R3, the Association of Business Recovery Professionals | **www.r3.org.uk/recovery**

Spring 2011

RECOVERY

International issues

Reach out and touch…

Bankruptcy tourism: the not-so-accidental tourists
The adventures of bankruptcy tourism in the UK

Coming back to COMI
COMI in different jurisdictions

Dealing with employees in cross-border EU insolvency proceedings
Practical advice

The East: the new Wild West
The challenges for international investors in Asia

Lessons to be learned from the *Super Aguri* case
Administrators beware – and prepare!

Interview Chris Laughton, president of INSOL Europe

Plus Legal update, Economic snapshot: Eastern Region

Advertising feature
Effective auctioning

Careers and professional development supplement
JIEB successful candidates!

insolv

BUSINESS SOLUTIONS

zero cost

WHAT OUR CUSTOMERS SAY:

"The task-based diary system makes compliance so much easier, having each and every task split down and on screen is a good safeguard against missing statutory deadlines.

Very simple to add diary lines as a reminder which is great"

Stephen Grant of Wilkins Kennedy, London

the complete software solution for insolvency practitioners

- **NO** annual site licences
- **NO** cost per user
- **NO** limit to the number of users
- **NO** year on year fixed overhead to your practice
- **NO** annual support maintenance costs

insolv – an industry focussed software solution for the insolvency process. It is the premier product for insolvency practitioners in the UK today.

- Designed by IP's for IP's.
- Integration of practice and case management with regulatory requirements at its core.
- Once off charge of £110 per assignment recoverable as a Cat. 1 Disbursement.
- Zero cost solution to the Practitioner.
- All the main corporate case types are catered for including liquidations, administrations and receiverships.
- Manage your personal cases including VA's, bankruptcies, trust deeds and sequestrations.

insolv – tracks the natural stages of an insolvency assignment in practice from pre-engagement to statutory reporting and closure.

Key Features include:

- Powerful Diary and Task Management
- Comprehensive Letter Packs
- Easy migration from existing systems
- Extensive back up support and free phone helpdesk
- Easy to implement and user friendly
- Fully integrated Financials
- SIP 9 compliant time recording module.

insolv

BUSINESS SOLUTIONS

Call us today to arrange a demonstration or to speak directly with the insolv team on:

0800 072 0092

w: www.insolv.co.uk e: info@insolv.co.uk

Editorial

Welcome to the spring 2011 issue of *RECOVERY*. We hope you like the new cover and layout of the opening pages. Our esteemed editor, Chris Laughton, is to be found on page 51 interviewed as president of INSOL Europe, in keeping with our international theme. Chris will be back in this column next issue.

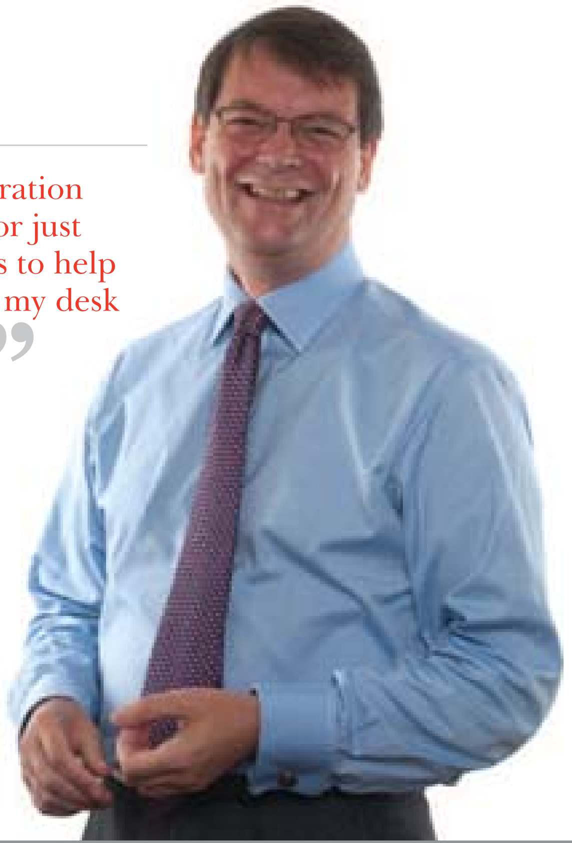
Congratulations to all those who have just passed their JIEB. Turn to the supplement for a roll-call of successful candidates. And what a time it is to be entering the profession, in the midst of the deepest of recessions, public sector cuts (the theme of the next issue of *RECOVERY*) and an inevitable interest rate rise. These will present challenges for society as a whole and as a profession we will be there to meet them head on.

It is heartening to read Steven Law's words on his time as R3's president (see page 5) and the campaign 'Holding rescue to ransom', and the energy and commitment that have gone into bringing to the government's attention the need to allow our rescue culture to do its work without being hijacked. R3 and Steven have been busy throughout the year working on the profession's image in the press through much high profile coverage and informed comment. Long may that continue.

So, in terms of our international theme, how do we see our regime in comparison with those overseas, in particular in mainland Europe? Michael Rutstein and Daniel Imison's articles (pages 15 and 16) serve as a reminder that despite the cynics' views on forum shopping, the fact is that our processes, skilled professionals and courts are the envy of many other jurisdictions. Rather than see the recent trend for forum shopping (and the forum 'selection' that Daniel Imison distinguishes) as a source of controversy, we should recognise that our insolvency regime, those skilled professionals who practice in it and our courts deliver rescue options that are simply not available in many other jurisdictions. Then again, speaking as one who practises law in the shopping 'destination', I would say that wouldn't I! Read Michael Thierhoff on 'Shifting COMI' (page 17) for a German perspective.

Daniel Redstone is a partner at Addleshaw Goddard LLP.

Regulars



51 Chris Laughton

"I frequently call on co-operation partners, professional friends or just other INSOL Europe members to help with foreign matters that cross my desk – and they, similarly, call me."

Regulars

Features

International issues

Legal update

R3 Matters

Advertising

Theme of *RECOVERY* summer 2011
Public sector cuts

Features

40 Paul Thompson

"We see numerous examples of very positive sales figures across all manner of lots and values."

Advertising feature

Careers and professional development supplement

RECOVERY

Editor
Chris Laughton, Mercer & Hole

Publishing manager Sarah Houghton
Tel: 01491 828939, sarah.houghton@groupgti.com

Advertising manager Brendan McGrath
Tel: 01491 826262, Fax: 01491 833146
brendan.mcgrath@groupgti.com

Art editor Thomas Gray

Administration Eva Faberova

Printed by Stephens & George

Forthcoming themes & advertising
www.r3.org.uk/recovery

RECOVERY is the quarterly magazine of R3, the Association of Business Recovery Professionals, 8th Floor, 120 Aldersgate Street, London EC1A 4JQ
Tel: 020 7566 4200, association@r3.org.uk, www.r3.org.uk

***RECOVERY* on the web**
RECOVERY is distributed to R3 members as part of their membership benefits. After an issue of the magazine has been sent to members, a PDF of the previous issue is uploaded onto the R3 website. This is so that the information may be disseminated to all the insolvency and restructuring community.
www.r3.org.uk/recovery

Published on behalf of R3 by
GTI Media, The Fountain Building, Howbery Park, Benson Lane, Wallingford, Oxon OX10 8BA
www.groupgti.com
Tel: 01491 826262

The Insolvency Service Steering Board

Louise Brittain discusses the position she held on the Insolvency Service Steering Board and how enlightening she found it.

The overriding purpose of The Insolvency Service Steering Board itself is to advise the Secretary of State through Stephen Speed, the director general, on the Agency's corporate plan, annual performance targets and the extent to which The Insolvency Service carries out its functions effectively and efficiently, in accordance with its plan. It is also there to provide guidance from a commercial and business standpoint to the chief executive and the senior team on the operation and development of the Agency.

Appointment as an independent member of the board

I was one of four independent members of the board and the only active insolvency practitioner. The board is chaired by Phil Wallace, an ex-KPMG partner, and the other independent members are there to offer expertise in core business areas such as IT, HR and project management. An appointment as an independent board member usually lasts up to three to four years.

Apart from the independent members, the board consists of the Agency's chief executive and his deputies and one representative from BIS. There are also a number of senior managers from The Insolvency Service that attend each board meeting. They attend to inform the group on their own service line or special project. Each reporting line has its own directing board and it is generally the outcome of the directing board meetings that are reported up to the steering board. Each meeting has 15 to 20 people present and lasts between three to five hours.

The board meets four to five times a year and, before each meeting, each service line produces a paper that is reviewed before the steering board meets. Reports received before most meetings would typically be focused on topics such as finance and operating performance, corporate governance, policy, enforcement and enabling the future. The meeting always started with the chief executive's summary.

In addition to these regular topics, we were also required to review and comment on the Annual Corporate Plan and ministerial targets, the Agency's Vision Document, the Annual Report and Accounts and the Year End Report to the minister. We were also required to sign the Official Secrets Act.

The Audit Committee met quarterly and my main focus on this committee was to approve the accounts and review the Risk Register.

Brainstorming future strategy

Apart from the regular Steering Board and Audit Committee meetings, as independent members we attended The Insolvency Service's Annual Away Day and Conference.

The away day was usually around Christmas time and its primary purpose was for the board members to meet and brainstorm the future strategy and direction of the Service and any other issues of priority. This was always a free flowing and thought-provoking day, producing a number of innovative ideas.

The most eye-opening experience for me was attending the National School of Government. This school is based in Belgravia and is effectively a training college for high level civil servants. It runs a number of training courses including subjects such as working with ministers and finding your way around Whitehall and Westminister.

Well informed board members' course

I attended the 'Well informed board members' course' or in my case, I suspect, the well behaved! This course covered topics such as the machinery of government, the role of the permanent secretary and, most importantly, it included the dark art of government accounting. Before I attended this course I had no idea how restrictive and complex the rules relating to government accounting are. I certainly thought that money generated in one part of the Agency could be used to offset expenditure in another, but this is generally not the case. For instance monies made by the ISA (Insolvency Services Accounts) cannot then be used to pay for disqualifications. Any surplus has eventually to be returned to the Treasury. The Official Receivers' admin fees can only be used to pay for the running of the OR's office. Trying to decipher ways of releasing capital investment was a constant source of frustration and occupied a great deal of the independent board members' time.

Through the National School of Government I also attended the Annual Conference for Non-Executive Board Members in Government and it was fascinating to discover how diverse government steering boards are, even though they all face common issues.

An enlightening experience

My experience over these last four years has been remarkably enlightening. I was extremely impressed with the dedication and commitment of the Official Receivers' staff, particularly those in the Official Receivers' offices. As a profession, I don't think we have any idea of the restrictions the senior directors and managers of the Agency have to operate within. It has made me very glad that I operate in the private sector where, while we don't receive monies from the Treasury to support our business, we are, however, able to run our businesses largely as we see fit.

I would highly recommend taking a position on a government steering board and I would also support greater understanding between the profession and The Insolvency Service. While we operate in the same market, we run very different businesses and it is only with open and honest communication can we understand each others' priorities.

> "As a profession, I don't think we have any idea of the restrictions the senior directors and managers of the Agency have to operate within."

From September 2006 to September 2010 Louise Brittain held a position as one of the independent members of The Insolvency Service Steering Board and as an independent member of the Agency's Audit Committee. These positions are non-executive board member positions and their purpose is to enable independent members to bring their commercial experience and expertise to the work of the relevant steering board, in this case, that of The Insolvency Service.

Louise Brittain is a partner in the Contentious Insolvency team at Deloitte.

President's column

In his final column as president, Steven Law launches R3's first ever campaign.

'Holding rescue to ransom'

This is my final column for *RECOVERY*, and I want to look forward rather than back. I will end my presidency launching R3's first ever campaign, 'Holding rescue to ransom'. This focuses on preventing suppliers changing their terms of supply or withdrawing services when a company goes into formal insolvency. Continuation of supply is critical to the everyday functioning of a business and I have seen firsthand that the ability of suppliers to take these unreasonable actions can make the difference between business survival and business closure. We are pushing for a change in law (an amendment to section 233 of the Insolvency Act 1986) to hold 'ordinary terms of business' in place in the event of insolvency. There would be real benefits if this were achieved: insolvency practitioners believe that there would be an additional 2,700 business rescues a year, 14 per cent fewer liquidations, better returns to creditors and a greater number of jobs saved.

> "'Holding rescue to ransom' focuses on preventing suppliers changing their terms of supply or withdrawing services when a company goes into formal insolvency."

I am very pleased about how this campaign was put together: it started as an issue raised at the policy group before being developed by the R3 policy team and being turned into material to discuss with journalists and MPs. With other changes in legislation being thrown at the profession, it is wonderful that R3 is suggesting an obvious improvement, and one with such a positive message on business rescue.

The interest from the press and MPs has been extremely encouraging so far, with several MPs including Lorely Burt MP and John Glen MP signing up immediately as 'campaign champions'. We launched the event in the House of Commons in early March with a roundtable discussion attended by key MPs and stakeholders. We considered key aspects of the campaign and heard some excellent case studies that brought this issue to life. I was administrator of a case recently where the electricity supplier continued to supply (as required by s233), but tripled the tariff from the company's pre-administration price, resulting in a cost to the estate (hence loss to creditors) of £60,000.

Promoting the profession

This caps a year I have spent rushing in and out of parliament; I am told I have met over 70 MPs in my presidential year! I have also been similarly impressed by the increasing levels of press coverage generated from meetings with journalists, with over 50 articles in the *Financial Times* and *Telegraph* alone during my presidency.

Much remains to be done before I leave office in April. We had a response from The Insolvency Service in February as the next stage of the OFT consultation, and separate responses on the moratorium and pre-pack administration consultations. We have recently submitted R3's response to the call for evidence in support of the Consumer Credit and Personal Insolvency Review.

Director disqualifications

An issue our members feel strongly about is director disqualification. Accordingly, R3 is working constructively with The Insolvency Service to ensure more of those who merit disqualification are suitably dealt with. To that end we have offered to help in the redesign of the D1 form, which we hope will assist in identifying the more serious cases, and have suggested putting them online. We have also offered to help with the update of the explanatory notes.

Celtic Manor Resort

R3 conference

I'd like to remind you about our forthcoming 21st Annual Conference. We have a packed and interesting programme and it will take place in a stunning venue – details below.

21ST ANNUAL CONFERENCE

COMING OF AGE

11–13 May 2011

Celtic Manor Resort, The Usk Valley, South Wales

Keynote address:
The Right Honourable Michael Portillo

Book online: www.r3.org.uk
E-mail: courses@r3.org.uk
Phone: 020 7566 4234

Thanks to R3 members

There are many people I should thank for a busy and productive year, too many to name individually. However, I would like particularly to thank those who work hard on the R3 council and all its committees, both nationally and up and down the country. The team at R3 have also been terrific, as well as the support received from my colleagues at Ensors. I have enjoyed the challenge enormously; we faced questions from the OFT, the media and other parts of government, but a solid process of engagement has paid dividends. To everyone I have met around the regions, thanks for your engagement and I am sure you will support Frances Coulson, who will, deservingly, take over from me in April.

It's been a privilege to serve as your president for the last year. Thank you. □

Steven Law is a partner at Ensors and president of R3.

News update

R3 appoints new deputy vice-president

Lee Manning, a partner in Deloitte's Reorganisation Services team has been appointed as deputy vice-president of R3. Lee, a fellow of R3 and the Institute of Chartered Accountants, joined Deloitte in 2004 and has over two decades of insolvency experience, previously working at Kroll for 14 years.

Insolvency Service statistics

It will not have escaped anyone's notice that there were further decreases in corporate insolvencies revealed by the Insolvency Service's Q4 2010 statistics issued on 4 February. R3's comments were run in *The Guardian*, *Financial Times*, *Daily Mirror* and on the BBC News website. Steven Law observed that corporate insolvencies in 2010 were lower than in 2009, suggesting that this has been an atypical recession. HMRC's Time to Pay scheme and the historically low interest rates have been effective at stemming the flow of insolvencies that usually occur post-recession. R3 research found that one third of small businesses describe themselves as reliant on public sector contracts and these businesses will be hit as the public sector cuts start to take effect this year.

Although the number of people in formal insolvency procedures fell in the last quarter of 2010, personal insolvency hit a record high for the year at over 135,000. Worryingly, these figures do not include the number of people using informal insolvency solutions such as debt management plans, estimated to be around 700,000. The findings from R3's personal debt survey found that four in ten people were already struggling to make it to payday. 35 per cent say they struggle because of credit card debts; and one in six say it's because of their mortgage repayments. A potential interest rate rise means that this figure is only likely to grow.

OFT to revoke up to 15 debt management licences

At least 15 debt management firms face licensing action from the Office of Fair Trading (OFT) while 35 companies have surrendered their consumer credit licences.

The OFT revealed that it intends to revoke the licences of eight firms and is investigating another seven companies that have not responded to the regulator's warning to become compliant with OFT guidelines.

Meanwhile, 79 firms met the 16 December deadline to submit audit reports that demonstrated improvements in their compliance, which will now be reviewed by the OFT. Firms that have met the deadline but failed to meet the compliance standards may also face action to revoke their licences.

This follows an OFT report issued in September 2010 that warned 129 debt management firms that they would lose their consumer credit licences unless they took immediate action to comply with its debt management guidance.

Consultation on OFT proposals

On 10 February, The Insolvency Service launched a 12-week consultation on the Office of Fair Trading's proposals to overhaul the regulatory structure of the profession. The consultation will run from 10 February to 6 May.

The consultation invites views on establishing an independent complaints body, fees' issues and detailed amendments to legislation on administration and liquidation. It also seeks to resolve issues around the weak position of unsecured creditors during insolvencies. And, because the regulatory framework applies to all regulated insolvency procedures, views are sought on both the personal and corporate insolvency market. R3 will be submitting its own response.

The Insolvency Service said all responses will be considered and used to inform what changes, if any, should be made to the regulatory framework for insolvency. View the consultation on: **www.insolvency.gov.uk/insolvencyprofessionandlegislation/con_doc_register/registerindex.htm**

Tax evaders face 200 per cent fines

From April 6, HMRC has warned that offshore non-compliance penalties for income tax and capital gains tax will be linked to the tax transparency of the country involved. There will be increased penalties for under-declared income and gains from territories that do not share tax information with the UK.

Tax evaders will risk of a penalty of up to 200 per cent of the tax due. HMRC has been given an extra £900 million to tackle tax cheats.

Banking news

George Osborne, the Chancellor of the Exchequer, announced on Radio 4's Today programme on 8 February that the bank levy will be raised from £1.7 billion to £2.5 billion with immediate effect. The levy on bank profits will be permanent, raising an extra £800 million this year and £2.5 billion every year.

Project Merlin has resulted in Britain's big 4 banks (RBS, HSBC, Lloyds and Barclays) plus Santander agreeing to make £190 billion of credit available to business in 2011; an increase from £179 billion in 2010. Of this lending commitment, £76 billion will be made available for smaller businesses, which represents an increase of £10 billion or 15 per cent in credit available to SMEs in 2010.

Clydesdale and **Yorkshire Banks** have announced that they are to significantly increase their support for small businesses across the UK. The banks are already on track to achieve their two-year pledge to provide £10 billion of new lending by the end of 2011. This will support that target and see levels of lending to small businesses increase significantly by 2015.

Santander has said it would increase gross lending by 12 per cent to £6.7 billion. Of this, cash for SMEs will be increased by 25 per cent to £4 billion.

The British Bankers Association (BBA) has called for the creation of a single body to regulate debt advice. A joint study from the BBA and Accenture entitled 'A New Model for Dealing with Personal Debt' recommends changes including:

- a single body to regulate debt advice;
- simpler debt remedies and increased emphasis on early intervention and resolution; and
- improving financial education and providing a single, online debt advice portal to help customers to help themselves.

Sir John Vickers, head of the Independent Commission on Banking, has made clear his intention to tackle the issue of banks that are 'too big to fail'. The final recommendations are unlikely to leave the bigger banks in their current form, although a full-scale break up of the banks or a direct split between deposit and investment functions was rejected.

Editor recovery@r3.org.uk | Recruitment recovery@r3.org.uk/recruitment

Legal update: dealing with wild pension plans

John Verrill assesses the Pensions Regulator's ability to impose a financial support direction.

Since the Pensions Act 2004 came into force, following government concern that employers were deliberately underfunding defined benefit pension schemes, a regime has been in place to compel employers to make up funding deficits.

Any funding deficit is a liability of the employer. Upon the occurrence of a qualifying insolvency event, which includes CVAs, administration and liquidation, the funding deficit is re-calculated on a 'full buy-out' basis, which requires the employer debt to be calculated on the assumption that the employer has an obligation to purchase annuities to meet the unfunded pension cost in relation to all members of the scheme. This has a dramatic effect on the liability that increases exponentially.

As soon as an employer suffers an insolvency event, all the rights of the pension trustee vest in the Pension Protection Fund (PPF), which is a lifeboat for protecting pensioners rights and which will fund up to £29,000 of a pension in relation to each member. PPF funding derives firstly from the assets of the scheme, and secondly from a levy-based contribution system, the levy being paid by all the UK's 7,800 defined benefit pension schemes on a 'risk' basis.

> *"I used to think all poets were Byronic. They're mostly wicked as a ginless tonic. And wild as pension plans."*
>
> Wendy Cope: *Triolet* (1986)

FSDs

In order to protect the PPF, section 43 of the Pensions Act 2004 enables the Pensions Regulator to issue a financial support direction (FSD) against associated companies, usually in circumstances where a deliberate act, or long term behaviour, of a group of companies has impaired the ability of the employer to meet its obligations to the pension scheme. The FSD regime enables the Regulator to impose an obligation to provide reasonable financial support within a specified time to the underfunded pension scheme of the employer, and to deal with non-compliance with that obligation by imposing, through Contribution Notice (CN), a specific monetary liability payable by an associated company to the trustees of the employer's underfunded pension scheme.

There are five matters that impact on the decision to issue an FSD and these are:

1) An FSD can only be imposed in relation to an occupational pension scheme.
2) In order to issue an FSD against a group company, the regulator must be satisfied that the relevant company was

Editor recovery@r3.org.uk | Recruitment recovery@r3.org.uk/recruitment

connected to the employer in the period of two years ending with the determination to issue an FSD.

3) An FSD may only be issued in relation to a company if the regulator is satisfied that the employer is insufficiently resourced within the period of two years ending on the issue of the FSD.
4) Generally that test would be satisfied if the value of the company's resources were less than 50 per cent of the estimated pension deficit owed by the company to the scheme. In addition the value of the resources of the target must be not less than the difference between the value of the company's resources and 50 per cent of the employer debt.

> In order to protect the PPF, section 43 of the Pensions Act 2004 enables the Pensions Regulator to issue a financial support direction (FSD) against associated companies.

5) Finally, an FSD may only be issued in relation to a company if the Determinations Panel (Panel) of the Pensions Regulator is of the opinion that it is reasonable to impose the requirements of the FSD on an associated company or 'target'. The legislation requires the panel, when deciding whether the imposition of an FSD is reasonable, to have regard to such matters as it considers relevant.

The factors are:

- The relationship of the FSD target with the employer, including whether there is control.
- The value of any benefits *received directly or indirectly by the target from the employer.*
- Any connection or involvement the target has or has had with the scheme.
- The target's financial circumstances and other prescribed matters.
- Before seeking the issue of an FSD, the Regulator must issue a warning notice setting out the grounds for the issue of the proposed FSD.

An FSD can only be effective after a determination by the panel, at which an opportunity arises for the making of representations by those likely to be affected. There is a final appeal if, following representations, an FSD is nonetheless issued.

It is difficult to predict with any certainty the reaction of the Pensions Regulator in any given circumstances. Recent determinations by the panel show the line now being taken in insolvency cases.

In the cases of *Nortel* and *Lehman*, FSDs were issued on the basis that the benefit of employee services of the UK employer were received by other group companies, many of which were abroad.

Nortel

The panel determined that Nortel UK was effectively controlled by Canadian parents and that the parents' control over Nortel UK's financial position included whether, and in what sum, it contributed to the pension scheme.

For many years prior to 2002, the group outside the UK often benefited by paying little or no contributions to the pension scheme and a failure adequately to address the deficit from 2002 onwards. Nortel UK was the employer that owed the pensions debt.

The panel found that the group also benefited from an interest-free loan from Nortel UK at the behest of the Canadian parents: it had no choice as to the making of the loan or its terms. At its peak in 2007 the loan to the group reached £467 million. This impaired the ability of Nortel UK to reduce its debt to the scheme. An FSD was considered by the panel to be appropriate in respect of a number of non-employer group companies.

Lehman

Lehman Brothers Holdings Inc (LBHI) filed for bankruptcy in September 2008, triggering a worldwide group insolvency. The employer of the Lehman Pension Scheme was a Lehman service company LBL. The scheme had been supported with a recovery plan, under the scheme-specific funding regime. The insolvency of the main Lehman UK companies left the employer without the means of providing continued support for the scheme. The Regulator sought the imposition of an FSD from the panel and it decided that it would be appropriate. The panel concluded that LBHI and the UK operating companies had strong associations with LBL and they also benefited from this relationship, including from the provision of staff and back-office services provided via LBL. LBL employed approximately 4,400 people, of which approximately 2,000 were seconded to other Lehman Group companies.

The panel found that the US parent, acting as group treasurer, was the source of employer contributions to the pension scheme and guarantor of LBL's liabilities to the pension scheme. An FSD was appropriate.

