

MAYER • BROWN

Insolvency Litigation and Related Strategic Concerns – US, European and Asian Considerations

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Mayer Brown is a global legal services provider comprising legal practices that are separate entities (the "Mayer Brown Practices"). The Mayer Brown Practices are: Mayer Brown LLP and Mayer Brown Europe – Brussels LLP both limited liability partnerships established in Illinois USA; Mayer Brown International LLP, a limited liability partnership incorporated in England and Wales (authorized and regulated by the Solicitors Regulation Authority and registered in England and Wales number OC 303359); Mayer Brown, a SELAS established in France; Mayer Brown JSM, a Hong Kong partnership and its associated entities in Asia; and Tauil & Chequer Advogados, a Brazilian law partnership with which Mayer Brown is associated. "Mayer Brown" and the Mayer Brown logo are the trademarks of the Mayer Brown Practices in their respective jurisdictions.

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Overview of Today's Program



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- Litigation in a cross-border insolvency context
- How insolvency can affect the jurisdiction in which the litigation occurs
- Aspects of insolvency law which will be of strategic relevance to insolvency litigation parties

Today's Speakers



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An English Perspective



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- Enforcement in England of foreign insolvency judgments
 - The ‘usual’ enforcement rule applying to non-insolvency judgments— is there a different rule for insolvency?
 - Within the EU
 - Insolvency Regulation Article 25: Judgments that derive directly from the insolvency proceedings and are closely linked with them
 - Outside of the EU
 - The Supreme Court’s decision in *Rubin v Eurofinance; New Cap v Grant*

An English Perspective



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- Some other factors relevant to jurisdiction strategy
 - Substantive differences
 - e.g. Preferences in England: influenced by a desire to prefer
 - Procedural differences
 - e.g. Availability of litigation funding in England

A German Perspective: Jurisdiction for Litigation Relating to Insolvency



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- National proceedings and proceedings outside the EU
 - Claims of the insolvency administrator
 - Ordinary rules of Code of Civil Procedure on local/international jurisdiction apply (also true for annex claims such as actions for avoidance and rescission)
 - Claims of creditors against the insolvency administrator
 - Pending litigation is stayed
 - Insolvency claims to be filed exclusively at the venue of the insolvency court

A German Perspective: Jurisdiction for Litigation Relating to Insolvency



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- Within the EU
 - ECJ: Does the action derive directly from the bankruptcy and is it closely connected?
 - If no: Council Regulation (EC) No 44/2001 (Brussels Regulation) applicable
 - If yes: Council Regulation (EC) No 1346/2000 (Insolvency Regulation) applicable

A German Perspective: Enforcement of Foreign Insolvency Judgments



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- Within the EU
 - Recognition of insolvency proceedings
 - Council Regulation (EC) No 1346/2000 (Insolvency Regulation)
 - Recognition and enforcement of annex decisions
 - Insolvency Regulation in connection with Council Regulation (EC) No 44/2001 (Brussels Regulation)

A German Perspective: Enforcement of Foreign Insolvency Judgments



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- Outside the EU
 - Recognition of insolvency proceedings
 - International Jurisdiction?
 - Public policy?
 - Recognition and Enforcement of annex decisions: German executory title required
 - Annex decision final?
 - International Jurisdiction?
 - Due process?
 - Contradicting decisions?
 - Public policy?
 - Reciprocity?

A US Perspective



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- Substantive Consolidation and International Insolvency
 - The application of substantive consolidation in US bankruptcy courts
 - Complications arising from the substantive consolidation of Multinational Enterprise Groups

A US Perspective



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- Three Tests Used to Evaluate Consolidation

- *Auto-Train* (D.C. Cir. 1987)

- The proponent must show substantial identity exists between the entities to be consolidated and that consolidation is necessary to avoid some harm or realize some benefit.
- A creditor may object to consolidation if it can show that it relied on the separateness of one of the entities in extending credit.
- If that showing is made, a court only orders consolidation if benefits outweigh harm.

- *Augie/Restivo* (2d Cir. 1988)

- A court considers whether creditors dealt with entities as single economic unit and did not rely on separate identity in extending credit (Separateness); OR
- whether the affairs of entities are so entangled that consolidation will benefit all creditors (Entanglement).

