

MAYER • BROWN

Recognition and Administration of Cross-Border Insolvencies and Restructurings— US, European and Asian Perspectives

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Background



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- Universalist vs. Territorial Approaches
- UNICITRAL Model Law

US Perspective



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- Section 304
- Chapter 15
 - “Foreign main proceedings” vs. “foreign nonmain proceedings”
 - Scope of automatic stay
 - JSC BTA Bank
 - Avoiding powers
 - Condor Insurance
 - Fairfield Sentry

UK Perspective – The Legal Framework



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Within the EU:

- EC Regulation 1346/2000 on Insolvency Proceedings (the EC Regulation)



Rest of the world:

- UNCITRAL Model Law on Cross Border Insolvency: implemented by the Cross-Border Insolvency Regulations 2006 (CBIR)
- s426 Insolvency Act 1986
- Common law
- Jurisdiction to sanction schemes of arrangement



- EC Regulation
 - Main (universal) and secondary (territorial) proceedings
 - Recognition across EU
 - Once proceedings opened, the law of those proceedings is the substantive and procedural insolvency law to apply
 - Important exceptions, qualifications
 - Co-operation between courts



- Cross-Border Insolvency Regulations
 - Recognise foreign main and non-main insolvency proceedings and powers of officeholder to represent the debtor
 - Impose stay and provide assistance
 - Suspending dispositions of property
 - Provide for examination of witnesses and delivery of information
 - Co-operation with foreign courts and foreign representatives
 - Courts of Great Britain to cooperate to maximum extent possible
 - Impact is territorial



- To what extent can a creditor in England be bound by rulings in foreign main proceedings?
- Two examples
 - Debt reorganisation plan/compromise/scheme of arrangement sanctioned by a court in the course of main proceedings
 - Insolvency officeholder seeking claw-back of payments alleged to be preferential



- Debt reorganisation plan/compromise/scheme of arrangement sanctioned by a court in the course of main proceeding
 - EC Regulation
 - Article 25: “Judgments handed down by a court [in main or secondary proceedings] which concern . . . compositions approved by that court shall also be recognised with no further formalities”
 - Self-executing and mandatory
 - Cross-border Insolvency Regulations
 - Extent to which foreign law can be applied is unclear
 - *Global Distressed Alpha Fund 1 LLP v PT Bakrie Investindo*
 - Guarantee subject to English law not discharged by an Indonesian debt reorganisation plan (under common law)



- Filling the gap on compromise of debts: jurisdiction to sanction schemes of arrangement for non-UK companies
 - Needs a “sufficient connection” between the foreign company and England in order for court to have jurisdiction (e.g. English jurisdiction and choice of law provisions in finance documents)
 - Not necessary for company to have its COMI or an establishment in England for there to be a “sufficient connection” (e.g. assets enough)
 - Court will also require
 - Reasonable possibility that sanction will benefit those to whom the scheme applies
 - That it has jurisdiction over one or more creditors
 - Recent examples include companies based in Spain, Germany, Italy, Bulgaria



- Insolvency officeholder seeking claw-back of payments alleged to be preferential
 - EC Regulation
 - Articles 4(2)(m) and 13: Dual actionability test – law of insolvency proceeding but defence if recipient can establish that the receipt is subject to the law of another Member State and that act is not challengeable under the law of that Member State
 - Cross-Border Insolvency Regulations
 - Judgment pending from the UK Supreme Court in *Rubin v Eurofinance* and *New Cap Re*
 - Court of Appeal ruled in those cases that under the common law, judgments in the court in which the main proceeding is taking place on transactions challengeable under insolvency law are binding



- Main proceedings (*Hauptverfahren*)
 - COMI
 - Law of main proceedings also applies for domestic matters (principle of universality) – however, with certain exceptions
- Separate domestic proceedings:
 - National branch in Germany required
 - Types
 - Secondary proceedings, Sec. 3 III EIR (*Sekundärverfahren*)
 - Independent territorial proceedings, Sec. 3 IV EIR (*Partikularverfahren*)
 - Consequence: domestic law applies (principle of territoriality)



- Rights in rem and real estate matters
 - Principles
 - Sec. 5 EIR – Third parties' rights in rem remain unaffected
 - Sec. 8 EIR – lex rei sitae in lieu of lex fori concursus applicable
 - Examples
 - Title in goods, real property, rights
 - Mortgages → execution in real property according to domestic law
 - Stay of procedure



- Labour law

- Principle

- Sec. 10 EIR – Effects of the insolvency proceedings on the employment relationship are governed by the law applicable to the employment contract

- Examples

- Application of shorter notice period for termination (§ 113 InsO)
- German law protection against dismissal
- Entitlement for insolvency payments (*Insolvenzgeld*)

German Perspective



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- Law of torts
 - Law of foreign main proceedings applies
 - Any insolvency-related effects
 - Liability for non-compliance with duty to file for insolvency
 - Domestic German law applies
 - Any non-contractual liability if tortious act was committed domestically
 - Liability of shareholder for insufficient capitalization of the company according to German case law