In neither the *Lehman* or *Nortel* cases has an FSD or a CN been formally issued as yet.

FSDs and administration expenses

In *Bloom & Ors* v. *The Pensions Regulator (Nortel, Re)* [2010] EWHC 3010 (Ch) (10 December 2010) Briggs J on applications by the Lehman and Nortel administrators, was asked to determine whether the liability of the UK Lehman and Nortel companies was an administration expense: he held that the liabilities were such expenses.

The critical issue for the judge was whether the cost of complying with an FSD, or the monetary obligation imposed by a CN, ranks in the administration or liquidation of the target as a provable debt, which would be an unsecured claim, or as an expense having super priority, or neither of those. If it was the latter it would be recoverable only in the very unlikely event that there was a surplus available for distribution to shareholders after all creditors including administration expenses had been paid in full.

The arguments of the Regulator were that such a liability was to be treated like rates in the *Trident* case. As is now well known, the *Trident* decision had the effect of elevating what had long been thought to be unsecured liabilities to administration expense status; such expenses to be paid ahead of the administrator's remuneration and ahead of payments to the holder of a floating charge.

Briggs J concluded that the FSD liability was not a provable debt since it was not a liability in existence at the date of administration, it only arose on the determination of the panel. The FSD liability was an administration expense, with dramatic fiscal consequences for the administrators of employer companies and their associates.

Briggs J accepted that the court has an inherent jurisdiction to re-order the priority in which expenses are to be paid so that the FSD liability could be paid last, but was not comfortable that he was put in this position and recognised the impact on the rescue culture. Legislation may be the only way out, as it was with rates in *Trident*. It is to be hoped that The Insolvency Service will be as sympathetic.

> The critical issue for the judge was whether the cost of complying with an FSD, or the monetary obligation imposed by a CN, ranks as an expense having super priority.

Another observation was that the panel process post insolvency could adopt a methodology by which the determination had the effect of treating the FSD or CN liability as ranking *pari passu* with other creditors so their interests would not be harmed by the operation of the expenses principle. That may be the subject matter of fruitful negotiations with the Regulator in insolvency cases. This is more particularly the case, since as the judge put it, *'the FSD regime contemplates a theoretically infinite variety of potentially reasonable proposals…'*

It is significant that all parties would have been content to have the liabilities created by and FSD or CN treated as » provable debts, but the legislation and case law did not apparently permit that outcome.

Exporting ginless tonic

In *Lehman*, when the panel determined that it was appropriate to issue an FSD to each of six companies, it declined to do so in relation to 38 other group companies. In *Nortel*, the panel determined to issue an FSD to 25 companies in Canada, the USA, Europe and Africa.

The stated position of the Regulator as regards *Nortel* is that:

'The FSD… is not an attempt to enforce outside of the Canadian or US insolvency processes. It provides certainty over the size of the pension debt for the courts and those supervising the Nortel insolvencies.'

The Pensions Regulator apparently takes the view that panel determinations (being in effect judgments) could be enforced in foreign courts under reciprocal enforcement legislation or the EC Judgments Regulation. The Regulator has recently issued a CN to a Belgian target after its UK employer subsidiary pre-packed its business to the parent with not enough regard to the pensions deficit. The amount of the CN was the PPF deficit.

Where a foreign target is insolvent, as in the *Nortel* and *Lehman* cases, the automatic stay provisions (in the US and Canada and elsewhere) will be likely to preclude enforcement and the FSDs will be treated as unsecured claims only. The irony is that the UK administration expense regime accords higher status to the liability than is available elsewhere, even though the pensions legislation specifically provides that the employer debt itself is not preferential.

In Canada, the court found the UK FSD process to be a breach of the Canadian Companies Creditors Arrangements Act (CCAA) stay and ordered that any outcome would be null and void in the Canadian insolvency process.

The Appeal Court dismissed the Regulator's appeal on the stay point, but stated that this should not operate to preclude the trustee and/or the PPF from asserting an unsecured claim in the CCAA process.

In the US, the Bankruptcy Court in *Nortel* made an order against the pension trustees and the PPF declaring that their participation in the Regulator's proceedings (in respect of Nortel US entities involved in the Chapter 11 process) would breach the Chapter 11 stay. The trustees and PPF have lodged an appeal, although it is understood that the matter has yet to reach the hearing stage.

Could the panel's deliberations have been stayed?

The Regulator presented its FSD case in *Nortel* to the panel at a hearing in June 2010. Presumably the target Canadian, US, European and African entities chose not to participate in writing or at the oral hearing given the views of the US court and the likelihood that any liability would be an unsecured claim in those proceedings.

The Lehman hearing before the panel was in September 2010.

The administrators consented to the panel proceedings, but without prejudice to whether they could be stayed by the effect of paragraph 43 of Schedule B1 to the Insolvency Act 1986.

Norris J, in *Hudson and others* v. *The Gambling Commission* [2010] EWHC 1229 (Ch), concluded that where the Commission's Regulatory Panel was seeking to review conduct in relation to the operation by the company of gaming machines, which included an assessment of the administrators compliance with the Gambling Act 2005, that was a legal process that was stayed by Paragraph 43. He said:

> “The conclusions of Briggs J and his obvious discomfort merit the urgent attention of the legislators.”

'I think the word "process" suggests something with a defined beginning and an ascertainable final outcome and which, in the interim, is governed by a recognisable procedure.'

It seems relatively clear that the deliberations of the panel in the arena of pensions are a legal process, so that they are or could have been stayed. Logically if the panel process is stayed so that even after a warning notice has been served by the Regulator, a determination cannot be issued to give effect to an FSD, the problem may be postponed. But if without an FSD/CN the liability would either not be provable or fall down the black hole the court may be likely to allow the panel determination to proceed.

Briggs J concluded that if following the issue of an FSD the exit from administration is liquidation, the liability under a CN issued in the liquidation will be a provable debt.

However, foreign companies, like many of the Nortel targets, would not be able to stay the panel process unless they sought the assistance of the court by seeking recognition under the Cross-Border Insolvency Regulations 2006 (CBIR). Would a court on recognition allow such proceedings to continue? There is an automatic stay on recognition of a foreign proceeding in article 20 of schedule 1 of the CBIR, but the court has a discretion to modify the stay. The untidy UK expense regime may not affect foreign insolvency proceedings in any event.

Conclusions

As mentioned in the judgment, the claims of the Regulator were included in the *Sea Containers* Chapter 11 case plan of reorganisation in the USA following issue of an FSD in relation to a UK pension scheme deficit the compromise of which by the Regulator and the company was found to be reasonable by the US courts. Perhaps that is the way forward here?

The conclusions of Briggs J and his obvious discomfort merit the urgent attention of the legislators. Before the decision, the Regulator seems to have been amenable to reaching consensual settlements, as the *Sea Containers* solution shows.

Byronic heroes are lonely rebellious and brooding, administrators will empathise for the time being…

John Verrill is a partner at Dundas & Wilson.

Editor recovery@r3.org.uk | Recruitment recovery@r3.org.uk/recruitment

Recent case summaries

Corporate and personal insolvency update from Carly Sandbach.

Corporate insolvency

***Re PAL SC Realisations 2007 Ltd (In Liquidation)* [2010] EWHC 2850 (Ch)**

Facts: Certain creditors of PAL, the respondents, held a floating charge over PAL and ranked second under a priority agreement for the repayment of debts to secured creditors. Following the entry into administration of PAL, the floating charge assets were realised. The amount owing to the first ranking secured creditor meant that nothing would be left for the respondents, and the prescribed part was all that was available to the unsecured creditors. The respondents *thereafter* surrendered their debenture and the debt was accordingly converted into a wholly unsecured claim. The liquidators applied for directions as to whether the respondents could participate in the prescribed part.

Held: The debts due to the respondents were to be treated as unsecured debts for the purposes of s176A(2) IA86. There was nothing in the provision to exclude a former floating charge-holder from participating in the prescribed part. It was argued, that the time at which to assess a creditor's entitlement to participate was, in accordance with the legislative policy behind s176A and the statutory scheme on insolvency generally, when the company entered administration. Relying upon r4.88(2) IR86, HHJ Kaye QC found that it was clear that a secured creditor who surrendered their security could prove for their whole debt *as if it were unsecured*, and that this provision contemplated a surrender of a security at a later time. Accordingly, if a charge-holder surrendered their security in accordance with r4.88(2) and was entitled to prove as if their debt were unsecured, there was no reason to continue to treat them for the purposes of s176A as a holder of a floating charge.

> "It was argued, that the time at which to assess a creditor's entitlement to participate was… when the company entered administration."

Comment: It had previously been held that a floating charge-holder was barred from participating in the prescribed part for the shortfall of its security because it was a proprietor of a floating charge within the meaning of s176(A)(2)(b) IA86 (*Re Permacell Finesse Ltd* [2007] EWHC 3233 (Ch)), and that a fixed charge-holder was not able to participate for its shortfall because its debts were not unsecured debts for the purposes of s176(A)(2)(a) IA86 (*Re Airbase (UK) Ltd* [2008] EWHC 124 (Ch)). For now, this case confirms the position of, and options available to, a floating charge creditor with a total shortfall. Indeed, it appears that this decision may have significant impact for secondary ranking floating charge-holders, who may now adopt a 'wait and see' approach – the relevant time for identifying their status as a creditor being when the claim against the prescribed part is made. This poses an unattractive proposition for unsecured creditors facing an ever decreasing pot.

Personal insolvency

***Child Maintenance & Enforcement Commission v. (1) Mark Beesley (2) Darren Richard Whyman* [2010] EWCA Civ 1344**

Facts: W was the non-resident parent of a child. In February 2009 he put forward a proposal jointly with his wife for an IVA, which was approved by his creditors on 11 March 2009. As at that date, W's arrears of child support represented some 94 per cent of his liabilities. The Commission did not attend the meeting for the approval of the IVA, taking the view that it was not a creditor capable of voting on, or being bound by, an IVA. The Commission applied for an order that the supervisor had incorrectly decided that the Commission was entitled to vote at the meeting, alternatively it sought an order pursuant to s262 IA86, revoking the IVA on the ground that it was unfairly prejudicial.

Held: At first instance HHJ Pelling QC, sitting as a High Court judge, held that the Commission was a creditor capable of being bound by an IVA within the meaning of s260(2)(b) IA86, but set aside the IVA as being unfairly prejudicial to the Commission. The Commission appealed.

The Court of Appeal held that the Commission was not a creditor entitled to vote at the creditors meeting called to consider W's IVA, and it was not capable of being bound by his IVA. If that were wrong, the judge below was right that W's IVA unfairly prejudiced the interests of the Commission.

Comment: Although W's liability was a bankruptcy debt within s382 IA86 and for the purposes of a bankruptcy, and the Commission was a creditor within s383(1) IA86 in respect of arrears of child support, the Court of Appeal recognised the legislative policy of excluding such liabilities from the consequences of bankruptcy and debt relief orders. Support was found for this in sections 281(5)(b) and 251I(1), by which the liability to pay child support, and any arrears of child support were not released by discharge from bankruptcy or expiry of the moratorium under a debt relief order. There being no justification for any different policy in the case of IVAs, the Court of Appeal by way of its judgment filled the legislative lacuna. Such an outcome was reached by way of a finding that it was an implied requirement under Part VIII IA86 that, for a creditor to be bound by an IVA, it must be capable of compromising the debtor's liability. As the Commission was incapable of such a compromise according to the Child Support Act 1991, it couldn't be bound by the IVA. ◻

Carly Sandbach is a barrister at Exchange Chambers.

Technical update

An update on the status of creditors and public policy, and the work of UNCITRAL Working Group V (Insolvency Law).

The status of creditors and public policy

Three recent cases have considered the status of creditors and public policy; two in individual voluntary arrangements (IVA) and one in debt relief orders (DRO). The first IVA case considered whether a claim from the Child Support Agency was a creditor (*Child Maintenance & Enforcement Commission* v. *Beesley & Anor* [2010] EWCA Civ 1344) and the second dealt with arrears of contributions under an Income Payments Agreement (IPA) (*re Hargreaves (in Individual Voluntary Arrangement) Booth* v. *Mond* [2010] BPIR 1111).

IVA cases

Re Beesley & Anor is a decision of the Court of Appeal, which found that CSA maintenance arrears cannot be a creditor for the purposes of an IVA. The facts and decision are dealt with in Carly Sandbach's round up of recent cases (see page 11) so we will not rehearse them here but it is worth considering where the judgment leaves the insolvency practitioner and the debtor. We would suggest 'in the mulligatawny'. It had been thought that an IVA proposal, which provided for the unpaid balance of the CSA maintenance arrears to survive the completion of the IVA, would overcome any claim of unfair prejudice and allow the debtor's financial difficulties to be resolved. Following this judgment while the CSA must be notified of the meting of creditors it cannot vote or participate in any IVA (at least not under the existing rules). Instead the CSA is free to pursue the debtor with potentially fatal consequences for the IVA.

We cannot see why this should represent a good result for the CSA let alone any other party. Before this judgment, and if written in the way suggested, an IVA could have enabled the CSA to make some recovery without writing off its debt and allowed the debtor to put his financial affairs in order so that the remaining sum due to the CSA at the completion of the IVA could be more easily satisfied. Now the CSA is unable to reap these benefits.

In the second IVA case Mr Hargreaves was made bankrupt in July 2005. Before he was discharged he made an IPA with his trustee in bankruptcy under s310A of the Act. For the first two years he made the payments due but in the third year he fell into arrears. In 2009 he proposed an IVA to his creditors, which was accepted in February of that year. He referred to the IPA in the proposal but made no reference to the arrears. His trustee in bankruptcy claimed that the arrears should be included in the IVA; the supervisor disagreed and both parties made applications to the court.

It was agreed by all parties that *'arrears under the IPA were a bankruptcy debt in relation to the IVA for the purposes of the statutory definition in s382 [of the Act]… because they constituted a debt or liability to which Mr Hargreaves was subject at the time of his IVA'.* There was disagreement, however, about whether or not the debt was provable. Counsel for the supervisor argued that the debt was not provable because an IPA may be subject to review by the court and therefore fell within the ambit of r12(3) of the Rules. The learned judge disagreed: *'I can see no principled basis for saying that they fall within any rule of law which makes them not provable. There are no grounds of public policy which would justify such an exclusion; nor is there any reason in principle why they should not be provable in bankruptcy'.*

The court then considered whether the arrears fell within the IVA. Counsel for the supervisor argued that it was not possible for the trustee in bankruptcy to compromise a claim arising from an IPA. The judge disagreed referring to the terms of s310A(6) of the Act, which, with the proviso that an IPA can be for no more than three years, states that an IPA *'may be varied by written agreement between the parties'.* Interestingly the wording of new paragraph 9B in Schedule 5 of the Act, effective from 6 April 2010 gives the trustee in bankruptcy *'power to make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the bankrupt's estate made or capable of being made by the trustee on any person'.*

> "Counsel for the supervisor argued that the debt was not provable because an IPA may be subject to review by the court and therefore fell within the ambit of r12(3) of the Rules. The learned judge disagreed."

The judge concluded that if he had not found that the IPA arrears were an IVA

 Editor recovery@r3.org.uk | Recruitment recovery@r3.org.uk/recruitment

debt the trustee in bankruptcy could have petitioned for the bankruptcy of the debtor, which would have resulted in the failure of the IVA!

Recovery of social security benefit from debtors subject to DROs

The third case, *R (Payne and Cooper)* v. *Secretary of State for Work and Pensions* [2010] EWCA Civ 1431, dealt with the attempted recovery by the Department of Work and Pensions of social security benefit from debtors subject to DROs. In September 2007 Mrs Payne obtained a Social Fund budgeting loan that she started to repay by deduction from her income support payments in August 2009. In that same month she obtained a DRO. Mrs Cooper was overpaid incapacity benefit that the Secretary of State sought to recover by deduction from subsequent payments of benefit. She obtained a DRO in January 2010. In both cases the debtors claimed that the Secretary of State was not entitled to take such action because of the terms of the legislation governing DROs. The critical wording is in s251G of the Act, which imposes the moratorium from qualifying debts:

'During the moratorium the creditor to whom a specified qualifying debt is owed
a) has no remedy in respect of the debt and
b) may not… commence any action or other legal proceedings against the debtor for the debt.'

By contrast s285 of the Act governing bankruptcy reads:

'After the making of a bankruptcy order no person who is a creditor of the bankrupt in respect of a debt provable in the bankruptcy shall:
a) have any remedy against the property or person of the bankrupt in respect of that debt, ...'

Both in the first instance and subsequently in the Court of Appeal the wording of s251G was found on a 'plain reading' to be different to the provisions of s285 of the Act. This has the rather curious result that the Secretary of State may claw back an overpayment of benefit or a social security loan by deduction from benefits in bankruptcy but may not do so in a DRO. To put it another way, a debtor who has £15,000 or more of debt is likely to receive harsher treatment than a debtor who has less than £15,000 of debt but who in all other respects is in the same financial position.

The work of UNCITRAL Working Group V (Insolvency Law)

In keeping with the international theme of this edition of *RECOVERY*, we should note the work of UNCITRAL Working Group V on insolvency law.

Everyone is aware of the UNCITRAL Model Law on Cross-Border Insolvency, which found its way into UK law via the Cross-Border Insolvency Regulations 2006: but the production of the Model Law was no one-off accomplishment. Working Group V remains hard at work, as a glance at the report of its 39th session held in Vienna in December will attest.

The 39th session was attended by representatives from 30 countries, from Argentina to Venezuela (Bolivarian Republic of). Some 20 other states and international organisations sent observers.

> "The working group also recommended that the relevant time for the determination of COMI should be the date of the initial application for the commencement of proceedings."

The working group engaged in discussions on:

- the provision of guidance on interpretation and application of aspects of the Model Law relating to centre of main interest (COMI);
- directors' responsibilities and liabilities in insolvency and pre-insolvency cases; and
- the production of judicial materials addressing the use and interpretation of the Model Law.

On COMI, the working group noted the diverse and conflicting case law, and felt that it could be useful for practitioners and courts to provide a list of indicative factors to be considered for the determination of COMI with a view to providing greater uniformity and predictability. It also recommended that the court opening proceedings should include factual information regarding whether the proceeding was a main or non-main proceeding within the meaning of the Model Law, to assist the determination of any subsequent main or non-main proceedings by a court.

The working group also recommended that the relevant time for the determination of COMI should be the date of the initial application for the commencement of proceedings. This question had arisen because of the large number of cases arising under both the Model Law and the EC Regulation where debtors move from one jurisdiction to another in close proximity to the opening of proceedings. The working group also commissioned a study on the COMI of groups for consideration at its next session.

The question of directors' responsibilities and liabilities in insolvency and pre-insolvency cases was considered in the light of proposals by the UK, INSOL International and the International Insolvency Institute that guidelines on this issue should be developed. Several aspects of the topic were highlighted:

- whether there could be minimum standards that should govern directors' behaviour and guidance to encourage best practice;
- whether directors' duties would change with the approach of insolvency;
- how the cross-border context would affect such duties; and
- what the appropriate consequences for breach of duties might be.

Issues discussed by the working group included:

- identifying the persons by whom and to whom the duties are owed;
- defining the time at which duties arise in the period before commencement of insolvency proceedings;
- specifying the nature of the duties owed or the types of misconduct to be covered;
- identifying the remedies available for that behaviour or breach of duty; and cross-border issues.

It should be noted that the working group's remit extends only to the conduct of directors in the context of insolvency, or near-insolvency, and not more generally outside that context.

The purpose of the development of judicial materials is to provide assistance to judges and enhance the consistency and predictability of outcomes.

The working group will put its proposals for further work in these areas to the next full session of the Commission, which takes place from 27 June to 15 July this year.

Those who are interested can access the papers relating the working group's activities at the following link: **http://www.uncitral.org/uncitral/en/commission/working_groups/5Insolvency.html**

Technical Bulletin

Technical Bulletin 93 was issued in December 2010. Its contents included:

- ECLAIR
- Personal insolvency in Scotland – recent changes
- Child maintenance payments and individual voluntary arrangements
- Rent in administration – Scottish case
- Remuneration – charging of secretarial and support staff
- Fraudulent trading – delay can reduce recovery
- Insolvency – the balance sheet test
- Administration – set-off of future debts
- Client money – Court of Appeal decision on the CASS Rules
- Mind the gap – assistance under Chapter 15 of the US Bankruptcy Code and the date of 'commencement of case'
- Enquiries addressed to DVLA

Giles Frampton (pictured) is a partner at Richard J Smith & Co and John Francis is the technical director at R3.

Legal Q&A

Alistair Burrow answers your insolvency queries with regard to Scottish law.

I have been asked to arrange the appointment of an LPA receiver, but the mortgaged property is in Scotland. Are there any particular issues I should be aware of?

The Law of Property Act does not apply in Scotland and the mortgage deed (called a standard security) will therefore not provide for such an appointment. Since the Conveyancing and Feudal Reform (Scotland) Act 1970 (the 1970 Act), the only competent security over land and buildings in Scotland is a standard security in one of the two (broadly similar) forms set out in that Act.

The procedure to be adopted by a creditor wishing to enforce its rights under a standard security has recently been clarified by the decision of the Supreme Court in the case of *The Royal Bank of Scotland plc* v. *Wilson* [2010] UK SC50. A creditor seeking repayment of all or part of a secured debt must serve a calling-up notice on the debtor and any occupiers of the subjects in terms of section 19 of the 1970 Act. If the calling-up notice expires without payment, provided that the subjects are not used to any extent for residential purposes, the creditor may proceed to exercise any of its rights under its security, including entering into possession and/or exercising power of sale. If any part of the property is used for residential purposes, the creditor may only recover possession of and/or sell the subjects if they are voluntarily surrendered by the debtor in terms of section 23A of the 1970 Act, or the court has granted a warrant under section 24(1A) of the 1970 Act. The creditor may require a warrant for ejection of the occupiers of the property.

“If the calling-up notice expires without payment, provided that the subjects are not used to any extent for residential purposes, the creditor may proceed to exercise any of its rights under its security, including entering into possession and/or exercising power of sale.”

Performance of non-monetary obligations under a standard security may be demanded by serving a notice of default on the debtor and any occupiers of the subjects in terms of section 21 of the 1970 Act, and/or raising court proceedings against them under section 24 of the 1970 Act. Such action does not permit a creditor to recover possession of, or to sell the secured subjects, if the debtor does not remedy the default. Calling-up notices must be served by creditors in cases where they wish to take possession of and sell subjects.

When enforcing a standard security the requirements of the recent Home Owner and Debtor Protection (Scotland) Act 2010 must also be complied with if the security subjects are used to any extent for residential purposes.

I act for a landlord whose tenant, a Scottish registered company, is apparently in liquidation. Section 178 Insolvency Act 1986 (Disclaimer) applies only to a winding-up in England and Wales. What rights does my client have?

You are correct that there is no right of disclaimer in Scotland. In practice, however, liquidators of Scottish companies will take a very similar approach, in that they are likely to seek to return the keys of the premises as soon as possible, and invite the landlord to submit a claim in the liquidation estate. The liquidator will decline to do anything that might be held to make him liable under the lease, and will seek to argue that the landlord should accept return of the keys in order to be able to take steps to mitigate his loss by re-marketing the property or the lease. A liquidator will generally be willing to co-operate to execute an assignation (assignment) of the lease, or a renunciation (surrender) of it if requested.

As this all depends on common law principles where the lease is treated as a contract between the parties, there is no formal procedure as is required under Section 178 and 179 of the Act. In addition, the concept of an original tenant remaining liable for the rent on assignation either through privity of contract for an ‘old’ lease or in prescribed circumstances under the Landlord and Tenant (Covenants) Act 1995 for a ‘new’ lease are not known in Scots Law, with the result that the obligation to mitigate loss is more likely to come in to play in Scotland. Finally, note that if the property were in Scotland, the landlord might benefit from the landlord’s hypothec, which gives him a right of security over (and in theory the right to sell) goods belonging to the tenant remaining in the premises let, in reduction of any arrears of rent. However, the enforcement procedure for the hypothec was abolished in the Bankruptcy and Diligence (Scotland) Act 2007, which means that the landlord is now dependent on the liquidator recognising and accepting his hypothec claim and giving it a secured ranking in the liquidation estate. ◻

“The concept of an original tenant remaining liable for the rent on assignation either through privity of contract for an ‘old’ lease or in prescribed circumstances under the Landlord and Tenant (Covenants) Act 1995 for a ‘new’ lease are not known in Scots Law.”

Alistair Burrow is a partner at Tods Murray LLP.

Coming back to COMI

Michael Rutstein discusses how COMI has been defined in different jurisdictions and how the COMI can be changed to improve the position for the debtor or stakeholders.

One of the key concepts of cross-border insolvency and restructuring is the debtor's centre of main interests (the COMI). The COMI will determine the type of insolvency procedure under the EU Insolvency Regulation that the debtor may enter into (main v. secondary or territorial) and the type of assistance that the court must afford to a recognised foreign representative under the Cross-Border Insolvency Regulations (main as opposed to non-main insolvency proceedings). This article has two aims: to bring the reader up to date with how various countries have defined COMI in recent years and the latest techniques that debtors have used successfully to migrate their COMI from one country to another.

