this order to the Registrar (or other proper officer) of the BVI Court.
12. Liberty to apply.

No appearance for the defendant.

Counsel for the plaintiffs: *Mr E Goodwin*

Solicitors for the plaintiffs: *Allens*

The Year in Review, 2013: United States Appellate Court Decisions Interpreting The Model Law on Cross-Border Insolvency

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Several United States Courts of Appeal interpreted provisions of the United States' version of the United Nations Commission on International Trade Law ("**UNCITRAL**") Model Law on Cross-Border Insolvency (the "**Model Law**"),[1] or Chapter 15, in 2013.[2] Practitioners that deal with cross-border insolvencies should be aware of these decisions. This article presents a brief summary of each of those important appellate decisions and their holdings. The decisions are *Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.)*, 714 F.2d 127 (2d Cir. 2013), *In re ABC Learning Centres Ltd.*, 728 F.3d 301 (3d Cir. 2013), *Jaffé v. Samsung Elecs. Co., Ltd.*, 737 F.3d 14 (4th Cir. 2013), and *Drawbridge Special Opp. Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013), which are summarized below:

Morning Mist Holdings Ltd. v. Krys (In re Fairfield Sentry Ltd.), 714 F.2d 127 (2d Cir. 2013)

Brief Statement of Relevant Facts: Fairfield Sentry was organized as an International Business Company under the laws of the of the British Virgin Islands, and from then until Bernard Madoff's arrest in 2008, it was the largest of the so-called Madoff "feeder funds", investing over 95% of its assets (or over $7 billion) in Bernard L. Madoff Investment Securities LLC. *Id*. at 130. Under its Memorandum of Association, Fairfield Sentry administered its business interests from the BVI, where its registered office, registered agent, registered secretary, and corporate documents were located. *Id*. Fairfield Sentry's board of directors, with members living in New York, Oslo, and Geneva, oversaw Fairfield Sentry's management, with day-to-day operations handled by an investment manager in New York. *Id*. When Mr. Madoff was arrested in 2008, Fairfield Sentry's independent directors suspended redemptions, held 44 board meetings by telephone initiated from the BVI, sent correspondence on BVI letterhead to Fairfield Sentry's shareholders regarding the Madoff scandal, and formed a litigation committee with the authority to consider, commence, and settle litigation to be taken by or against Sentry. *Id*. Additionally, shortly after the discovery of the Madoff fraud, the board of representatives of the Fairfield Sentry's New York-based investment managers resigned, and Fairfield Sentry's contracts with that investment manager were severed in 2009. *Id*. at 138.

In May 2009, Morning Mist, a shareholder in Fairfield Sentry, filed a derivative action in New York, claiming that Fairfield Sentry's directors, management, and service providers breached duties owned to Fairfield Sentry. *Id*. at 130-31.

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[1] This article refers to the relevant provisions of the Model Law by article and provides the statutory citation in the United States Bankruptcy Code in parenthesis after the Model Law citation.

[2] The United States codified UNCITRAL's Model Law in Chapter 15 of Title 11 of the United States Code or 11 U.S.C. §§ 1501 – 1532 (2005).

On July 21, 2009, on application of ten Fairfield Sentry shareholders, the High Court of Justice of the Eastern Caribbean Supreme Court entered an order commencing Fairfield Sentry's liquidation proceedings under the Virgin Islands Insolvency Act of 2003, appointed liquidators, including Kenneth Krys of Krys and Associates, and granted those liquidators custody and control of Fairfield Sentry's assets. *Id*. at 131. Almost a year later on June 14, 2010, the liquidator petitioned the United States Bankruptcy Court for the Southern District of New York for recognition of the BVI liquidation proceedings. *Id*. The bankruptcy court granted the liquidators' petition and determined that in order to determine Fairfield Sentry's center of main interest ("**COMI**") for purposes of Articles 2(b) and 17.2(a) of the Model Law (11 U.S.C. §§ 1502(4) and 1517(b)(1)), that the relevant period of activity was between December 2008, when Fairfield Sentry ceased operations, and June 2012, when the Chapter 15 Petition was filed. *Id*. The Court then determined that Fairfield Sentry's COMI was in the BVI and that the BVI liquidation was a "foreign main proceeding" under Chapter 15. *Id*. As a result, Morning Mists' derivative litigation was stayed.

Morning Mist appealed the bankruptcy court's order to the federal district court, which affirmed the bankruptcy court's decision. *Id*. at 132. The federal district court held that the bankruptcy court properly considered Fairfield Sentry's COMI as of the filing of the Chapter 15 petition, including its administration activities (not its activities over its 18 year operational history). *Id*. Morning Mist also argued that the BVI proceeding should not be recognized because it was a sealed proceeding and thus manifestly contrary to the U.S. public policy under Article 6 of the Model Law (11 U.S.C. § 1506). The federal district court held that in the United States the right to access court records is not absolute and that the BVI proceeding was not manifestly contrary to public policy. *Id*.

Issues Presented: Morning Mist appealed the decision to the Second Circuit Court of Appeals, where the issues considered were (1) whether the BVI liquidation qualifies as a foreign main or nonmain proceeding, *id.* at 133, and (2) whether the lower courts should have applied the public policy exception available under Article 6 of the Model Law (11 U.S.C § 1506), because the BVI liquidation was "cloaked in secrecy". *Id*. at 139.

Court's Holdings: With respect to the first issue, the relevant time period for determining the proper COMI, the Court held that the relevant time is at or around the time of the filing of the Chapter 15 petition and not the Chapter 15 debtor's entire operational history or the time of the filing of the applicable foreign proceeding, subject to an inquiry into whether the process has been manipulated, *i.e.*, the Court stated that to "offset a debtor's ability to manipulate its COMI, a court may also look at the time period between the initiation of the foreign liquidation proceeding and the filing of the Chapter 15 petition." *Id*. at 130 and 133-38 (focusing on the present tense construction of Article 17.2 of the Model Law (11 U.S.C. § 1517(b)) and that any relevant activities, including liquidation activities and administrative functions performed by a liquidator in the foreign proceeding can be considered in the COMI analysis).

