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The International Comparative Legal Guide to:

Corporate Recovery & Insolvency 2018

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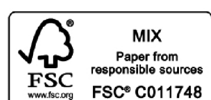

Editorial Chapter:

1	**INSOL International – An Overview** – Adam Harris, INSOL International		1

General Chapter:

2	**Resolving Insolvency the World Bank Way** – Jat Bains & Paul Keddie, Macfarlanes LLP		4

Country Question and Answer Chapters:

3	**Australia**	Gilbert + Tobin: Dominic Emmett & Alexandra Whitby	8
4	**Austria**	Schindler Rechtsanwälte GmbH: Martin Abram & Florian Cvak	15
5	**Bermuda**	Kennedys Chudleigh Ltd.: Alex Potts QC & Nick Miles	21
6	**Canada**	Thornton Grout Finnigan LLP: Leanne M. Williams & Puya J. Fesharaki	30
7	**Cayman Islands**	Campbells: Guy Manning & Guy Cowan	37
8	**England**	Macfarlanes LLP: Jat Bains & Paul Keddie	44
9	**Finland**	Law Office Waly & Koskinen Ltd.: Tuomas Koskinen & Sami Waly	50
10	**France**	De Pardieu Brocas Maffei Aarpi: Joanna Gumpelson & Philippe Dubois	56
11	**Germany**	Noerr LLP: Dr. Thomas Hoffmann & Isabel Giancristofano	63
12	**Greece**	Zepos & Yannopoulos: Emmanuel Mastromanolis & Danai Eirini Falconaki	69
13	**Hong Kong**	Gall: Nick Gall & Ashima Sood	78
14	**Hungary**	Kovács Réti Szegheő Law Firm: Dr. Eniko Vida & Dr. Attila Kovács	84
15	**India**	Dhir & Dhir Associates: Alok Dhir	89
16	**Indonesia**	Ali Budiardjo, Nugroho, Reksodiputro: Theodoor Bakker & Herry Kurniawan	97
17	**Ireland**	Matheson: Tony O'Grady & Karen Reynolds	102
18	**Italy**	Pirola Pennuto Zei & Associati: Massimo Di Terlizzi	109
19	**Japan**	Nishimura & Asahi: Yoshinori Ono & Hiroshi Mori	116
20	**Korea**	Barun Law LLC: Thomas P. Pinansky & Joo Hyoung Jang	123
21	**Luxembourg**	Loyens & Loeff Luxembourg: Anne-Marie Nicolas & Véronique Hoffeld	130
22	**Mexico**	SOLCARGO: Fernando Pérez Correa & F. Abimael Hernández	135
23	**Netherlands**	Wijn & Stael Advocaten: R.M. Vermaire & F.B. Bosvelt	141
24	**Nigeria**	Miyetti Law: Jennifer Douglas-Abubakar & Oluwole Olatunde	147
25	**Poland**	Tatara & Partners Restructuring & Insolvency Law Firm: Karol Tatara & Mateusz Kaliński	153
26	**Romania**	Zamfirescu Racoţi & Partners Attorneys at Law: Stan Tîrnoveanu & Cătălin Guriţă-Manole	158
27	**Russia**	INFRALEX: Artem Kukin & Stanislav Petrov	163
28	**Singapore**	BlackOak LLC: Ashok Kumar & Darius Tay	169
29	**Spain**	SUE Abogados, S.L.P.: Antonia Magdaleno Carmona & Julián Chamizo Renau	176
30	**Sweden**	Hannes Snellman Attorneys Ltd: Paula Röttorp & Carolina Wahlby	180
31	**Switzerland**	Lenz & Staehelin: Tanja Luginbühl & Dr. Roland Fischer	186
32	**Turkey**	Dirican | Gozutok | Bagci: Gokben Erdem Dirican	194
33	**USA**	Paul, Weiss, Rifkind, Wharton & Garrison LLP: Alan W. Kornberg & Elizabeth R. McColm	201

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Resolving Insolvency the World Bank Way

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Introduction

There are lists of achievements in which the United Kingdom would be confident of achieving a high ranking, if not placing first. These would include tea-drinking, queuing and underperforming at sporting events. They would not, however, (at least according to the World Bank) include the efficacy of the UK's insolvency laws.