- Rescission rights under German insolvency law
 - Claw-back by administrator leads to annulment of contested transaction
 - German rescission rights apply
 - Separate domestic proceedings in Germany
 - Property/goods located in Germany (i) at time of claw-back action, or (ii) at the time when the contested transaction occurred
 - No successful claw-back
 - If contested transaction was effected within foreign main proceeding

Asia Perspective – The Sanko Steamship Company



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- One of the oldest shipping companies in Japan
- Owns ships through special purpose companies
- Collects revenues through charters running back up the corporate structure
- Hires ships from other shipowners

Asia Perspective – The Sanko Steamship Company



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- Requested a standstill in March 2012
- Parallel restructuring proceedings
 - Japanese Creditors – Voluntary Rehabilitation
 - Foreign Creditors – INSOL Principles
- Sought bankruptcy protection in July 2012
- Japanese corporate reorganisation proceedings explicitly cover ONLY the Sanko entity itself

Asia Perspective – The Sanko Steamship Company



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- Recognition in the UK – UNCITRAL Model Law
- Recognition in the USA – Chapter 15
 - Terms of order: "*any asset or property owned, chartered, leased, managed, or operated by Sanko while such property is located in the territorial jurisdiction of the US*"
 - Contractual rights (e.g. charter hires) are considered property in the US



Presenter Profiles

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Howard S. Beltzer

Howard's practice focuses on major Chapter 11 proceedings and multinational bankruptcy cases. He has participated in recent significant Chapter 11 proceedings and multinational bankruptcies and restructurings, including the representation of one of the largest creditors and counterparties of the Lehman Brothers entities, as well as the administrators of one of the largest foreign Lehman Brothers entities; one of the largest lenders of General Growth Properties; the agent bank in a significant entertainment industry restructuring; Linens 'n Things, Inc., one of the largest retailers to file in the current bankruptcy cycle, as co-counsel; and Mervyn's, a large California-based department store chain. He also represented a leading European cable and telecommunications company in connection with its debt restructuring. The restructuring was effected through concurrent US Chapter 11 and Dutch moratorium proceedings involving the complex interaction of common and civil law insolvency regimes. Howard was also co-counsel to a leading US bank as agent to the Century Cable Holdings lenders in the Adelphia bankruptcy. Howard has advised numerous financial institutions in connection with structuring transactions involving insolvency-related concerns. He has developed particular experience in regard to the evolution of derivative products, as well as issues arising under the Uniform Commercial Code.

Howard is listed as one of the world's leading bankruptcy and insolvency lawyers in the IFLR (International Financial Law Review) 1000. He is currently a member of the American Bar Association, Section of Business Law and Business Bankruptcy Committee, and the Association of the Bar of the City of New York, where he was a past member of the Committee on Bankruptcy and Corporate Reorganization. He is the co-author of a leading multinational treatise on international insolvency.

Admitted

New York
US Supreme Court
US Court of Appeals for the Third Circuit
US District Court for the Eastern and Southern Districts of New York
US District Court for the District of Arizona

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Markfort Rainer
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Markfort Rainer

Dr. Rainer Markfort is a Corporate partner in the Düsseldorf office of Mayer Brown’s Corporate practice. He advises companies on the implementation of compliance systems, as well as on internal company investigations. He has many years of experience in the area of corporate law, restructuring and insolvency law, mergers and acquisitions, and arbitration. In addition to his native German, he speaks English, French and Italian. He joined Mayer Brown in 2006 after 14 years with another major law firm.

Admitted

Berlin, Germany 1992

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Devi Shah
Partner – London
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Devi Shah

Devi Shah is joint head of Mayer Brown's Restructuring, Banking and Insolvency group in London. She focuses on all aspects of restructuring and insolvency and has a particular interest in international and cross-border insolvency and restructuring matters, as well as pensions aspects of restructurings.

Devi has extensive experience in insurance insolvency and restructuring matters, including advising on provisional liquidation, schemes of arrangement (including international recognition and enforcement issues), proof issues and set-off, including set-off across jurisdictions. She also has experience in handling financial disputes, with particular experience in acting on guarantee claims and on restitution issues, as well as advising on fraud and other breach of duty allegations against professional trustees.

Ranked as a key individual, Devi is highly popular with clients, who say she "is really approachable and really knows her stuff" notes Chambers UK 2012. She has a good standing in the market and "engenders confidence and trust" (Legal 500, 2010). She has a flexible approach and provides "exceptional client service" (Chambers UK 2010). She was recognised as a rising star in the insurance insolvency area, "she's warm, friendly and knows her stuff." (Chambers & Partners UK Directory 2009).

Admitted

England and Wales, 1995

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Bill W.P. Amos

Bill Amos is a consultant of Mayer Brown JSM. Bill focuses on all aspects of commercial dispute resolution, including international trade, banking, shipping, aviation and insurance. He is experienced in shareholder disputes, as well as company and trust litigation. He conducts Hong Kong, London, Singapore and China-based arbitrations.

Bill also advises banks, insurers and trading companies on matters concerning asset finance, trade finance and international sale of goods. He is ranked as a leading lawyer for Dispute Resolution in Chambers Asia 2012.

Admitted

Hong Kong, 1995

England & Wales, 1991

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Thank you

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