Regarding the second issue presented on the appeal, whether the BVI liquidation manifestly violated U.S. public policy due to it being "shrouded in secrecy", the Court observed that this contention was "overwrought" since the sealed documents in the BVI were publicly summarized and any non-party could apply to the BVI court for access to the sealed documents. *Id*. at 140. Indeed, the Court noted that in certain instances in the United States documents are filed under seal and that access to those documents is not "an exceptional and fundamental value[]" but is instead a "qualified right." *Id*. As such, the Court rejected the contention that the BVI liquidation should not be recognized as manifestly in violation of US public policy.

***In re ABC Learning Centres Ltd.*, 728 F.3d 301 (3d Cir. 2013)**

Brief Statement of Relevant Facts: ABC Learning Centres Ltd. ("**ABC**") was a publicly-traded Australian company that provided child care and educational services in Australia, the United States, and other countries through 38 subsidiaries, including a U.S. company referred to as "ABC Delaware". *Id*. at 303. In June 2008, RCS Capital Development LLC ("**RCS Capital**") entered into a contract with ABC Delaware to develop child care facilities in the U.S., and ABC guaranteed these obligations. *Id*. In May 2010, RCS Capital won a $47 million verdict in Arizona on a breach of contract claim against ABC Delaware. *Id*. ABC Delaware had also sued RCS Capital in Nevada, seeking $30 million in damages. *Id*.

In November 2008, ABC's directors entered into a Voluntary Administration in Australia, and appointed administrators to determine whether ABC could be restructured or whether it had to be liquidated. *Id*. Entering into administration violated ABC's loan agreements with its secured creditors, who had a lien on all of ABC's assets, and who commenced a receivership process and appointed a receiver based on the commencement of the Voluntary Administration. *Id.* In June 2010, ABC's directors voted to enter liquidation proceedings and appointed administrators to wind up the company. *Id*. Thereafter, the liquidation proceeding and the receivership continued in tandem with the liquidators granting the receiver permission to manage and operate ABC. *Id*. On May 26, 2010, the administrators had petitioned the Bankruptcy Court for the District of Delaware for recognition of the Australian insolvency proceedings under Chapter 15 of the Bankruptcy Code. *Id*. at 304. The Bankruptcy Court found the liquidation was a foreign main proceeding that met the recognition requirements and did not manifestly contravene U.S. public policy and ordered recognition and a stay of actions against ABC and ABC's property within the United States' jurisdiction. *Id*. RCS Capital ultimately appealed these rulings to the Third Circuit Court of Appeals.

Issues Presented for Decision: Whether an Australian insolvency proceeding should be recognized as a foreign main proceeding under Chapter 15 of the Bankruptcy Code, and whether the debtor's fully-encumbered property in the United States is subject to the stay under Article 20 of the Model Law (11 U.S.C. § 1520). *Id*. at 303.

Court's Holdings: RCS Capital did not challenge that ABC met the administrative requirements of Article 15 of the Model Law (11 U.S.C. § 1515), nor that the liquidation is an administrative proceeding in a foreign country for the purpose of liquidation, authorized under a

law which relates to insolvency, and subject to the supervision or control of Australian courts. *Id*. at 308. RCS Capital also conceded that the liquidation proceeding operating parallel to a receivership could be granted Chapter 15 recognition in a case where the secured creditors only have a lien on a portion of the assets. *Id*. Instead, RCS Capital contended that only the receivership benefits from the Chapter 15 recognition, so that only the receivership was effectively granted recognition and since the receivership is not a collective proceeding and only benefits the secured creditor the receivership should not be recognized as a foreign proceeding. *Id*. The Court held that "Chapter 15 makes no exception when a debtor's assets are fully leveraged[]" and that that recognition must be ordered when a court finds the requisite criteria are meet subject only to the public policy exception of Article 6 of the Model Law (11 U.S.C. § 1506). *Id*. at 308-09 The Court then rejected RCS Capital's contention that since the receivership – a non-collective proceeding – would gain all the benefits of the ordered relief, that the Australian proceeding should not be recognized and the stay should not be upheld. The Court examined the public policy exception in the Model Law and determined that the public policy exception requires nothing more than that the foreign proceeding afford substantive and procedural due process protections. *Id*. at 309. Based on this reasoning, the Court of Appeals affirmed the lower court's rulings and allowed the recognition and stay orders to stand.

***Jaffé v. Samsung Elecs. Co., Ltd.*, 737 F.3d 14 (4th Cir. 2013)**

Brief Statement of Relevant Facts: Qimonda AG, a German corporation that manufactured semiconductor devices and dynamic random access memory, filed for insolvency in Munich, Germany, in January 2009. *Id*. at 17. Qimonda's principal assets were over 10,000 different patents, about 4,000 of which were U.S. patents and were subject to cross-license agreements with Qimonda's competitors. *Id*. Dr. Jaffé, Qimonda's German insolvency administrator, filed a petition for recognition of the German insolvency proceeding as a foreign main proceeding in order to obtain relief under Chapter 15, including administration of Qimonda's U.S.-based patents. *Id*. Contemporaneously with his commencement of his Chapter 15 case, Dr. Jaffé sent letters to licensees of Qimonda's patents, including the U.S. patents, under the cross-license agreements, declaring that under German law, the licenses granted under Qimonda's patents would no longer be enforceable and that he would re-license them for the benefit of Qimonda's creditors by replacing licenses paid for in-kind with cross-licenses with licenses paid for with cash through royalties. *Id*.

The bankruptcy court recognized the German insolvency proceeding as a foreign main proceeding and granted relief under Article 21.1(e) of the Model Law (11 U.S.C. § 1521(a)(5)), namely that Dr. Jaffé afford the licensees of Qimonda's U.S. patents the treatment they would have received in the United States under a provision in the United States Bankruptcy Code[3] that limits a debtor's ability to reject unilaterally licenses to the debtor's intellectual property by giving licensees the option to retain their rights under the licenses. *Id*. at 18. The bankruptcy court reasoned that this protection was necessary to ensure that licensees were "sufficiently protected" as required by Article 22.1 of the Model Law (11 U.S.C. §1522(a)). *Id*. The

[3] The relevant provision of the United States Bankruptcy Code is 11 U.S.C. § 365(n).

bankruptcy court also concluded that its failure to provide this protection would undermine the United States fundamental policy of promoting technological innovation and would thus be manifestly contrary to the public policy of the United States, thus violating Article 6 of the Model Law (11 U.S.C. § 1506). Dr. Jaffé appealed this decision to the Court of Appeals for the Fourth Circuit.

