



INSOL INTERNATIONAL

News Update

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EDITOR'S NOTE



Kathleen Wong
Partner
Allen & Overy LLP
South Africa

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CONTENTS

HIGHLIGHT ARTICLE

THE AMERICAS

ASIA PACIFIC

EUROPE, AFRICA &
MIDDLE EAST

The start of 2020 has seen a flurry of significant events around the world. Some uncertainties have now become certainties. Brexit has finally and officially happened. Nearly 20 years after the SARS outbreak hit the global economy, the world is facing another epidemic. The full effect of the Coronavirus is difficult to anticipate, but the only certainty is that whatever happens in China will be felt far beyond its borders.

In these challenging times, South Africa's state-owned entities have been struggling to stay afloat, including the national airline South African Airways, power utility Eskom and the South African Post Office. This month's [Highlight Article](#) takes a look at some of the powerful tools that are available for restructuring state-owned entities in South Africa, when liquidation or winding-up is simply not an option.

In the Caribbean, the courts have been busy. In a recent decision, the [BVI Court](#) has recognised and enforced judgments from China for the first time. The Privy Council decided [three appeals](#) coming from the Bahamas, the BVI and the Cayman Islands supporting the proposition that a domestic court may in certain circumstances delegate powers to a foreign court by allowing liquidators / receivers to reach outside of their jurisdictions to recover money from investors.

In Asia-Pacific, the [Constitutional Court in Indonesia](#) began 2020 with a bang by issuing a decision that is not likely to be received well in loan markets but paves the road for a more borrower-friendly jurisdiction. [Competition constraints](#) have dampened the sale of distressed businesses in Australia.

In Europe, a recent decision of the [European Court of Justice](#) has prompted a closer study of which law applies when determining the validity of an assignment of receivables cross-border.

In the post-Brexit era, this month's edition includes [an article](#) considering whether the UK will maintain its insolvency and restructuring pre-eminence after Brexit and a [case alert](#) relating to a recent English court decision that solvent proceedings cannot be recognised under the Cross-Border Insolvency Regulations 2006 (which implement the UNCITRAL Model Law in the UK).

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SEMINARS

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If you would like to send an article for inclusion in one of our forthcoming issues please contact our Technical Officer, [Louise Jennings](#)

If you would like to introduce a new member to INSOL International please contact our Database Manager, [Tony Ashton](#)

Thank you to all who have contributed to this month's issue. With over 650 delegates from 49 countries registered to attend INSOL's Annual Conference 2020, I look forward to seeing many of our readers next month in Cape Town!

HIGHLIGHT ARTICLE

The Restructuring of State-Owned Entities in South Africa: Some Powerful Tools

A number of South African state-owned entities (SOEs) are currently experiencing financial turmoil. The dire state of SOEs has become a common feature in the South African news cycle, repeatedly compelling government to provide financial assistance to keep them afloat. During the financial year 2018/19, the government provided guarantees amounting to R446 billion to just 11 SOEs, including power utility Eskom, national airlines South African Airways (SAA) and South African Express, arms manufacturer Denel and the South African Post Office.

As there is no special legislation to deal with the insolvency of an SOE, the insolvency regime applicable to companies generally applies to an SOE. When an SOE is in financial distress, the prospect of a liquidation or winding-up could be problematic. Unlike their private counterparts, SOEs have dual commercial and development mandates, provide basic goods and services, facilitate socio-economic development and transformation and as such play a vital role in maintaining social cohesion. Therefore, terminating an SOEs existence is not always an option. This article examines the two alternatives to liquidation and winding up available under the South African Companies Act, namely, business rescue and a compromise with creditors and the lessons for SOEs from corporate restructurings.

**By Callum O'Connor, Counsel
Ilke Meissner, Candidate Attorney
Kathleen Wong, Partner
Gerhard Rudolph, Partner
Allen & Overy (South Africa) LLP**

[Highlight Article >](#)

CASES

British Virgin Islands

Taking Charge - The BVI Courts Appoint a Receiver to Take Control of a PRC Judgment Debtor's Assets

A recent decision in the British Virgin Islands, *BVIHC (Com) 0032* of 2018, is notable as being the first case where the BVI Court has recognised and enforced judgments from the People's Republic of China Courts (and may assist future applicants seeking reciprocal relief from the PRC Courts for recognition of BVI Court orders). The case involved an application by a bank from the PRC for the appointment of post-judgment receivers by way of equitable execution over shares in a BVI company in order to enforce a multi-million dollar judgment debt.

[Walkers Global Advisory, 11 February 2020 >](#)

[Chinese Version >](#)

[Case Decision >](#)

ARTICLES

Cayman Islands

Caribbean Legal Update – Appeal Decisions by The Judicial Committee of the Privy Council

The Judicial Committee of the Privy Council in London, the highest appeal court for many Caribbean jurisdictions, decided three appeals in 2019 that are of keen interest to the insolvency community. All of the cases concerned preference payments to creditors shortly before the filing of a bankruptcy petition. Each of the three Privy Council decisions concerned a different jurisdiction with different legislation: namely the Bahamas, the British Virgin Islands and the Cayman Islands. The issues raised in these cases include when legislation can be used outside of its own jurisdiction and what elements make up an “intention to prefer.”