COMI under current UK law

COMI is, in broad terms, intended to refer to the country in which a debtor is most closely connected. Under both the EU Regulation and the Cross-Border Insolvency Regulations, there is a rebuttable presumption that the COMI is in the country of the debtor's registered office. Before 2006, the 'command and control test' carried favour in the UK and in many other countries such that the COMI of the ultimate parent of a corporate group was often said to be the COMI of all its subsidiaries, regardless of where they were incorporated and where they conducted their business. The command and control test received a hard knock by the European Court of Justice in *Eurofood IFSC Limited* (case C-341/04) where the court held that command and control by a parent was not sufficient by itself to render a subsidiary's COMI the same as its parent's. The current position has been succinctly (and in the author's view) correctly stated in *Re Stanford International Bank Limited* [2010] EWCA Civ 137. The Court held that the key test is that the COMI must be ascertainable by third parties by virtue of the facts and circumstances of the debtor, which are in the public domain, or that a typical third party would learn as a result from dealing with the debtor in the ordinary course of its business.

> "A debtor may wish to move its COMI in order to restructure in the country most beneficial to it or key stakeholders."

What about COMI developments in mainland Europe?

In France, the leading recent case has been *Eurotunnel*. In *Eurotunnel*, the French court was prepared to find that the COMI of non-French subsidiaries was in France because the Eurotunnel Group operated under centralised management physically located in France and this fact was ascertainable by third parties because the state of affairs was set out in the group's published accounts. In Germany, the most recent case has been the *PIN Group* where a Luxembourg-incorporated subsidiary was held to have a German COMI because all management meetings, all sales activities and, importantly, all restructuring negotiations with creditors and investors, took place in Germany.

What is the position in the US for Chapter 15 purposes?

Chapter 15 is the equivalent of our Cross-Border Insolvency Regulations. In assessing where the COMI is, the US bankruptcy courts consider the location of the following: the primary assets, the debtor's HQ, those managing the debtor's affairs and the majority of the creditors or the majority of those creditors who will be affected by the case. They also take into account the jurisdiction whose laws would apply to most disputes and the expectations of third parties with regards the location of a debtor's COMI (in *Re Bear Stearns Hi-Grade Structured Credit Strategies Master Fund, Limited* 374 BR). These are not exclusive factors and nor do they all need to be present in any one case.

Can you move it?

COMI is a fluid, not a static, state of affairs. Like a set of unwanted clothes, it can, with planning and a bit of shopping, be changed for a new suit more appropriate for a debtor facing financial hardship. A debtor may wish to move its COMI in order to restructure in the country most beneficial to it or key stakeholders. England has been a popular destination for migrating corporate and individual debtors because of its trusted court system, relative certainty of result, flexible and well regarded insolvency procedures (such as administration and CVAs) and the ability to select in advance the insolvency practitioner who will implement the restructuring strategy (this is generally not an option in other EU member states). A number of high profile COMI migrations to England have taken place recently, notably *Wind Hellas*, *Damovo* and *Kaupthing Capital Partners*. Factors that proved important in these cases to demonstrate that the COMI had moved to England were the opening of a new head office in England at which board meetings were held and from which correspondence was sent out, informing creditors of the new address, making a press announcement that the debtor's activities were moving to England, opening a bank account here, registering at Companies House as a foreign company and appointing UK-resident directors.

Conclusion

Understanding COMI and how to move it are important tools in advising debtors and their creditors as to how and where to restructure. The law and practice of COMI has evolved since the EU Regulation and the Cross-Border Regulations arrived in our statute books in the last decade and will, no doubt, continue to evolve as we look ahead to the next chapter of cross-border restructurings. ◻

Michael Rutstein is a partner at Jones Day.

The UK: the restructuring destination of choice

Why is London so popular when it comes to restructurings? Daniel Imison explains.

The concept of centre of main interests (COMI) came into effect in the UK via the EC Regulation on Insolvency Proceedings (the Regulation) in May 2002, but there is still ongoing debate about the ability of a corporate to move its COMI to effect a restructuring.

There are two views on this issue: (1) an entity is free to move its COMI and locate its business as it sees fit, (2) a pre-planned migration of COMI for the sole purpose of taking advantage of that jurisdiction's restructuring and insolvency legislation is an abuse of process. Restructuring involving pre-packs attracts further criticism.

It is worth drawing a distinction between forum *shopping* where the primary aim is to alter the insolvency rules that will apply in respect of existing debts and forum *selection*, which is an essential element of cross-border restructurings.

Why do corporates (and their advisors) prefer to carry out restructurings in the UK?

In our view, this is due to the relative certainty and predictability that the UK offers:

- There is less involvement of the courts compared with other jurisdictions and where access to the court is needed, it is quick and easy to obtain;
- We have a highly skilled and well established insolvency profession; and
- Stakeholders have the ability to choose the office-holder. In certain jurisdictions, office-holders are appointed from a court rota, which can cause difficulties if that person does not have the relevant experience. (Germany will soon allow creditors to choose the office-holder).

A further attraction is the ability to use a pre-pack and/or a Scheme of Arrangement to carry out a financial restructuring. Pre-packs can often achieve the best outcome for creditors and other stakeholders[1] as they do not require funding to trade the business in administration and can limit disruption to the operations.

WIND Hellas

The restructuring of WIND Hellas (WIND) in December 2010, a case that our firm was involved in, provides a good example as to the relative attractiveness of the UK. WIND is the third largest telecoms provider in Greece and due to the austerity measures and the additional levies imposed on telecoms companies by the Greek government, the group's debt burden of €1.9 billion became unsustainable.

Following negotiations between WIND and its varying classes of lenders, it became clear that a consensual out of court restructuring was not going to be achievable.

The finance companies of WIND were registered in Luxembourg with the main operating company registered in Greece. Neither Luxembourg nor Greek law provided a suitable reorganisation procedure and local insolvency processes were not only unpredictable but also likely to destroy value in the group.

Therefore, the board took steps to move the COMI of the finance companies to London in order to conduct the restructuring process. A scheme of arrangement was required to facilitate the restructuring as 100 per cent lender consent could not be obtained and a pre-pack transaction offered the best return to creditors.

In the cases of *Collins & Aikman* and *Nortel*, analysis showed that the greatest value for creditors would be achieved if as much as possible of the group's operations were maintained under the umbrella of one insolvency process. A UK administration process allowed this to happen.

There are relatively few countries in continental Europe that recognise the concept of pre-packs. Those that do are usually subject to court involvement and scrutiny and so are not, in reality, as flexible as the UK system.

Selecting COMI – the practicalities

There is no agreed, internationally recognised process for moving COMI. Indeed, the regulation and subsequent case law (*Eurofood* and *Stanford*) has tried to minimise forum shopping by stating that a COMI must have a degree of permanence. However, the courts recognise that the COMI of a company may change and it is clear that a company's COMI, if it is not the registered office, must be ascertainable by third parties. In practice, how does this work and what steps should be taken to move COMI?

In advising clients regarding COMI shifts careful planning and an adequate timescale is required. The following measures will all assist in demonstrating to the court that the COMI is in the UK:

- having a head office in the UK
- having a board comprised of UK-based nationals only and all board meetings being held in the UK
- register with HM Revenue & Customs for tax purposes
- register as a UK establishment of an overseas company at Companies House
- maintain bank accounts in the UK
- notify all creditors of the move of the head office to the UK and prepare a press release to publicly announce the move
- conduct restructuring negotiations in the UK.

Commencing these steps well in advance of the restructuring transaction is also critical as it will demonstrate to stakeholders that the company's COMI is now in the UK and that choice of COMI is intended to be permanent. While the regulation does not lay down a fixed time limit, it is recommended that a COMI shift is carried out *months* rather than *weeks* before a transaction in order to satisfy the courts that the COMI is bona fide.

Conclusions

As advisors, we should be proud that the UK's legislation offers a comparatively efficient, cost effective and simple regime that enables financially troubled debtors to restructure their affairs to the benefit of all stakeholders.

Will we continue to see the use of COMI shifts to the UK in restructurings? We believe so. However, the recent decision in the *Nortel* case creates some uncertainty where there are unfunded defined benefit pension schemes within a group of companies. It will also be interesting to see how the legislation of other European jurisdictions develops. France's reformed Safeguard procedure (which comes into effect in March 2011) goes someway to allowing the use of pre-packs.

An UNCITRAL working group is now considering the issue of COMI prior to the EU commencing its review of the regulation later this year. The output is likely to provide further food for thought. □

[1] See Dr Sandra Frisby's research: http://www.nottingham.ac.uk/law/staff-lookup/sandra.frisby

Daniel Imison is a director at Zolfo Cooper LLP.

Editor recovery@r3.org.uk | Recruitment recovery@r3.org.uk/recruitment

Shifting COMI or the dark side of the freedom of movement

Michael Thierhoff gives a German perspective on insolvency tourism.

It was early morning on one of the first days of summer when I, one of a chosen few to be part of an exchange with a UK school, disembarked in Harwich harbour and passed my landing card to one of the more serious members of Her Majesty's staff. He carefully reviewed the paper before he stamped my child's travel document with the words 'visit up to three months'. The night before I had already crossed the Dutch-German border where I had been subject to a check by German and then by Dutch customs. It was Dutch customs again before I boarded the vessel in the Hook of Holland. This was in 1970 and, in the days of £ s d, moving between countries was clearly different. At that time the same applied for corporates or the movement of products, which were carefully reviewed by customs wherever and whenever they crossed borders and duties were still a common feature.

Today I find this hard to explain to my kids who grew up in a very different Europe. In a world of single currency, the freedom of movement for people and products is probably one of a few remaining USPs that everyone acknowledges. In today's Europe we cross most borders without stopping and rarely need passports. The same applies for companies and products that also move within Europe with little or no formalities.

The problem

When you look at the professional literature and/or talk to other professionals or The Insolvency Service in the UK, a lot is written and said about what is seen as the other, darker side of the coin. A lot has been said about the German dentists and physicians that (mis-)use the freedom of movement and move their permanent residence to England. They do this not to cure English patients but to cure themselves from an overload of debt that they have accumulated with failed attempts at doing business in fields that are unrelated to their professional capacities. The result of this freedom of movement is something that the UK would love to get rid of. I have not heard any complaints in Germany about this new form of tourism.

In German professional literature there are a lot of complaints about companies that have shifted their centre of main interest (COMI) to England to enjoy what they see as a benefit of the Insolvency Code. It's the likes of *Daisytek*, *Deutsche Nickel*, *Automold* and *Schefenacker* that fill many pages because these companies and/or their advisors saw benefits in seeking protection from their creditors or restructuring the businesses under English law rather than in their (former) home jurisdiction. It is also professional literature that celebrates the *Brochier* case where we won the war bringing the insolvency back to Germany.

The background

When we look objectively at what we call insolvency tourism there are some key benefits. For individuals, the English offer is appealing; while the discharge under English law is granted after just one year, the German law has a discharge period of six years. It is little wonder that those who can afford it, despite being bankrupt, move to the UK.

The bonuses for the corporates are different. There is the CVA, which appears to have no parallel in German law, and the right to choose your IP rather than be left at the mercy of a judge in a remote German hamlet applying their discretion as to who is the proper IP for the case. Also, flexibility and speed of the process are promoted.

Is it any surprise then you hear so much about insolvency tourism and COMI shifts? So are there busloads of Germans travelling to the UK to get their discharge and a bandwagon of companies shifting COMI to England?

The myth

Researching to quantify the matter you may face problems. You cannot complain about the availability of statistics when it comes to insolvency, there are plenty. There were about 32,000 corporate insolvencies in Germany in both 2009 and 2010 and more than 100,000 insolvency filings of individuals. The numbers for England and Wales are also readily available. There were around 140,000 individual insolvencies for both 2009 and 2010 and there were some 20,000 liquidations and administrations reported for companies. But while a lot is written and even more is said about the migration in insolvency there are no statistics available. All you can get is word from the press office of The Insolvency Service stating that 'recent surveys of Official Receivers suggest that around 150 bankruptcy orders where made on the petition of foreign nationals in the last 18 months or so'. On the German side, there is no record of numbers being counted. If you seek your own statistics for corporates, you can count the numbers for the last five years on your hands. 120 individuals in one and a half years against the total of approximately 210,000 recorded overall gives you five in 1,000. And approximately ten out of the 150,000 corporate insolvencies in the recent five years is, from a mere statistical point of view, far less significant. If one were being sarcastic, it may be useful to continue *not* to report 'the problem' in statistics as otherwise this may kill a very interesting topic of discussion!

Epilogue

The freedom of movement for people, companies and products is something that we do not want to inhibit. We want to give ourselves and others the freedom to choose their residence and to set up a business where they like, where they see the greatest advantages or maybe just feel happiest. If we do, it follows that we have to accept that people can also have the liberty to choose in times of trouble. If we want to do away with it, the only way will be to introduce more uniform legislation across the EU. This is a slow process that is already under way and it will take many more years until we really have a common law background, which may not necessarily be a common law legislation but civil law. Until such time, we will live with those very few incidents of what we refer to as insolvency tourism.

Finally, please let me mention that those thinking of becoming tourists might be well advised to take another look. With sound advice a once wealthy German dentist may find out that in a German court with proper advice from an experienced counsel they may have their discharge in nine months by applying for an *Insolvenzplan*, the German version of a Chapter 11, which is also available for individuals under the German Insolvency Code.

Before shifting, companies may want to consider that the German Insolvency Code enshrines the concept of 'debtor in possession' and there is a unique funding of payroll in insolvencies plus some other features that are not available on islands. But companies may already know this and that is why only a few leave the continent. Maybe we should just sit back and relax and say as I remember Neil Cooper saying, 'What's wrong with forum shopping?'

Michael Thierhoff is a partner in Thierhoff Illy & Partner, Germany.

Bankruptcy tourism: the not-so-accidental tourists

Mark Parkhouse brings readers up to date with the adventures of bankruptcy tourism in the UK.

Many practitioners will have followed with interest the key developments over the last ten years or so in European and international cross-border insolvency law, particularly the meaning and effect of a debtor's centre of main interests (COMI). This article is a reminder of the main points, with a focus on the trend to 'bankruptcy tourism' within the European Community (EC). There has been considerable case law dealing with large scale corporate restructurings, where the parties and courts have been assisted by expert legal advice. At the suggestion of R3 president, Steven Law, this article is aimed to inform those insolvency professionals at smaller firms on the background, and on the practical steps to consider when dealing with these issues in the context of personal insolvencies, perhaps when a foreign debtor turns up at the office for local bankruptcy advice.

Background

Not so long ago, EC cross-border insolvencies were fraught with very basic difficulties. The insolvency systems of one jurisdiction generally had no automatic obligation or ability to recognise or assist the processes of foreign jurisdications. This meant, for example, that German liquidators would have to make an application to the High Court for an order recognising their appointment and their title to collect any assets in the UK jurisdiction; for instance, the credit balance of an account with an English bank. The proceedings could become complex where, for example, the directors insisted on a challenge to their mandate. In May 2002 the EC Regulation on Insolvency Proceedings 2000 (the EC Regulation) came into effect, bringing significant changes for the recognition and effect of insolvency proceedings within the EC (except for Denmark).

The EC Regulation does not, of course, harmonise substantive differences in insolvency law between the subscribing nations. Matters such as set-off, priorities among creditors, and many of the possible consequences of bankruptcy – including the timing and effects of discharge – are dealt with according to the national law of the member state with appropriate jurisdiction over the debtor. The EC Regulation provides a framework for the national jurisdictions to work together, by providing a system for mutual recognition of their mechanisms. It is primarily a procedural law providing for the recognition of foreign proceedings, for co-operation between courts and the co-ordination of cross-border insolvencies. Most topically for present purposes, it sets out which courts shall have jurisdiction over debtors.

COMI

The court where the debtor has his or her COMI has jurisdiction over the main insolvency proceedings opened in respect of that debtor. As the different jurisdictions within the EC have their different substantive systems, affecting rights to property and treatment of debtors, it may be that debtors can see advantages in slotting into a different jurisdiction from where they have lived and run up their debts. And this may be perfectly possible if the debtor believes his or her COMI has moved to the more benign system at the time bankruptcy proceedings are opened. This possibility of choosing the best jurisdiction in which to bring proceedings is known generally as 'forum shopping'. In the context of individuals finding the best place for their own bankruptcy proceedings, it has become known as 'bankruptcy tourism'.

> "The costs and practicalities of using foreign advisors and working with translators can reduce dividends and delay distributions."

Attractions to tourists

There can be various advantages for a debtor considering the jurisdictions of the member states for the best bankruptcy options. In practice, the chief attractions of shopping around appear to be:

1) to obtain a bankruptcy order and consequent release from claims in a jurisdiction that grants orders to consumers. In some jurisdictions, only traders can seek bankruptcy relief
2) to benefit from procedural advantages in applying for orders
3) to pay less, if anything, out of assets or income acquired after the bankruptcy order
4) to obtain an earlier release from bankruptcy

5) to obtain discharge from a more comprehensive array of debts, eg to include tax debts.

The insolvency system applied by the courts of England and Wales is considered by many to be debtor friendly. For example, the courts in England and Wales make bankruptcy orders against consumers enabling them to expunge their debts, unlike the courts in Italy. The filing of an application for bankruptcy in England and Wales is a relatively straightforward affair – once the forms are filed and the fees are paid, orders can be made on the same day that a debtor's petition is presented. There is usually a longer process in, for example, Austria. There is often an automatic discharge 12 months after an order made by courts in England and Wales. In Germany, the discharge from bankruptcy can take up to nine years.

In consequence of this apparently attractive system, a small minority of debtors whose antecedents would clearly point to a recent overseas domicile and creditor base have made applications to the courts of England and Wales for bankruptcy orders. These developments have stirred some commentators to refer to the system in this jurisdiction as the bankruptcy brothel of Europe, or in a less colourful metaphor, the Delaware of debtors' petitions. These tags clearly suggest resistance to any perceived invasion by bankruptcy tourists of this relatively benign jurisdiction.

Objections

The EC Regulation itself provides that it should not be used for forum shopping (Recital 4). The very fact that a debtor is planning where to base his COMI for reasons of bankruptcy may be enough to raise some hackles. It is not suggested that citizens of other states in the EC (or indeed, elsewhere) who have genuinely settled in England and Wales should not have access to the bankruptcy courts in just the same way as others domiciled here. These are debtors who can show their COMI is genuinely within the jurisdiction. The objections are mounted against those who create an illusion of a COMI within England and Wales, to take advantage of the system. The real substance of their affairs may well lie elsewhere.

The objections that may be taken by creditors who dealt with a debtor in a different member state of the EC – and who legitimately expected them to be bankrupt there, if anywhere – are obvious. All of the advantages for the debtor listed in points 1 to 5 above may be distinct disadvantages for creditors, both in notice of the bankruptcy and the amount and timing of any dividends. Creditors may also feel aggrieved that a foreign debtor may not make full disclosure of foreign assets to the Official Receiver or a trustee in bankruptcy, and that even disclosed assets may be more difficult, time consuming and expensive to realise if they are based overseas. Most practitioners charged with the administration of foreign assets will acknowledge that certainly this latter point is likely to be the case. The costs and practicalities of using foreign advisors and working with translators can reduce dividends and delay distributions.

> “It is not necessarily the case that the debtor's COMI must be where his or her assets and creditors are, or even where his or her home is, if his business is the relevant interest and run from a different country.”

Where is a debtor's COMI?

The EC Regulation says that for companies, there is a rebuttable presumption that it is the place of the registered office (article 3(1) and recitals 12 and 13). The extensive case law concerned with corporate COMI is considered in other articles in this issue (see pages 15 and 16).

The EC Regulation contains separate guidance in its recitals for the individual debtor. There is no clear definition, but the recitals say that an individual's COMI will be 'the place where the debtor conducts the administration of his interests on a regular basis and is therefore ascertainable by third parties'.

This provision has been considered in several cases. The following practical guidance may be helpful:

- Where does the debtor live; for how long?
- Is this intended to be a permanent move?
- How often does the debtor travel abroad, and for how long?
- What are the arrangements for employment, for taxation, for child care or access, for civic registration (required in some countries in the EC, including Germany), for banking, for domestic utilities such as energy supplies and social utilities such as libraries?
- How long have these arrangements applied? In practice, a period of six months may provide some credibility; claiming COMI in a member state after a few weeks could be an abuse of process.

It is not necessarily the case that the debtor's COMI must be where his or her assets and creditors are, or even where his or her home is, if his business is the relevant interest and run from a different country. So far, the courts of England and Wales have taken a permissive, controlled approach, trusting to the debtor's evidence and, some might say, to good common sense in the face of considerable uncertainty in the regulation. This attitude could well tighten if numerous well grounded applications have to be made by creditors or assistant Official Receivers complaining of improper debtor claims to COMI within the jurisdiction.

Freedom of movement

Freedom of movement is a fundamental principle under EC law. There is nothing in the EC Regulation to prevent a debtor from leaving his or her debts and even assets behind, if he or she is genuinely seeking a re-start in another member state, even if that involves a beneficial change of bankruptcy regime.

Wider issues

No mention of main proceedings under the EC Regulation should go without a mention that the regulation also provides for secondary or territorial proceedings to be opened in other member states, usually in respect of local assets.

The UN Model Law provides a similar framework for co-operation among signatories outside the EC. The Model Law also uses the COMI terminology.

Co-operation between the courts of different countries in insolvency matters can also be facilitated by the provisions of s426 of the Insolvency Act 1986. ◻

Further reading

Shierson v. *Vlieland-Boddy* [2005] BPIR1170
Re Staubitz Schreiber [2006] BPIR510
Official Receiver v. *Eichler* [2007] BPIR1636
Official Receiver v. *Stojevic* [2007] BPIR141
Official Receiver v. *Mittelfellner* [2009] BPIR1075

Reference may also be made to the paper 'COMI, Bankruptcy Tourism and Proving Jurisdiction' given at the Insolvency Lawyers' Association in February 2009 by Marcia Shekerdemian and Mr Chief Registrar Baister, and a longer paper 'Bankruptcy Tourism under the EC Regulation on Insolvency Proceedings: a view from England and Wales' by Professor Adrian Walters and Anton Smith in the ICLRG working paper series based on a paper given at the INSOL Academics Group Meeting in Dublin 11–13 June 2010.

Mark Parkhouse is a partner at solicitors McGrigors LLP.

Dealing with employees in the context of cross-border EU insolvency proceedings

The main employee issues are examined and some practical advice to deal with them is offered.

Main employee issues in a UK administration

Explaining the centre of main interests[1] (COMI) concept

Explaining to employees and their workplace representatives in EU countries that their employer is in a UK insolvency process can be a challenging exercise. Often employees and representatives will have only a limited understanding of their own country's insolvency processes and no understanding of those overseas.

Information and consultation

When undertaking collective dismissals or business sales where TUPE (Transfer of Undertakings (Protection of Employment) Regulations 2006) or its equivalent across the EU applies, there are requirements to inform and consult with employee representatives or affected employees themselves. Although failing to comply with information and consultation obligations in the UK usually only gives rise to financial penalties[2], failing to do so in some EU countries (and some outside the EU) can give rise to civil and criminal (including prison) sanctions. In addition, such failing can result in certain collective dismissal processes and corporate transactions being blocked until the relevant obligations have been complied with. Complying with those information and consultation processes is key to minimising liability and ensuring a smooth collective dismissal or sale process.

Retention of key employees

The success of the insolvency proceedings may hinge on the retention of a certain number of key employees in each of the main countries. Where this is the case, being able to roll out a relatively simple incentive/retention arrangement that is effective and similar in each of the relevant countries soon after appointment is usually very important.

Avoiding secondary proceedings

Where the administration strategy involves a co-ordinated sale of a group's business in order to maximise realisations for creditors of each entity, the administrators will usually want to avoid secondary proceedings in any of the countries where that is likely to mean losing control over the companies in those countries. In many countries, secondary proceedings may also result in many of the employees' claims assuming a higher priority than they would in a UK administration.

Assessing termination procedures

Article 10 of the Regulation states that 'the effects of insolvency proceedings on employment contracts and relationships shall be governed solely by the law of the member state applicable to the contract of employment.' Failing to follow lawful procedures in relation to the termination of employment gives rise to employment claims and can adversely affect the cost and timing of termination and, in some cases, render dismissals ineffective.

Payments made to employees by state bodies

In the UK the National Insurance Fund (**www.direct.gov.uk**) will, depending on the case, pick up certain payments to employees. EU countries have, for the most part, similar arrangements[3]. However, it can be difficult to persuade a state body to make payments when it has never heard of the insolvency process that applies by reason of the COMI of the company being in a different EU country.

Employment litigation and consistency of approach

Although it is usually possible in a UK administration to enforce the statutory moratorium regime under paragraph 43(6) of schedule B1 to the Insolvency Act 1986 to stay employment litigation, enforcing the moratorium in other jurisdictions can be problematic. This is partly because in some EU countries, an equivalent moratorium would not apply in a local insolvency process. Even if the employees/local courts accept that a moratorium applies in relation to creditor claims they may not accept that it applies to employees' claims, which can be considered a special class of claim. Sometimes local legal processes do not allow for preliminary issues, such as whether a moratorium applies, to be determined in advance of the substantive hearing (in effect negating the value of the moratorium).

Practical steps

Explaining the COMI concept

A communication process should be undertaken at as early a stage as practicable to ensure that local advisors (who are not insolvency specialists) understand the concept of COMI and why the company is subject to a UK insolvency process, in particular where the local country does not have an equivalent of the insolvency process that is being applied.