Issue Presented for Decision: Whether the bankruptcy court erred in employing Article 22.1 of the Model Law (11 U.S.C. § 1522(a)) to subject a German insolvency administrator's right to administer Qimonda's patents to provisions of the U.S. Bankruptcy Code that protects the licensees and allows them to elect to retain their license rights under Qimonda's U.S. patents, even though the U.S. law was contrary to German law.

Court's Holding: The Court held that the bankruptcy court's consideration of Article 22.1 of the Model Law (11 U.S.C. § 1522(a)) was "undoubtedly appropriate when authorizing relief" under Article 21 of the Model Law (11 U.S.C. § 1521). *Id*. at 27-28. The Court explained that Article 22.1 of the Model Law (11 U.S.C. § 1522(a)) requires the bankruptcy court to ensure protection of "*both* the creditors and the debtor." *Id*. at 28 (emphasis in original). The Court further noted that this provision requires a court to ensure that relief requested by a foreign representative under Article 21 of the Model Law (11 U.S.C. § 1521), adding that the section -

> does not impinge excessively on any one entity's interests, implying that each entity must receive at least some protection. And because the interests of the creditors and the interests of the debtor are often antagonistic, as they are here, providing protection to one side might well come at some expense to the other. The analysis required by [Article 22 of the Model Law (11 U.S.C.] § 1521[)] is therefore logically best done by balancing the respective interests based on the relative harms and benefits in light of the circumstances presented, thus inherently calling for application of a balancing test. . . .Chapter 15 does not require a U.S. bankruptcy court, in considering a foreign representative's request for discretional relief under [Article 21 of the Model Law (11 U.S.C.] § 1521[)], to blind itself to the costs that awarding such relief would impose on others under the rule provided by substantive law of the State where the foreign insolvency proceeding is pending. Instead, Chapter 15, like the Model Law, anticipates the provision of particularized protection, as stated in [Article 22.1 of the Model Law (11 U.S.C.] § 1522(a)[)].

Id. at 27-29 (relying on UNCITRAL's Guide to Enactment of the Model Law to support this conclusion). Thus, the Court affirmed the lower court's decision finding that it had reasonably exercised its discretion in conducing the balancing analysis under Article 22.1 (11 U.S.C. §

1522(a)) and concluding that granting the licensees protection was necessary to granting the foreign representative power to administer Qimonda's U.S. patents. *Id*. at 31.[4]

***Drawbridge Special Opp. Fund LP v. Barnet (In re Barnet)*, 737 F.3d 238 (2d Cir. 2013)**

Brief Statement of Relevant Facts: Octaviar Administration Pty Ltd. ("**Octaviar**"), an Australian company, was placed into administration in Australia on October 3, 2008, and the Supreme Court of Queensland, Australia ordered its liquidation on July 31, 2009. *Id*. at 241. As part of this liquidation, affiliates of Drawbridge Special Opportunities Fund LP ("**Drawbridge**"), were investigated and a lawsuit was commenced against certain of those affiliates in Australia on April 3, 2012, seeking over AUS$200 million. *Id*.

On August 13, 2012, Octaviar's liquidators (the "**Foreign Representatives**") petitioned the United States Bankruptcy Court for the Southern District of New York for an order recognizing the Australian liquidation proceeding as a foreign main proceeding to which Drawbridge objected. *Id*. The bankruptcy court entered an order recognizing the Australian proceeding as a main proceeding. *Id*. The bankruptcy court then entered an order granting the Foreign Representatives the right to seek discovery from Drawbridge and others. *Id*. Drawbridge appealed the recognition and discovery orders and the bankruptcy court certified the issues directly to the Court of Appeals because there was no controlling precedent governing the bankruptcy court's decision that a debtor within the meaning of chapter 15 is not required to have a domicile, residence, place of business, or property in the United States. *Id*.

Issue Presented for Decision: Whether the debtor subject to a foreign proceeding must comply with the jurisdictional requirement in the general provisions of the U.S. Bankruptcy Code other than Chapter 15 (namely, 11 U.S.C. § 109(a)) that requires a debtor to have a domicile, residence, a place of business, or property in the United States in order for it to obtain recognition of its foreign proceeding under Chapter 15.

Court's Holding: The Court held that "[b]ecasue Foreign Representatives made no attempt to establish that [Octaviar] had a domicile, place of business or property in the United States, recognition should not have been granted." *Id*. at 247. In reaching this decision, the Court further concluded that while the definition of "debtor" in 11 U.S.C. § 1502[5] supplants the general definition of "debtor" in the U.S. Bankruptcy Code it does not supplant the jurisdictional requirement to be a "debtor" under the U.S. Bankruptcy Code. Finally in reaching its decision, the Court observed that the Model Law does not contain an express requirement akin to the jurisdictional requirement in 11 U.S.C. § 109(a) in the United States Bankruptcy Code, the Model Law does recognize that a state may modify or leave out some of the Model Law provisions. *Id*. 251. Additionally, the Court noted that the relief the Foreign Representatives

[4] The Court went on to add that Article 22.1 of the Model Law (11 U.S.C. § 1522(a)) "*requires*" that a bankruptcy court "*ensure sufficient protection of creditors*, as well as the debtor. . .." *Id*. at 32 (emphasis in original); however, one of the three judges on the panel wrote a separate opinion in which he disavowed this section of the Court's opinion as *dicta*.

[5] This provision in Chapter 15 that defines "debtor" is not contained within Article 2 of the Model Law.

sought in their Chapter 15 case, namely pursuit of discovery against Drawbridge, was available under separate U.S. statutes. The Court vacated the bankruptcy court's order and remanded the matter for further proceedings consistent with the decision. *Id*.