The World Bank released its most recent set of rankings on the ease of doing business in October 2017. These rankings feature 190 jurisdictions, each of which is allocated a score based on a variety of indicators, which include "resolving insolvency". The UK achieves a respectable seventh placing in the overall "ease of doing business rankings" although, in what may come as a surprise to many practitioners in the UK restructuring and insolvency market, ranks fourteenth when it comes to resolving insolvency (down from thirteenth for the previous year).

The UK is (somewhat accurately) perceived to be a "creditor-friendly" jurisdiction and English law has developed a reputation of providing an effective framework to creditors to recover amounts owed to them by insolvent or distressed debtors. At the same time, English law and the English courts are perceived as being reliable and efficient in resolving disputes. English law is therefore often the preferred choice of governing law in financing and other commercial agreements, and the English courts are often the chosen forum for resolving disputes between parties to those agreements. One would therefore expect English law and English insolvency processes, at least as far as creditors are concerned, to be scored favourably in any comparative rankings with other jurisdictions.

Insofar as the ability of creditors' to make recoveries in insolvency proceedings, England scores fairly highly. The World Bank, when ranking jurisdictions on resolving insolvency, includes consideration of the rate of recovery achieved by secured creditors in insolvency proceedings. By this metric, the UK does comparatively well with secured creditors in UK insolvency proceedings, on average, achieving a recovery of 85.2 cents on the dollar (or pence on the pound), with proceedings taking around a year to result in a recovery. That rate of recovery is good for tenth place in the rankings, which is a higher rate than the USA and Germany, both of which achieve a higher ranking than the UK in the overall rankings.

In addition to the recovery rate, a number of other factors are taken into account when measuring a jurisdiction's overall score and place in the rankings. These include the cost of insolvencies, the ease of commencing proceedings and the strength of that jurisdiction's insolvency framework. The World Bank's own guidance sets out what it considers to be the "main good practices" in this respect as:

- establishing or promoting reorganisation or liquidation procedures;
- eliminating formalities and introducing or tightening time limits;
- regulating the profession of insolvency administrators;
- strengthening creditors' rights;
- clarifying rules for commencing insolvency proceedings;
- improving provisions applicable to treatment of contracts and voidable transactions; and
- introducing provisions on post-commencement financing.

UK practitioners would be fairly confident in saying that the UK does well on each of these practices, with the exception of post-commencement financing, on which English law does not provide any statutory framework. Generally speaking, UK insolvency law is clear, well-tested and put into practice by lawyers and qualified insolvency practitioners who are highly regulated. On initial impressions it therefore appears puzzling as to why English insolvency processes do not achieve higher rankings.

The Methodology Applied by the World Bank

A change in the World Bank's methodology which was introduced in connection with its 2015 rankings may, however, explain why the UK isn't featured higher in the rankings. The "strength of insolvency framework index" measures are tested by reference to principles developed by the World Bank's own "Principles for Effective Insolvency and Creditor/Debtor Regimes" (the "World Bank Principles") and UNCITRAL's "Legislative Guide on Insolvency Law" (the "UNCITRAL Guide"). The "strength of insolvency framework index" is then based on four other indices:

- *the commencement of proceedings index*, which measures the type of proceedings (liquidations and reorganisations) that both debtors and creditors can instigate in the relevant jurisdiction and what standard is used to declare a debtor insolvent;
- *the management of debtor's assets index*, which measures whether, once proceedings have been commenced, a debtor can continue transactions essential to the survival of its business. This also includes whether contracts that are burdensome can be terminated by the company, the extent to which the insolvency office-holder can challenge transactions entered into by the company and whether the debtor can obtain new financing during the proceedings;
- *the reorganisation proceedings index*, which measures whether and how creditors vote on a reorganisation plan and what protections are available to dissenting creditors (i.e. can they be "crammed down" in those proceedings); and

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- *the creditor participation index*, which measures whether creditors participate in decision making during proceedings (and object to any decisions which affect their rights and access to information.

The UK achieves a score of 11, which is the same as the score achieved by Trinidad and Tobago and the UAE (which has only had a consolidated bankruptcy law since 2016) and which is considerably less than the score of 15 achieved by the USA and Germany. A score of 11 ranks the UK around 50 places below the jurisdictions achieving the highest ranking. This is clearly concerning to practitioners in the UK. Why does the UK, despite being one of the world's leading financial and legal centres, score so poorly on these metrics?