A communication package for each relevant company should explain in simple terms the practical impact of administration for employees and their representatives (eg that they remain employed by their current employer subject to their current terms and conditions). The communication package should be translated into the local language.

Information and consultation

It is crucial to remember that even though the local company is under a UK insolvency process, local law applies in relation to any information and consultation process with employee representatives or employees. Do not assume that the process is the same in all EU jurisdictions, notwithstanding that the local legislation may be derived from a European Directive.

Ensure that the communications and management teams for the relevant company have retained and remain in contact with local advisors to ensure compliance with the relevant local law. As well as minimising risk in relation to the issues outlined above, maintaining good working relations with employee representatives may minimise the risk of industrial action and other action that is disruptive to the business and any dismissal or sale process.

Co-ordinate information and consultation processes where appropriate and, in particular, where a proposal in relation to a group company in one country may have an impact on a group company in another country, which also has information and consultation obligations. Employees and representatives in different countries belonging to the same group of companies communicate with each other, so ensure consistent messages are being provided.

Editor recovery@r3.org.uk | Recruitment recovery@r3.org.uk/recruitment

Where possible, avoid provisions (for example in sale agreements) that are conditional on information and consultation taking place. Conditions of this type can give employee representatives increased bargaining power to negotiate enhanced terms for employees.

In certain circumstances it may be appropriate to use irrevocable offers as part of the sale and purchase process in some countries, for example where there are criminal sanctions for failing to inform and consult pre-signing (such as in France) or where an injunction may be obtained to stop the sale going ahead (such as in the Netherlands). Provided the irrevocable offer arrangement is carefully constructed and drafted, it may minimise the information and consultation risks and may maintain the competitive advantage for the seller in relation to a sale of a business.

> “If you are co-ordinating a sale across EU countries, it is crucial to understand the different information and consultation obligations.”

Timing of closing the transaction will often be key, aiming to close as soon as possible. If you are co-ordinating a sale across EU countries, it is crucial to understand the different information and consultation obligations because they differ significantly between countries as to procedure, timing and sanction for breach. Having a ‘traffic light’ system may help: red (long process, severe sanctions); green (short process, light sanctions); and amber (mid range). Ensure the relevant information and consultation processes start early enough so that all of them finish in time to close the transaction.

Educate potential buyers (particularly if their core operations are not in the EU) about the information and consultation processes in which they will need to be involved. In some countries, such as Italy, the process is joint between the seller and buyer.

Retention of key employees

Ensure you retain the right people for the right time. The following categories are relatively standard:

- senior managers of key businesses
- a team from communications and human resources
- a team from accounts receivable where knowledge of collecting outstanding debts and necessary language skills cannot easily be replaced
- a team from accounts, for example to assist with claims or investigations by tax authorities that could result in significant tax liabilities.

When drafting retention arrangements, it is important to balance effectiveness against simplicity and to ensure that the IP can justify the arrangements if challenged by creditors. This should be possible provided that the arrangements are carefully drafted and are not offered to an unnecessarily wide range of individuals.

Avoiding secondary proceedings

Where the administrators consider it further to the purpose of the administration, consideration should also be given to providing assurance to employees and their representatives that they will not be treated less favourably than if secondary proceedings were brought in respect of their employer. The administrators may wish to seek directions from the UK court before giving such assurances. One advantage of such assurances may be to discourage the employees and their representatives from applying to commence secondary proceedings.

Ensure payments to employees are made as soon as possible. This includes checking with state bodies that may be able to make payments to the employees in respect of outstanding liabilities, whether and on what terms they will do so (see ‘Payments made to employees’ section below).

Assessing termination procedures

Obtain local law advice and ensure that company representatives who commonly liaise with employee representatives are involved in the relevant procedures.

Explaining the company’s financial position is often challenging, in particular where the company is not in a local insolvency process. However, it is usually advantageous to do this early, especially where there is a requirement to negotiate the level of payments with the employee representatives. The risks of not doing so tend to be protracted negotiations with employee representatives as well as threatened and actual industrial action (and other disruptive action).

Payments made to employees by state bodies

Many state bodies will not be familiar with the COMI concept. It is usually preferable to explain the underlying legal basis for the appointment of UK administrators and how administration should be considered akin to a local insolvency process such that the company can benefit from any obligations on the state body to pay employment-related payments. It is helpful if examples can be given of how state bodies in other EU countries have made payments. Examples we have encountered include the Italian state body INPS paying TFR payments (social security-type payments) to the employees in light of the German pension fund acknowledging the UK administration and agreeing to fulfil pension claims by former employees.

Employment litigation and consistency of approach

Maintain a consistent approach to the enforcement of the moratorium across employment litigation, especially in EU countries. Allowing litigation to proceed in one country can adversely affect your ability to enforce the moratorium in another where there is a similar underlying basis for the moratorium.

Ensure the local court/tribunal understands the concept of COMI under the Regulations and how English insolvency law can apply to when the local employment litigation can proceed. Raise the issue of the moratorium at the earliest opportunity and assess whether the local court/tribunal would be assisted by advice on the moratorium concept under English insolvency law (for example from legal advisors, academics or the English court).

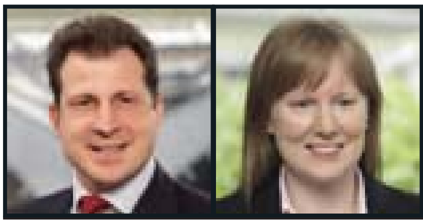
Communicate and educate

The practical steps that we advise be taken can best be described as communicating and educating. If communications with local advisors, employees and their representatives and local courts/tribunals educate them about what a COMI filing means and how it affects them, there is a real prospect that this will significantly reduce employee issues in cross-border EU insolvencies. Similarly, understanding and complying with the required information and consultation processes, in particular in relation to collective dismissals and business sales, should assist in maintaining reasonable industrial relations and minimise the risk of breakdowns in negotiations and industrial action or other disruptive action. ◻

1 EC Regulation on Insolvency Proceedings no 1346/2000 (the Regulation).

2 BIS confirmed in correspondence dated 20 November 2009 that it expects disciplinary sanctions to be imposed against IPs who fail to comply with information and consultation obligations in the context of collective redundancies.

3 http://www.inps.it/portal/default.aspx (in Italy), http://www.ags-garantie-salaries.org/accueil.html in France and http://www.psvag.de in Germany.



Andrew Taggart (far left) is a partner and Christine Young (left) is a senior associate at Herbert Smith LLP.

An offshore overview: insolvency in the Caribbean

Jonathan Murphy provides an insight into the Caribbean offshore market, with particular reference to the Cayman Islands, British Virgin Islands, Bermuda and the Bahamas.

The aim of insolvency legislation, and, by extension, practice, is to identify, take control and protect the assets of the company pending the identification and agreement of creditor claims prior to distribution. This is by far the greatest common factor between 'traditional' and offshore jurisdictions. Another factor is that the UK Insolvency Act 1986 forms the basis for the law in insolvency matters in the Caribbean, with appropriate amendments for local conditions. The differences start when looking at each of these factors independently: the types of appointment, the firms involved, locations of assets and creditors, the methods of recovery of assets and the law involved.

"Joint appointments may also be considered in cases where there are European assets and operations, particularly where there are actions to be pursued in the UK."

The Caribbean set-up

Many of the 'big 4' and second tier accounting firms have a presence in the Caribbean, particularly in the Cayman Islands (Cayman) and the British Virgin Islands (BVI). The UK insolvency market is dominated by the 'big 4' firms with most high-profile appointments going to these firms. The markets in the Caribbean are more evenly shared between these firms and several large independent firms that specialise in offshore matters. Insolvency practitioners and their staff are mostly chartered accountants from Commonwealth regions, with extensive experience in insolvency and offshore legal practices are brimming with qualified and experienced staff of similar origin.

Offshore jurisdictions have a relative lack of 'bricks and mortar' engagements and the majority of work involves court-supervised liquidations. It is rare that the operations, books and records or assets are located within the offshore jurisdiction where the liquidator is appointed.

Typical cases

A typical scenario in an offshore jurisdiction involves a foreign-owned company that is incorporated in the jurisdiction and has substantial assets and business activities located elsewhere. Aside from the incorporation of the company, there is little association within the jurisdiction. The financial services industry, from which the majority of appointments are made, is made up of hedge funds, international business companies (IBCs), captive insurance and reinsurance companies, all of which operate in any number of countries globally. Offshore liquidators have to commit a large amount of time and resource immediately following appointment to collect the books and records of the company, identify and secure assets and establish a means of correspondence with the creditors/investors.

The appointments encountered in offshore jurisdictions generally have links to three distinct geographic regions: America, Europe and Asia. Appointments with American links are more common, particularly in Cayman and Bermuda. Of the funds registered in Cayman, over 50 per cent of the assets are being managed in the United States (primarily New York). On appointments such as these, the offshore appointee runs the liquidation from the jurisdiction of appointment utilising the staff and resources from that jurisdiction.

Joint appointments

Appointments originating from Asia usually involve a practitioner from the offshore jurisdiction, with a joint 'foreign' appointee from the jurisdiction where the company conducts business, often PRC, Singapore or Hong Kong. The liquidation strategy and most of the work at the 'coal face' is carried out by the onshore appointee. The offshore role is generally to assist with the statutory requirements and oversight so the liquidation is managed in line with the court's expectations.

Joint appointments may also be considered in cases where there are European assets and operations, particularly where there are actions to be pursued in the UK. In liquidations involving European elements, the offshore liquidator will work jointly with the onshore liquidator in developing the strategy for pursuing assets and dealing with creditors.

	Cayman	BVI	Bermuda	Bahamas
Primary business within the financial services	Mutual funds	Holding companies	Reinsurance	Private banking & trust administration
Applicable law (all based on UK Insolvency Law 1986)	Companies Law 2010 and Companies Winding Up Rules 2010	Insolvency Act 2003	Bermuda Companies Act 1981 and Bermuda Companies (Winding-up) Rules 1982	Companies Act 1992, International Business Companies Act 2000, and Supplemental Winding-Up Rules
Licensing / regulatory process	Defined in Insolvency Practitioners Regulations 2008. No licence required but minimum qualifications specified.	Licence issued by the Financial Services Commission	None	None
Local liquidator required	Yes	Yes	Not required	Not required
Court	Grand Court of the Cayman Islands, Financial Services Division. *5 judges*	Eastern Caribbean Supreme Court, High Court of Justice, Commercial Division *1 judge*	Supreme Court of Bermuda *No special commercial court.*	The Supreme Court of the Bahamas. *No special commercial court.*
Local insolvency organisation	Insolvency Practitioners Committee (sub committee of CISPA)	RISA Insolvency Professional Association	None	None
No. of insolvency firms (estimated)	12	7	4	8

For joint appointments of the type noted above, the regulations in Cayman and BVI allow for a foreign practitioner to be appointed, but it must be jointly with a resident qualified insolvency practitioner. In BVI the foreign practitioner also needs approval from the Financial Services Commission to accept a joint appointment. The foreign practitioner must meet the standards required for domestic insolvency practitioners including independence and minimum insurance. The regulations provide that a foreign practitioner seeking appointment must submit evidence of his qualifications and details of his experience. In practice this can serve as a highly effective method of ensuring that a co-operative and unified approach is adopted in multi-jurisdictional insolvencies.

The prevalence of fraud cases

There is little restructuring turnaround work performed in offshore jurisdictions as the majority of work stems from fraud having been committed against the company. As a result, insolvency practitioners in offshore centres have vast experience in forensic accounting, investigations and litigation, as they seek to recover losses from responsible parties in a variety of onshore jurisdictions. Much consideration needs to be given in formulating a strategy that will allow for the maximum recovery against third parties. Given the cross-border nature of many offshore appointments, insolvency practitioners often have to seek recognition of their appointment in onshore jurisdictions to give them standing to pursue third-party claims by litigation.

A significant boundary to an offshore insolvency practitioner is when seeking recognition in the EU. A UK-based liquidator, appointed in the UK, is automatically recognised throughout the EU courts, once main proceedings have opened in the state of the debtor's centre of main interests. In circumstances where a foreign liquidator obtains recognition in the UK, he or she is not granted the same recognition throughout the EU. For this to be accomplished, he or she would have to apply to each court individually.

The role of the court

The court can play a different role in onshore and offshore liquidations. The UK court has a more 'stand-off' approach when dealing with liquidation and will generally only be involved in fee applications and in large disputes. The courts in offshore jurisdictions take a much more active role in agreeing a liquidation strategy and granting sanction to the liquidator for various actions, including pursuing litigation in other jurisdictions. Offshore liquidators will seek court directions more frequently than their onshore counterparts, for example, to settle disputed claims within the estate.

Above is a table that sets out the main differences in Cayman, BVI, Bermuda and the Bahamas.

A flexible approach

Many of the courts in the Caribbean have adopted a flexible and co-operative approach in cross-border insolvency matters. In the Cayman Islands and BVI recent changes to the law have codified such co-operation. In two recent judgments, involving Saad Investments and Kingate Global, the Supreme Court of Bermuda continued to demonstrate its willingness to provide recognition and assistance to foreign courts and to foreign liquidators in the resolution of cross-border insolvency issues relating to Bermuda as a matter of common law. In Saad Investments, Mr Justice Kawaley recognised the appointment of liquidators made by an order of the Grand Court of the Cayman Islands, granting them the ability to conduct aspects of the liquidation in Bermuda. In the Kingate matter, Mr Justice Kawaley ordered two BVI companies (already in compulsory liquidation in the BVI) to be wound up in an ancillary compulsory liquidation under the supervision of the Supreme Court of Bermuda. Further orders were granted that provided the liquidators with the power to obtain documents from the auditors of the companies to continue their investigations.

Any offshore jurisdiction represents its own unique market as noted in the primary industries of each jurisdiction in the table above. While much of the insolvency law is based on the Insolvency Act 1986, offshore jurisdictions have matured to reflect the types of appointment and local conditions of the jurisdiction. Many onshore appointments involve a sole jurisdiction, although this is a rare occurrence offshore. The key to the success in any liquidation that involves offshore jurisdictions is strong relationships with insolvency practitioners and attorneys that can provide the required expertise and advice in relation to their own jurisdiction where necessary.

Jonathan Murphy is a manager at KRyS Global.

The East: the new Wild West

Developing legal systems and lack of cross-border co-operation present challenges for international investors in Asia.

The wave of restructurings initiated by the recent global financial crisis highlighted the challenges faced by investors in the emerging markets of Asia. International investors would be wise to pay careful attention to these lessons when allocating the 'hot' money currently flowing from west to east as liquidity slowly returns to the global economy.

Legal challenges

Most obviously, the legal systems of the majority of Asian jurisdictions, while developing rapidly, do not provide a reliable forum in which international investors can enforce their legal rights. In China, the People's Court remains an organ of the state, the principle function of which is to implement policy rather than provide an effective venue for dispute resolution. In Indonesia, another increasingly attractive destination for foreign direct investment, the court system remains notoriously unpredictable as a result of (among other things) imprecise legislation, an unsophisticated judiciary and the fact that the courts are not bound by precedent. Preferential treatment of domestic creditors by local courts is common throughout Asia and exemplified in China, where onshore creditors commonly use freezing orders from the People's Court to create leverage and disadvantage international investors.

Local regulations and bureaucracy are also problematic. In China, power to represent a company is vested in a legal representative appointed by its shareholders. To be effective, the appointment (and any subsequent change) of the legal representative must be registered with the Administration for Industry and Commerce (AIC). A key objective for foreign creditors seeking to control a defaulted Chinese corporate is to replace the existing legal representative with their nominee. In practice, the incumbent legal representative will often refuse to cede control and the AIC will decline to register any change of legal representative until it has been provided with (among other things) a signed resignation letter.

The problems faced in attempting to replace a legal representative are exacerbated by the fact that the People's Court and AIC are organs of government with equal standing. As a result, orders of the People's Court do not bind the AIC. The scope for legal relief is therefore limited and enforcing creditors face a difficult battle to take control in the absence of concerted support from local authorities who can exert influence over the AIC.

"Preferential treatment of domestic creditors by local courts is common throughout Asia and exemplified in China, where onshore creditors commonly use freezing orders from the People's Court to create leverage and disadvantage international investors."

Cross-border issues

A second key issue is the absence in the majority of Asian jurisdictions of laws addressing recognition of foreign insolvency proceedings and assistance for foreign insolvency officers. Japan and South Korea are the only Asian nations to have adopted the UNCITRAL Model Law on Cross-Border Insolvency and, with the notable exception of China (see below), no other Asian nation has implemented legislation equivalent to the UK Cross-Border Insolvency Regulations 2006 or Chapter 15 of the US Bankruptcy Code.

In China, the PRC Law on Enterprise Bankruptcy (introduced in 2007) includes provisions for recognition of foreign insolvency proceedings. However, there has been no successful attempt to use them and it is unclear how they would be applied by the People's Court. Thus, in the case of FerroChina (a steelmaker based in Jiangsu, China) foreign creditors were excluded from the onshore restructuring process, despite appointing an offshore receiver. Similarly, in the notorious restructuring of Red Dragon Group Pte Ltd, a common law receiver appointed in respect of assets of the Singapore holding company was unable to obtain recognition in Indonesia – a civil law system that does not recognise the concept of receivership.

Editor recovery@r3.org.uk | Recruitment recovery@r3.org.uk/recruitment

The offshore to onshore dilemma

The general absence in Asian jurisdictions of effective legislation permitting recognition of foreign insolvency proceedings and assistance for foreign insolvency officers is particularly problematic given the widespread use of offshore to onshore investment structures. These structures have traditionally been used to provide tax benefits and circumvent local regulatory restrictions. In an offshore-to-onshore structure, debt is issued by a holding company incorporated in a tax-friendly offshore jurisdiction and the proceeds advanced to the onshore operating entities. It is not uncommon for investments to be made via multiple offshore holding companies, which can give rise to numerous issues in the event of default or insolvency.

> "In many cases, the only option available to offshore creditors of a recalcitrant Asian debtor is to commence insolvency proceedings in respect of the offshore holding company."

The risks inherent in offshore-to-onshore structures are highlighted by the recent experiences of investors in Chinese companies that sought to access additional capital by listing on the Hong Kong and Singapore stock exchanges and (in many cases) issuing convertible bonds to offshore investors. These companies commonly obtained their listings via holding companies incorporated in offshore jurisdictions such as Bermuda, the British Virgin Islands and the Cayman Islands. Recent years have seen a number of high-profile defaults by Hong Kong- and Singapore-listed companies with operating assets in China, including Asia Aluminium, Celestial NutriFoods, China Milk, FerroChina, Fibrechem Technologies, Fu Ji Food and Catering, and Sino-Environment. Some common problems highlighted by these defaults are considered below.

Structural subordination

Holders of debt issued by offshore holding companies are structurally subordinated to onshore creditors and are effectively treated as equity in any onshore restructuring process. The problem is compounded by the fact that many offshore debt issuances are not guaranteed by the onshore operating companies and do not benefit from security over onshore assets. In addition, the ability of the offshore holding company to service its indebtedness is dependent on the remittance of funds from the onshore operating companies. The ability of onshore operating companies to remit funds offshore can be restricted by foreign exchange controls and issuers such as China Milk Products Group have claimed to be unable to service their offshore indebtedness as a result.

In many cases, the lack of options available to offshore creditors to influence the onshore restructuring process has resulted in their exclusion. The recent restructuring of Guangdong-based Asia Aluminum Group provides an example. The restructuring involved a sale of all the Chinese operating companies to the existing owners following the appointment of provisional liquidators of the Hong Kong holding company. While the claims of local creditors were preserved in full, structurally subordinated foreign holders of unsecured senior and (Payment in Kind) PIK notes received returns of only 19.03 per cent and 0.72 per cent, respectively.

Drilling down from offshore

The absence of security over onshore assets means that, in many cases, the only option available to offshore creditors of a recalcitrant Asian debtor is to commence insolvency proceedings in respect of the offshore holding company. The appointed insolvency officer can then seek either to dispose of the shares in the onshore operating companies to a third party purchaser or to take control of them by exercising the rights of the holding company as shareholder. Typically, the universe of potential purchasers for a distressed Chinese business is limited, with the result that the insolvency representative is forced to attempt to realise value by taking control of and restructuring the onshore business and assets. For the reasons outlined above, exerting any influence over the onshore assets is a difficult task for a foreign insolvency officer.

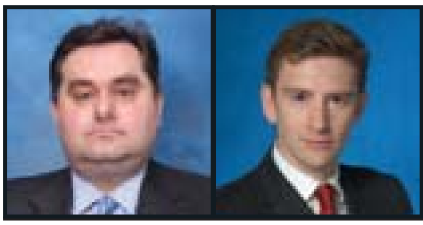
Unfortunately, the process of taking control offshore is also problematic. First, issues arise from the fact that the ultimate holding company is often incorporated in one jurisdiction and listed in another. Until recently, the resulting cross-border issues were addressed by appointing insolvency officers in both jurisdictions, a practice that was both time-consuming and costly. However, recent developments have cast doubt on the merits of this strategy. In particular, the writers have been successful in obtaining an order from the Grand Court of the Cayman Islands granting recognition of and assistance to the Hong Kong provisional liquidators of Fu Ji Foods and Catering (a holding company incorporated in the Cayman Islands and listed in Hong Kong) without the need for a parallel appointment. Similarly, in *Re Dickson Group Holdings Ltd*, Hong Kong liquidators were successful in obtaining recognition from the Bermudian courts and assistance in relation to the implementation of parallel schemes of arrangement under Bermudian and Hong Kong law.

Another common problem is the refusal of the registered agents of offshore holding companies to act in accordance with the instructions of the offshore insolvency officer. The registered agent is commonly appointed by the sponsor and will often refuse to provide copies of books and records or implement board and/or shareholder resolutions passed by the offshore insolvency officer without sponsor consent. The reluctance of registered agents to act without sponsor consent can result in expensive court battles and considerably delay any enforcement process. Perhaps the most prominent example is provided by the dispute over the appropriation of shares in the *Alfa Telecom* v. *Cukurova* case, but the writers are aware of many other instances in which disputes with registered agents have proved problematic.

Potential solutions?

Many of the problems outlined above are unlikely to improve significantly in the absence of legislative change, including the introduction of effective legislation for the recognition of foreign insolvency proceedings and assistance for foreign insolvency offices, the liberalisation of capital accounts and the relaxation of regulations restricting the ability of Asian debtors to pledge onshore assets as collateral for offshore debt. A cultural shift is also necessary. Accounting irregularities and fraud are common causes of defaults by Asian corporates. In addition, distressed Asian issuers tend to have little regard for their obligations to offshore investors and focus instead on engagement with onshore creditors. International investors can also help themselves by insisting on improved structures that provide mechanisms that enable them to exert additional control over the onshore operating companies.

In the absence of significant developments, Asia will remain a difficult frontier for international creditors. ◻



Mark Fairbairn (far left) is a partner and Damien Coles (left) is an associate at O'Melveny & Myers LLP.

Bankrupts beware: the world has just got smaller

Joey Byrne and Dermot Winters explains how the UNCITRAL Model Law helped insolvency professionals to recover concealed overseas assets in New Zealand.

Introduction

A case heard before the New Zealand High Court in September 2010 highlights how the implementation of international insolvency rules into domestic law assists an overseas trustee in bankruptcy's investigation procedures, and limits the ability of debtors to have concealed assets go undisclosed from creditors.

The Insolvency (Cross-Border) Act 2006 (the Act) implements the UNCITRAL Model Law on Cross-Border Insolvency into the municipal law of New Zealand[1]. In the first ever use of this legislation, interim relief was granted to the UK-based trustee in bankruptcy of a former UK resident, now domiciled in New Zealand.

> "The relief granted by the court represented the first ever utilisation of Article 19 of the Model Law."

The interim relief granted by Heath J in *Williams* v. *Simpson* included a search and seizure order over a private residence, a stay of execution over the bankrupt's assets, and provided for the examination of the bankrupt by the Official Assignee.

UNCITRAL

UNCITRAL (the United Nations Commission on International Trade Law) was established in 1966. The commission is a subsidiary body of the United Nations General Assembly, with its principal mandate being to assist the harmonisation of international trade.

The Model Law on Cross-Border Insolvency (the Model Law) was adopted by UNCITRAL on 30 May 1997, and was approved by the United Nations General Assembly on 15 December 1997. It is designed to assist member states to equip their insolvency laws with a modern, harmonised and fair framework to address more effectively the multiplicity of issues arising in cross-border insolvency cases[2].

Background to the case

Alan Geraint Simpson (Simpson), 69, was a Lloyd's of London name. In March 1998, Lloyd's obtained judgment against him in consequence of underwriting liabilities. In September 2009, Simpson was adjudicated bankrupt, consequent to a petition brought by Lloyd's in the High Court of England and Wales. Steven John Williams of Begbies Traynor Group (a bespoke UK-wide insolvency practice) was appointed as Simpson's trustee in bankruptcy (the trustee) on 12 January 2010.

By the turn of the millennium, Simpson had retired and left the UK to set up home in New Zealand. In accordance with normal bankruptcy procedures, shortly after his adjudication, Simpson provided a statutory declaration to the Official Receiver outlining his financial position and circumstances. In this declaration (which, as would be expected, is subject to the Perjury Act 1911[3]) Simpson affirmed that he had no personal assets of any significance.

However, subsequent investigations undertaken by the trustee revealed that Simpson had connections with a number of entities that were believed to have had involvement in the trading of precious metals. Simpson, however, denied having traded in silver or gold.