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First Scheme of Arrangement for a Vietnamese Company

Sanctioned by the English Courts

Introduction

On 4 September 2013, the High Court in England sanctioned the scheme of arrangement for a Vietnamese company for the first time, reinforcing the effectiveness of schemes as a restructuring tool for non-UK companies. In the course of the matter, the English High Court made two important rulings which we discuss in this article.

Background

In 2008, Vinashin was the fifth-largest shipbuilder in the world with over 30,000 employees. At the commencement of its restructuring, however, the company had liabilities of more than US$4.5 billion. On 20 December 2010, Vinashin missed the first principal repayment of US$60 million, thereby defaulting on a US$600 million facility. Over the course of the next two years, Vinashin engaged itself in extensive negotiations with its creditors as well as various ministries and government departments in Vietnam. Although it had successfully entered into consensual restructuring agreements with most of its domestic and international creditors, those pursuant to the US$600 million facility held out. As a scheme only requires support from creditors representing at least 50 percent in number and 75 percent in value to bind all parties to the same terms, a scheme was proposed to break the deadlock. A big threat to the restructuring came in Summer 2013, however, when certain creditors under the facility referred to brought proceedings against Vinashin in the English courts for summary judgment on the amounts then outstanding.

Stay of proceedings pending the scheme

When the hold-out creditors brought proceedings against Vinashin in the English courts, Vinashin made an application to stay those proceedings prior to judgment to enable Vinashin to put forward a scheme of arrangement to the entire syndicate. At first glance, this may appear to be an unusual use of the court's powers to grant a stay under its general jurisdiction to manage cases and the applicable Civil Procedure Rules. After all, Vinashin had admitted the claims in question and had also admitted in evidence that it was insolvent. However, the court granted the stay on the basis that:

1. support for the scheme in the form of executed undertakings to vote in favour had been obtained from creditors exceeding 50 percent in number and 75 percent in value of the total debt under the facility agreement;

2. the court was satisfied that the scheme had been set on foot and had a reasonable prospect of succeeding;

3. Vinashin was patently insolvent and accordingly the court had to consider the interests of Vinashin's creditors as a whole;

4. There was a strong argument that no creditor should be entitled to a judgment to the expense of other creditors; and

5. If individual lenders were entitled to obtain or execute a judgment against Vinashin, it may jeopardise the scheme.

The court emphasised that the present situation provided "special circumstances" which would necessitate its exercise of its discretion to grant a stay under its general powers.

The scheme

One of the reasons for turning to a scheme to deal with incalcitrant creditors was the fact that there was little precedent as to how a Vietnamese law insolvency process would play out.

Under the proposed scheme, each creditor's debt will be exchanged for notes of a value pro-rata to its debt. These notes are to be guaranteed by the Vietnamese government and would fall due in 2025. Thus, payment to the creditors will be delayed but as Vinashin argued, the creditors will still end up in a better position than if Vinashin was to be placed into an insolvency process in Vietnam.

Before sanctioning the scheme, the court first had to consider whether it had jurisdiction to do so. The company has no assets, operations or other connection to England and their creditors are not based in England, either. Nevertheless, the court held at the convening hearing that it did have jurisdiction to sanction the scheme for Vinashin based on the fact that the loans restructured by the scheme derived from a facility governed by English law and which was subject to a non-exclusive English jurisdiction clause. By doing so, the court rulings have confirmed that there is a low threshold for non-UK companies to establish a "sufficient connection" to the UK to implement a scheme.

The court also considered whether Council Regulation (EC) No. 44/2001 (the **"Judgments Regulation"**) would apply as some creditors were based in the EU. Whilst leaving open the question whether the Judgments Regulation would apply to schemes at all, the court ruled that the non-exclusive jurisdiction clause in the facility agreement sufficed as a basis for the English court's jurisdiction.

On 4 September 2013, the English High Court sanctioned the scheme which had been approved by creditors at a meeting in Singapore on 5 August 2013.

The implications of Vinashin

The court's decisions in relation to both the stay and the scheme in Vinashin will no doubt be seen as helpful developments further facilitating the use of schemes to restructure balance sheets. This is the first large-scale international restructuring undertaken by a Vietnamese state-owned entity. Due to Vinashin's strategic important role in the Vietnamese shipping industry, the Vietnamese government has had significant involvement in the process.

Vinashin is an excellent example of the supportive approach of the English courts to the rescue culture, facilitating a restructuring process designed for the benefit of a company's creditors as a whole. Developments like this will no doubt continue to raise the UK's profile as a premier venue for international restructurings.

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Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd & Anor [2013] 2 SLR 1035
Ring-Fencing of Assets in Cross-Border Insolvencies

The Issues

Does the insolvency ring-fencing provision in Singapore's Companies Act (the "**Act**") apply to a foreign company which does not carry on business in Singapore and is therefore not required to register under the Act? Does the Court have a common law discretion to disapply provisions of the Act? If so, does that discretion extend to the ring-fencing provision? And if it does, in what circumstances will that discretion be exercised? These were the questions that were put to the Singapore High Court in *Beluga Chartering GmbH v Beluga Projects (Singapore) Pte Ltd & Anor* [2013] 2 SLR 1035.

Facts

1. Beluga Chartering GmbH is a company incorporated in Germany. It was wound up in Germany and German liquidators were appointed. In due course, it was wound up in Singapore as a foreign company and Singapore liquidators appointed.

2. Beluga was hopelessly insolvent. It owed €1.2bn to creditors worldwide and S$1.4m to creditors in Singapore. But it had assets in Singapore of S$1.1m. If the Singapore assets were transmitted to the German liquidators for distribution to all creditors in accordance with German insolvency law, each creditor would receive an insignificant additional dividend. If however, the Singapore assets were ring-fenced and applied to settle the Singapore debts first, the Singapore debts would be settled virtually in full, but leaving nothing for transmission to the German liquidators.