Why Does the UK Place So Poorly?

To some extent the UK's relatively poor placing can be explained by the objectives of an effective insolvency regime identified by the World Bank Principles and the UNCITRAL Guide. Whilst the principles applied by each are not identical, there are some common themes. These include:

- the "preservation of the insolvency estate", which is measured in the UNCITRAL Guide. A similar test of the "premature dismemberment of a debtor's assets by individual creditors" is measured in the World Bank Principles. This, essentially, tests the strength and breadth of any automatic stay on creditor action imposed by a jurisdiction's insolvency proceedings;
- the "equitable treatment of similarly situated creditors" is referred to in both the UNCITRAL Guide and the World Bank Principles, as a measure of "how similarly situated creditors vote on a reorganisation plan" in the strength of insolvency framework index; and
- the recognition of "creditor rights" and the priority of claims within a clear set of rules and processes is referred to in both the UNCITRAL Guide and the World Bank Principles, the assessment of which includes whether post-commencement creditors (such as creditors which provide funding to the debtor within insolvency proceedings) receive priority over existing creditors.

On first view, the UK could be expected to score highly on all three tests. Administration and liquidation, being the two most commonly used insolvency processes in the UK, both provide for stays on creditor action without the insolvency officeholder's consent or the consent of the court (and administration goes further by imposing an automatic moratorium on enforcement action by a secured creditor without the consent of the administrator or an order of the court). Similarly, UK insolvency law provides a tried-and-tested regime for ranking the priority of creditor claims, including post-commencement "expenses" incurred by an administrator or liquidator which rank ahead of, amongst others, ordinary unsecured creditors. English law is also flexible regarding how it treats claims of creditors which might not previously have been considered by the courts (for example, claims under complex financial instruments). Observers of the recent Lehman Brothers "waterfall" decision[1] would no doubt have noted how the English courts were able to efficiently adjudicate claims relating to several matters specific to the unusual situation of the administration of Lehman Brothers' English business within the framework of the UK's insolvency laws.

However, it is clear that the methodology applied by the World Bank uses US-style Chapter 11 bankruptcy proceedings as the comparator for the laws of other jurisdictions, rather than UK insolvency proceedings. The emphasis on how creditors vote in respect of a "reorganisation plan", and the emphasis on the automatic stay on insolvency proceedings, corresponds to the process of the filing of a voluntary petition for Chapter 11. It is also not difficult to interpret the measure of whether the debtor can continue transactions essential to the survival of its business in the "management of debtor's assets index" as a reference to the "debtor in possession" process pursuant to Chapter 11, whereby a company that has filed for Chapter 11 bankruptcy protection remains in control of its property and business. Finally, the importance attached to the priority of "post-commencement creditors" is quite clearly a reference to debtor-in-possession ("DIP") financing that can be provided to companies in Chapter 11 and rank senior to existing creditors.

The World Bank's Approach

It is not the intention of the authors of this piece to criticise the approach of the World Bank when producing its rankings. There is clearly a great degree of merit in using the processes employed by the largest economy in the world as the basis on which to measure processes in other jurisdictions. However, it is clear that the jurisdictions with processes that most closely resemble those of the USA benefit the most from this approach to measurement, perhaps to the detriment of jurisdictions which have their own efficient and mature processes, but which are relatively dissimilar to those of the USA in some ways.

It should also be noted that the World Bank has itself cited the desirability of a uniform set of principles and processes adopted by as many jurisdictions as possible in order to facilitate a more harmonious and efficient cross-border insolvency market. From the outset of publishing its guidelines, in its working paper titled "*the World Bank principles and guidelines for effective insolvency and creditor rights systems*", the World Bank refers to its aim of "promoting international consensus on a uniform framework to assess the effectiveness of insolvency and creditor rights systems, offering guidance to policymakers on the policy choices needed to strengthen them". It can be implied that a key way to achieve such a uniform framework is via the adoption of universal processes and techniques for application in insolvency proceedings. There must therefore, by definition, be a set of processes which are already in existence which other jurisdictions can adopt or use as their inspiration as a means of achieving such consensus. It appears that the World Bank has adopted Chapter 11 bankruptcy as the process which other jurisdictions would be best-advised to look towards in order to improve their rankings.