The trustee later received an anonymous tip-off, purporting that Simpson had substantial assets comprising gold and silver bullion stored at his rented home in Hamilton, New Zealand. Acting on this information, the trustee carried out further investigations that served to reinforce the information in the tip-off.

The trustee's next move was to seek an order from the New Zealand High Court, permitting a search to be undertaken of Simpson's New Zealand home and also seeking to have permission to seize any assets found therein.

The law

The complexity and uniqueness of this case, owing to the cross-jurisdictional nature of the remedy sought and the geographical schism of the parties, is reflected by the fact that the relief granted by the court represented the first ever utilisation of Article 19 of the Model Law[4].

Article 19 of the Model Law, which deals specifically with the relief that may be granted upon receipt of an application for recognition of a foreign proceeding, was implemented into New Zealand law by the provisions of section 19 of schedule 1 to the Act.

Section 19 of schedule 1 can convey wide-ranging powers. It provides *inter alia* for relief of a provisional nature to include a stay of execution against the bankrupt's assets; for entrusting the administration and/or realisation of assets to a person appointed by the court; for the right to transfer, encumber or dispose of assets of the bankrupt; and for the provision for the examination of witnesses, and for the taking of evidence.

Given the fact that any concealed assets would be vulnerable to being moved on or dissipated, the prior and more pressing requirement of the trustee was to procure interim relief in the form of a search and seize order[5].

The order sought on behalf of the trustee included *inter alia* authority to carry out the following actions:

1) the issue of a search warrant, and authority to enter Simpson's home;
2) the seizure of any bullion;
3) the seizure of any receptacles where bullion was stored;
4) lodgement of any bullion seized in a secure location;
5) to have the search and seizure process recorded by video;
6) to seize documentation and computer records relating to Simpson's property;
7) to suspend Simpson's ability to deal with any assets; and
8) to provide for the formal examination of Simpson by the Official Assignee.

Recognition

The court in New Zealand acknowledged that for recognition purposes, it would have to determine whether to recognise the foreign proceeding as a 'foreign main proceeding' or as a 'foreign non-main proceeding'[6]. Heath J adjudged that (solely) for the purposes of the more urgent interim relief, Simpson's centre of main interests (COMI) did not need to be established.

Interim relief

It was recognised by the court that the Model Law aspired to promote co-operation in insolvency matters between the courts and other authorities of different states.

In parallel with the overriding aspiration of providing effective mechanisms to deal with cross-border insolvencies, it was incumbent upon the court to assist in a situation where a formal request had been received from an overseas court of competent jurisdiction. In this respect, it was noted that a Letter of Request (to act in aid) from the High Court of England and Wales had been received by the court. This letter, once accepted, would effectively entitle the court to exercise the same powers that it could apply in respect of a New Zealand bankruptcy[7].

Given the court's acceptance as to the trustee's position and the validity of his appointment, and its acceptance that the matter was a 'foreign proceeding'[8], the path was clear for the court to consider granting any or all of the range of reliefs permitted under Section 19(1) of the Act.

The request by the trustee for a search warrant gave rise, however, to a further issue that required the court's consideration.

Under Section 150(1) of the Insolvency Act 2006, the trustee would have to establish a 'reason to believe' that assets were concealed at the property subject to the search. The test for 'reason to believe' had previously been considered by the (New Zealand) Court of Appeal in the criminal matter of *R* v. *Williams*[9], whereby it was taken to mean an 'objective and credible basis for thinking that a search will turn up the items named in the warrant'.

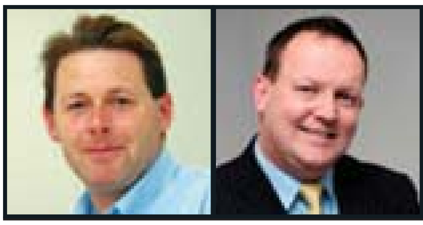
In considering the evidence presented to the court, it was recorded that while Simpson had initially come across as being co-operative with the trustee[10], numerous discrepancies in the information provided by him over the course of several months of correspondence with the trustee were uncovered. The shortcomings were highlighted by, for example, Simpson's refusal to provide the trustee with a global authority to obtain information on his affairs; by his denial of having traded in gold or silver despite evidence of his involvement in significant open contract dealings in late 2009; and by the evidence revealing that bullion with an estimated value of over NZ$1 million had been linked either to Simpson, or to persons connected with him. Further suspicion arose when Simpson advised a 'new address until further notice' to the trustee: the new address provided by Simpson was later discovered to be that of a Citizens Advice Bureau in Hertfordshire.

Heath J was satisfied that on the facts presented to the court, a credible basis did exist to the suspicion that Simpson had been less than honest and therefore he was minded to grant the interim relief sought.

Relief granted

On 17 September 2010, an order was made that provided *inter alia* for the following:

1) a search warrant authorising the Official Assignee to enter and search the home of Simpson, and to seize any receptacles containing bullion or other precious metals;
2) any items seized to be taken under police guard to a secure storage facility pending further order of the court;
3) execution of the search to be recorded by video;
4) suspension of Simpson's right to deal with assets situated in New Zealand; and
5) examination of Simpson before the Official Assignee.



Joey Byrne (far left) is a partner and Dermot Winters (left) is a senior solicitor at Freeth Cartwright LLP.

Subsequent to the granting of the order, a search of Simpson's home was undertaken. Insolvency staff, backed up by specialist search police, uncovered several dozen gold and silver ingots, in addition to bags of coins and notes. The value of the haul has been estimated at up to NZ$3 million.

The court in New Zealand has since vested the bullion recovered in the trustee.

Comment

The utilisation of the Model Law and specifically Article 19 illustrates how geographically diverse agencies can work together, swiftly and seamlessly. Within nine months of his taking office, the trustee and his legal team had seized undisclosed, hidden assets with an estimated value in excess of NZ$3 million, 12,000 miles from the place of appointment.

One might well anticipate much greater use of Article 19 and the Model Law from this point on, in jurisdictions where it has been adopted.

> "Numerous discrepancies in the information provided over the course of several months of correspondence with the trustee were uncovered."

1 The UNCITRAL Model Law was implemented in England and Wales by the Cross-Border Regulations 2006

2 The Model Law has to date been adopted in one form or another into the state law of 18 countries worldwide: Australia, British Virgin Islands, Canada, Columbia, Eritrea, Japan, Mauritius, Mexico, Montenegro, New Zealand, Poland, Republic of Korea, Romania, Serbia, Slovenia, South Africa, UK, USA

3 Section 5 of the Perjury Act 1911 makes it a criminal offence to deliberately provide false information in a statutory declaration

4 The aspirations of the Model Law are set out in its preamble; its purpose is to 'provide effective mechanisms for dealing with cases of cross-border insolvency, so as to promote the objectives of cooperation; greater legal certainty; fair and effective administration; protection and maximisation of the value of the debtor's assets; and facilitation of the rescue of financially troubled businesses'

5 To be effective, the order would have to be sought on a 'without notice' basis: there would be little point in making a debtor aware his premises were about to be searched

6 As defined within Article 2(a) and 2(b), Schedule 1 of the Insolvency (Cross-Border) Act 2006

7 By virtue of Section 8(2) of the Insolvency (Cross-Border) Act 2006

8 Op cit

9 [2007] 3 NZLR 207 (CA)

10 As is required pursuant to Section 291 of the Insolvency Act 1986

Valuation abroad

The valuation of mid-market businesses in major overseas jurisdictions.

Valuation is both a science and an art. The science consists of technical analysis and the application of methodology, and the art is based on the valuer's subjective analysis that relies on an understanding of the subject company in the context of the industry and the overall market in which it operates. When a company is located in a foreign jurisdiction or has multiple divisions located abroad this presents an additional challenge for the valuer.

Different country, different approach?

While valuations techniques and methodologies are similar the world over, there are differences in the mechanics of how each country considers the value of a closely held company.

For example, in the UK a small company premium is often utilised in the discount rate, based on published market studies, albeit that those studies are based on US data. In other countries, for example Australia, such studies are not relied on and the risk associated with a company's size is captured in an additional risk premium. The use of a beta factor is another area where the availability of source data will impact on the analysis. In the UK, our standard practice is to analyse market data for guideline public companies. Other countries may take a more academic approach to assess industry risk or may rely on sources such as the industry betas published by Aswath Damodaran[1] or a local source similar to the Risk Measurement Service in the UK[2].

Availability of data is arguably the most important factor in influencing how valuations are carried out in different jurisdictions. The legal and accounting frameworks that determine which companies are required to publish financial information, on what basis and to what level of detail, inevitably impacts on the approach taken by the valuer. In the UK, detailed published information exists on private companies that permits a better analysis of transactions than say, for example, in the US. Conversely, data on publicly held companies in the US is envied by those valuers researching guideline public companies in other jurisdictions.

Valuers in countries with active, mature stock markets are more able to utilise a market approach, albeit it is good practice to use a number of methodologies that are then reconciled to a considered conclusion. Use of leveraged buy out models as a method of valuation is increasing, especially in those countries where private equity activity is high.

Who will buy?

The influence of the potential purchaser cannot be ignored when looking at the value of a mid-market business in an overseas jurisdiction. Valuations tend to be prepared on the fair market value premise involving a willing buyer and a willing seller. However, valuers are increasingly considering what type of purchaser the subject company would attract, in order to provide a value that is more useful than purely hypothetical.

In considering the impact of the purchaser, factors that could affect the valuer's opinion include:

- Specific conditions relating to location such as repatriation laws or political risks that may limit the number of purchasers prepared to invest in that particular jurisdiction.
- The impact of the subject company operating across several different jurisdictions. This might restrict the number of prospective purchasers, for example, due to disparity of operations, perhaps to the point that the business could have a higher value if entities were sold separately.
- The assumed location of the buyer could also impact on the availability and cost of funding. A purchase that would require local or cross-jurisdictional funding may have a different financing cost.

> "The acquisition market can provide the valuer with good evidence of the values at which privately held businesses are actually selling."

Methodologies: specific challenges in applying valuation techniques

The market approach

The two main sources of data commonly considered when utilising a market approach include public stock markets, in which ownership interests of similar businesses are traded, and the acquisition market, in which entire businesses are bought or sold.

In relation to public stock markets, guideline public companies may be identified in a number of jurisdictions, although the valuer needs to assess the reliability and quality of the available information. For example it is questionable whether a thinly traded stock listed on a minor stock market could be assumed to give reliable comparison data on which a valuer can base the analysis.

For a global company, ideally the valuer would identify guideline public companies with global operations, thus replicating the risk profile of the company being valued. In an individual country, particularly in an emerging market, the valuer may well not be able to identify a sufficient number of guideline public companies. It may be possible to extend the search to similar countries or across a region. However, judgement should be applied and appropriate adjustments considered.

The acquisition market can provide the valuer with good evidence of the values at which privately held businesses are actually selling albeit that the details of many transactions are confidential. If the valuer has access to local contacts, they may be able to contribute useful knowledge for the valuer. For example our network has provided significant help to the London-based valuation team through local transaction experience.

The income approach

Specific challenges in reviewing financial forecasts used in applying the income approach come from the need to understand the basis of preparation along with the impact of local legal, accounting and tax issues. Additionally the valuer has the challenge of assessing the quality of management, which will impact on how forecasts are prepared, their achievability and the assessment of the underlying risks.

The valuer needs to determine an appropriate discount rate to apply to these cash flows and, in particular, assess the impact of country risk on the cost of equity and the cost of debt.

Country risk is best described as the specific risk of investment in overseas jurisdictions. Issues to be considered in addressing these risks include the effects of greater country diversification and efficiencies of operation, countered by exposure to country-specific political, legal, fiscal and accounting risks, and the consequential central costs incurred in monitoring and managing those risks.

A widely used source for assessing country risk is published on an annual basis by Aswath Damodaran[3]. His study utilises a country's long-term Moody's[4] rating to calculate a default spread based on traded country bonds for each country in order to arrive at an estimate of a country risk premium. This study takes a very long-term view of markets as compared with other sources, such as the country risk calculated by Bloomberg, which updates on a daily basis in response to changes in market data. As with all third party data, the valuer needs to analyse the calculation used to arrive at the implied premia before it can be applied or appropriately adjusted for the specific circumstances of the subject company.

Mike Thornton (far left) is a partner and Sheenagh McKillop (left) is an associate director in valuation services at Grant Thornton UK LLP.

The value of experience

Valuation is both an art and a science and valuing businesses abroad presents additional challenges to the valuer. While the desktop techniques of the domestic valuation can be adapted to take account of specific issues, it is the judgment and experience of the valuer that is required in analysing the data with regard to the specific local issues that affect the business abroad.

Valuation techniques and methodologies are similar the world over. However, when considering the challenges of valuation abroad the valuer should question every assumption utilised and not assume that what is appropriate in the UK can necessarily be transferred to any jurisdictions without adjustment.

1 http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/Betas.html
2 http://www.london.edu/facultyandresearch/subjectareas/finance/research.html
3 http://pages.stern.nyu.edu/~adamodar/New_Home_Page/datafile/ctryprem.html
4 www.moodys.com

INSOLVENCY INSURANCE SERVICES

OPEN COVER FACILITY

- Our market leading facility offers a range of insurances, broad-based wordings and competitive premiums.
- Willis is a global insurance broker with a wealth of resource and expertise available to our clients including Risk Management and Health and Safety Consultancy.

BONDS

- Our bonds attract a one-off premium payment which enables us to effectively manage the time and administrative burden on you.

WILLIS ONLINE

- Our bespoke Willis Online system has been adapted specifically for the Insolvency market.
- Appointments viewed online; Questionnaires completed and submitted on line.

A NEW TEAM, A FRESH APPROACH
WILLIS INSOLVENCY SERVICES

Willis Limited, Registered number: 181116 England and Wales.
Registered address: 51 Lime Street, London, EC3M 7DQ.
A Lloyd's Broker. Authorised and regulated by the Financial Services Authority for its general insurance mediation activities only.

FP897/8388/04/10

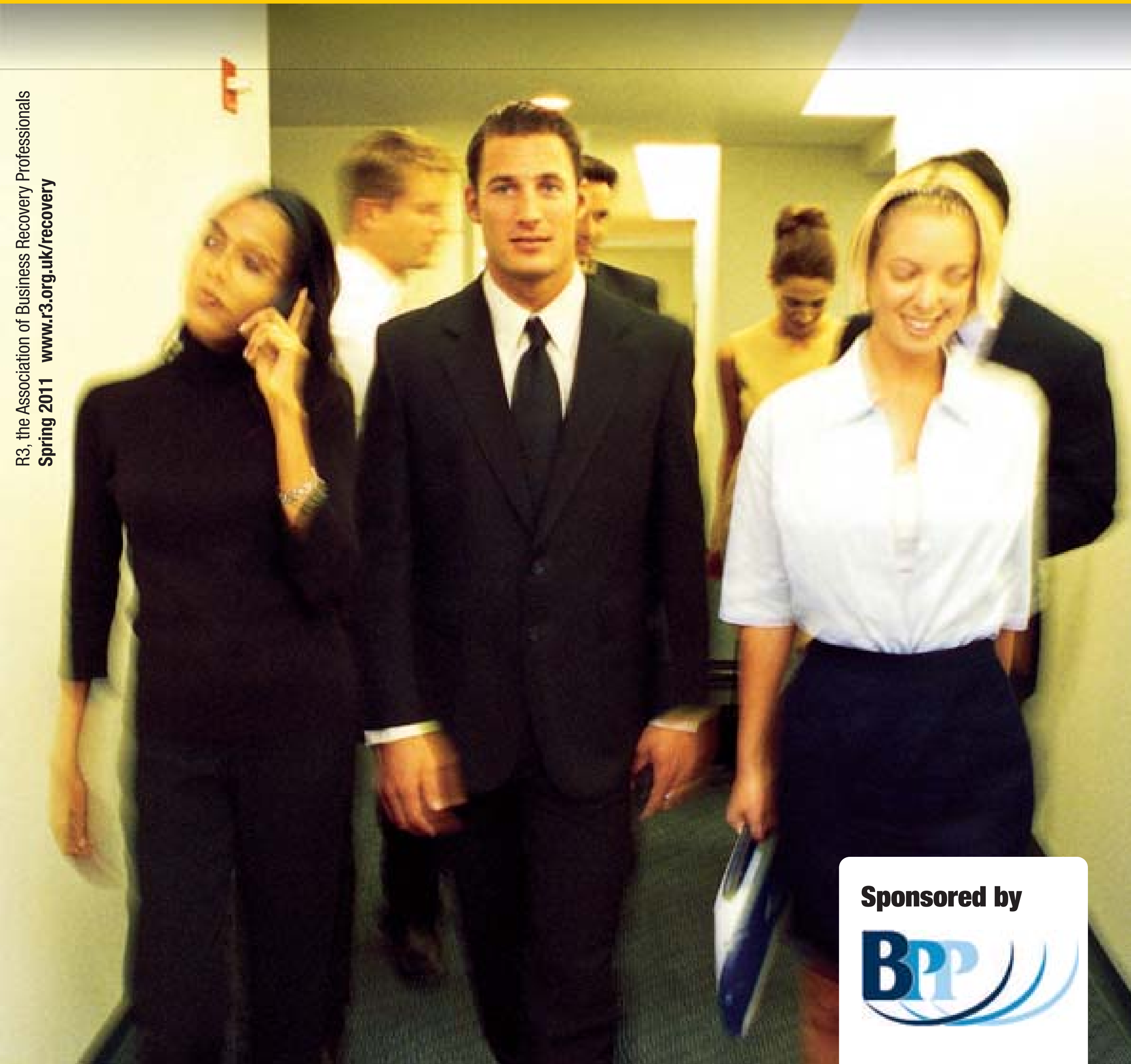
Willis

Recruit ■ Train ■ Retain **Careers and professional development**

RECOVERY SUPPLEMENT

R3, the Association of Business Recovery Professionals

Spring 2011 www.r3.org.uk/recovery



The increasing need for insolvency training in today's commercial world

André Evans explains the training needs of the insolvency sector, the options available and how trainers, firms and personnel seek to balance the competing demands of staff development and professional practice.

'Of all the mysteries of the stock exchange there is none so impenetrable as why there should be a buyer for everyone who seeks to sell… 24th October 1929 showed that what is mysterious is not inevitable. Often there were no buyers and only after wide vertical declines could anyone be induced to bid.'

This was written by J K Galbraith in *The Great Crash 1929: The classic account of financial disaster* but he might equally have been writing of the morning of Friday, 10 October 2008.

On that day, I was helping to facilitate a course at one of the larger law firms. It was just before 9.00 am and one of the lawyers picked up the news item on (inevitably) his Blackberry that the FTSE 100 had just fallen ten per cent in seven minutes. This was a week that would have seemed impossible to most observers even a year earlier. Icelandic banks were put into administration, the government bailed out familiar high street names such as the Royal Bank of Scotland and Lloyds banking group: these stock market-listed institutions now virtually nationalised industries. Three weeks before, Lehmans had become the biggest Chapter 11 filing in US history and AIG, the world's largest insurer, had been kept afloat by a $200-million cash injection.

insolvencies has continued to rise. Somehow firms and staff need to fit their training needs around all these other myriad pressures on their time.

Training needs

Training forms an essential part of a staff development strategy for our client firms. Entry-level employees must be familiarised with the UK's famously complex array of insolvency procedures as well as with the firm's own internal processes.

> "Insolvency and recovery work takes place within a complex regulatory structure extending far beyond the insolvency legislation itself. The law in these [other] areas, as well as in insolvency itself, is constantly changing."

Back at BPP, it did not take very much foresight to realise that the knowledge and skills of our clients who specialise in insolvency and corporate recovery would be in more demand than ever – and so, of course, it has turned out to be. In this harsh economic environment, directors and managers of businesses and over-indebted individuals have needed specialist advice as never before while the number of formal

Prospective insolvency practitioners must sit the demanding examinations set by the Joint Insolvency Examination Board (JIEB). Qualified staff are also required to comply with the continuing professional development requirements of the various Recognised Professional Bodies. All need to undertake technical and skills training to equip them for their developing role within the firm.

Starting out

For those in the early stages of their career, a range of beginners- and foundation-level courses are available, designed to give those relatively new to insolvency practice an overview of corporate and personal insolvency procedures.

Many organisations steer appropriate candidates who need a basic grounding in insolvency law and practice towards the Certificate of Proficiency in Insolvency (CPI) of the Insolvency Practitioners Association (IPA). No minimum period of work experience is required to sit the CPI and the exam aims, in a single three-hour paper, to test a broad range of the areas most commonly encountered in practice such as IVAs, bankruptcies, voluntary liquidation and administrations.

The exam, sat in June of each year, consists of multiple-choice, short form and written questions. Candidates can be required to draft documents and prepare straightforward insolvency accounts as well as answering hypothetical problem questions.

New qualifications

Recently, two new qualifications have entered the market. Firstly, the IPA introduced the Certificate of Proficiency in Personal Insolvency (CPPI) last year. The exam is structured similarly to the CPI but

Editor recovery@r3.org.uk | Recruitment recovery@r3.org.uk/recruitment

focuses on, and gives a thorough grounding in, personal insolvency issues, including those relating to insolvent partnerships and deceased insolvents. Candidates are expected to have a good working knowledge of non-statutory solutions such as debt management plans. The new qualification is a welcome innovation at a time when personal insolvencies remain high.

Also in 2010, the ICAEW introduced its new qualification – the ICAEW Certificate in Insolvency. The syllabus is very broadly based, covering all aspects of corporate and personal insolvency. A key feature of this new qualification is flexibility in terms of when and how candidates can be assessed.

It is run entirely through objective test questions, so that examinations are computer based. Frequent exam sittings, as well as the opportunity for unsuccessful candidates to re-sit very shortly after their first attempt enables people to fit the qualification more easily around their personal and working lives.

IP licence

Those who want to become licensed insolvency practitioners will, of course, have to pass the JIEB examinations, which are sat in November of each year. These consist of three papers: paper 1 (liquidations), paper 2 (administrations, company voluntary arrangements and receiverships) and paper 3 (personal insolvency). These three-and-a-half-hour examinations constitute a formidable barrier to entry to the insolvency profession. Candidates must be adept at giving practical written advice, drafting documents, preparing insolvency accounts and financial projections as well as having a good working knowledge of legal regulation and best practice.

The exams have a practical and topical bias – recent papers, for instance, have featured questions on pre-packaged administrations and statutory and non-statutory debt solutions for individuals.

Those preparing for the exam tend to be qualified accountants or solicitors or have considerable experience of insolvency work – typically they are people who are well established in their firms who have to juggle the courses and home study with the demands of busy professional practice. Despite the challenges (and perhaps not surprisingly), numbers enrolled on courses for the 2011 examinations are high.

Many client firms provide generous amounts of study leave to aid candidates in balancing these demands, as well as ensuring that their employees have the best possible opportunity of passing at the first attempt. The seniority of the candidates and the costs in lost chargeable time make it vital for training and study to be really effective.

In recent years, changes in the JIEB rules have helped by allowing candidates greater flexibility in the order in which the papers are sat. It is now possible to sit just one paper in year one and then, subsequently, take the remaining two papers at the same sitting.

Another option, which has been available for some years now, is to take two papers at the first sitting and then the third paper in the subsequent year. The changes are welcome and increasing numbers of candidates are taking advantage of them. However, 'credit accumulation' – the process of acquiring examination passes over a number of sittings – will not suit every candidate nor every firm. There are two main advantages when taking all three papers at the one sitting.

- Firstly and obviously, a successful candidate has got the whole qualification 'out of the way' and can now get on with the rest of his or her life safe in the knowledge that he or she will never have to, for instance, sit a mock exam ever again.
- Secondly, it is arguably more efficient to work on passing all three exams, given that so many areas of the syllabus are relevant to all three papers – including many of the areas covered in the statements of insolvency practice such as remuneration, records of meetings and the rules relating to creditors' committees.

> “Changes in the JIEB rules have helped by allowing candidates greater flexibility in the order in which the papers are sat, and the timing.”

Planning ahead

Alas, many professional people acquire the bad habit at the academic stage of their training of leaving study to the last minute. This may have been effective as a 21-year-old with few calls on his or her time outside of the need to eventually get down to some study, but it is a high-risk strategy for a busy professional, one who often has family and practice management responsibilities as well as the obligation to study for exams.

So planning when study is going to take place and what topics are going to be looked at is crucial. In particular, it is vital that candidates gain hands-on experience of attempting previous JIEB questions in exam conditions. The more a candidate's time is limited, the more important it is to treat study as if it were a work goal – something that will be undertaken by a deadline and must be done to the best of the candidate's ability.

Mentoring and support

The process of executing a study plan is so important that some firms employ training providers or consultants to provide mentoring or coaching programmes to manage the task of motivating and preparing candidates. Other students form their own study groups to help members stick to a programme of structured study and these informal groups have proved very effective in the past and provide a welcome break from solitary study.

Keeping up to date with regulatory changes

Insolvency and recovery work takes place within a complex regulatory structure extending far beyond the insolvency legislation itself. Practitioners will regularly encounter issues in areas as diverse as employment law, intellectual property, data protection, landlord and tenant, money laundering, consumer credit – the list is endless.