The Application to the High Court

3. The Singapore liquidators wanted to transmit the Singapore Assets to Beluga's German liquidators to be distributed in accordance with German insolvency law. So they applied to the High Court under the Act to determine, in essence, the following questions of law:-

   (a) were the Singapore Liquidators obliged to conduct the Singapore liquidation of Beluga in accordance with the Act without exception or modification;

   (b) if so, did the ring-fencing provision of the Act apply to Beluga given that it was a foreign company which was not registered in Singapore and which had never carried on business in Singapore;

   (c) if so, do the Singapore liquidators have the power, either under the Act or the general law, to transmit the Singapore assets to the German liquidators without complying with the ring-fencing provisions of the Act.

The First Question

4. The High Court answered the first question in the affirmative. The Act does not envisage a Singapore liquidator of any company, whether foreign or domestic and whether in an ancillary or a local liquidation, dealing with assets realised in Singapore otherwise than as provided by the Act. The Act therefore makes no provision to permit a Singapore liquidator to transmit assets realised in an ancillary liquidation of a foreign company to the foreign company's principal country of liquidation. But the Act is not intended to be, a complete and self-contained insolvency code. Considering the legislative history of Singapore's insolvency provisions and how the English and Singapore courts have interpreted them, the High Court does have a discretionary power at common law to disapply aspects of Singapore's statutory insolvency scheme in an ancillary liquidation so long as doing so is consistent with justice and Singapore public policy. That discretion enables the High Court to direct Singapore liquidators in an ancillary liquidation in Singapore to transmit assets realised in Singapore to a foreign company's principal liquidation for distribution under the law of the principal liquidation.

The Second Question

5. The ring-fencing provision of the Act applies to Beluga Chartering. The High Court interpreted the provision of the Act which controls the application of the ring-fencing provision as applying to all foreign companies and not only to those foreign companies which register under the Act as carrying on business in Singapore.

The Third Question

6. The High Court next had to decide whether to exercise its discretionary power to disapply the ring-fencing provision of the Act and make a transmission order. In exercising this discretion, the Court took into account several factors. The Court considered Beluga's business model and how it acquired its Singapore assets and incurred its Singapore debts. The bulk of

the Singapore debts were ultimately owed to the employees of Beluga's two wholly-owned subsidiaries in Singapore. These subsidiaries were incorporated in Singapore as separate legal entities but were always entirely dependent economically on Beluga. The efforts of the subsidiaries and of their employees were directed to promoting the business of Beluga, not of the subsidiaries. Beluga acquired its Singapore assets largely as a result of the efforts of these subsidiaries and of their employees. If the ring-fencing provision were disapplied, the Singapore creditors would suffer real prejudice. If it were applied, however, the general body of creditors would recover an insignificant additional amount, if anything at all.

7. Taking into account these factors, the High Court declined to exercise its discretion to disapply the ring-fencing provision of the Act and to make a transmission order. As a result, the High Court held that the Singapore liquidators were subject to the ring-fencing provision of the Act and could not transmit the Singapore assets to the German Liquidators unless they complied with it.

Postscript

8. Singapore's Court of Appeal heard the Singapore liquidators' appeal on 25 November 2013 and allowed the appeal with reasons to follow.

Conclusion

9. This decision is noteworthy. It is the first decision which expressly acknowledges that the ancillary liquidation doctrine is part of Singapore law. This is timely as Singapore considers an overhaul of its insolvency legislation. Will the new legislation codify an unqualified universalist approach to cross-border insolvency legislation or will it, in light of this decision, strike a middle ground by balancing territorial insolvency interests against the primacy of the principal liquidation by a broad discretion? Until the new legislation comes into force, will this decision promote Singapore's position as a regional financial and insolvency hub by confirming the potential to disapply the Act's ring-fencing provision (which otherwise appears to be mandatory) to the liquidation of a foreign company which does register as carrying on business in Singapore? The reasons of the Court of Appeal in allowing the appeal are keenly anticipated and together with the High Court's decision are worthy of further discussion.

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Discussion Paper regarding Interim Payments in Hong Kong

Introduction

The purpose of this Discussion Paper is to highlight the issues relevant in Hong Kong to the awarding of interim payments in respect of the fees and disbursements of insolvency practitioners and their agents, and to suggest some ideas as to how interim payments can be awarded in an expeditious and cost efficient manner in both provisional liquidations and liquidations. This Discussion Paper is intended to facilitate the Panel discussion regarding the remuneration of insolvency practitioners at the upcoming INSOL Conference in Hong Kong in March 2014.

Background

In Hong Kong, the bills of costs of the following insolvency practitioners / agents must be taxed:

- provisional liquidators appointed pursuant to s.193 and s.194(1A) of the Companies Ordinance;
- liquidators where there is no committee of inspection or the liquidator and the committee of inspection fail to agree; and
- agents employed by liquidators or the Official Receiver.

Interim payments are intended to alleviate the delays faced by insolvency practitioners and their agents in receiving payment for their services and to assist them with their cash flow. The delays experienced by insolvency practitioners and their agents in receiving payment for their services are the result of the length of time it takes to tax their bills of costs given the resource constraints faced by the High Court Registry.

It typically takes several months from the date on which the bill of costs of the insolvency practitioner or their agent is submitted to the Registry before the taxation process is complete.

The Jurisdiction and Need for Interim Payments

It was accepted by the Honourable Mr Justice Barma in Re Lehman Brothers Securities Asia Ltd (No 1) [2010] HKLRD 43 at §22 that the Court has an inherent jurisdiction to order interim payments and that the need for interim payments was "self-evident". His Lordship held that it was unreasonable to expect professionals to provide their services over a period of time without any provision being made for payments on account of their remuneration and expenses. In that case, Barma J granted the provisional liquidators and their agents interim payments equivalent to 75% of their fees and 100% of their disbursements.