However, the benefits of processes of jurisdictions which aren't directly analogous to Chapter 11 should not be discounted. The fact that the UK has a relatively high recovery rate, as is recognised by the World Bank rankings, suggests that even though it has its own distinct insolvency regime, that regime is effective in ensuring that creditors receive an acceptable return on their investment, even where the debtor is in an insolvency process. The ability of creditors to achieve such a return is fundamental to the proper functioning of the credit markets.

It should also be noted that UK law also provides for two forms of binding compromise (schemes of arrangement and CVAs) which, whilst leaving the company within the control of its directors, provide creditors and companies with tried-and-tested means of effecting restructurings which, provided that a certain threshold of creditors vote in favour, bind all creditors (or at least those creditors affected by the process). Schemes in particular have become a tool by which companies are able to effect complex and far-reaching restructurings – there is perhaps no greater testament to their effectiveness than the number of non-UK companies which have relied on the flexibility of the UK courts to use schemes in

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recent years. Furthermore, English law and the English courts provide certainty and the means for companies to carry out informal restructurings with minimal court involvement and without the requirement for insolvency proceedings. English law governed finance documents are, as a result, used in many cross-border financings due to the certainty that English law provides, including that the underlying mechanics of the documents allow lenders and borrowers to facilitate restructurings quickly and efficiently. The fact that companies can, by relying on English law, avoid the need for an insolvency process in the first place should, in our view, be given recognition.

How Can the UK Improve its Position in the Rankings? What are the Concerns with Any Potential Changes?

Notwithstanding the effectiveness of the UK's insolvency and restructuring processes in their current guises, the UK government is taking steps to make those processes more consistent with Chapter 11-type processes in other jurisdictions. A consultation titled "a review of the corporate insolvency framework" produced by the Insolvency Service in May 2016 sets out the UK government's intention to "enable more corporate rescues of viable businesses and ensure that the insolvency regime delivers the best outcomes".[2]

The consultation sets out a number of proposals which are intended to achieve this purpose. These include:

- the introduction of a "preliminary moratorium" of up to three months, during which a company can consider its options (under the supervision of an "authorised supervisor" who monitors the company's conduct and actions during the moratorium) with the benefit of a stay on creditor action;
- the company being able to designate certain contracts as "essential contracts" (in addition to the provision of IT services and utilities, which are already protected under UK law). The essential contracts cannot be terminated or varied by the counterparty during the moratorium (provided the payments under the contract are maintained when due) and would provide a tool for dealing with "ransom" creditors;
- a company being able to propose a binding reorganisation/restructuring plan to its creditors – this would be similar to a scheme of arrangement. For example, creditors will be separated into different classes and 75% of creditors by value and (unfortunately for those who regard the numerosity requirement as a weakness) a majority in number of creditors in each class would be required to vote in favour of the plan. However, a reorganisation plan would be proposed as a means to bind/effect all creditors, unlike a CVA or scheme where a specific group of stakeholders or creditors are often targeted. The reorganisation plan will also benefit from a moratorium which will allow the company to propose and work through the plan without the threat of creditor action (currently only CVAs of relatively small companies may benefit from such a moratorium); and
- the introduction of rules relating to rescue finance, which re-order the priority of expenses in administrations to encourage rescue finance (by ensuring that rescue finance is senior to other expenses incurred by the administrator) and the introduction of debtor in possession provisions whereby security can be granted to new lenders over property which is already secured to other creditors (and may rank senior to, or *pari-passu* with, the existing creditor's security).

It is not difficult to see the source of the government's inspiration when preparing these proposals – they do, to a large extent, replicate steps available to companies in Chapter 11. It is clear that when drafting the proposals the UK government has recognised a need under English law for processes which provide breathing space to allow a company to negotiate with its creditors and propose a restructuring plan without the disruption caused by creditor action, or the threat of such action.