The law in many of these areas, as well as in insolvency itself, is constantly changing. Recent examples include the final tranche of the Companies Act 2006 coming into force, the new Insolvency (Amendment) Rules that came into force in April 2010, the consequential changes to SIP 9 and the pronouncements of The Insolvency Service on the subject of pre-packs. There is also a constant trickle of cases on topical areas such as centre of main interests migration under the EC Insolvency Regulation and TUPE Regulations.

So, the need for keeping up to date is clear – and not only on the technical but also on the practical aspects of insolvency as types of business that were previously thought to be relatively safe come under pressure. A colleague and I, for instance, recently attended an excellent R3 course on insolvent partnerships, which covered, among other things, the insolvency of solicitors' practices. Last year, Halliwells, a well known law firm sent shock waves through the profession when it went into administration.

Why train?

It goes without saying that training benefits organisations that need to ensure that their staff are competent, empowered and appropriately qualified and regularly updated in their field.

It is also highly valued by staff who recognise that it represents a heavy investment in their own development. That in turn helps to attract and retain the best talent – perhaps one of the most important reasons why organisations are prepared to make the investment they do in training. To find out more about BPP's professional training programmes for individuals and businesses, see **www.bpp.com**.

André Evans is head of learning and development at BPP.

Career progress

2009's JIEB award winners talk about studying for the JIEB, what they enjoy about their jobs and their hopes for future professional progression.

Jackie Parsons is a senior insolvency manager at Dodd Rescue.
IPA prize for first place and the ICAEW prize for the member with the highest mark

The exams (and studying for them) were one of the most challenging experiences in my career. When studying you really do seem to have the worst of both worlds. You have to combine studying with the daily challenges of working in an environment that involves reacting at short notice. Time management becomes the cardinal rule and you have to be dedicated to managing study time from the start.

I enjoy the pace, the variety, the people and the businesses and feel privileged to work in an area where our advice can help a business (or a part of it) to survive. My work incorporates a variety of corporate and individual cases and no two days are the same.

I am lucky to be part of a growing insolvency department up in Cumbria, and obtaining the JIEB qualification now enables us to bring a second IP into the firm. I also hope to continue my involvement in the ICAEW Insolvency SIG committee, helping them support IPs and continue to raise the profile of the rescue industry.

Annabel Allison is a manager in Corporate Recovery at RSM Tenon.
PwC prize for second place and BPP prize for highest mark in the Personal paper

The JIEB experience was the most difficult thing I have ever done; it literally consumed my life for the year. However, the feeling when I put my pen down after the third exam was priceless, although slightly superseded by the feeling on results day! The best advice I was given was to go into the exams and 'do your job'.

I love the variety within my job at RSM Tenon; no day or case are ever the same. I am a nosy problem solver by nature so my chosen career is perfect.

Passing the JIEB has been a key step in progressing with RSM Tenon and consolidating my 12 years' experience in insolvency. It has provided a platform for me to advance and experience different areas of the practice, I have had more exposure to the recovery and advisory side and hope to take appointments in the future.

Kevin Wall is a senior associate at Zolfo Cooper.
Leonard Curtis prize for third place

Studying for the JIEB was a bit of a marathon and involved a lot more study hours than any previous exams. Courses started in January and I was soon balancing revision for the three subjects with ongoing work commitments. November also approached quicker than I expected and in the last weeks before the exams the JIEB literally took over my life. I just kept focusing on one question after another, aiming to pick up another answer each time. Fortunately, it seems to have worked!

I enjoy the variety and pressure that corporate recovery can bring, with no two assignments ever the same. It is this interesting and changing environment that has kept me in this career.

I'm currently on secondment at a leading bank and my future ambitions are to build further experience and relationships that allow me to continue to progress at Zolfo Cooper. Most importantly, I just want to remain in a role that I find challenging and enjoyable.

Caroline Leeds Ruby is a partner at Sherman & Sterling LLP.
ILA prize for the lawyer with the highest mark

The JIEB exams were an interesting challenge. I am a partner in a law firm so my study time was extremely limited and I had to draw on my existing knowledge and experience to a larger degree than BPP would advise! Obviously a regular study plan is the best option but do not give up hope if your hours are unpredictable like mine.

Most of the students taking the exams with me were accountants and the course was more focused on the accountancy and commercial side but I found these aspects the most interesting and useful. It was also good to get a non-legal view on certain topics. I would certainly encourage other lawyers reading this to study for the examinations.

Sarah Dickson is a senior executive in the Transaction Advisory Services.
ICAS prize for member with the highest mark

There is no denying that the JIEB is one of the biggest challenges I've faced. I was fortunate to receive a great deal of support from Ernst & Young LLP. The knowledge that I was studying for a qualification that could be used in my everyday working life helped to keep me motivated. It may sound crazy, but I thoroughly enjoyed it!

Every day brings something different. Although this can be challenging, I really enjoy tackling new issues, developing innovative solutions and ultimately adding value to the stakeholders. It is rewarding when you sell a business as a going concern knowing that, as well as getting the best results for creditors, you have also made a tangible difference to the lives of the employees.

I believe we work in an industry where you can earn respect from your peers and develop a strong reputation through hard work and always being seen to be fair and doing the right thing. The JIEB is a great platform to build from and I hope that, by working hard, I can continue to learn and to achieve my potential.

Joint Insolvency Examination – November 2010

Congratulations to all the successful candidates, as listed below.

A

Adlam C (8344) Norwich
Armstrong G (8009) Paisley
Asbury M (8201) Dudley

B

Baker H (8327) Merthyr Tydfil
Bartlett C (8305) Bristol
Bills M (8100) London
Blackhall A (8128) London
Bradley R (8254) Manchester
Brock T (8268) Manchester
Brooks C (8203) Birmingham
Brown S (8332) Sunderland
Bull J (8097) Leeds
Bullman S (8065) Chichester

C

Cadet K (8315) Waterlooville
Callender J (8147) Bedford
Carter P (8055) Guildford
Carvill-Biggs S (8090) Watford
Chiang G (8214) Salford
Clarke E (8053) Eye
Coad R (8302) Clevedon
Colclough S (8238) Nantwich
Cole R (8216) Sale
Cole S (8255) Wigan
Collins S (8060) Twickenham
Connell E (8275) Leeds
Cowgill B (8215) Bolton
Craig P (8014) Glasgow
Cresswell J (8269) York

D

Davidson I (8230) Stockport
Davies R (8099) Harlow
Dickens P (8106) London
Dickens S (8062) Kingston upon Thames
Dodhia H (8140) Stanmore
Dowers J (8049) London
Dymond R (8281) Dronfield

E

Easterby R (8184) London

F

Farmer D (8350) Rayleigh

JIEB 2010 prizes winners

Insolvency Practitioners' Association Prize for First Place Christopher Huzal

PricewaterhouseCoopers Prize for Second Place Joanna Bull

Leonard Curtis Prize for Third Place James Cresswell

Association of Chartered Certified Accountants' Prize (awarded to the ACCA member with the highest mark) James Cresswell

ICAEW Prize (awarded to the ICAEW member with the highest mark) Christopher Huzal

Insolvency Lawyers' Association Prize (awarded to the lawyer with the highest mark) Amy Gallimore

Institute of Chartered Accountants of Scotland Prize (awarded to the candidate in the Scottish papers with the highest and sufficiently meritorious marks) Stuart Preston

BPP Prize (awarded to the candidate with the highest mark in the Personal paper) Steven Wright

G

Galley L (8226) Wilmslow
Gallimore A (8114) Dorchester
Gaunt S (8146) London
Goodhew R (8179) London

H

Hailey D (8130) Baldock
Hancock S (8191) Birmingham
Harris-Rush R (8283) Sheffield
Haunch O (8083) London
Hemming P (8084) London
Hewitt J (8088) Dartford
Hicks S (8342) Tavistock
Higgins M (8334) Newcastle upon Tyne
Holgate H (8078) Haywards Heath
Hopkins D (8251) Bolton
Hunt M (8199) Worcester
Hutt J (8178) London
Huzal C (8056) London

I

Imison D (8086) London

J

Jacobson M (8180) London
James R (8239) Chester

K

Keany E (8340) Torquay
Kedney J (8194) Birmingham
Kemp D (8046) New Malden
Kent I (8127) Woking

L

Larkman T (8043) London
Legdon E (8277) Sheffield
Leggett P (8301) Bristol
Leonard I (8029) Belfast
Lewin J (8349) Nottingham
Lewis C (8202) Sutton Coldfield

M

McDonnell R (8107) London
McRobert G (8120) London
Maddison H (8136) St. Albans
Malik S (8080) London
Malone M (8213) Worcester
Massey A (8054) London
Matthews I (8058) London
Mistry H (8237) Stockport
Mittal R (8192) Walsall
Moffitt K (8112) London
Morgan L (8125) London
Morley N (8298) Doncaster
Myers N (8104) Coulsdon

N

Nairn I (8335) Durham
Nakar A (8072) Surbiton
Naughton L (8138) London
Neill J (8030) Hillsborough

O

O'Connor J (8057) London

P

Page H (8172) London
Palacio C (8310) Southampton
Parker J (8287) Leeds
Pearson K (8333) Gateshead
Peat M (8231) Stockport
Penn L (8338) Exeter
Preston S (8001) South Queensferry
Pretlove G (8126) Hornchurch
Prince G (8182) Lichfield
Pullin M (8274) Stockton-on-Tees

Q

Qureshi F (8115) Stanmore

R

Radomsky A (8174) Edgware
Reid M (8173) Eastbourne
Rifkind C (8177) London
Rimmer J (8189) Leicester
Robb S (8010) Glasgow
Robinson T (8217) Derby
Robson B (8185) Rugby
Russell R (8346) Nottingham

S

Sanderson S (8064) London
Sandher R (8181) Solihull
Seifert J (8052) Pinner
Short L (8118) London
Shortt D (8050) Gerrards Cross
Sloper M (8232) Manchester
Southard A (8003) Broxburn
Stibbons S (8137) Bexleyheath

T

Tate C (8320) Eastleigh
Tatton W (8221) Stoke-on-Trent
Taylor J (8264) Bacup
To K (8314) Brighton
Tout M (8309) Southsea

W

Watts C (8067) London
Webster J (8266) Sale
Welburn E (8276) Harrogate
Whitaker L (8145) Brighton
Whittaker T (8242) Chorley
Wildsmith B (8228) Cheadle
Williamson C (8250) Chorley
Woodhall M (8087) Reading
Wright S (8011) Glasgow

Analysis of November 2010 results

Papers sat	Papers passed				
	3	2	1	0	Total
3	78	29	25	23	**155**
2		31	34	24	**89**
1			51	55	**106**
Total	**78**	**60**	**110**	**102**	**350**

R3 events, courses and conferences

Date	Event title	Venue
March		
1	Introductory Programme – Personal Insolvency 1	etc. venues, London
1	Introductory Programme – Personal Insolvency 1	Deloitte, Birmingham
1	Introductory Programme – Personal Insolvency 1	Irwin Mitchell, Leeds
8	Trading Insolvencies	Grange City Hotel, London
10	Liquidations	Cedar Court Hotel, Huddersfield
22	Business & Options Reviews	CCT Venues, Barbican
24	Liquidations	Hyatt Regency, Birmingham
24	West Midlands New Professionals Bowling & Buffet Evening	Bowlplex Birmingham
29	Yorkshire Women's Group Regional Meeting	Kings Chambers, Leeds
31	Trading Insolvencies	Chase Hotel, Cheltenham
31	Yorkshire Regional Meeting	Crowne Plaza, Leeds
April		
5	CPI Student Workshop	Lawrence Graham, London
5	Introductory Programme – Personal Insolvency 2	etc. venues, London
5	Introductory Programme – Personal Insolvency 2	Deloitte, Birmingham
5	Introductory Programme – Personal Insolvency 2	Irwin Mitchell, Leeds
7	SPG Technical Review	Grange City Hotel, London
11	Eastern Regional Meeting	TBA
27	CPI Student Workshop	Ernst and Young, London
28	North East Charity Bike Ride	Starts at Lands End
May		
2	North East Charity Bike Ride	Finishes in Newcastle
11–13	R3 21st Annual Conference – Coming of Age	Celtic Manor Resort, South Wales
17	Introductory Programme – Rescue 1	etc. venues, London
17	Introductory Programme – Rescue 1	Deloitte, Birmingham
17	Introductory Programme – Rescue 1	Irwin Mitchell, Leeds
18	North East Regional Meeting	RSM Tenon, Sunderland
19	SPG Technical Review	Met Hotel, Leeds
19	Midlands Spring Ball	The ICC, Birmingham
19	North West Region Golf Day	Bolton Golf Club
24	Debt Restructuring	Hilton Tower Bridge, London

For further information on R3 courses and conferences, please visit the R3 website **www.r3.org.uk**, where you can download the full 2011 programme. Alternatively, call the Courses team on 020 7566 4234 to request a programme by post.

regional events   R3 events

A commercial approach in a commercial world

Claire Martin-Royle provides an update on the legal issues surrounding the restructuring of the European Directories Group and their implications for junior creditors in future cases.

The decision of the Court of Appeal (CA) in *(1) HHY Luxembourg SARL (2) AMP Capital Investors Ltd* v. *Barclays Bank plc and others* [2010] EWCA Civ 1248 provides the most recent blow by the courts to junior lenders. The court decided they were unable to challenge a restructuring because the terms of an intercreditor agreement should be interpreted in the most commercially sensible manner.

Facts

The case concerned the European Directories Group (the group), which operated a directories business across a number of European countries via subsidiaries that were directly or indirectly owned by European Directories (DH7) BV (DH7). The immediate parent of DH7 was European Directories (DH6) BV (DH6).

DH6 and its various subsidiaries were party to a number of facility agreements that were supported by cross-guarantees and security in favour of the security trustee. The relationship between the creditor groups was regulated by an inter-creditor agreement (ICA).

It was proposed the group would be restructured as follows:

1) DH6 would be placed into administration in England;
2) the administrator of DH6 would sell DH6's shares in DH7 to a new holdco owned by the priority senior lenders of the group;
3) the security trustee would transfer the primary and guarantee liabilities of the group to the new holdco, which would issue debt instruments to the priority senior lenders only; and
4) the security trustee would release the guarantees and security given by DH7 and its direct and indirect subsidiaries.

The issue

Steps three and four above were to be effected by the security trustee pursuant to its powers under clause 15.2 of the ICA, which provided that where 'the asset which is disposed of consists of all of the shares in the capital of an obligor or any holding company of that obligor', the security trustee was authorised to execute 'any release of the obligor or holding company'.

The junior lenders argued the clause should be interpreted narrowly such that only the liabilities and security of the company being sold (ie DH7) could be released. In contrast, the senior creditors contended clause 15.2 permitted the security trustee to release any obligor that was being transferred, whether directly via a sale of its shares, or indirectly by the sale of its holding company's shares.

High Court decision

Proudman J agreed with the junior lenders. She held the narrow interpretation to be the 'natural meaning of the words', which must be right in the context of ordinary corporation law because each of the companies in the group were separate legal entities and the change of ownership of DH7 did not change the ownership of its subsidiaries.

> "Clause 15.2 should be read to allow a release of the liabilities and security of the company being sold and also the other obligors who were direct and indirect subsidiaries of that company."

Court of Appeal decision

The CA reversed the judge's decision on the basis that her interpretation did not reflect the most commercial construction of clause 15.2 and, where there was a clause capable of two meanings and neither flout common sense, you should adopt the more commercial construction. The CA held Clause 15.2 should be read to allow a release of the liabilities and security of the company being sold and also the other obligors who were direct and indirect subsidiaries of that company.

It was noted the security trustee could have enforced its security and sold all of the shares of each obligor separately, but this would have incurred greater expenditure resulting in less money for creditors. Furthermore, such an interpretation would be contrary to the ICA, which was a co-operative document between parties with similar interests who wanted to maximise recoveries.

Emphasis was also given to preserving the concept of primary and deferred creditors. The interpretation applied by the CA was considered to preserve the order of priority and give effect to the context of the ICA as a whole.

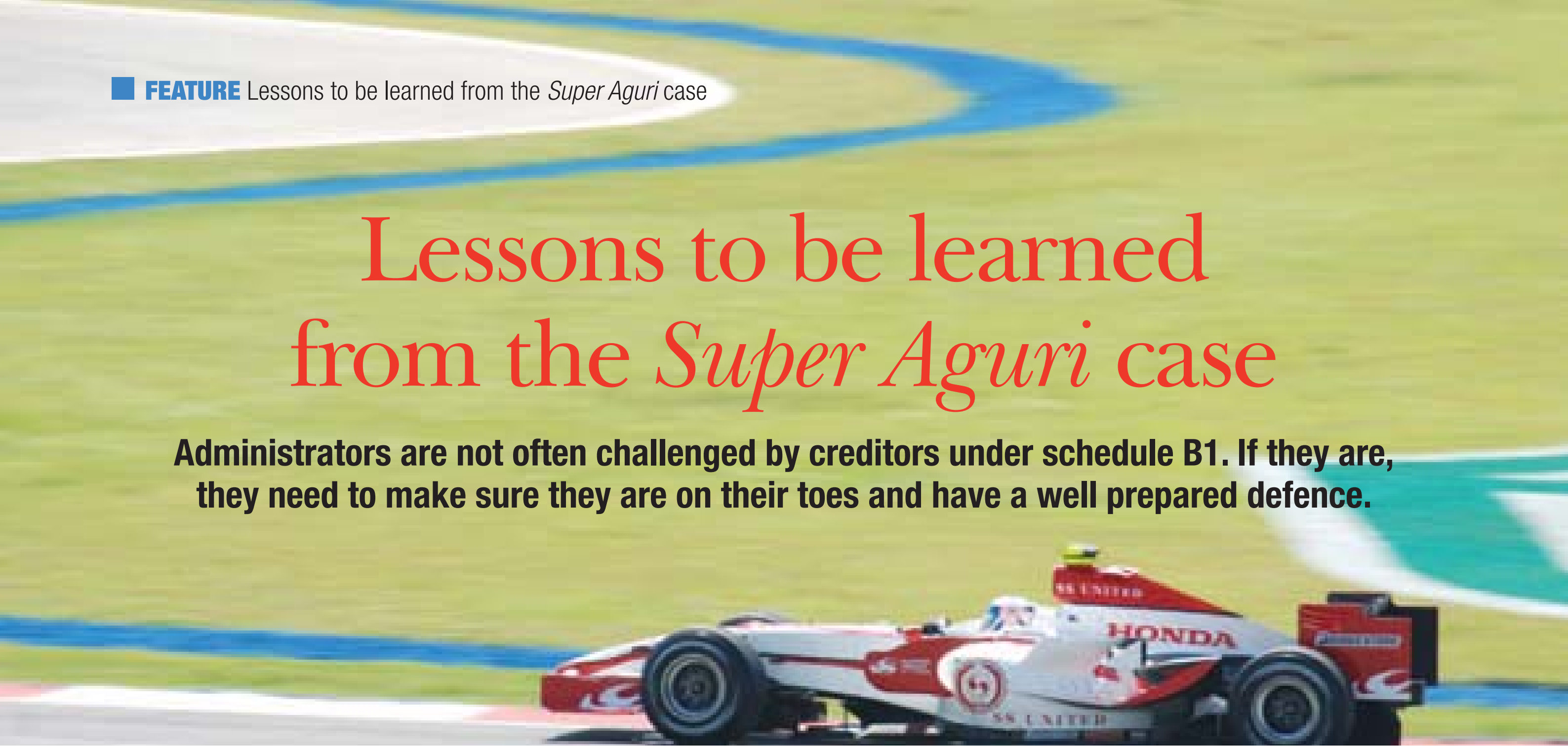
Implications

The CA decision is a further example of courts adopting a commercial approach when interpreting commercial instruments (see, for example, *Re Sigma Finance Corporation* [2009] UKSC 2 and *(1) Cattles Plc* v. *(2) Welcome Financial Services Limited and others* [2010] EWCA Civ 599). It provides welcome comfort for senior creditors who were concerned restructurings in which the same wording as that considered by the CA was used, could not proceed.

Giving effect to the commercial construction of clauses is important for all parties concerned in transactions. Lenders, both senior and junior, analyse the credit risk and price of a transaction according to what, among other things, they consider to be their priority and enforcement rights pursuant to the documents; a narrow interpretation of the clause would have run contrary to such considerations and left the junior lenders who were 'out of the money' able to delay or thwart a restructuring.

The case serves as another reminder to junior creditors that where they are 'out of the money' they will have limited, if any, say in the restructuring, and reassurance to senior creditors that it will be difficult to override a commercial construction of a clause, which does not flout common sense, by raising an argument on an ambiguous clause. It therefore continues to be extremely important that, where any junior rights are to be preserved or granted, the documents are clearly drafted. □

Claire Martin-Royle is a partner in Restructuring and Corporate Recovery Group at Taylor Wessing LLP.



Lessons to be learned from the *Super Aguri* case

Administrators are not often challenged by creditors under schedule B1. If they are, they need to make sure they are on their toes and have a well prepared defence.

On 26 October 2010, Mr Register Jaques handed down a well-reasoned judgment in the long running *Super Aguri* case[1] (*Super Aguri F1 Limited* (SAF)). In summary, the applicant administrators had applied to the court for an order under rule 2.106(6) of the Insolvency Rules 1986 (as amended) (IR1986) fixing their remuneration on a time/cost basis.

The case surrounded the failure and subsequent disposal of the Super Aguri Formula One racing team, which was the principal business of SAF. SAF's largest creditor was Honda Motor Company Limited (Honda) representing around 72 per cent of SAF's total indebtedness of £53 million.

Honda had expressed opposition to the appointment of the administrators because it did not believe that the stated statutory purpose[2] of the administration was achievable and that therefore all the administration would achieve was to increase costs. Honda wanted SAF to go into liquidation immediately. At the subsequent creditors' meeting, Honda got its wish and different insolvency practitioners were appointed to undertake the liquidation. Prior to the commencement of the liquidation, the administrators had negotiated a deal with a third party purchaser for part of SAF's business, which was ultimately completed by the liquidators.

This was the worst or best (depending upon your point of view) kind of hostile administration. The administrators were faced with 'an implacable opponent'[3]. This put an entirely different slant on the case from the administrators' perspective. The full ambit of creditors' rights under the Insolvency Act was available to Honda and it could afford to use them. The case raises a number of interesting legal, professional and practical issues that will sound in other cases.

Get your retaliation in first

As preliminary points, counsel for the liquidators submitted firstly that the administrators should not have been appointed and, secondly, he criticised the administrators' approach to the administration.

In summary, his contention in support of the first point was that the appointment was made without consulting Honda, SAF's largest creditor, and further, that the directors did not follow Honda's wishes that SAF should proceed immediately into creditors' voluntary liquidation. His third contention was that the directors did not seek directions of the court before proceeding with the appointment.

In support of his second contention, he submitted that administrators when appointed should (1) prepare their proposals for submission to the creditors, (2) convene a meeting of the creditors to consider those proposals and (3) embark on their tasks as administrators. He contended the administrators embarked on the second and third tasks in reverse order. In summary, he stated that the case was 'exceptional' as the administrator 'embarked on a course of his own against the known wishes of the majority stakeholder and without the permission of the court'.

Both contentions were rejected by Mr Registrar Jaques on the simple basis there is no duty on the directors to consult with creditors before appointment or apply for directions; equally the administrators are not obliged to convene a meeting of creditors before they embark on their duties as administrators.

> "Counsel for the liquidators set out ten reasons as to why the administrators' bills and supporting narratives did not comply with the Practice Statement[5]."

Apparently, Honda had threatened court action but had not followed through. There are a number of paragraphs in schedule B1 of the Insolvency Act 1986 (IA 1986) that may have been relevant to Honda's position. Paragraph 74 is the most all-embracing and gives a creditor the right to apply to the court where it believes an administrator is acting or has acted so as to harm the interests of a creditor unfairly or proposes to act in a way that would unfairly harm the interests of a creditor.

One of the remedies is that the court can provide for the appointment of the administrators to cease. This is similar to paragraph 81 but under paragraph 81, the applicant must allege an improper motive. Under paragraph 88, the court may remove an administrator from office (but the administration and the office of administrator would continue in being).

What flows from this is that none of Honda's contentions in relation to the appointment of the administrators or conduct of the administrators would be relevant to the application to fix the administrators' remuneration. As Mr Registrar Jaques said[4] '…absent any attack on the applicants' [administrators'] professional integrity or bona fides [which was not a point advanced by the liquidators] it is not for me, sitting in this court, to go behind the applicants' signed statement confirming that in their opinion it was reasonably likely that the purpose of the administration would be achieved.' It follows therefore that aggrieved parties should not leave their criticisms of the administrators' appointment or strategy until the hearing to determine remuneration and should act quickly and seek redress at an early stage.

Evidence – choose your witness

Counsel for the liquidators set out ten reasons as to why the administrators' bills and supporting narratives did not comply with the Practice Statement[5]. The Practice Statement (which is supplemental to IA1986 and IR1986 and Statement of Insolvency Practice 9) is intended to ensure that the remuneration of an appointee, which is fixed by the court, is fair, reasonable and commensurate with the work undertaken. Interestingly in this case, Mr Registrar Jaques contrasted what was required on an *ex parte* hearing and what was required on an *inter partes* hearing. He said that on an *ex parte* hearing, 'it is important that the written evidence addresses all of the [required] matters'[6]. In this case he said that any failure to address all the relevant matters was less important because any gaps could be covered by oral evidence. He took the view that the documentation submitted together with the oral evidence did in fact cover all prescribed matters and enabled him to fix the administrators' remuneration.