Recent Examples of Interim Payments

Since the decision in Re Lehman Brothers Securities Asia Ltd, there have been various other successful applications for interim payments including:

- Lehman Brothers Securities Asia Ltd (HCCW 437/2008) - Interim payments were awarded equivalent to 90% of the fees and 100% of the disbursements of the agents employed by the liquidators of Lehman Brothers Securities Asia Ltd and the other Lehman Brothers companies in liquidation in Hong Kong prior the taxation of those fees and disbursements under the Companies (Winding-up) Rules;

- FU JI Food and Catering Services Holdings Limited (HCCW 621/2009) - Interim payments were awarded equivalent to 70% of the fees and 100% disbursements of the provisional liquidators of FU JI Food and 100% of the fees and disbursements of the agents employed by them;

- Anglo-Starlite Insurance Company Limited (HCCW 270/2009) - An interim payment was awarded equivalent to 75% of the fees and 100% of the disbursements of the provisional liquidators of Anglo-Starlite and of the solicitors employed by them.

- Starbay International Limited (HCCW 649/2209) - Interim payments were awarded equivalent to 75% of the fees and 100% of the disbursements of the provisional liquidators of Starbay Limited and an interim payment equivalent to 85% of the fees and 100% of the disbursements of the agents employed by them. Such interim payments were in respect of both fees and disbursements that had already accrued and also future fees and disbursements.

- Moulin Global Eyecare Holdings Limited (HCCW 470/2005) - Interim payments were awarded equivalent to 90% of the fees and 100% of the disbursements of the agents employed by the liquidators of Moulin. Such interim payments were in respect of both fees and disbursements that had already accrued and also future fees and disbursements.

- CA Pacific Finance Limited and CA Pacific Securities Limited (HCCW 36/1998 and 37/1998) - An interim payment was awarded is respect of the long outstanding fees of the liquidators of CA Pacific.

- MF Global Holdings HK Limited (HCCW 357/2011) – An interim payment was ordered, but in doing so the Court strongly suggested that future applications for payments on account would only be considered in what have become known as "mega-insolvencies". Whilst the Court recognised that provisional liquidators should not be required to finance very large or long-running provisional liquidations, it appears that smaller insolvency practitioners, for whom such an assignment can consume a substantial amount of resources will be required to fund provisional liquidations where they are appointed.

- Yu Kee Food Company Limited (HCCW 181/2011) - The Court declined to make an order for an interim payment stating that there was no basis for the provisional liquidators of Yu Kee not complying with the normal procedure for the assessment of their fees and disbursements and those of their agents.

It has also become evident that interim payment provisions are being incorporated into orders for the appointment of administrators of estates (who frequently typically also insolvency practitioners) and that pursuant to such interim payment provisions the administrators are empowered to draw down the remuneration and expenses on a regular basis before the taxation by the Court or approval of their fees by the beneficiaries.

Interim Payment Applications

Notwithstanding that interim payments seem to have become more common since the decision in Re Lehman Brothers Securities Asia Ltd, it would appear that under current practice, a significant amount of evidence is required before the Court will make an interim payment order. That evidence must explain, *inter alia*, the major tasks undertaking by the insolvency practitioners and/or their agents, the reasons those tasks were undertaken, the total fees and disbursements to be charged, and details in regard to the scrutiny of the fees by the liquidators, and the reasons why those fees are considered reasonable.

If such evidence is not provided to the Court then it would appear that the application for the interim payment may be rejected; that was the outcome in Re Wing Fai Construction Co Ltd [2003] 1 HKLRD 80. In that case, Kwan J (as she then was) held that it was unacceptable for an interim payment to be made even before the provisional liquidators had submitted their bills of costs for taxation.

Moreover in light of recent decisions, it would appear interim payment applications should only be considered in major insolvencies.

The Issues

The primary issues faced by the Court and the insolvency practitioners are: "In what circumstances should the Court award interim payments?" and "How can the Court award interim payments on a cost efficient and expeditious basis?"

The secondary issues are as follows:

- What evidence should be required in support of an interim payment application?
- What is the appropriate level of interim payment?
- What are the appropriate charge-out rates to be applied when ordering interim payments?
- Which of the costs associated with making an application for an interim payment should be recoverable?[1]

[1] Given that the need for interim payments is self evident, all reasonable costs associated with the making an application for an interim payment should be recoverable. A similar issue is whether the not insignificant costs of preparing taxation bundles should be reimbursable to the insolvency practitioner. Because insolvency practitioners have a duty to comply with the detail provisions set out in the Procedural Guides, they should compensated for the tasks related to the discharge of that duty. This practice would be consistent with the practice set out in United Kingdom's Practice Statement for the Fixing and Approval of the Remuneration of Appointees (2004). This Practice Statement requires appointees including liquidators, administrators and trustees on any application for the fixing and approval of the remuneration of an appointee to provide information to satisfy/comply with the Maxwell Principles, and specifically provides that states that "*Unless otherwise ordered by the court the costs of and occasioned by an application for the fixing and/or approval of the remuneration of an appointee shall be paid from the assets under the control of the appointee.*"

- What form of security, if any, should be required from insolvency practitioners and their agents in connection with an interim payment order?

The Possible Way Forward

The Court may wish to consider the following solutions to the issue of interim payments:

- Including a provision in respect of interim payments in the order appointing the insolvency practitioner - e.g. "Upon submission to the Registry of a taxation package in the form required by the Procedural Guidelines in the respect of the insolvency practitioner's bill of costs, the insolvency practitioner shall be entitled to an interim payment on account in respect of their fees and disbursements equivalent to [xx]% of the bill of costs."

- Requiring insolvency practitioners, in their capacity as officers of the Court, to undertake to repay any overpayments in respect of their fees and disbursements.

- Including a provision in the order of appointment in respect of the charge-out rates in the order appointing the insolvency practitioner - e.g. "Until otherwise ordered, the charge-out rates of the insolvency practitioners shall be as follows ….". In the past it was common for the orders appointing liquidators to include a provision that their fees be calculated on the basis of the rates agreed between the Hong Kong Society of Accountants (now the Hong Kong Institute of Certified Public Accountants and the Official Receiver's Office. Given that the new rates were agreed in August 2012 this may represent a suitable approach bringing certainty to the calculation of the insolvency practitioner's time costs, if not the actual level of fees approved by the Court.