[Bedell Cristin Legal Update, 7 January 2020 >](#)

[AWH Fund Case Decision >](#)

[Fairfield Sentry Case Decision >](#)

[SEB Case Decision >](#)

ASIA PACIFIC

CASES

Indonesia

Indonesian Constitutional Court Paves the way for a more Borrower-friendly Jurisdiction

Six days into 2020, the Indonesian Constitutional Court began the New Year with a bang, issuing a decision that is not likely to be received well in loan markets. The Constitutional Court Decision, aside from changing the legal landscape of the Fiducia Law, also reinterprets the meaning of “default” in a way that goes counter to Indonesian government’s efforts to encourage foreign investment in the country. It can also be seen as a major step towards creating a more borrower-friendly jurisdiction. The government needs to address this issue urgently if it wishes to sustain the lending market’s appetite.

[Herbert Smith Freehills Indonesia Update, 27 January 2020 >](#)

Australia

The Chill of Competition Constraints on the Sale of Distressed Businesses in Australia

A recent decision by the Australian Competition and Consumer Commission to oppose a proposed sale by voluntary administrators of a group of companies is a reminder to insolvency practitioners as well as creditors and other stakeholders of the limitations imposed by the Australian competition regime in connection with the sale of shares and / or assets of a distressed entity. Indeed, the restraints and hurdles imposed by the competition regime sit awkwardly with an insolvency practitioner’s duties and obligations under Australia’s insolvency regime. This potential to dampen insolvency sales is not limited to Australian insolvency proceedings since similar antitrust positions are reflected in many jurisdictions around the world.

[Norton Rose Fulbright, International Restructuring Newswire, First Quarter 2020 >](#)

EUROPE, AFRICA & THE MIDDLE EAST

CASES

United Kingdom

No Recognition of Solvent “Foreign Proceedings” in the UK

The English court has held that solvent proceedings cannot be recognised under the Cross-Border Insolvency Regulations 2006 (which implement the UNCITRAL Model Law for

Germany

Which Law Applies When Determining the Validity of an Assignment of Receivables Cross-border?

The validity of an assignment of receivables cross-border depends on the law that applies to the assignment. This question arose in the

Cross-Border Insolvency in the UK), in the case of *Sturgeon Central Asia Balanced Fund Ltd*. The English court had recognised *Sturgeon's* solvent liquidation in May 2019 — the first order to recognise the liquidation of a solvent company as a foreign proceeding in this jurisdiction (as reported in our July 2019 issue).

Care will be necessary in future cases where a company may not be obviously insolvent (or in financial distress). Of course, for certain international restructuring / insolvency regimes, most notably U.S. Chapter 11 cases, insolvency is not a prerequisite. This may also be problematic in the case of group proceedings where it may not be obvious that all debtors are insolvent.

[Kirkland & Ellis Alert, 30 January 2020 >](#)

[Case decision >](#)

context of a German bankruptcy where the issue was referred to the European Court of Justice for a preliminary ruling. This article considers the implications of the ECJ judgment in Case C-548/18 BGL *BNP Paribas SA vs. TeamBank AG Nürnberg* and how this affects assignees and the priority of competing claims. It also considers the proposed EU Assignment Regulation and how that might assist in determining the question of jurisdiction in the future.

[Squire Patton Boggs Restructuring Global View, 23 January 2020 >](#)

[Case decision >](#)

ARTICLES

United Kingdom

Forum Shopping in the UK and EU in the context of Cross-border Restructuring and Insolvency in a new post Brexit World

Can the UK maintain its insolvency and restructuring pre-eminence post Brexit? Whilst the UK's formal departure from the EU took place on the 31 January 2020, the existing body of EU law, including the European Insolvency Regulation, remains in force as far as the UK is concerned until the end of the implementation period completion day, which is scheduled to be 31 December 2020 at 11 pm. This article looks at the way forward and considers the various steps that the UK government can take to offset any negative consequences associated with Brexit and maintain the UK as an attractive venue both for individual bankruptcies and for corporate insolvencies and restructurings.

[Article by Professor Gerard McCormack, INSOL Scholar 2020 - 2021, Leeds University and Visiting Professor, University of Vassa, Finland, January 2020 >](#)

CONFERENCES & SEMINARS



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INSOL Cape Town

Sunday 15 March – Tuesday 17 March 2020

We look forward to welcoming delegates to what promises to be an interesting and rewarding conference programme.

Highlights include:

Daniel Martin Katz, J.D., PH.D., Professor of Law, Illinois Tech – Chicago Kent Law
Professor Katz is an expert on digital innovation and will share with us exciting new ways to embrace and effectively use digital innovation in insolvency practice.

Ian Rheeder, Chartered Marketer (SA), MSC. Leadership of Innovation
Ian will explain how to tackle the elusive subject of leadership from a neurological level with special emphasis on managing and leading millennials.

As ever, we offer our sincere gratitude to the Main Organising Committee, Technical Committee and sponsors for their continued support and assistance.

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Tel Aviv One Day Seminar



4 May 2020
Tel Aviv Hilton,
Israel

REGISTRATIONS ARE OPEN

Early Booking Deadline: 23 March 2020

[Click here to view the programme and register.](#)

We would like to thank our generous sponsors of the seminar:

Platinum Sponsor: Kirkland & Ellis

Please contact [Danielle Timmons](#) for further information.

We look forward to seeing you in Tel Aviv!

Channel Islands One Day Seminar



17 June 2020
Radisson Blu Waterfront Hotel
St Helier, Jersey

REGISTRATIONS ARE OPEN

Early Booking Deadline: 24 April 2020

[Click here to view the programme and register.](#)

We would like to thank our generous sponsors of the seminar:

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Cayman Islands One Day Seminar



18 November 2020
The Ritz-Carlton
Grand Cayman,
Cayman Islands

SAVE THE DATE

Please contact [Danielle Timmons](#) for further information and sponsorship opportunities.

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