This is a fair point but it is dependent on the nature and quality of evidence given by the relevant witness or witnesses. In circumstances where you have a hostile creditor it may be prudent to ensure all the prescribed points are dealt with to cover the risk that there may be issues with the oral evidence. It may even be worth engaging a legal costs' draftsman to assist.

In this case, the liquidators provided no written evidence whatsoever. The registrar was clearly expecting a reasoned strategic analysis of where the administrators, in their submission, went wrong and how if they had acted differently the outcome for Honda, as the major creditor, would have been enhanced.

In terms of oral evidence, one of the administrators gave evidence and was extensively cross examined. He was described as 'an impressive witness, a professional, who was dealing with a matter that fell within the scope of his professional expertise.'[7] Interestingly, the liquidators chose to field the solicitor representing them and Honda. This approach was not commended by the registrar.

Clearly what is required is a fairly scientific comparison of how the case should have been conducted as opposed to how it was conducted so that empirically the financial impact can be shown. That has then to be bolstered by cogent and credible oral evidence justifying the alternative strategy and outcome.

Rolls Royce or not

The administrators were particularly criticised by the liquidators in relation to their work in preparation for the holding of the creditors' meeting and for doing it in a 'Rolls Royce' fashion, which they said was unnecessary and excessive. This raises an important practical point. The registrar allowed the administrators' remuneration here even though it was agreed on all sides that the sums expended were high. The rationale behind the decision was the registrar's view that the cause of high expenditure was *not* the administrators'

profligacy but Honda's hostility. Consequently, where office-holders are faced with a hostile, well funded creditor they are entitled to spend extra time both to demonstrate their case to the other creditors and to ensure the protection of their professional reputations.

Who's on the ticket?

The work of three office-holders, one director and one senior manager, accounted for 74 per cent of the fees claimed. Forty per cent of the fees claimed were attributable to the office-holders themselves. The liquidators were of the view it was unreasonable to have three office-holders and for two of the office-holders, rather than one, attending to most matters.

There was extensive cross examination of the lead administrator on this point; his justification was once again the hostility of Honda and its advisors and the need, from a risk management perspective, to put in place safeguards to minimise any criticisms of their actions. The registrar accepted this approach. Obviously on the larger cases (for example *Lehman Brothers* where there are four administrators) the size of the case can dictate the number of office-holders. But even where the case is relatively small, additional office-holders can be justified where there are particular circumstances.

Cabletel[8] and 'the standard administration'

Cabletel was the case heard by Mr Registrar Baister that led to the production of the Practice Statement referred to above. Much of the criticism levelled at the administrators' costs was based on the contention that the administration of SAF was just a 'standard administration' to which no special considerations applied. The registrar roundly rejected this contention and this determination pervaded his decisions against the liquidators' other contentions. He said that this case could in no way be described as a 'standard administration [as] it was conducted in an atmosphere akin to trench warfare, [where] the hostile party being Honda, did not brook any opposition to its wishes and the object of its hostility [was] the [administrators]…'[9].

In *Cabletel*, of course, the boot was on the other foot. In that case, Mr Registrar Baister reduced the administrators' fees by over nearly 70 per cent for a variety of reasons. *Cabletel* was a standard administration that had been considerably over-managed. Mr Registrar Jaques did adopt the principles set down by Mr Registrar Baister and did reduce the administrators' fees in certain areas but the only reductions were minor (less than five per cent) and in the context of the overall application. One area where the registrar did make a reduction was in relation to legal fees for advice in relation to the validity of Honda's security where Honda had conceded that it did not hold a floating charge that would affect their appointment of administrators.

On the whole, however, the registrar rejected the liquidators' other contentions in relation to the number of staff involved and duplication. In relation to charging for secretarial, administrative and cashiering services, the practice from the *Cabletel* case and the Practice Statement is not to show these charges separately (unless there are, for example, exceptional amounts of work in these categories) and then, where they are charged separately, to set out why they have been charged for separately and to confirm that such work has not also been charged for in the hourly rates of the office-holders and their professional staff. In this case, the charges for secretarial, administrative and cashiering services were shown separately and, it appears, no written explanation was given as to why this was the case. In this case it was clear that the time spent on secretarial, administrative and cashiering was not exceptional but the administrators still chose to show it separately. Under cross-examination by the liquidators' counsel, the reason became clear. To do otherwise would be unfair and would lead to a 'total distortion' of the position. In this case, as we have seen above, 74 per cent of the total fees were attributable to three office-holders and their senior staff and the administrators' position was that to assimilate administrative time into other charge out rates would therefore be unfair. The registrar found the administrators' explanation 'both logical and convincing'[10] and allowed the costs in full.

So there was a clear deviation from the *Cabletel* case. What the administrators did was to say that it was fairer to creditors to charge the secretarial, administrative and cashiering time separately at £16,500 than to include a charge for these services within the hourly rates that, in this case, would have made a major impact on the overall figure claimed. This approach commended itself to the Registrar. He was more than »

> "In the context of an application for remuneration, one of the main areas that let the liquidators down was that they filed no written evidence."

happy to distinguish this case from *Cabletel* for the reasons already stated. The broader question is whether, even in the standard cases, it is fairer that these charges are shown separately and whether there is a case for reform[11].

In summary

The administrators were awarded £241,843.46 of the £253,348 claimed[12]. This is a significant award when compared with the £75,000 open offer made by the liquidators a week before they received notice of the application. Tactically, Honda achieved little by its interventions. Their chosen liquidators ended up completing the deal negotiated by the administrators.

Ultimately there are many lessons in this case for the aggrieved creditor. The first is if you believe you have a case to challenge an administrator's actions – then make it; do not expect the court to be sympathetic to your concerns at the end of the administration. The same is true if you have an alternative strategy from the one followed by the administrators.

In the context of an application for remuneration, one of the main areas that let the liquidators down was that they filed no written evidence. It is also quite clear what kind of evidence the registrar was expecting to see. Had the liquidators been able to put together a reasoned case as to why what the administrators had done could have been done differently and/or more cheaply, then the result would undoubtedly have been different. Equally had one of the liquidators given evidence in support of that case, rather than relying on their solicitor, the weight attached to the administrators' evidence may have been different.

There are many ways in which creditors can keep administrators on their toes. Schedule B1 was designed to encourage creditor participation in the process. Sadly, the provisions are little used so administrators that do abuse their position are rarely challenged. In this case, the administrators stood firm in the face of a powerful adversary and were vindicated.

> "The work of three office-holders, one director and one senior manager, accounted for 74 per cent of the fees claimed."

1 Long and Others (acting as the Joint Administrators of *Super Aguri F1 Limited*) v. *Turner and Kinlan* (acting as the Joint Liquidators of *Super Aguri F1 Limited* (Chancery Division 3656 of 2008))

2 In this case schedule B1 Insolvency Act 1986 paragraph 3(1) achieving a better result for the company's creditors as a whole than would be likely if the company were wound up

3 Mr Registrar Jaques paragraph 41

4 Paragraph 26

5 Practice Statement: *The Fixing and Approval of the Remuneration of Appointees* [2004] BCC 912

6 Paragraph 28

7 Paragraph 30

8 *Re Cabletel Installations Limited* (In Liquidation) [2005] BPIR 28

9 Paragraph 40

10 Paragraph 53

11 The Institute of Chartered Accountants in England and Wales recently published a consultation on revised forms of Statements of Insolvency Practice 7 and 9. The proposals substantially shorten the SIPs by removing the majority of legal and technical references and are drafted on a more principles-based approach. Comments were invited by 1 December 2010

12 It appears that in the application the administrators claimed £16,499 as part of their remuneration, which was in fact the fees of their solicitors, Hammonds.

Ian G Williams is Counsel with Bryan Cave's London office.

50th anniversary of the IPA

Colin Bird, former president of R3, outlines the milestones in the organisation's history.

The IPA celebrates a noteworthy milestone this year – the 50th anniversary of its formation as a discussion group of insolvency practitioners. In 1961, insolvency was conducted by a few specialist practitioners who thought it would be a good idea to form a discussion group as the accountancy bodies had left the insolvency business behind and did not provide much, if any, support. The Discussion Group of Accountants Specialising in Insolvency was formed under the leadership of Bob Hellyer, a well known IP of the day. Nick Milner became the IPA's general secretary for many years.

The early years

Of course the discussion group was not only a good source of technical material (early members believed that technical knowledge should be shared – the first of many innovative steps) but also a good forum for social interaction. As a result, the annual conference was born, with the help of many years' sterling work by Malcolm Cork and Lindsey Denny. The recession in the mid 1970s spawned many more practitioners and the discussion group needed beefing up. Thus the IPA was incorporated in 1977 to continue the work.

The presidents of the IPA over its 50 years are a roll call of distinguished professionals; that so many leaders of this business gave up their time to build this profession is a mark of the IPA's success.

> "The presidents of the IPA over its 50 years are a roll call of distinguished professionals."

Introduction of a code of ethics and qualifications

It was during the late 1970s that two major innovations were introduced: the first was the introduction of insolvency-specific professional conduct and ethics guidance and the second was the introduction of professional examinations leading to membership. The IPA had led the way, and the examinations later became the basis of the profession-wide Joint Insolvency Examination, which is now the standard qualification to become an insolvency practitioner.

The industrial recession of the early 1980s brought another expansion in the ranks of specialist professionals and created additional demand across the country. It also brought to light abuses of the insolvency rules – some of which attracted the attention of Parliament. The clamour for a review of insolvency law and practice led to the Insolvency Act 1986 that provided, for the first time, a statutory authorisation regime for practitioners in which the IPA became an RPB (some would argue that it should have been the only one – a debate that rages even today!).

The birth of SPI

In the late 1980s there were some who could see a distinct advantage in separating the industry's regulatory activities from the other professional activities, such as representing IPs, technical support and training. Another driver was the need to create a unified profession. Led by Mark Homan and Ian Bond, the IPA and other bodies developed an approach to 'hive down' some of their non-regulatory insolvency activities into a new body that could represent the whole profession and run training and technical support; developing standards that could then be promulgated by each RPB, thus unifying the profession. After considerable discussions and a leap of faith by all, the Society of Practitioners of Insolvency (SPI), now R3, was born. Ian Bond was appointed president of SPI as well as the IPA, and served two terms to ensure that the bodies worked closely together.

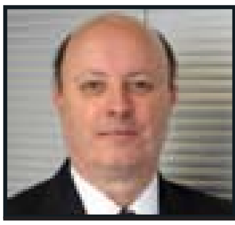
Further developments

Innovation continued at the IPA – the development of the CPI and CPPI examinations for non-licensed professionals; the voluntary regulation of fixed charge receivers; the development of standards for the debt management industry; and the appointment of Peter Joyce, previous agency chief executive of The Insolvency Service, as director general. In addition the regulation of practitioners has developed to focus on outcomes for creditors, for which much credit goes to the IPA's second general secretary and CEO Nick Sabin. David Kerr, the current CEO, is taking on the challenge of handling current developments in regulation, including the recent report by the OFT. The number of members and students has grown significantly over the last two years, and the IPA enters its 50th year in good shape to tackle the challenges ahead.

There is always the possibility that the profession will be faced with the threat of having separate regulation thrust upon it. Some IPs have wished for this in the past but, in my view, they should be careful what they wish for! The profession needs to continue to create and live up to the highest possible professional standards – and deal effectively with those who fall short. In other words, it needs to demonstrate that the present system of delegated statutory regulation works effectively.

The IPA has been at the forefront of developments in the profession for the last half century – not just looking after its members and their needs but promoting change where necessary in the public interest. As the body of specialists in this field (just as it was 50 years ago) the IPA will no doubt continue to do so.

> "The IPA has been at the forefront of developments in the profession for the last half century."



Colin Bird is a past president of R3 and IPA, and is currently chairman of Tawa plc.

Online filing and insolvency

Jim Harra explains the requirement for IPs to file online and outlines their responsibilities.

Recent amendments to the corporation tax regulations, which exempt some insolvent companies from the need to file their company tax returns online, are a result of our ongoing dialogue with R3's technical group. These changes, which came into effect from 4 January 2011, were outlined in an earlier article (*RECOVERY*, summer 2008, p29). This article explains in more detail the wider online filing implications for individuals and businesses subject to insolvency proceedings.

Online filing

HMRC has been implementing online filing for returns and the electronic payment of tax. The following are normally required to submit accounts, returns and other forms online to HMRC, in various capacities.

VAT-registered businesses

From 1 April 2010, VAT-registered businesses that (1) have a turnover of £100,000 or more (ex VAT) and (2) those, regardless of their turnover, who registered or should have registered for VAT on or after 1 April 2010, must file their VAT return online and pay electronically. They can file online using HMRC's free online filing service or a commercial software product.

Currently, all other businesses registered for VAT before 1 April 2010 with a turnover of less than £100,000 can continue to file their VAT returns on paper and pay by other methods. However, as ministers have now decided that these businesses will also be required to file online (and pay electronically) in 2012, we strongly recommend that they switch to online filing well before then. Benefits of using the VAT online service include a longer period to file the return and pay, automatic calculation of some return figures and immediate acknowledgment of receipt.

Corporation tax – companies

From 1 April 2011, companies that file a company tax return for an accounting period ending after 31 March 2010 must do so online and make payments electronically. For most companies, the accounts and computations in the return must be sent in a data format called inline Extensible Business Reporting Language (iXBRL).

HMRC provides free software, designed for companies with less complex tax affairs, which includes templates to submit accounts and computations in the correct iXBRL format. Other companies and their agents can choose from a range of alternative software packages and managed services that are available from commercial suppliers.

Details of compatible software for all HMRC's online services can be found on our website (see box opposite).

PAYE – employers

Employers must file their PAYE Employer Annual Return (forms P35 and P14s) online by 19 May each year. Since 6 April 2009, employers with 50 or more employees have also been required to file their employee starter and leaver forms P45 and P46 online, while employers with fewer than 50 employees will be required to do the same from 6 April 2011.

Although only large employers (those with 250 or more employees) are required to pay electronically, we recommend that all employers make payments to HMRC in this way. Paying electronically is safe, convenient and secure, provides certainty about when payments will be received and avoids postal costs and delays.

You can find more details about paying PAYE and other taxes electronically on our website, including information about which methods constitute electronic payment.

> "The regulations governing compulsory online filing of company tax returns now contain specific exemptions for insolvent companies."

Income Tax Self Assessment (ITSA)

There is no statutory requirement to file Income Tax Self Assessment (ITSA) returns online. However, HMRC recommends that people filing an ITSA return do so online and pay any tax due electronically. Around three-quarters of returns are now filed online, with the customers concerned being able to take advantage of a number of service benefits, including automatic tax calculations and quicker repayments.

Insolvency

Insolvency affects the requirement to file online and make payments electronically in a number of different ways. It affects each of the categories mentioned above in the following ways.

VAT

The VAT online filing legislation, effective since 1 December 2009, specifically exempts VAT-registered businesses from the requirement to file their VAT returns online and make payments electronically if they are subject to insolvency procedures.

When HMRC receives notification of insolvency proceedings in respect of a VAT business that is required to file online, we will arrange for future VAT returns to be issued on paper. However, some types of insolvent business may continue to file online, if they wish to do so.

Businesses in administration, subject to a voluntary arrangement or Scottish trust deeds, can file online if they want to, although the administrator will need to know the business's login details to be able to access the VAT online service.

Mandated VAT businesses, which are subject to bankruptcy proceedings, sequestrations, liquidations or administrative receivership, are not able to file VAT returns online. The IP must submit any future returns that are due on paper.

Corporation tax

The regulations governing compulsory online filing of company tax returns now contain specific exemptions for insolvent companies. A company does not have to deliver its company tax return online while it:

- is subject to a winding-up order;
- is in administration;
- is in administrative receivership;
- has a liquidator acting in a creditors' voluntary winding up;
- has a supervisor carrying out functions in relation to a company voluntary arrangement;
- has a compromise or arrangement in effect.

The regulations also exempt limited liability partnerships that deliver company tax returns from filing online, where a liquidator is appointed or the partnership is the subject of a winding-up order by the court.

However, all exempt companies and partnerships are still required to pay any corporation tax, late payment interest or late filing penalties electronically.

Members' voluntary liquidations are not included in the statutory exemptions. From April 2011, in common with other solvent companies, they must file their company tax returns for accounting periods ending after 31 March 2010 online if they receive a notice to deliver a company tax return. However, HMRC will not normally issue a notice to such a company, provided the IP tells us that the company is in liquidation. Instead, HMRC will seek to agree the liabilities during the period of winding up by reference to the documentation prepared by the liquidator, unless there is specific reason to require a company to file a full tax return. This means that HMRC will be able to continue our established practice of accepting the financial statements produced by IPs so that we can agree any corporation tax liability during the winding-up period.

PAYE

There is no statutory exemption from online filing for insolvent employers. HMRC therefore expects any PAYE Employer Annual Return (forms P35 and P14s) and employee starter and leaver forms P45 and P46, which are due from insolvent employers, to be filed online.

> "There is no statutory exemption from PAYE online filing for insolvent employers."

In some administration, administrative receivership, liquidation and bankruptcy cases, a new PAYE scheme will be set up to separate liabilities and payments for the pre- and post-appointment periods. A separate return will need to be submitted for each period using the pre- and post-appointment PAYE scheme reference numbers.

IPs have no formal responsibility for making any returns prior to their appointment. However, in practice, HMRC relies very heavily on co-operation from IPs to submit any outstanding returns, as this helps us to establish any claim in the insolvency. The HMRC's Insolvency Claims Handling Unit (see box below) is available to assist IPs who have questions about the procedural aspects of establishing insolvency claims.

When a voluntary arrangement is approved, a new PAYE scheme is also created and separate returns are needed for the pre- and post-approval periods. It is usually a condition of approval that the employer submits any outstanding returns, with the IP having no formal responsibility to do this.

To file returns and forms using the PAYE online service, the IP must either:

- agree access to the insolvent employer's existing user ID and password;
- register as a PAYE agent and obtain an HMRC agent ID and then Register and Enrol (R&E) as a PAYE agent;
- R&E as the insolvent employer for the pre- and/or post-insolvency periods, taking care to differentiate between the respective user IDs and activation codes for each period.

The Online Services Helpdesk (see box below) is available to assist IPs with the practical aspects of filing PAYE returns and forms online.

Income Tax Self Assessment (ITSA)

There is no statutory requirement for self assessment income tax returns to be filed online or for payments of amounts due to be made electronically. As a result, there is no need for a specific online filing exemption for insolvent individuals and partnerships.

In cases of bankruptcies, sequestrations, voluntary arrangements and trust deeds the taxpayer, and not his insolvency representative, remains responsible for making a return for the tax year in which the relevant insolvency order is made. However, an IP may file the return on the taxpayer's behalf. Only one return is required for the entire year to establish the pre- and post-order liabilities and this return must be filed on paper.

Our 'soft landing' approach

HMRC has so far, adopted a 'soft landing' approach to imposing penalties after mandation. We recognise that not all customers will get everything right first time and it doesn't make sense to penalise those who have made a genuine effort to comply with the online requirements.

Our soft landing approach consists of HMRC being flexible about issuing penalties for failure to file online due to unforeseen IT difficulties for a period after mandation, and providing customers with lots of support to help them make the transition successfully. We will be adopting this approach again during the implementation of online filing for company tax returns.

For the very latest news and up-to-date information about using HMRC online services, please visit our website (see box below).

PAYE contact information

Insolvency Claims Handling Unit: Tel. 0191 225 7852
Online services helpdesk: Tel. 0845 6055 999

General advice for IPs
HMRC online services: **www.hmrc.gov.uk**

Jim Harra is senior responsible officer for HMRC's Business Tax Programme.

Effective auctioning can ensure IPs maximise creditors' returns

Paul Thompson outlines the benefits of auctioning property.

As inflationary pressures grow, fuel prices soar and interest rates come under scrutiny, it is inevitable that insolvency practitioners will see an increase in their workload.

The property sector is clearly directly impacted by changes in the borrowing rate, which, in the case of companies, will arise through increases in the cost of raw materials, bad debts and costs of borrowing that all place an increased burden on revenues and cash flows. Similarly, households feel the pain through difficulties ranging from increased mortgage repayments, through to missed credit card repayments.

I think it is fair to say that an element of the assets of many companies will be their property, whether in the form of offices, premises, warehouses, factories, residential portfolios or, in the case of construction companies, on-going developments, completed or otherwise.

Because property is such a key factor, the approach taken by the insolvency practitioner to crystallise the value of these assets is important.

When I speak to insolvency practitioners, the same concerns emerge when selling the asset, namely the speed of sale, the value achieved, the ability to sell without warranty or obligation, as well as the need to avoid protracted negotiations with potential purchasers.

The answer to each of these concerns is simple – auction it!

In 2010, over 1,760 properties were placed in auction by insolvency practitioners, with a total sales value in excess of £294 million, which, incidentally, is a 73 per cent increase on 2009.

So let's look at the key points of auctioning.

Speed of sale

IPs generally do not have the luxury of waiting for improved economic conditions and the value of any property asset can bleed away either through the IP incurring costs of management, or through simple vandalism. Therefore the speed of the sale is important, so with a standard completion time of 20 working days from exchange and, in Pugh & Company's case, 21 auctions around the country per year, the ability to dispose of a property quickly is always available.

Certainty

Contracts are exchanged on the day of the auction, supported by a ten per cent non-refundable deposit generating an early source of funding to any insolvency case.

Control of the process and fixed timescales

Another key concern to IPs is that other routes to market can expose the IP to protracted negotiations with potential buyers who flit from deal to deal, in their own time scales, as the IP covers costs of insurance, theft, damage and potentially expensive advice from consultants. In auctions, the terms of the sale are drafted at the outset by the IP's legal team, which provides the format to detail the 'sold as seen' element of the sale. These terms are non-negotiable and are provided prior to any auction for interested parties to view and carry out any necessary due diligence, but with the backstop date of the auction ensuring the market is 'focused' on the sale. It's amazing how many times I speak to clients where the potential buyer has moved away from the deal. When the same client announces an impending auction they quickly reappear.

> "We see numerous examples of very positive sales figures across all manner of lots and values."

Accountability

A significant factor for IPs is the accountability of any sale process. Again, auctions provide the answer. As a leading national auctioneer, we ensure exposure to both the local and national market, plus an extensive database of buyers. This is a highly significant factor when facing those prickly creditors' meetings. Additionally, if the auctioneer has acted diligently, the price achieved at auction is, *de facto*, the true market value of the property.

Value

Clients and creditors need to see value not only in terms of sales value for the asset, but also in terms of the costs of procuring the sale. With respect to value, dependent upon the auctioneer providing prudent valuation advice at the outset, auctions create a combative bidding scenario, which, coupled with exposure to the wider market, ensures realisations are maximised. In many cases the end result can significantly exceed the reserve, for example, we have all seen the *Only Fools and Horses* auction episode; well, we sold a lot guided at £1.7 million for £4.8 million. Needless to say we had a very happy client, and we see numerous examples of very positive sales figures across all manner of lots and values.

Cost

From the point of view of costs, auctions are a relatively inexpensive route in that we neither deplete the earth's resources in producing large quantities of expensive sales particulars, nor do we operate on a 'running meter' basis, with no timescales in place. Fees are taken from the deposit received on the day, thus reducing the administrative burden, and our sales commission is wholly dependent on achieving a successful sale. This format suits all parties to an insolvency case, whether they be the funder, the borrower or the creditors – and therefore, the IP.

So, in summary, if you are looking for speed, certainty, maximised sales value, no warranties and a robust accountable sales process, then auctions should be the top of your list.

Paul Thompson is a director at Pugh & Company.

Economic Snapshot: Eastern Region

The East of England has one of the most stable regional economies in the UK but is it strong enough to survive the economic challenges ahead? Laurence Weeks reports.

The economic doom and gloom that has dominated East Anglia over the past two years has begun to give way to a more positive outlook for the local economy.

Notable is the fact that, even when the national economy was in recession, the East of England still had one of the highest employment rates among the English regions and its businesses invested more in research and development than those in any other region.

Gross value added

Furthermore, the Eastern Region is responsible for nine per cent of the UK's gross value added (GVA) and its productivity was a percentage point higher than the UK rate in 2008, the third highest of the English regions. In 2009, one in five employee jobs were in the wholesale and retail sector – higher than any other region. The East of England was also responsible for 13 per cent of the UK's agriculture and fishing GVA, which is the highest proportion after Scotland and similar to the South West.

But while the economic foundation for the Eastern Region is comparatively sound, there is, without doubt, a long way to go before we see a return to the level of economic prosperity enjoyed before the onslaught of the recession. With heavy public sector cuts already being implemented alongside the squeeze in Time to Pay, VAT rises and potential increases in the interest rates, the question is whether the East of England is strong enough to overcome these economic challenges.

> "In Suffolk alone, 73,000 people work in the public sector, which is over a quarter of the county's workforce. In Cambridge, 40 per cent of the workforce is employed in the public sector."

The level of business confidence

On the corporate front, there is certainly an air of positivity emanating from local businesses. Accountancy firm Baker Tilly's Outlook 2011 survey, conducted by YouGov, highlights that small and medium sized enterprises (SMEs) in the East of England are becoming increasingly confident of their overall prospects for the next twelve months, with only one in five (21 per cent) negative about their organisation's future.