- As an alternative to including a provision in respect of interim payments in an order appointing the insolvency practitioner to his office, allowing the insolvency practitioner to apply by way of paper application to the masters for interim payments upon the submission of a taxation package to the Registry.

Miscellaneous issue

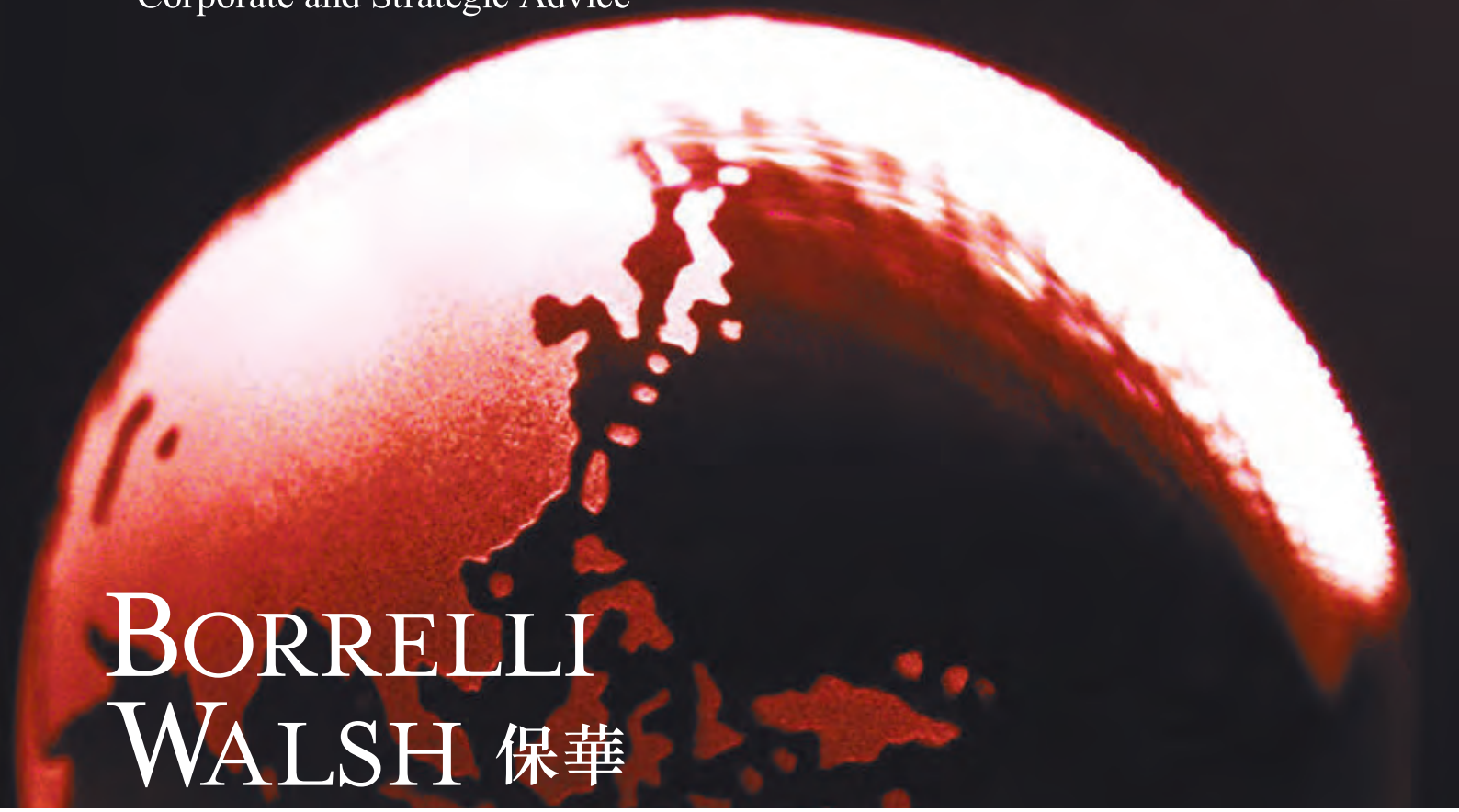
- If there is no provision regarding charge-out rates in the order of appointment, the Court may wish also to provide guidance as to the tests to be applied when considering the appropriate charge-out rates of insolvency practitioners and their agents. The appropriate charge-out rates should be the broad average or general rate charged by persons of the relevant status and qualifications who carried out the relevant kind of work: see Mirror Group Newspapers v Maxwell and others (No 2) [1998] 1 BCLC 638 at p.8; and Jones v Secretary of State for Wales [1997] 2 All ER 507, [1997] 1 WLR 1008.

Stephen Briscoe / James Wood
February 2014

REACHING THE WORLD FROM ASIA PACIFIC

Borrelli Walsh is a specialist restructuring, insolvency and forensic accounting firm.

- Corporate Recovery and Insolvency
- Financial Investigations, Forensic Accounting and Expert Evidence
- Financial and Operational Restructuring
- Matrimonial, Trust and Probate
- Corporate and Strategic Advice



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CORPORATE FINANCE/ RESTRUCTURING

THE INDUSTRY LEADERS IN TURNAROUND AND RESTRUCTURING, TRANSACTION ADVISORY SERVICES AND CORPORATE RECOVERY

FTI CONSULTING™

For more information on our activities across Asia Pacific and how FTI Consulting can help your business, please contact us on

info-ap@fticonsulting.com

CRITICAL THINKING AT THE CRITICAL TIME™

About FTI Consulting

FTI Consulting, Inc. is a global business advisory firm dedicated to helping organisations protect and enhance enterprise value in an increasingly complex legal, regulatory and economic environment. FTI Consulting professionals, who are located in all major business centres throughout the world, work closely with clients to anticipate, illuminate and overcome complex business challenges in areas such as investigations, litigation, mergers and acquisitions, regulatory issues, reputation management and restructuring.

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CRITICAL THINKING AT THE CRITICAL TIME™

FTI CONSULTING™

Corporate Finance/Restructuring

The Corporate Finance/Restructuring practice of FTI Consulting provides complete support in turnaround and restructuring, transaction advisory services and corporate recovery. The practice has a reputation for taking on challenging and complex assignments that require exceptional strategic and technical capabilities.