It can be said that the proposals could be perceived as being somewhat debtor-friendly. In particular, allowing distressed companies, no matter their size and without a requirement of support from key creditors, such as a lender holding a security over a substantial part of their assets, to propose a three-month moratorium against creditor-action, whilst their directors remain in control (with no exposure for personal liability but under the supervision of a qualified professional), will be closely scrutinised by lenders in the UK market. Clearly the prospect of being locked out of enforcing whilst the moratorium is in place will raise a few eyebrows amongst lenders, although insolvency practitioners and independent turnaround advisors may take a different view. However, provided that creditors are protected by being able to "lift" the moratorium if the company is taking actions which prejudice creditors' interests or the value of their collateral (which is mentioned in the proposals, albeit potentially only limited to the first 28 days of the moratorium) and if there are creditor protections such as liability for directors who claim a moratorium even when there is no reasonable prospect of achieving a restructuring (which is not) then there should be an agreeable middle-ground between a company's wish to restructure its affairs without the looming threat of enforcement, and the wish of creditors to be able to enforce if they feel that the amount they could recover is being diminished by the company.

There is also a concern that the new corporate re-organisation process would be in replacement of existing tools, being the CVA and scheme of arrangement, rather than in addition to them. That would limit the main attraction of a CVA, being the flexibility of a "single class" procedure. It could also limit the flexibility of a scheme, where a company can choose to focus solely on a particular class of claims and not have to win the support of unaffected creditors.

In addition, secured lenders may be concerned about the proposals for rescue finance and, specifically, whether such finance could rank senior to existing secured creditors. The proposals regarding rescue finance are, essentially, that if existing lenders refuse to provide additional finance, the company (or its authorised supervisor) would seek their consent to rescue finance being advanced by a third party. If the existing lenders wanted to challenge the proposal they would need to make an application to court, with the onus then being on the supervisor to demonstrate, to the satisfaction of the court, that (i) the granting of security for the rescue finance is a necessary pre-condition to that finance being made, (ii) the interests of existing chargeholders is adequately protected, and (iii) obtaining rescue finance is in the best interests of creditors as a whole. Satisfying limb (ii) of this test is likely to require independent valuation advice to demonstrate that there is sufficient value in the company's assets for both the existing secured lender and any rescue finance to be paid in full if those assets are disposed of. Disputes could therefore arise regarding valuations which secured lenders feel over-value the company's assets in order that rescue finance be made available to the company. An agreed set of principles governing such valuations could help guard against this, although clearly the methodology used will differ between various businesses and sectors.

Striking a Balance

Aligning the UK's insolvency processes with those of other jurisdictions, where most of those other jurisdictions are leaning towards Chapter 11 style processes, certainly has potential benefits.

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Creating a harmonised regime where creditors and debtors are familiar with the processes used in each jurisdiction provides certainty, particularly in large, cross-border restructurings.

On the other hand, part of what makes the UK market attractive to lenders is the fact that it is perceived as being creditor-friendly, without being unduly punitive for borrowers (the UK's insolvency and bankruptcy laws for individuals are, for example, far less restrictive than other jurisdictions). Adopting laws which mirror Chapter 11 may mean that the UK loses what makes it unique – why, for example, would an overseas company shift its COMI to the UK to utilise an English administration, or go to the trouble of proposing a scheme of arrangement in the English courts, when the UK has adopted processes which are similar to a number of other jurisdictions?[3]

The onus will be on the government to strike a balance between aligning UK insolvency law with that of other major jurisdictions without sacrificing the benefits of its current regime. That won't be easy. However, if done well, the improvements to UK insolvency law and its financial markets could be pronounced. For example, if rescue financing is introduced into UK law in a manner which does not prejudice existing lenders, an entirely new market of rescue finance could grow. It would be difficult for the World Bank to ignore those improvements.

Endnotes

1. *The Joint Administrators of Lehman Brothers Limited (Appellant) v. Lehman Brothers International (Europe) (In Administration) and others (Respondents) [2017] UKSC 38.*
2. "*A review of the corporate insolvency framework: a consultation on options for reform*", Insolvency Service, page 6.
3. A huge caveat to this point, of course, is the looming threat of Brexit and the prospect that a failure to agree a deal on the recognition of jurisdiction and judgments could cause the UK restructuring regime to become less accessible than it has been in the past [*as discussed elsewhere in this publication*].

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