Tellingly, however, only 37 per cent of SMEs in the region are positive about the outlook for their sector, and less than one in five (19 per cent) has confidence in the East Anglia regional economy.

Particular concerns for the year ahead include a potential downturn in sales revenues, competition from low-cost competitors, the effect of the VAT rise to 20 per cent, increased costs of goods and services and the growing uncertainty and burden of taxation.

It is therefore fairly evident that while local businesses appear positive in what they can control and manage themselves, they are far less optimistic regarding factors that they deem out of their control.

These concerns are echoed by R3's own research among its members in the Eastern Region, who also include a decrease in consumer spending and a squeeze of Time to Pay as potential developments most likely to have a considerable negative impact on businesses in 2011.

Personal insolvency

Moving on to personal insolvency, the national picture over the last few years has been dire. The number of individuals entering into formal insolvency procedures has increased by 350 per cent – from 29,528 individuals becoming insolvent in 2000 to over 134,000 individuals entering into insolvency in 2009. However, this is not necessarily an accurate reflection of what has been happening in East Anglia.

There have been a few constituencies with high rates of personal insolvency, such as Braintree, South West Norfolk and Great Yarmouth but, generally, the East of England has not suffered as greatly as many other regions across the UK.

However, the outlook going forward is more uncertain. The coalition government's intention to rid the public sector of over half a million jobs remains a deep concern to those of us in the East of England. A sizeable percentage of individuals in the region are public sector employees. In Suffolk alone, 73,000 people work in the public sector, which is over a quarter of the county's workforce. In Cambridge, 40 per cent of the workforce is employed in the public sector.

Added to that, R3 research shows that 32 per cent of people in the East of England struggle to make it to payday. Factors such as inflation associated with basic living costs and potential rises in interest rates will not make this monthly struggle any easier. Accordingly, we may have many individuals teetering on the edge financially.

But despite all the economic doom and gloom, it remains our view that at both a corporate and personal level the East of England is better placed than most other regions to survive the challenges of the year ahead. The next twelve months or so will, most definitely, be tough, but the signs are already there for Eastern Region recovery.

Laurence Weeks is the R3 Regional Chair for the Eastern Region and a partner at Taylor Vinters.

Editor recovery@r3.org.uk | Recruitment recovery@r3.org.uk/recruitment

R3 contacts

Staff R3, 8th Floor, 120 Aldersgate Street, London EC1A 4JQ
Tel: 020 7566 4200 **Fax:** 020 7566 4224 **Website:** www.r3.org.uk

President .... Steven Law *e-mail:* steven.law@ensors.co.uk
Vice-president .... Frances Coulson *e-mail:* fcoulson@moonbeever.com

Administration

Chief Executive Officer .... Graham Rumney *e-mail:* grumney@r3.org.uk
Executive Assistant .... Gabriella Pizzichemi *e-mail:* gpizzichemi@r3.org.uk
HR and Office Manager .... Alan Roberts *e-mail:* aroberts@r3.org.uk
Assistant Office Manager .... Tasneem Choudhury *e-mail:* tchoudhury@r3.org.uk
Regional Administrator .... Sara Calvert *e-mail:* scalvert@r3.org.uk

Finance

Finance Manager .... Ryan Porter *e-mail:* rporter@r3.org.uk
Assistant Finance Manager .... Alex Coles *e-mail:* acoles@r3.org.uk
Accounts Administrator .... Chris Shann *e-mail:* cshann@r3.org.uk

Membership & Marketing

Head of Marketing & Member Services .... Cynthia Matthews *e-mail:* cmatthews@r3.org.uk
Marketing Executive .... Helena Douglas *e-mail:* hdouglas@r3.org.uk
Membership Marketing Assistant .... Katherine Bassett *e-mail:* kbassett@r3.org.uk
Regional Administrator .... Rinisha Bhagat *e-mail:* rbhagat@r3.org.uk
Database & IT Administrator .... Samit Vadgama *e-mail:* svadgama@r3.org.uk

Communications, Public Affairs and Policy

Director of Communications & Public Affairs .... Victoria Johnson *e-mail:* vjohnson@r3.org.uk
Communications Manager .... Will Black *e-mail:* wblack@r3.org.uk
Policy Manager .... Esme Harwood *e-mail:* eharwood@r3.org.uk
Communications Officer .... Addy Frederick *e-mail:* afrederick@r3.org.uk
External Communications Officer .... Charlotte Towerton *e-mail:* c.towerton@r3.org.uk
Public Affairs Officer .... Laura Harvey *e-mail:* lharvey@r3.org.uk

Small Practice Group

Small Practice Group Committee Support Executive .... Emma Lovell *e-mail:* elovell@r3.org.uk

Education, Courses and Conferences

(Tel: 020 7566 4234; Fax: 020 7566 4225)
Training Director .... David White *e-mail:* dwhite@r3.org.uk
Head of Courses and Conferences .... Angela Stannard *e-mail:* astannard@r3.org.uk
Courses and Conferences Organiser .... Natalie Harvey *e-mail:* nharvey@r3.org.uk
Courses and Conferences Producer .... Zoï Fletcher *e-mail:* zoi.fletcher@r3.org.uk
Courses and Conferences Co-ordinator .... May Ghaghda *e-mail:* mghaghda@r3.org.uk
Course Administration .... Maggie Dean *e-mail:* mdean@r3.org.uk
Course Bookings .... *e-mail:* courses@r3.org.uk

Technical

Technical Director .... John Francis *e-mail:* jfrancis@r3.org.uk

Committee Chairs

Constitution Adviser .... Deborah Gregory 020 7296 2000
Education, Courses and Conferences .... Jane Moriarty 020 7311 1000
General Technical Committee .... Giles Frampton 01752 690101
Membership and Member Services .... Lee Manning 020 7936 3000
Regional Communications Committee .... Chris Williams 01603 877540
Scottish Technical Committee .... Rachel Grant 0131 273 3771
Smaller Practices Group .... Frances Coulson 020 7637 0661

Regional Chairs

Eastern .... Laurence Weeks 01233 225 012
London & South East .... Alison Goldthorp 020 7606 8855
Midlands .... Matthew Hammond 0121 265 5000
North East .... Linda Farish 0191 256 9500
North West .... Matt Dunham 0161 953 6900
Northern Ireland .... Garth Calow 028 9024 5454
Scotland .... Judith Howson 0141 204 2800
Southern .... Nick Keitley 0845 415 000
South West & Wales .... Andrew Sheridan 0117 945 2000
Yorkshire .... Andrew Walker 0870 1500 100
Women's Group .... see www.r3.org.uk/womensgroup

Regional Representatives on the R3 Council

Eastern .... Chris Williams 01603 877540
London & South East .... Stephen Grant 01491 725544
Midlands .... James Nicholls 01743 453050
North East .... Jim James 0191 204 4000
North West .... David Gray 0161 831 8243
Northern Ireland .... Joan Houston 02890 443500
Scotland .... John Hall 0131 466 2877
Southern .... Julie Palmer 01202 786 560
South West & Wales .... Richard Hill 0117 905 4069
Yorkshire .... Robert Brown 0113 244 3121

Other Council Members

John Alexander, Mark Andrews, Elizabeth Bingham, Louise Brittain, Robert Brown, Malcolm Cohen, Patrick Ellward, Antony Fanshawe, Giles Frampton, Colin Haig, Brian Hamblin, Richard Heis, Gareth Limb, Lee Manning, Jane Moriarty, Peter Sargent, Frank Simms.

R3 membership categories

We continually strive to improve benefits for all members. Membership benefits across categories include:

- A copy of *RECOVERY* every quarter
- Attendance at regional meetings
- Priority bookings for R3 courses and most of its conferences
- Technical bulletins and releases
- Access to the members' section of the R3 website
- An invitation to the R3 annual conference
- Continuing professional education at discounted rates

Please see below for details of the different categories of membership:

Full members are invited to contribute to the development of insolvency, business recovery and turnaround professions at both local and national levels. Benefits include: use of the designatory letters MABRP and a certificate of membership, inclusion in the *R3 Directory* and a copy of it, membership of INSOL International.

Associate members are individuals who do not meet the requirements for full membership but work significantly within the business recovery sector.

New Professional (Student) members are individuals preparing to take the examination of the Joint Insolvency Examination Board (JIEB) or Certificate of Proficiency in Insolvency (CPI). Pass students of these exams are eligible to apply for full R3 membership.

New Professional (Networking) members are individuals who have recently joined their firm, and/or are new to the business recovery sector and wish to network with R3 members. This category receives electronic copies only via access to the R3 website.

Smith & Williamson boosts its director-led team

Anthony Spicer and Greg Palfrey have been appointed as joint Heads of Smith & Williamson's Restructuring & Recovery Services division (RRS). Anthony takes responsibility for the team based in the firm's head office in the City of London while Greg oversees the RRS teams across its seven regional offices.

Vivienne Oliver and Henry Shinners have both been promoted to director. Henry has been with the firm for the vast majority of his career, and some years ago, won the top prize for the JIEB exams. Vivienne joined Smith & Williamson in 2009 and has 20 years' experience in restructuring and recovery, including 18 years at Ernst & Young. She chairs the London R3 Women's Group.

Paul Wood has recently been recruited to the Bristol office as associate director, supporting clients across the South West. The firm expects to further develop its Bristol team in the coming year.

"Our core strength and focus lies in the mid-market and we believe the close involvement of our senior staff in case work enables us to obtain the best results for clients. These senior appointments demonstrate Smith & Williamson's commitment to provide a genuine director-led service with support from a very able team who collectively claim decades of experience," said Anthony Spicer.

Greg Palfrey added: "We expect there to be a rise in the number of businesses needing help to restructure in 2011 and so we are looking to build upon our network of regional offices to meet our clients' needs throughout the UK."

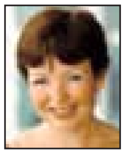
The firms' restructuring presence in Guildford is strengthened as David Blenkarn, who joined Smith & Williamson as a director two years ago, is now based there, working across the South East.

Smith & Williamson has recently been appointed to both NAMA panels. The firm's various teams from across the UK and Dublin will be working in conjunction with each other on NAMA instructions.

Greg Palfrey
02380 827631

Anthony Spicer
020 7131 4336

David Blenkarn
01483 407 100



Vivienne Oliver
020 7131 8259

Henry Shinners
020 7131 4339

Paul Wood
0117 376 2269

firstname.lastname@smith.williamson.co.uk

www.smith.williamson.co.uk/restructuring-and-recovery

Industry announcements

Bridge
BUSINESS RECOVERY

Senior Manager joins *Bridge Business Recovery*

Insolvency specialist Bridge Business Recovery (BBR) has strengthened its team with the appointment of insolvency expert Mike Reavill as a Senior Manager.

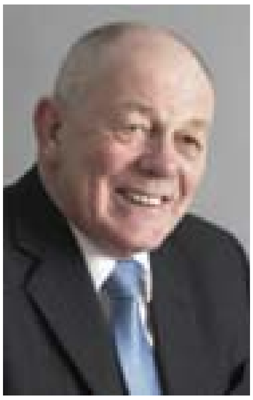
Mike joins Bridge from PricewaterhouseCoopers LLP, where until recently he worked in the Insolvency Management Team and, among other responsibilities oversaw cases relating to the failure of the Enron Corporation – the world's largest insolvency before Lehman Brothers.

Mike, who started his career in corporate banking with Barclays Bank, first got involved in the industry in the mid-1990s, quickly making a name for himself in the South East of England for his work in helping to turn around owner-managed businesses facing financial difficulties.

A big fan of American sports, particularly baseball, which he played in the UK National League for some 13 seasons, he will help drive forward the rapidly expanding insolvency team at Bridge.

Says Mike Reavill: *"I am absolutely delighted to be joining the team at Bridge Business Recovery. The firm has built an enviable reputation in recent years for its innovative work and I am planning on utilising my experience to help further strengthen that offering to clients."*

Colin Wiseman to be appointed head of business development



Wilkins Kennedy Restructuring and Recovery ("WKR&R") are delighted that Colin Wiseman will become head of business development on 1st May 2011 after Colin has stood down as managing partner of the firm. During Colin's time as managing partner the firm has seen a period of unprecedented growth and some of the best years of profit the firm has ever seen.

WKR&R are confident that this growth will be replicated in WKR&R. During his time as managing partner Colin has still been part of the WKR&R team, however, managing a £27m business has obviously kept him very busy leaving less time for WKR&R. Colin will also be involved in technical work offering his many years of his experience and technical knowledge to those cases where it is required.

Colin says *"I am looking forward to a return to being partner in charge of business development in WKR&R, seeing those contacts that I do not see often enough more frequently and catching up with those contacts that I have not seen at all for a while. I am aware these days it is all about reciprocation and as a £27m turnover practice we have lots of opportunities to refer work to others. I am also keen to convey that the knowledge and ability of those in WKR&R is first rate and probably under acknowledged in the marketplace."*

Keith Stevens managing partner of WKR&R says *"Having Colin back in the market focused on WKR&R will be great for Wilkins Kennedy and will be a great boost to our drive for growth."*

WILKINS • • KENNEDY
Chartered Accountants & Business Advisers

Advertisers' index

Supplement sponsor: BPP Professional Education

IBC = inside back cover, IFC = inside front cover, OBC = outside back cover.

PROFESSIONAL SERVICES

JLT

Insolvency Practitioners

Capital Providers

Professional Service Firms

Corporate Recovery Risks

Experience. Innovation. Partnerships.

For more information about our Insurance, Risk Management and Litigation Risk Management Services please contact:

Ed Brittain

Tel: +44 (0) 121 626 7821

Email: ed_brittain@jltgroup.com

JLT Specialty Limited (JLT). Lloyd's Broker. Authorised and Regulated by the Financial Services Authority. A member of the Jardine Lloyd Thompson Group. Registered Office: 6 Crutched Friars, London EC3N 2PH. Registered in England No. 01536540. VAT No. 244 2321 96.

mgrappraisals

CHARTERED SURVEYORS • VALUERS • AUCTIONEERS

Insolvency advertising services

Courts Advertising Limited

Tel: 01268 494140 Fax: 01268 544358

Leading insolvency advertising specialists. Bob Andrews, Media House, Christy Close, Southfields Business Park, Basildon, Essex SS15 6EA

Reynell STATUTORY ADVERTISING

Save time and money, call the specialists.

Contact Ewan Clydesdale on tel: 020 8527 6100, fax: 020 8531 8305, DX 38408 Highams Park or email: infostatads@tmpw.co.uk

TMP Worldwide inc. TMP Reynell (est. 1812)

Investigations

Lasker Investigations UK

Private and Commercial Investigators. Complete professional investigation service including, surveillance, de-bugging, tracing, asset location, due diligence and general enquiries. Discreet and confidential service.

Call 0800 197 9822 or +44(0)870 321 3999. Email info@lasker.co.uk
Lasker Investigations UK, 30 Borough High Street, London, SE1 1XU

Surveyors, auctioneers & valuers

Valuation & Realisation of Assets

Property, Plant and Machinery, Chattels, Inventory
Empire Auction & Valuations! Tel: 020 7419 5059

GVA Grimley

Solving client challenges across industries, through our 6 UK offices.

T: 08449 02 03 04 **www.gvagrimley.co.uk/corporaterecovery-properties**

JPS Chartered Surveyors

Worth House, Unit 32 Stanley Road, Whitefield, Manchester M45 8QX
Tel: 0161 767 8001 www.JPSsurveyors.co.uk

Food Industry, Catering or Hospitality Sector Case

Pro Auction leading auction specialist in chattel asset realisation, plant & machinery within the food processing catering & hospitality sectors.

Services to the IP nationwide • No fee based sales – private treaty, tender and auction • Valuation within 24 hours of instruction • Experienced, insured professional team • Full service offering – appraisal, sale, site clearance.

Mark Flynn T: 01761 414000
E: info@proauction.ltd.uk www.proauction.com

Wanted

Autex Graphic Machinery Ltd

Printing & finishing equipment for both home and export markets. Whole plants or single items.

Tel: 01273 814455 Fax: 01273 814499 **www.machineoffers.com**

To advertise in *RECOVERY*
call Brendan McGrath on 01491 826262
or e-mail brendan.mcgrath@groupgti.com

APPOINTMENTS

To advertise call Brendan McGrath on 01491 826262 or brendan.mcgrath@groupgticom

Personal Insolvency Examination

Certificate of Proficiency in Personal Insolvency

Do you specialise in **personal** insolvency? Searching for professional recognition? This is what you're looking for

CPPI – a significant milestone for those choosing a career in the specialist personal insolvency sector. It provides an opportunity for professional recognition at an equivalent level to the CPI*.

Both examinations are offered in multiple UK venues, including exams for the Scottish insolvency regime.

The focus of CPPI is on statutory forms of personal insolvency, but with an element of non-statutory debt solutions to ensure that specialists are able to give appropriate advice on the full range of solutions to insolvent debtors.

CPPI is well placed to equip you with the knowledge and understanding you need to carry out your professional duties competently and confidently on personal insolvency assignments.

For further information on CPPI or CPI, contact the IPA's Student Officer Maria Weemes on mariaw@ipa.uk.com or 020 7397 6400

[**SUBMIT YOUR ENTRY BY 5TH APRIL FOR JUNE 2011 SITTING**]

The IPA – insolvency examiner of choice

Insolvency Practitioners Association 1961 - 2011

[*The established Certificate of Proficiency in Insolvency is IPA's more general exam for personal and corporate insolvency professionals, and is widely acknowledged as an important intermediary level qualification, as well as excellent preparation for Joint Insolvency Examinations].

Interview with Chris Laughton

Chris Laughton, president of INSOL Europe, explains what the organisation does, his objectives for the year and how INSOL Europe can help UK IPs.

What does INSOL Europe do and how is that relevant to UK practitioners?

More and more restructuring and insolvency professionals throughout Europe are finding that they need to deal with financial distress across borders. Many businesses import or export, and people travel and acquire assets (and liabilities) outside their own jurisdiction. Within Europe (the rest of which is the UK's major trading partner by far) the European Insolvency Regulation applies directly to 26 of the 27 member states, but even Denmark (which opted out) and Switzerland (non-EU) work closely with their neighbours in this field.

INSOL Europe exists to promote the practice of restructuring and insolvency throughout Europe and one of its primary methodologies is networking between members.

For any practitioner who needs to solve a problem in another European jurisdiction, or has the opportunity to be asked to solve a UK problem for a foreign practitioner or client, INSOL Europe offers unparalleled access to like-minded professionals throughout our region of the world. INSOL Europe also promotes co-operation among non-IPs through its Judicial Wing, Lenders Group, Academic Forum, Turnaround Wing and committees, and to national and supranational organisations as well as to interested individuals.

There will be more opportunities for UK IPs in Europe not only as goods, services and people move increasingly across borders, but also because the UK has the most flexible and constructive insolvency regime in Europe. The best way, in my view, to seize those opportunities is to meet fellow professionals through INSOL Europe and establish professional relationships with them. Some 40 per cent of INSOL Europe's membership (currently 1,100) meets at its annual conference and as one of our (English) Council members puts it, 'You've got to network to get work'!

A key point is that most continental European IPs are small practitioners – even

the ones who deal with the largest cases. They are almost invariably lawyers and this is therefore an area of practice that is less dominated by major accounting and law firms than we might experience at home.

By the way, although it is actually a French association, the language for all INSOL Europe's activity is English and 18 per cent of its members are from the UK.

> "There will be more opportunities for UK IPs in Europe not only as goods, services and people move increasingly across borders, but also because the UK has the most flexible and constructive insolvency regime in Europe."

What are your objectives as president?

I want to see our profession communicating better with those with whom it comes into contact. Clearly, INSOL Europe as an association has a particular role to play in such communication, but I also want to encourage our members themselves to communicate better, whether with each other or in their daily professional lives. For me, therefore, an obvious step is to raise the profile of the profession and the association across Europe.

A particular project that will support my communication drive is the European Insolvency Case Register, a database of all the cases on the European Insolvency Regulation from the whole of the EU. There are a number of logistical and linguistic challenges, but we are confident of being able to launch the case register at INSOL Europe's annual conference in Venice on 22–25 September 2011. (By the way, I whole heartedly recommend the conference to anyone who even thinks they might have an interest in European cross-border restructuring and insolvency.)

At a personal level, my commitment to communication is I hope evident from my contributions to *RECOVERY* and *Eurofenix*, my apparently popular blog at *insolvencyblog.com* and, with colleagues' support, Mercer & Hole's Insolvency Issues website and other publications.

What are the strengths of INSOL Europe in mainland Europe?

As a collection of the professionals most interested in this area of law and practice across Europe, INSOL Europe is the natural focus of enquiry and dialogue for a range of interested bodies, from the European Commission to academics (who tend to be more influential in legal circles on the continent than we are used to in the UK). We have close relationships with the European Commission on matters pertaining to insolvency – they are interested in and supportive of the case register, we have a virtual office in Brussels monitoring relevant EC developments and we are increasingly involved in submissions to the Commission, currently, of course, focusing on the 2012 review of the European Insolvency Regulation.

INSOL Europe, like R3, is a member of INSOL International. Yes, I know it's » confusing to have two international organisations called INSOL, but they are quite separate. All members of R3 are automatically members of INSOL International (as indeed, all members of INSOL Europe are members of INSOL International) but only members of R3 who chose to join INSOL Europe participate in and pay for the services of INSOL Europe. I see that as one of the great strengths of INSOL Europe, that it is an entirely voluntary association of like minded people who want to work together to derive benefit from their association.

Are there threats or opportunities for UK IPs working in Europe?

As a UK IP I would say, wouldn't I, that we in this country have a great insolvency system and we use it well compared to many other jurisdictions. There are times when we can use English insolvency procedures for European businesses.

> A particular project that will support my communication drive is the European Insolvency Case Register, a database of all the cases on the European Insolvency Regulation from the whole of the EU.

COMI shifts or forum shopping (which, done properly, is an entirely appropriate use of the law) have been developed largely by UK IPs. I suspect this is partly because we are flexible in our approach, given the nature of our insolvency legislation. Of all practitioners in Europe, I suspect we have most to gain in terms of winning work.

The threat from practitioners from other countries practising here is, in reality, non-existent. And, just in case you are tempted, the last thing I recommend any UK IP trying without good local advice and plenty of experience, is to practise in mainland Europe. There is far more to be gained by concentrating on the part of the problem that you know well how to solve and getting a good local practitioner, whom you have got to know, to do the same on his or her side of the border.

It is a real opportunity to be able to source great local experts on the continent when you or a client needs such advice. I frequently call on co-operation partners, professional friends or just other INSOL Europe members to help with foreign matters that cross my desk – and they, similarly, call me.

Remember too that Europe goes quite a long way east. INSOL Europe is doing a lot of work in the Balkans, in the main eastern European countries of Poland, the Czech and Slovak Republics, Hungary, Romania and Bulgaria, as well as the Baltic states (where we have our eastern European committee conference

INSOL Europe Vienna 2010 Congress

in Tallinn in May) and, further afield, in Ukraine, Moldova and Russia. At this stage in some of the more far flung countries, the work is largely to advise on the development of insolvency regimes, but there is plenty of real cross-border insolvency work between the UK and eastern Europe.

Personally, I see continuing huge differences between insolvency law regimes across Europe. We will never have a single European insolvency system. Clearly, harmonisation efforts, such as the European Insolvency Regulation, have helped both understanding and practice, but I think we have more to fear from the lobbying of the bondholder community for what it regards as more useful procedures than from the co-operative approach to harmonisation found generally across Europe.

An example of the differences and the reasons why they will remain can be seen in the floating charge debenture security with which we are so familiar and continental Europeans are not. It is at the heart of our business lending and, although it could be argued that as a mechanism it gives too much control over distressed businesses to too few major banks, I think it will remain with us for the foreseeable future. There is little chance of it being adopted across Europe.

> I frequently call on co-operation partners, professional friends or just other INSOL Europe members to help with foreign matters that cross my desk – and they, similarly, call me.

Another thing to be aware of is that various European countries (eg Italy) have no provision for consumer bankruptcy at present. That is an area for harmonisation to which I contributed recently by giving an interview for a major Italian insolvency conference on the way our personal insolvency system works.

I have just joined in a debate in Germany about their adopting a more 'English' approach to allowing creditors to influence the judges' choice of IP (currently it is the exclusive prerogative of German judges, who will not be influenced by creditors). One thing I have learned, however, is that you can't just export one country's methods to another. We may fundamentally all adopt the *pari passu* principle, but the way we do it has to take into account quite deep cultural and jurisdictional differences.

Getting to know fellow professionals from other European cultures through membership of INSOL Europe and communicating in the way I encourage us all to do is a first step. Learning about those differences and identifying people to help deal with their local end of a shared problem is what we need to move on to.

Is bankruptcy tourism a live issue?

Wind Hellas has been held up as a prime example of bankruptcy tourism and COMI (centre of main interest) shifting; and at the other end of the scale German nationals frequently try to come to England to go bankrupt and obtain their discharge within a year (rather than the six years or more they would enjoy back home (but see page 17)). COMI shifting happens and will continue to happen, even if some people don't like it because in a particular case it is not to their advantage. Frankly, they need to work out how to use the law and how others will do so.

Interestingly, many INSOL Europe members now deal with COMI issues regularly and consider that other aspects of cross-border co-operation are the leading edge of this area of practice. □

Sarah Houghton is the publishing manager of *RECOVERY*.

Editor recovery@r3.org.uk | Recruitment recovery@r3.org.uk/recruitment