Our regional and international coverage, combined with our specialist teams' depth of experience and results focused approach, means we are uniquely placed to meet our clients' needs.

HOW WE ARE DIFFERENT

- Pragmatic and outcome-driven, we focus on delivering results
- A reputation for taking on challenging and complex assignments
- Specialist operational restructuring and performance improvement personnel
- Skilled and experienced across a broad spectrum of industry sectors, enabling us to deploy the right people to every assignment
- Preparedness to assume board and similar roles to fulfill control, review and monitoring responsibilities, including acting as Legal Representative in China.
- As a specialist firm, we do not run into conflict issues that traditional accounting firms often face

TURNAROUND AND RESTRUCTURING

We offer an integrated range of services to help clients analyse, negotiate, restructure and turnaround businesses that are experiencing liquidity constraints. Our services include:

- Financial restructuring
- Operational performance improvement
- Providing interim management and chief restructuring officers
- Lender, company and strategic advisory

TRANSACTION ADVISORY SERVICES

FTI Consulting delivers financial, operational, transactional and advisory support to clients across the investment life cycle. This includes conducting due diligence, valuations, post-acquisition integration, health checks, performance improvement, interim management and board roles, and providing sell-side advisory services. Our services include:

- Mergers and acquisitions
- Transaction support and due diligence
- Valuation services
- Asset management/servicing
- Initial structuring advice
- Ongoing operational support and assistance

CORPORATE RECOVERY

Our focus is on saving businesses. We manage all types of formal insolvency administrations. We recognise that stakeholder needs are paramount when dealing with insolvent companies and aim to utilise our experience, skills and contacts to maximise financial outcomes. Our services include:

- Receiverships
- Provisional, court and voluntary liquidation
- Schemes of Arrangement
- Judicial Management
- Trustee in Bankruptcy
- Financial monitoring
- Corporate re-lists
- Investigations and litigation

CLIENTS IN FOCUS

- We were appointed liquidators of Pioneer Iron and Steel Group Company Limited in the British Virgin Islands after it was discovered that the company had approximately US$80 million in creditors and had been the subject of considerable asset stripping. We pursued a litigation strategy through a number of jurisdictions and, with the assistance of litigation funding, ultimately resulted in a significant return to creditors.
- Acting as the court-appointed monitor of Sino-Forest, tasked with overseeing operations and cash management, including regular reporting to the court and liaising with various stakeholders.
- Appointed receiver and manager of GSF Capital by the High Court of Singapore. We took control of a renewable energy fund operating 178 solar power stations in southern Italy.
- Appointed as provisional liquidators of Hong Kong-listed Peace Mark Holdings Limited, after having identified large-scale financial irregularities that had previously been undetected for many years. We successfully sold a highly distressed China retail business and separately sold the Group's interest in Sincere Watch, a profitable pan Asian retail business. Litigation conducted by us in connection with the financial irregularities resulted in further recoveries.
- We were appointed as financial advisor for certain secured lenders in relation to a debt restructuring of Berlian Laju Tanker in Indonesia, the third largest chemical tanker group in the world. The company had debts in excess of US$1 billion. We assisted the lenders through a complicated restructuring process.

PPB ADVISORY

The advisory firm of choice

for restructuring solutions and related investment opportunities in Australasia

Sydney | Melbourne | Brisbane | Perth | Auckland

PPB Advisory is the firm of choice
for investors seeking advice in Australasia

Our market knowledge, access to leading investment opportunities and strength of network are second to none.

We are different because of the way we relate to people.

We get better outcomes by building genuine rapport with stakeholders.

We ask the right questions – and work together with clients to achieve the right solutions.

Specialising in restructuring and turnarounds, insolvency services, corporate advisory, forensics and investigations – we employ more than 300 people across Sydney, Melbourne, Brisbane, Perth and Auckland.

Our work on landmark matters including RM Williams, Elders, BrisConnections, Gunns, Burrup Fertilisers, Provident Capital, Hi-Fert, Clive Peeters, ABC Child Care Centres, Trio Capital and Lehman Brothers Australia has enabled us to grow and develop an unrivalled business network and enables us to tap the best investment opportunities in the Australasian market for our clients.

As professional advisors we:

- provide strategic and financial advice
- lead major transactions involving changes of ownership or capital structures
- advise on complex business restructures and turnarounds
- undertake forensic investigations
- provide insolvency services to companies and individuals.

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Member Associations

American Bankruptcy Institute
Asociación Argentina de Estudios Sobre la Insolvencia
Asociacion Uruguaya de Asesores en Insolvencia y Reestructuraciones Empresariales
Association of Business Recovery Professionals- R3
Association of Hungarian Insolvency Lawyers
Association of Insolvency and Restructuring Advisors
Association of Restructuring and Insolvency Experts
Australian Restructuring, Insolvency and Turnaround Association
Bankruptcy Law & Restructuring Research Centre, China University of Politics and Law
Business Recovery and Insolvency Practitioners Association of Nigeria
Business Recovery and Insolvency Practitioners Association of Sri Lanka
Canadian Association of Insolvency and Restructuring Professionals
Canadian Bar Association (Bankruptcy and Insolvency Section)
Commercial Law League of America (Bankruptcy and Insolvency Section)
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Hong Kong Institute of Certified Public Accountants (Restructuring and Insolvency Faculty)
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Insolvency Practitioners Association of Malaysia
Insolvency Practitioners Association of Singapore
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Recovery and Insolvency Specialists Association (BVI) Ltd
Recovery and Insolvency Specialists Association (Cayman) Ltd
REFor – The Insolvency Practitioners Register of the National Council of Spanish Schools of Economics
Russian Union of Self-Regulated Organizations of Arbitration Managers
Society of Insolvency Practitioners of India
South African Restructuring and Insolvency Practitioners Association
The Association of the Bar of the City of New York
Turnaround Management Association (INSOL Special Interest Group)

INSOL INTERNATIONAL
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