- *Owens Corning* (3d Cir. 2005)

- A court considers whether creditors in fact relied on unity of entities in extending credit and
- Whether separating entities would *hurt* all creditors.

A US Perspective



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- Substantive Consolidation in United States Bankruptcy Courts: Fluid Courts Applying Fluid Standards
 - Different courts apply different tests
 - Bankruptcy courts are equitable in nature



- Complications Arising from Substantive Consolidation and Multinational Enterprise Groups
 - Predicting the application of substantive consolidation is extremely difficult
 - No international or regional legal regimes exist to coordinate the conduct of insolvency proceedings across jurisdictions
 - Choice of law questions arise
 - Legal disputes may be prolonged
 - Creditors may receive suboptimal prices

A US Perspective



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- Because of the uncertainty surrounding substantive consolidation, Counsel should carefully weigh the potential consequences of substantive consolidation when drafting loan documents and formulating cross-border negotiation strategies. Consider creative solutions, such as:
 - Cross-border protocols in case of insolvency
 - Centralization of insolvency proceedings
 - Conferring with counsel in relevant countries

An Asian Perspective



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- Three factors which might have an impact on deciding whether to institute court proceedings in an insolvency scenario
 - Non-recognition of foreign insolvency appointees
 - Administration not available
 - Access to litigation funding

An Asian Perspective



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- Non-Recognition of Foreign Insolvency Appointees
 - HK has no equivalent to UK s.426/Cross Border Insolvency Regulations or US Chapter 15.
 - To exercise the powers of a liquidator in HK, office-holder must be a liquidator appointed by the HK court.
 - Can present difficulties in establishing HK nexus

An Asian Perspective



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- Administration Not Available
 - No equivalent to UK administration/US Chapter 11
 - To restructure, resort is had to provisional liquidation to obtain the moratorium which is otherwise unavailable
 - But, *Legend Intl. Resorts Ltd*—PL is not available if the sole reason for PL is to restructure—traditional "jeopardy to assets" must still be shown
 - Has led to some innovative arguments on jeopardy to assets...

An Asian Perspective



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- Access to litigation funding
 - Maintenance and Champerty still rule the day—liquidation exception to these principles now applied by the Court taking a liberal approach
 - Funding is lawful in insolvency context and funders are available

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Thank You.

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David Allen
Partner – London
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David Allen

David Allen is head of Litigation in London. He focuses on the handling of substantial commercial disputes.

David has particular experience in banking and insolvency litigation, including several high-profile insolvency proceedings. He displays "good tactical judgement" notes Legal 500 2012.

Described as "professional and extremely capable" (Chambers & Partners 2005) and someone who "understands the big picture" (Chamber & Partners Directory 2006), David has also won acclaim from his clients as a lawyer who is "responsive, available and calm under pressure" (Chamber & Partners Directory 2006). He is praised for his "absolutely superb client management skills" says Chambers & Partners UK Directory 2009 "He's utterly reliable and good at getting contracts through on time" report clients. He has a fine reputation heading up the "good value" team, which is "excellent at liaising with the other side in a diplomatic manner in order not to up the antagonism" (Legal 500, 2009). The 2010 edition notes David for his "strong legal mind with commercial awareness". Chambers UK 2010 recommends David for his efficiency, calmness and "excellent interpersonal skills" and the 2011 edition notes that he "works effectively and pragmatically, and can drill down to the key issues very quickly." Ranked as a key individual, he is "incredibly good" and "provides excellent practical advice" notes the 2012 edition.

Admitted

England and Wales 1984

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Jean-Marie Atamian
Partner – New York
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Jean-Marie Atamian

Jean-Marie L. Atamian is co-head of Mayer Brown's New York litigation group. He is an experienced trial lawyer whose practice focuses on complex commercial and bankruptcy litigation before state and federal trial and appellate courts. He has extensive banking litigation experience, which has included representing domestic and foreign banks in lender liability, securities fraud, and common law fraud actions. His securities fraud experience has included representation of corporations, financial services firms, accounting firms, and individuals in Rule 10b-5, control person, insider trading, stock manipulation, and RICO actions.

Jean-Marie has represented corporations, banks, and consulting firms in numerous bankruptcy actions, including adversary proceedings, preference actions, and cash collateral hearings. He has represented several Big Four (and other) accounting firms in actions including negligence, fraud, and aider and abettor claims. Jean-Marie has also represented corporate and individual clients in federal and state court actions involving contract disputes, tortious interference, unfair trade practices, fraudulent conveyances, veil piercing, real estate, sovereign immunity, and illegal takings. He has also represented property owners in disputes with management companies, government agencies and lessees.

Admitted

New York 1986

US Court of Appeals for the Second Circuit 2002

US Court of Appeals for the Third Circuit 2007

US District Court for the District of Colorado 1997

US District Court for the Eastern District of New York 1991

US District Court for the Southern District of New York 1991

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Dr. Jan Kraayvanger

Dr Jan Kraayvanger is a partner in the Frankfurt office of Mayer Brown’s litigation and arbitration practice. He joined the firm in 2002 and advises national and international clients on a wide range of commercial arbitration and litigation. He has experience both as arbitrator as well as counsel. Jan has extensive expertise in all aspects of the litigation process and arbitral matters, including corporate and post M&A disputes, financial disputes, commercial disputes and cartel law disputes. A significant number of the matters Jan advises in have an international focus and are conducted in English language.

Admitted

Frankfurt am Main, Germany 2002

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Richard Tollan
Partner – Hong Kong
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Richard Tollan

Richard Tollan is a partner of Mayer Brown JSM. He advises on insolvency and fraud matters. He advises liquidators and other insolvency practitioners on matters of insolvency law and the legal aspects of issues arising in the management of insolvent estates; advises other office-holders appointed by regulatory bodies to manage various types of regulatory administrations and related misfeasance investigations; and advises creditors in respect of their rights and claims in an insolvency environment and other estate administrations.

He also advises banks and other parties with respect to fraud and management of large scale litigation to recover the proceeds of fraud. He advises on investigations into corporate mismanagement prior to insolvency; ICAC and SFC investigations; anti-money laundering/counter-terrorist financing matters; investigations conducted in respect of the Foreign Corrupt Practices Act. He also advises banks on matters of banking law and insolvency litigation and identity theft fraud.

Richard is a former Detective Inspector in the Commercial Crime Bureau of the Hong Kong Police running multi-jurisdictional investigations into serious fraud. According to Asia Pacific Legal 500 (2007-09), Richard is described as "fantastic," "contentious specialist" and "very personable." Richard has been nominated as a Leading Restructuring and Insolvency Lawyer in the 21st/2011 Edition of the IFLR1000. He is also a Recommended Restructuring and Insolvency Lawyer by the PLC Which Lawyer? Yearbook in 2008 and the PLC Cross-Border Restructuring and Insolvency Handbook in 2007.

Admitted

Hong Kong 1998

England and Wales 1999

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Kristy Zander
Partner – London
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Kristy Zander

Kristy focuses on advising and acting for lenders, security providers, insolvency practitioners, directors and creditors in relation to all aspects of restructuring and insolvency. She has experience in providing insolvency advice in relation to complex transactions. In addition, she has acted in the resolution of a wide range of commercial disputes, with particular experience in substantial insolvency litigation. Kristy is an "up-and-coming partner" notes Legal 500 2012. She "has excellent technical knowledge and applies it to the client's business goals" notes Legal 500 2011.

Admitted

Supreme Court of South Australia 2001
Federal Court of Australia 2005
High Court of Australia 2005
Australia, New South Wales 2005
England and Wales 2011

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Justine T.K. Lau
Associate – Hong Kong
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Justine T.K. Lau

Justine Lau is a senior associate of Mayer Brown JSM who advises on mainly contentious restructuring and insolvency matters for liquidators and other insolvency practitioners. Justine has advised clients on a broad range of insolvency-related issues, most recently in the context of the global financial crisis. Her practice involves advising clients on all types of litigious matters arising from the management of insolvent estates. Justine also has experience in advising creditors in respect of their rights and claims in and against insolvent estates (liquidation, receivership and other insolvency administrations).

As she is also Australian qualified, Justine has experience in advising clients in relation to restructuring and insolvency issues arising under the Australian corporate and personal insolvency regimes including advising clients in respect of the Australian voluntary administration and receivership processes.

Admitted

Hong Kong 2009

Australia, Victoria 2002

High Court of Australia 2002

Federal Court of Australia 2002